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VOL. 6

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Published by OCTOBER PRINTING CO., LTD.

Tel. 0-2996-7392-4 Fax: 0-29967395

Editor's Note

I am delighted to introduce the latest edition of *Thammasat Business Law Journal*, one of the first academic legal journals in English to be published in Thailand.

The primary objective of the *Journal* is to provide a forum for publication of the research of students in Master of Laws Program in Business Laws (English Program) at Faculty of Law, Thammasat University. Our vision is to assist young scholars in transforming their research papers into peer-reviewed articles. The *Journal* publishes articles on all aspects of business law and its relevant legal issues. We hope that the *Journal* be a part of the academic community and continually contribute to legal development.

This *Journal* would not have been possible without the contribution of many considerable individuals. First and foremost, I would like to thank all prominent professors for providing valuable comments to the contributors. I also would like to thank the Advisory Board and the Editorial Board for their strong continuing support. My deep gratitude goes to the Manager and the Managerial Staff for the time and effort. Importantly, the support from Faculty of Law, Thammasat University allows us to continue to publish the *Journal* and distribute it.

We truly hope you will enjoy reading our latest edition.

Nilubol Lertnuwat
Editor-in-Chief
Thammasat University

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PATENT EXHAUSTION IN CASES OF RECYCLING AND REPAIR OF GOODS*

*Anirut Somboon***

Abstract

Everyone knows that recycling and repairing can generally reduce resource consumption and waste production. Additionally, their economic benefits entice consumers to repair and recycle goods. However, in cases of patented goods, these activities may collide with exclusive rights of patentees.

According to the patent system, a patent is granted to an inventor with a set of exclusive rights to prevent third parties from making, using, offering for sale, selling or importing a patented product within a limited period of time. Nevertheless, under the exhaustion doctrine, such an exclusive right is consumed when the patented product has been legitimately sold in order to limit an exploitation of the patent and to support free circulation of goods. Thus, purchasers can use or resell it without permission from the patentees. However, the purchasers cannot construct a new article in place of the original one. Recycling the used goods into the recycled goods to serve its initial utility, *e.g.*, recycled ink cartridges, and repairing of damaged goods, falls in between the realm of permissibility under patent exhaustion and infringement of patent protection. The extent of the act in which purchasers are able to commit on the patented goods might be questioned. With the unpredictability of the scope of rights, purchasers who merely recycle or repair may be liable for patent infringement, which could cause some enterprises not to engage in recycling businesses.

Additionally, the patentee may create post-sale restrictions on use of their goods, such as using a “Single Use Only” sign, to avoid exhaustion of the patent right. If such restrictions, are allowed to be enforceable, perhaps it could hinder purchasers and consumers in using the goods under normal social convention.

This article will present laws and court decisions from United States and Japan, which provide a repair defense as an extension of the exhaustion doctrine and have established their own standards for distinguishing permissible recycling/repair from reconstruction. It also provides an analysis of posted problems from the inadequate provision in Thai Patent

* This article is summarized and arranged from the thesis “Patent Exhaustion in Cases of Recycling and Repair of Goods” Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2015

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Act to deal with these matters. Moreover, a recommendation will be proposed to resolve such problems.

Keywords: recycling and repair, exhaustion doctrine, and patent infringement

บทคัดย่อ

เป็นที่ทราบกันว่าการรีไซเคิลและการซ่อมแซมสินค้าสามารถช่วยลดการใช้ทรัพยากรธรรมชาติและการเพิ่มขึ้นของขยะได้ รวมทั้งผู้บริโภคยังได้ประโยชน์ทางเศรษฐกิจจากการรีไซเคิลและซ่อมแซมสินค้าอีกด้วย แต่ในกรณีของสินค้าที่มีสิทธิบัตรนั้นการกระทำดังกล่าวอาจเป็นการขัดแย้งสิทธิของเจ้าของสิทธิบัตรได้ ภายใต้แนวคิดของกฎหมายสิทธิบัตร สิทธิบัตรจะถูกลบให้แก่อุบัติการณ์ซึ่งสิทธิแต่เพียงผู้เดียวในการผลิต ใช้ เสนอขาย ขาย หรือนำเข้า ผลผลิตทันทีที่ได้รับความคุ้มครองตามสิทธิบัตร เพื่อตอบแทนการเผยแพร่ข้อมูลของสิ่งประดิษฐ์และคุ้มครองสิทธิแต่เพียงผู้เดียวในการหาประโยชน์จากสิ่งประดิษฐ์ดังกล่าวภายในระยะเวลาที่กฎหมายกำหนด อย่างไรก็ตามภายใต้หลักการสิ้นสิทธิ เมื่อผลิตภัณฑ์ดังกล่าวถูกขายแก่ผู้ซื้อ สิทธิแต่เพียงผู้เดียวของเจ้าของสิทธิบัตรจะหมดลงเพื่อจำกัดการหาประโยชน์เหนือสิ่งประดิษฐ์ที่ถูกขายไปแล้วเพื่อสนับสนุนการไหลเวียนโดยเสรีของสินค้า ดังนั้น ผู้ซื้อสามารถใช้และขายสินค้าดังกล่าวโดยไม่ต้องขอความยินยอมจากเจ้าของสิทธิบัตรอีก แต่กระนั้น ผู้ซื้อไม่สิทธิสร้างสินค้าดังกล่าวขึ้นมาใหม่จากสินค้าเดิมได้ การรีไซเคิลสินค้าที่ใช้แล้วให้กลับมาใช้ได้ใหม่เหมือนเดิม เช่น แท่นหมึกปริ้นเตอร์ และการซ่อมแซมสินค้าที่เสียหายหรือใช้การไม่ได้อาจถูกตีความว่าเป็นการกระทำที่ขอมรับได้ตามหลักการสิ้นสิทธิหรืออาจเป็นการกระทำที่ละเมิดสิทธิบัตรก็ได้ จึงเกิดเป็นปัญหาว่าผู้ซื้อที่มีสิทธิกระทำการดังกล่าวได้แค่ไหนเพียงใดจึงจะไม่ละเมิดสิทธิของเจ้าของสิทธิบัตร นอกจากนี้ภายใต้ความไม่แน่นอนในขอบเขตของสิทธิ ผู้ซื้อที่ต้องการเพียงแต่ทำให้สินค้าที่ใช้แล้วหรือเสียหายกลับมาใช้ใหม่ได้อาจต้องมีความผิดฐานละเมิดสิทธิบัตร และผู้ประกอบการด้านการรีไซเคิลสินค้าอาจขาดความมั่นใจในการประกอบธุรกิจของตน

อีกทั้งเพื่อเป็นการหลีกเลี่ยงการสิ้นสิทธิในสิทธิบัตรของตน เจ้าของสิทธิบัตรอาจกำหนดเงื่อนไขการใช้สินค้าที่มีสิทธิบัตรที่ตนได้ขายไปแล้วได้ เช่น การอนุญาตให้ใช้แค่ครั้งเดียวหรือห้ามการนำสินค้าทั้งหมดไปกลับมาใช้ใหม่ ซึ่งหากข้อกำหนดดังกล่าวมีผลบังคับใช้ ผู้ซื้อและผู้บริโภคอาจถูกจำกัดสิทธิในการใช้สินค้าที่มีอยู่ตามสมควร

บทความนี้จะอธิบายถึงกฎหมายและคำพิพากษาของศาลในประเทศสหรัฐอเมริกาและญี่ปุ่นที่ได้มีการกำหนดข้อกเว้นเรื่องการซ่อมแซมสินค้าภายใต้หลักการสิ้นสิทธิ และจัดให้มีมาตรฐานในการแบ่งแยกระหว่างการรีไซเคิลหรือซ่อมแซมสินค้าที่ขอมรับได้ตามหลักการสิ้นสิทธิกับการสร้างสินค้าขึ้นมาใหม่อันเป็นการละเมิดสิทธิบัตร นอกจากนี้จะมีการวิเคราะห์ปัญหาของการที่ไม่มีบทบัญญัติเพียงพอในการตีความเพื่อใช้กับข้อเท็จจริงในเรื่องดังกล่าว และท้ายสุดได้แสดงความคิดเห็นเป็นข้อเสนอแนะในการปรับปรุงกฎหมายดังกล่าวต่อไป

คำสำคัญ: การรีไซเคิลและการซ่อมแซม, หลักการสิ้นสิทธิ, การละเมิดสิทธิในสิทธิบัตร

1. Background of patent protection and exhaustion doctrine

A patent is a set of exclusive rights granted by a state to an inventor to make, use, or sell an invention for a certain number of years.¹ Without

¹ World Intellectual Property Organization, WIPO Intellectual Property Handbook: Policy, Law and Use 17 (2008).

patent protection, any person can create and sell any inventions that others have spent time, money and knowledge to develop or make, with neither permission nor compensation. Pursuant to four major theories for patent protection, the patent system was created to protect inventors' natural property rights in their thoughts, to reward inventors who create beneficial things, to urge the inventors to produce useful works and to stipulate disclosure of the inventions to society.² Any person who commits these activities without authorization from a licensing agreement or given consent from the owner shall generally be held liable for patent infringement.

However, once the patented protection has been sold, these exclusive rights conferred by a patent will be consumed under the exhaustion doctrine.³ Procedurally, the doctrine of exhaustion is an affirmative defense asserted by the purchaser against infringement concerning the sale or use of the patented article after it has been authorized for sale by the patentee.⁴ Supported by two general reasons, the exhaustion of patent right, firstly, separates the patent right from being a transferred subject matter of patent, and secondly, does not allow the patentee to extract revenue twice.⁵ To use or sell the said transferred goods, the purchaser or whoever else obtained it does not need to request a permission from the patentee. The exhaustion, however, is not absolute. Amongst all exclusive rights conferred by a patent, only the rights which are of an exclusively commercial nature involve exhaustion as a consequence of the sale, whereas, other rights concerning manufacturing or physical product handling, *e.g.*, producing, reconstructing, etc., do not exhaust.⁶

In general, exhaustion of patent rights applies when products embodying an invention patent have been authorized for sale.⁷ However, there are two conflicting notions of patent exhaustion.⁸ On the one hand, in cases where patent exhaustion is considered as a mandatory rule, a patent right becomes exhausted once it has been legitimately sold, regardless of whether or not the patentee subjects the sale to express patent restrictions. On the other hand, the exhaustion doctrine may be treated as a default rule, a patent is exhausted only when the sale of that patented product was unconditional. In the latter rule, the patentee can avoid exhaustion of patent

² Janice Mueller, *An Introduction to Patent Law* 26 (2nd ed. 2006).

³ Nuno Pires de Carvalho, *the TRIPS Regimes of Patent Rights* 108 (2nd ed. 2005).

⁴ William Cornish and David Llewellyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 251-252, 258-259 (6th ed. 2008); cited in Vijay Kumar Himanshu, *Patent Monopoly and Doctrine of Exhaustion: Limits on Exclusive Right*, 16 JIPR 453-462 (2011).

⁵ *Carvalho*, *supra* note 3, at 108-109.

⁶ See Arthur Miller and Michael Davis, *Intellectual Property – Patents, Trademarks, and Copyright in a Nutshell* 135-137 (1990).

⁷ Amber Hatfield Rovner, *Practical Guide to Application of (or Defense against) Product-Based Infringement Immunities under the Doctrines of Patent Exhaustion and Implied License*, 12 Tex. Intell. Prop. L.J. 227, ¶ 246 (2004).

⁸ Wentong Zheng, *Exhausting Patents*, 63 UCLA L. Rev. 122, 128 (2016).

rights by imposing restrictions to control the resale or use of goods in aftermarkets.⁹

2. Legal problems concerning recycling and repair of patented goods

The acts of recycling and repairing of goods have benefits on both the environment and economy. Full allowance of all extent to which those acts can be committed surely meets the need for ecological development and a sustainable economy in modern times. However, in the case of patented products, the existence of recycled or repaired goods probably reduces the sale of original goods and competes with the patentee or authorized sellers. One might say that those acts can be the potential interference to the interests of the patentee and decrease the incentive to invent new technology. On the other hand, if the scope of permitted recycling and repair is improperly narrow, patent rights will be expanded to aftermarket and the right of downstream users to recycle and repair patented products will be limited.

Without the clear definition of permissible recycling and repair of patented products, this study will focus on the extent to which the acts should be permitted in accordance with exhaustion of patent right. Moreover, whether the exhaustion doctrine should be considered as a mandatory rule that applies even on conditional sales, or a default rule which applies only when the sale has no condition or restriction on the post-sale use of goods that may play a role in consideration of this matter. In order to catch up with environmental conservation, it is essential to revive patent laws that balance between the incentives for inventors to develop new technologies and the interests of the public in practicing the patented goods in post-sale.¹⁰

3. Foreign laws concerning exhaustion of patent rights on recycled and repaired goods

Neither the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), an international agreement administered by the World Trade Organization (WTO), address or harmonize national legislation on the issue of exhaustion of intellectual property rights. On account of the complexity of legal and economic aspects having yet to be fully assessed, each of the member states are free to establish their own regime for exhaustion without challenge, unless a dispute arises under provisions of other WTO Agreements, *e.g.*, GATT.¹¹

In the United States, the exhaustion doctrine or first sale doctrine has no origin from statutory law but was developed through the Supreme

⁹ *Id.* at 128-138.

¹⁰ AIPPI, *Working Guidelines*, Question Q205 Exhaustion of IPRs in case of recycling and repair of goods, available at <http://www.aippi.org>

¹¹ *Carvalho*, *supra* note 3.

Court's decisions,¹² such as in *Univis Lens*.¹³ In this case, the Court ruled that "the patentee cannot control the resale price of patented articles which he has sold, either by resorting to an infringement suit, or...by stipulating for price maintenance by his vendees."¹⁴ Nevertheless, in cases where the patentee restricts the purchaser or imposes conditions on use and disposal of the patented article, the violation of these restrictions has a negative impact on the authorization of the sale. By virtue of the violation of valid restrictions, the sale of patented articles becomes unauthorized. Without an authorized sale, the exhaustion doctrine therefore shall be inapplicable.¹⁵ Affirmed by the *en banc* Federal Circuit's decision in *Lexmark v. Impression*,¹⁶ the court ruled in *Mallinckrodt* that the patentee can condition the sale of patented goods with a restrictive notice and thereby restrict the disposition of the goods by the purchasers, with the exception of antitrust law violations, such as price-fixing and tie-in restrictions, or violations of other law or policy.¹⁷ Therefore, downstream users can be limited to recycle or repair the damaged or used patented products so as to use it again by the patentee's restrictions on post-sale use of goods, *i.e.*, a "Single Use Only" sign on the product's package.¹⁸

The U.S. Supreme Court also set up repair defense as an extension of first sale doctrine and established the standard for distinguishing permissible repair from infringing reconstruction by considering the 'spentness' of the whole product in *Aro I*.¹⁹ The Court ruled that repair of a patented product is permitted until the whole article has been spent by reasoning that "in order to call the monopoly, conferred by the patent grant, into play for a second time, it must, indeed, be a second creation of the patented entity."²⁰ According to that, repair and reconstruction dichotomy, downstream users can recycle or repair even the essential part of patented inventions until the whole product becomes spent. However, the patentee is allowed to impose the condition of sale to avoid patent exhaustion and prevent the users from the acts.

In Japan, no provision of the Japanese Patent Act refers to the exhaustion doctrine. The exhaustion of patent rights, however, has been recognized under court decisions, even if the doctrine is not codified in the statute. The Japanese Supreme Court in the *BBS* case recognized the

¹² The United States Group, *United States Group Report*, Question Q205 Exhaustion of IPRs in cases of recycling or repair of goods, *available at* <https://www.aippi.org>

¹³ *United States v. Univis Lens Co.*, 316 U.S. 241 (1942)

¹⁴ *Univis*, 316 U.S. at 250.

¹⁵ John Gladstone Mills, *Patent Law Fundamentals* § 20:40:50 (2nd ed. 2002).

¹⁶ *Lexmark v. Impression*, 816 F.3d 721, at 726 (Fed. Cir. 2016).

¹⁷ *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, at 708 (Fed. Cir. 1992).

¹⁸ *See Mallinckrodt*, 976 F.2d at 702.

¹⁹ *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 365 U.S. 336 (1961).

²⁰ *Aro*, 365 U.S. at 346.

exhaustion doctrine of patent right and reasoned that “(i) if the patentees’ approval must be required anytime the patented products are assigned or otherwise disposed of, the free circulation of goods on the market will be prevented, and (ii) it is unnecessary to let the patentee exploit his invention twice in the stream of commerce.”²¹ Moreover, the Grand Panel of Intellectual Property High Court ruled in the *Canon* case in 2006 that “[i]n light of the fact that an exhaustion of a patent is admitted from the perspective of harmonization between the protection of inventions under the Patent Act and social and public interest, exhaustion of a patent should not be prevented by the patentee’s intention.”²² In comparison with the U.S. Federal Circuit’s ruling in *Mallinckrodt*, a patentee in Japan is not able to limit patent exhaustion by making any agreement. Thus, in Japan, the restriction on use of the patented product, once it has been sold, shall be ineffective to override exhaustion doctrine.

Although, Japan is classified as a civil law legal system country, the legal system in the field of intellectual property is an exception. Common law system aspects have been adopted in combination with the traditional civil law system in order to form reliable rules and ensure consistency of judicial decisions.²³ Although it is not binding to subsequent courts, the decisions of the Japanese Grand Panel of IP High Court have utmost persuasive authority which other courts are reluctant to overrule, unless there is a more reliable reason.

Furthermore, the Grand Panel of IP High Court in *Canon* held that the exhaustion of patent rights did not apply over the recycled ink cartridge and that it infringed the patent.²⁴ Establishing the repair-reconstruction distinction, the Court ruled that a patent right over a patented product, even once it has been sold, is not exhausted, if there are activities categorized into the following categories:²⁵

(1) Where the patented product is reused or recycled after its utility (kôyô in Japanese) has been depleted by virtue of the expiration of the ordinary lifespan of the product, through examining whether the patented product has finished its service as a product, or;

(2) Where a third party has made processes or replacements to the whole or part of the components corresponding to the essential portion of

²¹ BBS Kraftfahrzeugtechnik AG v. K.K. Racimex Japan (1997), 1612 Hanrei Jihō 3, at 8.

²² Canon Inc. v. Recycle Assist Co., no. 2005 (Ne) 20021, at 22; the full case officially translated to English *available at* http://www.ip.courts.go.jp/app/files/hanrei_en/403/000403.pdf

²³ Kaoru Kuroda and Eiji Katayama, *Efforts to Establish Clear Standards for Exhaustion in Japan*, 7 Wash. J.L. Tech. & Arts 515, 534-535 (2012), *available at* <http://digital.law.washington.edu/dspace-law/handle/1773.1/1133>

²⁴ *Canon*, *supra* note 22, at 52.

²⁵ *Canon*, *supra* note 22, at 47.

the patented invention by focusing on, while evaluating, the invention protected by patent.²⁶

The Court determined that the utility of ink cartridges has not been depleted under the First Category but under the Second Category the act of refilling the ink recreated essential features in claim 1 as the capillary forces at the interface between the two chambers and the pressure differential created by the ink-filled chamber is present again when refilling the ink. Hence, the patent over ink cartridges did not exhaust and the act that the defendant committed without the patentee's permission constituted infringement of patent right.²⁷

It may be said that the application of patent exhaustion in respect to recycling and repair cases in United States is broader than in Japan. According to U.S. repair and reconstruction dichotomy, the boundary of permissible acts of recycling and repair of patented products tends to be more expanded. However, it should be noted that the U.S. patent law permits the patentee to avoid the patent exhaustion by imposing restrictions, *e.g.*, post-sale restriction or field-of-use restriction. In other words, the entitlement of users to repair, reuse, recycle, or other types of uses of the goods can be limited by any clause in the sale contract or even a label attached on the product package. On the other hand, the Japanese precedent prohibits the intention of the patentee from overriding patent exhaustion, although the permissibility of the recycling and repair of the goods under the repair-reconstruction test is narrower than in the U.S. The difference in enforceability of the contractual limitation of patent exhaustion may be one of the substantial factors in considering the line drawn when distinguishing between permissible repair/recycling and infringing reproduction.

4. Analysis on thai patent law concerning exhaustion of patent rights on recycled and repaired goods

The provision of the exhaustion doctrine was added to the Thai Patent Act under Section 36 paragraph two (7) in order to harmonize domestic law with international obligations under TRIPs, it was one of the WTO agreements applied to Thailand as a WTO State Member. In addition, the provision is a benefit, which promotes research and invention of new products and processes.²⁸

“The preceding paragraph [exclusive rights] shall not apply to...the use, sale, having in possession for sale, offering for sale or importation of a patented product when it has been produced or sold with the authorization or consent of the patentee.”²⁹

²⁶ *Canon, supra* note 22, at 47-48.

²⁷ *Canon, supra* note 22, at 52.

²⁸ 116 Royal Thai Government Gazette Ch. 22 Gor., March 31, B.E. 2542 (1999).

²⁹ Thai Patent Act B.E. 2522 (1979) as amended by the Patent Act (No.2) B.E. 2535 (1992) and the Patent Act (No.3) B.E. 2542 (1999), § 36, ¶ 2 (7).

Once the patented product has been legitimately sold by the patentee or others with his permission or produced by other authorized persons, a patentee can no longer exercise his right to exclude others from the use, sale, possession for sale, offering for sale, or importation of a product covered by the product patent or produced by using a process patent. Nevertheless, the right to exclude others from producing the patented product or using a patented process to produce is not exhausted in accordance with this provision but still remains up to the patentee. Thus, the purchaser, who becomes the proprietor of a product, can exercise his proprietary right over the patented product as he wants but shall not have right to produce a new product identical or equivalent to the patented product that he purchased. If exaggerated, the exclusive right of the patentee to produce might be interpreted to include the act of reproduction of the product to be usable again. A person who reproduces a patented product, therefore, shall be liable for patent infringement. Although these seem simple to determine with common sense, how much an act in question is permissible to repair/recycle or infringe reproduction, should be distinguished by considering the balance of the interests of patentee and public.

The patent exhaustion provision, under Section 36 paragraph two (7) of the Thai Patent Act, is not sufficient to deal with this matter since no statutory definitions of the term ‘repair’ and ‘recycling’ are legislated under the Act. Both repair and recycling of the goods might be considered as the right to use of the patented product, that the patentee can no longer exercise, when it has been sold by himself or by others with his consent. However, the term use of the patented product and the scope of use permitted under the exhaustion doctrine are not laid down under the law. The absence of the definitions for ‘repair’ and ‘recycling’ is not only in the Thai Patent Act and subsequent legislation, *e.g.*, The Ministerial Regulations, but there are also no Supreme Court decisions that ruled for their definition or any permitted condition of the acts.

Should courts construe the patent’s scope of protection which is defined in the claims of the patent specification and determine whether the accused device or process is literally identical or equivalent to the claims under the traditional patent infringement analysis? In my point of view, the acts of recycling and repair of the patented products are vulnerable to be determined to constitute patent infringement. Because such acts are committed solely with the intention of making the damaged or used product be useable in its initial purpose again, these are inherently inevitable to be determined identical to or equivalent to the prior product. This approach focuses solely on the patent protection aspect but may not consider whether the act is foreseeable under normal social convention. Moreover, it lacks balancing amongst the interests of patentee and interest of public or consumer to use the products. Since the acts are committed on the product which the patentee has enjoyed the reward for his creation, the interest of the patentee outweighs the right of purchaser to use the patented goods.

Aside from being able to grant others a license to exercise the exclusive right which the law allows a patentee to impose conditions or restrictions pursuant to Section 39 of the Thai Patent Act, the patentee's right to impose post-sale restrictions upon the purchasers is questioned since the statutory law has never been clarified. In this matter, there are two legal opinions. The first opinion is of Professors Chavalit Uttasart and Nanadana Indananda, who both pointed out that restriction on post-sale use of the patented goods should not be considered an infringement under patent law when recycling or repair of the goods. Instead, it should be considered under the principle of contract law. In a case where the purchaser fully agrees with post-sale restrictions, the violation of such restriction may constitute a breach of contract.³⁰ The second opinion is of Professor Jakkrit Kuanpoth,³¹ who addressed that the post-sale restriction on use of patented goods is void because such clause is contrary to the patent exhaustion provision under Thai Patent Act Section 36 paragraph two (7), which takes into account public order in the general view of contract law.³² Even though the parties to the contract fully agreed, the post-sale restriction is ineffective.

If the exhaustion doctrine is treated as a mandatory rule as mentioned by Professor Jakkrit Kuanpoth, the marketing plan created by patentee would be limited. The patentee cannot impose any restriction on use of the goods. This may have environmental benefits because purchasers and downstream users would be capable of repairing and recycling the patented products. However, there probably are some marketing plans which are beneficial for environmental conservation, for example, the "Return Program Cartridges" in *Lexmark v. Impression*, where the manufacturer did not allow purchasers to reuse the products because they intended to recycle the cartridges marketed under the program themselves. In some situations, the allowance to impose restriction on the post-sale use of goods is able to enhance the environmental responsibility of the patentee.

5. Conclusion and recommendations

In the case where goods are protected by invention patent, the provision under Section 36 paragraph two (7) of the Thai Patent Act is insufficient to clearly answer whether and to what extent the acts of recycling and repair of goods should be permitted in the scope of use under the doctrine of patent exhaustion. Moreover, no laws or guidelines explain

³⁰ See Chavalit Uttasart and Nandana Indananda, *Thailand Group Report*, Question Q205 Exhaustion of IPRs in cases of recycling or repair of goods, available at <https://www.aippi.org>

³¹ Interview with Jakkrit Kuanpoth, Counselor of Tilleke & Gibbins's IP Group, in Bangkok, Thailand (June 29, 2015).

³² Thailand Civil and Commercial Code, § 150: "An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals."

whether patentees can or cannot avoid patent exhaustion by imposing the restrictions on post-sale use of goods.

After studying the patent laws in of the United States and Japan, a volume of cases in both countries have established diverse approaches for interpretation of their own national patent laws to apply to and have formulated criterions for the facts at issue. On the one hand, the case laws in the United States ruled that a patent right is not exhausted when recycling or repair of patented goods violated a valid restriction on post-sale use imposed by the patentee. If there is no such conditional sale, the acts of recycling and repair committed after the entity of the goods had already spent as a whole without the permission from patentee does not exhaust a patent right, but constitutes patent infringement under the repair and reconstruction dichotomy. On the other hand, the IP High Court's decision in Japan laid down the highly persuasive guideline concerning this issue by holding that the patentee's intention cannot control exhaustion of a patent. Also, the court formulated that a patent right covering a product basically exhausts once it has been sold, unless the product has been reused or recycled after product's lifespan expired under Category 1 of the repair-reconstruction test or unless its components corresponding to an essential part of the patented invention have been altered or replaced under Category 2 thereof.

Whereas the awareness of the environment and sustainability is increasingly growing, the Thai Patent law remains silent. This uncertainty is probably an underlying problem that renders any person who obtained the goods to be reluctant about exercising their rights of ownership to recycle or repair the product; it also makes any private sector afraid to engage in the recycling business, and any patentee able to extend the exclusive right. Therefore, to catch up with the growth of the awareness of the environment and sustainability, it is essential to advance the Thai patent law.

As described by Professor Jakkrit Kuanpoth, the patent exhaustion provision under Section 36 Paragraph two (7) should be considered as a mandatory rule. No patentee should be allowed to override the exhaustion of a patent since the exhaustion doctrine is a purely legal concept without primary function to reward inventors. Furthermore, rather than allowing the Thai court to interpret the current inadequate provision that may lead to an undesirable guideline, Thailand should amend the Thai Patent Act through adding a provision that defines the terms permissible for repair and recycling of products protected by invention patent in order to clarify the patent exhaustion provision. To balance between the interest of patentee and the interest of the public and consumers to use the patented products, the heart of invention should be protected by patent protection, and the right to free use of goods should be a privilege of the public and consumers. This study proposes that the provision under Section 36 Paragraph two of the Thai Patent Act should be amended to add a new subsection (8) as the following detail:

“The preceding paragraph [exclusive rights] shall not apply to... (8) The act of recycling or repair of a patented product, unless such an act involves replacement or reproduction of an essential component of the product in a commercial manner or for profits.”

Plus, as to clarify the scope of both acts, Section 3 of the Act should be amended to include the definition of recycling and repair as follows:

“Repair” includes maintenance work and minor interventions.

“Recycling” means the act whereby the product embodying patent have served the use for which they were conceived are reused without being reduced to their constituent ingredients.

According to the amendment, any person who obtained the patented goods can repair or recycle it for private use without the patentee’s consent, even if the act has changed or reproduced its essential components. For recycling businesses, the act of recycling goods collected from the patentee’s customers, by which the essential components are replaced or reproduced, which is found committed in a commercial manner or for profits constitute patent infringement. For patentees, their exclusive rights are not exhausted when there is an act by which an essential component of the product has been replaced or reproduced, unless the acts have been committed for private use. By this measure, the commercial benefit of patentees and the interest of the public and consumers to use patented goods will be reasonably protected simultaneously.

TRANSPARENCY MEASURES TO CONTROL FINANCIAL INTERACTIONS BETWEEN PHYSICIANS OR HEALTHCARE PROFESSIONALS AND PHARMACEUTICAL COMPANIES

Ariya Suebphanwongs

Abstract

It is unavoidable that medicine is one of the key fundamental things for human's needs. Nevertheless, medicine has its special qualification different from other general products because it could directly cause harm and risk to health and life of consumers. In addition, it is not freely available for consumer's purchase as other consumer goods since medicine is specific, and it requires knowledge and skills of the well trained experts, in order to provide proficient and efficient diagnosis. Consequently, patients are not at the position to select their own treatment, but to lay their trust on physician or healthcare professional to perform this role for them instead. Therefore, prior to consumption of the medicines, the patients always decide to receive recommendation or diagnosis from physicians or healthcare professionals who are experts in their relevant fields, and patients dependably put their trust on them for their solution of what medications are genuinely essential for them. This is a reason why the physicians and healthcare professionals must prioritize their patients with their best attempts since most of the patients are reliant upon the physicians and healthcare professionals who are expected to put the needs of the patient as the first priority.

Even consumers are confident the physicians and healthcare professionals to act in the best interests of their patients, the medicines are manufactured and sold by pharmaceutical companies similarly as other general items in business sector, and most consumers are widely unaware of the direct and indirect influence of the pharmaceutical companies' marketing over the physicians and healthcare professionals they depend on. To stimulate their companies' sale volume, the physicians particularly are the major targets for the marketing of pharmaceutical companies due to the authorization to prescribe and a high status in society, so their decision could determines success of each product. Therefore, it is not surprising that the majority of marketing strategies spent by pharmaceutical companies go towards direct-to-physician promotion that leads to problem of conflict of interest between the physicians or healthcare professionals and the pharmaceutical companies. This relationship is very sophisticated than we have imagined since this kind of relationship comprising of useful financial support and improper financial interactions that could cause many serious results from irrational use of medicine until bribery or corruption.

From all previously mentioned, if prescriptions from physicians and healthcare professionals are truly transparent and free from any conflicts of interest with the pharmaceutical companies under monitoring and controlling by efficient measure, the ultimate interest would be with the patients, as consumers, and with the state. In this regards, this article focuses on

transparency measures to control financial interactions between the physician or healthcare professionals and the pharmaceutical companies by studying existing measures applied in overseas and comparing with current situations of Thailand. The study will provide analysis and recommendations to enhance the effective enforcement of the transparency measure and to find out the potential results that suitable for Thailand.

Keywords: Transparency, Physician, Healthcare professional, Pharmaceutical company

บทคัดย่อ

เราไม่สามารถปฏิเสธได้ว่ายารักษาโรคถือเป็นหนึ่งในปัจจัยหลักในการดำรงชีพของมนุษย์ อย่างไรก็ตามยาโรคนั้นจัดเป็นสินค้าอย่างหนึ่งที่เรียกได้ว่ามีลักษณะและคุณสมบัติเฉพาะตัวที่โดดเด่นกว่าสินค้าอุปโภคบริโภคทั่วไปเนื่องจากยาเป็นสินค้าที่สามารถส่งผลกระทบต่อชีวิตและสุขภาพของผู้บริโภคได้โดยตรง นอกจากนี้ยาไม่ใช่สินค้าที่ตัดสินใจซื้อหาได้ง่ายและอิสระอย่างสินค้าอุปโภคบริโภคทั่วไป ดังนั้นในการบริโภคยาแต่ละครั้งนั้นผู้ป่วยในฐานะผู้บริโภคจะมอบความไว้วางใจให้กับผู้มีความรู้เฉพาะทาง โดยเข้าขอคำแนะนำหรือรับการตรวจวินิจฉัยจากแพทย์หรือผู้ประกอบวิชาชีพด้านสาธารณสุขเพื่อให้ได้รับคำแนะนำหรือการวินิจฉัยที่ถูกต้องและสั่งจ่ายยาที่เหมาะสมตรงกับอาการและโรคของตน ดังนั้นผู้ปฏิบัติหน้าที่ไม่ว่าในฐานะแพทย์หรือผู้ประกอบวิชาชีพด้านสาธารณสุข เช่น เกษตรกร ซึ่งเป็นผู้ที่ได้รับความไว้วางใจและความเคารพจากผู้ป่วย จึงต้องปฏิบัติหน้าที่ของตนโดยคำนึงถึงความสำคัญของผู้ป่วยเป็นอันดับแรก

แม้ผู้บริโภคส่วนใหญ่จะเชื่อมั่นในตัวแพทย์และผู้ประกอบวิชาชีพด้านสาธารณสุขที่ตนเข้ารับคำแนะนำหรือการรักษาว่าบุคคลดังกล่าวจะปฏิบัติหน้าที่โดยคำนึงถึงผลประโยชน์ของผู้ป่วยเป็นหลัก แต่ผู้บริโภคส่วนใหญ่ก็มิได้ตระหนักว่ายาเป็นสินค้าชนิดหนึ่งซึ่งถูกผลิตเหมือนสินค้าทั่วไปในท้องตลาดซึ่งบริษัทยาต้องใช้กลยุทธ์ทางตลาดต่าง ๆ เพื่อกระตุ้นยอดขายและการตลาดส่วนใหญ่ที่บริษัทประยุกต์ใช้นั้นจะมุ่งไปทางแพทย์เป็นกลุ่มเป้าหมายหลัก เนื่องด้วยสถานะทางสังคมของแพทย์ที่ได้รับความเคารพนับถือจากบุคคลทั่วไปในสังคม ดังนั้นอำนาจในการสั่งจ่ายของแพทย์ย่อมมีผลต่อยอดขายของยาแต่ละชนิด ดังนั้นจึงต้องยอมรับว่ากลยุทธ์ทางการตลาดนั้นย่อมมีอิทธิพลไม่โดยดุษฎีโดยอ้อมต่อพฤติกรรมการสั่งจ่ายของแพทย์และผู้ประกอบวิชาชีพด้านสาธารณสุข ซึ่งความสัมพันธ์ในลักษณะเช่นนี้ค่อนข้างมีความซับซ้อน โดยประกอบทั้งการสนับสนุนทางการเงินอย่างแท้จริงจากบริษัทยา และการตลาดที่มุ่งสนับสนุนทางการเงินในรูปแบบแอบแฝงอันนำมาสู่ปัญหาซื้อขายอย่างไม่เหมาะสมจนถึงปัญหาการทุจริต

จากเหตุผลตามที่กล่าวมาหากมีมาตรการใดๆ ที่มีประสิทธิภาพและสามารถควบคุมความสัมพันธ์ระหว่างแพทย์หรือผู้ประกอบวิชาชีพด้านสาธารณสุขกับบริษัทยาให้เป็นไปอย่างโปร่งใส ปราศจากซึ่งผลประโยชน์ขัดกันใดๆ ผลประโยชน์หลักก็จะเกิดกับผู้ป่วยในฐานะผู้บริโภค บทความนี้จึงมุ่งศึกษามาตรการที่บังคับใช้อยู่ในต่างประเทศว่ามีมาตรการใดบ้างที่ใช้เพื่อควบคุมความโปร่งใสในความสัมพันธ์ทางการเงินระหว่างแพทย์หรือผู้ประกอบวิชาชีพด้านสาธารณสุขกับบริษัทยาและเปรียบเทียบกับสถานการณ์ในประเทศไทย โดยวิเคราะห์และเสนอมาตรการที่เหมาะสมกับบริบทของประเทศไทยต่อไป

คำสำคัญ: ความโปร่งใส, แพทย์, ผู้ประกอบวิชาชีพด้านสาธารณสุข, บริษัทยา

1. Introduction

From past to present it has been obvious that when people have their health problem, they always put their trust to the physicians and healthcare professionals to act in their best interests. However, most consumers are generally unaware of the direct and indirect power of marketing by pharmaceutical companies on the physicians and healthcare professionals they depend on. As per business purpose and very high market value, healthcare and pharmaceutical sectors are really vulnerable to unethical practices in its system¹ especially transparency in financial interactions among people in healthcare industry since the related stakeholders are various, different, and have many objectives. They comprise physicians, healthcare professionals, researchers, manufacturers, distributors, wholesalers, retailers, medical representatives² and regulators. For this reason, non-transparent interactions between the physicians or healthcare professionals and the pharmaceutical companies can manifest themselves in many forms throughout every level of the system such as the giving and taking of gifts, unethical drug sale promotion, collusion, fraud, bribery and corruption. A report by PriceWaterhouseCoopers (hereinafter referred to as PWC) stated that bribery and corruption are the main threats, and they are the second most commonly reported type of economic crime for the pharmaceutical sector. Furthermore, the same report also shows that in recent years the pharmaceutical sector has faced criticism over how it interacts with physicians and healthcare professionals.³ Another report from PWC also argued that too much money is spent on advertising by pharmaceutical company.⁴

All of the above raise the issue of ensuring that non-transparent financial interactions between the physicians or healthcare professionals and the pharmaceutical companies do impact on their discretion when giving a diagnosis, and procuring and dispensing medicines. For this reason, a number of countries have put in place measures to control unhealthy financial interactions between the physicians and healthcare

¹ World Health Organization, **Measuring Transparency in Medicines Registration, Selection and Procurement: Four Country Assessment Studies**, 1 (2006).

² In this study, medical representative means a person who works for pharmaceutical company or its subsidiary or distributor, and he or she is a key connection between the physicians or healthcare professionals and the pharmaceutical companies with the main purpose to increase awareness of brand and use of company's product. It also known as medical sale representative, pharmaceutical sale representative or reps.

³ Pharmaceuticals and Life Sciences Sector Analysis of PWC's 2014 Global Economic Crime Survey, PriceWaterhouseCoopers, **Pharmaceuticals and Life Sciences' fight against bribery and Corruption**, 4 (2014).

⁴ PriceWaterhouseCoopers, **Pharma 2020: The vision which path will you take?**, 7 (2007).

professionals on the one side and the pharmaceutical companies on the other.

Currently, Thailand does not have legislation to control this matter directly and effectively. This makes the issue of non-transparent financial interactions among those people more serious and reflects in a number of ways such as irrational use of drug, economic system, corruption and moral ethics. There is, however, an attempt to drive forward this concern including through research⁵ in this area. These are reasons why it is interesting to complete a study on transparency measures to control financial interactions between the physicians or healthcare professionals and the pharmaceutical companies of foreign countries. Comparing the advantages and disadvantages can act as a guide for Thailand to adopt potential solutions which these solutions should cover two core principles: 1) the principle of disclosure obligation and 2) the principle of prevention of conflict of interest.

2. NATURE OF INTERACTION IN HEALTHCARE SYSTEM

This chapter will focus on the nature of physician-patient relationship (hereinafter referred to as PPR) and physician-pharmaceutical company relationship (hereinafter referred to as PPCR). The scope of study comprises of the ways that they are supposed to be and the way they really are including effects from inappropriate PPCR.

2.1 Nature of Interactions between Physicians or Healthcare Professionals and Patients in History and in Modern World

Since the Hippocratic tradition began, generations of physicians have promised to do their best to protect their patients from hazards and heal them. The physician is already accepted and acknowledged as a protector who uses his specialized knowledge to recover and benefit patients. Therefore, the relationship between the physician and the patient is compared to that of father and child, termed the “Paternalism model”. Whilst this model emphasizes the protection given by the physician, at the same time it ignores the autonomy of the patient.⁶

For centuries, this model was accepted until the idea of individualism emerged. This concept does not just affect politics and religion but also influences the thinking of patients when it comes to PPR.

⁵ ดารพร ธีระวัฒน์ และคณะ, รายงานฉบับสมบูรณ์โครงการการศึกษากฎหมายควบคุมการส่งเสริมการขายยาในประเทศ, แผนงานกลไกเฝ้าระวังและพัฒนาาระบบยา (2553) (Dr. Daraporn Thirawat ET AL, **Report on Study on Legal Measures to Control Drug Sale Promotion in Foreign Countries**, Thai Drug Watch Organization (2010)).

⁶ รติกร กุลวรรกุลพิทักษ์, “ความรับผิดชอบของแพทย์จากการฝ่าฝืนเจตนาลิขสิทธิ์การรักษาส่วนหน้าของผู้ป่วยภาวะสุดท้ายของชีวิต”, วิทยานิพนธ์นิติศาสตรมหาบัณฑิตสาขากฎหมายเอกชน, มหาวิทยาลัยธรรมศาสตร์, 11-12 (2557) (Ratikorn Kulvarakulpitak, “Civil liability of physicians in interference with advance directives”, Master of Laws’ thesis, Thammasat University, 11-12 (2014)).

Nowadays, the idea of patient autonomy and self-decision has emerged as the powerful ethos in the healthcare system, and the influence of the paternalism model has been slowly reduced. The concept of patient autonomy is a combination of the patient's needs, concerns, ideas, expectations and decisions with professional recommendations from the physician, which requires a reasonable amount of mutual trust and understanding between both sides. One of the reasons why a strict paternalism model is no longer valid is the erosion of confidence in and respect for physicians by the public.

2.2 Nature of Interactions between Physicians and Patients in Thailand

Thailand has an Asian culture and has Buddhist influences. The former PPR was based on paternalism in the same way as Western culture. Thai people also gave respect to physicians due to their knowledge and high profile, and also agreed with their decisions without any comments. However, things have changed. The idea of paternalism is starting to disappear and there is a greater focus on patient autonomy and contractual model instead.⁷

2.3 Contractual Model of Patient-Physician Relationship

In a modern libertarian society, contractual relationships cover a wide range of human transactions which all parties agree freely to. This includes modern medicine in which the physicians are recognized as service providers of medical skills and the patients as consumers who are looking for medical products or service to serve their needs. In practice, if physicians or hospitals accept the patients, it shall be deemed that the unwritten contract is in place between them. Therefore, it is possible that the contractual model could slowly undermine and reduce the traditional paternalism model.⁸ However, the contractual model is not sufficient to explain such a sophisticated relationship as the PPR since it is complex both externally and internally. The PPR is sophisticated because the physicians and patients are not usual sellers and purchasers in general situations.

Even currently the PPR is always seen in form of the contractual model which it is expected that all parties would get into the medical agreement freely and independently. However, after considering and due to complexity of this relation, the patients still have less bargaining power

⁷ Kulvarakulpitak, *supra* note 6, at 12-13.

⁸ อนุชา กาศลังกา, “การศึกษาปัญหาแพทย์และบุคลากรทางการแพทย์สังกัดกระทรวงสาธารณสุขและสำนักงานปลัดกระทรวงสาธารณสุขถูกฟ้องร้องจากการรักษาพยาบาล”, เล่มที่ 32, วารสารวิชาการกรมสนับสนุนบริการสุขภาพ, 57, 61 (2555-2556) (Anucha Kardlungka, “The study of the doctors and medical personnel in hospitals under the Ministry of Public Health and the Office of Permanent Secretary for Public Health have been in the prosecution of the medical services purposes”, Volume 32, **Academic Journal of Department of Health Service Support**, 57, 61 (2012-2013)).

than the physicians who are specialized in their relevant fields. Therefore, it is unavoidable that the physician is the person who has obligations to look after and keep in mind his patient's interest or it could be said that the physicians must remind themselves that they have a fiduciary duty.

2.4 Nature of Interactions between Physicians and Pharmaceutical Companies

Pursuant to the high market value of the pharmaceutical industry, it is not surprising that pharmaceutical companies spend a lot on marketing to stimulate their sale volumes. According to many surveys⁹ and pieces of research,¹⁰ the great majority of these expenditures are on medical representatives visiting the offices of physicians or contacting physicians to build a relationship and present their products. Medical representatives are primarily college-educated but those who have graduated with a science background could have more advantages in this occupation. They also have to attend training programs designed specifically to enable them to promote companies' products. This career is highly-pressured because it is commission-based. Visits from the medical representatives are always coordinated with many marketing tactics to achieve their trading purposes such as leaving reminders (notepads, pens and other small gifts engraved with the company logo), leaving drugs samples and sponsoring academic and non-academic activities. These create the issue of how to ensure that those unhealthy relationships will not create negative influences over medical prescriptions or lead to any conflicts of interest between the physicians or healthcare professionals and the pharmaceutical companies.

3. Financial interactions between physicians or healthcare professionals and pharmaceutical companies in foreign countries

This chapter will pay attention on existing transparency measures applied in 2 foreign countries and background before launching the measure of each country will be taken into consideration also.

3.1 USA

According to the survey,¹¹ 64% of Americans believed that it was crucial to be aware of financial interactions between physicians or healthcare professionals and pharmaceutical companies. The same survey stated that 68% of Americans would support a law that forces

⁹ Consumer International, **Drugs, Doctors and Dinners: How drug companies influence health in the developing world**, 23 (2007).

¹⁰ Joshua E. Perry, Dena Cox & Anthony D. Cox, "Trust and Transparency: Patient Perceptions of Physicians' Financial Relationships with Pharmaceutical Companies", 42(4), *Journal of Law, Medicine & Ethics*, 475, 475-477 (2014).

¹¹ Pew Prescription Project, "Consumer Survey: Disclosure of Industry Payments to Physicians" (2008), <http://www.pewtrusts.org> (last visited 11 July 2016).

pharmaceutical companies to disclose any financial interaction with physicians or healthcare professionals. The survey also reveals that most Americans do not agree with gifts being given by pharmaceutical companies to those in the healthcare sector since they believe that receiving any sort of gifts would influence physicians' decision about prescription regardless of the value of the gifts.

After having closely considered this issue, in order to have any transparency measures to control financial activities between physicians or healthcare professionals and pharmaceutical companies, such measures must include the following two principles: the principle of disclosure obligation and the principle of prevention of conflicts of interest.

Legislators decided to draft a law, namely the Patient Protection and Affordable Care Act (hereinafter referred to as PPACA), which was first introduced and supported by Senators Charles Grassley and Herb Kohl¹² and finally enacted into law in 2010 as Section 6002 of the PPACA. The cornerstone of the mentioned law is the requirement to report the expenditure of pharmaceutical companies by emphasizing disclosure to the public of any financial interactions with physicians or healthcare professionals. The objective of this law is to prevent conflicts of interest of physicians or healthcare professionals related to pharmaceutical companies. Although the PPACA does not directly stop drug sale promotional activities, the pharmaceutical companies must be very careful about what they spend on their marketing activities. Furthermore, this law creates awareness of reciprocal arrangements between physicians or healthcare professionals and pharmaceutical companies.

3.2 Australia

The pharmaceutical industry is a significant and enormous sector of its economy and has unique nature from other businesses or industries. Traditionally, pharmaceutical companies rely upon medical representative to persuade physicians' behavior or discretion in prescribing. This relationship has been controversial issue in their negative impact on public and society.¹³ The use of promotional activities in the drugs business in Australia is similar to that found in the USA in that most pharmaceutical companies spend a great deal of money on strategic marketing activities. The objective of these marketing activities is to stimulate sales. Research¹⁴

¹² Press Releases, Grassley and Kohl Urge Action on Sunshine Law, <http://www.aging.senate.gov/press-releases/grassley-and-kohl-urge-action-on-sunshine-law> (last visited 11 July 2016)

¹³ Magda Huynh, David Low & Geoffrey Lee, University of Western Sydney, **Relationships between Medical Sales Representatives and Physicians: An Exploratory Study**, 1 (2008), <http://researchdirect.westernsydney.edu.au/islandora/object/uws:7787> (last visited 28 July 2016).

¹⁴ E.E. Roughead, K.J. Harvey & A.L. Gilbert, A. L., "Commercial detailing techniques used by pharmaceutical representatives to influence prescribing", 28(3), **Australian and New Zealand Journal of Medicine**, 306, 306-310 (1998).

conducted by the University of South Australia and La Trobe University found that the most popular way to achieve this objective was to send medical representatives to meet physicians or public healthcare professionals with the purpose of building a good relationship. Additionally, when the medical representatives make their visits, as the most common method of building influence is to offer complementary presents or free meals. Consequently, it is undeniable that this well-grounded relationship might influence physicians or healthcare professionals in making decisions on issuing prescription to their patients by favoring products from the medical representatives with whom they have close a relationship over products from other companies with similar quality drugs.

Such information is consistent with another survey¹⁵ which reveals that 76% of patients in Australia are not aware of any financial interactions with interest related to their physicians and pharmaceutical companies. 70% wished to be able to know if their physicians were offered any financial benefits or incentives to participate in research, and 61% expressed that they would want to know if there was any sponsorship offered to physicians to attend conferences. Additionally, 79% of patients wanted to be aware of any incentives received by the physicians, and 80% revealed that they would have more confidence in their physicians' decisions if any interests related to their physicians were disclosed. Similarly, there was a statement issued by the Chairman of the Australian Competition & Consumer Commission (hereinafter referred to as ACCC) on 26 July 2006¹⁶ where he said that: "Consumers should be able to have confidence that decisions made by their doctors are made solely having regard to their best interest without any potential for influence by benefits or perks."

In considering the above evidence, if there is to be any transparency measures to control such activities between physicians or healthcare professionals and pharmaceutical companies then these should include the following two principles: principle of disclosure obligation and principle of prevention of conflicts of interest.

Accordingly, Medicines Australia adopted principle of disclosure obligation into the 18th edition of its Code of Conduct (hereinafter referred to as Australia Code of Conduct) which is the latest version authorized by the ACCC in April 2015. The objective is to strengthen the pharmaceutical industry in the country by requiring pharmaceutical companies to submit a report related to any financial activities with people in the healthcare sector to Medicines Australia. This requirement highlights financial interaction disclosure of the prescription medicines companies if they are financially

¹⁵ Martin H N Tattersall, Aneta Dimoska & Kevin Gan, "*Patients expect transparency in doctors' relationships with the pharmaceutical industry*", 190(2), **the Medical Journal of Australia**, 65, 66 (2009).

¹⁶ Martin H N Tattersall & Ian H Kerridge, "*Doctors behaving badly?*", 185(6), the **Medical Journal of Australia**, 299, 299-300 (2006).

related to physicians or healthcare professionals in order to prevent conflicts of interest and to increase public trust and confidence. Moreover, the US PPACA has likewise been adopted as a model for its study as well.¹⁷ The Transparency Working Group suggested that even though financial disclosure under the US PPACA was all-inclusive and broad, it should be adapted to be less complicated and to be more practical to Australia's context¹⁸.

The core of the Australia Code of Conduct emphasizes information disclosure of prescription medicine companies by clearly indicating activities within the terms of financial interaction which covers those usually practiced by pharmaceutical companies: strategic marketing activities, exemption on such activities from disclosure, responsible parties control and information compilation. In case there are any petitions against non-members of Medicines Australia, an examination could take place if Medicines Australia receives approval from the complaint companies. However, if the accused companies refuse to cooperate in such examination, Medicines Australia has the right to submit the information to the Therapeutic Goods Administration, Department of Health (hereinafter referred to as TGA) or ACCC. This principle could be used as a model to solve the unethical situations in the pharmaceutical industry in Thailand. However, if the provisions are applied to Thailand's situation, consideration of the context, environment and specific issues in Thailand need to be taken into account.

4. FINANCIAL INTERACTIONS BETWEEN PHYSICIANS OR HEALTHCARE PROFESSIONALS AND PHARMACEUTICAL COMPANIES IN THAILAND

This chapter will focus on current situations in Thailand including transparency measure that is suitable for our country.

4.1 Situations in Thailand

In Thailand consumers have convenient access to medicines through pharmacies in case they have some small illness which does not require serious diagnosis. Consumers generally receive a service from drugstores by telling the pharmacist about their symptoms, getting advice and then deciding which medicines they should consume. However, if the

¹⁷ Medicine Australia, "Transparency Working Group, Terms of Reference", <https://medicinesaustralia.com.au/code-of-conduct/transparency-working-group/> (last visited 12 July 2016)

¹⁸ Medicine Australia, "Transparency Working Group, Transparency Working Group Communiqués", <https://medicinesaustralia.com.au/wp-content/uploads/sites/52/2012/08/20121009-comm-Transparency-Working-Group-Second-Meeting.pdf> (last visited 12 July 2016)

symptoms are severe, patients would choose to get treatment or diagnosis from physicians. Consequently, physicians or healthcare professionals are trusted by patients for recommendations or treatments because they are qualified to do this. Those personal qualifications are directly associated with medical knowledge and skills which need to be certified by medical institutes or public healthcare departments such as the Medical Council of Thailand or the Pharmacy Council of Thailand. In other words, patients place their trust on qualified physicians to recommend, diagnose, treat and provide efficient and necessary medications for the symptoms that they are suffering from. This trust brings undeniable duties to physicians or healthcare professionals in performing their work with honesty, care and morality, by putting their patients' interests before anything.

In business terms, although medicines have been manufactured and sold for commercial purposes, similarly to other consumer goods, they are different from other products due to three particularities¹⁹:

(1) Medicines can be both advantageous and disadvantageous to consumers. If the latter, then the consumer's life, health and hygiene will be directly affected.

(2) Medicine is not freely available for consumers to purchase as are other consumer goods because dispensing medicine requires knowledge and skills of well-trained experts, subject to efficient diagnosis. Consequently, patients are not in the position to select their own treatment but instead place their trust on physicians or healthcare professionals to perform this role for them.

(3) Medicine is one of the fundamental essentials which concern state budgets and expenses to support people's medical expenses through governmental projects, for example, Social Security scheme or Universal Healthcare scheme.

After having reviewed these particularities of medicines, the decision to recommend or prescribe them by physicians and healthcare professionals needs to be made, unavoidably, under the following three conditions²⁰:

(1) The decision needs to be made by referring to the accuracy and completeness of medicine indications and possible side-effects.

(2) The decision requires considerations on patients' personal information individually such as disease severity, age and gender.

¹⁹ นันทวัชร นวตระกูลพิสุทธ์, “French Sunshine Act: กฎหมายเพื่อความโปร่งใสในความสัมพันธ์ระหว่างแพทย์หรือผู้ประกอบการวิชาชีพด้านสาธารณสุขกับบริษัทยา”, 43 (1), วารสารนิติศาสตร์มหาวิทยาลัยธรรมศาสตร์, 67, 92 (มีนาคม 2557) (Nontawat Nawatrakulpisut, “French Sunshine Act: Bill on Promoting Transparency in Interactions between Physicians or Healthcare Professionals and Pharmaceutical Companies”, 43(1), **Thammasat Law Journal**, 67, 92 (March 2011)).

²⁰ *Id.* at 92.

(3) The decision needs to be made, truly without bias or any kind of influential factors such as persuasion or anything else.

After having reviewed the above and the situations concerning marketing activities on pharmaceutical products in Thailand, it can be said that the situation in Thailand is similar to the USA and Australia. From statistics, during 2006-2009, the money spent on drug advertisements reached 25,000 million Baht per year, but this only account for direct advertisements to consumers. If the advertisements to physicians and healthcare professionals were included, the value of the expense would be many times higher²¹.

Speaking of direct marketing activities towards physicians and healthcare professionals, the approaches and steps are not significantly different from the ones performed in the USA and Australia. The approach is to build well-grounded relationships with physicians and healthcare professionals through the medical representatives by offering presents, complementary meals, academic seminar sponsorship or travel outside the country to encourage physicians and healthcare professionals to get acquainted with the medical representatives, thus creating conflicts of interest. Consequently, the National Health Assembly meeting reached the resolution to “Stop Unethical Drug Sale Promotion to Decrease Economic Loss and for the Sake of Patient’s Health” matter, in order to drive associated sectors to learn the measures which are executed outside the countries. Therefore, all associated parties would be able to suggest adaptations of measures used abroad to Thailand’s context by considering efficiency and practicality of the adapted measures, with the ultimate objective to develop and improve the situation in Thailand.

From all the above, if prescriptions from physicians and healthcare professionals are transparent without any conflicts of interest, and monitoring and controlling was done efficiently, the ultimate interest served would be those of patients, as consumers, and the state.

4.2 Transparency Measure for Thailand

After reviewing situations in Thailand, any transparency measure that will be proper and sufficient to control unhealthy activities among people in the healthcare industry in Thailand must be able to achieve the following purposes:

- (1) Encourage and secure the confidence and mutual respect between public and medical practitioners;
- (2) Provide openness to public examination which could reduce the risk to improper transactions between the pharmaceutical

²¹ เอกสารหลัก มติสมัชชาสุขภาพครั้งที่ 2, ยุติการส่งเสริมการขายยาที่ขาดจริยธรรม: เพื่อลดความสูญเสียทางเศรษฐกิจและสุขภาพของผู้ป่วย, 4 (2552) (Main document: Resolution of National Health Assembly No. 2, **Stop Unethical Drug Sale Promotion to Decrease Economic Lost and for the Sake of Patient’s Health**, at 1 (2009)).

companies and the medical practitioners that could effect to the independence of their decision-making;

(3) Facilitate consumers to make well informed decisions about their healthcare options and make them take into account their healthcare providers' involvement with business enterprises; and

(4) Cover all monetary transactions and other transfers of value between a company and an individual healthcare professional.

After considering the four key purposes for reaching the transparency measure “principles of disclosure obligation” of financial transactions between the physicians or healthcare professionals and the pharmaceutical companies shall be a crucial tool to accomplish such purposes since its main function could provide openness to the public, thus preventing or reducing conflicts of interest among said people.

4.3 Loophole in the Principle of Disclosure Obligation in Thailand

After examining the Drug Act B.E. 2510 (hereinafter referred to as Drug Act) and comparing with models used in USA and Australia, it has been found that the current law controlling the drug system in Thailand does not include principle of disclosure obligation in its contents. Sections 88 to 90 Bis under Chapter 11²² states about drug advertising only in terms of general principles which do not cover issues about improper financial transactions among people in the healthcare sector.

Since the current Drug Act has been in force for a very long time, some of the provisions no longer apply to current circumstances and it lacks of areas to cover inappropriate action related to collaborations between physicians or healthcare professionals and pharmaceutical companies. There have been numerous endeavors to modify the Drug Act to be more modern and consistent with continuous circumstances. Eventually, the two draft drug acts from Office of the Council of State version and public version are drafted. However, neither of these incorporates disclosure concepts into their drafts.

Furthermore, after reviewing provisions in the Medical Council Regulations on Medical Ethics Preservation B.E. 2519, the Notification of the Ministry of Public Health on the Code of Conduct for the Procurement and Sale Promotion of Drugs and Medical Supplies B.E. 2557, the Code of Conduct for Drug Sales Promotion in Thailand and the Code of Practice 9th Edition, 2012 of Pharmaceutical Research & Manufacturers Association, they include principles to prevent conflicts of interest by prohibiting gifting. However, it is found that the practice of unethical drug sale promotion through various complicated strategies is still going on in Thai culture²³.

After taking the practices applied overseas into consideration along with the resolution of the National Health Assembly to stop unethical drug

²² The Drug Act B.E. 2510

²³ Resolution of National Health Assembly No. 2, *supra* note 21, at 2.

sale promotion, it is undeniable that having transparency measures to control financial interactions between physicians or healthcare professionals and the pharmaceutical companies in Thailand is necessary and important. However, transparency measures are not intended to detect or specify that every relationship among said people must be inappropriate. However, if they are confident that their interactions are acceptable, then there is no reason not to disclose such information.

5. CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

It is clear that, by analyzing all matters involved with how to control transparency in financial interactions between physicians or healthcare professionals and the pharmaceutical companies in USA and Australia, the following summary can be given. The PPACA and the Australia Code of Conduct do not strictly prohibit financial interactions between physicians or healthcare professionals and the pharmaceutical companies and nor do they restrict sale promotions and advertising directed at the former. However, both countries also include the principle of disclosure obligation into their laws and codes of conduct respectively.

The PPACA requires applicable manufacturer who make a payment or other transfer of value to the covered recipients to submit a report to the Secretary of the Department of Health and Human Services with the main purpose of providing enhanced transparency into the relationships between physicians or healthcare professionals and commercial enterprises.

In addition to the PPACA requirement, the Australia Code of Conduct also includes the principle of disclosure obligation under Clause 41 “Transparency Reporting” by requiring the member company to report payment or other transfer of value that is made to physicians or healthcare professionals who are registered to practice in Australia.

It could be found that disclosure of the financial relationships between the pharmaceutical industry and healthcare providers is not intended to signify an improper relationship. Collaborations among the medical product industries, physicians and healthcare professionals can contribute to the design and delivery of life-saving drugs, devices and medical supplies. However, these relationships might influence research, and the discretion or decision-making of the physicians or healthcare professionals in ways that compromise them. This can also potentially cause increased healthcare costs. Whilst disclosure alone is not sufficient to separate acceptable financial support and those that may raise conflicts of interest, disclosure and transparency have the objective of shedding light on the nature and extent of the relationships that exist and discourage development of inappropriate relationships.

As mentioned that the unhealthy relationship among said people might influence over research, discretion or decision of the physicians or

healthcare professionals in ways that compromise between what they have got in return. Whilst only disclosure is not sufficient to separate between useful financial support and those that may raise conflict of interest, disclosure and transparency have goal to open the nature and extent of the relationships that exist and discourage development of inappropriate relationships. For Thailand, it is quite obvious that the Drug Act B.E. 2510 as an existing and most important law to control over drug system does not have principle of disclosure obligation even the Draft Drug Act (Office of the Council of State Version) and the Draft Drug Act (Public Version) do not include this principle either.

5.2 Recommendations

For that reason, this should have been developed to provide a more appropriate transparency measure in Thailand, and promote such measure to be the Act. The process to make transparency measure should have the strategies both in policy aspect and legal aspect. Even the National Drug Policy B.E. 2554 and National Drug System Development Strategy B.E. 2555-2559²⁴ as current national drug policy includes strategic plan for encouragement of ethical practice and stop unethical drug sale promotion, it would be more progressive to incorporate concept of transparency to control financial interactions between the physicians or healthcare professionals and the pharmaceutical companies, assign the relating authorities to study all existing measures that we have and compare with the foreign laws to point out loopholes of the current laws and regulations to accomplish the purpose in a practical way.

For legal aspect, the author agree with the model law applied in USA since it is promote its transparency measure in to the legislative law so it has stronger enforcement than self-regulation model of the Australia Code of Conduct which has power over its members only. In addition, after considering current self-regulation in Thailand, PReMA Code, it is found that problem of unethical drug sale promotion still going on in Thailand. Therefore, encouragement of transparency measure into legislative would be more effective. Furthermore, amendment to the existing law by adding new chapter to control transparency in financial interactions between the physicians or healthcare professionals and the pharmaceutical companies in the Drug Act B.E. 2510 is better to include all provisions related to drug system into one statute to make it more practical for all relevant people to study and comply with.

²⁴ นโยบายแห่งชาติด้านยา พ.ศ. 2554 และยุทธศาสตร์การพัฒนาระบบยาแห่งชาติ พ.ศ. 2555-2559 โดยคณะกรรมการระบบยาแห่งชาติ (National Drug Policy B.E. 2554 and National Drug System Development Strategy B.E. 2555-2559 by National Drug System Development Committee)

FORMAL REQUIREMENTS FOR INTERNATIONAL COMMERCIAL CONTRACTS: COMPARATIVE STUDY BETWEEN THAI AND FOREIGN LAWS*

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Abstract

At present, it is important that business transactions conform with formal requirements as to writing or written evidence as required by laws appropriate to certain contracts. Such requirements aim to protect the contracting parties from fraudulent actions and to ensure peace in business relations. Despite their significances, formal written requirements appear to be losing importance for international transactions when modern convenient means of communication are used to conclude contracts in trade. Under the “Freedom from Forms Requirements” concept, no formalities are required for international commercial transactions. Any type of evidence is allowed to demonstrate the existence or content of the contract.

However, in the Thai context, problems exist in terms of formal requirements for contracts for international sale of goods. Paragraph 3 of Section 456 of the Thai Civil and Commercial Code (CCC) is commonly used by the courts to determine trade disputes. For enforcement of the law, written evidence signed by the contracting parties is required. This provision obviously does not offer a satisfactory remedy or enable enforcement for injured parties who lack documentary evidence. The study of the United Nations Convention on Contracts for the International Sale of Goods (the “CISG”), the uniform law for international sale of goods contracts, shows that Article 11 of this international instrument requires no formalities for conclusion of a contract. Moreover, other international instruments, such as the Principles of European Contracts Law and UNIDROIT Principles of International Commercial Contracts 2010, incorporate similar concepts as the CISG. They declare that commercial contracts can be formed without formalities unlike Section 456 Paragraph 3 of the CCC.

Since Thailand has retained formal requirements for conclusion or enforceability of contracts of sale including contracts for international sale of goods, the solution to this problem is to amend Paragraph 3 of Section 456 of the CCC by adding a new paragraph for application particularly to

*The article is summarized and rearranged from the thesis “Formal Requirements for International Commercial Contracts: Comparative Study between Thai and Foreign Laws” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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contracts for international sale of goods. This new paragraph should specify that the formal requirement embodied in Paragraph 3 shall not be applicable to international sale of goods contracts. In addition, for the long-term development of international trade in Thailand, ratifying the CISG would be advantageous in making Thai international trade more acceptable from foreign trade partners' perspective.

Keywords: Formal Requirements, International Commercial Contracts, Contracts for the International Sale of Goods (CISG), Freedom from Forms Requirements, Statute of Frauds

บทคัดย่อ

ในปัจจุบัน เป็นสิ่งสำคัญที่ธุรกรรมทางธุรกิจต่างๆ ต้องอยู่ภายใต้บังคับข้อกำหนดเกี่ยวกับแบบอย่างเช่น หนังสือ หรือ หลักฐานเป็นหนังสือซึ่งกฎหมายกำหนดให้ต้องมีเพื่อความเหมาะสมกับสัญญาลักษณะต่างๆ ข้อกำหนดเหล่านี้มีจุดประสงค์เพื่อคุ้มครองคู่สัญญาจากพฤติกรรมที่ฉ้อฉลต่างๆ และเพื่อให้เกิดความสงบสุขในความสัมพันธ์ทางธุรกิจ แม้ว่าจะมีความสำคัญก็ตาม ข้อกำหนดเกี่ยวกับแบบเริ่มจะหมดความสำคัญลงสำหรับการทำธุรกรรมระหว่างประเทศเมื่อวิธีการที่ทันสมัยและสะดวกสบายในการติดต่อสื่อสารถูกนำมาใช้ในการทำสัญญาในการค้าระหว่างประเทศ ภายใต้แนวคิด "การปราศจากข้อกำหนดเกี่ยวกับแบบ" แบบของสัญญาเป็นสิ่งไม่จำเป็นในการทำธุรกรรมเชิงพาณิชย์ระหว่างประเทศ พยานหลักฐานทุกรูปแบบสามารถนำมาใช้ในการพิสูจน์ความมีอยู่หรือเนื้อหาของสัญญา

อย่างไรก็ตาม ในประเทศไทย ปัญหาเรื่องข้อกำหนดเกี่ยวกับแบบในสัญญาซื้อขายสินค้าระหว่างประเทศยังคงมีอยู่ มาตรา 456 วรรค 3 แห่งประมวลกฎหมายแพ่งและพาณิชย์ของประเทศไทยถูกใช้โดยศาลในการตัดสินคดี สำหรับการฟ้องร้องบังคับคดี กฎหมายกำหนดให้ต้องแสดงหลักฐานเป็นหนังสือลงลายมือชื่อคู่สัญญาฝ่ายที่ต้องรับผิด บทบัญญัตินี้ไม่ได้ทำให้คู่สัญญาที่ได้รับความเสียหายเพราะขาดหลักฐานเป็นหนังสือได้รับการเยียวยาหรือบังคับให้เป็นไปตามสัญญาได้อย่างน่าพึงพอใจ การศึกษาอนุสัญญาสหประชาชาติว่าด้วยสัญญาซื้อขายสินค้าระหว่างประเทศ (CISG) อันเป็นกฎหมายเอกรูปสำหรับการซื้อขายสินค้าระหว่างประเทศแสดงให้เห็นว่า มาตรา 11 ของอนุสัญญานี้ ไม่ได้วางข้อกำหนดเกี่ยวกับแบบในการทำสัญญาไว้ นอกจากนี้ก็กฎเกณฑ์ระหว่างประเทศอื่น ๆ เช่น Principles of European Contracts Law และ UNIDROIT Principles of International Commercial Contracts 2010 มีแนวคิดเช่นเดียวกับหลักเกณฑ์ของ CISG ทั้งนี้โดยกำหนดว่า สัญญาทางพาณิชย์สามารถทำขึ้นได้โดยไม่ต้องมีข้อกำหนดเรื่องแบบดังเช่นมาตรา 456 วรรค 3 ของประมวลกฎหมายแพ่งและพาณิชย์

เนื่องจากประเทศไทยยังคงใช้ข้อกำหนดเกี่ยวกับแบบในการจัดทำหรือฟ้องร้องบังคับคดีสัญญาซื้อขายรวมทั้งสัญญาซื้อขายสินค้าระหว่างประเทศ วิธีแก้ไขปัญหานี้คือแก้ไขมาตรา 456 วรรค 3 ของประมวลกฎหมายแพ่งและพาณิชย์โดยการเพิ่มวรรคใหม่สำหรับการปรับใช้กับสัญญาซื้อขายสินค้าระหว่างประเทศ โดยเฉพาะ วรรคใหม่นี้ควรจะนำข้อกำหนดเกี่ยวกับแบบที่ปรากฏอยู่ในวรรค 3 ของมาตรานี้มาใช้บังคับแก่สัญญาซื้อขายสินค้าระหว่างประเทศ นอกจากนี้ สำหรับการพัฒนาการค้าระหว่างประเทศในประเทศไทยในระยะยาว การให้สัตยาบัน CISG จะเป็นประโยชน์ในการทำให้อการค้าระหว่างประเทศของไทยได้รับการยอมรับมากขึ้นจากมุมมองของบรรดาประเทศคู่ค้าต่างๆ

คำสำคัญ: ข้อกำหนดเกี่ยวกับแบบ, สัญญาทางพาณิชย์ระหว่างประเทศ, สัญญาซื้อขายสินค้าระหว่างประเทศ, หลักการปราศจากข้อกำหนดเกี่ยวกับแบบ, บทกฎหมายเกี่ยวกับการฉ้อฉล

1. Introduction

Provisions regarding formal requirements for contracts play a significant role in commercial transactions in many societies. Such formalities are required by law to be complied with¹ in order to prevent fraud and to be used as documentary evidence in disputes when lawsuits are filed.² Many countries have laws governing these formal requirements: some in the form of written evidence required by law in civil cases, while others do not impose formal requirements for the completion of commercial contracts. Nevertheless, it is clear that provisions of formal requirements are widely used in business transactions around the world including Thailand, which has formal requirements applying to commercial contracts.

In Thailand, formal requirements are applied in commercial transactions, especially sale of goods contracts, while foreign trading countries may not make use of such provisions for commercial transactions. Thus, concepts regarding formal requirements for the sale of goods contracts between Thai and foreign laws are clearly different. Foreign trading partners make use of international instruments, particularly Article 11 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) which provides that contracts can be made without written stipulations. This provision helps to establish sale of goods contracts between parties in different countries more conveniently. On the other hand, Thailand uses paragraph 3 of Section 456 of the Civil and Commercial Code (CCC) to apply in both domestic and international sale of goods contracts which requires written evidence signed by the contracting parties to enforce compliance with the contract on the party in breach. However, provision of formal requirements for sale of goods contracts under paragraph 3 of Section 456 of the CCC is not appropriate in international sale of goods contracts. This domestic legal requirement obstructs the development of international trade in Thailand.

To resolve problems as have occurred in trade cases and to prevent such difficulties in the future, this article suggests amending the CCC, Section 456, by adding an exception to apply specifically in international sale of goods contracts. In addition to this proposed solution, in order to encourage long term development of international trade in Thailand, ratification of the CISG is recommended.

2. Overview of Formal Requirements for Sale of Goods Contracts

2.1 Development of Formal Requirements

Formal requirements of contracts have evolved since ancient times. Their origins began in the Roman era. They are the various formalities required by law that parties have to comply with when entering into

¹ Arthur L. Corbin, **Corbin on Contracts, One Volume Edition** 8 (1952).

² Ingeborg Schwenzer, Pascal Hachem & Christopher Kee, **Global Sales and Contract Law** 265 (2012).

commercial contracts. Many significant concepts of Roman law, including provisions for formal requirements of contracts, have been incorporated into the fundamental principles of several legal systems around the world.³ Jurisdictions using Common law and Civil law systems, which include most of the important legal systems in practice in the world today, incorporate such provisions ultimately influenced by legal concepts of Roman law.⁴

Significantly, strictness of provisions of formal requirements has loosened with respect to the rules of commercial contracts which require the conclusion of documentary forms to be valid or enforceable. These provisions began to change when they were used in international commercial transactions such that, for international trade, in order to develop provisions of formal requirements that conform to the nature of international trade which demands flow and flexibility of communications among parties in two or more countries, formal requirements are typically ignored and not applied. Thus, the alternative “no formal requirements” concept has been implemented in respect of international commercial contracts instead of formal requirements. This has come about as a result of the attempts by international trade institutions that wish to create uniform laws of international trade⁵ and encourage uniformity of standards among international trade partners.

Thus, in the modern period, there have been no provisions for formal requirements for international commercial contracts. These developments are the foundation of the “freedom from forms requirements”⁶ concept applicable to the international instruments which have facilitated the growth of international trade.

2.2 Formal Requirements for International Commercial Contracts

The fact that in international trade, commercial contracts do not require contractual formalities is a significant distinction between modern legal requirements and those in Roman law, Common law and Civil law systems. In international commercial contracts, the concept of no formal requirements is effective and sufficient to control international transactions. The provisions derived from “no formal requirements” provide that contracts do not require specific written form or written evidence. Contract formalities are unnecessary because any actions taken by parties in commerce are recognized as evidence that a commercial contract exists.

³ Andrew Borkowski & Paul du Pessis, **Textbook on Roman Law** 355 (3rd ed., 2005)

⁴ Schwenzer, Hachem, & Kee, *supra* note 2 at 8.

⁵ *Id.* at 33.

⁶ See UNCITRAL, *Digest of case law on the United Nations Convention on the International Sale of Goods* (2012) art. 11, (Jun. 5, 2016) [hereinafter *Digest* (2012) art.11], <https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>.

Therefore, this study will focus on the concept of no formal requirements which is embodied in the international instruments applicable to international commercial contracts, including Article 11 of the CISG, Article 1.2 of UNIDROIT Principles of International Commercial Contracts 2010 (PICC), Article 2:101 (2) of Principles of European Contract Law (PECL), and provisions from the Principles of European Law on Sale (PELS) all of which are used to apply to international commercial contracts. In order to facilitate international trade, contracts need to be convenient with a minimum of formalities required for their conclusion. Various alternative kinds of evidence are admissible to demonstrate facts in international trade disputes.⁷

3. Formal Contract Requirements in Foreign Countries

3.1 Formal Requirements for the Sale of Goods Contracts in the U.S.

Provisions of formal requirements for sale of goods contracts in the United States are separated clearly. The US has effective domestic laws governing sales embodied in the Uniform Commercial Code (hereinafter “UCC”). This Code has comprehensive legal requirements for businesses and trade⁸ and is used in many states around the U.S. The provision of formal requirements for domestic sale contracts is provided in Section 2-201. This rule was developed from the concept of *statute of frauds*, which is a significant concept from the Common law tradition used to protect parties against fraudulent actions. It consists of the central concept of the *parole evidence rule* where written contracts are protected from proof of other kinds of evidence.⁹

The U.S. ratified and adopted the CISG for use as their specific law on international commercial contracts (sale of goods contracts). Thus, domestic sale laws are considered inappropriate for application to international trade because Article 11 of the CISG does not require the formalities of sale contracts in international transactions. As a result, American trade parties apply this (CISG) article to international sale of goods transactions.

3.2. Formal Requirements for the Sale of Goods Contracts in the UK

In the UK, the application of formal requirements for sale of goods contracts is different from the aforesaid applications in the U.S. as UK law does not differentiate formal requirements between domestic sale of goods

⁷ Larry A. Dimatteo, “An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability,” 23 *Syracuse J. Int’l L. & Com.* 67, 70 (1997).

⁸ Schwenger, Hachem & Kee, *supra* note 2 at 12.

⁹ E. Allan Farnsworth, *Contracts* 402 (7th ed., 1982).

contracts and international commercial contracts. This is because UK domestic laws are sufficient to control sale of goods transactions in both cases. Section 4 of the Sale of Goods Act 1979 (hereinafter “SGA”)¹⁰ applies to commercial transactions. This provision widely covers many types of formalities including both documentary records and oral communications or conduct between parties to contracts of sale. Since Section 4 of the SGA is adequate to govern trade transactions in the UK, there is no need to develop other formal requirements for international sale of goods contracts nor is there any concern to adopt the CISG or other soft laws to trade cases.

In fact, to date, the UK has not ratified the CISG¹¹ and there appears to be no further intention to adopt the Convention for use in international trade.¹² In addition, due to the fact that trade parties can agree to vary or exclude provisions of the CISG from their international agreements¹³, the ratification of the CISG is not a priority for UK based traders. Non-ratification of the CISG in the UK shows that it is unnecessary to adopt the entire Convention in order to apply some selected articles to sale of goods contracts if existing domestic sale laws are suitable to deal with both domestic and international sales transactions.

3.3 Formal Requirements for the Sale of Goods Contracts in Germany

In Germany, formal requirements have been divided into two spheres: formal requirements applied to domestic sale of goods and international sale of goods contracts. Germany has a Civil law system which already contains many codes applied in business transactions, in both civil cases, for which the German Civil Code or “BGB”¹⁴ applies, and in commercial cases, for which the German Commercial Code or “HGB”¹⁵ is used to deal with various types of contracts. Generally, special provisions governing contracts of sale are embodied in §§ 433-515, Title I, Section 8, Book 2 of the BGB.¹⁶ However, trading parties must apply §§ 373-382 of the HGB to contracts of sale if sale transactions are contracted between

¹⁰ M.G. Bridge FBA, *The Sale of Goods* 11(3rd ed., 2014).

¹¹ See Nathalie Hofmann, “Interpretation Rules and Good Faith as Obstacles to the UK’s Ratification of the Harmonization of the CISG and to the Harmonization of Contract Law in Europe,” 22 *Pace Int. law Rev.* 145, 147 (2010).

¹² Ahmad Azzouni, “The adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom,” (May. 5, 2016), <http://www.cisg.law.pace.edu/cisg/biblio/azzouni/html#iaa>.

¹³ *Id.*

¹⁴ *Id.* at 18.

¹⁵ Schwenzer, Hachem&Kee, *supra* note 2 at 18.

¹⁶ Manfred Pieck, “A Study of the Significant Aspects of German Contract Law,” 3 *Ann. Surv.Int’l & Comp. L.* 111, 134 (1996).

merchants.¹⁷ Formal requirements in this study will focus on the provisions in the BGB.

German domestic laws, as exemplified in the BGB, are reliable because they have been codified and developed over a long period of time. Likewise, their domestic formal requirements for a contract of sale are reliable rules to control sales transactions within the country. They do not require formalities of contract of sale to be evidenced in written forms. Furthermore, with respect to international trade, Germany has adopted the CISG as specific law on the international sale of goods contracts.¹⁸ This adoption separates their formal requirements for a contract of sale into two different operations. The existing concept is used to apply to domestic sale of goods contracts whereas the concept of “freedom from forms requirements”¹⁹, Article 11 of the CISG, has been adopted to apply to international commercial contracts. Under this article, no formal written requirements are imposed on the trade parties when making contracts of sale. These implementations have facilitated German sales law with respect to other developed countries.

4. Problems Arising from Formal Requirements in Thailand

4.1 Formal Requirements for Sale of Goods Contracts in Thailand

Formal documentation requirements for sale of goods contracts in Thailand are prescribed by law to protect parties to contracts. This study will focus on written documentation required to enforce contracts for sales of movables valued 20,000 baht (US\$600) or more, as specified in paragraph 3 of Section 456 of the CCC. This paragraph states that a sale of movable goods at an agreed price is not enforceable unless it is supported by written evidence signed by the liable party or deposit was given, or partial payment of debt was made.²⁰

The written evidence for sale of goods contracts is necessary in cases where an injured party wishes to enforce his claim against the liable party who executed the contract. No written contract is required for enforcement of transactions valued below twenty thousand Thai baht.²¹

4.2 Problems Arising in Contracts under Section 456 Paragraph 3 of the Civil and Commercial Code

¹⁷ *Id.*

¹⁸ [cisg.law.pace.edu](http://www.cisg.law.pace.edu), CISG: Table of contracting States, <http://www.cisg.law.pace.edu/cisg/countries/cntries-Germany.html> (last visited May 14, 2016).

¹⁹ Peter Schlechtriem, “Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany,” *JuridiskTidskrift* 1, 16 (1991-1992).

²⁰ Civil and Commercial Code sec. 456 paragraph 3.

²¹ Wissanu Krea-Ngam, *Textbook on Sale, Exchange and Gift* 143 (10th ed. 2006). (วิชญ์ เครื่องงาม, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ซื้อขาย, แลกเปลี่ยน, ให้* 158 (พิมพ์ครั้งที่ 10 กรุงเทพฯ: สำนักพิมพ์นิติบรรณาการ 2549)).

Section 456, Paragraph 3 of the CCC, is a domestic law used to control sale of goods transactions in Thailand. Thai courts also apply this section to international trade disputes from which various difficulties may arise. The provision in paragraph 3 of Section 456 is not in accordance with formal requirements applicable to international commercial contracts as stipulated in Article 11 of the CISG, Article 1.2 of the PICC, Article 2: 101 (2) of the PECL, and PEL S, which do not require contracts to conform to specific written forms. In Thailand, sale of goods contracts valued twenty-thousand baht or more must be accompanied by written evidence in order to be enforceable whereas sale of goods contracts in the aforementioned international laws do not need such written evidence. International parties to sale agreements may make use of any type of evidence to prove the existence of a contract, including *parole* evidence.

This obviously may lead to problems since, especially for sale of goods contracts, international trade partners rely on the CISG which is more flexible in use with contracts made with high-speed communications.²² Such contracts can use any type of performance for contract enforcement as stipulated in article 11 of the CISG.

Thus, Thai sales contract law (Section 456 Paragraph 3 of CCC) applying to both domestic and international sale of goods contracts conducted in Thailand and international sale of goods contracts conducted outside Thailand is in conflict with international sale of goods contracts as currently used.²³

5. Conclusion and Recommendations

Sale of goods contracts are business transactions used by traders within and between countries for sales of goods. As such, they must be governed by laws to protect liabilities of trade. Provisions important to contracting parties include formal contractual requirements designed to have parties adhere to their obligations which would otherwise be void or unenforceable. Internationally, different formal requirements have been created for use depending on the area of business and suitability to facilitate trade relations. In Thailand, Section 456 paragraph 3 of the CCC requires parties to sales contracts to conclude written documentation in order to have a right to bring lawsuits in cases of breach of contract.

Internationally, instruments used in trade disputes, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), UNIDROIT Principles of International Commercial Contracts 2010 (PICC), or the Principles of European Contract Law (PECL) are all available but particularly important is article 11 of the CISG which

²² Salin Thewphaingam, The Unification of International Sale Laws: Uniform Interpretation of The United Nations Convention on Contracts for The International Sale of Goods (CISG) (Aug. 9, 2012) (unpublished LL.M. thesis, Thammasat University) (on file with Libraries, Thammasat University).

²³ *Id.*, at 77.

provides that sale of goods contracts do not need to be evidenced in documentation or concluded in writing; any kind of evidence may demonstrate the existence of contracts, including witnesses. This article is implemented for international sale of goods practices under the concept of “freedom from forms requirements”.²⁴ Based on this principle, any type of evidence may be used to show a contract exists, such as oral communication, prior transaction between the parties, telex and electronic mail. This provides for flexibility and flow of communications among traders.

As section 456 paragraph 3 of the Thai CCC is inapplicable in international sale of goods contracts disputes, it is clear this is in need of amendment to be brought in accordance with the concept of “no formal requirements” as commonly used elsewhere to facilitate trade. As such, the following recommendations are provided:

(1) Thailand should amend Section 456 paragraph 3 of the Civil and Commercial Code as it is currently not suitable for use in international sale of goods contracts disputes. The proposed amendment must provide for a greater number of means to demonstrate the existence of contracts for international sale of goods.

(2) Thailand should consider the possibility of ratifying the CISG which currently governs foreign trade outside of Thailand. Ratification of the CISG would minimize conflicts between Thai and international sale of goods laws to address sale of goods contract disputes. In addition, ratification would increase the reliability of Thai contract law in the eyes of international trade partners.

²⁴ Peter Schlechtriem & Petra Butler, **UN Law on International Sales, The UN Convention on the International Sale of goods** 61 (2009).

EMPLOYMENT INJURIES FOCUSING ON MENTALMENTAL INJURIES*

*Bunyaporn Potisakulwong** ***

Abstract

Mental-mental injuries are purely mental injuries resulting from emotional stimulus. In Thailand, the scope of work-related mental injuries can be determined in the first instance by considering relevant provisions of labor law, such as Section 5 of the Worker's Compensation Act, B.E. 2537 (1994). In it, words such as "injury" and related terms are defined broadly which may be sufficient to include work-related mental injuries, but its precise meanings and scope remain unclear.

There is no provision under Thai labor law for explaining which mental-mental injuries are legally recognized and therefore compensable. Thai worker compensation law lacks clear definition of "mental-mental injury", nor are exceptions provided or scope defined. No specific legal framework or consistent court precedent exists in Thai labor law for mental-mental injuries as compensable employment injuries. In practice, it is entirely up to authorities to offer definitions, causing uncertainty.

In search of a suitable solution for Thai law, relevant US, UK, and German laws were comparatively reviewed. These legal systems recognize mental-mental injuries principle, clearly defined in court decisions, written law, and prototype rules. This thesis suggests that Thailand should certify and define the boundaries of "suffering from injury" or "work-related sickness". It should be clear to cover a wide range of mental-mental injuries. There is no single perfect solution. Accordingly, this thesis would like to suggest that a suitable solution should be a combination of a number of different legal tools. These include establishing the basic principles for authorities' evaluation and defining specific exceptions and presumptions about mental-mental injury matters and etc.

Keywords: Employment injuries, Mental injuries, Workers' compensation law, Work-related injuries.

บทคัดย่อ

การเจ็บป่วยทางจิตอันเนื่องมาจากการได้รับความกระทบกระเทือนทางจิตใจ คือความเจ็บป่วยทางจิต ซึ่งเกิดจากการได้รับผลกระทบทางอารมณ์หรือจิตใจ ภายใต้กฎหมายไทยนั้น การจะพิจารณาขอบเขตของความเจ็บป่วยทางจิตอันเนื่องมาจากการทำงานต้องพิจารณาจากบทบัญญัติในกฎหมายแรงงานที่เกี่ยวข้อง เช่น มาตรา 5 แห่งพระราชบัญญัติเงินทดแทน พ.ศ. 2537 ซึ่งแม้ว่ากฎหมายไทยจะได้บัญญัติความหมายของความเจ็บป่วยและ

* This article is summarized and arranged from the thesis "Employment Injuries focusing on Mental-Mental Injuries" Master of laws in Business law (English Program), Faculty of Law Thammasat University, 2015.

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คำที่คล้ายกันไว้กว้างๆ พอที่จะตีความให้หมายรวมถึงความเจ็บป่วยทางจิตอันเนื่องมาจากการทำงานได้ แต่ความหมายและขอบเขตยังไม่มีความชัดเจน

กฎหมายแรงงานไทยไม่ได้อธิบายไว้อย่างชัดเจนว่าการเจ็บป่วยทางจิตอันเกิดจากการได้รับความกระทบกระเทือนทางจิตนั้น ได้รับการรับรองหรือคุ้มครองตามกฎหมายหรือไม่ กฎหมายไทยขาดหลักการหรือกฎเกณฑ์ที่แน่นอนในการพิจารณาความเจ็บป่วยประเภทนี้และไม่มีขอบเขตหรือข้อยกเว้น รวมทั้งไม่มีกรอบทางกฎหมายและแนวคำพิพากษากฎีกาที่สามารถนำมาพิจารณาเงินทดแทนในกรณีเกิดความเจ็บป่วยเช่นนี้ ในทางปฏิบัติการพิจารณาขึ้นอยู่กับดุลพินิจของพนักงานเจ้าหน้าที่ซึ่งอาจทำให้เกิดความไม่แน่นอน

เพื่อเสนอแนวทางในแก้ปัญหากฎหมายไทย จึงต้องมีการพิจารณาระบบกฎหมายในประเทศสหรัฐอเมริกา สหราชอาณาจักร และเยอรมนี ระบบกฎหมายของประเทศเหล่านี้ล้วนแล้วแต่ยอมรับหลักการของการเจ็บป่วยทางจิตอันเนื่องมาจากการได้รับความกระทบกระเทือนทางจิต โดยนิยามผ่านคำตัดสินของศาล กฎหมายลายลักษณ์อักษร และ กฎเกณฑ์ซึ่งวางไว้เป็นต้นแบบ วิชานิติพนธ์ฉบับนี้จึงเสนอให้มีการรับรองและบัญญัติขอบเขตของคำว่า “ประสบอันตราย” และ “เจ็บป่วย” ขอบเขตดังกล่าวควรครอบคลุมและชัดเจนพอที่จะให้ความคุ้มครองในกรณีที่ถูกจ้างได้รับความเจ็บป่วยทางจิตอันเนื่องมาจากการได้รับความกระทบกระเทือนทางจิตอันเนื่องมาจากการทำงาน อย่างไรก็ตาม ไม่มีกฎหมายใดกฎเกณฑ์หนึ่งที่สมบูรณ์แบบ ดังนั้นการจะพัฒนาแนวความคิดทางกฎหมายส่วนนี้จำเป็นต้องใช้เครื่องมือทางกฎหมายหลาย ๆ หลักเกณฑ์ประกอบกัน เช่น กำหนดหลักการพื้นฐานในการประเมินความเจ็บป่วยทางจิต กำหนดข้อยกเว้นและบทสันนิษฐาน เป็นต้น

คำสำคัญ: ความบาดเจ็บอันเนื่องมาจากการทำงาน, ความเสียหายทางจิต, กฎหมายเงินทดแทน, การเจ็บป่วยที่เกี่ยวข้องกับการทำงาน

1. Introduction

In recent years, mental illness has received increasing attention not only at the national but also at the international level. The reasons for this are both the long-term effects on the health and quality of life of the individual concerned and the aggregate impact on the national economy and business communities. Mental health disorders reduce employees' productivity and, in severe cases, are the cause of incapability for work (e.g. wasting of working days due to illness) and are now the most common reason for early retirement.¹

The scientific community and professional circles have agreed that psychological stress and its effect on workers is an increasingly pressing challenge of our modern working world.² It is worth noting that the protection of workers against possible health risks is not merely an ethical issue but also an economic and social one³

In reality, it is difficult to draw a sharp and hard line between usual stress and work-related mental injuries. This is the reason why many countries have stipulated a set of basic rules to determine the scope of

¹ Joint Declaration on Mental Health in The Workplace, Federal Ministry of Labour and Social Affairs, Confederation of German employers Associations, German Trade Union Confederation, 3.

² *Id.*

³ *Id.*

compensable mental injuries. Legislatures and courts often have difficulty in determining the compensation of mental-mental injuries because it is difficult to evaluate mental injuries due to their subjective nature.⁴ Moreover, individuals may respond to mental stimulus in a different way and it has no physical component. Therefore, it is easy to make a mistake in compensating an invisible injury claim.⁵

2. Meaning of mental-mental injuries

According to court precedents, mental-mental injuries mean mental injuries caused by mental stimulus⁶ or purely mental injuries resulting from emotional stimulus.⁷ Mental-mental workers' compensation cases are also defined by the literature as incidents "where a mental stimulus causes a mental or nervous injury, such as post-traumatic stress disorder".⁸ It involves "a mental or emotional stimulus resulting in a primarily 'nervous' injury."⁹

Although no definition can capture all aspects of all mental injuries, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) comes close by describing it in the following way:

"a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above."¹⁰

⁴ Bailey, Ashley R., "Stress Is [Not] Part of the Job: Finding the Appropriate Balance between Fairness and Efficiency to Compensate Posttraumatic Stress Disorder under Workers' Compensation Statutes [comments]," **Wisconsin Law Review** no.3 (2015), 514.

⁵ *Id.*

⁶ Atchison, Thomas W., "Workers' Compensation Law: Mind Games: Understanding Mental Injuries Following Recent Changes to The Minnesota Workers' Compensation Act." **William Mitchell Law Review** 41, (January 1, 2015), 1394

⁷ *Shealy v. Aiken Cnty.*, 535 S.E.2d 438, 442 (2000)

⁸ Inman, James M., "Where Are You Hurt - Kentucky Redefines Workers' Compensation Injury in a Post-Traumatic Stress Disorder World [notes]," **Kentucky Law Journal** no.3 (2007), 474.

⁹ Larson, A. **The law of workmen's compensation**. n.p.: Albany, M. Bender, 1960., 618.

¹⁰ Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), American Psychiatric Association, 20.

An example of such an injury can be found in the United Kingdom case of *Hale v. London Underground*.¹¹ Mr. Hale was a fireman who was rescuing the victims of the King Cross underground fire and witnessed the death of victims which caused him to experience depression. In this case, the claimant did not suffer physically but the incident which occurred while he was working was an emotional stimulus and caused mental injury (nervous shock) to him. This is an example of a work-related, mental-mental injury where a court held that it should be compensated.

3. Comparative study: employees' rights to compensation benefits from mental-mental injuries in foreign countries

For the purpose of thoroughly analyzing mental-mental injuries and seeking solutions to the legal problems in Thailand, it is necessary to comparatively study the laws of other countries. US law, UK law and German law have been chosen to be reviewed. US law, UK law and German law all accept the existence of work-related mental-mental injuries as well as work-related physical injuries.

The work-related mental-mental injuries principle was also analysed through many jurisdictions and legislations. Some states in the US offer a definition, boundary and exceptions to work-related mental injuries in their statutes such as Arizona's Workers' Compensation Act.

Even though the United Kingdom and some states of the United States have no written principles in their statutes, they have prototype court jurisdictions according to a common law system and academic textbooks which describe and clarify work-related mental-mental injuries. Although the approaches of mental-mental injuries are recognized in different concepts across different states, each approach is clearly defined. For example, the United States describes and divides it into four approaches as (a) mental-mental injury is compensable if caused by gradual stress even if the stress is not unusual; (b),(c) mental-mental injury is compensable if the stimulus is unusual and/or sudden; and (d) mental-mental injuries are never compensable.¹²

German law does not codify employment law in a singular "Employment Act". Instead, employment matters are addressed in several different legislative acts.¹³ However, mental injuries are recognized as an employment injury through the Federal Social Court's decision and various laws such as EFZG, Statutory accident insurance and the ArbSchG.

The comparative work that has been done in this work allows for the following summary to be made. Workers' compensation law of the United States (with slight differences in some states) has a general framework that

¹¹ *Hale v. London Underground*, (1992) 11 BMLR 81

¹² Bailey, Ashley R., *supra* note 4, 514-518.

¹³ Elert, Nicole, and Christopher T. Brooks.: 618 Questions Frequently Asked by Foreigners. Berlin: De Gruyter, 2014. German Employment Law eBook Collection (EBSCOhost), EBSCOhost (accessed April 28, 2016).,6.

clarifies the important aspects of the concept of mental-mental injury; for instance, the question as to whether any compensable mental-mental injury must only occur “suddenly” or “unexpectedly”, and provides some exceptions to the compensation claims (e.g. any psychological injury occurred as a consequence of employer’s action in good faith or based on the exercise of his lawful right are not compensable and cannot be the subject of a claim.)

In the case of the law of the United Kingdom, the key aspects of mental-mental injury are well described and ruled on through the court precedents¹⁴, especially the problem about whether or not an employer is able to foresee or anticipate an accident which is a mental stimulus. These examples are of significant importance and play a crucial role in explaining the relation between the emergence of mental (and mental-mental) injuries and the work patterns as well as the environment in the workplace, and for our attempt to refine and develop the existing workers’ compensation law of Thailand in order to serve better its philosophy and spirit, which initially and primarily aim to protect the employee who has suffered from a work-related injury.

4. Mental-mental injuries principles under Thai law

Workmen’s Compensation Act B.E. 2537 (1994) has no specific provision for mental-mental injuries. Therefore, we shall interpret the meaning of “suffering from injury” and “work-related sickness” in Section 5 of this Act to determine the compensating mental-mental injuries. Workmen’s Compensation Act B.E. 2537 defines “suffering from injury” as “physical or mental injury or death suffered by an employee as the result of work employment or in the course of protecting the interest of the employer or according to the commands of the employer”.

Obviously, this is broadly phrased and is open to interpretation. However, it also too ambiguous. There are no clear boundaries for interpretation as to whether or not Thailand affirms the existence of mental-mental injuries which are purely mental in nature.

“Work-related sickness” is defined as “illness suffered or the death of an employee as a result of work caused by diseases incidental to the nature or condition of work”. This definition is also broadly stated and not obvious. In practice, the boundaries of these definitions depend upon the discretion of the authorities which causes uncertainties.

Moreover, the categories of “compensation” according to the Workmen’s Compensation Act are divided into indemnity, medical expenses, rehabilitation expenses and funeral expenses which are described above; in these, no reference or mention is made about pure mental injuries.

Section 13 to Section 18 of this Act states that the calculation and method of compensation are further detailed in Ministerial Rules.

¹⁴ *Barber v Somerset CC*, [2004] UKHL 13

Therefore, for the sake of interpretation, we shall consider the relevant Ministerial Rules to understand the mental-mental injuries under Thai law.

The Ministry of Labour's announcement, Period of compensation rules and method for monthly salary calculation, refers to loss of organs or suffering from physical injuries but there is no mention of mental injuries. Moreover, Table No. 2 of this announcement prescribed that "the employee who suffered from injury of a brain system which causes conscious disorder and/or mental disability may be compensable".

It may be interpreted that the compensable mental injuries need to be caused by physical injuries. According to this announcement, there are no rules concerning mental-mental injuries which are purely mental and not related to the physical aspect.

According to the Ministry's rules, Medical Expenses Rates B.E. 2551 prescribe medical expenses rates for injuries or sickness. Mental-mental injuries were not mentioned in this Ministry's Rules. Even number (7) of this rule broadly stated "Other severe injury or chronic sickness" although the announcement of the Labour Minister entitled Suffering from other severe injury or chronic sickness B.E. 2553, which was enacted to describe the meaning of "Other severe injury or chronic sickness" also did not mention or refer to mental-mental injuries.

Mental-mental injuries were not stated in the prescribed work-related diseases schemes, the announcement of Labour Ministry, either. However, for the purpose of flexible interpretation, number (8) of this announcement inclusively stipulates and does not specifically legislate the categories of work-related diseases as "Other proven work-related diseases".

Diagnosis and evaluation of capability loss or work-related injuries, which is an announcement of Labour and Social Welfare Ministry, legislates in article 4 that "Evaluation of capability loss will rely upon 'Evaluation of physical and mental capability loss manual' of Workmen's Compensation Committee." This manual describes mental-mental or pure mental injuries. However, it is a manual for medical affairs and does not relate to legal causation or legal principles.

One could argue, on the other hand, that the Thai judiciary had already accepted mental injuries as work-related illness in many cases, for instance, the Supreme Court's *Judgment Red Case No. 3866/2529*, *No. 5121/2537*, *No. 1683/2539*, and *No. 2258/2543*. However, our observation has revealed that all mental injuries in those Supreme Court judgments are not "mental-mental injury" which is the main topic of this topic. The reason some physical elements involved in those injuries.

A good example of a court decision which shows that Thai court does not recognize pure mental injury as compensable injury is the Supreme Court's *Judgment Red Case No. 1447/2523* which decided that the mental injury caused by a fright or a mental impact cannot be compensated since Thai law has hitherto no legislative law that certifies this kind of claim as a compensable one.

It is clear that Thai courts determine the mental stimulus that causes physical injury (mental-physical injury) as employment injury. However, there is no clue as to whether mental-mental injury is certified or determined as employment injury under Thai laws. It can be said that the main parliamentary acts and related provisions in the realm of Thai labour or social security law do not give us a lucid answer as to whether and which work-related mental-mental injuries are legally recognized and thus compensable. Thai labour law has no guiding principles or clear stipulated rules which could be used to determine the meaning and scope of the work-related mental (and mental-mental) injury.

Due to the lack of a general and legal framework, the practices depend primarily upon the discretion of responsible authorities on a case-by-case-basis, especially the courts. This situation has resulted in uncertainty for both employers and employees and may, eventually and inevitably, cause a major problem for the whole economic sector, let alone the violation of the principle of certainty of law which is one of the main elements of the principle of rule of law.

5. Proposed solutions

The current situation, as already discussed, causes many difficulties not only in the theoretical study of law but also – and most importantly – in the application of the law and the functioning of the legal system as a whole. To summarize, it can be said that both the legislature and the courts are generally confronted with the complicated problem of evaluating and determining the compensation for mental-mental injuries due to various reasons.¹⁵ Therefore, it is suggested that Thailand should improve the law on this matter by clarifying its definition and thus establishing a model law confirming the mental-mental injuries principle. However, there is neither a perfect solution nor principle for the development of mental-mental injury system. Therefore, this work would like to suggest that it should be a combination of a number of different legal tools. These are given below.

(a) A clear definition and boundary of “mental-mental” injuries should be written down.

As Thailand is a civil law country and has no exact rules or precise meaning of pure mental in the definition of employment injury, the specific meaning and boundary of “mental-mental” injuries should be written down. This problem is the most significant point of this topic because Workers’ Compensation Act, B.E. 2537 is the main statute to determine employment injuries. The purpose of secondary law such as Ministry declarations and regulations and the scope of authorities’ power discretion rely on this statute as it is primary law. If the main statute is unclear, problems of interpretation cannot be eliminated. Therefore, in order to officially introduce mental-mental injuries into Thai laws, it should be clarified in the

¹⁵ Bailey, Ashley R., *supra* note 4, at 514.

meaning of “suffering injury” and “work-related sickness” that mental-mental injuries are included.

(b) Clarify or define long-term mental injuries (stress/strain) in the definition of “sickness” in Section 5 of Thai Workers’ Compensation Act.

Mental-mental injuries or behaviour disorders which are caused by “stress or strain” are mental injuries caused by long-term mental stimulus and cannot specify the precise time or place of mental stimulus. They are a result of exposure to risk factors arising from work activity. Due to the features of stress, the international terms and the definition under Thai law, the mental injury caused by stress or strain (not unusual and not sudden stimulus) should be recognized under the term “occupational disease” according to international standards or determined as “sickness” under the term “sickness” according to Section 5 of the Workmen’s Compensation Act B.E. 2537.

(c) Mental injury caused by an unusual or sudden incident should be determined.

A mental-mental injury caused by an unusual or sudden incident is not mentioned in the definition of “sickness” in previous recommendation clauses due to it being a mental injury caused by the incident or mental stimulus which could indicate the precise place and time. Suffering an injury is different from the features of a sickness which occurred due to a work environment (long-term mental stimulus and not unusual or sudden). Therefore, it should be described separately.

This work suggests that Thai law should specify legal requirements such as “unusual or/and sudden” to clarify the causation between injury and employment. This may be better and make it easier for authorities to determine the relation between employment and mental injury as it could be a basic principle for deciding whether mental injuries are compensable employment injuries.

(d) Adopt workers’ compensation law by providing the exceptions for employers’ good faith actions.

Clearly written exceptions could draw a sharper line and offer a better balance between the employers’ business management discretion and employees’ mental injury. Therefore, Thailand should adopt workers’ compensation law by providing the exceptions for employers’ good faith actions.

(e) The need for basic factors or principles and required fundamental factors.

Clarity of legislation is necessary but flexibility of interpretation is also needed. It is necessary for authorities to use discretion in some cases in order to apply a suitable compensation approach. However, unlimited discretion can cause many problems as described above. Therefore, the basic factors or principles and required fundamental factors are useful for authorities’ evaluation.

(f) For the purpose of relieving an employee’s burden of proof, there is an assumption of the inclusion of some occupations.

Workers in some occupations are exposed to high risks at work such as firefighters, police officers and paramedics. The exact presumption of work-related injury is useful to determine the cause of employment injury. Therefore, written presumption is advantageous.

(g) Draft an accountable legal term for assessment of mental injury as an employment injury.

Internationally, they have the DSM and the ICD to assist in the diagnosis of mental injury in medical terms but they also have the legal terms for a decision in mental injury claims (whether it is an employment injury). For its part, Thailand has the manual for medical evaluation but it not related to legal causation. It merely describes the characteristics of mental syndromes which are medical terms but has no written rules that can be used to consider the relation between injury and employment. Therefore, it is necessary to put in place an accountable legal term for the assessment of mental injuries as employment injuries.

(h) Enlarge and improve on the principles of mental-mental injuries by using the interpretation of the courts

The Labour Court is a specialist court established for resolving labour and employment disputes. The judges have specialist knowledge of employment laws. This should be taken advantage of with a view to combining court interpretations and legislative methods. The principle of mental-mental injuries as employment injuries can be established by a court decision or at the discretion of a court. However, this method takes a long time and as Thailand is civil law country court decisions are not accepted as law. Therefore, the author would like to suggest that it should be used as guidelines and combined with other recommended methods.

(i) The need for a preventive method to address mental-mental injury claims.

As well as defensive methods which regulate the methods or principles to handle the diagnosis and evaluation of mental-mental injuries, a preventive method is also necessary to prevent the mental-mental injury claims. For example, in Germany, for the purpose of employees' security; specifies rules and guidance standards to support workplace practices under performance-based standards are required¹⁶, specification of the type and number of safety and health advisors required within companies.¹⁷

6. Conclusion

Under Thai law, the scope of work-related mental injuries can be determined in the first instance by considering relevant provisions of labour

¹⁶ Description of the organization of the occupational health and safety system and the delivery of prevention services, Report to the Expert Advisory Panel Occupational Health and Safety Prevention and Enforcement System, Institute for Work & Health, April 15, 2010, 3.

¹⁷ *Id.*, at 2.

law such as Section 5 of the Worker's Compensation Act, B.E. 2537. Even though the meanings of "injury" and relevant terms are defined by Thailand's workers' compensation law to be broad enough so that they also include work-related mental injuries, their precise meaning and scope are nevertheless not completely clear.

The main parliamentary acts and related provisions under Thai labour law do not provide a lucid answer as to whether and which work-related mental-mental injuries are legally recognized and thus compensable. Thai workers' compensation law lacks clear principles or rules to define the term "mental-mental injury" and neither does it give it as an exception nor provide scope for it. There is neither a specific legal framework nor consistent court precedents concerning mental-mental injuries as compensable employment injuries under Thai labour law. In practice, it is entirely up to authorities to determine its meaning which causes uncertainty.

Therefore, this work would like to suggest that Thailand should certify and define the boundary and definition of "suffering from injury" or "work-related sickness" to be broad but clear enough to cover a wide range of mental-mental injuries. The improvement should come from legislation and court interpretations, both in terms of defensive and preventive methods. As there is no single perfect method to solve this problem, the legal tools or methods of other countries and international law may offer good models for Thailand to establish principles for mental-mental injuries.

LEGAL PROBLEMS OF E-COMMERCE TRUSTMARKS IN THAILAND

Chatanut Khiewcham

Abstract

Thailand is one of many nations that offer e-commerce trustmark schemes to overcome the lack of trustworthiness in e-commerce transactions. However, the characteristics of Thai e-commerce trustmarks i.e. the DBD (Department of Business Development) Registered and DBD (Department of Business Development) Verified, which are both administered by the Department of Business Development (“DBD”), Ministry of Commerce, do not follow the same principles that those in developed countries follow. As there is no specific Thai law for this case, both trustmarks are registered as certification marks under the Trademark Act B.E. 2534 even though their characteristics and purposes are different from certification mark principles. Moreover, the trustmark issuance and monitoring will be considered, if e-consumers who rely on such trustmarks have suffered loss due to the negligent actions of the DBD. It is unclear whether e-consumers can make any claim against the DBD for damage when they rely on a trustmark issued by the DBD.

The purpose of this thesis, is to study the principles of e-commerce trustmarks in Thailand, the United States and European Union with a goal of setting out appropriate legal measures to revise issues associated with trustmark principles in Thailand. The method used in this thesis to achieve this includes: documentary research in textbooks; journals, statutes; government publications; newspapers; experts’ opinions; public information public on the internet and other relevant documents that have originated from Thailand, the United States and the European Union. The results of this thesis touch on five key issues: 1. The DBD should change its position to be as a supervisory one of trustmark principles as is the case in the U.S. and E.U., the DBD should support and oversee non-profit organizations or companies in the private sectors. 2. To protect the DBD Registered under the Trademark Act, the authorized use of the DBD Registered should be in writing and signed by the authorized persons of the DBD. 3. The DBD, as a trust service provider should be liable to the e-consumers for damage caused intentionally or negligently, if they have failed to comply with their obligations. 4. A periodic evaluation should be established as a necessary step of monitoring, as specified by McAfee and Norton. The DBD should request a reasonable fee or some funding to support improved monitoring. 5. Enforcement laws should be legislated according to the principle of the Regulation (EU) No 910/2014.

Keywords: E-commerce, Trustmark, Web seal

บทคัดย่อ

ประเทศไทยเป็นอีกประเทศหนึ่งในนานาประเทศที่นำเครื่องหมายรับรองความน่าเชื่อถือบนเว็บไซต์ (Trustmark) มาใช้เพื่อแก้ปัญหาการขาดความน่าเชื่อถือในการทำธุรกรรมพาณิชย์อิเล็กทรอนิกส์ (E-commerce) แต่ลักษณะของเครื่องหมายรับรองความน่าเชื่อถือที่ใช้ปัจจุบัน เช่น เครื่องหมายรับรอง DBD Registered และ เครื่องหมายรับรอง DBD Verified ซึ่งจดทะเบียนและดำเนินการโดยกรมพัฒนาธุรกิจการค้า กระทรวงพาณิชย์นั้น มีลักษณะหลายประการไม่เป็นไปตามหลักการของเครื่องหมายรับรองความน่าเชื่อถือที่ยอมรับกันทางสากล เนื่องจากในปัจจุบันไม่มีกฎหมายเฉพาะเพื่อบังคับใช้กับกรณีนี้ เครื่องหมายรับรองทั้งสองจึงจดทะเบียนเป็นเครื่องหมายรับรองตามพระราชบัญญัติเครื่องหมายการค้า พ.ศ. 2534 แต่ตามหลักการนั้นทั้งลักษณะและวัตถุประสงค์ของใช้เครื่องหมายรับรองความน่าเชื่อถือบนเว็บไซต์นั้นแตกต่างกับเครื่องหมายรับรอง นอกจากนั้นการออกเครื่องหมายรับรองความน่าเชื่อถือบนเว็บไซต์ รวมถึงการควบคุมดูแลต้องมีการพิจารณาอีกครั้ง ซึ่งถ้าผู้ซื้อออนไลน์นั้นเชื่อว่าเว็บไซต์ที่แสดงเครื่องหมายรับรอง DBD Registered และ เครื่องหมายรับรอง DBD Verified นั้นน่าเชื่อถือ แต่ได้รับความเสียหาย เพราะการกระทำใดๆ อันเป็นการประมาทเลินเล่อของเจ้าหน้าที่กรมพัฒนาธุรกิจการค้า ไม่มีกฎระเบียบกำหนดไว้เป็นการเฉพาะว่าผู้ซื้อออนไลน์สามารถเรียกร้องค่าเสียหายจากกรมพัฒนาธุรกิจการค้าซึ่งเป็นผู้ออกเครื่องหมายรับรองได้หรือไม่

วิทยานิพนธ์ฉบับนี้จัดทำขึ้นเพื่อศึกษาหลักการของเครื่องหมายรับรองความน่าเชื่อถือบนเว็บไซต์ในประเทศไทย สหรัฐอเมริกา และสหภาพยุโรป เพื่อหาแนวทางที่เหมาะสมในการเสนอปรับปรุงการดำเนินการเครื่องหมายรับรองความน่าเชื่อถือบนเว็บไซต์ในประเทศไทย วิทยานิพนธ์ฉบับนี้ศึกษาด้วยวิธีการศึกษาเอกสาร หนังสือ บทความ รัฐธรรมนูญ บทความของหน่วยงานรัฐ หนังสือพิมพ์ ความเห็นของผู้เชี่ยวชาญ ข้อมูลที่เผยแพร่ทางอินเทอร์เน็ต และเอกสารอื่นๆที่เกี่ยวข้อง จากประเทศไทย สหรัฐอเมริกา และสหภาพยุโรป

จากการศึกษา ผู้วิจัยมีข้อเสนอแนะ 5 ประเด็น ดังนี้ 1. กรมพัฒนาธุรกิจการค้า ควรเปลี่ยนบทบาทจากผู้ออกเครื่องหมายรับรองความน่าเชื่อถือบนเว็บไซต์เป็นหน่วยงานควบคุมดูแลเช่นเดียวกับอเมริกาและสหภาพยุโรป และสนับสนุนให้องค์กรไม่แสวงหากำไรและหน่วยงานเอกชนเป็นผู้ดำเนินการแทน 2. เพื่อเป็นการคุ้มครองเครื่องหมาย DBD Registered ตามพ.ร.บ. เครื่องหมายการค้า กรมพัฒนาธุรกิจการค้า ควรอนุญาตให้ผู้ขอใช้บริการใช้เครื่องหมายฯ โดยทำเป็นหนังสือและลงลายมือชื่อรับรอง 3. กรมพัฒนาธุรกิจการค้า ในฐานะผู้ออกเครื่องหมายรับรองความน่าเชื่อถือบนเว็บไซต์ควรรับผิดชอบต่อผู้ซื้อ หากความเสียหายนั้นเกิดเพราะเหตุแห่งการประมาทหรือความจงใจ 4. ควรมีการจัดทำการประเมินตามระยะเวลาเพื่อควบคุมมาตรฐานเครื่องหมายฯ เช่นเดียวกับ McAfee และ Norton 5. ควรมีการออกกฎหมายเฉพาะเพื่อบังคับใช้เช่นเดียวกับ Regulation (EU) No 910/2014

คำสำคัญ: พาณิชย์อิเล็กทรอนิกส์, เครื่องหมายรับรองความน่าเชื่อถือบนเว็บไซต์, เครื่องหมายบนเว็บไซต์

1. Introduction

While e-commerce businesses are increasing worldwide, lack of trust is still the main obstacle of e-commerce. Security, privacy, unfamiliarity with services, lack of direct interaction, and credibility of information seem to be at the top of the list of consumers' concerns in making online transactions. This is also true in Thailand. The value of B2B (Business-to-Business) E-commerce in Thailand is a double the size of B2C (Business-to-Consumer). The 2014 Household Survey on the Use of Information and Communication Technology showed that many people have never booked or purchased goods and services via the internet because

they were afraid of being deceived (36.7%), they were unable to see the actual goods (36.2%) and, they were concerned about security (3.7%).¹ This indicates that lack of trust in e-commerce is the most important obstacle to e-commerce in Thailand. Trustmark schemes have been created to counter trustworthiness in e-commerce.

Thailand adopted a trustmark scheme around 2011, when the “DBD Registered” was created to register e-merchants. A survey from 2003 to 2015 showed that new applicants are increasing as a total of 12,573 e-merchants, are now able to use DBD Registered.² “DBD Verified” was then created as a more reliable alternative to the DBD Registered. The DBD Verified is used by 130 e-merchants, according to statistics from the period of July, 2014 - July, 2015.³ Although no cases have come before the Supreme Court, it is clear that e-consumers’ complaints are in an increasing trend. The statistics for July 2015⁴ showed that, eight persons submitted complaints about the trustmark receivers (the e-merchants) to the Department of Business Development, the trustmark service provider. Four persons claimed that they had paid for goods but did not receive the ordered goods, three persons did get goods as their requested, and one person received poor quality goods. This is reason enough to consider why the e-merchants who are granted trustmarks from the Department of Business Development, breach trust. It is important to recognize all the factors that could be the cause of this such as ineffective issuance procedures, criteria or monitoring.

2. Nature and Characteristic of E-Commerce Trustmarks

2.1 Nature of Trustmark

Although online shopping is a global phenomenon, e-customers may feel a lack of confidence in online merchants because they do not know their identity, cannot ascertain whether they are fraudulent and cannot physically check the quality of products or services before they decide to make a purchase. Moreover, the safety and security of sending personal and financial information through the internet is unmonitored. We may say that the main reason for this issue is information asymmetry.

To counter this, different methods are used by web shop designers to increase trustworthiness of shops such as using a professional layout, showing user feedback, and using advertisements and third party certification-trustmarks. This research will outline e-consumers’ concerns

¹ The National Statistical Office, *"The 2014 Household Survey on the Use of Information and Communication Technology"*, p.53, <http://service.nso.go.th/nso/nsopublish/service/survey/ICTFull57-1.pdf>.

² Department of Business Development, *"Statistics DBD Registered and DBD Verified 2558"*, p.1, <http://www.trustmarkthai.com/ecm/public/newsletter/view.html?id=981>.

³ *Id.*

⁴ *Id.*

and the reasons why trust needs to be built. Developing trust is an important factor under conditions of uncertainty and risk, which are certainly the case in e-commerce. Trustmarks are mostly designed by trustmark organizations to increase consumer trust in e-commerce and protect consumers from unfair behavior during online shopping.⁵

Self-regulation was implemented to express the feelings of perhaps the majority of Internet users, who were afraid that governments might take their internet freedom away.⁶ J.P. Barlow, the founder of the Electronic Frontier Foundation powerfully expressed the self-regulatory character of the Internet as below:

“You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. ... We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before”⁷

A majority of authors accept the idea of self-regulation as it relates to the forming of mutual relationships in the form of agreements. It can be said that “self-regulation of the Internet by means of leaving everything for parties to set out in a contract is contrasted with a top-down approach of regulating Internet behavior by means of harmonized statutes”.⁸

2.2 Definitions and Types of Trustmarks

Trustmarks are seals or labels that represent a certification of the web shop when displayed. Online trustmarks thus aim to assure consumers that a particular online seller has been validated by a trustmark service provider and was found to be safe. Therefore, a trustmark is a part of certification. The word “certification” derives from the Latin adjective *certus*, which means “determined, resolved, fixed, settled, purposed”.⁹ The most common perception of certification is that it gives some form of guarantee, generally of quality and dependability in their widest sense. The key element in the certification process is the third party, an independent party who is expected to give an assurance (a guarantee) of the qualities of some products or services through the issuance of a certificate.¹⁰

2.3 Difference between certificate marks and trustmarks

⁵ Elena Chernovich, “*Trust in E-commerce : the moral agency of trustmarks*”, (Master Degree, Philosophy of science, technology and society, University of Twente, 2012), 6, in essay, http://essay.utwente.nl/63443/1/_Chernovich,_Elena_-_S1042726_-_Master_Thesis.pdf.

⁶ Przemysław Paul Polanski, *Customary Law of the Internet: in the Search for a Supranational Cyberspace Law*, p. 85 (2007).

⁷ Barlow, J.P. *A Declaration of the Independence of Cyberspace*. (1996).

⁸ Przemysław Paul Polanski, *supra* note 6 at 86.

⁹ Lewis, C.T. *A Latin Dictionary*. New York: Oxford University Press, p. 320. (1996).

¹⁰ Paolo Balboni, *Trustmarks in E-commerce: the Value of Web Seals and the Liability of their Providers*, 24 (2009).

A certificate mark is a term which indicates that a product or service has been certified by a third party to comply with a set of requirements.¹¹ The US Patent and Trademark Office defines certificate marks as:

“[A]ny word, name, symbol, or device, or any combination thereof (1) used by a person other than its owner, or (2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this chapter, to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person’s goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.”¹²

In relation to trustmarks, much of the literature has focused on their use in e-commerce, sometimes they are called “web seals”. As defined in the EU online trustmarks:

“Trustmarks aim to assure consumers that a particular site or online seller has been validated by a trustmark provider and is found to run a safe sales process. They are designed to increase consumers’ trust in the webshop that carries the trustmark”¹³

The US NSTIC (National Strategy for Trusted Identities in Cyberspace) captures this breadth succinctly: “A trustmark is used to indicate that a product or service provider has met the requirements of the Identity Ecosystem, as determined by an accreditation authority.”¹⁴

Accordingly, a trustmark has some different characteristics from a certification mark because it has a different purpose. A certificate mark is used by one person to certify the goods or services of others, but a trustmark is used by one organization to certify the websites of others. Moreover, the principles of a certificate mark are created as regulated rules by the government sector for protection of the mark owner’s right over a certificate mark, while a trust mark is created under the purpose of self-regulation which when applied between private sector (act as a trustmark service provider) - private sector (act as a merchant), they are allowed to revise or change a mark which is more proper to their business than a certificate mark principle. A certificate mark can be enforced against others only in the territory that the owner has registered such mark, but a trust mark can be used in worldwide, the trustworthiness depends on a reliability of a trustmark service provider.

Trustmarks are also distinct from brands because brands relate to origins and trustmarks relate to processes.¹⁵ For example, the IBM logo

¹¹ Gilad L. Rosner, “*Trustmarks in the Identity Ecosystem*”, p. 3, <http://oixuk.org/wp-content/uploads/2014/09/Trustmarks-paper-FINAL-v2.pdf>.

¹² See 15 U.S.C. § 1127.

¹³ Gilad L. Rosner, *supra* note 11, at 3.

¹⁴ Gilad L. Rosner, *supra* note 11, at 4.

¹⁵ Gilad L. Rosner, *supra* note 11, at 6.

indicates the source of a product whereas a mark from the British Scheme Organization indicates that a service has undergone a certification process. Moreover, brands are used to communicate characteristics, but for something to be called a trustmark it must be a process or mechanism that allows someone to trust it.¹⁶ Whereas the Rolex watch brand is used to communicate quality, trustworthiness and an aspirational sense of value and class, the Better Business Bureau OnLine seal is meant to communicate reliability and trustworthiness.¹⁷

3. E-Commerce Trustmarks under Foreign Laws

3.1 The United States

Trustmark schemes in the US are administered by non-profit organisations such as trustmark service providers. Furthermore, trustmarks are distributed by private companies, especially security scanning service operators. The most important trustmarks in the U.S. are: TRUSTe; BBBOnline; BBBOnline; WebTrust; McAfee Secure; and Norton Secure. The aim of trustmarks is to increase trust in e-commerce by issuing trustmarks to verify e-commerce websites according to their specific criteria and standards.

There are no specific laws that apply to trustmark schemes in the U.S., different laws will apply to each case depending on the issues. Other than this, trustmark service providers are under the control of the Federal Trade Commission (FTC). For example, in the case of TRUSTe, it was charged by the FTC for deceiving consumers through its privacy seal program. The details of the case were that TRUSTe failed to conduct annual recertifications of over 1,000 incidences for companies, which held TRUSTe privacy seals and were to be renewed every year. Moreover, TRUSTe became a for profit organization in 2008, but it still claimed its non-profit status after that time. Therefore, the FTC made an order that “TRUSTe is prohibited from making misrepresentations about its certification process or timeline, as well as barred from misrepresenting its corporate status or whether an entity participates in its program”. It was also ordered to pay \$200,000 as part of the settlement under the COPPA rule for safe harbor programs.¹⁸

3.2 European Union

Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures was

¹⁶ Gilad L. Rosner, *supra* note 11, at 6-7.

¹⁷ *Id.*

¹⁸ Federal Trade Commission, “*TRUSTe Settles FTC Charges it Deceived Consumers Through Its Privacy Seal Program*”, p.1, <http://www.ftc.gov/news-events/press-releases/2014/11/truste-settles-ftc-charges-it-deceived-consumers-through-its>.

announced on December 13, 1999.¹⁹ The purpose of this Directive was to facilitate the use of electronic signatures and to contribute to their legal recognition. It establishes a legal framework for electronic signatures and certain certification-services in order to ensure the proper functioning of the internal market. It does not cover aspects related to the conclusion and validity of contracts or other legal obligations where there are requirements prescribed by national or community law nor does it affect rules and limits, contained in national or community law, governing the use of documents.

Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market was announced on July 23, 2014 for repealing Directive 1999/93/EC.²⁰ EU members are aware that building trust in the online environment is key to economic and social development. Lack of trust, in particular because of a perceived lack of legal certainty, makes consumers, businesses and public authorities hesitant to carry out transactions electronically and to adopt new services. This Regulation seeks to enhance trust in electronic transactions in the internal market by providing a common foundation for secure electronic interaction between citizens, businesses and public authorities, thereby increasing the effectiveness of public and private online services, electronic business and electronic commerce in the Union. Directive 1999/93/EC of the European Parliament and of the Council, dealt with electronic signatures without delivering a comprehensive cross-border and cross-sector framework for secure, trustworthy and easy-to-use electronic transactions. This Regulation enhances and expands the *acquis* of that Directive.

4. E-Commerce Trustmark under Thai Law

The Department of Development, Ministry of Commerce (the “DBD”) has created the two types of e-commerce trustmarks in Thailand: 1. DBD Registered, and 2. DBD Verified.²¹ DBD Registered is a trustmark given to certify that the merchant, either an ordinary or a juristic person, has successfully registered his/her online business operations with the DBD, and that the buying and selling of products or services can be conducted as

¹⁹ EU-Lex, “*Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures*” (May. 16, 2016), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:en:HTML>.

²⁰ EU-Lex, “*Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market*” (May. 15, 2016), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0910&qid=1466948929663&from=en>.

²¹ Department of Business Development, Ministry of Commerce, “*Frequently Asked Questions*”, p.10, <http://www.trustmarkthai.com/ecm/content/faq001.pdf>.

e-commerce transactions. The DBD Verified is only given to a juristic person that has registered its online business operations and met all qualifications and criteria specified by the DBD for certifying reliability of electronic business operations. The reliability level of DBD Verified is higher than DBD Registered.

Subject to Section 91 of Trademark Act B.E. 2534, “the authorization of others to use a certification mark for goods or services shall be in writing and signed by the owner of the certificate mark.” This provision states about a form of certificate evidence. All juristic acts and contracts which are not in a form prescribed by law are void under section 152 of Civil and Commercial Code²². DBD Registered and the DBD Verified are registered as the certificate marks under Trademark Act B.E. 2534, thus to authorize others to use the marks, the DBD shall provide a certificate in writing signed by an authorized person for each registered trustmark owner. In fact, if the DBD approves an e-merchant on DBD Registered, the DBD must send a trustmark source code via email to the e-merchant’s e-mail address. A successful e-merchant is required to show the DBD Registered seal on the first page of its e-commerce website. There is no written evidence or procedure which shows us that the authorized use of the DBD Registered is made in writing and signed by the DBD as obligationed by Section 91 of the Trademark Act B.E. 2534.²³ It may be said that it is not a lawful authorization of a certificate mark under the Trademark Act and such authorization of the DBD Registered is void under section 152 of Civil and Commercial Code. The e-merchants may be at risk of an unauthorized use of DBD Registered, which would be damaging for them and cause loss of trust.

Analysis of Problems

1. The characteristics of trustmarks

List	US	EU	Thailand
Operator	Non-profit organisation or private sector	Non-profit organisation or private sector	Government Sector
Character	Trust mark or Web seal	Trust mark or Web seal	Certificate mark under Trademark Act B.E. 2534

²² See section 152 of Thai Civil and Commercial Code.

²³ วัศ ดิงสมิตร, “คำอธิบายกฎหมายเครื่องหมายการค้า”. กรุงเทพมหานคร: สำนักพิมพ์นิติธรรม, 2545, น. 173(Wat Tingsaming, “*the explanation of trademark law*”. Bangkok: Nititham, 2002, p. 173)

Most trustmark service providers in the US and EU are non-profit organizations or companies in the private sectors. However, trustmarks in Thailand are operated by the government sector, namely the DBD which does not follow the trustmark principles of developed countries. When the government sector acts as a trustmark service provider, there is weak supervision and monitoring as it is difficult to assign such supervision over trustmark service providers. Because effective monitoring is also key for building trust in trustmarks, the use of hi-tech solutions is necessary.

The principle of a trustmark is specific, according to the OECD guidelines. In both the US and EU, they are set up distinct from certificate marks and are not required to be registered as certificate marks under their trademark acts. This contrasts with Thai trustmarks which are registered as certificate marks under the Trademark Act B.E. 2534. It is therefore necessary for Thai trustmarks to stop being dealt with according to trademark rules as at present they cannot be enforced worldwide unless they are registered all around the world.

2. The legal relationship with and liability of trustmark service Providers

List	US	EU	Thailand
Legal relationship			
Liability of trustmark service provider	Yes	Yes (See Article 13 of the Regulation (EU) No 910/2014)	?

In the U.S., no specific requirements are set out for a negligent action of trustmark service providers. Thus, off-line principles are applied in the case of torts and contracts laws. In the EU, trustmark service providers shall be liable for damages caused to any natural or legal person due to failure to comply with the obligations under the regulation, as stated in Article 13 paragraph 1, except their limitations are informed to the consumers in advance, service providers will not be liable for damages arising from the use of services exceeding the indicated limitation according to Article 13 paragraph 2.

In Thailand, no specific law has been announced, they are not stated in Regulations of using the DBD Registered and DBD Verified. Thus, Section 5 of Administrative Procedure Act B.E. 2539 “Administrative order” is applied to this case.

3. The monitoring of trustmark receiver

List	US	EU	Thailand
Active monitoring	Yes	Yes	No
Passive monitoring	Yes	Yes	DBD Registered and DBD Verified

Active monitoring is a main required process which both the U.S. and EU set as an essential method for building trustworthiness of online shopping. Effective monitoring should be set and applied to Thai trustmarks all well.

3. Enforcement of laws specific to trustmarks

US	EU	Thailand
• Yes (under the control of Federal Trade commission)	• Yes (See Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market)	• No Specific law • Present applying law: Trademark Act

The proper rules and regulations should be a focus and concern. The U.S. and EU also follow and adopt the principles of OECD guidelines. Their laws are continually developed and adapted for supporting an online economy. No specific law is applied for Thai trustmarks prepared by the DBD in Thailand. A specific act should be drafted and set.

4. Conclusions and Recommendations

E-commerce trustmarks are designed to be understandable to all e-consumers that websites meet the trustmark requirements under the standards of the trustmark service provider. The aim of issuing trustmarks is to overcome the lack of trust in online shopping which is the key element in e-commerce. Trustmark service providers will issue a trustmark to e-merchants only if the e-merchants meet their standards e.g. security, privacy, business practice. E-merchants hope that, by displaying the trustmark on their websites, e-consumers will trust their certified practice

and feel more confident about parting with personal data and carrying out a transaction on the website.

The key elements of a trusted certification practice which are accepted by many countries are certifier independency, impartiality in the auditing procedure, active monitoring of the certified company, certifier enforcement power and certifier accountability. Fees are another key point, especially in relation to TMO independence. Every trustmark service provider requires an annual fee from e-merchants.

The results touch on five key issues:

1. The characteristic of trustmarks - the DBD should change its position to be as a supervisory one of trustmark principles as is the case in the U.S. and E.U., the DBD should support and oversee non-profit organizations or companies in the private sectors that promote e-commerce trustmarks in Thailand.

2. Trustmark certification process - if the DBD proposes its trustmark (DBD Registered) to be protected under the Trademark Act, the authorized use of DBD Registered should be in writing and signed by an authorized person of the DBD, as for the pre-certification phase of the DBD Verified, the standards of certification should be set up by a professional association and follow the international practices i.e. those set out under Regulation (EU) No. 910/2014; in the part of the post-certification phase, a certified applicant who has had his trustmark revoked, should not have the right to re-apply for certification again, for at least 5 years. A blacklist of untrusted e-merchants should be published.

3. The legal relationship and liability of a trustmark service provider - the DBD, as a trust service provider should be liable to the e-consumers for damage caused intentionally or negligently, if they have failed to comply with their obligations.

4. The monitoring of trustmark receivers - a periodic evaluation should be established as a necessary step of monitoring, as specified by McAfree, and Norton. The DBD should request a reasonable fee or some funding to support improved monitoring.

5. Enforcement of laws specific to trustmarks - enforcement laws should be legislated according to the principle of the Regulation (EU) No 910/2014, especially regarding a qualified trust service provider's liability and burden of proof, trustmark issuance procedures, and monitoring process including setting up a supervisory body to control all trustmark aspects.

CROSS-BORDER HEALTHCARE SERVICES IN THE UNITED KINGDOM UNDER EU DIRECTIVE 2011/24/EU AND REGULATION (EC) NO. 883/2004: LESSONS FOR THAILAND

Chayaphat Ampavat

Abstract

At the present time, Thailand has problems that need to be solved which are inequity in accessing to healthcare services and difference of the benefits packages of insured persons under the three Thailand's healthcare models: National Health Security Scheme, Civil Servant and State Enterprise Scheme, and Social Security Scheme. The system that covers most Thai people is the National Health Security Scheme, which is aimed to create security in healthcare for all Thai people. Thai people should have efficient healthcare treatment, and they should not have problems pertaining to monetary or financial issues as obstacles to receiving basic healthcare treatment. Besides, management in healthcare system still needs to be developed to take care of people. Patients' rights, including reimbursement right, should not be ignored but be considered in both the domestic and international perspectives.

Healthcare itself on domestic level involves complex issues, but when it is in the international context or cross-border context, it becomes even more complicated. Therefore, there should be legal mechanisms to facilitate cross-border healthcare services. The possible solution is learning from the United Kingdom under European Union's experience. EU legislation might be an appropriate model for arrangements of cross-border healthcare services including patient's reimbursement, control quality and safety, and cooperation across borders.

Keywords: cross-border healthcare, patients' rights, patient's reimbursement

บทคัดย่อ

ในปัจจุบัน ประเทศไทยมีปัญหาคือจำเป็นต้องแก้ไขในเรื่องของความเท่าเทียมกันในการเข้าถึงการรักษาทางการแพทย์ และความแตกต่างกันของชุดสิทธิประโยชน์ของผู้ประกันตามระบบสุขภาพของไทยทั้งสามระบบคือ คือ ระบบสวัสดิการรักษายาบาลข้าราชการ ระบบประกันสังคม และระบบระบบประกันสุขภาพแห่งชาติ ประชาชนส่วนมากในประเทศไทยอยู่ภายใต้ระบบระบบประกันสุขภาพแห่งชาติที่มีจุดประสงค์ในการสร้างความมั่นคงทางด้านสุขภาพให้แก่ประชาชนทุกคน ประชาชนชาวไทยควรได้รับการรักษาที่มีประสิทธิภาพโดยปราศจากอุปสรรคใดๆ ในการเข้าถึง โดยเฉพาะอย่างยิ่งปัญหาทางการเงิน นอกจากนี้การจัดการระบบสุขภาพยังคงต้องมีการพัฒนาเพื่อการดูแลประชาชน รวมทั้งเรื่องสิทธิของผู้ป่วยและสิทธิในการเบิกจ่ายไม่ควรได้รับการเพิกเฉยทั้งในระดับภายในประเทศและในระดับนานาชาติ

เรื่องของสุขภาพแม้ภายในประเทศมีความซับซ้อนและเมื่อเป็นเรื่องของระบบประกันสุขภาพในมุมมองของระหว่างประเทศยิ่งซับซ้อนยิ่งขึ้น ดังนั้นมีความจำเป็นต้องมีมาตรการทางกฎหมายที่ช่วยส่งเสริม

ระบบสุขภาพระหว่างประเทศ การศึกษาประสบการณ์จากประเทศอังกฤษในบริบทของสมาชิกของสหภาพยุโรป รวมทั้งการศึกษากฎหมายของยุโรป อาจจะเป็นต้นแบบที่เหมาะสมในการเตรียมความพร้อมในเรื่องระบบสุขภาพระหว่างประเทศที่อาจจะเกิดขึ้นในอนาคต ทั้งในเรื่องของสิทธิในการเบิกจ่ายของผู้ป่วย การควบคุมคุณภาพและความปลอดภัยในการรักษา และความร่วมมือข้ามพรมแดน

คำสำคัญ : ระบบสุขภาพระหว่างประเทศ, สิทธิผู้ป่วย, สิทธิในการเบิกจ่ายของผู้ป่วย

1. The healthcare systems around the world

In general, the healthcare systems can be divided into three main systems, which are Bismarck system, Beveridge system, and private insurance model.¹ The Bismarck system or sickness fund is the system which employers and employees fund national health social insurance through compulsory contribution. The providers are public and private providers. The countries that apply the Bismarck scheme are Germany, France, Belgium, etc.² The second system is private insurance model which can only be found in the United States.³ Its funding is based on premiums paid to private insurance companies, and predominantly, the providers are private sectors. The last model is the Beveridge system: the system which is funded from general government revenues.⁴ The services are provided mainly by public health providers. It is a universal healthcare which covers all people.⁵ The Beveridge system offers healthcare service as benefits in kind, which patients can receive healthcare services for free.⁶

¹Robert Kulesher, Elizabeth Forrestal. "International models of health systems financing." Journal of Hospital Administration, 2014, Vol. 3, No. 4. <http://www.ecu.edu/ah/upload/Kulesher-Forrestal-2014-International-Models-of-Health-Systems-Financing.pdf>, Accessed on November 1, 2015.

²Penguin Press. "The Healing of America: A Global Quest for Better, Cheaper, and Fairer Health Care" <http://www.pbs.org/wgbh/pages/frontline/sickaroundtheworld/countries/models.html>, Accessed on November 1, 2015.

³N. Lameire, P. Joffe1 and M. Wiedemann. "Healthcare systems — an international review: an overview." http://ndt.oxfordjournals.org/content/14/suppl_6/3.full.pdf, Accessed on November 1, 2015.

⁴Physicians for a National Health Program. "Health Care Systems - Four Basic Models." http://www.pnhp.org/single_payer_resources/health_care_systems_four_basic_models.php, Accessed on November 19, 2015.

⁵Joseph Kutzin. "Bismarck vs. Beveridge: is there increasing convergence between health financing systems?", <http://www.oecd.org/gov/budgeting/49095378.pdf>, Accessed on November 1, 2015.

⁶Laura Nistor. "Public Services and the European Union." https://books.google.co.th/books?id=V_NYaVhgNzUC&pg=PA20&lpg=PA20&dq=reimbursement+system+benefit+in+kind+system&source=bl&ots=Zi3PxZqTtxt&sig=vW_TSYw3sX-

2. The healthcare systems in the United Kingdom and European Union

2.1 Concept of the healthcare systems in the United Kingdom

In the United Kingdom, the concept of the rights to healthcare has been changed from labor right to one of the human rights after World War 2. This right is embedded in the constitution.⁷ Consequently, the National Health Service or NHS was set up in 1946 in order to respond to the ideal that good healthcare should be provided for all persons free of charge, except for some types of healthcare treatment that would require some charges such as prescriptions and optical and dental services. The National Health Service has a responsibility to manage the public healthcare sector in the United Kingdom with no discrimination according to the NHS Constitution.⁸

2.2 United Kingdom as the Member State of European Union

The United Kingdom is one of the twenty-eight Member States of the European Union. As a single market, people in the European Union can move around within its national territory and also outside their homeland or residence. Although, in theory, most people choose to receive healthcare in their homeland or the country of residence or the country in which they are covered or insured,⁹ some of them choose to receive healthcare in other countries within the European Union.

Some people travelled within the European Union and found a necessity to get a treatment in such country within the European Union. For example, Mr. A who resides in France travelled to Germany (on vacation or business visit), and got into a car accident; he then needed to receive a healthcare treatment in Germany. Some people plan to receive a healthcare treatment in a country within the European Union due to cheaper cost, availability of expertise, or avoidance of long waiting-list in their countries. Another example, Ms. B who resides in Belgium wanted to have a hip replacement, but she had to wait for one year. She suffered from the pain and decided to have an operation in the Netherlands, due to the shorter

qRuses0dkgLev6l8&hl=th&sa=X&ved=0ahUKEwixv8SbkpLKAhWFBY4KHZIVD2IQ6AEILjAD#v=onepage&q=reimbursement%20system%20benefit%20in%20kind%20system&f=false, Accessed on November 1, 2015.

⁷*Ibid.*

⁸NHS. "Guide to the Healthcare System in England Including the Statement of NHS Accountability." https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/194002/9421-2900878-TSO-NHS_Guide_to_Healthcare_WEB.PDF, Accessed on November 19, 2015.

⁹Department of Health of England. "Cross-Border Healthcare and Patient Mobility in Europe." https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252940/Cross_Border_Healthcare_Information.pdf, Accessed on November 1, 2015.

waiting-list there. Some people require specific medical needs or highly specialized treatments which may not be provided in their country or may be available but they have uncertainty to get those treatments in their land. These situations are examples of the various factors that patients determine to travel for care.¹⁰

The world is more integrated. In recent years there is an increasing mobility of patients across international borders.¹¹ When this phenomenon occurs, there are many legal issues arising. Variations in education and professional standard between countries may impact the quality of care. Moreover, healthcare services are not like other services because patients who receive healthcare services need continuity of care. It means patients need a follow-up in their home countries. Thus, it becomes the reason why cross-border healthcare needs collaboration and communication between countries.

Cross-border healthcare services have both positive and negative effects. In the European Union, the recent Member States such as Czech Republic, Slovakia, Slovenia, and Croatia have less potential at providing healthcare services than other Member States. And they also have problems accessing to healthcare services domestically. Thus, people from these countries choose to use healthcare services elsewhere within the European Union¹² because countries in the European Union share similarities in language and culture.¹³ They can also cross the boundaries with convenience as there is no need for visa and there are many modes of transportation. Due to the wide extension of cross-border healthcare services within the European Union, the European Union has researched problems especially reimbursement on cross-border healthcare services and launched their legislations and policies in order to achieve the goal of efficient cross-border healthcare by determining administrative procedures and establishing the reimbursement system.¹⁴ Besides, they attempt to increase the potential of providing healthcare services with the same

¹⁰Willy Palm and Irene A. Glinos. *"Enabling patient mobility in the EU: between free movement and coordination."*

http://www.euro.who.int/_data/assets/pdf_file/0004/138181/E94886_ch12.pdf,

Accessed on November 1, 2015.

¹¹Matthias Helbe. *"The movement of patient across border."* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3040015/#>, Accessed on November 1, 2015.

¹²Osterle A. Health care across borders: Austria and its new EU neighbours. *Journal of European Social Policy*2007;17(2):112–24.

¹³Legido-Quigley H, Glinos I, Baeten R, McKee M. Patient mobility in the European Union. *BMJ*2007 Jan 27;334(7586):188-90.

¹⁴Evers S, Paulus A, Boonen A. Integrated care across borders: possibilities and complexities. *Int J Integr Care*2001;1:e18.

healthcare standard throughout the European Union, focusing on safety and quality standard.¹⁵

The problem is that the Member States want to control their budget on healthcare. If they allow patients to receive healthcare abroad while having to pay for higher price, it will cause the imbalance of their controlling budget. On the other hand, patients have the rights to healthcare. If the Member State cannot provide healthcare within a reasonable time, patients have the rights to seek healthcare anywhere within the European Union. In the past, the European Court of Justice established that health care is a national policy. If patients seek healthcare anywhere in the European Union, they need to be allowed by the Member State of affiliation through the pre-authorization process.

Later, pre-authorization policies were contested by citizens, who successfully challenged the refusal of national social insurance system to reimburse the costs of planned, unauthorized treatments undertaken in another Member State. ECJ decided that prior authorization acts as a barrier to the principle of free movement.¹⁶ In the case of Watts,¹⁷ ECJ established the principles of reimbursement for cross-border healthcare services: it should be done regardless of what system of individual country is, and a treatment can proceed in spite of no prior authorization on the ground that the refusal has no justified reason. If it is not possible for the State of residence to receive a healthcare service within a period compatible with the disease and the clinical situation of the patient, the national institution cannot refuse to allow cross-border healthcare.¹⁸ The ECJ scrutinized the ultimate goal of the freedom to supply and receive services as a higher interest.¹⁹

As a result from this case, the EU legislations which concern the cross-border healthcare services, including the planned care, need to be crystal-clear, to scrutinize which situations require a prior authorization, and to assure that there should not be any barriers and should be no restrictions of patients' rights to obtain cross-border healthcare. Consequently, the Directive 2011/24/EU of the European Parliament on the application of patients' rights in cross-border healthcare was launched.

¹⁵Cucic S. European Union health policy and its implications for national convergence. *Int J Qual Health Care* 2000 Jun;12(3):217-25

¹⁶Katharine Footman. "Cross-border health care in Europe." http://www.euro.who.int/__data/assets/pdf_file/0009/263538/Cross-border-health-care-in-Europe-Eng.pdf, Accessed on November 19, 2015.

¹⁷Case C-372/04 *Watts* [2006] ECR I-04325.

¹⁸Monica Cappelletti. *Healthcare Right and Principle of "Minimum Standards: The Interpretation of the Judiciary in A Comparative Perspective*. Switzerland: Springer International Publishing, 2015.

¹⁹Flaminia Tacconi. "Freedom of Health and Medical Care Services within the European Union." http://www.zaoerv.de/68_2008/68_2008_1_b_195_208.pdf, Accessed on November 12, 2015.

The Directive has been launched to clarify the legal certainty of reimbursement criteria and also confirm the entitlement of the patients' rights when they seek healthcare services abroad in order that they acknowledge the cost and level of the cost of their medical treatment that can be reimbursed. Many essential principles of cross-border healthcare have been formed in the Directive, for instances, the doctrine of undue delay. Its definition is that the treatment must be provided within a time limit which is medically justifiable by measuring the patient current state of health and probable course of illness. It is also based upon an objective clinical assessment of the patients and their individual circumstances.²⁰

The reimbursement of cost is only one of the issues of cross-border healthcare services. Beyond that, there are provisions concerning the responsibilities of the Member States, and the cooperation in healthcare among the Member States are comprised in the Directive as well. The EU seems to have adopted the readiness of applying its economy to make the improvement of healthcare for all European patients.²¹

3. The healthcare systems in Thailand

3.1 Category of healthcare system in Thailand

In Thailand, there are three health insurance systems,²² which are the Social Security system (SSS), the Civil Servant system (CSS), and the National Health Security Program (NHSP).

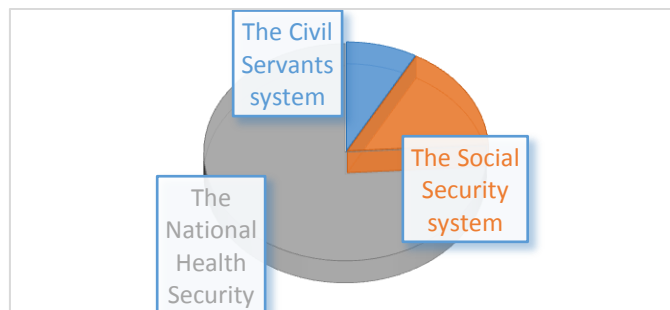


Figure 1 Healthcare System in Thailand

²⁰Claire Donovan and others. "REQUESTS FOR TREATMENT IN COUNTRIES OF THE EUROPEAN ECONOMIC AREA WALES PROCEDURE.", <http://www.wales.nhs.uk/sitesplus/862/opaendoc/231756>, Accessed on November 1, 2015.

²¹Miek Peteers. "Free Movement of Patients: Directive 2011/24 on the Application of Patients' Rights in Cross-Border Healthcare." <http://booksandjournals.brillonline.com/content/journals/10.1163/157180912x615158>, Accessed on November 1, 2015.

²²Health Insurance System Research Office. "Health Insurance system in Thailand." <http://www.hisro.or.th/main/?name=knowledge&file=readknowledge&id=14>, Accessed on November 19, 2015.

The chart above illustrates population in Thailand who has the rights under each system: 5 million people (8%) benefit from the Civil Servants system; 9.84 million people (15.8%) benefit from the Social Security system; 47 million people (75%) benefit from the National Health Security system, which is the Beveridge system.

3.2 The current situation in Thailand

The current situation in Thailand appears that the Thai government supports the country to be a medical hub of the Southeast Asian region. There is a medical tourism which is a sub-set of cross-border healthcare, and it generates much income to Thailand. However, there is no concrete legal instrument to facilitate cross-border healthcare services. Therefore, if we analyze the EU law, it will be useful for Thailand in creating a model law for guaranteeing the cross-border patients' rights and placing obligations on healthcare service providers.

While the Thai government's policy supports healthcare business, it also helps foreign patients on the principle of humanity. In areas near the border of Thailand, Thai hospitals and facilities are confronting with the problems of inflowing Lao patients seeking healthcare in Thailand without ability to pay for the treatment fee, thus affecting the controlling budget in Thailand. Therefore, if we have a reimbursement system, it will help Thailand manage its resource and budget more effectively and increase the potential in providing healthcare service by finding a consensus between these two countries.²³ Cooperation between healthcare providers in border regions can avoid duplicate tasks and wasting resources.

The ASEAN has initiated coordination and harmonization of laws in many areas. There is a directive concerning medical device and a cosmetic directive, while healthcare services which are important for the ASEAN's economy still lack cooperation in this field to support cross-border healthcare services. The benefits will be for patients to exercise their rights within the ASEAN. Besides, it will be beneficial for managing and delivering healthcare services among the Member States in the ASEAN. Like the EU, the ASEAN also supports the free movement of services and, in the future, a plan to be a single market. The principles experienced in the EU might be useful for establishing ASEAN cross-border healthcare services structure, and it will be a guideline for Thailand and the ASEAN to implement a model law that is efficient and appropriate for Thailand and ASEAN's context.

As Thailand has the policy toward becoming a medical hub of the Asian region and participation in the ASEAN Economic Community (AEC), it is likely that legal problems regarding cross-border healthcare

²³Research Institute for Thai Healthcare Security. *"Effect of Laotian seek healthcare in Thailand."*

<http://www.hisro.or.th/main/modules/research/attachservices/174/Full-text.pdf>,

Accessed on November 24, 2015.

services might emerge in the future. These problems could be the results of patients from the neighboring countries entering Thailand to receive medical services as well as Thai residents moving or travelling to other countries in the ASEAN to seek medical treatment. Accordingly, the healthcare services in the United Kingdom under the EU laws and regulations are interesting for study and research – they will be lessons for future healthcare services in Thailand which is a part of the ASEAN Economic Community (AEC).

4. The current problem of healthcare systems in Thailand

Due to the fact that these three systems vary in many aspects, they cause some problem as will be described in the following details.

4.1 Gaps in benefit package

Due to the difference in benefit package, it creates inequality of patients' rights in Thai healthcare system. Despite some high-cost treatments, people who are insured under the Civil Servant and State Enterprise and Social Security System can receive such treatments, while people who are insured under the Universal Health Coverage cannot afford. For example, Renal Replacement Therapy (RRT) is excluded from the Universal Health Coverage because of its high cost, but it can prolong life and improve quality of life. This problem also leads to ethical concerns as well, since some healthcare treatments are excluded from the coverage, but they actually can save life of people.

4.2 Difference in facilities of healthcare

Payment method affects incentives of service providers to provide healthcare treatment. The Civil Servant Medical Benefit Scheme is on the basis of free service. Therefore, the budget is open and leads to an increase in healthcare spending from the healthcare service providers. Besides, service providers are likely to be prompted to provide high-technology treatment for patients, because they can get repayment from the government no matter how much they spend on providing the service. On the other hand, the Universal Health Coverage is a closed-end payment service. Some service providers may not be willing to offer high technology treatment in order to reduce the cost and gain more profits. Therefore, determining a proper rate of payment needs a balance between restricted budget spending and consideration of appropriate access and quality of care of patients.

4.3 Limited access to healthcare

Under the Universal Healthcare Coverage and Social Security Scheme, patients must go to the registered hospital or healthcare facility that they chose. Some people who live in rural areas are not convenient to go to the registered hospital that is far away from their home. On the other hand, patients under the Civil Servant and State Enterprise scheme's

benefits can go to any public hospital and get reimbursed. Further convenience is that, if they go to the registered public hospital, they do not have to pay upfront.

5. The current cooperation in healthcare in the ASEAN in the form of Directive

There is not much cooperation in ASEAN's healthcare system. But there are some aspects that are now in preparation for the advent of the ASEAN Economic Community (AEC). So far, the ASEAN Medical Device Directive or AMDD has been launched in 2012. The unofficial time of its implementation was anticipated by 2015 with all of the ten Member States' compliance. But now there is only Singapore who is the first leading country to implement its national law in compliance with this AMDD, while the second country that has implemented the AMDD is Malaysia. At least it shows that the ASEAN is interested in the field of healthcare and tends to establish a harmonized legal framework. They see the importance of a unified system that could support cross-border healthcare, not only for financial benefit but also for improving ASEAN people's health quality.

The origin of this AMDD was adjusted from the European Medical Devices Directive (MDD 93/42/EEC) and other European guidelines. Therefore, researching on the European Union Directive would be helpful as an introduction for a directive of the ASEAN on cross-border healthcare as well. In spite of the fact that in the near future the Directive may not be spontaneously appropriate for the ASEAN's context due to differences in cultural, economic, technological, and political situations, the approaches from European Union legislation study would be adaptable to Thai law pertaining to agreements such as in bilateral treaty or multilateral treaty with other countries that are ready for cross-border healthcare.

Although the government policy nowadays highlights medical tourism and tries to attract foreigners to receive healthcare in Thailand, the advent of the AEC and its free trade in services include the Thais mobility to other countries in the ASEAN as well. It means that when the Thais move to other countries, whether permanently or temporary, it cannot be considered as a free movement without adjustment of health policy.

6. Obstacles to cross-border healthcare in Thailand and ASEAN's context

6.1 Absence of harmonized models of healthcare system in Thailand

In Chapter 3, we can see that even in the domestic level of reimbursement of healthcare in Thailand, there are many problems of inequality. Before we promote cross-border healthcare, we have to make sure that it will not intensify the problem of inequality. In our healthcare,

Thailand tries to promote healthcare as a universal right that can be enjoyed by all citizens regardless of their economic status. Therefore, the principle is how we can harmonize the models of healthcare system in Thailand under one supervising unit, and after that we can set up a cross-border healthcare arrangement through legal instruments.

6.2 Difference in economic status and cohesiveness in the ASEAN community

The European Union can have cross-border healthcare because there is cohesiveness of the European Union, which supports mobility of persons across Members' territories. For example, there is no visa requirement. Additionally, cross-border healthcare works well perhaps because there is not much difference in economic status. From the European Union's experience, although the European Union is harmonized in economic perspective, the small country still gets problems from the effects of cross-border healthcare. The principle is that although patients need to get treatment within appropriate time of access, which is about the life of people and human rights, resources allocation, government's administrative procedure, including finance management have to be considered. Healthcare spending has been high in recent years; therefore, cross-border healthcare certainly could save life in the view of a country that lacks medical treatment. On the other hand, how we balance public management and people's life is quite a difficult and complex issue which needs interdisciplinary consideration.

6.3 No central judicial organization to promote cross-border healthcare

The first concrete cross-border healthcare rule came out in the form of European Union Regulation, which originally did not give much freedom in seeking cross-border healthcare; in other words, receiving healthcare abroad within the European Union countries needs permission from the state that one is insured – only in exceptional cases is there no need of such permission, for example on an emergency basis. Later, the European Court of Justice took another role, an active role, as a true promoter of cross-border healthcare by granting the right to receiving healthcare abroad – this time the scope was broader than it had been provided in the Regulation. Therefore, it came out later in the form of the Directive, whereby each Member State of the European Union has to implement in its own domestic legislation.

Comparing to Thailand and the ASEAN, we do not have the central court which will be the main actor in cross-border healthcare. According to the ASEAN Charter, the way we settle disputes is also reliant on arbitration. Moreover, if we try to promote cross-border healthcare in the ASEAN, it will need more progress in legal instruments, whereas in the ASEAN we normally use negotiation which takes time to find consensus because of our diversity in healthcare system. However, bilateral arrangement of the

countries that have similar contexts can occur such as the Singapore and Malaysia Arrangement.

7. The suggested provision in case of Establishing Cross-border Healthcare Services Legislation

7.1 Provision of information

The information must be accessible including in the formats for disabled persons such as braille, large print, and audio. Also, nowadays' technology has an important role in providing information; therefore, electronic format should be available. The information that should be arranged does the function of informed choice. Moreover, the information about quality and safety of providers, complaints and redress procedure, and price should be arranged for patients.

Suggested information of other countries that should be available for patients is as detailed below:

- Healthcare system in other Member States
- Professional standard and guideline
- Treatment price and choices
- Healthcare provider's registration status
- Assurance of professional indemnity
- Complaints and redress procedure
- How reimbursement will be performed (direct payment on government-and- government level, or the patient has to pay upfront)

7.2 Provision of direct payment from the government

There is a drawback in claiming under the Directive that patients have to pay upfront. This will lead to an incapability of payment. There should be a provision that exceptional cases, such as in emergency cases, can get direct payment from the government. Similarly, in the case of treatment with high cost, people should be able to request for direct payment, otherwise they will not have enough money for paying upfront. The vulnerable groups such as low-income people should be able to request for direct payment as well. This will decrease equity issues and eliminate fraudulent claims. It will be very useful for patients who seek treatment of addictive diseases so that they do not have to claim for the reimbursement many times.

7.3 Provision of clarity of patients' rights

The United Kingdom's model shows us that there is the problem of uncertainty in recognizing what are the rights that patients have or not. Therefore, there must be crystal-clear information about what healthcare services they are entitled to seek abroad.

7.4 Provision of prior authorization

Some may disagree with the prior authorization system which is considered as a barrier to obtain healthcare abroad. In the writer's opinion, it goes on the contrary that the prior authorization can diminish the risk of fraud. However, the discretion of authority has to be set by the regulatory, otherwise it may create bureaucracy. But certain healthcare of which cost is not high can leave the room for receiving healthcare without permission from the government.

7.5 Administrative procedure

The lesson learned from the United Kingdom shows that the procedure needs to determine an appropriate limit of time for decision making from the government, otherwise it will be too slow for patients to receive healthcare abroad. However, some cases cannot adopt the normal timeframe due to the complexity in case-by-case basis of healthcare treatment.

7.6 Shared information by establishing network for medical professionals' qualification.

- Registered status of medical professionals including notification of limitations of their practice or conditions of their licenses
- Medical professionals' history of education and practices

7.7 Reimbursement

Cross-border healthcare needs the clarity of national tariff. In the United Kingdom, there is a good example for monitoring cost accountability and of setting up the national tariff every year, in which there normally are consultations among healthcare sectors. However, the national tariff can just be used as guidance but not a compulsory amount that patients will get reimbursed. The exact amount of payment is required to present to the government authority before going to get healthcare abroad.

7.8 Continuity of care

There is a need of cooperation between the sending country and the receiving country, otherwise healthcare service will be short of continuity and diagnosis for side-effect. The National Contact Points will do the function of elaborating; however, the healthcare providers are also required to contact with one another with willingness for participation and regards for the interests of patients.

7.9 Translation of information

In the United Kingdom, despite the National Contact Points having translated the information, the question still remains whether they have the duty of care for precision of that translation, or it is just to escort but not raising the duty of care.

7.10 Transfer of medical record information

In the EU, there is the arrangement of transferring information including healthcare information through another directive. And it makes sure that the medical record or e-prescription can be well-understood in another Member State by using encoding process. However, the code may not cover all cases; that's why we need a communication with good relationship on the international level.

THE RIGHT TO BE FORGOTTEN UNDER THAI LAW*

*Daongoen Chinpongsanont***

Abstract

One of the essential parts in human dignity is reputation, and nowadays the too-much speech can tear down the individual's privacy. Normally, there are two well-known rights under the privacy involved with this digital age, i.e. right of free expression and right to access information, but recently the right to be forgotten has been recognized as one of the privacy rights. Technically, the right occurs to solve a problem in the digital age because it is very difficult to bury the individual's past in the online world.

In May 2014, the right to be forgotten was recognized in the European Union through, *Google Inc. v Agencia Española de Protección de Datos, Google Spain case*, a decision by the Court of Justice of the European Union (CJEU). Thenceforth, search engines were obliged to remove outdated or extremely personal information from search results. In some countries, the right to be forgotten has been rejected. Questions remain about the benefits of this right, seemingly based on the concept of a second chance. It is not an absolute right so it is difficult to balance this right with other related rights, especially rights of free expression and access to information.

The question was addressed whether data should be remembered forever or may be changed by owners in Thailand. European Union rulings were studied, considered among the most effective privacy- protection regulations. Rulings were issued with the objective to protect personal data, offering high protection standards. Yet in the United States, the right to be forgotten confronts the First Amendment, the Communications Decency Act of 1996 (CDA) and privacy tort law. In the United States, the legal right to be forgotten has less weight than other fundamental rights. Recommendations were offered to enhance effectiveness of adopting the right to be forgotten under Thai Law.

Keywords: Right to Be Forgotten, Erasure Right, Personal Information

* The article is summarized and rearranged from the thesis "The Right to be Forgotten Under Thai law" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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บทคัดย่อ

ในปัจจุบันจำนวนข้อมูลส่วนบุคคลที่เผยแพร่ในโลกออนไลน์นั้นมีเป็นจำนวนมากและบ่อยครั้งที่เมื่อเวลาผ่านไปข้อมูลส่วนบุคคลที่ถูกเผยแพร่กลับส่งผลกระทบต่อสิทธิส่วนบุคคลของเจ้าของข้อมูล โดยทั่วไปแล้วสิทธิส่วนบุคคล

ที่เรารู้จักกันดีนั้น ได้แก่ สิทธิที่จะแสดงความคิดเห็นและสิทธิในการเข้าถึงข้อมูล แต่ไม่นานมานี้สิทธิที่จะถูกลืมได้ถูกหยิบยกขึ้นมาเพื่อเป็นมาตรการในการคุ้มครองความเป็นส่วนตัวของเจ้าของข้อมูล โดยให้เจ้าของข้อมูลสามารถขอลบข้อมูลส่วนบุคคลของตนในโลกออนไลน์ได้

เมื่อเดือนพฤษภาคม 2556 ที่ผ่านมาสากลยุติธรรมยุโรปได้อาศัยหลักของสิทธิที่จะถูกลืมในการตัดสินใจคดีระหว่างผู้ให้บริการค้นหาข้อมูลบนอินเทอร์เน็ตอย่างกูเกิลในประเทศสเปนและนายมาริโอ กอนซาเลซ ผู้ใช้บริการการค้นหาข้อมูล โดยวางหลักให้เจ้าของข้อมูลสามารถร้องขอให้ผู้ให้บริการค้นหาข้อมูลบนอินเทอร์เน็ตลบข้อมูลส่วนบุคคลที่มีความล้าสมัยจากหน้าแสดงผลการค้นหาได้ ซึ่งภายหลังจากที่มีคำตัดสินดังกล่าว สิทธิที่จะถูกลืมได้ถูกกล่าวถึงอย่างกว้างขวาง ในขณะที่ประเทศในสหภาพยุโรปยอมรับหลักการของสิทธิดังกล่าว ยังมีอีกหลายประเทศที่ไม่เห็นด้วย เนื่องจากหลักการการใช้สิทธิที่จะถูกลืมนั้น ต้องไม่กระทบกับสิทธิขั้นพื้นฐานอื่นๆ จนเกินขอบเขต โดยเฉพาะอย่างยิ่งสิทธิที่จะแสดงความคิดเห็นและสิทธิในการเข้าถึงข้อมูล

ภายหลังจากคำตัดสินของศาลยุติธรรมยุโรป สหภาพยุโรปได้มีการบัญญัติถึงสิทธิดังกล่าวขึ้นอย่างชัดเจนและเป็นรูปธรรมภายใต้กรอบทางกฎหมายด้านการคุ้มครองข้อมูลส่วนบุคคล เพื่อให้การคุ้มครองส่วนบุคคลมีประสิทธิภาพมากยิ่งขึ้น อย่างไรก็ตามเมื่อพิจารณาหลักกฎหมายของประเทศสหรัฐอเมริกาที่ใช้บังคับในปัจจุบัน ทั้งรัฐธรรมนูญ กฎหมายว่าด้วยการสื่อสารที่เหมาะสม และกฎหมายลักษณะละเมิด พบว่าสิทธิที่จะถูกลืมนั้นได้รับการสนับสนุนน้อยกว่าสิทธิขั้นพื้นฐานที่มีกฎหมายรองรับไว้ ทั้งนี้ สำหรับประเทศไทย กฎหมายที่มีอยู่ในปัจจุบันไม่ได้กำหนดหลักเกณฑ์ที่รองรับสิทธิที่จะถูกลืมไว้อย่างมีประสิทธิภาพและครอบคลุม จึงเห็นควรเสนอให้มีบทบัญญัติเฉพาะที่เกี่ยวกับสิทธิดังกล่าว ซึ่งรวมถึงการขอใช้สิทธิ ข้อยกเว้นและบทลงโทษหากมีการฝ่าฝืน เพื่อลดปัญหาการไม่มีกฎหมายรองรับในการขอลบข้อมูลส่วนบุคคลในโลกออนไลน์

คำสำคัญ: สิทธิที่จะถูกลืม, สิทธิในการขอลบข้อมูล, ข้อมูลส่วนบุคคล

1. Introduction

At present it could not be denied that, people write more emails than letters and search the information on the Internet approximately twenty billion times each month.¹ The huge number of information creates a question whether people have too many speeches. As the number of the new data is so great, in particular on Google as appeared on the result pages, there is a long trail of digital footprints left by the Internet users. Some information, which is recognized by Google or other search engines, is often mistaken or misunderstood. For example, Dr. Russo, a plastic

¹Jacques Bughin, Laura Corb James Manyika, Olivia Nottebohm, Michael Chui, Borja de Muller Barbat and Remi Said, *The impact of Internet technologies: Search*, (July 2011), https://www.mckinsey.com/~media/McKinsey/dotcom/client_service/High%20Tech/PDFs/Impact_of_Internet_technologies_search_final2.ashx, (accessed on May 29, 2016).

surgeon, was sued twenty years ago and finally cleared from the accusation, but when people search his name on the Internet, his lawsuit still appears².

In the online world, it is difficult to delete the data and the past still emerges as a reminder of the events that may upset people. Of course, there are good points of the internet, such as history or education views, but it sometimes preserves the incorrect or old links rather than allows such links to be deleted. As you can see in the above-mentioned case, even twenty years of being a successful doctor has passed, one incident is still haunting him.

Digital eternity is a problem because of privacy matters. One of the solutions for solving this problem is to adopt the “*right to be forgotten*” principle. The concept of this right has been continuously expanded around the world with an attempt to protect the privacy on the Internet and serve as a tool of controlling the individual’s reputation.

2. Background of the Right to Be Forgotten

The right to be forgotten has slowly appeared to the world in the latest decades when new technological devices have been invented. This right is reflected in various areas in the European; for example, the intellectual root of this right can be found in the French criminal law as *le droit à l’oubli*—or the “*right of oblivion*”³. After a long period, the concept of privacy right has passed through the European Union and the beginning of the concept of “*acquis communautaire*” or “*EU acquis*” has arisen.⁴ Recently, in May 2014, the right to be forgotten was widely recognized in the European Union from *Google Inc. v. Gonzalez*.⁵

Court of Justice of the European Union: *Google Inc. v. Gonzalez*

Back to 2011, Mr. Gonzalez filed a complaint with the “*Spanish Data Protection*” against La Vanguardia Ediciones, the owner of the daily newspaper in Spain. He claimed that when we searched his name on Google, the search result would show the links for two pages of the La Vanguardia’s newspaper dated January and March 1988. That news was about a real estate auction for paying his social security debts. He wanted

²Laidlaw and Emily B., “Private Power, Public Interest: An Examination of Search Engine Accountability”, *International Journal of Law and Information Technology*, (14 October, 2014).

³Jeffrey Rosen, *A Grave New Threat to Free Speech From Europe*, (February 10, 2012), <https://newrepublic.com/article/100664/freedom-forgotten-internet-privacy-facebook>, (accessed 10 November, 2015).

⁴European Union Conditionality and the *Acquis Communautaire*, <http://www.cesruc.org/uploads/soft/130221/1-130221113Z4.pdf?pldezynhfkbcvomf>, (accessed on June 23, 2016).

⁵Case C-131/12, http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065, (accessed on March 29, 2015).

the newspaper to remove the news and Google Spain or Google Inc. to conceal his private data in their search results.

Then, in May 2013, the Court of Justice of the European Union (CJEU) held that Google obtained the private data of Mr. Gonzalez that was difficult to be found without search engines like Google, and it was not the right of the search engines to clarify an individual's right by "merely the economic interest"

Most importantly, although it was an important thing to process the accurate data at the time when the data were posted to the Internet, it was the controller's duty to update the data that are "*inaccurate, inadequate, irrelevant or excessive in relation to their original purposes rather than keeping them up-to-date or keeping them for a longer period than necessary.*"⁶ This is involved with not only the economic interest, but the interest of the public should also be considered. According the CJEU's decision, the right to be forgotten can be defined as follows;⁷

1. The data owner has a right to request the search engines to remove the links appeared on their search results, even they are publicized by the third party;

2. Even though Google or search engines themselves did not post the information of the data owner, it was still their responsibility to take care of the information because the function of their operation was to make access to the links easier for the internet users. They have to make sure that their operation of erasure is under the legal framework and meets the minimum requirements of the law;

3. The information on the search engine results is not eliminated from the online world, but it simply does not appear on the outcome when the users search for the information.

Anyhow, the right to be forgotten is not an absolute right, the ability for requesting to remove the displayed information of individuals was under the condition of the public interest of such information.⁸ The balance of the right depends on the data subject's private life and on the public interest in having that information.⁹

As a result of the case, Google have to establish a department for deleting the photos or contents that people posted on the Internet. To deciding whether the data should be deleted or not, Google relies on the reports that are filled in by the data subject in its request form. Of course, people will bring up a lot of reasons just for deleting their embarrassing past. It brings up the question that how can Google rely on it? This is not

⁶ Id.

⁷ Derechos Digitales, *What are the implications of the right to be forgotten in the America*, https://www.ifex.org/americas/2015/09/22/derecho_olvido/, (accessed on September 22, 2015).

⁸ Id.

⁹ The Manila Principles on Intermediary Liability Background Paper, Version 1.0, (May 30, 2015).

included the question as to how to set the balance between the right to be forgotten and the right of free speech. The highly subjective question is that what a public interest actually is, what remains relevant and for how long?

3. The Right to Be Forgotten in Foreign Laws

3.1 European Union Directive

The ruling of European Union has been established with an objective to protect a personal data. This ruling has a high standard of protection, which can be applied everywhere in the member states of European Union. The individuals can complain and obtain an appropriate redress if his/her data are misused.¹⁰ The root of the right to be forgotten was appeared in the 1995 Data Protection Directive¹¹ under the title “*Right of access*”.¹² According to this article, the persons can ask the controller to delete any data when such data are no longer needed or deemed incomplete or inaccurate. Moreover, the controllers who collect and manage the private information have a duty to protect it from being misused as well as to respect the right of the data owners. However, the right under this law is under strict conditions and for legitimate purposes only.

Recently, the European Union’s framework proposed a future directive for finding the solutions for the present issues and the greatest benefit. On June 15, 2015, the Council has agreed with the new approach of the General Data Protection Regulation.¹³ Then in May 2016, the official texts of the Regulation were just launched and enforced. This regulation has intended to replace Directive 95/46/EC. Under the new directive, the right to be forgotten is provided under title of “*Right to erasure*” in article 17.¹⁴

3.2 United States of America law

In United States, there is no literal law providing this right, at least not the same as European Union Directive. One of the reasons that the right to be forgotten is such a difficult concept to define and protect in the United States is that it conflicts with the fundamental human right to free, open and

¹⁰European Union, *Protection of Personal Data*, <http://ec.europa.eu/justice/data-protection/>, (accessed on October 24, 2015).

¹¹Stuart Winter-Tear, *GDPR-The Right to be Forgotten*, <http://www.stuartwintertear.net/gdpr-the-right-to-be-forgotten/>, (accessed on May 21, 2016).

¹²Article 12 (b) of the Data Protection Directive.

¹³Council of the European Union, *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.statewatch.org/news/2015/dec/eu-council-dp-reg-draft-final-compromise-15039-15.pdf>, (accessed December 15, 2015).

¹⁴Official L 119/43 Journal of the European Union EN (May 4, 2016), Article 17.

access the information which provides in the First Amendment of the United States Constitution.¹⁵

Moreover, there is the Communication Decency Act 1966 (“CDA”) which was established for shaping the landscape of the Internet by providing the protection of the third persons from the content in the websites and ensuring that the Internet companies will grow with no fear of the litigation from the activities.¹⁶ Under section 230, an online intermediary is not only a regular Internet service provider, but it also means those whose definition is involved with an “*interactive computer service provider*” that has a function of hosting or republishing a speech protected from being sued for what others say or do.¹⁷ This section was interpreted by the court in *Langdon v. Google case, Inc.*, that there is a prohibition of suing a lawsuit when a service provider edits the content on the Internet and even deletes it from their services. In the court found that “*section 230 provides Google, Yahoo, and Microsoft immunity for their editorial decisions regarding screening and deletion from their network.*”¹⁸

In the United States, there are questionable issues about the benefits of this right. It seems that the right to be forgotten is based on the concept of a “second chance”. Also, it is difficult to balance it with other related rights, in particular the rights of free expression and access to information. In practice, it is difficult to exercise this right in the world where the information is usually saved in the Internet all the time. It is even more difficult if the objective of deletion causes a doubtful issue as the right could be mentioned as a deletion of original data or links in the search engines.¹⁹

Even though the United States law does not mention the right to be forgotten, it in fact seems that the United States has had a long experience with the legal forgiveness in the Restatement of Torts.²⁰

Regarding to the rule of torts, which is similar to the right to be forgotten, refers to the “public disclosure of embarrassing private facts.”²¹ Thus, in the circumstances that the information is useless or no

¹⁵ American Government, *First Amendment Rights*, <http://www.ushistory.org/gov/10b.asp>, (accessed on May 20, 2016).

¹⁶ Andrew P. Bolson, Esq., “Flawed But Fixable: Section 230 of the Communications Decency Act”, (2013).

¹⁷ CDA 230, <https://www.eff.org/issues/cda230>, (accessed October 13, 2015).

¹⁸ Eric Goldman, *Search Engines Defeat “Must-Carry” Lawsuit—Langdon v. Google.*, http://blog.ericgoldman.org/archives/2007/02/search_engines_3.htm, (accessed on June 1, 2016).

¹⁹ *Id.*

²⁰ Restatement of the Law, Second Torts 1977 s 652 (B).

²¹ “Forcing Europe to Wear the Rose- Colored Google Glass: The “Right to Be Forgotten” and the Struggle to Manage Compliance Post Google Spain”, *Columbia Journal of Transnational Law*, (2016).

longer serve the purpose of being public, people still do not have the right to request for removal.

4. Legal Problems in Thailand

In Thailand, there are no literal provisions providing the right to be forgotten. According to the current laws, under section 420²² of Civil and Commercial Code, it can be applied in the situations that data controllers fail to keep the information safe or to protect it from other persons or disclose inaccurate information from the facts, the data owner can sue against them and under section 423²³ of Civil and Commercial Code, it can be applied when a person makes a false statement and spreads it as a fact and such false statement injures the reputation, credit, earnings or prosperity of the other persons. Then, that person shall be liable for arising damage. but in circumstances that a person wants to remove the truthful information for example, an embarrassing picture like the face before got a surgery of woman which appears on the search results whenever typing her name, in such case, the data controller and search engine will not be considered as the liable person under this section since the information was deemed true.

Furthermore, under Credit Information Business Act 2012 (B.E. 2545) (Amendment B.E. 2551) which aims to protect the use and disclosure of information but the definition of the “data” under section 3²⁴, the information is limited to a statistic report about the client’s history of paying debts. So, the boundary of the data will be limited and not general. So, in case that the kind of information is not involved with the finance or “general data”, such as the posts on Facebook or history of persons in the blogs or websites, this law could not be applied.

For this reason, when the users or data owners want to remove the useless or unwanted data, they have no literal legal ground for requesting of

²² Civil and Commercial Code, section 420 provides 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.

²³ Civil and Commercial Code, section 423 provides that

[A] person who, contrary to the truth, asserts or circulates as a fact that which injurious to the reputation or the credit of another or his earnings or prosperity in any other manner, shall compensate the other for any damage arising therefrom, even if he does not know of its untruth, provided he ought to know it.(...)

²⁴ Credit Information Business Act 2012 (B.E. 2545), Section 3 provides that (...). “Information” means anything that can bear the meaning of facts pertaining Credit Information or Credit Point, regardless of whether such bearing of the meaning is due to the condition of that thing or due to any other methods, and regardless of whether being prepared in the form of document, file, report, book, map, drawing, picture, film, video or audio record, record made by computer, or any other methods that can disclose the information recorded. (...)

removal. In practice, they have to solve the problem by contacting the search engines directly which the decision to remove or maintain such data is depended on the service providers. Otherwise, the data owners or service providers have to file their complaint to the court and the court may or may not order the search engines to remove such information due to no specific legal provisions for such claim. In that sense, the right to be forgotten is deemed a very useful principle

5. Conclusion and Recommendations

Although there have been attempts to harmonize these two rights, there is a room for each country to decide how far they would like the right to be forgotten to extend. For instance, in Gonzalez case, the European Union Directive set only the minimum standard, but the court offered their citizens a greater privacy right.

The suggestion is that Thailand should follow the European Union framework by recognizing the concept of this right and passing a law that is similar to the European Union directives. Despite the enactment of laws covering certain areas of personal data protection, there have been no existing rules, mechanisms or measures regulating the personal data protection as general principles. However, on January 6, 2015, the Ministry of Information and Communication Technology just proposed the draft Personal Data Protection Act (B.E. ...) to the cabinet which was already approved by the Cabinet of Thailand.²⁵ The author proposed that the principle of the right to be forgotten should be provide in the Personal Data Protection Bill since the concept of this law aims to protect the information of the individuals which is similar with the concept of the rights.

Regarding to the section 5 of the drafted²⁶, the definition of “personal data” means any information or data relating to an identified natural person or can identify a natural person by reference to the facts, data or any other materials about that natural person which is similar to the definition of “personal data” under the European Union Directive. The law does not limit the form of data so it can be in any form, such as sounds, images, books, letters, or anything that can be recorded not only in computers but also in any kind of documents. This is deemed a broad meaning which already served the purpose of the right to be forgotten.

In addition to the present definition of the “personal data administrator”²⁷, the author would like to include a new party who obtains

²⁵ สรุปสาระสำคัญของกฎหมายคุ้มครองข้อมูลส่วนบุคคลและประเด็นที่เกี่ยวข้องกับการคุ้มครองข้อมูลส่วนบุคคลในการทำธุรกรรมทางอิเล็กทรอนิกส์ภาครัฐ, <http://www.etcommission.go.th/article-dp-topic-conclusion-dp.html>, (accessed on 19 July, 2016).

²⁶ Drafted of the Personal Data Protection, Section 5, <http://web.krisdika.go.th/data/news/news11804.pdf>, (accessed on July 1, 2016).

²⁷ Id.

the links or copies or replications of personal data, such as search engines, as one of these personal data administrators. This is as same as the new directive of the European Union that prevents the arguments of the duty of search engines and the right to be forgotten. However, the exercising of the right to be forgotten should be under the certain conditions as follows:

- (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- (b) the data subject withdraws consent;
- (c) the data is inaccurate, inadequate, irrelevant or excessive; or
- (d) the period of storage has expired

Moreover, Thailand should establish a supervisory authority for making removal or refusal decisions. This supervisory authority should have the authority to enforce the laws and issue the orders to the data controllers. The officers in this authority should come from the government in order to prevent the problem of double standard of making these decisions by private entities. In addition, it may save time and money from bringing a large number of requests to the courts. This new principle would be sufficient regulation to solve the existing problems of requesting for the removal of unwanted data.

This may encourage the nation to respect the individual's right; however, not every request for the removal should be processed. It is important to note that the right to be forgotten is not an absolute right, it needs to be balanced with other related rights, such as right to access information and freedom of expression. Of cause, setting a clear boundary for what circumstances where the information should be private or public is also important. With this way, the corporations may get the benefit by having the law as same as the international standard in particular under the European Union Regulations. In conclusion, all three entities, i.e. nations, corporations and individuals, will benefit by having the literal laws that are consistent with the international standard.

**PASSING OF RISK IN THE SALE OF GOODS ORDINANCE NO 11
OF 1896 IN SRI LANKA: AN ANTIQUATED THEORY: A
COMPARATIVE STUDY**

David Kithsiri Jayalath

Applicable Law in Sri Lanka

Sale of Goods law in Sri Lanka is governed by Sale of Goods Ordinance No 11 of 1896. The risk of accidental loss of the goods sold passes prima facie when the property passes as per section 21(1) of the Sale of Goods Ordinance No 11 of 1896 in Sri Lanka. Section 21(1) – “Unless otherwise agreed, the goods remain at the seller’s risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer’s risk, whether delivery has been made or not”.

This is an antiquated rule found in the Sale of Goods Ordinance No 11 of 1896 derived from its predecessor the UK Sale of Goods Act of 1893. More modern texts, such as the Uniform Commercial Code, the Uniform Laws on International Sales and the Vienna Convention on Contracts for the International Sale of Goods, provided that, as a rule, the risk shall pass on delivery of the goods.

Sri Lankan and foreign sales law

The first issue which has to be examined when a dispute arises between the parties about the delivery of the goods, the passing of the property or the risk, is whether the dispute is to be considered under Sri Lankan law or the foreign law prevailing in the country of the buyer or some other law chosen by the parties.

The adoption and implementation of the UN Convention on Contracts for the International Sale of Goods (CISG) can be resolved these problems much easier, and bring about greater certainty into the law. The answer which the rules on the conflict of laws may provide is that the issue is decide by Sri Lankan law, in which case provisions of the Sale of goods Ordinance will apply¹.

If, however, the contract is governed by foreign law, the SriLankan courts may still have jurisdiction to hear the case. The only inference which has to be drawn from the application of foreign law to a particular contract is that the rules of the relevant foreign law displace the provisions of the Sale of Goods Ordinance, and that foreign law can be relied upon in the Sri Lankan courts if its rules can be proved by expert witnesses or in another admissible manner.

In *Blue Diamond* case², about sale of diamonds to a foreign buyer and as to the place where contract was made and cause of action arose, Sri Lankan Supreme Court held that the District court of Colombo had jurisdiction to

¹ *Blue Diamonds Ltd v. Amsterdam Bank*, 2 Sri Lankan Law Reports 249.

² *Id.*

determine the case. If the Sri Lankan exporter has avoided the application of foreign law by the means of including in his contract an express stipulation that the contract shall be governed, in all respects, by Sri Lankan law, the Sale of Goods Ordinance would then apply to the sale contract.

Sri Lankan court decision on *Usman v Rahim*³

Sri Lankan Court of appeal in *Usman v Rahim* case held that “section 58(2) of the Sale of Goods Ordinance No 11 of 1896, applies only to the English law in force at the time the section was enacted, and not to any subsequent change in the English law”. This rule still valid in Sri Lanka.

Passing of property and the importance of time of passing of property

It is important to know the precise moment of time at which the property in the goods passes from the seller to the buyer, because-

(1) As a general rule, as provided in section 21 of the Sale of Goods Ordinance, the party entitled to property in the goods has to bear the risk of destruction of the goods by fire or other accidental cause; and

(2) In case of the bankruptcy of either seller or buyer, it is necessary to know whether the goods belong to the trustee of the bankrupt or not.

In the law of international trade, contrary to the presumption contained in section 21(1) of the Sale of Goods Ordinance, the two concepts of the passing of the risk and the transfer of property are regularly separated and the statutory presumption may be displaced by agreement of parties. Special arrangements may be agreed between themselves. In the absence of such arrangements the risk will generally pass in a contract for the sale of goods abroad when the goods leave the custody of the seller. In an Ex Works contract the risk normally passes when the goods are delivered to the buyer or his agent. In FAS contracts it passes when the goods are placed alongside the ship and in FOB and CIF contracts normally when they are delivered over the ship's rail.

If the contract provides for Delivered Duty Paid (DDU) of the buyer, the intention of the parties as regards the passing of the risk can often be gathered from the terms of payment and the insurance arrangement⁴. If the price is prepaid and the buyer is responsible for insurance, there is hardly a doubt that the goods travel at his risk. The result would be reversed if the price was collected on delivery and the seller had to cover the insurance risk. In container delivery terms the risk passes normally when the goods are delivered into the custody of the carrier⁵.

The risk, unlike the property, may pass to the buyer although the goods are unascertained goods that have not been appropriated, but traditionally only

³ 32 NLR (New Law Reports), 259.

⁴ Saleem Marsoof PC, *Introduction to International Sale of Goods*, 33,(2006).

⁵ *Id.*

if some “special facts” could be established. Such facts included situations where the buyer accepted the delivery order of the seller which instructs a warehouse man, for example, in *Sterns Ltd V Vickers Ltd*⁶ court held that to deliver a certain quantity from a bulk held at the warehouse, particularly if the buyer by the acceptance of the order undertakes the appropriate charges in respect of the goods comprised in the order.

Passing of risk according to the Civil and Commercial Code in Thailand

According to section 458 of the Civil and Commercial Code of Thailand (Hereinafter referred to in this thesis as “CCC”) ownership of the property is transferred to the buyer from the moment when the contract of sale is entered into. If a contract of sale is subject to a condition or a time clause then the ownership is transferred after the said condition is fulfilled or the said time has arrived. Section 458 of the CCC sets the rule that ownership passes to the buyer at the time of sale.

Section 460 states that, in case of unascertained property, the ownership is not transferred until the property has been numbered, counted, weighed, measured or selected or its identity has been otherwise rendered certain.

The rule as to “risk” is not laid down in the sale part of the CCC but is specified as a general rule, applicable to all contracts, in section 370 and 371 of the code. Under section 370, in a reciprocal contract intended to transfer any real right, right in rem, in specific property, if the property is lost or damaged without fault of the debtor, such loss or damage is borne by the creditor.

The application of section 370, in the context of a contract of sale, leads to a legal consequence that the buyer has to bear, immediately at the time the contract is entered into, the loss of or damage to the goods sold. In other words, risk pass to the buyer at the time of sale. But, if the goods are not yet ascertained and the property is not yet “specific property” accordingly, the risk of loss or damage does not yet fall on the creditor, under section 371 of the CCC.

Passing of risk under Sale of Goods Act 1979 in UK

According to section 20(1) of the Sale of Goods Act 1979, the risk passes at the time agreed upon by the parties., unless the parties have a contrary intention, the risk passes with title.

Common ownership rule

Section 20A, under the caption of “undivided shares in goods forming part of a bulk”, applicable to contracts for the sale of a specified quantity of unascertained goods if the conditions in 20 A (1) are met. Those conditions are:

⁶ [1923] 1 KB 78.

(a) The goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties; and

(b) The buyer has paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk.

Section 20A further states that in subsection (2), “where this section applies, then (unless the parties agreed otherwise) as soon as the conditions specified in paragraphs (a) and (b) of subsection (1) above are met or at such later time as the parties may agree-

(a) Property in an undivided share in the bulk is transferred to the buyer, and

(b) The buyer becomes an owner in common of the bulk.

Section 20A(3) states that “the undivided share of a buyer in a bulk at any time shall be such share as the quantity of goods paid for and due to the buyer out of the bulk bears to the quantity of goods in the bulk at that time”. If a buyer has paid the price for only some of the goods due to him out of a bulk, any delivery to the buyer out of the bulk shall be ascribed in the first place to the goods in respect of which payment has been made. This section further explains that ‘a payment of part of the price for any goods shall be treated as payment for a corresponding part of the goods’.

UK legislators added another subsection to section 20 recently under the caption, ‘Deemed consent by co-owner to dealings in bulk goods’. Section 20 (B) (1) says that,

A person who has become an owner in common of a bulk by virtue of section 20A shall be deemed to have consented to-

(a) Any delivery of goods out of the bulk to any other owner in common of the bulk, being goods which are due to him under his contract;

(b) Any dealing with or removal, delivery or disposal of goods in the bulk by any other person who is an owner in common of the bulk in so far as the goods fall within that co-owner’s undivided share in the bulk at the time of the dealing, removal, delivery or disposal

Passing of risk-chapter IV of CISG

The Convention's provisions on the passing of risk will apply only when the parties had not made any previous express or implied arrangement on the issue, since the CISG forms positive law, which means that the parties can exclude the application of its provisions completely or vary the effect of specific articles⁷.

The Vienna Convention regulates the passing of risk from the seller to the buyer in Chapter IV of Part III, in articles 66-70 CISG. Those articles deal with the allocation of "price risk" and give answers to the following questions;

⁷ CISG article 6.

- i) is the buyer in a case of accidental loss or damage of the goods still obliged to pay for their price notwithstanding their loss or damage?
- ii) And does the seller still have the right to claim payment of the price?

‘Loss or Damage’ to the goods after the risk has passed to the buyer- Article 66

The consequence of passing of risk according to the first sentence of article 66, is that the buyer will still be obliged to pay the price of the goods, which have been accidentally lost or damaged, as if he had received goods conforming to the contract of sale. The factors leading to that choice are various: the buyer will be the one who will receive the goods at the end of the day and he will be in a better position to check them and handle their possible loss or damage.

The meaning of risk in Chapter IV encompasses any loss or damage to the goods due to any incident for which neither of the parties is responsible. Since the loss was accidental, the buyer cannot accuse the seller for non-performance and deny fulfilling his obligations. Article 66 CISG clearly states that the buyer is obliged to pay for the price of the goods after the risk has passed to him.

Nevertheless, the last phrase of article 66 introduces an exception to the previous rule of the first sentence of article 66. Thus, if the loss or damage is caused by an act or omission of the seller, then the seller will be the party that will bear the risk and the buyer will not be obliged to pay the price.

Risk when contract involves carriage- Article 67

The passing of risk in sales involving carriage of goods is regulated in the Convention in a separate article, in article 67, and since sales involving carriage of the goods is the most common situation in international sale contracts, article 67 forms the basic provision for the passing of risk under the Convention. Paragraph one of article 67 establishes two rules:

- a) If the seller and buyer did not agree for the goods to be handed over at a particular place, then the risk passes to the buyer when the goods are handed over to the first carrier in accordance with the contract of sale.
- b) If the parties agreed on the handing over of the goods to the carrier in a particular place, the risk passes when the goods are handed over to the carrier at that particular place.

This rule is very practical and efficient, since the splitting of transit risk is avoided and the buyer bears the risk during the whole transport in land and water. Generally the splitting of transit risk is undesirable, as it presents serious problems of proof. Hence, it is not easy to prove when the damage occurred -- if it happened before or after the point of passing of risk to the buyer -- especially when it was caused by a non

obvious event (overheating, seawater damaging the cargo), which is normally revealed at the end of the journey⁸.

The first sentence of article 67(1) eliminates that possibility by charging the buyer with the burden of bearing the transit risk. On one hand, that is fair, since the goods are not under the seller's control anymore and he should not bear the risk of goods that are no longer in his hands. But on the other hand, the goods are not under the physical control of the buyer either - they are under the control of the carrier⁹.

The rule in the second sentence of article 67(1) does not present any special difficulties. It applies in situations where the parties have agreed on the handing over of the goods in a specific place¹⁰. In these situations the risk will not pass when the goods are handed over to the first carrier, but when they are handed over to the carrier in the agreed place, and if the place is generally described, the seller will have the right to specify it.

The third sentence of article 67(1) stresses that even if the seller has retained any documents, with which he is able to control the disposition of the goods, this does not prevent the risk from passing. This phrase is an indicative declaration that the Convention does not connect the passing of risk with ownership. "The purpose of the third sentence of Article 67(1) is to ensure that the rules as to risk in the first two sentences are not subverted by the common practice of sellers of retaining the shipping documents as a form of security for the payment of the price. It guards against misunderstanding which might arise, particularly in the minds of those accustomed to legal systems in which risk and property are linked"¹¹.

The second paragraph of article 67 clearly requires that the goods should be "clearly identified to the contract" for the risk to pass to the buyer. By this prerequisite there is an attempt to protect the unsuspecting buyer from the seller's false claims in a partial loss or damage, that the lost or damaged goods were those that the buyer bought¹². This provision especially refers to bulk goods and collective consignments, like wheat or oil and generally to liquid cargos. It is necessary, therefore, that the goods are identified and this happens, according to the article's wording, when the seller puts markings on the goods, when the goods are expressly indicated in the shipping documents, when the seller gives notice to the buyer, or in any other way, since the enumeration in article 67(2) is not exhaustive¹³.

⁸ Zoi Valioti, "Passing of Risk in International Sale Contracts", **Nordic Journal of Commercial Law**, 14, (2002).

⁹ *Id.*

¹⁰ *Id.*

¹¹ S. Bollee, "The Theory Risks in the 1980 Vienna Sale of Goods Convention", 256, available at <http://cisgw3.law.pace.edu/cisg/biblio/bolle.html>, (last accessed April.30, 2016).

¹² *Id.*

¹³ Zoi Valioti, *supra* note 8.

Sale of goods during transit -Article 68

The Convention has a separate article on the passing of risk of goods that are sold during transit. Goods afloat are a quite special category that needs a separate regulation, since they are several times exposed to unusual circumstances, like perils of the sea, risks of war, piracy and more. This is frequently the case where the seller has bought in advance large cargos of oil, wheat, natural gas, and metals and generally goods that are carried in bulk and starts the journey towards a destination without having previously sold the goods and without knowing the recipients¹⁴.

The contracts of sale will then be concluded while the goods are in transit and in most cases the goods will be sold several times until their final destination. The CISG deals with this situation in article 68, which provides that the risk passes to the buyer from the moment that the contract is concluded¹⁵ and only in special circumstances does the risk pass retroactively from the moment of handing over of the goods to the carrier who issued the documents embodying the contract of carriage.¹⁶

The third sentence of article 68 "introduces a proviso"¹⁷; it provides that when the seller knew or was supposed to know at the moment when the contract was concluded, that the goods had suffered damage or loss and did not inform the buyer, then he bears the risk of the loss or damage.

General residual rules on risk-Article 69

Article 69 is called the 'residual rule' on the passing of the risk in the CISG. Contracts of international sale of goods that do not fall within the scope of article 67, involving carriage, and article 68, sale of goods in transit, will be governed by article 69:

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods, or if he does not do so in due time, from when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

Risk when the seller is in breach- Article 70

¹⁴ K.Pantelidou, "Issues from the allocation of risk under the Vienna Convention for the International Sale of Goods" 97, **Private Law Chronicle**, (2002).

¹⁵ Article 68 first sentence.

¹⁶ Article 68 second sentence-exception.

¹⁷ B.Nicholas in C.M.Bianca and M.J.Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987) art 68, para 2.3.

Article 70 of the Vienna Convention handles the relationship between the rules on passing of the risk and the rules concerning breach of contract by the seller. It answers the question whether the risk can be transferred back from the buyer to the seller when that seller is in breach of the contract.

Passing of risk according to the Incoterms 2010-

The meaning of risk under INCOTERMS 2010 is the same as in the Vienna Convention and covers any physical loss or damage to the goods that is "accidental" and for which neither of the parties is responsible, i.e. caused by "acts of God" or acts or omissions of third parties.

The transfer of risk in Incoterms is linked to the delivery obligation of the seller. The main rule expressed in Incoterms is that the seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with the Incoterm, and that the buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in the Incoterm.

Concept of Risk

The concept of risk and which will be the party who bears it, is an issue of extreme importance, which preoccupies both parties in a contract of sale. The reason of its importance is its peculiar nature, which might lead to certain harsh and unfair effects and result in the buyer being obliged to pay the price for the goods, even if they have been lost or damaged by a cause irrelevant to the party's act or omission. Therefore, because of its nature and especially because of its consequences, normally the parties will make specific arrangements in their contract regulating the passing of risk, or make express or implied agreements on the application of standard trade terms. In the most rare case of no previous arrangement, then national laws or international conventions regulating the matter will apply¹⁸.

Time and consequence of passing of risk

It is true that the goods might suffer loss or damage in various points in time from the formation of the contract of sale till the actual handing over to the buyer, since these two actions might either coincide and take place at the same time, or a long period of time might elapse between them. During that time there is always the possibility that the goods might suffer loss or damage due to a sudden and unexpected accidental event, for which neither the seller nor the buyer share any responsibility. The question that is of importance in all these situations is a question of time: when did the risk pass? The answer is decisive since by answering this question it is determined which of the parties; the seller or the buyer will bear the risk and its consequences. The rules on the passing of risk, therefore, are dealing with the issue of whether the buyer will still have to pay for the price of the

¹⁸ Zoi Valioti, *supra* note 8, at 2-3.

lost or damaged goods even if he never received them or he received them in a poor state, and whether the seller will still be entitled to receive the price for the goods.

Theories on the passing of risk

Depending on the legal structures, social circumstances and background, three main theories have developed and been adopted regarding the time of passing of risk:

The first theory links the time of the passing of risk with the time of conclusion of the contract of sale. This theory is not very practical, since most of the times, especially in international sales, at the moment when the contract is concluded the goods are still in the hands of the seller and thus, under his control. A situation where the seller has the control of the goods and the buyer has to bear the risk is hardly desirable, since the buyer will always claim that the seller did not exercise due diligence, creating serious disputes and litigation. The first theory is adopted by Switzerland, Spain, Netherlands, and CISG article 68 on sale of goods during transit.

The second theory connects the passing of risk to the passing of ownership. This theory is quite impractical as well, since the ownership is not at all connected or related to the notion of risk. Moreover, this theory does not correspond to the latest practices of sale of goods with retention of ownership, given that in these cases the seller maintains the ownership while the buyer possesses the goods. That means that the seller will have to bear the risk of goods that are under the control of the buyer; this result is undesirable as well, since it will certainly lead to litigation. The second theory is adopted by Sale of Goods Act 1979 in UK, Sri Lanka, Hong Kong, Singapore, France, Italy, India and Thailand

The third theory that has developed connects the passing of risk with the time of delivery of the goods . That means that the party, which has physical control over the goods will be the one bearing the risk. This theory seems the most fair and reasonable since the party that possesses the goods is in a better position to guard them, take the necessary precautions for their safety, or the appropriate actions to save them after the damaging event had occurred, collect the remaining goods that escaped the damage or loss, assess the damage and turn to the insurer for indemnification where and when the goods are insured . The third theory is adopted by CISG in articles 67 and 69, Germany, Greece, Sweden, USA, China, Japan and Singapore.

Analysis

Having examined the pertinent provisions and case law, we can conclude that the CISG, as a general law, would follow the approach that links the transfer of risk and the delivery of the cargo. On the other hand, the SGA 1979 connects transfer of property and transfer of risk.

In relation to the basic situation where the seller must deliver a particular cargo to the purchaser at his own location of business, the Vienna Convention 1980 follows the same method because it considers that risk

will pass on delivery as soon as the purchaser takes control over the cargo. On the other hand, in English law risk passes prima facie once the contract is concluded by parties, and this is the decisive point for transferring the property. It has been suggested that the Convention is fair and useful because the seller has control over the cargo and it is easier for the seller to provide insurance for the goods as well as protecting them while they are under his control. Moreover, it is likely that the cargo can be covered by standing policies, which are held by the seller with regard to his location and their contents, while the purchaser will most likely need a particular policy in order to cover certain risks.

In respect of the sale of unascertained commodities, it appears that both the SGA 1979 and the CISG rely upon previous ascertainment by the seller. In a sale in which the dispatch of the commodities is not involved, the Vienna Convention 1980 first requires the seller to identify the commodities and after doing so, he should put them under the control of the purchaser¹⁹, who is in default when not accepting delivery. In addition, both the SGA 1979 and the Convention use the same methods with regard to the purchaser's default in accepting the commodities delivery. In this situation, the risk under the CISG transfers to the buyer at the moment that the cargo is put at his disposal; or if the delay by him is enough to be a breach of contract. Similarly, under the SGA 1979 the purchaser is responsible for the risk if he causes the delay to the delivery and this delay contributes to the loss of the cargo, as was the case in *Demby Hamilton and Co Ltd v Barden*²⁰.

We have seen that the passing of risk provisions in the Sales of Goods Ordinance No 11 of 1896 in Sri Lanka are antiquated. Fundamental reason for this situation is that Sri Lankan courts are not allowed to follow SGA 1979 provisions on passing of risk by the Court of Appeal decision in *Usman v. Rahim*. Since we have not adopted CISG into our domestic legal system Sri Lanka courts have no jurisdiction to interpret risk provisions in CISG.

Sale of Goods Ordinance No 11 of 1896 is not a complete and comprehensive piece of legislation for modern business world. It is most unfortunate and indeed inexplicable as to why the Sale of Goods Ordinance has been allowed to remain almost unchanged for nearly 120 years. This is especially so when the areas requiring radical change have been highlighted through the numerous reforms that have transformed the original English Act in to quite a different entity²¹.

Recommendations

¹⁹ Article 69.3 of the Convention.

²⁰ *Demby Hamilton and Co Ltd v Barden*, [1949] 2 All ER 435.

²¹ Dynalex, “*The Sale of Goods Ordinance No 11 of 1896-A Long way to go?*”, available at <https://dynalex.wordpress.com/2012/10/25/the-sale-of-goods-ordinance-no-11-of-1896-a-long-way-to-go>. (last accessed on April. 30, 2016)

Sri Lanka should adopt CISG to rectify the present antiquated legal theory in Sale of Goods law in Sri Lanka. Sri Lankan Parliament has the power to adopt and regulate CISG into domestic legal system in Sri Lanka. This is similar to Singapore's formation of CISG into its domestic legal system. At the same time Sri Lankan Parliament could pass a legislature to overrule the decision in *Usmain v. Rahim* and allow the Sale of Goods Act 1979 in UK to be applicable in Sri Lanka as its domestic law. Finally, Sri Lankan Parliament could pass a new legislature to adopt Sale of Goods Act 1979 in UK and its subsequent amendments.

NON-USE CANCELLATION AGAINST TRADEMARK REGISTRATION IN THAILAND*

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Abstract

Non-use cancellation is a legal proceeding for cancelling the registration of trademark based on the claim that such trademark has not been genuinely use in course of trade, within a proper period, by the trademark owner who registers such trademark to commercially utilize to the trade and benefit to the economic. In addition, the cancellation can also claim that such trademark owner has no intention to use the trademark in commerce. This kind of cancellation, non-use scheme, can be a significant method for cleaning up the cluttered Registry records, and help in revoking the registration of unused trademarks from the system. This could, in turn, provide the opportunities for later comer, who may genuinely use an identical or similar trademark in commerce, but its application has been rejected by the Registrar due to the obstacle of the prior registration of such unused trademark. The later comer may file a cancellation to eliminate such obstacle and finally obtain the protection.

In Thailand, although the provision regarding non-use cancellation proceeding has been provided under Section 63 of Thai Trademark Act B.E. 2534 (1991). However, considering on the precedent orders of Board of Trademark and Supreme court's judgment, it appears that the non-use cancellation in Thailand has been a difficult proceeding in practice. Due to the facts that a petitioner, who files a cancellation request, must bear the burden of proof showing the absolute non-use of the registered trademark that belongs to the other party. Moreover, the petitioner is also required to prove the intention in mind of the registrant demonstrating lack of bona fide intention to genuinely use the trademark in relation to the registration. These burdens to produce the evidences in term of such negative facts seem to be impossible for the petitioner. In addition, Thailand does not allow partial cancellation, which is resulting that the petitioner must prove the actuality of non-using of trademark on every items as applied in the registration. Besides, the standard of proof required by the Board of Trademark has been set very high. These requirements have put more burden to the petitioner. Where the non-use cancellation rarely succeeds, the unused trademark registration would be as a barrier for the new

* This article is summarized and arranged from the thesis “Non-use Cancellation against Trademark Registration in Thailand” Master of laws in Business law (English Program), Faculty of Law Thammasat University, 2015.

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investors to put invest their business in the country where their trademarks could, perhaps, be in risk of not being protected.

For the above reasons, the Author therefore has studied on the problems in practice of non-use cancellation proceeding in Thailand, by comparing with the provisions and proceedings of this scheme that have been adopted in foreign countries e.g. the United States of America, the United Kingdom, Japan and the People Republic of China. According to the research, the Author found that the burden of proof and requirement for standard of proof in such jurisdictions have been stipulated differently from Thailand, which enable the non-use cancellation in these particular countries are efficiently implemented. It is to say that the successful non-use cancellation scheme is also benefit to urge the registrant to be aware of genuinely use its trademark in course of trade, which plays a vital role in balancing between the rights given to the trademark owner and public interest, as well as supporting the improvement of trade and economic growth. As a result, adopting the advantages and goodness of non-use cancellation proceedings from foreign countries could enlighten Thailand to see the unresolved problem and significant necessity to eliminate the obstacles that block the foreign investor to come invest in Thailand and impede the economic growth.

Keywords: Trademark, Non-use Trademark, Cancellation, Non-use Cancellation

บทคัดย่อ

บทบัญญัติเกี่ยวกับการเพิกถอนทะเบียนเครื่องหมายการค้าด้วยเหตุที่ไม่มีการใช้ (Non-use cancellation against trademark registration) คือ การเพิกถอนการจดทะเบียนของเครื่องหมายการค้าบนข้ออ้างที่ว่า เครื่องหมายการค้าที่ได้รับจดทะเบียนแล้วไม่ได้ถูกใช้ให้เกิดประโยชน์ในทางการค้าอย่างแท้จริง (Genuine use) ภายในระยะเวลาที่เหมาะสมโดยเจ้าของเครื่องหมายการค้าขึ้นของจดทะเบียน หรืออาจเป็นกรณีการเพิกถอนทะเบียนเครื่องหมายการค้าบนข้ออ้างที่ว่า เจ้าของผู้ขึ้นของจดทะเบียนไม่มีความตั้งใจที่จะใช้ (Intention to use) เครื่องหมายการค้าดังกล่าวเลย ซึ่งกระบวนการเพิกถอนในลักษณะนี้มีความสำคัญที่สามารถช่วยลบล้างเครื่องหมายการค้าที่ไม่ได้ใช้ทั้งหลายออกจากระบบข้อมูลในบันทึกของนายทะเบียน และเป็นการเปิดโอกาสให้บุคคลอื่นที่อาจใช้เครื่องหมายการค้าที่มีลักษณะเดียวกันหรือเหมือนกันแต่ไม่สามารถจดทะเบียนได้เนื่องจากมีเครื่องหมายการค้าที่ไม่มีการใช้จริงดังกล่าวจดทะเบียนไว้ก่อนหน้าอันเป็นอุปสรรคขัดขวางการจดทะเบียนของผู้ขอรายหลังนี้ สามารถยื่นคำร้องขอเพิกถอนเพื่อจัดอุปสรรคดังกล่าวและขอรับความคุ้มครองในเครื่องหมายการค้าของตนได้ในภายหลัง

ในประเทศไทย แม้พระราชบัญญัติเครื่องหมายการค้า พ.ศ. 2534 จะมีบทบัญญัติเกี่ยวกับการเพิกถอนเครื่องหมายการค้าด้วยเหตุที่ไม่มีการใช้บัญญัติไว้ในมาตรา 63 ก็ตาม แต่เมื่อศึกษาถึงแนวทางของคำสั่งของคณะกรรมการเครื่องหมายการค้าและคำพิพากษาของศาลฎีกาในกรณีดังกล่าว จะเห็นได้ว่า การเพิกถอนเครื่องหมายการค้าตามมาตรา 63 นั้นเป็นไปได้ยากในทางปฏิบัติ เนื่องจากผู้ยื่นคำร้องขอ (Petitioner) จะต้องเป็นผู้ที่มีภาระการพิสูจน์ถึงการไม่ได้ใช้เครื่องหมายการค้าที่จดทะเบียนแล้วในทางการค้าอย่างแท้จริง ซึ่งเป็นเรื่องยากที่ทางผู้ยื่นคำร้องขอจะสามารถนำสืบข้อเท็จจริงหรือหลักฐานอันเป็นการพิสูจน์หลักฐานในเชิงปฏิเสธ (Negative

facts) เกี่ยวกับการไม่ได้ใช้เครื่องหมายการค้าของบุคคลอื่น ยิ่งไปกว่านั้น ผู้ยื่นคำร้องจะต้องพิสูจน์ให้เห็นถึงเจตนาภายในของเจ้าของเครื่องหมายการค้าผู้จดทะเบียนด้วยว่า ไม่มีความตั้งใจโดยสุจริตที่จะใช้เครื่องหมายการค้าดังกล่าวเลย ซึ่งเป็นเรื่องที่แทบจะเป็นไปไม่ได้ อีกทั้ง กฎหมายยังมีข้อกำหนดของกระบวนการยื่นการฟ้องร้องที่ทำให้ผู้ยื่นคำร้องจะต้องพิสูจน์ถึงการไม่ได้ใช้เครื่องหมายการค้าดังกล่าวกับทุกรายการสินค้าที่ยื่นขอจดทะเบียนและมาตรฐานของการพิสูจน์นั้นก็ได้อีกกำหนดโดยคณะกรรมการเครื่องหมายการค้าไว้สูงมากอันเป็นการเพิ่มภาระให้แก่ผู้ยื่นคำร้องมากยิ่งขึ้น ในประเทศที่การฟ้องร้องการจดทะเบียนเครื่องหมายการค้าที่เป็นอุปสรรคนั้นกระทำได้อย่างยาก การจดทะเบียนของเครื่องหมายการค้าที่ไม่ได้ใช้จริงในทางการค้านี้จะส่งผลให้กำแพงกีดกันนักลงทุนรายใหม่เข้ามาลงทุนในประเทศ เนื่องจากเครื่องหมายการค้าของเขาเหล่านี้อาจมีความเสี่ยงที่จะไม่ได้รับความคุ้มครอง

ด้วยเหตุนี้ ผู้เขียนจึงได้ศึกษาถึงปัญหาของกระบวนการฟ้องร้องการจดทะเบียนดังกล่าวในเชิงปฏิบัติ โดยได้เปรียบเทียบกับบทบัญญัติและกระบวนการฟ้องร้องการจดทะเบียนในลักษณะเดียวกันที่ได้ใช้บังคับอยู่ภายใต้กฎหมายในต่างประเทศ อันได้แก่ สหรัฐอเมริกา สหราชอาณาจักร ญี่ปุ่น และสาธารณชนจีน พบว่ามีการกำหนดการฟ้องร้องในเรื่องดังกล่าวนี้แตกต่างจากประเทศไทย ทำให้กระบวนการฟ้องร้องการจดทะเบียนในประเทศเหล่านี้มักจะประสบความสำเร็จ และส่งผลให้เจ้าของเครื่องหมายการค้าตระหนักถึงการไม่ใช้เครื่องหมายการค้าที่จดทะเบียนแล้วในทางการค้าอย่างแท้จริงอันมีบทบาทสำคัญในการสร้างความสมดุลระหว่างการคุ้มครองของเจ้าของเครื่องหมายการค้าและประโยชน์สาธารณะ ตลอดจนสามารถขับเคลื่อนเศรษฐกิจและเติบโตทางการค้าในแต่ละประเทศมากยิ่งขึ้น ดังนั้น หากสามารถนำข้อดีจากบทบัญญัติและกระบวนการฟ้องร้องในทางปฏิบัติของประเทศเหล่านี้มาปรับใช้กับกฎหมายและกระบวนการในทางปฏิบัติของประเทศไทยอาจส่งผลให้การฟ้องร้องการจดทะเบียนเครื่องหมายการค้าด้วยเหตุที่ไม่มีการใช้นี้ประสบความสำเร็จและมีประสิทธิภาพมากขึ้น

คำสำคัญ: เครื่องหมายการค้า, เครื่องหมายการค้าที่ไม่มีการใช้, กระบวนการฟ้องร้องการจดทะเบียนเครื่องหมายการค้า, การฟ้องร้องการจดทะเบียนเครื่องหมายการค้าด้วยเหตุที่ไม่มีการใช้

1. Introduction

Trademark is a kind of intellectual properties which is categorized as an industrial property,¹ which is created for the purpose of indication of the origin of products or services which bear under such particular trademark.² As being an identifier of one person's goods or services,³ it is necessary that a trademark must be put in genuinely used by the owner who may be manufacturer or seller to represent as a symbol allowing public and consumers, who are more relying on trademark, to distinguish its products or services from products or services belonging to others. The consumer always repurchases the goods or services based on a previous pleasurable experience or manufacturer's reputation for quality.⁴ On the other hand, the

¹ กรมทรัพย์สินทางปัญญา. 99 ปี เครื่องหมายการค้าไทย. 16. พิมพ์ครั้งที่ 1 พ.ศ. 2556 (Department of Intellectual Property, 99 Years of Thai Trademark. (1st Edition, 2013))

² วาส ดิงสมิต. คำอธิบายกฎหมายเครื่องหมายการค้า. 2. พิมพ์ครั้งที่ 1. กรุงเทพมหานคร : สำนักพิมพ์นิติธรรม. 2545. (Wat Tingsamit. **Explanation of Trademark Law**. 2. (1st Edition Bangkok: Nitiitham, 2002))

³ Amada Michaels. **A Practical Guide to Trademark Law**. 88. (3rd Edition. London Sweet & Maxwell, 2002)

⁴ *Supra* note 2.

owner and manufacturer is also benefit from trademark to facilitate the advertisement of products by enabling the consumers to recognize the products and its brand name easily in a short period of time and be encouraged to purchase such products from seeing the trademark.⁵ Therefore, a trademark functions as a tool that both benefits to the trade and encourages economic growth.

Trademark law has been developed to provide a legal protection for traders' interests along with protecting the public and consumers. The protection of trademark is provided by a negative form of protection.⁶ It is called "exclusive" rights, which given to the owner in order to prevent others from using his intellectual property without any authority.⁷ Therefore, under such power, the trademark owner tries to seek the legal protection by early applying for registration in order to receive a tangible evidence to present its legal certainty.⁸

Occasionally, a trademark owner may early file an application in order to be the first party who registers it, and secures the protection, even if the owner might not have used such registered trademark in commerce or have no intention of using it. This type of registration is considered as defensive registration which places a barrier preventing others from registering the same or similar trademark. Therefore, such owner of the registered trademark only holds the registration on paper, but they do not utilize the protection received for their trademark in the course of trade.

Thus, on this basis, Trademark law imposes a legal proceeding that provides the opportunity for a third party, who believes that they are affected by the unused trademark that have been prior registered as an obstacle to the later application, to file a petition to remove such existing registration.⁹ However, as trademark law is correspond to the 'principle of territoriality'¹⁰, each country has its own territorial decision to provide a legal protection for a trademark within its jurisdiction and impose the its own way to regulate the trademark system to the domestic law. Therefore, the non-use cancellation scheme may be implemented and required

⁵ *Id.*

⁶ Marisa Cremona. **Intellectual Property Law**. 88. (4th Edition. Palgrave Macmillan Law Masters, 2006)

⁷ *Id.*

⁸ Japan Patent Office. Outline of Japanese Trademark System. http://www.jpo.go.jp/torikumi_e/hiroba_e/pdf/136th_inta/pamphlet.pdf (accessed on December 10, 2015)

⁹ International Trademark Association (INTA). "*Cancellation of a Registered Trademark*". March 2016. <http://www.inta.org/TrademarkBasics/FactSheets/Pages/CancellationofaRegisteredTrademarkFactSheet.aspx> (accessed on December 5, 2015)

¹⁰ วิชัย อริยานันทกะ. ข้อสังเกตบางประการเกี่ยวกับกฎหมายเครื่องหมายการค้าและการป้องกันการแข่งขันที่ไม่เป็นธรรม "วารสารกฎหมายทรัพย์สินทางปัญญาและการค้าระหว่างประเทศ". 2545. (Vichai Ariyanuntaka. "Some observations on the legal protection of Trademarks and Unfair competition law." Intellectual Property and International Trade Law Journal. 2002.)

differently in each country. Where the requirement for proving use or non-use are not set too high, the non-use cancellation may be efficiently successful. While on the other hand, in some countries where the burden of proof lies on the petitioner and requires high standard of proof, non-use cancellation could be a difficult proceeding.

2. Non-use cancellation against trademark registration

The non-use cancellation scheme is enacted to remedy the defect of registration system, "First-to-File system", that grants the protection as an exclusive right to use to the first come first serve basis, regardless on the genuine use of trademark in course of trade. The trademark that have a prior registration, but in facts, is not used to serve the commercial purpose, may affect to the rights of later trademark owner, who may genuinely use the same or similar trademark in course of trade. The later application would be refused by the Trademark Office due to the obstacle of prior registration of unused trademark. As a result, if the non-use cancellation scheme is successful, it may facilitate clearing the unused trademark from the Registry's records and being a true reflection of the commercial reality.¹¹ Once the cancelling decision issued, it does not mean only erasing of the trademark in registry records itself, but also means the erasing all the rights of the trademark owner that come along with it in which obtained from such registration.¹² It is to say that non-use cancellation scheme is also benefit to urge the registrant to commercially use the trademarks in order to maintain its legal protection, as well as to support the public interest by relieving the imbalance between the shortage of trademark resources and the strong demand for trademarks.¹³

The party who is entitled to file a request for non-use cancellation against the registered trademark may be anyone or an aggrieved party whose interest is affected from such existing registration, depending on the requirement in each country. According to Article 19 of TRIPs Agreement, it requires that a registration which could be cancelled only when it has been in an uninterrupted period of at least 3 years of non-use¹⁴. However, in

¹¹International Trademark Association (INTA). *"Standing Requirements in Connection With Non-Use Cancellation Actions"* November 13, 2013 <http://www.inta.org/Advocacy/Pages/StandingRequirementsNonUseCancellationActions.aspx> (accessed on December 5, 2015)

¹² Robin N. Brenner. *"Use it or Lose it! Burdens of Proof in Non-Use Cancellation Actions: A Call for Balance in the Trademark Laws of Thailand, Indonesia and India"*, **Cardozo Arts & Entertainment Law Journal**. 491.(Vol. 27 Issued 2, 2009)

¹³ Hui Gao. CCPIT Patent & Trademark Law Office. *"Protection of Registered Trademarks in Non-Use Cancellation Cases in China"*. January 23, 2015 <http://www.lexology.com/library/detail.aspx?g=2c55e192-5ffe-47e3-823b-c4a3c285aca5> (accessed on July 15, 2016)

¹⁴ TRIPS Agreement. Article 19.

some countries i.e. India¹⁵, Indonesia¹⁶, they may apply at least 5 years period as from the date of registration to allow the non-use cancellation scheme.

In most countries, the non-use cancellation request must be filed as a petition with the Trademark Office in each country. In some countries, it is considered as a litigation process that must be presented as a lawsuit with the Court within particular jurisdiction.

The burden of proof and requirement for standard of proof is upon each internal regulation of Trademark Law and practice in each country, which in some countries, the burden of proof lies on the petitioners, but in some countries, the trademark owner will bear such burden. According to some experts' opinions, a tendency of imposing a burden of proof for such non-using trademark should be bound by the registered owner, rather than the petitioner.¹⁷ It is very difficult for any third party who has no access to the facts and information of the use of trademark to prove its non-use. It was opined that in case of removing a deadwood from the registry records as this method of non-use cancellation, such a reversal of the burden of proof seems to be justified.¹⁸

It is also possible to apply to remove the entire registration in respect of all list of goods, or only some of the goods or services for which the trade mark is registered. By cancelling only some of the goods or services as registered in the application is for the aspect that only some of goods or services are concerned to be deemed as non-use as per the ground for revocation, therefore the revocation shall only relate to those goods or services, not all the items listed in the application.

3. Comparative study: non-use cancellation against trademark registration in foreign countries

1. The United States of America

The trademark registration and claim for the lawful ownership approach in the United States of Americas ("US") is based on the First-to-Use system. That is to say that basically, any person who firstly use the trademark is assumed to have the lawful ownership of the trademark.

The provision concerning non-use cancellation is provided in the US Trademark Act 1946¹⁹, also known as the Lanham Act. It provides that a petition for requesting a non-use cancellation may be filed, at anytime, by an interested person who believes that he is or will be damaged if the registration of trademark, which abandoned by the owner. According to the

¹⁵ Indian Trademark Law. Article 46.

¹⁶ Indonesian Trademark Law. Article 69

¹⁷ World Intellectual Property Organization (WIPO). **Background Reading Material on Intellectual Property**. 78. (2nd Edition. WIPO Publication, 2008)

¹⁸ *Id.*

¹⁹ US Trademark Law. § 14 (15 U.S.C. § 1064).

Court's judgment in case *Auburn Farms, Inc. V. McKee Foods Corps*²⁰, the burden of proof is set forth that the petitioner has to prove only a prima facie evidence that the owner of registered trademark in question has abandoned the trademark pursuant to the provision of Section 1127.²¹ Once the petitioner can prove such prima facie evidences of abandonment, the burden of proof will be shifted to the trademark owner who bears the duty to rebut that the trademark is still in use or has intention to resume the use.²²

Since the US has the requirement for genuine use, which is the process that forces the trademark owner to submit evidences proving the use of trademark within the prescribed periods, in order to obtain and maintain the registration. Therefore, the abandonment of trademark, or lack of intention to use trademark by the trademark owner, can be demonstrated through the act of not providing statement of use when the time requested. The petitioners who request the cancellation based on the claim of such non-use may easily find these information and evidences from the Registrar's records. Once the evidences showing abandonment by the trademark owner is established, then, the trademark owner shall bear the burden to rebut the allegation by submitting the evidences showing use of his or her own trademark and/or the intention to continue to use it, which the evidences shall be in hands if the mark and business regarding this mark is actually being operated. This process shows that the US Court does not stipulate too high standard of proof for both petitioners and trademark owners. Therefore, the burden of proof for non-use cancellation in US is not too difficult to overcome.

2. The United Kingdom

The United Kingdom ("UK") is a common law country, which has adopted a mix of "First-to-use" and "First-to-file" for its trademark acquisition system to compromise with the common practice of the rests of the European Community. However, upon the current situation, due to the result of "Brexit" referendum²³ on June 26, 2016, there are still remaining of unanswerable questions as to how UK could stipulate the internal laws in

²⁰ เอกรินทร์ วิริโย, ปัญหาการเพิกถอนการจดทะเบียนเครื่องหมายการค้าด้วยเหตุที่เจ้าของเครื่องหมายการค้าไม่ใช้เครื่องหมายการค้า, วารสารนิติศาสตร์, 737, ปีที่ 44 ฉบับที่ 3, กรุงเทพมหานคร : โรงพิมพ์มหาวิทยาลัยธรรมศาสตร์, กันยายน 2558 (Aggarin Viriyo, "Problems on Trademark Cancellation on the Ground that the Trademark Has Not Been Used" *Thammasat Law Journal*, 737, Volume 44 No. 3, Bangkok : Thammasat University Publishing, September (2015).) (Citing 51 U.S.P.Q. 2d 1439, 1443 (1999))

²¹ US Trademark Law, § 45 (15 U.S.C. § 1127).

²² *Supra* note 20.

²³ Brian Wheeler & Alex Hunt, BBC News, "Brexit: All you need to know about the UK leaving the EU" <http://www.bbc.com/news/uk-politics-32810887> (accessed on July 21, 2016). (Citing "It is a word that has become widely used as a short way of saying the United Kingdom is leaving the European Union by merging of the two words Britain and Exit".)

many issues and how this would affect to trademark registration system. The reason that the Author has studied this UK trademark law due to the facts that the first Trademark Act of Thailand B.E. 2475 (1931), was enacted by, at that time, followed UK trademark law, Trade Mark Act 1905.²⁴ Therefore, the non-use cancellation proceeding in Thailand has its roots from the UK's trademark law.

Any person may apply for the revocation of the non-use trademark in UK may be either made to the Registrar with United Kingdom Trademark Office or Court.²⁵ In the Section 46(1)(a), an application for revocation can be made only if a trademark in question has been registered for at least five years with the earliest date of revocation being the day following the fifth anniversary of the registration date.²⁶ This means that the period of five years counts from the date of completion of the registration procedure, rather than from the date of filing of the application.²⁷ If non-use is alleged, it is for the trademark owner to show what use, if any, has been made of the mark.²⁸

The UK Trademark Law has clearly stipulated the burden of proof specifically for the non-use cancellation that the burden must bear by the trademark owner, not a petitioner. What must be established is some genuine and commercial use that has been made of the mark.²⁹ Only offering goods for sales under the mark is suffice, even if no actual sales can be proved.³⁰ The acts which can describe as preparatory to launching goods under the mark onto the market may also be considered as sufficient evidence.³¹ However, any commencement or resumption of use which is made within three months period prior the filing date of non-use cancellation seems to be disregard as the use of trademark, unless the owner of such mark can show that there is a preparation for such commencement or resumption has been began with unaware of the application of revocation.³² It is designed to prevent the owner from preserving his mark by hastily starting to make a use of the mark once he knows that an application for revocation is threatened.³³

3. Japan

²⁴ *Supra* note 20.

²⁵ UK Trademark Act 1994. Section 46 (4).

²⁶ UK Intellectual Property Office. "*Guidance: Revocation (non-use) proceedings*" [https://www.gov.uk/government/publications/trade-marks-](https://www.gov.uk/government/publications/trade-marks-revocation/revocation-non-use-proceedings)

[revocation/revocation-non-use-proceedings](https://www.gov.uk/government/publications/trade-marks-revocation/revocation-non-use-proceedings) > (accessed on May 12, 2016)

²⁷ *Supra* note 3. Page 77.

²⁸ *Supra* note 3. Page 78.

²⁹ *Supra* note 3. Page 78.

³⁰ *Supra* note 3. Page 78. (citing *Hermes trade mark* [1982] R.P.C. 425.)

³¹ *Id.*

³² *Supra* note 3. Page 79.

³³ *Id.*

Japan is a civil law country that adopts the principle of first-to-file system for registration of trademark, which a trademark filed earlier has priority for registration.³⁴ Under Japanese Trademark Act 1959, there is no explicit provision that genuine use is a requirement for obtaining and maintaining protection.³⁵

According to Article 50 of Japanese Trademark Law, a registered mark which has not been used in Japan in connection with any of the designated goods or services for more than three years in Japan, the registration is vulnerable to a third party's cancellation request based on non-use. Any person may file a non-use cancellation request with the Court in order to request for a trial for rescission of trademark registration. Like, Japan Patent Office ("JPO"), whenever has a reasonable doubt as to whether the applicant is currently conducting the business or whether has any concrete plans to conduct the business in the future in connection with the designated goods or services, may file an application to respond to the issue of non-use trademark.³⁶

The burden of proof for non-using of registered trademark is on the Registrant of trademark. The use in which the Registrant must provide needs to be used in a manner connecting with each of designated products or services as applied for registration.³⁷ In case, a trademark has not been put in actual use but the owners have a concrete plan to use such trademarks in connection with the goods or services as applied in future, the applicants must submit a document certifying that they are conducting or plan to conduct business in future.

4. The People's Republic of China

The People's Republic of China is a fast developing country attracting massive investment from the local and foreign investors, therefore the legal protection is critically needed for serving the foreign investors' rights and the preventive measure against potential infringement which would cause a huge damage to the business of trademark owner. The First-to-File system is adopted within the jurisdiction for trademark registration.³⁸ Like in other countries, Chinese trademark registration is provided on this first-come-first-serve even if such trademark may have not yet been used in commerce. However, the registered trademark is

³⁴ *Supra* note 8.

³⁵ AIPPI. "The requirement of genuine use of trademarks for maintaining protection: Japan". 8 June 2011. http://aippi.org/wp-content/uploads/committees/218/GR218_japan.pdf (accessed on December 5, 2015)

³⁶ *Supra* note 8.

³⁷ *Supra* note 35. (citing *Dale Carnegie*, Tokyo High Court decision, 28 February 2001, Heisei 12 (Gyo-Ke) No.109.)

³⁸ Lexology. "Protection of registered trademarks in non-use cancellation cases in China." <http://www.lexology.com/library/detail.aspx?g=2c55e192-5ffe-47e3-823b-c4a3c285aca5> (accessed on December 5, 2016)

vulnerable to be cancelled by non-use cancellation, which surprisingly most of them are successful.

The regulation of non-use cancellation is stipulated in Article 49 Paragraph 2. "*any organization or individual may request that the Trademark Office make a decision to cancel such registered trademark.*"³⁹ Therefore, there is no special limitations on the petitioner.⁴⁰ The petitioner can be any person or entities, that may not have to be an aggrieved person and not required to prove its legal interest.⁴¹ An application for cancellation against a registered trademark based on non-use in China must be filed with China Trademark Office ("CTMO"). It is a simple statement that the mark has not been used for at least three consecutive years prior to the filing date of the cancellation application.⁴² In support of the application, the petitioner can submit the result of a brief internet search, for instance, a print-out from a popular search engine i.e. BAIDU, GOOGLE, etc., showing that there is no 'hits' resulting from a search of the owner in relation to the goods or services under the disputed trademark.⁴³ Chinese trademark registration is, not only classify the list of goods according to the class designated by the Nice Classification, but also dividing the goods or services as applied into sub-classes. Consequently, the grounds for cancellation can be sustained for some of the goods or services for which trademark is registered, it is acceptable that an application request can be filed in respect of cancelling only partial of designated goods or services.⁴⁴

After the CTMO accepts the cancellation application and notifies to the Registrant, the burden of providing valid evidence of use of the trademark in question in relation to the designated goods or services rests with the trademark owner.⁴⁵ The Supreme People's Court opined that the trademark owners need to produce the evidence that shows '*public, genuine and lawful*' use of the trademark in commerce.⁴⁶ Resulting from being able

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Trademark Law of the People's Republic of China. Article 49.

⁴² Hatty Cui. "*Brief review of 'non-use' trade mark cancellation proceedings in China*". China Daily. June 14, 2012 http://ipr.chinadaily.com.cn/2012-06/14/content_15502882.htm (accessed on July 15, 2016)

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Supra* note 42.

⁴⁶ Freshfield Brucks Haus LLP. "*Cancelling Registered Trademark in China for Non-Use*". 23 May 2012 <http://www.freshfields.com/knowledge.aspx?language=en&region=china&PageSize=70&pageNumber=14> (accessed on April 14, 2016). (citing *Dianhong Pharmaceutical Group v. Kangwang* (2008).)

to produce the appropriate evidences or the justifiable reason for non-use, the registration will be satisfied to be maintained.⁴⁷

4. Non-use cancellation under Thai law

The Trademark Act B.E. 2534 (1991) has provided a provision for cancellation against trademark registration based on the grounds of non-using in Section 63. From the Author's perspective and studying, it appears that the problems of non-use cancellation proceeding in Thailand that need to be considered are as follows:

1. No Requirement for Genuine Use of Trademark.

There is no requirement for genuine use of trademark that force the trademark owner to be aware of pushing its registered trademark in commercial use. Under Thai Trademark Law and the Board of Trademark's consideration, the registered trademark owner is presumed to have used or has the intention to use the trademark with all of the goods and services as listed in the application at the time of filing application. This presumption also applies to the circumstance that if the registrant continues to renew its protection at the time of renewal. Therefore, it put difficulty on the petitioner to produce the evidence rebutting this presumption of law, which provides the monopolization of rights to the first registrant. Giving the exclusive and absolute rights only to the first registrant, without assuring that the rights given has been properly utilized, may cause the abusing of trademark's functions in sense of not being able to represent the owners and non-benefit to the trade, and also may jeopardize the good will of trademark registration system.

2. Burden of Proof for Non-Using of Registered Trademark.

According to the law and practice in correspondence with the Supreme court judgment, the concept of burden of proof in Thailand applied the accusatorial system that *"the person who asserts the matter must prove it"*. Therefore, under Thai Trademark Law, it is clearly stipulated that a petitioner who file a cancellation petition must bear the burden of proof of the alleged non-use of the disputed trademark. In addition, not only must prove the actuality of non-using of trademark for at least 3 consecutive years prior to the date of filing a cancellation petition, but the law also requires the petitioner to prove that the registrant has no intention to use the trademark whatsoever. These requirements place too much burden to the petitioner and contrary to the fact that the petitioner does not have sufficient access to the required evidences and the truth whether the registered trademark is used or not. Furthermore, proving the intention in mind of

⁴⁷ Management, Markets and Legal Consulting Group. "China Trademark Law : Non-Use Cancellation Actions". HG.org Legal Resources. <http://www.hg.org/article.asp?id=33278> (accessed on July 15, 2016)

other person is almost impossible. It has been a difficult proceeding for the petitioner to bear the obligation of proving in term of such negative fact. The possibility to prove and produce the evidences showing the fact of non-use and no intention to use of trademark is seldom succeeded.

3. High Standard of Proof Required by the Board of Trademark.

The Board has placed the high standard of proof that strictly require the petitioner to prove the concrete evidences demonstrating, beyond doubt, that the registrant never use such registered trademark and has absolutely no intention to use it. Any proof in which is produced by the petitioner is repeatedly refused by the Board of Trademark. The Board mostly claimed and verdict that the evidences produced by the petition are not sufficient and cannot prove actuality of non-using of trademark on the registered goods and services of trademark owner, without the need to consider the registrant's rebutting evidence. Furthermore, referring to the Supreme Court Judgment, it was defined that only use of trademark with a short period of time and small quantity, either in form of test marketing, clinical trials, or in relation to free promotional goods can at least show the intention to use the trademark of the registrant. Therefore, it is very difficult for the petitioner to overcome this requirement.

4. Requirement of Proof for Non-Using on Every Items of Goods or Services under Registration.

By the interpretation of the phrase "*if it is proved that...with the goods which it was registered*" as imposed under Section 63 of Thai Trademark Act, the law has set the requirement of proof for non-using trademark on every items of goods or services under the registration. Therefore, even though the petitioner is able to prove the non-use of one item, but not all of those that are registered, the Board will not cancel such trademark registration and will hold that it is insufficient to prove the owner of the registered trademark has no intention to use or, in fact, have never used the trademark in good faith for such other registered goods. As a result of this requirement, it is considered that the use in relation to some of the goods is enough for the registrant to maintain the entire registration and prevail the cancellation.

5. Conclusion and recommendations

Where the cancellation for a non-use trademark is so difficult, there are many effects that may be caused by such problems such as cluttered registry records or a registered trademark that preserves the rights to block others from utilizing it. This obstructs later trademark owners who wish to be protected the under the same registration. Like, Thailand, the burden of proof lies on the petitioner who has no access to the facts and information that constitute the use of trademark. In addition, the high standard of proof

required by the Board of Trademark, to produce the concrete evidences showing the absolute non-use of trademark as well as the lacking of intention to use trademark by the trademark owner, has put more burden to the petitioner. Facing such extreme difficulties when canceling one's trademark also results in monopoly rights being given to the first registrant, which may indirectly cause the trademark owner to not be afraid of losing their registration as well as create unfair competition to the subsequent users that may not be able to enter into the market because of the presence of the already existing registered trademark.

Therefore, it is the time for Thailand to seriously consider on legal measures that could reduce such burden of proof and eliminate the barrier set by the high standard of proof. The recommendations are as followed.

5.1 Implement the Requirement for Genuine Use of Trademark.

The Author opines that the requirement for genuine use could encourage the trademark owner to rapidly and constantly use the trademark in commerce in order to obtain or maintain its registration rights. Like providing in the United States of America, non-submission of evidences of genuine use when the time is requested could be a cause to presume that the trademark owner has not used the trademark in real business. Therefore, this would be a tangible evidence to prove non-use of trademark. Thailand may consider adopting the schemes of requirements for genuine use to implement in Thai Trademark Law.

5.2 Shifting Burden of Proof for Non-Using of Trademark to Registered Owner

Even though Thailand applies the concept of burden of proof in Thailand as the accusatorial system that *"the person who asserts the matter must prove it."* However, according to Section 84/1 of Civil Procedure Code, it also provides the exceptions that a party who asserts a disputed fact does not have to bear the burden of proof, so called *"Factual Presumption"*, which also affirms on the principle of *'Res ipsa loquitur'* or *'thing speaks for itself'*. Therefore, in case of non-use cancellation, facts whether the trademark is used or not ought to be happened in ordinary course of event, which shall be bound by the owner, who possesses all the evidences and has full knowledge of use of trademark, not the petitioner. It seems to be more appropriate to adopt this exception to the Thai Trademark Law and shift the burden of proof for non-using of disputed trademark from the petitioner to the owner of registered trademark, like adopted by many countries i.e. the United Kingdom, Japan and the People's Republic of China where the non-use cancellation proceedings are mostly efficient and successful,

However, if, there is some opinions that it is not appropriate for Thai Trademark Law to change the accusatorial system and the burden of proof should be bound by trademark owner at the beginning of non-use cancellation process, at least, it is recommended to adopt the *prima facie* principle, like the United States of America's proceeding. Once the

abandonment of trademark or preliminary cause of non-using were established by the petitioner, then, the burden of proof will be shifted to the trademark owner to produce the evidences rebutting that the trademark such non-use was caused by any special circumstances and justified by the proper reason.

In addition, providing examples of what could be considered as "special circumstances" that justify the proper reasons for non-using may set the pattern for the Board of Trademark, the petitioners, as well as the trademark owners themselves to be in the same page of the definition of use and non-use.

5.3 Eliminate the High Standard of Proof by Applying the Principle of Preponderance of Evidence (Balance of Probability)

As the legitimated clause "*if it is proved that*" and according to the Board of Trademark's decisions, the strict requirement has set the standard of proof very high. The Board usually requests for the concrete and excessive evidences demonstrating the actuality of non-use and lack of intention to use of the trademark owner before rendering its decision to cancel the trademark. This requirement shows that the Board has put the standard of 'beyond reasonable doubt', as commonly applied in criminal cases, to the petitioner. However, cancellation to revoke a trademark registration based on non-use of trademark in commerce should have affected only to the trademark owner's intellectual property rights in senses of business operation and trading system. This is a private right. Therefore, this procedure should fall under civil procedure.

Therefore, if the law still affirms to place the burden of proof on the petitioner, it should eliminate such high standard of proof by applying the principle of preponderance of evidence or so called 'Balance of Probability' to the petitioner. Under this scheme, the Board may consider the evidences by weighing whether they are reliable to demonstrate the reasonable facts of non-using of the disputed trademark. This will allow the petitioner who has the legal burden to proof have more chance in overcoming the cancellation.

5.4 Allowing Partial Cancellation and Providing Legal Measure for Limitation of Registration on Unrelated Goods/Services

Occasionally, many trademark applications have listed many items of goods or services, it is nearly impossible for the petitioner to prove the non-use for all items. In some countries i.e. the United Kingdom, Japan and the People's Republic of China, it is possible for the petitioner to apply for partial non-use cancellation to remove only some of the goods or services are deemed to be non-use and concern with the goods they aim to apply for protection.

In the Author's view, it should be possible for Thailand to allow partial cancellation, like the proceedings in other countries. However, in order to prevent occurrence of confusing trademarks, Thailand should also consider giving the secured legal measures for the limitation of registration

preventing these problems i.e. providing good public announcements and legal measures to deal with the trademark's co-existence. Moreover, Thailand may consider adopting the sub-classification system as Chinese trademark registration, which could allow the partial cancellation to revoke only the goods or services that fall under the same sub-class.

In this thesis, the Author does not aim to force Thailand to completely change its domestic law regarding non-use cancellation provisions. But in fact, providing the advantages and goodness of non-use cancellation proceedings from other countries could enlighten Thailand to see the significant necessity to eliminate the obstacles that block the foreign investor to come invest in Thailand and impede the economic growth. Still, Thailand needs to be careful in adopting these proceedings and provides the legal measures to be appropriately adjusted with its existing practice.

MUSICAL WORKS : GUIDELINES FOR ANALYSIS OF COPYRIGHT INFRINGEMENTS IN RELATION TO MUSICAL WORKS*

*Jessadapohn Somboonpong ***

Abstract

This article intends to study musical works with a particular focus on musical notes in order to suggest some guidelines for copyright infringement analysis. One of the most complicate issues is “substantial similarity” in the concept of fair use since the unique nature of music makes the analysis more complicate than other copyright works. In other words, the analysis of musical disputes requires much more factors than legal knowledge. Therefore, the study of musical works should not only be based on legal analysis but musical knowledge should be applied to cases as well.

It is the author’s view that in order to make the copyright analysis easier to understand, the music should be separated into three fundamental parts. The first part is the “Melody Part”, which is the most outstanding and important part of the song. This part appears frequently in decisions of the courts. The next part is the “Harmony Part” that usually goes along with the melody part. The last but not least is the “Rhythm Part”. Moreover, in order to analyse cases along with the musical theory, the study will classify cases as “Melody Part Analysis”, “Harmony Part Analysis” and “Rhythm Part Analysis”. Furthermore, the author would like to discuss two musical techniques of the original work arrangement, transposition and variation.

Keywords: Musical works, Copyright infringement, Musical notes

บทคัดย่อ

อุตสาหกรรมดนตรีเป็นอีกหนึ่งในธุรกิจที่มีความเจริญรุ่งเรืองเป็นอย่างมากในสังคมปัจจุบันและการละเมิดลิขสิทธิ์ก็เป็นปัญหาสำคัญที่ส่งผลกระทบต่อการค้าในธุรกิจดังกล่าว ดังนั้นจึงมีความจำเป็นที่กฎหมายจะต้องเข้ามามีบทบาทในการให้ความคุ้มครองงานดนตรีกรรมในฐานะงานอันมีลิขสิทธิ์เช่นเดียวกับงานอันมีลิขสิทธิ์ประเภทอื่นๆ อย่างไรก็ตามก็เพื่อให้กฎหมาย สามารถอำนวยความสะดวกได้อย่างมีประสิทธิภาพ จึงต้องคำนึงถึงธรรมชาติของงานนั้นๆ ประกอบด้วยเนื่องจากงานที่แตกต่างกันย่อมต้องการความคุ้มครอง ที่แตกต่างกัน

ในกรณีของงานดนตรีกรรมซึ่งมีความเป็นเอกลักษณ์เฉพาะตัว กล่าวคือ โดยธรรมชาติของคนหนึ่งนั้นไม่มี หลักเกณฑ์ที่ตายตัวจึงทำให้การประพันธ์บทเพลงสามารถที่จะเปลี่ยนแปลงไปได้ตามยุคสมัยและความนิยม ของ

* This article is summarized and arranged from the thesis “Musical Works: Guidelines for Analysis of Copyright Infringements in relation to Musical Notes” Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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ผู้คนในสังคม ณ ช่วงเวลานั้นๆ บทเพลงที่เกิดขึ้นในช่วงเวลาที่ต่างกันจึงมีเอกลักษณ์ที่แตกต่างกันเมื่อบทเพลง มีความแตกต่างกันไปตามยุคสมัยกฎหมายจึงไม่อาจกำหนดกฎเกณฑ์ที่ตายตัวขึ้นมาเพื่อใช้บังคับกับทุกกรณีได้

การวินิจฉัยงานดนตรีกรรมจึงต้องทำการวินิจฉัยเป็นรายกรณีๆ ไป โดยพิจารณาตามข้อเท็จจริงที่เกิดขึ้น รวมถึงสภาพแวดล้อมทางสังคม ณ ช่วงเวลานั้นๆ ประกอบด้วย การวิเคราะห์งานดนตรีกรรมจึงเป็นเรื่องที่ละเอียดอ่อนและซับซ้อนเนื่องด้วยธรรมชาติของดนตรีดังที่กล่าวมา ดังนั้นในการวินิจฉัยบทเพลงแต่ละบท เพลงจึงมีความจำเป็นที่จะต้องนำความรู้ทางทฤษฎีดนตรีเข้ามาอธิบายและชี้ให้เห็นถึงการละเมิดลิขสิทธิ์ใน บทเพลงนั้นๆ

บทความนี้จะแสดงให้เห็นถึงการวินิจฉัยการกระทำอันเป็นการละเมิดลิขสิทธิ์ในงานดนตรีกรรม โดยแบ่งบทเพลงออกเป็น 3 ส่วนเพื่อสะดวกต่อการวินิจฉัย คือ ส่วนของทำนองหลัก (Melody Part) ส่วนของทำนองประสาน (Harmony Part) และส่วนของกลุ่มของจังหวะ (Rhythm Part) และจากการแบ่งบทเพลงออกเป็น ส่วนๆ ในการวินิจฉัยนี้เองนำไปสู่ประเด็นปัญหาของการใช้คำศัพท์บางคำในบทบัญญัติกฎหมาย โดยในทาง บริบทของดนตรี คำนั้นๆอาจมีความหมายที่แตกต่างออกไปจากความหมายโดยทั่วไป ซึ่งอาจนำไปสู่ความเข้าใจที่คลาดเคลื่อนในการตีความได้ นอกจากนี้บทความยังกล่าวถึง วิธีการดัดแปลงบทเพลงโดยการใช้ความรู้และเทคนิคทางดนตรีโดยนำความรู้ทางทฤษฎีดนตรีมาใช้ในการอธิบายเพื่อให้เกิดความเข้าใจมากยิ่งขึ้นและสุดท้ายบทความนี้ได้แสดงความคิดเห็นเป็นข้อเสนอแนะในการปรับปรุงกฎหมายดังกล่าวด้วย

คำสำคัญ: งานดนตรีกรรม, การละเมิดลิขสิทธิ์, โฉดดนตรี

Introduction

Nowadays, music industry becomes one of the most popular and prospering businesses in the world. BBC news reports that artists like Sam Smith, Ed Sheeran and Paloma Faith helped the British music industry contribute £4.1bn to the United Kingdom economy in 2014.¹ There is no doubt that musical disputes mostly arise around a large amount of money. Absolutely, whenever the disputes arise in the society, law is required to step in and provide clear standards for settling the disputes efficiently. In that manner, copyright law plays a significant role. However, copyright law does not provide specific guidelines to analyse the infringement in musical works. Hence, it is difficult to predict the outcome of musical work infringement cases.

Under intellectual property law, copyright is the law that deals with the creation of mind. Generally, musical composition is a process, as to which the composer creates his work with his own idea together with his labor to produce a song, which represent the melody, harmony and rhythm along together. Even though musical notes are used in a system of western notation style, which musicians all over the world can clearly understand. However, for lay listeners it seems to be such a complicate matter. This problem makes the analysis of musical work more complicate than other copyright works. For instance, in some cases to identify the similarity of the note structure is not a simply way as a note-for-note analysis. Nonetheless, the position of musical notes in a song look not exactly the same, but when

¹Mark Savage, "British music industry boosts economy by £4.1bn", Nov. 5, 2015 available at <http://www.bbc.com/news/entertainment-arts-34722928> (last visited Mar. 7, 2016).

carefully considered musical notes along with musical theories they trigger some suspicious matters.

1. The Overview of Copyright Law in relation to Musical Works

Copyright Act B.E. 2537 (1994) of Thailand provides the protection for musical work and gives the definition of musical work as “a work with respect to a song which is composed for playing or singing whether with rhythm and lyrics or only rhythm, including arranged and transcribed musical note or musical diagram”. Moreover, it provides the exclusive right for the owner of copyright to reproduction or adaptation, giving benefits accruing from the copyright to other persons, and licensing some rights with certain conditions. However, musical cases deal with musical notation are not arise much in Thailand, therefore the study in this article will based on the cases in the United States to analyse and create a guideline for Thai copyright law.

In the United States, the first copyright legislation enacted by congress was the Copyright Act of 1790, which protects only maps, charts, and books. It provided protection upon the owner for fourteen years, with a renewal for an additional period of fourteen years. Then the Act of 1831 includes the protection of musical works for the first time, and extended the privilege of printing, reprinting, publishing, and vending the copyrighted work to a term of twenty-eight years with a right of renewal for a second term of twenty-eight years in favor of the author or his family.² In the early to mid-nineteenth century, Europe was the center of many famous Western musical achievements such as Beethoven, Schubert, Schumann, Chopin, and so on, who produced numerous masterworks. From that situation, European works dominated the United Sates musical scene. However, by the end of the nineteenth century, the United States classical and popular music began to develop. At this time the domestic composers had generated a respectable work, which largely derivative from European models, and began to invoke copyright law to protect their compositions. Therefore, the use of copyright in the United States to enforce rights in music has increased throughout the twentieth century and into the new millennium.³

Furthermore, the concept of “fair use” must be concerned in this study as well. Actually, fair use is the right to use a copyright work under certain conditions without the copyright owner’s permission. It allows one to use and build upon prior works in a manner that does not unfairly deprive prior copyright owners of the right to control and benefit from their works⁴.

² “*International copyright and musical compositions*”. 3 DePaul L. Rev. (1954).

³ Margit Livingston and Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 Vanderbilt J. Of Ent. And Tech. Law. 227, (2013).

⁴ “*Copyright and Fair Use*”, Harvard University, available at <http://ogc.harvard.edu/pages/copyright-and-fair-use> (last visited Mar. 7, 2016).

The proper amount of the similarity in a song that the composer has the right to claim for fair use is one of the most interesting topic to be discussed.

In the United States, the fair use defense is stipulated in section 107 of the Copyright Act. The statute provides that fair use of a work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright. However, to determine whether such use is fair use or not, one must consider the four factors of fair use, which is the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole and the effect of the use upon the potential market for or value of the copyright work. Furthermore, other important matters to be considered are whether the use is commercial or noncommercial and whether the use is transformative or not.

2. The Analysis of Cases in relation to Musical Works

In order to analyse cases, the study will classify cases as melody part analysis, harmony part analysis and rhythm part analysis. First, ***Marks v. Leo Feist, Inc.*, 290 F. 959 (2d Cir. 1923)**, shows the example of rhythm part analysis. According to this case, even if two song have certain similar melody parts, but it just a musical technique such as using some part of chromatic scale, then it could not be considered as a copyrightable part. Furthermore, even if there have some similarities of rhythm in the two songs, however the court mentions that the playing of this two compositions would not confuse one with the other.

Secondly, ***Jewel Music Pub. Co. v. Leo Feist, Inc.*, 62 F. Supp. 596 (S.D.N.Y. 1945)**, is the example of the analysis in harmony part. In this case both songs were in the same time signatures and key signatures. Even though, they also had similar harmonic structures, however the court considered that this is so common for this style of songs. Therefore, according to the harmony part the court found that the harmonic structure in both songs is basically the same. However, it is a common harmony structure, it just goes the way that the harmony actually follows the melody.

The third case, ***Hein v. Harris*, 175 F. 875 (C.C.S.D.N.Y. 1910), aff'd 183 Fed. 107 (2d Cir. 1923)**, is the case that showing the analysis in melody part by using the transposition technique. However, in the process of transposition there have no originality at all and the owner of the transposed song can not claim for copyright protection. Moreover, this creation of such work shall be considered as a copyright infringement.

The last case, ***Fred Fisher, Inc. v. Dillingham* 298 F. 145 (S.D.N.Y. 1924)**., demonstrates the harmony analysis that copying any substantial component part of accompaniment pattern could be considered as an infringement. This case showing that in some instances, the harmony

part could be claimed for the originality of the song and it could be the copyrightable part as well.

3. Criteria of Copyright Infringements in relation to Musical Works

In some cases, the defendant only put in superfluous notes, passing notes, some parts of the scales, or some accidental signs into the song just for making the song dissimilar. To make the analysis more efficient, considering the song by separating into several parts might be the better way to understand. Thus, this article will create criteria by using music theories along with legal analysis.

Actually, musical similarity can appear in any part of the songs, lyrics, melody, harmony even rhythm. Since some scholars claim that the substantial similarity must be notice by lay listeners, therefore there are some method to testify the similarity such as the audience test. However, others claim that musical cases must have the expert testimony to analyse the similarity of songs since music is a complicate science, therefore the audience test is not enough. Moreover, in case of lay listeners, sometimes they notice only the lyrics no matter it was composed in which language, most of them can notice that the lyrics of two songs are similar. Therefore, the lyrics is less complicate than other parts of the song.

Unlike the lyrics, other parts of the song such as melody, harmony including rhythm is more complicate for lay listeners to identify the similarity. Thus, the study in this article will not mentioned anything about the lyrics even though it still considered as the subject matter of musical work. Assume that, without the lyrics, lay listeners listen to one song at the first time and then play the same song again but with the key changed from Major to minor, which make the sound sadder. Since the feeling of the song absolutely changed, it might have some effects on some lay listeners' ears and they might think that it is not the same song they have listened previously. For this instant, musical theories are required to use for explain.

Therefore, to analyse the similarity of each song, it requires much more specific factors such as musical theories to be applied. However, there are some conflicts between the nature of law and music. Generally, law requires clear standard to analysis cases while it is not exactly the same nature as music, which is one of the most flexible sciences. The music's unique nature makes it difficult to draw a distinction between the ideas and expression.⁵ To resolve the problem mentioned above, a guideline is needed.

3.1 Transposition

Transposition is a technique that use to change the key of songs. Music in a Major key can be simply transposed to any other Major key, as well as music in a minor key can be transposed to any other minor key.

⁵ Jeffrey Cadwell, *Expert Testimony, Scenes a Faire, and Tonal Music: A (Not So) New Test for Infringement*, 46 Santa Clara L. Rev. 137 (2005).

However, changing from minor key to Major key requires much more changes rather than simple transposition. Generally, when a song has been transposed, the sound would be higher or lower. However, the important point is that except the key signature everything in transposed song still remain the same as the original one. Therefore, transposing must be considered as an infringement of copyright work.

3.2 Variation

Variation is a basic technique in order to developing music. Not only the melody part that could be changes, variations could be applied with all parts of songs. There are various forms of chords and accompaniments for building the improvisation. In other word, a theme song is repeated in an altered form. Therefore, the nature of variations is to remind of the original song in every variation forms. If the variation were applied with significant part or the heart of a song, then it should be considered as an infringement against musical work.

4. Conclusion and Recommendations

4.1 Conclusion

From studying Thai copyright law along with the United States copyright law, the United Kingdom copyright law including international rules in relation to musical works, it can be concluded that generally copyright law has the purposes of protecting the creator of a work against infringements, guaranteeing commercial exploitation and stimulating new ideas. Therefore, copyright law authorizes the creator certain rights to make use of his own work. However, there are some exceptions and limitations to copyright defined by law. Generally, exceptions and limitations to copyright are subject to the three-step test initially set out in the Berne Convention and other international agreements. The Berne Convention provides that an exception or limitation to copyright is permissible only if

(1) it covers only special cases

(2) it does not conflict with the normal exploitation of the work;

and

(3) it does not unreasonably prejudice the legitimate interests of the author.

Thus, within that standard, exceptions and limitations vary from country to country in scope and amount.

While most countries specifically identify the exceptions and limitations to copyright that they have created, the United Kingdom and the United States have created each well known exception in their statutes. The principle of “fair dealing” in the United Kingdom covers a substantial scope of uses where prior permission is not needed. The criteria for what is considered to be fair dealing are listed in the law. In the United States, the four factors in the concept of “fair use” assessed by a court to determine fair use are set in the statute and case law.

Therefore, in order to study the copyright infringement, it is necessary to study the exceptions as well. One of the most complicated issues is that whether or not the use of a work is considered as substantial proportion to the whole original work. Moreover, the unique nature of musical works makes the analysis of substantial similarity in musical works become delicate matter.

Since the analysis of substantial similarity is about the quality not quantity, musical knowledge plays a significant role to point out some clues. Assume that if one wants to analyse whether there was any infringement in literary works or not, the analysis of literary work requires the language knowledge to describe the similarity of the two works. Compared to literary works, musical work analysis is the process of examining the two pieces of music in order to determine the actual similarity to find out that the similarity occurs because of infringements of another's song or whether the similarity occurs because both pieces of music have been written within the tonal system⁶. The analysis should go through melodic similarity, similarity of chord progressions and the overall pattern similarity.

Nowadays in the prospering entertainment business era, music industries need seriously copyright protection indeed. In order to provide proper protection, the law should set up some guidelines for the copyright infringements analysis. The analysis guidelines not only benefit lawyers to predict the outcome of cases but also remind those composers and songwriters for their use of another's music as well.

4.2 Recommendations

(1) According to section 4 of Thai Copyright Act B.E. 2537 (1994), a "musical work" is defined as: *"a work with respect to a song which is composed for playing or singing whether with **rhythm** and lyrics or only rhythm, including arranged and transcribed musical note or musical diagram."* However, with all due respect the author does not agree with the using of the term "**rhythm**" because besides the lyrics there are many elements in songs. For example, in one song there could be many musical parts such as a melody part, harmony part and rhythm part. Moreover, in the musical context rhythm refers to the organization of musical sound events that determines how sounds are produced over time.

The author would like to mention the use of the term "music" in the current copyright law of the United Kingdom, the Copyright, Designs and Patents Act 1988 (the 1988 Act). The Act contained the definition as follows: *"Musical works are works consisting of **music**, exclusive of any word or action intended to be sung, spoken or performed with the **music**."* According to this Act, musical works means the musical elements with any words or action that are intended to be sung spoken or performed with particular music. Therefore, instead of using the term "rhythm", the term

⁶ The arrangement of all the tones and chords of a composition in relation to a tonic.

“music” might be better to describe the other parts of the song which are not the lyrics.

(2) As mentioned in (1), the analysis of “music” part should be separated into at least three basic parts in order to determine the actual similarity from melodic similarity to similarity of chord progressions and the overall pattern similarity. Therefore, the analysis should consider as melody part analysis, harmony part analysis and rhythm part analysis. Generally, melody part is the most memorable part of the song. Hence, in many cases the court points that melody part is copyrightable and could be claimed for its originality. However, in some cases harmony part and rhythm part could be protected under copyright as well.

(3) In case that there were some tricks that used to alter the original song by using musical knowledge, such work should not be claimed for its originality and also infringe the original copyrighted work. Though there were many musical techniques to do so. This article would like to point out some tricks that used as reflected in study cases in the United States and the United Kingdom. From the study, the author would like to introduce two musical techniques by which if one uses to alter another’s song, the outcome tends to be like the same song as the original one. Of course, such act would be considered as an infringement.

The first technique is “transposition” that is used to change the key signature of the song. The operates in the following way, beside the tone of the whole song which could be higher or lower, the rest are still the same as the original one. Therefore, this is the reason why the author would like to suggest that if one use this technique to alter another’s song, one should not claim for copyright protection and should be considered as infringing the original copyrighted work.

The second technique is “variation”. This technique is used to change the song into various styles. Generally, variation is a basic technique in order to develop music. Not only the melody part that could be changed, variations could be applied with all parts of songs. There are various forms of chords and accompaniments for building the improvisation. In other words, a theme song is repeated in an altered form. Therefore, the nature of variations is to remind of the original song in every variation form. If the variation were applied with significant part or the heart of a song, then it should be considered as an infringement against the original theme song.

**PROBLEMS OF CONSUMER PROTECTION RELATING TO
TRADEMARK LAW: A CASE STUDY IN REGARD TO USAGE OF
UNFAIR METHOD TO CAUSE CONFUSION ON AUTHENTICITY
OF TRADEMARK OWNERSHIP***

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Abstract

At present, some business operators use dishonest methods to run their businesses. For example, they imitate trademarks or packaging of other businesses in order to use well-known trademarks and confuse the consumer. In some cases, trademark law may not give sufficient protection of the consumer's interests. Some business operators have registered or changed the juristic person's name by using the trademark of others without the permission of the trademark owner, or have used part of another's trademark as their own. This causes confusion to the consumer who may think that the trademark owner and such juristic person are the same or an affiliated company. The consumer may buy products or receive services from the juristic person who is using another's trademark because they rely on the quality of the real trademark owner. This causes damage to the consumer who does not receive the products or services from the real trademark owner, and the product or service from the business operator who is not the real trademark owner may not have been of an equal quality to the product or service from the real trademark owner.

Under Thai law, there are many laws which are intended to protect the consumer. However, in the case that the business operator has registered or changed its juristic person's name by using the trademark of others or part of it without permission and causes confusion to the consumer, the consumer does not receive proper protection under Thai law.

Under international law, there is an unfair competition principle in the Paris Convention. Any act of competition contrary to honest practices such as causing confusion, discrediting competitors and misleading the public is prohibited under international law. The act of some business operators above can be considered as unfair competition.

Since the present Thai law may not apply to protect the consumer who confused on authenticity of trademark ownership, in order to resolve

* This article is summarized and arranged from the thesis "PROBLEMS OF CONSUMER PROTECTION RELATING TO TRADEMARK LAW: A CASE STUDY IN REGARD TO USAGE OF UNFAIR METHOD TO CAUSE CONFUSION ON AUTHENTICITY OF TRADEMARK OWNERSHIP" Master of laws in Business laws (English Program), Faculty of Law Thammasat University, 2015.

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this problem, the article proposes that the legislature should enact a new special statute covering unfair competition.

The unfair competition law should set out the acts that will be considered as unfair competition and include the acts which causes the consumers to confuse on authenticity of trademark owner for giving the protection to the consumer.

Keywords: Unfair Competition, Consumer Protection, Trademark, Passing off

บทคัดย่อ

ในปัจจุบันมีผู้ประกอบการบางรายใช้วิธีที่ไม่สุจริตในการดำเนินกิจการยกตัวอย่างเช่น เลียนแบบเครื่องหมายการค้าหรือบรรณลักษณ์ของผู้ประกอบการรายอื่นเพื่ออาศัยความนิยมของเจ้าของเครื่องหมายการค้าและทำให้ผู้บริโภคเกิดความสับสน ในบางกรณีกฎหมายเครื่องหมายการค้าไม่อาจให้ความคุ้มครองที่เพียงพอแก่ผู้บริโภค มีผู้ประกอบการบางรายอาศัยวิธีการจดทะเบียนหรือเปลี่ยนชื่อของนิติบุคคลของตนเองโดยใช้คำในเครื่องหมายการค้าของผู้อื่นโดยไม่ได้รับอนุญาตจากเจ้าของเครื่องหมายการค้าหรือใช้บางส่วนของเครื่องหมายการค้าของผู้อื่นมาเป็นเครื่องหมายการค้าของตนเอง การกระทำดังกล่าวทำให้ผู้บริโภคเกิดความสับสนว่าเจ้าของเครื่องหมายการค้าและผู้ประกอบการเหล่านั้นเป็นบริษัทเดียวกันหรือบริษัทในเครือเดียวกันผู้บริโภคอาจซื้อสินค้าหรือรับบริการจากผู้ประกอบการที่ใช้เครื่องหมายการค้าของผู้อื่นเนื่องจากเชื่อมั่นในคุณภาพของเจ้าของเครื่องหมายการค้าที่แท้จริง เหตุการณ์ดังกล่าวก่อให้เกิดความเสียหายแก่ผู้บริโภคเนื่องจากทำให้ผู้บริโภคไม่ได้รับสินค้าหรือบริการจากเจ้าของเครื่องหมายการค้าที่แท้จริงและสินค้าหรือบริการจากผู้ประกอบการที่ไม่ใช่เจ้าของเครื่องหมายการค้าที่แท้จริงอาจมีคุณภาพไม่เท่ากับสินค้าหรือบริการของเจ้าของเครื่องหมายการค้าที่แท้จริง

กฎหมายไทยจำนวนมากที่มีจุดประสงค์ในการคุ้มครองผู้บริโภค แต่ในกรณีที่ผู้ประกอบการจดทะเบียนหรือเปลี่ยนชื่อนิติบุคคลของตนเองโดยใช้เครื่องหมายการค้าของผู้อื่นโดยไม่ได้รับอนุญาตหรือใช้บางส่วนของเครื่องหมายการค้าของผู้อื่นมาเป็นเครื่องหมายการค้าของตนเองซึ่งก่อให้เกิดความสับสนแก่ผู้บริโภคนั้น ผู้บริโภคไม่ได้รับการคุ้มครองที่เหมาะสมจากกฎหมายไทย

ภายใต้กฎหมายระหว่างประเทศมีหลักเกณฑ์เรื่องการแข่งขันที่ไม่เป็นธรรมระบุไว้ในสนธิสัญญากรุงปารีส การกระทำใดในการแข่งขันที่ขัดต่อการกระทำที่สุจริต เช่นการก่อให้เกิดความสับสน การทำให้คู่แข่งหมดความน่าเชื่อถือหรือการทำให้สาธารณชนเข้าใจผิดในสินค้าของตนนั้นจะถูกห้ามภายใต้กฎหมายระหว่างประเทศ การกระทำของผู้ประกอบการดังกล่าวข้างต้นพิจารณาได้ว่าเป็นการแข่งขันที่ไม่เป็นธรรม

เนื่องจากกฎหมายไทยในปัจจุบันไม่สามารถให้ความคุ้มครองผู้บริโภคในกรณีที่สับสนในความเป็นเจ้าของเครื่องหมายการค้าที่แท้จริงได้ ดังนั้นเพื่อแก้ไขปัญหาดังกล่าว บทความนี้จะขอเสนอว่าฝ่ายนิติบัญญัติควรบัญญัติกฎหมายพิเศษสำหรับการป้องกันแข่งขันอันไม่เป็นธรรม

กฎหมายป้องกันการแข่งขันอันไม่เป็นธรรมควรระบุว่าการกระทำใดถือว่าเป็นการแข่งขันอันไม่เป็นธรรมและรวมการกระทำที่ก่อให้เกิดความสับสนในตัวของเครื่องหมายการค้าเป็นการแข่งขันอันไม่เป็นธรรมด้วยเพื่อเป็นการให้ความคุ้มครองแก่ผู้บริโภค

คำสำคัญ: การแข่งขันอันไม่เป็นธรรม, การคุ้มครองผู้บริโภค, เครื่องหมายการค้า, การลวงขาย

INTRODUCTION

At present, some business operators use dishonest methods to run their businesses; they have registered or changed the juristic person's name by using the trademark of others without permission from the trademark owner, or have used part of another's trademark as their trademark. This confuses the consumer, who may think that the trademark owner and such juristic person are the same or an affiliated company. The consumer may buy products or receive services from the juristic person who is using the other's trademark because they rely on the quality of the real trademark owner. It causes damage to the consumer who does not receive products or services from the real trademark owner, and the product or service from the business operator who is not the real trademark owner may not have been of an equal quality to the product or service from the real trademark owner.

Under Thai law, there are many laws which have the purpose of protecting consumers. The important Thai laws which have such a purpose are the Thai Consumer Protection Act B.E. 2522 and the Thai Trademark Act B.E. 2534. However, the consumer protection system in Thailand has a somewhat paternalistic nature which means that consumers may not be able to exercise their rights directly or take legal action by themselves. The consumer could not take legal action against the person who used the unfair methods causing their confusion about the authenticity of trademark ownership and could not claim for compensation.

This article will therefore study the principle of consumer protection, especially the unfair competition principle and the passing off principle in the foreign countries in order to analyze Thai laws. It proposes enactment of a new special statute in order to resolve the problem that Thai laws do not protect the interests of the consumers mentioned above.

THE UNFAIR COMPETITION PROTECTION UNDER INTERNATIONAL LAW

The main source of unfair competition law at international law level can be found in the Paris Convention for the Protection of Industrial Property (hereinafter the Paris Convention). It has the objective to protect industrial intellectual property. The word industrial property is defined in article 1(2) of the Paris Convention as consisting of patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition. Some intellectual properties in the definition of the word industrial property are not industrial property by nature, but are industrial property by negotiation during the drafting of the Paris Convention.¹

¹ Bodenhausen, G.H.C., *Guide to the Application of the Paris Convention for the protection of industrial property as revised at Stockholm in 1967*, (Geneva: WIPO, 1997), 23.

The unfair competition principle in the Paris Convention was adopted by the Revision Conference of Brussels in 1900; it was specified in article 10 *bis*:

Article 10 *bis*

(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

(i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

(ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

(iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

According to article 10 *bis* (2) of the Paris Convention, unfair competition consists of ‘any act of competition contrary to honest practices’. There is no clear definition of the words ‘honest practices’ in the convention. It will be the duty of the court or legislation process in each country to apply the word honest practices in their country. This is because the meaning of honest practices is flexible. The criteria of ‘fairness’ or ‘honesty’ in competition depend on the reflection of the sociological, economic, moral and ethical concepts of a society. This will be different in each country and sometimes even within one country. The criteria of honest practices change with time. Moreover, there are always new acts of unfair competition occurring, because there is apparently no limit to inventiveness in the field of competition.²

According to article 10 *bis* (3) of the Paris Convention, there are examples of the acts which are considered to be unfair competition. There are three types: causing confusion, discrediting competitors and misleading the public. The common aspect of these important examples of unfair competition is the attempt by the business operator to succeed in business without using his own achievements in terms of price and the quality of his products, but by taking undue advantage of the work of another or by influencing consumer demand with false or misleading statements.³

² WIPO, “Protection against Unfair Competition Analysis of the Present World situation,” (Geneva, 1994), 23.

³ *Id*, at 24.

THE UNFAIR COMPETITION PROTECTION UNDER THE LAW OF FOREIGN COUNTRIES

The nature of law against unfair competition in each country is different. This is because the nature and form of unfair competition occurring in each country is different. Therefore, the international treaty does not give a clear definition of the word unfair competition and lets each country give its own definition and legal process, according to the situation and nature of unfair competition in that country.

The protection against unfair competition in each country can be divided in three groups as follows.⁴

1. The protection against unfair competition by special statutes

In some countries, the legislature has enacted a special statute to prevent unfair competition, such as Japan, Korea, Denmark, Bulgaria, Canada, Sweden and Switzerland. Some countries will apply a special statute or special law together with general law in order to prevent unfair competition. General law will have general provisions which relate to the protection against unfair competition and have a means of law enforcement, especially civil enforcement. The special statute will provide the detail of general law.

2. The protection against unfair competition by tort law and/or the passing off principle and the trade secret principle

Countries which use a civil law system will prevent unfair competition by tort law and countries which use a common law system will use the passing off principle and the trade secret principle developed by court judgments. Examples of the countries which use tort law to prevent unfair competition are France, Italy and the Netherlands. In contrast, the English legal system uses the passing off and trade secret principles to prevent unfair competition.

3. The protection against unfair competition by special statutes together with tort law and/or the passing off principle and trade secret principle

Some countries prevent unfair competition by using their Civil Code, court judgments and special statutes. In a country which uses a federal state system, the segregation of federal law and state law causes a difference in protection against unfair competition and makes it more complicated. Federal law against unfair competition will not apply in a case which is under the jurisdiction of the state court. The protection against

⁴ นลินธร ชาดิศิริ, “การกระทำอันเป็นการแข่งขันอันไม่เป็นธรรมทางการค้าและสภาพบังคับตามกฎหมาย : ศึกษากรณีเฉพาะทรัพย์สินอุตสาหกรรม”, วิทยานิพนธ์มหาบัณฑิต คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, 2539, 49-50. (Nalinthorn Chartsiri. “Unfair Competition and Legal Sanctions: A Case Study of Industrial Property”, Master of Law’s Thesis. Chulalongkorn University, 1996, 49-50).

unfair competition in each state may be more complicated and more developed than federal law. An example of a country which uses this system is the United States of America.

In the United States, the legal basis of unfair competition and consumer protection law contains a variety of federal and state statutes, common law doctrines, and the judicial decisions that interpret those statutes and doctrines. Unfair competition in the United States is related to intellectual property doctrines such as trademarks and trade secrets. It is also related to torts. An infringement of an intellectual property right is considered to be a tort. There is no general clause against unfair competition, as unfair competition law in the United States includes many doctrines from common law and statutes of many jurisdictions.⁵

PASSING OFF

Passing off is the legal principle in a common law system which was developed for protection against unfair competition in a free trade market. There is evidence of the concept in English court judgments since the 17th century. In English law, there is no unfair competition law, however, it is claimed that the passing off law principle has the same effect of protection as the unfair competition law.⁶

The general rule governing passing off is that no trader may conduct his business so as to lead customers to mistake his goods, or his business, for the goods or business of someone else.⁷ Therefore, it can be said that the passing off in trademark law means one trader uses the trademark of another on his products, in order to sell them by causing confusion to consumers who think that such products belong to the trademark owner. The passing off principle has the same foundation as trademark law, which is considered to be one of a wrongful act. The important thing which the law relating to the passing off protects is the 'goodwill' in a business. The owner of goodwill in a business should receive protection from the law.⁸ The main point about passing off is that

⁵ Frauke Henning-Bodewig, *International Handbook on Unfair Competition* (Munich: C.H. Beck, 2013), 622-623.

⁶ วิชัย อริยานันทกะ, “ข้อสังเกตบางประการเกี่ยวกับกฎหมายเครื่องหมายการค้าและการป้องกันการแข่งขันที่ไม่เป็นธรรม (1),” บทบัณฑิต (เนติบัณฑิตยสภา) 58, (2545): 133. (Vichai Ariyanuntaka, “Some Notices relating to Trademark Law and the Protection against Unfair Competition (1),” Bot Bundit (Thai Barrister) 58, (2002): 133).

⁷ Robin Jacob, and Barrister Alexander Daniel, *A Guidebook to Intellectual Property: Patents, Trade Marks, Copyright, and Designs*, 4th ed. (London: Sweet & Maxwell, 1993), 107.

⁸ พงษ์เดช วานิชกิตติคุณ, “ปัญหาบางประการเกี่ยวกับการลงขาย,” บทบัณฑิต (เนติบัณฑิตยสภา) 56, (2543): 94 (Pongdeat Wanitkittikhun, “Some Problem Issues Relating to Passing Off,” Bot Bundit (Thai Barrister) 56, (2000): 94).

goodwill has been established by one trader and another trader tries to take advantage of that goodwill, to exploit it to the detriment of the first trader.⁹

In 1990, there was the case of *Reckitt & Colman Ltd v Borden Inc*¹⁰ also known as the *Jiff Lemon Case*. This case is a leading decision of the House of Lords on the tort of passing off. The facts in the case were that the plaintiff sold lemon juice in a yellow plastic bottle which had the colour and shape of an actual lemon. The defendant produced lemon juice contained in a plastic bottle like the plaintiff's, but the defendant's bottle was larger than the plaintiff's and had a flattened side. It made the consumers confused that the products of the defendant were the products of the plaintiff. The defendant therefore was prohibited from using such a plastic bottle. The court held that the defendant was guilty of passing off.

Lord Oliver laid down the essentials for a passing off action, derived from this case as follows:¹¹

- (a) the existence of the claimant's goodwill
- (b) a misrepresentation as to the goods or services offered by the defendant
- (c) damage (or likely damage) to the claimant's goodwill as a result of the defendant's misrepresentation.

THE PRINCIPLE OF CONSUMER PROTECTION UNDER THAI LAW

According to Thai law, there are approximately fifty laws which have the objective of protecting the consumer, although some Acts protect the consumer indirectly. In such Acts, the government or administrative section will be the person who exercises the right and the private individual will not be the directly injured person. However, at present there is the Thai Consumer Protection Act B.E. 2522 which protects the consumer directly.¹²

According to section 4 of the Thai Consumer Protection Act, the consumer has five rights of protection as follows:

- (1) The right to receive correct and sufficient information and description as to the quality of goods or services
- (2) The right to enjoy freedom in the choice of goods or services
- (3) The right to expect safety in the use of goods or services
- (4) The right to receive a fair contract

⁹ David I. Bainbridge, *Intellectual Property*, 6thed. (Harlow England: Person Longman, 2007), 726.

¹⁰ *Reckitt & Colman Ltd v Borden Inc* [1990] 1 All E.R. 873.

¹¹ Bainbridge, *supra* note 9, at 728.

¹² สุขุม สุกนิตย์, *คำอธิบายกฎหมายคุ้มครองผู้บริโภค*, พิมพ์ครั้งที่ 9 (กรุงเทพฯ: สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย, 2557), 145. (Susom Supphanit, *Textbook on Consumer Protection Law*, 9th ed. (Bangkok: Chulalongkorn University Publishing House, 2014), 145.

(5) The right to have the injury considered and compensated in accordance with the laws on such matters or with the provision of the Consumer Protection Act

The other important law which has the purpose to protect consumer is trademark law. Trademark has two main purposes; the first purpose is to protect business reputation and goodwill by considering that a registered trademark is a property. The second purpose is to protect consumers from deception, and to prevent consumers from buying inferior products or services by mistaken belief that they originate from or are provided by another business operator.¹³ The consumer also has an interest from trademark law. They associate the products or services and their quality with the associated brand name or logo and will not wish to be confused by similar names or logos placed on different products. The protection under trademark law on the origin of products also gives the benefit to consumer interests. It can guide consumers in the exercise of choice.¹⁴

The protection of the trademark owner's right from people who infringe the trademark also protects the consumer's right. This is because when the trademark owner can take legal action against people who infringe the trademark, the confusion of the consumer about products from different sources which use the same trademark will be eliminated. Therefore, the clear main purpose of trademark law is to protect the interests of trademark owners and consumers in one product market.¹⁵

Therefore, it can be said that trademark law is important, not only for trademark owners, but also for consumers, because from the function of trademark, consumers can distinguish the products or services of one business operator from others. Consumers can depend that products under the same trademark come from the same origin or manufacturer. Moreover, products under same trademark should have same quality. It helps consumers to choose the product having quality and to avoid others. It provides protection to consumers to receive products and services from the manufacturers which they rely on.

ANALYSIS OF THE PROBLEM UNDER THAI LAWS

According to problem mentioned above, some consumers were confused that the trademark owner and the business operator who registered or changed the juristic person's name by using the trademark of others without permission from the trademark owner, or have used part of another's trademark as their trademark (the “**Offender**”) were the same

¹³ Bainbridge, *supra* note 9, at 585.

¹⁴ Paul Torremans, *Holyoak & Torremans Intellectual Property Law*, 7thed. (Oxford: Oxford University Press, 2013), 433.

¹⁵ ชัชชัย พุกพลศิริ, *คำอธิบายกฎหมาย เครื่องหมายการค้า* (กรุงเทพฯ: สำนักพิมพ์นิติธรรม, 2536), 6-7 (Tatchai Supaponsiri, *Textbook on Trademark Law* (Bangkok: Nititham Publishing House, 1993), 6-7).

juristic person or affiliated company. Some consumers entered into a contract with the Offender on a misunderstanding. It caused damage to the consumers because they did not receive the product or service from the company they wished, and the product or service from the Offender may not have been of an equal quality to the product or service from the trademark owner.

In relation to the rights of consumers under the Thai Consumer Protection Act B.E. 2522, the acts of the Offender which run their business or advertise their business by using the trademark of others, can be considered to be advertisement according to the definition of the word advertisement in section 3 of the Consumer Protection Act B.E. 2522.¹⁶ Therefore, the consumer's protection which relates to the problem is consumer protection against advertising.

According to section 22 of the Consumer Protection Act B.E. 2522,¹⁷ the act of the Offender may be considered as an advertisement which contains a statement which is unfair to consumers. Using the part of another's trademark as their trademark may be considered to be a statement causing misunderstanding of the essential elements concerning services, because the consumer may confuse the product of the offender with the product of the trademark owner. However, the Committee on Advertisement may consider that section 22(2) does not apply to the Offender's act because in practice, when consumers entered into contracts or received services from the Offender, they received information from the Offender's officer before entering into the contracts. Therefore, it may be considered that the consumers had already received the protection (true and fair information from the Offender) before receiving the services and had not suffered any damage from the contract, service or advertisement of the Offender.

If the Committee on Advertisement opines that the Offender's advertisement violates section 22, the Committee shall have the power to issue one or several orders as per section 27.¹⁸ Pursuant to section 27(4), in

¹⁶ **Section 3** ...“Advertisement” includes any act which, by whatever means, causes the statement to be seen or known by an ordinary person for trading purposes...

¹⁷ **Section 22.** An advertisement may not contain a statement which is unfair to consumers or which may cause adverse effect to the society as a whole; that is, notwithstanding such statement concerns with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or services.

The following statements shall be regarded as those which are unfair to consumers or may cause adverse effect to the society as a whole:

(1) Statement which is false or exaggerated;

(2) Statement which will cause misunderstanding in the essential elements concerning goods or services, notwithstanding it is based on or refers to any technical report, statistics or anything which is false or exaggerated;...

¹⁸ **Section 27** In the case where the Committee on Advertisement is of the opinion that any advertisement violates section 22, section 23, section 24 (1) or section 25,

order to resolve the problem, the Committee on Advertisement may issue an order to correct consumers' misunderstanding by ordering the defendants to advertise that their service or business does not concern or relate to the plaintiff. However, the problem of this section is that the issuance of an order must be in accordance with the rules and procedure prescribed by the Committee on Advertisement, however, at present it has not yet issued such rules and procedure. Therefore, at present the Committee on Advertisement cannot exercise the power under section 27(4).

Moreover, where the Committee on Advertisement has already issued the rules and procedure of issuance of the order according to section 27(4), in practice, a problem may occur as to whether the Committee would exercise such power to order the defendant to correct misunderstanding by advertisement or not, as by imposing such an order to the defendant, which is the most severe penalty under section 27, means that the defendant has to accept that its advertisement is incorrect. In addition, issuance of such an order according to section 27(4) may result in civil, criminal or administrative liability to the Committee on Advertisement.

With regard to the rights of the consumer under trademark law, the law protects the interest of the trademark owner and provides them with a right to file a lawsuit against a person who infringes their trademark. However, the consumer does not receive protection directly from this law. Therefore, consumers who were confused between the service of the plaintiff and the defendant cannot directly issue a lawsuit against the person who infringes the trademark under the Thai Trademark Act.

CONCLUSIONS AND RECOMMENDATIONS

The act of some business operators which registered or changed the juristic person's name by using the trademark of others without permission from the trademark owner, or have used part of another's trademark as their trademark can be considered as unfair competition. It is because it causes the confusion to the consumer. Such act confuses the consumer, who may think that the trademark owner and such a juristic person are the same or an affiliated company. The consumer may buy products or receive services from the juristic person who is using the other's trademark because they

the Committee on Advertisement shall have the power to issue one or several of the following orders:

- (1) to rectify the statement of method of advertisement;
- (2) to prohibit the use of certain statements as appeared in the advertisement;
- (3) to prohibit the advertisement or the use of such method for advertisement
- (4) to correct by advertisement the possible misunderstanding of the consumers in accordance with the rules and procedure prescribed by the Committee on Advertisement.

In issuing an order under (4), the Committee on Advertisement shall prescribe the rules and procedure by having regard to the interest of the consumers and to the bona fide act of the advertiser.

rely on the quality of the real trademark owner. It causes damage to the consumer who does not receive products or services from the real trademark owner.

According to the problems, the consumer who confused on authenticity of trademark ownership does not receive the proper protection under Thai law. The author would like to propose some recommendations as follows.

Proposing the Enactment of a New Special Statute

At present, Thai law may not protect the consumer and provide a fair remedy. The consumer cannot file a complaint by themselves. The author is of the opinion that to adjust the existing law within some section of each act to give consumers the right to file a complaint may distort or affect the main purpose of the whole Act. For example, the main purpose of the Trademark Act is to give protection to the trademark owner. The protection of the consumer under trademark law is the effect from the protection of the trademark owner only. Therefore, if we adjust or add some sections to give more rights to the consumer it will affect other sections and the main purpose of the whole Act.

Moreover, in the case where the legislature enacts a new special statute to resolve the problem, it will be easy for the lawyer to apply and interpret the law because the new special law will have as its main purpose to prevent unfair methods. In the future, if there are other acts which cause a similar problem, it will be easy for the legislature to amend or adjust the law.

Therefore, the author proposes the enactment of a new special statute covering unfair competition. This is because the act of the Offender is considered to be causing confusion to the public. Causing confusion is an example of unfair competition under article 10 *bis* (3)(iii) of the Paris Convention.

Some existing Thai laws do not give a consumer the right to file a complaint against a business operator who has caused confusion to the public. The author is of the opinion that Thai unfair competition law should give this right to a consumer who suffers damage from an act of unfair competition. Consumers would have direct protection if they were able to file a lawsuit with the court themselves.

Thai unfair competition law should provide a general provision which relates to the protection against unfair competition and is enforceable like article 10 *bis* (2) of the Paris Convention. The author considers that the words provided in the general provision should be flexible, because the act of unfair competition will change with time. In the future, new acts of unfair competition may occur. Therefore, a flexible wording in the general provisions of unfair competition law will provide the opportunity for the court to use its discretion to interpret the acts that should be considered as unfair competition.

Moreover, the author's view is that Thai unfair competition law should specify examples of some acts which are considered to be unfair competition like article 10 *bis* (3) of the Paris Convention. Examples will clearly indicate what type of act will be considered as unfair competition. It will help the court to apply the law and interpret whether some act will be considered as unfair competition or not. It will also clearly warn all business operators not to commit the prohibited acts. The examples of unfair competition should include those acts by a manufacturer or business operator which cause confusion on authenticity of trademark ownership.

Proposing the Establishment of New Organization

Unfair competition law and consumer protection relates to many laws, i.e. intellectual property law, consumer protection law and competition law. However, according to the present Thai law, the government authority or commissions who control or use the power of each law are separate. Under trademark law, the authority is the Department of Intellectual Property. Under consumer protection law, the authority is the Office of the Consumer Protection Board, and under competition law, the authority is the Office of the Thai Trade Competition Commission. Therefore, the author considers that to improve the prevention of unfair competition effectively, the authority of each law should be coordinated. The author proposes the establishment of one organisation which has the authority to control and exercise the powers relating to every law in order to protect and balance the interests of business operators and consumers. An example of such an organisation is the Federal Trade Commission (FTC) of the United States of America, which has the authority to control and exercise the powers under intellectual property law, competition law and consumer protection law. The FTC's main mission is to protect consumers and promote competition in the market. If there is an organisation which has the power to take care of all aspects related to consumer protection, the consumer protection under Thai law will be more effective.

LEGAL MEASURES ON CONTROLLING MEDICAL TOURISM FACILITATOR*

*Kanparpat Noppharesksawat***

Abstract

According to the escalation of health care movement resulted from unsatisfied medical care within the national level, the dramatically increase of patients has been found in the competitive medical tourism market, especially in Thailand. As mentioned reason, medical tourism facilitator, health care middleman, tries to establish a supply of medical services to the patients that leads to ‘sale of medical treatment’ phenomenon. Since medical tourism contracts are referred to modern contracts relating to medical and insurance issues, it is exploring that Thai laws and regulations are challenged because of legal loophole. Hence, in order to understand and realize how Thai laws should be amended, it is necessary to study foreign laws.

Each medical tourism facilitator put its effort to attack patients, leads to the main problems on both legal status and business operation since the pre-medical treatment until post-medical treatment. An advertisement and a disclosure of information refer to the oppressive allurements, while the adhesion contractual terms and conditions benefit the medical tourism facilitators themselves. Furthermore, the contractual limitations and exclusions always provide the few responsibilities for medical tourism facilitator in the case of medical error, poor medical procedure, uncertified medical equipments and physicians, and the cancellation of insurance coverage which affect the patients’ rights. As a result of low patient protection, the indirect effect brings Thailand to the downturn of medical tourism progress and destroyed medical tourism reputation consequently.

This article provides readers with an overview of laws and regulations from the Republic of Korea, and the United States of America (California and Pennsylvania) which have faced to the problems of health care service network as same as Thailand. Those countries present their laws specifically govern medical facilitators. With the respect to existing laws, Thailand has the recent statute which is the inadequate measures of controlling medical tourism facilitators and their operations of medical service network. In this regards, this article will state analysis of how legal measures on controlling medical tourism facilitator shall be concerned and alternative resolutions in order to create effective and complete enforcement.

* This article is summarized and arranged from the thesis “Legal Measures on Controlling Medical Tourism Facilitator” Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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Keywords: medical tourism facilitator, medical travel broker, cross-border healthcare, control measures, patient safety, insurance, medical tourism.

บทคัดย่อ

เนื่องจากการเพิ่มขึ้นของเคลื่อนไหวกทางด้านสุขภาพอันเป็นผลมาจากการได้รับการบริการทางการแพทย์อันไม่เป็นที่พึงประสงค์ภายในประเทศ ทำให้จำนวนผู้ป่วยซึ่งเพิ่มขึ้นอย่างรวดเร็วถูกพบได้ในการแข่งขันทางตลาดด้านการท่องเที่ยวเชิงการแพทย์โดยเฉพาะในประเทศไทย จากเหตุผลดังกล่าว ผู้อำนวยความสะดวกในกิจการท่องเที่ยวเชิงการแพทย์ซึ่งเป็นตัวกลางเชิงการแพทย์ พยายามที่จะเข้ามาจัดหาบริการด้านการแพทย์ให้แก่ผู้ป่วยจนนำมาสู่ปรากฏการณ์ของ “การขายการรักษาพยาบาล” สัญญาการท่องเที่ยวเชิงการแพทย์อันเป็นสัญญาลูกผสมและมีความทันสมัยซึ่งเกี่ยวเนื่องกับประเด็นการรักษาพยาบาลและการประกันได้สร้างความท้าทายต่อกฎหมายไทยเพราะเกิดช่องว่างการกฎหมายขึ้น ดังนั้น เพื่อเข้าใจและตระหนักถึงการแก้กฎหมาย จึงมีความจำเป็นอย่างยิ่งที่จะต้องศึกษากฎหมายของต่างประเทศ

ผู้อำนวยความสะดวกในกิจการท่องเที่ยวเชิงการแพทย์พยายามดึงดูดความสนใจของผู้ป่วยจนนำมาสู่ปัญหาเรื่องสถานะทางกฎหมายและการดำเนินกิจการตั้งแต่ก่อนการเข้ารับรักษาพยาบาลไปจนถึงขั้นตอนหลังการรับการรักษาพยาบาล การโฆษณาและการเปิดเผยข้อมูลถือเป็นสิ่งเร้าที่น่าสนใจสำหรับผู้ป่วย ขณะที่ข้อตกลงและเงื่อนไขของสัญญาการท่องเที่ยวเชิงการแพทย์ยังให้ประโยชน์ต่อผู้อำนวยความสะดวกในกิจการท่องเที่ยวเชิงการแพทย์อีกด้วย ข้อสิทธิและข้อบกพร่องต่างๆ ได้ก่อการหนัที่ความรับผิดชอบน้อยนิดให้แก่ผู้อำนวยความสะดวกในกิจการท่องเที่ยวเชิงการแพทย์ โดยเฉพาะในกรณีหากเกิดความผิดพลาดจากการรักษาพยาบาล การรักษาพยาบาลที่ต่ำกว่ามาตรฐาน การไม่ได้รับรองมาตรฐานของอุปกรณ์และแพทย์ผู้เชี่ยวชาญหรือบุคลากรอื่นๆ และการปฏิเสธการประกันการรักษาพยาบาล ซึ่งส่วนกระทบต่อสิทธิของผู้ป่วยทั้งนั้น ผลอันเกิดจากการคุ้มครองผู้ป่วยซึ่งไม่เหมาะสม นำมาสู่ผลกระทบทางอ้อม โดยเป็นการทำลายภาพลักษณ์ของการท่องเที่ยวเชิงการแพทย์ของประเทศไทย

บทความนี้ได้เสนอภาพรวมของกฎหมายจากประเทศสาธารณรัฐเกาหลีและสหรัฐอเมริกา (มลรัฐแคลิฟอร์เนียและเครือรัฐเพนซิลเวเนีย) ซึ่งเคยประสบปัญหาเรื่องเครือข่ายการให้บริการทางการแพทย์เช่นเดียวกับประเทศไทย ประเทศเหล่านี้ได้ออกกฎหมายมาควบคุมผู้อำนวยความสะดวกในกิจการท่องเที่ยวเชิงการแพทย์เป็นการเฉพาะ ในปัจจุบัน ประเทศไทยมีมาตรการทางกฎหมายซึ่งเป็นไม่เพียงพอต่อการควบคุมผู้อำนวยความสะดวกในกิจการท่องเที่ยวเชิงการแพทย์และการดำเนินกิจการด้านการท่องเที่ยวเชิงการแพทย์ ด้วยเหตุนี้ บทความฉบับนี้จึงมุ่งเน้นการวิเคราะห์ว่าเหตุใดมาตรการทางกฎหมายในการควบคุมผู้อำนวยความสะดวกในกิจการท่องเที่ยวเชิงการแพทย์จึงสมควรได้รับการพิจารณาและการเสนอวิธีการแก้ไขปัญหามาเพื่อการบังคับใช้กฎหมายอย่างมีประสิทธิภาพและสมบูรณ์

คำสำคัญ: ผู้อำนวยความสะดวกในกิจการท่องเที่ยวเชิงการแพทย์ นายหน้าในกิจการท่องเที่ยวเชิงการแพทย์ การรักษาพยาบาลข้ามประเทศ มาตรการในการควบคุม ความปลอดภัยของผู้ป่วย การประกัน การท่องเที่ยวเชิงการแพทย์ การท่องเที่ยวสุขภาพ

Medical tourism is defined as a new phenomenon in the healthcare industry that reflects a greater mobility of patients from the host countries to other countries for medical procedures supplied by several stakeholders¹, especially medical providers, insurance companies, and other facilities.

¹ Archie A. Alexander, *Cross-Border Health Care Services Trading: “Glocal” Trading Challenge*, Rapee Editor, Rapee Thammasat University 2015 (Matichon

For sustainable medical service network², medical tourism facilitators are persons who rearrange and deliver healthcare services to patients, particularly foreign patients. Critically, the medical tourism facilitators are a primary entity of medical service network that plays the role in a marketing channel in competitive marketplaces for global patients.³ The medical tourism facilitators have significant influences on decision-making of the patients and medical providers in accordance with medical choice, price, facilitation, and pre-post medical treatment.⁴

Recently, the medical tourism becomes a fierce battlefield of medical service competition as a result of operations of the medical tourism facilitators. With such competition, medical tourism facilitators earn a referral fee from the coordinating providers in exchange for the operations of medical service network.⁵ Given with joint coordination and shared objectives for various stakeholders of medical tourism network, in order to narrow the scope of this study, the relationship between medical tourism facilitators, patients, and medical providers shall be discussed.

Main problems in this study are the legal status and business operation. First of all, the legal status of medical tourism facilitators becomes the primary concern. As Thai officials interpret that the legal status of medical tourism facilitators shall comply with tourism law; tourism license approval and qualification are applied. Indeed, medical tourism facilitators are administrators in medical service network. The requirement of license approval is based on the leisure program which demonstrates the lack of requirements on medical and insurance, and low

PLC (2015) 154-191, ISBN: 978-9-74-466819-6.
<https://www.facebook.com/rapreebooktu> (last visited May 27, 2016).

² The integration of medical service with the network system between hospital or other medical professor, insurance company and other relevant healthcare facilities.

³ Maria K. Todd, *Medical tourism facilitator's handbook*, CRC Press, Newyork, United States, 2012, page 1.

⁴ ณัฏฐิรา อำพลพรวณ. บริษัท มาร์เก็ตไวส์ จำกัด, *สรุปสาระสำคัญจากการประชุม International Medical Tourism & Travel*, ระหว่างวันที่ ๑-๒ มีนาคม ๒๕๕๓, โครงการศึกษาเพื่อเพิ่มศักยภาพทางการตลาดสำหรับกลุ่มนักท่องเที่ยวเชิงสุขภาพและโครงการสำรวจพฤติกรรมและความพึงพอใจของนักท่องเที่ยวชาวต่างประเทศกลุ่มสุขภาพความงาม (NattiraAmphonphan, Marketwise Co Ltd., *International Medical Tourism & Travel Conference 2010*); Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*; Nathan Cortez, *Recalibrating The Legal Risks Of Cross-Border Health Care*, Yale Journal of Health Policy, Law & Ethics.

⁵ Charles Runckel, "Why Should You be a Medical Tourist?", available at http://www.business-in-asia.com/asia/medical_tourism.html; Medial Tourism Business Plan, available at <http://www.morebusiness.com/medical-tourism-business-plan> (last visited May 28, 2016); Medical Tourism Research Group, SFU, *Medical Tourism Facilitators: Ethical Concerns about Roles and Responsibilities*; Roy G. Spece, Jr., *Medical Tourism: Protecting Patients From Conflicts Of Interest In Broker's Fees Paid By Foreign Providers*, Journal of Health & Biomedical Law.

quality and qualification for persons who manipulate the whole of medical care networks. The indirect result from the wrong interpretation is that the specialized regulatory organizations in health care are not able to review their legal status. Hence, the medical tourism facilitators can operate the business on their own without any restriction or approval from the responsible sectors. The non-legal status could lead medical tourism facilitators to enter into the medical network chain easily and brings the drawback to the healthcare standard and patients' safety. Besides, the other providers in medical service network have no liability even if they know the illegal status of medical tourism facilitators. The last issue of legal status is the fiduciary duty. Presently, the medical tourism facilitators are subject to the principle of reasonable care as the main duty. However, they have to manage the medical service network that addresses the curious question of which the suitable duty they should comply.

Lastly, the business operation is another concern. With less consciousness on patients' right and medical standard, the medical tourism facilitators, whether wholly or partially, cause medical errors that destroy the reputation of the medical hub of Thailand. Medical tourism facilitators make the exaggerated commercial ads to attract the patients without any precautions of medical accidents or the assumed risks.⁶ Some of them pretend that they are health consultants; even they have been not certified by Medical Council or other health care organizations. Besides, the unilateral contracts between medical tourism facilitators and the patients may restrict the patients' rights and impose fewer responsibilities for them.⁷ The famous terms and conditions include with several waiver clauses, such as a declaration of non-medical referral service, no medical professional staff, termination of service, limitation of liability, and non-recovering process on medical error. The medical accident case which addresses the death and disorder was Joy Williams⁸, whereas the fault advertisement is represented in British female teacher case⁹ and Dr. Xeping case.¹⁰

⁶ นายแพทย์สุธีร์ รัตนมงคลกุล, ๕ วิชาชีพสุขภาพกับนโยบายสาธารณะแบบมีส่วนร่วม กรณีศึกษานโยบายการเป็นศูนย์กลางสุขภาพนานาชาติ, หน้า ๑๖๔-๑๖๖ (Dr. Sutee Rattanamongkolkul, 5 Organizations with Public Strategy in the Case of International Medical Hub, page 164-166); พล.ต.ต.นพ. อรรถพันธ์ พรหมฉายรัตน์, ศัลยกรรมและเวชศาสตร์เพื่อการเสริมสวยประเทศไทย (Auttpan Polnmontarat, Surgery and medical operation for Thai Beauty, available at <http://www.manager.co.th/Daily/ViewNews.aspx?NewsID=9570000076666>, <http://www.erk-erk.com/2013/04/stmstyle8/#sthash.DhZuYMFm.dpuf>) (last visited May 28, 2016).

⁷ PlacidWay Terms of Use, available at <http://www.placidway.com/termsconditions.php>; Medical Tourism Magazine, *supra* note 141; General Terms and Conditions of Med2Heal, available at <http://med2heal.com/contact/terms-conditions/>

⁸ Andrew Buncombe, *British woman's cosmetic surgery death in Thailand sparks warning over 'surgical tourism', Police say the surgeon was unqualified*, available at <http://www.independent.co.uk/news/world/asia/british-womans-cosmetic->

Nevertheless, to control the medical tourism facilitators, Thailand lacks both instrument and statute specifically imposed on legal status and business operation. Thereby, the patients may be vulnerable to fault management in the medical service network or be harmed from the medical error. Giving the general provision, the inadequacy of the existing laws is identified. Some provisions are involved and related to the control of medical tourism facilitator.

Firstly, Consumer Protection Act B.E. 2522 (1979) is referred to as the fundamental law for controlling the business and the consumer protection. Noticeably, the services which are subject to these provisions are defined as the ordinary services that can be clearly seen in daily life. Because of the general legislation, consumer protection law is the unfit instrument, such as consumer protection board which is not specialized in medical and insurance, and broad scope of protection without concerns on medical care and insurance. Besides, its purpose excludes the control of business operation with specific terms on medical advertisement and disclosure. Hence, the consumer protection law does not cover the medical tourism contracts which are referred to the modern business model.

Secondly, Tourism and Tourist Guide Business Act, B.E. 2551 (2008) is a statute that tends to govern on leisure basis. The objective of this law does not cover the mobility of patients in medical tourism network. Unfortunately, Thai officials construe that medical tourism is one kind of travel. As a result of the wrong interpretation, the medical tourism facilitators are only subject to the legal instruction, such as application of tourism license, tourism qualification, and orders and declarations of Tourism Board. In order to gain the tourism license and qualification approval, the applicants have to furnish the relevant information in connection with the scope of tourism service. It can be explicitly seen that the consideration of medical treatment and insurance are not stipulated in the tourism provisions. Similar to Consumer Protection Board, the committee of tourism business and guide comprises the agencies who are keen on the leisure and commerce, not specific healthcare and insurance criteria. Thus, the rules and regulations, which are enacted by Tourism Board, do not focus on health care and cannot solve the problems consequently. To explain, the provisions of medical tourism facilitator should be subject to the particular broad which is able to suggest or

surgery-death-in-thailand-sparks-warning-over-surgical-tourism-9815529.html (last visited May 29, 2016).

⁹ TV3 News, *Error lip surgery of British female teacher*, January 8, 2016, available at <http://morning-news.bectero.com/international/08-Jan-2016/67409> (last visited May 29, 2016).

¹⁰ Nation TV, "เซปิง-ชลธิศ" จากคู่หูเป็นคู่ความ หันหลังสร้างดาวคนละดวง, ๑๗ กุมภาพันธ์ ๒๕๕๘, (Nation TV, "*Xeping-Chonlathid*" from partners to rivals, February 17, 2016, available at <http://www.nationtv.tv/main/content/social/378489991/>) (last visited May 29, 2016).

manipulate the particular knowledge, such as medical and financial terminology.

Thirdly, Thai Civil and Commercial Code is the basic code imposed on several types of cases, including brokerage contract, obligation and contract, and hire of work. Those are not complicated legal relationship because these three types of contracts do not fully cover and provide the legal instrument of control over medical tourism facilitator as the hybrid contract in the medical service network. Medical tourism facilitators are referred to persons who engage in medical service network. They start the business by introducing their medical tourism packages, entering into contract, bringing patients for medical treatment, and health recovering. As mentioned, medical tourism facilitators should not be deemed as brokers who arrange third parties for contractual conclusion. On the other hand, medical tourism facilitators are defined as the quasi-brokerage characters. As a result of unfit law, the law of brokerage does not cover the main elements of controlling medical tourism business. When it comes to hire of work contract, non-suitable solution also addresses. Medical tourism business is the hybrid contract which is not just the basic service contract in normal practice. The law of hire of work imposes the rights and obligations of normal service for contractual parties. It is not surprised to learn that hire of work law cannot give the best solution for amendment problems. The law of brokerage mainly imposes payment method while the law of hire of work and obligation use the simple scope of liability whether creditors partially perform the obligation with fault or not. Thereby, the general terms cannot suitably apply to the specific case. The law of obligation serves the general principle in the reciprocal contracts, including the contracts in medical tourism network. However, the medical tourism facilitators' contract defines the specific contract in respect to medical care and insurance, so the law of obligation cannot fill the loophole of particular contexts.

Fourthly, relevant medical legislations rule that medical tourism facilitators are not subject to the control of governmental agencies in healthcare criteria. This brings the hardship to Medical Council of Thailand in that it cannot exercise its power on the investigation, the indication of liability, and penalty for illegal medical tourism facilitators. The mere suggestion it could give is the cautions for the patients before contractual conclusion.

Fifthly, legal measures for enhancing medical tourism can be categorized into two types: preventive and remedial measures. The remedial measure does not favor the foreign patients and affects the reputation of Thai medical tourism. In the general lawsuits, the litigations are based on claiming either in tort or contract. In the point of view of tort law, where a medical tourism facilitator himself is determined as being the wrongdoer by causing the damage to a patient on his own fault without any contemplation of the third party (the provider or other facilitating entities), he has to liable

to the injured person.¹¹ Recently, there is no existing law that imposes the liability on middlemen on fault of the medical practitioners and medical malpractices arising from the providers.¹² Unless the medical tourism facilitators partially damage the injured with the falsified information or suggesting the substandard treatment that destroys the whole purpose of patients' informed consent. Apart from tort litigations, breaches of contracts are another reason of lawsuits. Thus, the liability shall be limited for their own faults based on the unilateral contractual deals and laws. Struggles on suing to Thai civil courts serve the patients lower compensation compared with expensive expenses during litigation, inadmissible evidence in foreign language, and extended period of time.¹³ As mentioned above, the measures of sanction which provide a light and unenforceable method, are not enough to secure the patients' right and medical standard.

As can be seen, the existence of inadequate legal measures in laws and regulations impedes patients' safety and the reputation of Thai medical tourism. As a result, the preventive measure shall be concerned in the scope of legal status and business control. When the medical tourism facilitators are controlled, the reasonable and adequate medical treatment will occur which would increase the confidence on health care of patients.

The serious problems of medical tourism facilitators are also found in most countries around the world. A lot of countries are looking at causes and the way to stop the impact on health care systems. Most of them realize that the medical tourism facilitators are still a valuable factor in the medical tourism, so they do not prohibit such career from the medical network. As the result, the medical and insurance laws are involved with the consideration of consumers' health. The recent regulations are found in the Republic of Korea and the United States by focusing on California and Pennsylvania. The reason behind choosing Korean law as a model law is that the Republic of Korea is the famous destination country as same as Thailand, and also faces the same tough oversight on the business operation of medical tourism facilitators.¹⁴ The harmonization between Korean and Thai legislations would strengthen the Thai policy on worldwide health care and enhance the competitiveness of Thai medical tourism. Apart from Korean law, the laws of the United States governing on managed care

¹¹ Civil and Commercial Code of Thailand, s. 420.

¹² S. Saithanu et al., *Management of Medical Liability in Thailand*, 12 J. Health Sci. 876 (2003) (Thail.).

¹³ David M. Engel, *Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand*, 30 Law & Soc. Inquiry 469, 506 (2005), at 493.

¹⁴ Camille Hong, *Are Illegal Korean Agencies Sending Patients To Bad Plastic Surgeons?*, Economics, News Stories, April 1, 2015, available at <http://koreanplastic.com/are-illegal-korean-agencies-sending-patients-to-bad-plastic-surgeons/> (last visited May 29, 2016); Chelsea Kim, *Medical Tourism in South Korea: Beware of Illegal Brokers Who Overcharge You*, Medical Tourism Korea, available at <https://www.seoultouchup.com/medical-tourism-south-korea-beware-illegal-brokers-overcharge/> (last visited May 29, 2016).

organization are enacted to solve the increasing healthcare cost problem in the employees' welfare in most states.¹⁵ Given with the same functions of being middlemen in medical service network, managed care organization and medical tourism facilitators are involving in the health crisis through their facilitation. Unfortunately, each state has its own policy on the control of managed care organization, without any federal code. This study will explore only two states: California and Pennsylvania. Noticeably, preferred provider organization is one kind of managed care organization which has the nature and structure as same as medical tourism facilitator. The reason of selecting Pennsylvania regulation as the model law is that it gives the broad provision with a clear policy and allows the preferred provider organization to create the contract and business operations as long as not against the prohibition.¹⁶ Otherwise, California set the new definition of managed care organization. "Health care service plan" is placed instead of managed care organization. California module law offers the strong patient protection and detailed regulation in order to maintain affordable health care.¹⁷ Consequently, this study mostly imposes California law as a model law.

The Korean medical law launched the new provisions on registration and investigation on medical tourism, which is Medical Services Act B.E. 2553 (Amendment in 2010). In order to control the legal status, Korean law gives the definition of medical institution, and liabilities for all partners in medical service network for the acknowledgement of conspiracy on illegal status of medical institution.

On the aspect of business operation, Korean law indicates broad scope without guidance and bestows the power to relevant officials to review all activities. It leads to the ineffective result on the suitable practice which the medical tourism facilitator should comply with.

In addition to Korean law, with West's Pennsylvania Administrative Code, it seems that Pennsylvania law takes an approach of the review by relevant officials and the broad principle on legal status and business operation of preferred provider organization that has the same function as Korean law. For controlling the legal status by a license approval and a qualification of preferred provider organization, Pennsylvania provisions concentrate on the regulatory organization in particular with the specialized skill, the scope of review, and the coordination among responsible governmental sectors.

¹⁵ Dana Baroni and Amy Lee, Research and Oversight Council on Workers Compensation 2002, *An Analysis of Managed Care Network Standards in Other State Workers' Compensation Systems*, available at <http://www.tdi.texas.gov/reports/wcreg/netstands.html> (last visited May 28, 2016).

¹⁶ *Id.*

¹⁷ California Department of Managed Health Care, available at <https://www.dmhc.ca.gov/>.

By the way, without business practice, Pennsylvania law stipulates the broad principle on quality of health care and management, contractual control, and grievance system, including the compliance with medical conduct and insurance regulations.

Lastly, by Knox-Keene Health Care Service Plan Act of 1975, combined with Regulations Applicable to California Licensed Health Care Service Plans of 2015, California laws uses the greater strict control on health care service plans on both legal status and business operation. The license approval with all required documents and evidences, qualification of health care service plan, and fiduciary duty become the alternative solution in order to eliminate the illegal status of the plans because of detailed guideline which make the entrepreneurs easily understand and follow. Besides, the competent officials specialize in medical care and insurance have the power to examine the plans' status.

Moreover, giving the guideline for business operation, California regulations impose several issues that cover the pre-medical treatment to post-medical treatment. The control on advertisement, quality of care (system management and health care), report of business operation, contractual control, and grievance system are the effective rules that make the medical tourism facilitators able to find the reasonable practice on the balance between patient protection and business affairs.

Back to the limitations of Thai laws and regulations in connection with controlling medical tourism facilitator, the existing legislations are not appropriate to apply on the cases because they do not provide some specific terms and conditions. It seems that the study on control measures of medical tourism facilitators from other countries, combined with analysis of existing Thai regulations shall be taken in order to make the appropriate solution for medical tourism in Thailand.

The essential reason to harmonize the legal measures is to recreate the patients' confidence, protect Thai medical practitioners and facilities in medical service system and the patients. Thailand, one of the countries of destination for medical tourism, enters into the global medical market with the 'medical hub of ASIA' policy and other factors, such as high medical standard, low medical expense, and plenty of sightseeing. It seems that medical tourism facilitators, private organizations, are the giant wheel on driving the medical tourism. In addition, being the leader of medical services in ASEAN, Thailand shall prepare for greater mobility of patients that is sequenced from AEC opening at the end of 2015s, instead of allowing private sector the manipulates the chronic and complicated problem unsystematically. It can be noticed that the controlling on medical tourism facilitators is also enable Thailand to enhance the competitiveness of Thai medical tourism and to support Thai reputation on medical tourism.

It is necessary to impose the laws and regulations that specially governing on medical tourism facilitator. In implicated attitude, the medical tourism facilitators are deemed as professionals in medical service chain. Thus, they are assumed to be persons who should take the responsibility for

preventing the accidents and damages from medical errors. Both domestic and foreign patients, who are not familiar with advance technology and complicated bodies, entrust their lives in the hands of medical tourism facilitators. The indirect inputs that resulted from suitable legal measures are to increase the confidence of patients and develop Thai medical tourism image. Thereby, the proposed alternative resolutions are to stipulate the newly drafted law on specifically controlling medical tourism facilitator. The approaches on the status of law are composed of two phases: formal law and substantive law.

Firstly, the newly enacted law that specifically governs medical tourism facilitators: “*Medical Tourism Facilitator Control Act*”. Noticeably, patients, whether domestic or international, should be protected in a similar way under the same umbrella of control medical tourism facilitator. However, to complete the integration of medical service and insurance, ‘*the definition of medical tourism facilitator*’ shall be inserted in the relevant laws, with the condition of being “subject to Medical Tourism Facilitator Control Act and other relating laws and regulations”.

Secondly, concerning on Medical Tourism Facilitator Control Act, the substantive law should be composed of the controls on legal status and business operation.

The advisory instruments on ‘*medical tourism facilitators*’ legal status’ are combined with an accurate definition, a 5-year renewal license approval, a qualification of medical tourism facilitators and an approval guidance for the consideration of governmental agency, liabilities for illegal medical tourism facilitators and third parties, and a fiduciary duty.

Otherwise, suggested instrument on the ‘*business operation of the medical tourism facilitators*’ can be categorized into three phrases: pre-medical treatment, during medical treatment, and post-medical treatment.

For the ‘*pre-medical treatment*’, the control on advertisement and the disclosure of information are imposed in order to limit the freedom of medical tourism facilitators and raise the awareness of the patients on the gathering information process.

In the aspect of ‘*during medical treatment*’, legal measures are composed of the report, quality of care, and contractual control. The reports of business operation will create the greater coordination among parties within medical service chains. This could make the patients able to access to the public information and also guide the trend of governmental policy for enhancing Thai medical tourism strategies. The quality of both health care and management can strongly supports the medical standard and insurance in practice. These two requirements reasonably lead medical tourism facilitators to control their partners of medical service network and complete their systems as well. Lastly, contractual control will provide the necessary terms and conditions in the legal relationship between medical tourism facilitators, patients, and medical providers, such as cancellation of coverage, access to medical record, medical tourism accident coverage, and evidences. The control on contract is the potential instruments for the

reduction of unfair terms and conditions. In practices of contractual conclusion, the medical tourism facilitators conclude the unilateral contracts which do not protect the consumer with limitation of its responsibilities. When the law does not impose the control on medical tourism facilitator, contractual parties need to rely on the freedom of contract. Even the patients are not satisfied with unfair terms; they have no choice but are compelled to enter into the medical tourism contract for medical treatment.

Finally, on '*post-medical treatment*', the grievance system will secure the patients' confidence and safety. On the other hand, the medical tourism facilitators have to follow the result of their business and be responsible for any errors arising from the medical service network with the review from specific board.

The efficient legal measures on controlling medical tourism facilitators shall be deemed as a potential instrument for driving Thai medical tourism to the acceptable global standard. Nevertheless, the measures in other aspects apart from legal approach should be considered as well. In order to enhance the steady progress systematically, Thai governmental authorities should launch the training practices or accreditation for the medical entrepreneurs to train their employees following Korean model practical guideline as for achieving the worldwide acceptance.

The proposed alternative resolutions in this study represent the mere legal control measures on medical tourism facilitators in particular with the relationship between medical tourism facilitators, patients, and medical providers. In the case where the governmental sectors are concerned on the necessity of newly enacted or amendment law for control over medical tourism facilitators, this study may be adopted or studied further as basic knowledge in order to indicate the explicit responsibilities of the relevant sectors and enhance the greater integration among all participants in medical tourism marketplaces. For the effective and complete enforcement and the broad scope of amendment laws and regulations, other issues should be pursued, such as the relationship between medical tourism facilitators, insurance companies, and other providers within medical service network.

A COMPARATIVE STUDY OF COMPENSATION FOR DAMAGE RESULTING FROM MINING ACTIVITIES IN JAPAN AND THAILAND

Keiko Nakanishi

Abstract

Thailand has been experiencing severe environmental problems resulting from mining activity such as environmental damage and health damage. Mine pollution and its compensation for victims are one of the serious problems which need to be addressed immediately in order to impose compensation in accordance with Polluter Pays Principle (PPP). This thesis focuses on compensation for health and environmental damage resulting from mining activity and examines how victims can get the appropriate and reasonable value of compensation by identifying defendant properly compared with Japanese and Thai laws.

Focusing on Japanese laws concerning compensation for damage resulting from mining activity, there are three main and significant laws; Mining Act, Pollution Related Health Damage Compensation Act, Water Pollution Control Law. On the other hand, Thai laws such as the Enhancement and Conservation of National Environmental Quality Act of 1992, Mineral Act of 2002, the Navigation in the Thai waters Act of 1992 also impose compensation for mine damage, however, there is still no clear standard and guideline or method to be used in assessing mine pollution damage. Therefore, this leads to one of the most obstacles that victims can't be awarded the appropriate and reasonable value of compensation.

Thus, in order to overcome issues of compensation for damage by identifying defendant more effectively, standards concerning scope of mine damage compensation and calculation methods of compensation had better be established clearly. Thai laws had better adopt concept of "Extended Producer Responsibility" which covers not only prevention of pollution but also remediation.

Additionally, section 131/1 of Minerals Act of 2002 had better revise explicitly to mention what types of activities are applicable to compensation to ease difficulty of identifying defendant. Besides, section 88/12 of Minerals Act of 2002 should not be limited to cover "within the mining area" concerning scope of compensation to be awarded.

Keywords: Compensation for mine damage, Remedy, Mining activity and impact,

Introduction

This research discusses the background and the problems concerning compensation for damage resulting from mining activities. Additionally, this research shows that why laws concerning compensation for mine

damage should be implemented, together with the hypothesis, objective of study, scope of study, methodology, and expected result from the study.

At present in Thailand, there are some provisions imposing compensation on party causing damage resulting from mining activities, however, there is still no clear provision dealing with criteria and guidelines or methods to be used in assessing mine pollution damage such as how compensation for damages is to be calculated concerning total amount of compensation that responsible party has to pay or which items should be compensated for victims. Hence, compensation for pollution damage in Thailand remains practice complex. No clear provision assessing damage to mine pollution creates one of the most important obstacles for court in making decision and awarding an amount of damages that accurately reflects actual value of damage.

Strengthening of environmental consideration and improving some parts of inefficient legislations concerning compensation for mine damage is indispensable for protecting people who injured and it is further demanded rapidly in Thailand toward expansion of mining activity by foreign business, ASEAN integration. Economic development will lead to increase pollution damage.

This research focuses on compensation for health damage and environmental damage resulting from mining activity in order to examine how victims can get reasonable and appropriate compensation which matches to damage as far as possible compared with Japanese and Thai laws.

Mining activity and impact

Mine pollution may be continued and caused terrible damage to a large number of people in a wide area. Besides, as there are many cases that damage may appear by accumulation of hazard substances taking some years after cause of act, identifying polluter is extremely difficult.

Chapter 2 focuses on the overview of mining activity in both countries of Japan and Thailand and it also shows environmental impact and health impact caused by mining activity. What kind of certain mining activities may cause what kind of mine pollution damages? Mine damage might be caused mainly in the step of drilling activity for extraction, emissions of dust or smoke, disposal waste rock, discharge water in mining process. The damages may be a board range of various pollutions such as noise, air, water pollution and soil contamination. Additionally, chapter 2 introduces pollution-related diseases in Japan, Itai-itai disease and Toroku arsenic disease which are certain specific disease caused by mining activity in detail.

Compensation for damage resulting from mining activity in japan

This chapter illustrates the conceptual framework of Pollution Pays Principle and Precautionary Principle under the Japanese laws, together with the object, content of compensation, scope of compensation.

Additionally, chapter 3 introduces the calculate methods of compensation of Japan with the formula in detail. The subject matters of this study are the Civil law, Pollution-Related Health Damage Compensation Act (PRHDCA), Mining Act, Water Pollution Control Law and State Redress Law. Also, chapter 3 studies and analyzes landmark cases relating to compensation for mine damage in order to investigate and further research of this study.

Concerning techniques for increasing the value of compensation in Japan, it has become clear that indicating extent of damage clearly that are health damage and labor disability, influence on life by damage such as decrease income would be indispensable. Additionally, if victims can prove negligence or intention of defendant's act, or if victims can reduce percentage of victim's negligence when victims have certain negligence, the value of compensation can be increased.

Compensation for damage resoulting from mining activity in thailand

Chapter 4 shows the conceptual framework of Pollution Pays Principle and Parens Patriae Doctrine under the Thai laws. The subject matters of this study are as follows.

1. Civil Commercial Code
2. The Enhancement and Conservation of National Environmental Quality Act of 1992.
3. The Mineral Act of 2002
4. The Navigation in the Thai Waters Act of 1992
5. The Hazardous Substance Act of 1992

The discussion focuses on Section 420 of the wrongful act, Section 1337 of property damage under Civil Commercial Code, Section 96, Section 97 under the Enhancement and Conservation of National Environmental Quality act of 1992, Section 131/1 and 88/12 of the Mineral Act of 2002, Section 119, Section 119 *bis* of the Navigation in the Thai Waters Act of 1992 and Section 69 of the Hazardous Substance Act of 1992 by explaining the general concept and principle behind these provisions.

Besides, this chapter provides a comparative study of compensation for mine damage between Japan and Thailand in order to investigate characteristics, including major problems of compensation for mine damage under the Thai environmental laws.

Conclusions and recommendations

Chapter 5 shows the overall analysis of the entire papers and provides some legislative recommendations and other recommendations based on the content of conclusions. The recommendations focus on appropriate, practical solutions concerning compensation for mine damage in order to approach the appropriate and reasonable value of compensation for victims by identifying polluter properly.

There are also several issues in the Japanese laws, however, Japanese laws prescribe more concrete and more strict regulations from the experience of severe mine pollution damage in the past compared with Thai laws. Japanese laws may be applicable to use as references for improving some regulations of Thai laws. We need to face the matter that many people suffer from environmental pollution damage resulting from mining activity on the back side of development. At least, such victims should be awarded the reasonable and appropriate compensation which matches extent of damage as far as possible.

CORPORATE INCOME TAXATION ON CROSS-BORDER LEASING*

*Kornrapat Laosakulthai***

ABSTRACT

Under the Thai Revenue Code, other relevant laws and regulations, cross-border leasing business can gain the tax benefits only in the form of tax depreciation. This tax depreciation is unable to attract and facilitate the export of cross-border leasing transaction. Thailand's corporate income taxation on cross-border leasing still does not provide the adequate provision for granting a tax incentive to the export of cross-border leasing to the lessee in ASEAN member countries as well as measures to control a use of corporate income tax incentive accurately.

Therefore, this article presents the study of the corporate income taxation on cross-border leasing to illustrate in two issues: 1) tax incentive for the export of cross-border leasing to the lessee in ASEAN member countries; and 2) measures to control the use of such tax incentive under Thai laws.

Keywords: cross-border leasing, corporate income tax, lease, leasing, net operating loss, tax incentive

บทคัดย่อ

ภายใต้ประมวลรัษฎากร กฎหมายและกฎระเบียบที่เกี่ยวข้องอื่นๆ ธุรกิจลีสซิ่งระหว่างประเทศสามารถใช้ประโยชน์ทางภาษีอากรเฉพาะในรูปแบบของการหักค่าเสื่อมราคานั้น ซึ่งค่าเสื่อมราคานี้ไม่อาจดึงดูดและส่งเสริมการส่งออกของธุรกรรมลีสซิ่งระหว่างประเทศได้ การภาษีอากรในลีสซิ่งระหว่างประเทศของประเทศไทยจึงยังมิได้จัดให้มีซึ่งบทบัญญัติที่เหมาะสมในการให้ สิทธิประโยชน์ทางภาษีอากรสำหรับการส่งออกของลีสซิ่งระหว่างประเทศไปยังผู้เช่าในประเทศสมาชิกอาเซียน รวมทั้งมาตรการควบคุมการใช้สิทธิประโยชน์ทางภาษีเงินได้ อย่างชัดเจน

บทความนี้จึงได้ศึกษาการภาษีอากรในลีสซิ่งระหว่างประเทศเพื่อแสดงให้เห็นถึงปัญหาในสองประเด็น ได้แก่ 1) สิทธิประโยชน์ทางภาษีอากรสำหรับการส่งออกลีสซิ่งระหว่างประเทศไปยังผู้เช่าในประเทศสมาชิกอาเซียน และ 2) มาตรการควบคุมการใช้สิทธิประโยชน์ทางภาษีอากรดังกล่าวภายใต้กฎหมายไทย

คำสำคัญ ลีสซิ่งระหว่างประเทศ ภาษีเงินได้นิติบุคคล ลิส ลีสซิ่ง ขาดทุนสุทธิจากการดำเนินงาน สิทธิประโยชน์ทางภาษีอากร

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Introduction

Nowadays, domestic leasing market of Thailand has been growing up. There is a high competition among leasing companies, both the companies established under Thai laws, and the companies set up under the laws of foreign countries and carrying the leasing business in Thailand. The leased assets provided by these companies comprise of the vehicle (auto lease), machinery and equipment. Many major leasing companies still provide a domestic leasing as their services mainly focus on the auto lease which requires an ownership registration. In a case of cross-border leasing, equipment is a better option as most of them are moveable and do not require a registration. Moreover, the Association of Southeast Asian Nations (ASEAN) has established the ASEAN Economic Community (AEC) since December 31, 2015. The whole region is going to transform into a single market. Investment, service, and flow of capital move more freely.¹ It is an excellent opportunity for leasing companies in Thailand to export this service to a lessee in the ASEAN member countries. The outbound income from the cross-border leasing will transfer to be a corporate income tax, which is the government's revenue for using as its expenditure and another purpose, such as distributing income, facilitating business growth, and maintaining economic stability.²

Definition of Cross-Border Leasing

A lease or leasing is an agreement whereby the lessor leases out an asset to the lessee upon the lessee's desire. In a term of cross-border leasing, both the lessor and the lessee are located in different countries. The lessor will purchase an asset upon the lessee's request at his cost from a supplier or an exporter, then leases out the asset to the lessee. After that, the asset will be delivered to the lessee's place by the supplier or exporter. The lessor provides the lessee a right of possession and a right to use an asset for a particular term. In this regard, the lessee remunerates the lessor by installments of lease rents. The lessor will get the profits from the interest built into the calculation of the lease rents.³ In addition, there is no any requirement of security since the asset itself is a security. Sometimes it is determined as a secured loan.⁴ At the expiration of the lease term, the lessee will be entitled to purchase or return the leased asset to the lessor. The lessee can reserve his capital as he obtains one hundred percent financing from the lessor. Currently, there are two main types of leasing. One type is a finance lease, and another one type is an operating lease.⁵ The

¹ "ASEAN Economic Community", available at <http://www.asean.org/communities/asean-economic-community>.

² Group of Tax Scholars, **Taxation According to Revenue Code 2014 1** (2014).

³ David Wainman, **Leasing** 16-17 (1991).

⁴ David Wainman, *supra* note 3, at 2.

⁵ FLA, "Types of Leasing", available at <http://www.flas.org.uk/business/types-of-leasing>.

classification of lease sometimes includes sale-type lease and leveraged lease.⁶

Corporate Income Taxation

Corporate income taxation on cross-border leasing is similar to other businesses. Income derived from this transaction must be computed on a net profit basis. In details, there are some differences from other business as follows:

1) Lease Characterization

According to the Revenue Department Ordinance No. Tor. Por. 4/2528,⁷ and the Ministerial Regulation No.144,⁸ ‘renting the asset by leasing’ means a rental agreement whereby the lessor who is the owner of the asset and rents out with a promise that the lessee has the right to purchase the leased asset or to return said asset to the lesser. This meaning reflects a concept of legal ownership that focuses on ownership holder. However, the term of cross-border leasing is not defined under the Thai Revenue Code or other relevant laws.

2) Lessor as Taxpayer

The lessors as juristic persons are subject to the corporate income tax liability, according to Section 39 of the Thai Revenue Code. Some of them are a company incorporated under Thai laws in a form of a limited company or a public limited company. Some other lessors are a company incorporated under foreign law that carrying a leasing business in Thailand. A limited partnership and a registered partnership can also be a lessor. Other lessors may include a company or juristic partnership incorporated under foreign law which has an employee or a representative or a contact person in carrying on its business in Thailand and receives the profits in Thailand, a business that a foreign government, organization of a foreign government or any other juristic person established under a law of foreign country operates commercially or profitably, and a joint venture.

3) Income Recognition

The lessor is subject to a corporate income tax liability on a net profit basis, according to Section 65 paragraph 1 of the Thai Revenue Code.

⁶ Comptroller of the Currency, **Lease Financing Comptroller’s Handbook January 1998** 10 (1998).

⁷ Revenue Department Ordinance No. Tor. Por. 4/2528 (1985) for ordering the payer of assessable income under Section 40 who have to withhold tax by the virtue of Section 3 *tredecim* of the Revenue Code.

⁸ Ministerial Regulation No.144 (B.E. 2522) Issued Pursuant to the Revenue Code regarding the Revenue Tax.

The computation applies an accrual basis under Section 65 paragraph 2 of the Thai Revenue Code. All lease rents and expenses related to such lease rents arising during accounting period of twelve months,⁹ even the lessor has not received in such accounting period yet, must be deemed as income and expenses for that particular accounting period. Also, Article 3.4 of the Revenue Department Ordinance No. Tor. Por. 1/2528¹⁰ provides that these incomes and expenses in each accounting period shall be calculated according to the portion of the lease term.

4) Net Profit Computation

Under Section 65 of the Thai Revenue Code, the lessor shall pay a corporate income tax under the net profit basis calculated by deducting income arising from leasing business carried on in an accounting period with expenses. The lessor's computation must comply with the conditions under Section 65 *bis* regarding deductible expenses, and Section 65 *ter* which is related to the prohibited expenses. After computing the net profits, the lessor shall multiply such net profits by the tax rate for a corporate income tax to be paid and file a tax return for the accounting period.

This net profit computation has some exemptions in a case of outbound income. The lessor who has paid his income tax in another country can use such paid taxes as a tax exemption against the corporate income tax to be paid in Thailand. This includes a lease rent paid by the lessee in ASEAN member countries in Brunei Darussalam and Cambodia to the lessor in Thailand. In the case of remaining ASEAN member countries that Thailand has a double tax agreement (DTA) with, lease rents are determined as royalties. The royalties paid to Thai lessor shall be charged not exceeding 15 to 25 percent of the amount of the royalties. Both cases can use as a tax credit under the criteria and conditions of the Royal Decree No.300 and Proclamation of Director-General No.65, but up to the amount of tax that would have been payable from income derived in Thailand.¹¹

5) Tax Depreciation on the Leased Equipment

In the cross-border leasing, the lessor has a legal ownership over the leased equipment so that the lessor can deduct the depreciation and depletion on the leased equipment as other assets, according to Section 4 (5) of Royal Decree No.145¹² so that the allowable deduction rate is at 20% of

⁹ Except in the some cases where it may be less than twelve months, see Thai Revenue Code, Section 65 paragraph 1.

¹⁰ Revenue Department Ordinance No. Tor. Por. 1/2528 (1985) Re: Application of Accrual Basis in Computation of Income and Expense of Company or Juristic Partnership.

¹¹ See Royal Decree No.300 and Proclamation of Director-General No.65.

¹² Royal Decree Issued Pursuant to the Revenue Code regarding the Depletion and Depreciation of the Asset (No.145) B.E. 2527 (1984).

the capital cost per one accounting period, totaling at rate of 100% for five accounting periods. It will be computed on an average of time in acquiring in each accounting period. The lessor can adopt both straight-line and the double-declining method, but the useful life of the asset shall not be less than 100 shared by the rates stipulated in Section 4 paragraph 1 of Royal Decree No.145.

6) Net Operating Loss Treatment

A net loss or net operating loss (NOL) is incurred when the expense exceeds the income. In a case that the lessor acquires huge amount of equipment for cross-border leasing transaction and deducts the tax depreciation, it might result in a net loss. Thus, the lessor can carry such net loss forward for five years from the present accounting period, according to the exception of Section 65 *ter* (12).

7) Withholding Tax of Lease Rent

According to Article 6, Paragraph 1 of Revenue Department Ordinance No. Tor. Por. 4/2528, a juristic person who pays money or any other gain derived from a rent of property, an assessable income under the Thai Revenue Code, Section 40 (5) (a), to the juristic lessor carrying a leasing business in Thailand, shall deduct the withholding tax at a rate of 5.0%. Subject to Paragraph 2 of the Article 6, in case that the lessor having a paid-up capital of sixty million Baht upwards is a vat-registered business person,¹³ and a lessee is a juristic person with the lease term exceeding three years, a lessee shall not deduct a withholding tax as imposed. Moreover, the term of 'leasing' shall be defined as prescribed in paragraph 3 of the Article 6. This exemption is not applied to the cross-border leasing transaction since this transaction is carried outside of Thailand.

Nevertheless, the provisions of Paragraph 2 and 3 of the Article 6 were repealed by Article 1 of the Revenue Department Ordinance No. 259/2559 (2016).¹⁴ Therefore, upon Article 2 of this Ordinance, the lessee shall deduct the withholding tax at the rate of 5% of every payment of the lease rent. It has come into force on the assessable income (lease rents) since June 1, 2016.

¹³ According to Thai Revenue Code, Section 82/3.

¹⁴ Revenue Department Ordinance No. Tor. Por. 259/2559 (2016) Re: Order the Payer of Assessable Income under Section 40 of Revenue Code to have Withholding Tax Liability.

8) Penalties and Punishment

After submitting a tax return, assessment by the Thai Revenue Department may be required. This assessment is a legal enforcement to control the lessors to comply with the Revenue Code and relevant regulations. In the case of intentionally attempting to evade or defeat tax, a person shall be either fined not exceeding 200,000 Baht or imprisoned not exceeding one year, or both, according to Section 37 of the Thai Revenue Code. In the case of intentional notifying, giving, or answering a false statement, or showing false evidence with a tax evasion purpose, a person shall be either imprisoned for three months to seven years and pay penalties from 2,000 to 200,000 Baht, according to Section 37 of the Thai Revenue Code. These imprisonments and penalties also apply to the attempt to evade tax by using false facts, fraudulent, artifice or other similar nature.

Conclusions

In the computation of net profit, the leasing company can deduct the principal in the form of depreciation at the rate of 20% of capital equipment for an accounting period, as it is determined to be other assets. It affects the cash flow of leasing companies in financing other lessees. Because of a time value of money,¹⁵ the faster a leased asset can be depreciated, the greater the tax advantage of the leasing company.¹⁶ It results as money to invest new equipment since cross-border leasing requires a high amount of cash flow to invest in new equipment. Therefore, Thailand should improve existing Thai laws and regulations in respect of corporate income taxation to promote the export of cross-border leasing service by increasing the rate of tax depreciation. NOL carryforward period of five years should also be extended for the remaining NOL after such five years. Finally, Thailand should improve provisions to provide stronger measures in controlling of the use of tax incentive, such as higher penalties and punishment, investigation system, and exchange of information with other countries, and should provide a registration system for leasing business, both domestic and international leasing transactions to support the controlling measures effectively.

¹⁵ Time value of money or in shortly TVM is a concept in respect of money. The money at present time has a greater value than the same amount in the future because of its potential earning capacity..

¹⁶ Eugene F. Brigham & Michael C. Ehrhardt, **Financial Management: Theory & Practice** 788 (14th ed. 2014).

CLICKBAITS: LIABILITY UNDER COPYRIGHT LAW IN THAILAND*

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Abstract

At present, the internet has become one of the most important information sources. Moreover, the price of communication devices is cheaper than before. Therefore, people are able to access interesting information via internet. Unfortunately, some people who understands a modernist behavioral lifestyle has discovered a method earning money from this and seeks benefit by using a tactic called “Clickbait”.

“Clickbait” consisted of two words. One is “click” means “an instance of selecting an item in a website or app by clicking or tapping on a mouse, touchscreen, or other input device.” Another is “bait” means “to entice or provoke, especially by trickery or strategy.” Once they are merged, it means “[a] provocative or sensationalistic headline text that entices people to click on a link to an article, used as publishing tactic to increase webpage views and associated ad revenue.”

Because clickbait websites aim only on increasing webpage views, hence, it needs more and more contents to fulfill its sites. Unfortunately, many of these sites do not create contents by themselves, but steals contents from legitimate and hardworking authors. This execution may deem as a copyright infringement.

After conducting comparative study on Thai and foreign copyright laws, namely US law and UK law, it was found that clickbait websites are not in favor of fair use and fair dealing doctrine and being considered as a copyright infringement. Furthermore, it was found that the US law is effective to tackle online copyright infringed contents and suitable for applying to click-baiting offences.

In Thailand, the Thai Copyright Act B.E.2537 (1994) is a main statute to deal with copyright infringement offence. Even though it was recently amendment in B.E.2558 (2015) but it is unable to tackle click-baiting problems effectively, since clickbait websites abruptly generate a huge amount of income to clickbait website owner within a short period. In addition, the Computer Crime Act B.E.2550 (2007) has no measure for tackling online copyright infringed contents. Thus, the revision of the Thai Laws should be seriously taken into consideration. In this regard, the author

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provided not only proposed solutions to resolve this fashionable issue but also a recommendation format for a good digital online content.

Keywords: Clickbait, Copyright, Copyright Infringement

บทคัดย่อ

ปัจจุบันนี้ อินเทอร์เน็ตเป็นแหล่งข้อมูลข่าวสารที่สำคัญ อีกทั้งอุปกรณ์อิเล็กทรอนิกส์สำหรับการสื่อสารมีราคาขอมหา ทำให้ประชาชนสามารถเข้าถึงข้อมูลข่าวสารบนอินเทอร์เน็ตได้อย่างกว้างขวาง จึงมีคนกลุ่มหนึ่งซึ่งสามารถจับทางในการสร้างธุรกิจและเข้าใจในพฤติกรรมของผู้บริโภคยุคใหม่ เริ่มต้นแสวงหาประโยชน์จากผู้ใช้งานอินเทอร์เน็ตด้วยสิ่งที่เรียกว่า Clickbait

Clickbait (คลิกเบท) เป็นคำประสมกันระหว่างคำว่า Click (การกด) และคำว่า Bait (สิ่งล่อใจ) ซึ่งคำว่า Clickbait นั้น อธิบายถึงเนื้อหาของเว็บไซต์ใด ๆ ที่มีวัตถุประสงค์หลักในการ “สร้างรายได้จากการโฆษณา” โดยอาศัยการเขียนพาดหัวข่าวที่สร้างให้คนเกิดความอยากรู้อยากเห็น เพื่อให้ “คลิก” เข้าไปอ่านเนื้อหา เมื่อคนคลิกเข้าไปมาก ๆ เจ้าของเว็บไซต์เก็บสะสมสถิติการเข้าชมไปเสนอต่อเอเจนซีโฆษณา เพื่อขายโฆษณา และรอรับรายได้จากการโฆษณาโดยไม่ต้องลงทุนลงแรงอะไรมากนัก

เมื่อการทำ Clickbait มีวัตถุประสงค์หลักในการเพิ่มจำนวนผู้เข้าชมเว็บไซต์ จึงทำให้เว็บไซต์ Clickbait ส่วนใหญ่ เน้นสร้างเว็บไซต์ให้มีเนื้อหาที่หลากหลาย โดยไม่สนใจคุณภาพของเนื้อหา และมักจะคัดลอกเนื้อหาจากเว็บไซต์อื่น ๆ มาใช้เป็นเนื้อหาในเว็บไซต์ของตนเอง ซึ่งการกระทำดังกล่าว เข้าข่ายเป็นการกระทำที่ละเมิดลิขสิทธิ์

จากการศึกษาเปรียบเทียบกฎหมายลิขสิทธิ์ รวมถึงกฎหมายที่เกี่ยวข้องในการจัดการเนื้อหาที่ละเมิดลิขสิทธิ์บนระบบอินเทอร์เน็ตของประเทศสหรัฐอเมริกา และประเทศอังกฤษ พบว่าลักษณะของการนำเนื้อหาจากแหล่งอื่นมาใช้ในเว็บไซต์ Clickbait นั้น ไม่เข้าข้อยกเว้นของการละเมิดลิขสิทธิ์ตามหลัก Fair Use และ Fair Dealing และจากการศึกษายังพบว่าระบบการจัดการกับเนื้อหาที่ละเมิดลิขสิทธิ์บนระบบอินเทอร์เน็ตของประเทศสหรัฐอเมริกา มีความสะดวก รวดเร็ว และเหมาะสมในการนำมาปรับใช้กับการละเมิดลิขสิทธิ์ของการทำ Clickbait

สำหรับประเทศไทย พ.ร.บ. ลิขสิทธิ์ พ.ศ. ๒๕๓๗ เป็นกฎหมายหลักในการจัดการเกี่ยวกับเรื่องการละเมิดลิขสิทธิ์ ซึ่งได้ประกาศใช้มาเป็นระยะเวลากว่า ๒๐ ปีแล้ว ถึงแม้ว่าจะมีการแก้ไขเพิ่มเติมล่าสุดในปี พ.ศ. ๒๕๕๘ แต่ก็ยังไม่สามารถจัดการกับ Clickbait ได้อย่างมีประสิทธิภาพ เพราะการละเมิดลิขสิทธิ์โดยการทำ Clickbait นั้น สามารถเกิดขึ้นได้โดยง่าย รวดเร็ว และสร้างรายได้จำนวนมากให้แก่ผู้กระทำละเมิดลิขสิทธิ์ในระยะเวลาอันสั้น นอกจากนี้ พ.ร.บ. ว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ พ.ศ. ๒๕๕๐ ยังไม่มีบทบัญญัติของการจัดการกับเนื้อหาที่ละเมิดลิขสิทธิ์บนระบบอินเทอร์เน็ต จึงสมควรที่จะปรับปรุงแก้ไขบทบัญญัติกฎหมายเพื่อรับมือกับปัญหาดังกล่าว ทั้งนี้ ผู้เขียนได้เสนอข้อคิดเห็นในการปรับปรุงแก้ไขบทบัญญัติกฎหมาย และเสนอรูปแบบในการเขียนบทความออนไลน์ที่ดีมาด้วยในโอกาสเดียวกัน

คำสำคัญ: คลิกเบท, ลิขสิทธิ์, ละเมิดลิขสิทธิ์

1. The Overview of Clickbait

“You will Never Believe ... what’s contained in this article!!!”

Are you familiar with this type of headline? If you do, then you may have once faced with it; Clickbait.

Clickbait is a new phenomenon of wicked business emerged on the internet. It defines as “[a] provocative or sensationalistic headline text that entices people to click on a link to an article, used as publishing tactic to increase webpage views and associated ad revenue”.¹ Clickbait websites are not only appear in foreign websites but also in Thai websites. Many Thai clickbait websites such as www.ohozaa.com, petmaya.com or www.catdumb.com are the websites that make a living on Portal Web (website that gather all interesting article in one place),² which is known as Parasite Web. These clickbait websites do not create contents by themselves, but lean on others websites by filching contents from others, changing the words, and use provocative or sensationalistic headline text to make them being excited and entices people to click on a link to the article. These technique is also popular in foreign websites because it really works well and increases the webpage views.³

Inside each page of clickbait website, there has an advertising unit called “Contextual Advertising”. The owners of the sites will be paid according to how many clicks the page has received; meaning that the more the page is being accessed, the more income the site owner generates. That is why clickbait website owners try to increase the webpage views as much as they can.

There are two stealing methods employed by Thai clickbait websites. One is by translating from the foreign news, and another is by copying contents from the local websites within the country.⁴

Mister Tham Chuasathapanasiri, a scholar of Academic Institute of Public Media (AIPM) gave the suggestion about the characteristic of clickbait websites as:⁵

- 1) Copy contents from original source and modify the wording;
- 2) Not prepare hyperlink to the original source because they want to increase their webpage views;
- 3) Using a headline that encourages people to click, to see more, without telling them much information about what they will see;
- 4) There is no editorial department to control the quality of journalism, no pressman, and also no editor-in-chief.

¹ The Free Dictionary by Farlex, *clickbait*, available at <http://www.thefreedictionary.com/clickbait> (last visited Jun. 19, 2015).

² Yugioh2500, “เว็บไซต์พอร์ทัล (Web Portal) คืออะไร? มาทำความรู้จักกัน”, 11 กันยายน 2557, (Yugioh2500, “What is Web Portal? Let’s know about it”, Sep. 11, 2014), available at <http://ireview.in.th/what-is-a-web-portal/> (last visited Jun 9, 2015).

³ หายนะออนไลน์ “เว็บปรสิต” ก๊อปปี้ข่าวจนยอดวิวกระจาย!, ASTV ผู้จัดการรายวัน, 10 พฤษภาคม 2558, (Online Disaster: “Parasite Web” Earned webpage views from stolen contents!, ASTV Daily Manager, May 10, 2015), available at <http://www.manager.co.th/Daily/ViewNews.aspx?NewsID=9580000053326> (last visited May 17, 2016).

⁴ *Id.*

⁵ *Id.*

Stealing contents from others websites and repost on his own website is considered committing a copyright infringement by reproduction and communication to the public.⁶ Other than copyright infringement, clickbait website owners sometimes copy or translate contents from others sources without verify the truth of those contents and makes detriment to the original source of information.⁷ Moreover, some clickbait websites owners create nonsense contents and or contents without any subject matters there are only some contents for click-baiting purpose.⁸

2. Liability for Clickbait under Foreign Copyright Law

The author decided to choose the copyright law and others relevant laws of these two countries: The United States of America (U.S.) and the United Kingdom to conduct a comparative study. Since the U.S. Copyright Law has provisions to tackle with modern type of copyright infringement, and also has fair use doctrine. While English Law has fair dealing doctrine which are able to determine the infringement of contents under clickbait website.

2.1 Liability for Clickbait under U.S. Law

2.1.1 The Code of Laws of the United States of America (U.S.C.)

The Code of Laws of the United States of America (variously abbreviated to Code of Laws of the United States, United States Code, U.S. Code, or U.S.C.) is the official compilation and codification of the general and permanent federal statutes of the United States. The highlight provision related to clickbait issue is the Title 17 of U.S.C. § 107⁹ – Limitations on exclusive rights: Fair use.

If clickbait applied with four factors of fair use doctrine, it's result shall be like these as follow:

(1) *the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational study.*

Clickbait website aims to use others copyright work in order to gain benefit from webpage views, this use is a commercial purpose. Fair use is more likely to be found when the copyrighted work is “transformed” into something new or of new utility or meaning, while clickbait website often

⁶ Thai Copyright Act B.E.2537 (1994) Section 27

⁷ Obassblog, “Clickbait คืออะไร? ทำไมเราไม่ควร Click?”, 28 มิถุนายน 2558, (Obassblog, “What is Clickbait? Why We should Avoid It?”, Jun. 28, 2015), available at <http://obass.orgfree.com/index.php/2015/06/28/clickbait/> (last visited May 11, 2016).

⁸ *Id.*

⁹ 17 U.S.C. § 107

does no change to others works or only make a little change. Hence, clickbait is not favor for this factor.

(2) the nature of the copyrighted work

This factor concerns about works itself whether it is fictional or non-fictional. A judge is more likely to find a determination of fair use if the copy material is taken from a factual work such as a biography than from a fictional work such as a novel.

The stolen contents by clickbait website always be a fictional work which has to use idea and effort to create such work. Thus, clickbait is not favor for this factor.

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole

Clickbait always use all of copyrighted work for their contents, both writing and photograph work. Therefore, clickbait is not favor for this factor.

(4) the effect of the use upon the potential market for or value of the copyrighted work

The last factor is concerning on the effect of the usage of the copy work in the potential market. Contents which internet users have read already tend to never read twice, this effect potential market for copyrighted work – internet users, and made the copyright owner loss profit from earning income from webpage views.

Being considered all factors in the fair use principle, click-baiting is no favor for the fair use.

About the remedies aspect. In the U.S.A., in addition to demanding for “Actual Damages”, copyright owner who won the case can demand for “Statutory Damages”, which give the choice to copyright owner not to prove the actual damages but a chance to use criterion per work to calculate statutory. The court has discretion to award this damage from \$750 – \$30,000 per one work.¹⁰

If that infringement was willfully committed, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.¹¹ Conversely, in a case where the infringer sustains the burden of proving, and the court found that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.¹²

2.1.2 Digital Millennium Copyright Act (DMCA)

The Digital Millennium Copyright Act (DMCA) enacted in 1998 implemented treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) signed at the 1996 World

¹⁰ 17 U.S.C. § 504(C)(1)

¹¹ 17 U.S.C. § 504(C)(2)

¹² *Id.*

Intellectual Property Organization (WIPO) Geneva conference. DMCA was signed into law by President Clinton on October 28, 1998.¹³ The DMCA is divided into five titles. Clickbait issue is involved with the Title II, the “Online Copyright Infringement Liability Limitation Act” concerning Notice and Takedown Measure. This measure allows the copyright owners to inform the Internet Service Provider (ISP) to take a file out of the system, or disallow users’ access to the file. Once ISP take out the file from the system or obstruct the accessing of the users, the ISP will not have to liable for an infringement of users.

2.2 Liability for Clickbait under English Law

2.2.1 Fair Dealing

The fair dealing is a doctrine which provides an exception to United Kingdom’s Copyright Law, in cases where the copyright is infringed for the purposes of non-commercial research or study, criticism or review, or for the reporting of current events. This principle is narrower than the U.S.’s fair use doctrine. There is no statutory definition of fair dealing. It will always be a matter of fact, degree and impression in each case.¹⁴ Considering click-baiting under the fair dealing principle, it has no purpose in non-commercial research or private study, criticism or review, reporting current events, or illustration for instruction, quotation, or parody, caricature or pastiche. Therefore, click-baiting is no favor under the fair dealing principle.

2.2.2 Intellectual Property Offences

A person who infringing copyright which committed for commerce is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale, or both.¹⁵

The standard scale of fines for summary offences states in Criminal Justice Act 1982 Section 37. It shows that the level 5 on the standard scale has the £5,000 amount of fine. Therefore, if a person commits an offence who, without the license of the copyright owner in the course of a business – exhibits in public (Section 107(1)(d)(iii)) is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding £5,000, or both.

3. Liability for Clickbait under Thai Copyright Law

¹³ U.S. Copyright Office Summary, “*The Digital Millennium Copyright Act of 1998*”, Dec. 1998, available at www.copyright.gov/legislation/dmca.pdf (last visited Dec. 10, 2015)

¹⁴ Intellectual Property Office, “*Exceptions to Copyright*”, available at <https://www.gov.uk/guidance/exceptions-to-copyright> (last visited Dec. 10, 2015).

¹⁵ English Copyright, Design and Patents Act 1988, sec. 107(5).

Clickbait has no any condition which be the act under exception to copyright infringement according to Section 32¹⁶ of the Thai Copyright Act B.E.2537 (1994) because contents of clickbait website has been stolen from others websites are conflict with a normal exploitation of the copyright work by the copyright owner and does not unreasonably prejudice the legitimate interests of the author, the original websites also want to increase their webpage views. Therefore, we do not need to consider that whether the act is under (1) – (8) in paragraph two of Section 32 of Copyright Act B.E.2537 (1994) or not, because paragraph two is subject to the provision in the first paragraph.

As click-baiting is a copyright infringement, there is the Safe Harbor for Service Providers principle in Section 32/3 of the Copyright Act B.E.2537 (1994) to cope with digital online infringed contents. It states that *“In the case where there is reliable evidence showing that there is a copyright infringement in the computer system of a service provider, a copyright owner may submit a petition requesting the court to order the service provider to cease such copyright infringement...”* However, this provision may not provide completely the capability in dealing with clickbait and copyright infringement offences. We need a quick method to cease the click-baiting because the characteristic of clickbait is different from other formats of copyright infringement. Making clickbait website is only copy and paste the contents into it which always be the interesting substance of people in that period. For example, the news about a raping which draw user’s attention and raise the emotion. This type of contents may attract many users and remained the popularity for one or two days, then fading out. This incident is quickly happened and gone. Thus, submitting a petition requesting the court to order the service provider may delay the take down process. Another issue is, there is no clear definition for the word “to cease the infringement” that whether or not included the “website blocking”.

There also has Punitive Damages principle in Section 64¹⁷ paragraph two of the Copyright Act B.E.2537 (1994). However, to recover punitive damages, the copyright owner has to provide evidences to proof the actual damage as paragraph one states before getting additional damages, which is more complicate and difficult of proving, besides in some cases there are too many clickbait websites infringing one copyright work. If the copyright owner is able to recover statutory damages the same as Section 504 of the U.S.C., it will help the copyright owner to recover damages easier and also decrease the court’s work load.

In present, there is no court decision about click-baiting. However, in authors’ opinion, the action of clickbait website owner is clearly shows that they use such infringed work for profit, even if it is not the direct profit

¹⁶ Thai Copyright Act B.E.2537 (1994) Section 32

¹⁷ Thai Copyright Act B.E.2537 (1994) Section 64.

collecting from viewers. Therefore, clickbait website owners should liable as the copyright infringement which committed for commerce as states in Section 69¹⁸ paragraph two of the Thai Copyright Act B.E.2537 (1994). Nevertheless, someone may think that the penalties are quite low, in addition, click-baiting can make high profit. Therefore, it worth to take risk for committed the offence.

Aside from the Thai Copyright Act B.E.2537 (1994), the Computer Crime Act B.E.2550 (2007) is another law that relevant to clickbait issue. Since clickbait websites may host their contents by local hosting or international hosting. If clickbait website is hosted by local hosting, it is easily to find hosting provider to proceed Notice and Take Down process, but when the clickbait website is hosted by international hosting provider, it is rather difficult to carry out this process.

To tackle with clickbait website which hosted by international hosting provider is running website blocking. At present, website blocking could be done under Section 20¹⁹ and Section 14²⁰ of the Computer Crime Act B.E.2550 (2007) which has no offense about copyright infringement, there has only offence that might have an impact on the Kingdom's security as stipulated in Division 2 type 1 or type 1/1 of the Criminal Code, or that it might be contradictory to the peace and concord or good morals of the people that is able to run website blocking. Hence, if copyright infringement become one offense under Section 20 that can request the court to restrain the dissemination of infringed data, this will help us to block these clickbait websites from accessing.

4. Conclusions and Recommendations

4.1 Conclusions

At present, clickbait problem is still easy to experience. If we do not control or take action on this problem, copyright owners will suffer and lose all enthusiasm in creating new works. The internet users will always feel annoy with these digital online garbage and be suspicious every time when they had to click through link in order to read the contents.

Apart from copyright infringement problem, clickbait is the worsen. Sometimes it creates an untrue story or trivial matter in order to deceive readers to read and spread out by abusing among others readers even they reprimanded. These distort stories makes some peoples believed in and spread out to others, after sharing it is difficult to correct that misunderstanding. Moreover, some contents are different from headline, furthermore, after click through, it is not content – shopping webpage instead! Clickbait is very annoyed and we should call that, this is the way of earning income by “swindling”.

¹⁸ Thai Copyright Act B.E.2537 (1994) Section 69.

¹⁹ Computer Crime Act B.E.2550 (2007) Section 20.

²⁰ Computer Crime Act B.E.2550 (2007) Section 14.

Clickbait is more insidious than even some old ways of flogging newspaper stories, because “*readers are being treated as stupid*” – said Beckman.²¹

4.2 Recommendations

After conduct the comparative study, these are the proposed solutions and recommendations for tackle with click-baiting problem:

A) Increase the penalties for committed copyright infringement offence by prolong the imprisonment penalty and increase the penalty fine to the point that it is not worth for commit the offence;

B) Having regulations that allow the copyright owner to recover statutory damages like Section 504 of the U.S.C.

C) Amending the Safe Harbor for Service Provider principle in the Thai Copyright Act B.E.2537 (1994) to allow the copyright owners to directly inform the Service Provider to take a file out of the system, or disallow users’ access to the file. Another point is obviously identify the meaning of “to cease the infringement” that included “website blocking” which will able to block website which has infringing contents.

D) Amending Section 20 of the Computer Crime Act B.E.2550 (2007) by adding a copyright infringement offence that allows the Court to restrain the dissemination of infringed data.

E) Having particular legal provision about click-baiting in the Computer Crime Act B.E.2550 (2007), because the characteristic of clickbait is a bad conduct executed on the internet which resemble to others offences stated in such act.

F) Recommend the website owners to create contents by themselves and have the proper format for the article, such as provided clickable hyperlink that take the readers to the original source of the article. Moreover, please do not create nonsensical or carelessly contents with only purpose to earning webpage views.

Eventually, the author hope that this article will be able to provoke about clickbait problem and has a proper law provision to handle with it. Whenever we have powerful law and conscious users, clickbait problem will annihilate from the internet. If we do not aware of this phenomenon and do not solve it right now, then, in the future, internet will full of these waste websites, quality contents will disappear, nonsensical, unscreened, and untrue story will occupy in every space. When we search for information on the internet, we have to waste time in screening these waste data and have some troubled in further reference. If the clickbait is still remaining, apart from us that be anxious with these scraps, our descendant who must confront with it will have a hard time to differentiate that which

²¹ Andrew Beaujon, “*The real problem with clickbait*”, Jul. 16, 2014, available at <http://www.poynter.org/2014/the-real-problem-with-clickbait/258985/> (last visited May 16, 2016).

one is true, which one is untrue, which one is good, which one is bad, from something called “Clickbait.”

LEGAL PROBLEMS INVOLVING LEASEHOLD CONDOMINIUM IN TERMS OF THE EFFECTIVENESS OF THE LAW ENFORCEMENT*

*Narintip Songchitsomboon***

Abstract

Because of the implementation of AEC and Government's policy to urge and boost industrial and commercial long term investment, it results to the free flow of labour and capital come to Thailand. Owing to the restriction of law on the foreigners holding the ownership of land and the limitation of the foreign ratio to hold the ownership of freehold condominium, leasehold condominium becomes an excellent alternative for the foreigners who desire a long term living in Thailand.

Since the leasehold condominium is developed on the land which is subject to leasehold, it is not governed by Thai Condominium Act B.E. 2522 (1979). Instead, it is governed by the hire of immovable property law, section 537-574 of Thai Civil and Commercial Code. As the unique business concept of leasehold condominium, which the buyer (lessee) is required to make fully payment of the rental in advance on the date of lease registration, some provisions under Thai Civil and Commercial Code are not proper in compliance with lease of leasehold condominium. In practice, most parties negotiate some clauses differentiate from the law in order to correspond to such unique business concept; however, it does not guarantee or ensure the buyer of leasehold condominium to have properly protection by law as well as it leads to many unsolved problems.

In order to urge the economy of our country, particularly in real estate sector, and to guarantee or ensure the buyer of leasehold condominium to be properly protected by law, this thesis, therefore, studies on the foreign laws relevant to leasehold interest; the United States of America and Ontario, Canada are the countries where their legal systems have been influenced from common law system whereas the legal system of Germany and France are the root countries of civil law system. Furthermore, this thesis will suggest the legislative solutions by amending Thai Civil and Commercial Code to specify provisions regarding the lease of leasehold condominium.

* This article is summarized and rearranged from the thesis "Legal Problems involving Leasehold Condominium in terms of the Effectiveness of the Law Enforcement", the Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University.

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Keywords: Leasehold Condominium, Leasehold Interest, Freehold Condominium

บทคัดย่อ

เนื่องด้วยมีการรวมกลุ่มประชาคมเศรษฐกิจอาเซียน (AEC) รวมทั้งรัฐบาลได้ออกนโยบายเพื่อกระตุ้นและส่งเสริมการลงทุนระยะยาวในภาคอุตสาหกรรมและพาณิชยกรรม จึงมีผลทำให้มีการไหลเวียนของแรงงานและเงินทุนผ่านเข้ามาในประเทศไทย แต่เนื่องจากกฎหมายไทยได้กำหนดห้ามชาวต่างชาติถือครองกรรมสิทธิ์ในที่ดิน อีกทั้งยังจำกัดอัตราส่วนของชาวต่างชาติในการถือกรรมสิทธิ์ห้องชุดในอาคารชุดที่ถือครองกรรมสิทธิ์ (Freehold Condominium) ดังนั้นอาคารชุดที่ถือครองสิทธิการเช่า (Leasehold Condominium) จึงกลายมาเป็นอีกทางเลือกหนึ่งให้กับชาวต่างชาติที่สนใจจะเข้ามาอยู่อาศัยระยะยาวในประเทศไทย

โดยเหตุที่อาคารชุดที่ถือครองสิทธิการเช่านั้น ได้ถูกพัฒนาขึ้นบนที่ดินที่มีเพียงสิทธิการเช่า ดังนั้นอาคารชุดที่ถือครองสิทธิการเช่าดังกล่าวจึงไม่ได้อยู่ภายใต้บังคับของพระราชบัญญัติอาคารชุด พ.ศ. 2522 แต่อยู่ภายใต้บังคับของประมวลกฎหมายแพ่งและพาณิชย์ ในเรื่องการเช่าสิ่งหามิทรัพย์ ตามมาตรา 537 – มาตรา 574 และด้วยลักษณะเฉพาะของธุรกิจอาคารชุดที่ถือครองสิทธิการเช่า ที่ซึ่งผู้ซื้อ (ผู้เช่า) ต้องชำระค่าเช่าทั้งหมดล่วงหน้าภายในวันที่จดทะเบียนการเช่า นั้น ทำให้กฎหมายบางมาตราในประมวลกฎหมายแพ่งและพาณิชย์ ไม่เหมาะสมที่จะนำมาใช้บังคับกับการเช่าอาคารชุดที่ถือครองสิทธิการเช่า ในทางปฏิบัติ คู่สัญญาส่วนใหญ่จะเจรจาตกลงกันกำหนดข้อสัญญาให้แตกต่างไปจากที่กฎหมายบัญญัติไว้ เพื่อที่จะให้มีความเหมาะสมและสอดคล้องกับลักษณะเฉพาะของธุรกิจอาคารชุดที่ถือครองสิทธิการเช่าดังกล่าว แต่อย่างไรก็ตาม การตกลงกำหนดข้อสัญญาดังกล่าวนั้นก็มิรับรองหรือทำให้ผู้ซื้ออาคารชุดที่ถือครองสิทธิการเช่ามั่นใจว่าได้รับการคุ้มครองตามกฎหมายอย่างเหมาะสม อีกทั้งยังเป็นการก่อให้เกิดปัญหาตามมาอีกมาก

เพื่อที่จะกระตุ้นเศรษฐกิจของประเทศโดยเฉพาะในภาคอสังหาริมทรัพย์ และเพื่อที่จะรับรองและทำให้ผู้ซื้ออาคารชุดที่ถือครองสิทธิการเช่ามั่นใจว่าได้รับการคุ้มครองตามกฎหมายอย่างเหมาะสม วิทยานิพนธ์ฉบับนี้ จึงมุ่งเน้นศึกษาหลักกฎหมายของต่างประเทศที่เกี่ยวข้องกับสิทธิการเช่า อันได้แก่ ประเทศสหรัฐอเมริกา และเมืองออนแทรีโอ ประเทศแคนาดา ซึ่งระบบกฎหมายของประเทศดังกล่าวได้รับอิทธิพลมาจากระบบกฎหมายคอมมอนลอว์ ในขณะที่ระบบกฎหมายของประเทศเยอรมัน และประเทศฝรั่งเศสนั้น เป็นรากฐานของระบบกฎหมายซีวิลลอว์ นอกจากนี้ วิทยานิพนธ์ฉบับนี้ ยังเสนอแนะมาตรการทางกฎหมายในการแก้ปัญหาดังกล่าว โดยการเสนอให้บัญญัติมาตราที่เกี่ยวข้องกับการเช่าอาคารชุดที่ถือครองสิทธิการเช่าในประมวลกฎหมายแพ่งและพาณิชย์เป็นการเฉพาะ

คำสำคัญ อาคารชุดที่ถือครองสิทธิการเช่า, สิทธิการเช่า, อาคารชุดที่ถือครองกรรมสิทธิ์

1. Introduction

By the end of the year 2015, the ASEAN Economic Community (AEC) is implemented. The goal of the AEC is to become a single production base where goods can be manufactured anywhere and distributed efficiently to anywhere within the region. These effects in the ASEAN countries to be aware of the free flow of labor and capital which come to their country. Because of the geographical nature as well as the

availability of infrastructure and foreigner friendly habit¹, these all make Thailand to be the attractive country for the foreign investors. In addition, the Hire of Immovable Property for Commerce and Industry Act B.E. 2542 (1999) was enacted, on 19th May B.E. 2542 (1999), with its objectives to ease any rules and conditions in respect of the hire of immovable property for commercial and industrial purposes and to increase the investor's confidence and attractiveness of long term investments particularly foreigners. Besides considering the factor on the law supporting the long term lease, dwelling becomes the one of the significant factors to consider which country they determine to make the long term investment since they have to migrate from their country to another country.

Unfortunately, Thai law restricts the foreigners having the ownership of land; however, they can register the lease of land for 30 years and have the ownership of the house or they can own the freehold condominium in case the ownership in the condominium units collectively not exceeding 49% of the spaces of the whole units in such particular condominium at the time of making the registration of such condominium². As there are many restrictions in having the ownership of a dwelling, leasehold condominium is an excellent alternative for the foreigners who desire to live long term in Thailand. Leasehold condominium is the unique business concept which the buyers (lessees) are required to make full payment of the purchase price of the unit (rental) in advance of the date of registration of the lease.³ Because of its unique business concept, it differentiates the lease of leasehold condominium from the other lease of residential space, for example, rented house, dormitory, etc. For the lease of residential space, the lessee usually makes the payment of rental in monthly or yearly basis during the lease term, whereas, in the lease of leasehold condominium, the lessee requires to make full payment of rental in advance upon the date of registration of the lease. Furthermore, in the lease of residential space, the lessor is more concerning to the characteristic of lessee than the lease of leasehold condominium.

Under Thai Condominium Act B.E. 2522 (1979), leasehold condominium is not regarded as to be condominium since it has been developed on leased land which the developer has no ownership of land.⁴

¹ Thailand Board of Investment, "*Why Thailand/Thailand's Advantages*", available at http://www.boi.go.th/index.php?page=thailand_advantages (accessed June 1, 2016)

² พระราชบัญญัติอาคารชุด พ.ศ. 2522 มาตรา 19 ทวิ (Condominium Act B.E. 2522 (1979), sec. 19 bis)

³ กุลชา จรุงกิจอนันต์, ทำอาคารชุดบนสิทธิการเช่าได้ด้วยหรือ?, กรุงเทพธุรกิจ, 19 มิถุนายน 2556" ภายใต้ "กฎหมายเศรษฐกิจ", (Koonlacha Charungkit-Anant, *Can the condominium be developed on the leased land?*, Krungthepturakij, June 19, 2013, under "Economic Law") available at <http://www.bangkokbiznews.com/blog/detail/512009> (accessed June 1, 2016)

⁴ พระราชบัญญัติอาคารชุด พ.ศ. 2522 มาตรา 6 ทวิ (Condominium Act B.E. 2522 (1979), sec. 6)

Therefore, leasehold condominium in Thailand is regulated under the hire of immovable property law, section 537-574 of the Thai Civil and Commercial Code. The provisions under this Code are suitable for the general lease which the rental payment shall be made in monthly or yearly basis. As a result, such provisions are not proper and suitable for the unique business concept of leasehold condominium. In practice, most parties enter into the agreement having some clauses differentiating from the law provided in order to correspond to the unique business concept of leasehold condominium; however, it does not guarantee or ensure the leasehold condominium buyer to be properly protected by law. In addition, the major drawback of principles of lease law in Thailand is that the characteristic of lessee is the essence of a lease agreement. From this, it leads to many unsolved problems relating to the lease of leasehold condominium. In addition, at present, there is no specific provision to apply properly with the lease of leasehold condominium and some possible provisions are silent on some issues and improper to solve the arising problems. It is, therefore, essential to lay down the laws relating to lease of leasehold condominium in the specific provisions.

2. Definitions and History of Leasehold Condominium

According to Brian Bucknall's view, a law professor at Osgoode Hall Law School located in Toronto, Ontario, it denotes the term leasehold condominium that *"the possibility of creating condominium projects on land that is held under a long term lease."*⁵

Based on Hiroshi and Melvin A. Reskin's view, it defines that *"the purchaser of a unit in the freehold acquires an undivided fee simple interest in land, whereas the purchaser of a unit in the leasehold acquires an undivided interest in leasehold on a fee which has been submitted to a horizontal property regime."*⁶

In the eye of Leo J. Joliet, the term leasehold condominium refers to *"the principal use for the leasehold condominium is in those areas where transfers in fee have become so restricted that the public has become accustomed to paying a ground rent for residential property or in those instances where land cannot be conveyed in fee."*⁷

From aforementioned scholars' view, it can be implied that leasehold condominium is a condominium where is developed on the land is subject to the leasehold. The purchasers of the leasehold condominium unit do not obtain the ownership of the unit, on the other hand, they shall be granted the right of use the condominium unit for a specific period.

⁵ Brian Bucknall, "Leasehold Condominiums: The Further Flight of the Fee" Osgoode Hall Law Journal, Volume 14, Number 1 (June 1976)

⁶ Hiroshi and Melvin A. Reskin, "Leasehold Condominiums", Connecticut Law Review, Vol. 2, No. 1, June 1969

⁷ Committee on New Developments in Real Estate Practice, "Real Property, Probate and Trust Journal", Vol. 2, No. 3 (Fall 1967), 347-361

The number of demand of dwelling is increasing, whereas the number of supply of freehold land becomes decreasing. In addition, in some countries, the lands are held the ownership by the governmental agency which their laws restrict to transfer the ownership of lands, for example, Hong Kong, Singapore, etc. Thus, the concept of leasehold condominium was introduced, by the real estate developer, in order to maximize the use of land for solving such issue.

3. Distinction of Freehold Condominium and Leasehold Condominium

In the condominium business field, the interest of real estate can be categorized into two characters which are:

1. Freehold condominium, the buyer has the ownership's right perpetually which the buyer can sell, distribute, transfer, or give the ownership's right of the condominium to any other person without any restriction.

2. Leasehold condominium, the lessee (the buyer of the leasehold condominium unit) has only the right of possession and occupancy. When the term of the lease ends, the right of possession and occupancy shall revert to the lessor, thus the lessor's interest during the lessee's possession and occupancy is known as a revisionary interest.⁸

The advantages of leasehold condominium are described as follows:⁹

First, the development costs of leasehold condominiums are lower than those of freehold condominium.

Second, the landowner continues to hold the ownership of land, whereas the particular parcel of land can be generated income by means of development.

Third, in case there is the restriction of transfer of the ownership of the land, leasehold condominium can be created without violating such rules.

Fourth, the purchaser of the leasehold condominium unit may be able to purchase the unit at a lower price since the cost of the land is not included.

4. FOREIGN LAWS RELATING TO LEASEHOLD INTEREST

4.1 The United States of America

The concept of leasehold condominium is recognized in the Uniform Condominium Act. This Act provides the definition leasehold condominium and the definition the unit owner as well as, the creation of

⁸George J. Siedel and Robert J. Aalberts, *Real Estate Law*, 6th ed., (Mason, Ohio, U.S.A: Thomson West, 2006), 389

⁹*Supra* Note 8

the leasehold condominium. Apart from the Uniform Condominium Act, the Uniform Commercial Code and the Restatement (Second) of Property: Landlord and Tenant, Part V. Transfer by Landlord or Tenant of Interest in Leased Property are the laws governing the lease of leasehold condominium. Some significant matters relating the lease of leasehold condominium shall be described as follows:

- The lessee is entitled to sublease the leasehold interest to the third person unless otherwise specified in the lease agreement. The sublessee shall be responsible to the lessor directly to the extent of the lease agreement as well as obtaining protection by law.¹⁰

- The lessor or the lessee has the right to transfer the interest of the leased property to the third person unless the law prohibited.¹¹ Even though, the interest of leased property shall be transferred to the third person (transferee), the transferor shall remain binding to perform the obligations which specified explicitly in the lease agreement.¹²

4.2 Ontario, Canada

The concept of leasehold condominium has emerged as the one of type of condominium in Ontario, Canada. Leasehold condominium is created on lands where the declarant (the person who processes the registration of leasehold condominium) possessed only a leasehold interest and has the consent of the owner of land to develop the condominium on the lands.¹³ Condominium Act, 1998 and the Residential Tenancies Act, 2006 are the laws to govern the lease of leasehold condominium. Some significant matters relating to the lease of leasehold condominium shall be described as follows:

- The lessee has the right to transfer or lease of the leasehold interest of the unit to the third person without obtaining the prior consent of the lessor. Nonetheless, in case of the transfer of the leasehold interest of the unit, the lessee cannot transfer the leasehold interest of the unit and its appurtenant common interest in part.¹⁴

- The lessee has also the right of mortgage the leasehold interest of the unit without obtaining the prior consent of the lessor.¹⁵

- In case of the renewal of the lease of leasehold condominium, the lessor bears the responsibility to give the written notice to the leasehold condominium corporation, whether the lessor intends to

¹⁰ Uniform Commercial Code, § 2A-305

¹¹ Restatement (Second) of Property: Landlord and Tenant, Part V. Transfer by Landlord or Tenant of Interest in Leased Property, § 15.1

¹² Restatement (Second) of Property: Landlord and Tenant, Part V. Transfer by Landlord or Tenant of Interest in Leased Property, § 16.1

¹³ Mark Freedman, "*Condominium Development Update*", Canadian Institute Condominium Conference, March 2007

¹⁴ Condominium Act, 1998, sec. 165 (4) – (5)

¹⁵ Condominium Act, 1998, sec. 165 (4)

renew or not at least five years before the end of lease term. Then, such copy of notice shall be sent to the lessee. In case of the renewal of the lease of leasehold condominium, the lease term shall be at least 10 years or the greater term as specified in the notice.¹⁶

- When a lessee dies and there is no other lessee in the leased property, the lease agreement shall be deemed to be terminated in thirty days after the death of the lessee.¹⁷

4.3 Germany

According to the German Civil Code (BGB), leasehold interest can be categorized into two types which are; 1) *Ordinary Lease*, the lessor has an obligation to grant the lessee the use of the leased property for the leased period and the lessee is obliged to pay the agreed rent to the lessor,¹⁸ and, 2) *Usufructuary Lease*, the lessor has an obligation to grant the lessee the right to possess, use and enjoy the property as well as the right to receive benefits from its fruits of the leased property during the leased period.¹⁹ There are some significant matters relating to the lease of leasehold condominium which shall be described as follows:

- For residential leases, the lessee may require the lessor to give permission to permit a third person to use or occupy the leased property if the lessee acquires the justified interest. However, the lessor may be entitled to refuse such permission when; 1) there is a compelling reason in the person of the third person; 2) the residential space would be overcrowded or; 3) the lessor cannot, for other reasons reasonably, be expected to permit third person use. Notwithstanding, if the lessor grants such permission, the lessee shall remain fully responsible for any liability and/or damages arising from the third person.²⁰

- Upon the death of the lessee, the lease agreement shall succeed to; 1) spouse holding a joint household with the lessee, including civil partner; 2) lessee's children living in the joint household of the lessee if the spouse does not succeed; 3) other family members holding a joint household with the lessee if spouse or civil partner does not succeed; or 4) persons maintaining a joint household of a permanent nature with the lessee.²¹

- The lessor has the right to transfer the ownership of the leased property to any other person. The transferee shall be bound by the rights and obligations of the transferor (lessor) towards the lease agreement.

¹⁶ Condominium Act, 1998, sec. 174

¹⁷ Residential Tenancies Act, 2006, sec. 91 (1)

¹⁸ อาชวิศว์ สหิบุญ, การเช่าช่วงและการโอนสิทธิการเช่า, (วิทยานิพนธ์นิติศาสตรมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2554), 95 (Artchavid Sahiboon, Sublease and Assignment, (Master's Thesis, Faculty of Law, Thammasat University, 2011)), 95

¹⁹ *Id.*

²⁰ German Civil Code (BGB), sec. 540

²¹ German Civil Code (BGB), section 563-564

However, the lessor shall remain to be liable as the surety of the transferee to the lessee in case of the transferee's default of performance obligation under the lease agreement.²²

4.4 France

According to French Civil Code, the hire of thing can be divided into two types which are; 1) *Rente Fonciere*, the lessee shall pay the annuity in order to acquire the immovable property and the original owner shall receive perpetual income,²³ and, 2) *Lease*, the lessor allows his property to be under the administration of the lessee for the limit of time, and the lessee shall pay the rent for the consideration.²⁴ There are some significant matters relating to the lease of leasehold condominium which shall be described as follows:

- The lessee can sublet or assign the leasehold interest to any other person unless there is forbidden as agreed by the parties. It is obviously that the leasehold interest under lease agreement is not regarded as the exclusive right of the lessee. However, it may be forbidden wholly or in part and such forbidden clause is always strict.²⁵

- The leasehold interest under the lease agreement shall be transferred to the heir of the lessor or of the lessee whether the death of the lessor or the lessee occurs. Then, the said heir shall be bound by the rights and obligations of the lease agreement.²⁶

- The purchaser of the leased property shall be bound by the rights and obligations of the lease agreement. Moreover, the said purchaser shall not evict the lessee who has the authentic lease, from the leased property, or the lease agreement has a certain expiry date unless such right reserved by the lease agreement.²⁷

5. Problems regarding Lease Agreement of Leasehold Condominium under Thai Civil and Commercial Code

The provisions of Thai Civil and Commercial Code are incompatible for the current real estate property market. Leasehold condominium, which is a consequence of the evolving real estate development business, becomes more attractive to many buyers who are looking for the living space for their long term stay. There are, however, obstacles or problems arising therefrom which are as follows:

1) Leasehold Interest being Ceased upon Death of Lessee

²² German Civil Code (BGB), section 566

²³ รสรินทร์ ปลอดข้า, การโอนกรรมสิทธิ์ในอสังหาริมทรัพย์ที่ให้เช่า, (วิทยานิพนธ์นิติศาสตรมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2554), 71-73 (Rossarin Plordkhome, The Transfer of Ownership of Immovable Property Hired, (Master's Thesis, Faculty of Law, Thammasat University, 2011)), 141-143

²⁴ *Id.*

²⁵ French Civil Code, article 1717

²⁶ French Civil Code, article 1742

²⁷ French Civil Code, article 1743

Since the leasehold interest is an exclusive right of the lessee, when the lessee dies, the leasehold interest shall not be transferred or devolved to the heir of the lessee unlike the ownership right. Therefore, the leasehold interest shall be ceased and the leased property shall be returned to the lessor.²⁸ This principle of lease law certainly leads to the unsolved problem since the lessee had already made full payment of rental in advance upon the date of registration of the lease in order to live until the expiration of the lease term (30 years). In order to solve such arising problem, the parties shall mutually agree on such matter by stipulating the clause in the lease agreement that, such leasehold interest shall be devolved to the heir upon the death of the lessee. This clause is generally called as “succession clause” nevertheless, if this succession clause is not defined in the lease agreement, the heir of the lessee cannot claim from the lessor to perform the obligations under the lease agreement. Therefore, it would be better to have the legislative measure to assure the lessee and the heir of the lessee the proper protection of their rights.

2) Purchaser of Leased Property Bound by only Rights and Obligations under Lease Agreement

In general, for attracting the lessee (purchaser of the leasehold condominium), the renewal clause shall be defined in the lease agreement. When the ownership of the leased property is transferred to the third person (transferee), the transferee shall bind by the rights and obligations under the lease agreement.²⁹ However, the Supreme Court’s Decision has defined that the rights and obligations which are bound by the transferee of the ownership of leased property shall be only the rights and obligations under the lease agreement. In other words, any other rights and obligations which are not the essence of the lease agreement shall not be bound by the transferee. Even though, the renewal clause is specified in the lease agreement, the transferee shall not bind to perform such clause since it is not right and obligation which is the essence of the lease agreement.³⁰

3) No Specific Law on Devolution of Rights and Obligations upon the Death of Lessor

According to the principle of law provided, the death of the lessor shall not affect the survival of the leasehold interest, the rights and obligations under the lease agreement shall be transferred to the heir of the lessor. However, this issue is still controversial whether the rights and obligations of the lessor shall be transferred to his heir under section 569 of

²⁸ ศาสตราจารย์ ดร. ไพฑูริศ เอกจริยกร, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ เช่าทรัพย์สิน – เช่าซื้อ*, พิมพ์ครั้งที่ 18. (กรุงเทพฯ: วิญญูชน, 2557), 209-210 (Professor Dr. Phathaichit Ekkachariyakon, “*Hire of Property, Hire-Purchase*”, Vol. 18 (Bangkok: Winyuchon, 2014)), 209

²⁹ Thai Civil and Commercial Code, sec. 569

³⁰ อำนัณห์ คล้ายสังข์, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วย เช่าทรัพย์สิน เช่าซื้อ*, พิมพ์ครั้งที่ 8 (กรุงเทพฯ: สำนักพิมพ์มหาวิทยาลัยธรรมศาสตร์, 2533), 31 (Amnak Klaisang, *The Explanation of Civil and Commercial Code, Hire of Property, Hire- Purchase*, Vol. 8 (Bangkok: Thammasat University Press, 1990)), 31

Thai Civil and Commercial Code or the principles of inheritance law. Such controversy has been referred to by the Supreme Court's Decisions which are divided into two opinions as follows:

- Under the principles of inheritance law, it is resulting that the heir of the lessor shall be bound by the rights and obligations as well as any liabilities under the lease agreement.³¹

- Under section 659, it means that the heir of the lessor shall be bound by only the rights and obligations under the lease agreement.³²

Even though, most scholars have the similar opinions on the principles of inheritance law,³³ there is no explicit law to govern on this issue yet. In addition, the current Supreme Court's Decision tends to admit that such rights and obligations shall be transferred under section 569.³⁴ Therefore, the heir of the lessor would only be bound by the rights and obligations under the lease agreement. The other rights and obligations which are not the essence of the lease agreement, for example promise to renew the lease agreement clause and the succession clause, are not bound by the heir of the lessor.

4) Leasehold Interest not Regarded as Property Liable to Execution

According to section 285 of Thai Civil Procedure Code,³⁵ it defines that the properties which are not liable to the execution shall be the properties not transferable by law. In general, the leasehold interest is a valued property but, the law has specified the condition of transfer of the leasehold interest by the lessee,³⁶ as a result, it is not freely transferable by law. Nonetheless, such leasehold interest is not strictly prohibited to transfer since such provision provides that the parties can agree otherwise under the lease agreement. Thus, if the lease agreement stipulates that the lessee is entitled to sublease or assign to the other person, it shall be deemed that the leasehold interest is not the exclusive right of the lessee and can be transferable. As a result, the leasehold interest is the property which is liable to the execution.³⁷ On the other hand, if the lease agreement does not specify otherwise, the leasehold interest is not the property which is liable to the execution.

³¹ รองศาสตราจารย์ สำเรียง เมฆเกรียงไกร, *คำอธิบายกฎหมาย เช่าทรัพย์สิน เช่าซื้อ ลีสซิ่ง*, พิมพ์ครั้งที่ 1. (กรุงเทพฯ: นิติธรรม, 2555), 314 (Professor Samrieng Mekkiengkrai, *Hire of Property, Hire-Purchase and Leasing*, Vol. 1 (Bangkok: Nititham, 2012)), 61

³² *Id.*

³³ *Supra* Note 37 at 194

³⁴ *Supra* Note 37 at 194

³⁵ Thai Civil Procedure Code, sec. 285

³⁶ Thai Civil and Commercial Code, sec. 544

³⁷ ศาสตราจารย์ ดร. มานะ พิทยาภรณ์, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ลักษณะ เช่าทรัพย์สิน*, พิมพ์ ครั้งที่ 15. (กรุงเทพฯ: จีรรัชการพิมพ์, 2546) 17 (Professor Dr. Mana Pitayaporn, *The Explanation of Civil and Commercial Code, Title: Hire of Property*, Vol. 15 (Bangkok: Jitratat Printing, 2003)), 17

6. CONCLUSIONS AND RECOMMENDATIONS

Since the provisions of Thai Civil and Commercial Code are incompatible for the current real estate property market situation which the form of real estate development business has been evolving. The leasehold condominium, which is a result of the evolving real estate development business, becomes more attractive to many buyers who are looking for the living space for their long term stay. However, there are many problems relating to the lease of leasehold condominium, and fortunately, Thailand has enacted law on the Hire of Immovable Property for Commerce and Industry Act in B.E. 2542. This Act, has adopted some principles of foreign lease laws with the long term lease, and provided some provisions different from Thai Civil and Commercial Code. Some provisions of this Act could be the model law which solves many arising problems. Therefore, the recommendation is to amend Thai Civil and Commercial Code by adding the specific chapter regarding the lease of leasehold condominium, the details of which are described as follows:

1. To Specify Leasehold Interest of Leasehold Condominium Devolved automatically to Heir of Lessor or of Lessee

In this regard, the principles of lease law under the United States of America, Germany and France should be adopted to apply to the lease of leasehold condominium in Thailand, which should stipulate that the lease agreement is not terminated upon the death of the lessor or of the lessee, and the leasehold interest shall be automatically inherited to the heir of the lessor or of the lessee. In fact, this similar legal concept has appeared under section 7 of the Hire of Immovable Property for Commerce and Industry Act B.E. 2542. It has imposed that the rights and obligations in relation to a lease shall devolve upon the heir, unless otherwise specified in the lease agreement. In order to conform to the Hire of Immovable Property for Commerce and Industry Act B.E. 2542, the Thai Civil and Commercial Code should be amended by adding the provision regarding leasehold interest of leasehold condominium upon the death of the lessor or of the lessee as follows;

“Chapter 4/1

Lease of Leasehold Condominium

Section 571/1 The rights and obligations in relation to a lease agreement of leasehold condominium including other rights and obligation as specified in such lease agreement shall devolve upon the heir unless otherwise specified in the lease agreement.”

2. To Specify all Rights and Obligations under Lease Agreement Bound by the transferee of the Leasehold Condominium

Based on the study of the foreign laws, most foreign laws have similar principles of law on this issue, which provides that the transferee shall obtain and be bound by the rights and obligations of the lessor towards the lease agreement. Furthermore, the lessor remains having the liability to the lessee in case the transferee breaches the lease agreement. In this regard,

such principles should be adopted by the Thai law. Furthermore, the long term lease of immovable property agreement must be in writing and being registered with the competent officer, and therefore the transferee could acknowledge the terms and conditions under the lease agreement before obtaining the ownership of the leased property from the lessor. In order to achieve that objective, the Thai Civil and Commercial Code should be amended by adding the provision regarding the rights and obligations of the lease agreement binding upon the transferee of the leasehold condominium as follows:

“Section 571/2 The lease agreement of leasehold condominium is not extinguished by the transfer of ownership of the leasehold condominium.

The transferee is entitled to the rights and subject to the obligations of the transferor towards the lessee, including other rights and obligation as specified in the lease agreement.”

3. To Specify Leasehold Interest being Assigned or Subleased Freely

Apart from Germany law, most principles of foreign laws allow the lessee to freely assign or sublease the leasehold interest to any other person as long as having no such restriction by the agreement. The Thai law also adopts the same principle as appears under section 7 of the Hire of Immovable Property for Commerce and Industry Act B.E. 2542. Therefore, it should apply the same principle to turn the leasehold interest to be the liquid asset and the property which is liable to execution by adding the provision regarding leasehold interest to be assigned or subleased freely as follows:

“SECTION 571/3 UNLESS OTHERWISE SPECIFIED IN THE LEASE AGREEMENT, THE LESSEE MAY FREELY ASSIGN OR SUBLEASE THE LEASEHOLD INTEREST OF LEASEHOLD CONDOMINIUM, WHETHER IN WHOLE OR IN PART, TO THE THIRD PERSON”

CONSUMER PROTECTION REGARDING PRE-CONTRACTUAL INFORMATION ON E-COMMERCE*

*Nartchutha Nillek***

Abstract

In selling, the asymmetry of information between traders and consumers is one of the most common problems. It refers to goods or service that take place in trading where one party, traders, normally having more information than another party, consumers. It shows inequality between both parties which is usually considered as a reason for controlling transactions. In addition, the information for the consumer is questioned due to the fact that the nature of e-commerce transaction is the absence of face-to-face interaction between traders and consumers so the consumers have no opportunity to examine or test the goods or service or to know the information related to traders before they involve with any transaction.

Moreover, as the absence of physical interaction, consumer may face with various problems while making purchase electronically due to the contract making process become longer and more complex. Accordingly, the time before the conclusion of a contract is very important as it enable the potential consumers to truly acknowledge and understand the object of contract details and their rights in order to make an informed consent before dealing with e-commerce transaction.

Considering from the current Thai laws, consumers who purchase goods or service over the internet shall have the right to be informed some information depending on the trader's discretion according to the lack of proper control by law. Hence, in order to know and realize the possible solutions for Thai laws, the study of foreign laws is very crucial. This article provides an overview of pre-contractual information on e-commerce under European Union Laws and the United Kingdom laws as they have specific provisions in controlling trader's duty in providing pre-contractual information on e-commerce before the consumer is bound by the contract. Hence, this article will analyze the legal measures for controlling trader on the stated issue and propose the appropriate solutions for Thai laws.

Keywords: pre-contractual information, consumer protection, e-commerce

* This article is summarized and arranged from the thesis "Legal Measures on Controlling Medical Tourism Facilitator" Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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บทคัดย่อ

ในการซื้อขายสินค้าและบริการ ความไม่เท่าเทียมกันทางด้านข้อมูลระหว่างผู้ประกอบการและผู้บริโภคถือเป็นปัญหาหลักที่เกิดขึ้นบ่อยครั้ง อาจกล่าวได้ว่าสินค้าหรือบริการที่ทำการซื้อขายนั้น ผู้ประกอบการซึ่งเป็นผู้รู้ข้อมูลฝ่ายหนึ่งจะมีข้อมูลมากกว่าผู้บริโภคอีกฝ่ายหนึ่งซึ่งก็คือผู้บริโภค แสดงให้เห็นถึงความไม่เท่าเทียมกันระหว่างคู่สัญญาทั้งสองฝ่าย จึงเป็นที่มาของการควบคุมการติดต่อทางธุรกิจดังกล่าว ยิ่งไปกว่านั้น การให้ข้อมูลแก่ผู้บริโภคเกิดเป็นประเด็นปัญหาขึ้นเนื่องจากลักษณะของการพาณิชย์อิเล็กทรอนิกส์ซึ่งไม่มีการสื่อสารกันซึ่งหน้าระหว่างผู้ประกอบการและผู้บริโภค ดังนั้นผู้บริโภคจึงไม่มีโอกาสได้พิจารณาตรวจสอบหรือทดลองสินค้าหรือบริการ รวมถึงไม่ทราบข้อมูลเกี่ยวกับผู้ประกอบการก่อนที่จะเข้าผูกพันตามธุรกรรมต่างๆ

จากการไม่มีการติดต่อกันซึ่งหน้า ผู้บริโภคอาจพบปัญหาต่างๆขณะทำการซื้อผ่านทางอิเล็กทรอนิกส์เนื่องจากขั้นตอนการทำสัญญาซับซ้อนมากขึ้น ดังนั้น ระยะเวลาก่อนเข้าทำสัญญาจึงมีความสำคัญอย่างยิ่ง ทั้งนี้ เพราะผู้บริโภคสามารถรับรู้และเข้าใจสาระสำคัญของสัญญา รายละเอียดและสิทธิต่างๆของตนเพื่อที่จะแสดงเจตนาด้วยใจสมัคร ก่อนที่จะตกลงเข้าทำธุรกรรมทางอิเล็กทรอนิกส์ได้

พิจารณากฎหมายไทยในปัจจุบันพบว่า ผู้บริโภคที่ซื้อสินค้าหรือบริการทางอินเทอร์เน็ตจะมีสิทธิได้รับข้อมูลบางส่วนตามดุลยพินิจของผู้ขาย เนื่องจากกฎหมายไทยยังขาดการควบคุมหน้าที่ในการให้ข้อมูลก่อนเข้าทำสัญญาทางพาณิชย์อิเล็กทรอนิกส์ของผู้ขายที่เหมาะสม ดังนั้น เพื่อที่จะได้ทราบและตระหนักถึงวิธีการแก้ไขปัญหที่เกิดขึ้นในกฎหมายไทย จึงมีความจำเป็นอย่างยิ่งที่จะต้องศึกษากฎหมายต่างประเทศ บทความนี้ได้นำเสนอภาพรวมของการให้ข้อมูลก่อนเข้าทำสัญญาทางพาณิชย์อิเล็กทรอนิกส์ในกฎหมายของสหภาพยุโรปและสหราชอาณาจักร ซึ่งได้มีการกำหนดบทบัญญัติไว้เป็นการเฉพาะในการควบคุมหน้าที่ของผู้ขายในการให้ข้อมูลก่อนเข้าทำสัญญาทางพาณิชย์อิเล็กทรอนิกส์แก่ผู้บริโภค ดังนั้น บทความนี้จะวิเคราะห์มาตรการทางกฎหมายที่ใช้ในการควบคุมผู้ขายในเรื่องดังกล่าว และเสนอมาตรการในการแก้ไขปัญหที่เกิดขึ้นในกฎหมายไทย

คำสืบค้น: การให้ข้อมูลก่อนสัญญา, การคุ้มครองผู้บริโภค, การพาณิชย์อิเล็กทรอนิกส์

The trader is generally responsible for providing advice to certain information in order to avoid the declaration of intention under a mistake by the consumer. Later on, there is an adjustment from providing information to certain level information for an advice to provide information concerning goods and services. The reason behind this is that an advice is free willing of the trader. However, the consumer protection law prescribes it as a compulsory duty that the trader is required to provide information about goods and service including details of the contract which is to be legally binding.¹

¹ ดารพร ธีระวัฒน์, “รายงานวิจัยฉบับสมบูรณ์ เรื่องสัญญาผู้บริโภค วิเคราะห์เปรียบเทียบหลักเกณฑ์ การคุ้มครองผู้บริโภค ด้านสัญญาของต่างประเทศและของไทย”, ศูนย์วิจัยและให้คำปรึกษาคณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ (2557) น. 17-18 (Daraporn Thirawat, “The Full Report of the Consumer Contract: The Comparative Analysis of the Consumer Protection regarding Contracts between Foreign Countries and Thailand”, Research and Consultancy Institute (2014) p.17-18

Pre-contractual information is the core factor affecting consumer buying decision described as the information process² by the research studied by University of Amsterdam, Institute for Information Law (IViR). According to the research, the consumer information being used as a tool to inform and empower consumers, is not only critical to provide them necessary information, but also important to communicate the information with the practical ways that consumer usually interact or gain benefit from.

Hence, the rationale to specify legal obligation of the trader to provide information are as follows:

1) The asymmetries of information between traders and consumers in the business to consumer transaction (B2C) raise the rationale of pre-contractual information requirements that allows consumer to make an informed decision³, in which the decision has been made based upon an understanding of the facts. In order to reduce an inequality in terms of knowledge between parties, the pre-contractual information requirements can be considered as a strong justification for intervention in consumer contracts. Especially in e-commerce transaction, traders and consumers are trading at a distance. The information is only available to the consumer in the trader's home page address. The goods or services cannot be examined, touched or experienced physically. Consumers apparently receive only limited information on traders and have very little access to the necessary information.

2) A business contract might not only be difficult for consumers to understand, but there is also some conflicts of interests between traders and consumers. In practice, traders unilaterally impose the terms and conditions of the contract in a way that benefit their interests. Therefore, the law must provide information to the disadvantaged party in order to make he or she knows and understands and to let them make the contract with truly mutual agreement.

3) Physical interaction between trader and consumer in e-commerce transaction is absent. Thus, consumer may encounter with numbers of problems while making purchase electronically due to the longer and more complexed of the contract making procedure. It reflects concerns of informational change into digital form: the procedure that is required in the process of contract making could be vanished, which means that consumers may unintentionally enter in to the binding contracts and because of the characteristic of the medium, the risk of an error in

² European Commission, "EU cloud computing expert group: discussion paper pre-contractual information requirements and cloud services", http://ec.europa.eu/justice/contract/files/expert_groups/discussion_paper_pci_en.pdf (accessed on November 3, 2015)

³ Giesela Ruhl, "Consumer Protection in Choice of Law" <http://www.lawschool.cornell.edu/research/ilj/upload/ruhl-final.pdf> (accessed on September 15, 2015)

electronic document may increase. Thus, the trader must allow their consumers awareness arisen in the ordering process to detect and correct errors.

The right of the consumer to be informed is purposely to protect the consumers in particular. It requires the trader to provide information concerning goods or service as to enhance the ability of the consumer decision-making to purchase. It can be concluded that the duty to provide information is crucial to protect consumers as consumer being perceived mostly as a weaker party comparing to trader in respect of the bargaining power and knowledge of goods and service. The consumer protection law intends to equalize this balance between both parties by insisting the transparency of the information concerning goods and service that must be thoroughly provided in the process of offering information or in the earlier stage before concluding the contract. As a consequence, consumers can reflect their true preferences in making their decisions.

Although Thai law has the Act concerning electronic transaction (Electronic Transaction Act B.E. 2544), the Act did not cope with the consumer protection refer to the duty to provide pre-contractual information on e-commerce. Moreover, it only aims to support the legal status of an e-commerce transaction, such as offer and acceptance, in order to support the validity of the contracts concluded by electronic means.

Unlike foreign countries' law and regulations, Thai law, the protection of consumers' right in receiving pre-contractual information on e-commerce is ineffective although there are some laws supporting the right of consumers to acknowledge the pre-contractual information before entering into the contract as follows;

1) Duty to inform the declaration of intention and the juristic act in accordance to the CCC section 149 together with section 354. It could be interpreted that the declaration of intention of consumer should be made with the voluntary act and it should not be made by mistake, fraud or duress.⁴ Hence, the offering for sale must be clearly informed the information concerning goods and service.⁵ From the interpretation, the right to be informed is actually in the general principles of Thai law that it must be clearly and certainly provided. However, it is broadly defined of how the offer should be made. It does not prescribe trader's duty in providing the specific information in order to explicitly protect the consumer.

2) The right to receive pre-contractual information in fraud by silence regarding to the CCC section 162. The act is fraud if the seller expresses his intention to be in silence although he has duties by law or even when he does not have a duty by law, but by good morals to inform

⁴ ศนันท์กรณ์ (จำปี) โสคติพันธุ์, “คำอธิบายนิติกรรมสัญญา”, วิทยุชน (2550) น. 34-35 (Sanankorn (Jampee) Sothipun, “**Juristic Acts and Contracts**”, Winyuchon (2007) p.34-35

⁵ *Id.* p.260.

the fact or quality of the goods. As the duty to inform by good morals is imprecise and it is only ruled by the court, pre-contractual information on e-commerce is uncertain that which specific pre-contractual information that trader should provide. Thus, trader might use this loophole to conceal the information that adversely affects to the consumer buying decision.

The remedy available for consumer is that the declaration of intention procured by fraud is voidable. When the consumer avoided the voidable act, the consumer must return the property to the trader and the trader has to return the money paid to the consumer.

3) The right to receive the property with the qualification as same as description provided as per the principle of Sales by Description regarding to the CCC section 503 paragraph 2. As e-commerce is the form of communication in order to provide the information to the consumers directly with the objective to let the consumers in the remote area declare their intention to purchase the goods and services, hence, it could also be considered as the sale by description according to the CCC.⁶ Considering that the description prescribed by the trader is the pre-contractual information. However, traders have freedom on the presence of the content on their webpage, given that the goods delivered has to be in the same condition as per described by the trader.

The remedies available under the CCC for consumer are right to refusal of performance under section 320; however, in e-commerce transaction, consumer always receive the goods by post so the refusal of performance might be inapplicable; right to refusal of settlement under section 369; in practically, this right can barely applied to reality for e-commerce business since consumers are required to pay in advance before the goods being delivered, right to claim for damages under section 215 and right to rescind from the contract under section 387-389.

4) The right to receive information regarding to the Consumer Protection Act B.E.2522, section 4(1). Considering that the information provided is broadly defined and it is under trader's discretion. The consumers are entitled to the right to be leaded when the right of consumers under section 4(1) is violated.

5) The right to receive information statement contained in data communication for offering to sell goods or service regarding to the Direct Sales and Direct Marketing Act B.E. 2545 provides that data communication shall be manipulated by the ministerial regulations according to section 28; however, it has not been yet enacted. Moreover, section 29 of this Act which stipulates that the provisions of the law on Consumer Protection in respect of Consumer Protection against Advertising

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พลอย

เจริญสม,

“การขายตามคำพรรณนา”,

http://digi.library.tu.ac.th/journal/0051/2_1_jul_2551/30PAGE292_PAGE304.pdf

(accessed on February 6, 2016)

(Ploy Charoensom, “*Sales by Description*”)

shall apply to the data communication for offering to sell goods or services by the direct marketing businessman, it solely controls the information which is considered as unfair. There is no written duty for traders to provide specific detail. In addition, the authority of direct sales and direct marketing board is only to control the communication of information of entrepreneur after the loss has been occurred rather than to protect the damage from happening. According to the Act, trader's duty in providing specific information to the consumer is found only post-purchase process.

When the right to be informed under section 29 is violated, it is under the opinion of the direct sales and direct marketing board to rectify, prohibit or correct the information. Besides that the consumers is entitled the right to replace goods in case of its defect under section 33 of the Direct Sales and Direct Marketing Act B.E.2545 as Prof.Kittisak Prokati interpreted that when the trader certifies any of the purchased goods or service qualification, such certification shall be a part of the contract and the trader shall be liable for the defected goods when the qualification of the goods certified fails the conformity.⁷

According to the uncertainty of pre-contractual information requirements under Thai laws, the case shall be decided by analogy to the most nearly provision, and in default of such provision, by the general principles of law.⁸ Regarding to the study, the most nearly applicable law would be a sale by description it could be interpreted the binding nature of pre-contractual information that the information given pre-purchase is a part of the contract that the trader must follow.

From the study, the problems related to consumer protection regarding pre-contractual information on e-commerce under Thai law could be summarized as follows:

Firstly, the ordering process on e-commerce may have several stages which cause confusion to the consumer. Thus, when placing an order, the consumers, unintentionally enter into a contract or even make mistakes during the purchasing process. This brings the issues why trader should take reasonable and logical steps to allow consumers correcting the errors of their order before the contract concluded.

Secondly, with an ambiguity to identify trader's geographical location on the internet, considering to Thai law and regulations, traders are obliged to inform information concerning the status and other details about the trader to the consumer only upon the prescription of Committee on Advertisement. Accordingly, the sale of the other goods and service besides

⁷ กิตติศักดิ์ปกรกิต, “ผลงานวิจัย เรื่อง ความรับผิดชอบเพื่อคุ้มครองผู้บริโภคในสัญญาซื้อขาย”, โครงการวิจัยเสริมหลักสูตร มหาวิทยาลัยธรรมศาสตร์ (2532) น.27 (Kittisak Prokati, **“Liability for Defects in Sales Contract”**,Curriculum research project Thammasat University (1989) p.27)

⁸ The Civil and Commercial Code, § 4

from the prescription, the trader is not obliged to provide information about himself to the consumer.

Thirdly, information concerning the main characteristics of the goods or service, considering from Thai law, it does not mention about the trader's duty providing specific information which affects to the consumer buying decision before he or she places an order.

Fourthly, with insufficient information requirement of traders from the notification of the Central Commission on Prices of Goods and Services regarding the displaying prices of goods or services B.E. 2558, the consumers may face problems of misleading, and difficulties in planning or calculating their expenses and purchasing power.

Fifth, other information included in contract considering from the current Thai law, it controls only the process after the contract is concluded.

Sixth, right of withdrawal, as the goods and service sold in the direct marketing can be classified into two types in which the consumer is entitled the right to terminate the contract and those who do not have such right. The non-existence of pre-contractual information in this situation could cause consumer to take risk purchasing goods or services by description without knowing that the termination right is applied to which goods and service.

Seventh, when the consumers want to claim the contract being made under a mistake, they, as a plaintiff, will bear the burden of proof according to the Civil Procedure Act. The problem is on the new technology, or the internet, in which the communication used is out of control by the consumer.⁹ As easily adjusting information or closing down the website of the traders, the plaintiff could find difficulties in collecting the document as the burden of proof to the court.

Eighth, the statutory remedies available for the consumer under the Thai jurisdiction in case of the pre-contractual information is not complied with could be found in many laws which could cause confusion to the consumers to pursue their remedies. In addition, the right to replace goods only explicitly specified only in case of its defect which also could cause confusion to the consumers whether they can claim for the right to replace goods in case where the goods is not in line with the information traders have certified pre-purchase.

Due to an insufficiency in providing pre-contractual information under Thai laws considering from the Consumer Protection Act B.E.2522, the CCC, and the Direct Sales and Direct Marketing Act B.E. 2545, it leads to the conclusion that the consumers enter into the contract without being well-informed of the information regarding goods and services. Consequently, consumers are more likely to make a declaration of intention

⁹ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Recital 22

under a mistake as a consumer, who has less information comparing to traders or called information asymmetry, have some difficulties to reflect their true preference in making a decision. These are loopholes the traders might use to facilitate themselves in selling goods or service, while the consumers are being exploited with the insufficient pre-contractual information that lead to affect adversely the consumers buying decision. As a result, it would negatively influence consumer confidence in purchasing goods or services via e-commerce channel and thus, consequently, it could affect to the whole industry and stability of the economy. Therefore, in order to harmonize interest between both parties, the consumer protection in pre-contractual information should be taken seriously and enacted under Thai law.

From the study in foreign laws, both European Union laws; Directive 2011/83/EU on consumer rights, Directive 2000/31/EC on Electronic Commerce and the United Kingdom laws; the Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013, Consumer Rights Act 2015 and the Electronic Commerce Regulations 2002 control the traders' duty in providing specific pre-contractual information on e-commerce in order to resolve asymmetry of information in the B2C transactions. The European Consumer Centre Germany states that the provisions on information obligation of the Electronic Commerce Directive influences consumers purchasing behavior on the website because the clear detail of the businesses such as company's data, price, and technical steps for contract conclusion has power on consumer's voluntariness to engage in doing business.¹⁰

As several organizations support the idea of the provisions on information requirements that are perceived as a good exercise for a firm which increase consumer confidence and results in increased willingness of consumers to engage in the online activity. Thus, the following information shall be concerned;

Importantly, the law tries to equalize the responsibilities between traders and consumers when there is a cancellation of contracts or delivery failure. Information on costs and terms of delivery must be clear under transparency focus. In consequence, consumers should express their consent of payment firmly on their commitment to the transaction they are engaging, which should result in lower dispute resolution costs for business and consumer damage.¹¹

¹⁰ European Commission DG internal Market and Services Unit E2, "*Study on the Economic Impact of the Electronic Commerce Directive, Final Report*", http://ec.europa.eu/internal_market/e-commerce/docs/study/ecd/%20final%20report_070907.pdf (accessed on September 1, 2016)

¹¹ Department for Business Innovation & Skills, "*Consultation on the implementation of the Consumer Rights Directive 2011/83/EU*", https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/3269

The hidden charges and costs of the goods and services offered on the internet shall be dictated firmly. “Cost traps” is the situation where consumers were tricked to pay a charge or cost for the “free” service from traders as an example of horoscope and recipes on the internet. This pre-contractual information shall protect consumer from this cost by reassuring that consumers understand and firmly acknowledge the payment condition of such services.¹² The disclosure of total cost of the products and services altogether with any extra fees shall be provided by traders. Shall there be such information indicated clearly on the website, consumers would not have to pay additionally for an extra cost or services.¹³

The information on right of withdrawal is one of the most important provisions specified by the Consumer Rights Directive as recital 37 suggests that in the case of selling at a distance, consumers is unable to see the goods before concluding the contract. Consumers shall then have the right to withdraw from the contract within 14 days without the requirement of stating reason.¹⁴ However, when the right of withdrawal does not exist, traders have to provide information of the nonexistence of such right.

Trader has to provide the technical steps information involved when a consumer placing an order in order to make the consumers aware of their involvement in which process and their commitment at which point, respectively. Placing an order is also related to the contract formation. Therefore, it is important that traders should provide not only technical steps, but also legal implications relating to the process of contract formation. Even though consumers will be more familiar to the offline type of contract procedure, in this current situation, where most consumers are international and getting involved in the online business, this requirement is a new nature which is required by the supplier to provide this necessary information mentioned earlier.¹⁵ The identifying and correcting input errors¹⁶ which provide logical steps that ease customers to correct their errors along the way of their order shall also be provided before an order being placed.

The information requirements shall be accounted as a part of the contract. To prove that whether trader has provided pre-contractual, the burden of proof shall be on trader.¹⁷ As communication used is beyond the

[0/12-999-consultation-implementation-of-consumer-rights-directive.pdf](#). (accessed on September 25, 2015)

¹² European Commission, “*Consumer Rights: 10 ways the new EU Consumer Rights Directive will give people stronger rights when they shop online*”, http://europa.eu/rapid/press-release_MEMO-11-450_en.htm?locale=en (accessed on September 1, 2016)

¹³ *Id.*

¹⁴ Consumer Rights Directive, art.9(1)

¹⁵ Geraint G. Howells, et al., “**Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness**”, Ashgate (2005) p.104

¹⁶ E-commerce Directive, art.10(c)

¹⁷ Consumer Rights Directive, art.6(9)

consumers' capability to control this medium, it is important to mention that the burden of proof maybe on traders.¹⁸

The European Union law imposes various information requirements, it also specifies the specific consequences when the following information is not complied by the trader 1) price and any additional charges; the consumer shall not be bound by the contract. 2) the right of withdrawal; the time to withdraw from the contract shall be extended and 3) the order implied an obligation to pay; the consumer shall not be bound by the contract. However, the European Union law usually leaves the duties on the remedies available for the consumers where there is any infringement of the information requirements to the Member States' internal law.¹⁹

In the United Kingdom laws, there was complexity of the law before the enactment of the Consumer Rights Act 2015. Recently, it is still not easy for parties to understand thoroughly and be clear about their rights and responsibilities, which leads to argumentations being costly for parties and obstructs consumers from exercising their rights. Thus, the remedies available for consumer are harmonized into one piece which is the Consumer Rights Act 2015.

The United Kingdom provide the consumer rights in accordance with the European Union law and impose additional remedies according to the Consumer Rights Directive which are 1) in case of the information regarding the main characteristics is not complied with, the right to enforce terms about goods and services are different depending on the statutory rights that are breached and the nature of goods and services. Under a goods contract; the consumer shall have Short term right to reject, right to repair or replacement, right to price reduction or final right to reject. Under a service contract, the consumer shall have the right to require repeat performance and the right to price reduction. 2) In case of the information other than the information regarding the main characteristics is not complied with; both goods and service contract, the consumer shall entitle the right to recover the costs incurred from the trader, up to the amount the consumer has paid. Beside from the stated remedies when the trader does not conform to the information requirements by not providing any information specified by law; consumers could make a complaint about the contravention of this requirement to the concerned enforcement authority or the court.

From the legal basis of foreign laws, Thai law should propose the provision of pre-contractual information on e-commerce and also the consequences of non-compliance with the information requirement in an appropriate measure as follows:

¹⁸ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Recital 22

By the virtue of section 28 of the Direct Sales and Direct Marketing Act B.E.2545, the Ministerial Regulation should be enacted in order to stipulate the specific information which shall be disclosed to the consumer as a pre-contractual information on e-commerce as follows: “Before the contract is concluded, the trader must provide the consumer of the following information: 1) the main characteristics of goods and service, 2) Identity of the trader, contact details such as telephone and fax numbers, e-mail address and geographical addresses, trade registration number, VAT number 3) the total price of the goods or service including taxes or if the prices cannot be precisely calculated in advance, the calculation method should be provided. 4) The right of withdrawal, if it exists or the non-existence of the right of withdrawal, the conditions, time limit and process to exercise such right. 5) Details of the potential contract 6) Place and delivery procedure of the goods or service 7) the technical steps to proceed in order to conclude the contract. 8) The technical procedure, before an order has been placed, of the identifying and correcting input errors. 9) when placing the order is implied an obligation to pay the trader, it shall be labeled in a clearly and comprehensibly manner with the words “order with obligation to pay”.

1) Pre-contractual information in the aforementioned recommendation should form a part of the contract. Thus, the details contained in the sales of goods or service document should contain all pre-contractual information required in section 28 allowing the consumers to verify whether contractual information is in accordance with the pre-contractual information provided pre-purchase. If the consumers find it is not in accordance thereof, they could exercise the right of withdrawal. In addition, the traders should provide such confirmation on a durable medium, such as e-mail, and SMS, where the information is stored, and it could be accessible in the future with an unchangeable information which is stored at the beginning in order to benefit the consumers of the potential problems after purchase. Thus, the information contained in the purchase and sell document stipulated in section 31 paragraph 2 of the Direct Sales and Direct Marketing Act B.E.2545 shall include “details under section 28”

2) In order to bring the aforementioned solution into practice, when the problems on pre-contractual information on e-commerce arise post-purchase, the burden of proof should be borne by the trader. Thus, section 29 of the Consumer Case Procedure Act B.E.2551 should be additional included the following statement;

“As regards compliance of the requirements for pre-contractual information provided by the Direct Sales and Direct Marketing Act B.E.2545, the burden of proof shall be borne by the trader.”

In such case, where the fact cannot be proved by any other methods, if pre-contractual information is missing from the sales of goods or service document, trader will become more vulnerable in such situation unless he has provided the information on a durable medium before.

4) Thai law should stipulate the current remedies available in many laws into one piece of legislation in order to make it easier for consumer to pursue for legitimate remedies. In addition, the consumer rights of non-compliance of the trader with the information requirements should depend on the types of pre-contractual information as follows:

4.1) The main characteristics of the goods or services; in case when the trader act's does not comply with the pre-contractual information provided concerning the main characteristics of the goods, if the consumer does not mean to exercise the unilateral right to terminate the contract but remaining to receive the goods, the law should explicitly stipulates the right to replace the goods in case of the goods is not in line with the information provided pre-purchase in order to benefit the consumer interest.

4.2) Price; in the situation where the consumer declared an intention under a mistake as to the total cost. The trader should be responsible for any additional cost that he did not pre-contractually provide to the consumer by himself, thus, consumer should not be bound by the contract or order.

4.3) The Right of Withdrawal; in order to comply with the Royal Decree to be issued in accordance with section 33 paragraph 2 of the Direct Sales and Direct Marketing Act B.E.2545, the law should enact the consumer's right to be explicitly informed of the information concerning on the territory of their termination depending on each contract.

Moreover, if the information concerning the right of withdrawal has not been provided pre-contractually by the trader, the duration to exercise the right of withdrawal should be extended as prescribed in the European Union Directive or the United Kingdom law, according to a study in chapter 3.

4.4) Information concerning Details of the contract other than the main characteristics; Thai law should endorse the consumer's right from the non-compliant and inaccurate information to recover either the cost or upto the full amount of value at the time consumers had purchased.

LEGAL PROBLEMS ON THE INVESTMENT IN STATE UNDERTAKING UNDER THE PRIVATE INVESTMENT IN STATE UNDERTAKING ACT B.E. 2556*

*Natcha Khiangprakhong ***

Abstract

Due to the executive power contained in the three powers of state according to the theory of Separation of Powers approached by Montesquieu, the government has a duty to deliver public service to response public interest. However, the public services mostly are large projects and required substantial amount of money. The public private partnership (PPP) has been introduced to many countries as a resolution to deliver public service.

In respect of Thailand, the PPP has been known for a long time since the era of King Rama V, but no official laws and regulations until the year 1992. The Private Participation in State Undertaking B.E. 2535 was enacted to regulate the PPP in Thailand. However, after having been effective for over twenty years, it appeared that there were a number of problems occurring in applying this Act. One of the most important problems was the scope of private participation in state undertaking. This is due to the definitions provided in the Act are wide and ambiguous. It causes confusion for both governmental agencies and investors to apply this Act.

As a consequence, the new law called Private Investment in State Undertaking B.E. 2556 has been enacted and effective, but the problem on the scope of private participation in state undertaking has not been resolved. Therefore, the same problem is still ongoing.

This article will present the overview of the PPP in global aspect and two examples foreign countries' PPP laws which are the Republic of Korea and the United States. Besides, it also provides the details and analysis of the problems regarding the scope of private participation/investment in state undertaking in both the Private Participation in State Undertaking Act B.E. 2535 and the Private Investment in State Undertaking Act B.E. 2556. Moreover, there is a recommendation provided to resolve such problem.

Keywords: Public Private Partnership, PPP, Public service, Private participation

* This article is summarized and arranged from the thesis "Legal Problems on the Investment in the State Undertaking under the Private Investment in State Undertaking Act B.E. 2556" Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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บทคัดย่อ

เนื่องจากอำนาจบริหาร ซึ่งเป็นหนึ่งในอำนาจของรัฐทั้งสามตามทฤษฎีการแบ่งแยกอำนาจของมองเตสกีเอ รัฐบาลหรือฝ่ายบริหารมีหน้าที่ในการให้บริการสาธารณะเพื่อตอบสนองความต้องการของสาธารณชน อย่างไรก็ตาม บริการสาธารณะส่วนใหญ่เป็นการลงทุนขนาดใหญ่ที่จะต้องใช้ระดมเงินทุนจำนวนมาก การให้เอกชนร่วมลงทุนในกิจการของรัฐ (PPP) จึงเข้ามามีบทบาทในการแก้ไขปัญหาการให้บริการสาธารณะในหลายประเทศ

ในกรณีของประเทศไทย แม้ PPP เป็นที่รู้จักมาเป็นเวลานานตั้งแต่สมัยรัชกาลที่ 5 แต่ไม่ปรากฏว่ามีกฎระเบียบเกี่ยวกับ PPP อย่างเป็นทางการจนกระทั่งปี พ.ศ. 2535 ได้มีการบัญญัติพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535 เพื่อกำหนดกฎเกณฑ์เกี่ยวกับ PPP ในประเทศไทย โดยตลอดระยะเวลาที่ยี่สิบปีที่พระราชบัญญัตินี้มีผลใช้บังคับปรากฏว่ามีปัญหาจำนวนมากที่เกิดขึ้นจากการปรับใช้พระราชบัญญัตินี้ และหนึ่งในปัญหาที่สำคัญคือขอบเขตของการร่วมงานหรือดำเนินการในกิจการของรัฐคืออะไร ซึ่งปัญหานี้เกิดจากการที่คำนิยามกว้างและกำกวม ทำให้ผู้ใช้กฎหมายทั้งภาครัฐและผู้ลงทุนเอกชนเกิดความสับสนในการปรับใช้พระราชบัญญัตินี้

ด้วยเหตุดังกล่าว จึงมีการบัญญัติกฎหมายฉบับใหม่มาบังคับใช้แทนพระราชบัญญัติเดิม โดยกฎหมายฉบับใหม่ชื่อว่า พระราชบัญญัติว่าด้วยการให้เอกชนร่วมลงทุนในกิจการของรัฐ พ.ศ. 2556 แต่ปัญหาเรื่องขอบเขตของการลงทุนในกิจการของรัฐที่จะต้องตกอยู่ภายใต้บังคับของพระราชบัญญัตินี้ยังคงไม่ได้รับการแก้ไข จึงทำให้ปัญหาเดิมยังคงดำเนินต่อไป

ในบทความนี้จะแสดงให้เห็นถึง PPP ในภาพรวม และได้ยกกฎหมาย PPP ของประเทศสาธารณรัฐเกาหลีและสหรัฐอเมริกาเป็นตัวอย่างในการศึกษา นอกจากนี้ ยังได้ศึกษารายละเอียดและวิเคราะห์ปัญหาที่เกี่ยวกับขอบเขตของให้เอกชนลงทุนในกิจการของรัฐทั้งในพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535 และพระราชบัญญัติว่าด้วยการให้เอกชนร่วมลงทุนในกิจการของรัฐ พ.ศ. 2556 และสุดท้ายได้แสดงความคิดเห็นเป็นข้อเสนอแนะในการปรับปรุงกฎหมายดังกล่าวด้วย

คำสำคัญ: การให้เอกชนร่วมลงทุนในกิจการของรัฐ, PPP, บริการสาธารณะ, การร่วมลงทุนของเอกชน

1. The Overview of Public Private Partnership

It is widely seen that traditional public procurement has been a problematic issue in delivering public services. Due to the ambiguous terms of reference and specification, the unexpected outcomes to public sector are found. The public private partnership (the “PPP”) becomes an approach to enhance the deficiencies of both public and private sector.¹ Due to its substantial advantages, many governments use PPP as a new strategy for providing infrastructure and public services.²

Many scholar, institutions, government and even internal organizations such as the United Nations (UN), The United States Nation Council of State Legislature P3 Toolkit, The European Commission and

¹ Young Hoon Kwak, Ying Yi Chih and C. William Ibbs, “Towards a Comprehensive Understanding of Public Private Partnerships for Infrastructure Development”, CALIFORNIA MANAGEMENT REVIEW VOL. 51, NO. 2, 2 (2009)

² *Id.* at 1.

The World Bank as well as Black's Law Dictionary similarly defined the definition of the PPP. Accordingly, it can be concluded that the **PPP is an agreement between public and private party with objective to provide public services by any means to ensure the sharing of risks in the project.**

1. The PPP must be an agreement between public and private sector: The public partner in the PPP project is governmental entities including ministries, departments, municipalities and state owned enterprises.³ The private sector can be any private entity both local and international investors including nongovernmental organizations (NGOs) and community-based organizations (CBOs).

2. The PPP must contain the purpose to provide public service: According to French Supreme Administrative Court Judgment, it defined "public service" as an activity which is conducted by authority for purpose of public interest.

2.1. Objective: it must be an activity relating to public interest;

2.2. Structure: it must be conducted by the juristic person in public law and a private entity where the state has designated as a public service provider on its behalf; and

2.3. Legal System: it must be subject to administrative law system and under administrative court jurisdiction.⁴

The PPP must be done by any means to ensure the sharing of risks: the concept of the PPP is different from the idea of traditional procurement where the government serves all risks on the grounds that the private sector is expected to absorb substantial risks such as construction or project risks, financial risks, performance risks, etc.

2. Public Private Partnership in Foreign Countries

2.1 Public Private Partnership in the Republic of Korea

2.1.1 The Private Participation in Infrastructure Law

The Korean PPP Act and the PPP enforcement Decree are the major regulations of the legal framework for the PPP projects in the South Korea.⁵ It was defined the Public Private Partnership Project in the Korean PPP Act, Article 2 Definition subparagraph 5 which can be separated into two following types:⁶

(1) Solicited Project

³ Asian Development Bank, Public-Private Partnership Handbook, <http://www.adb.org/documents/public-private-partnership-ppp-handbook>

⁴ นันทวัฒน์ บรรมานันท์, กฎหมายปกครอง, (กรุงเทพฯ: วิญญูชน), พิมพ์ครั้งที่ 4, 2557, หน้า 335 (Nanthawat Boramanan, Administrative Law, at 335 (4th ed. 2014)).

⁵ *Id.* at 8.

⁶ Act on Public-Private Partnerships in Infrastructure, Article 2 subparagraph 5

The competent authority creates a PPP project plan which describes the significance and details of each project. The candidate project must be one of the 46 eligible facility types as specified in the Korean PPP Act.⁷

In the case that the project costs more than W50 billion and would require more than W30 billion from the central government, the competent authority must submit the project to the MOSF to initially conduct feasibility in accordance with the National Fiscal Act.

(2) Unsolicited Project

Article 9 of the Korean Act allows private sector to propose the potential PPP and request the competent authority for designation such project to be the PPP. The selection process will be conducted under a competitive bidding. It should be noted that in case of the unsolicited project, the law does not required that the project must relate to the Infrastructure Facilities Projects.

2.1.2 Procurement methods

There are only four types of the PPP, stated as below, to be conducted in the South Korean as specified in Article 4 of the Korean PPP Act.

(1) Build-Transfer-Operate Method: the ownership of infrastructure facilities shall be transferred to the state as soon as the completion of the construction and the concessionaire has a right to manage and operate the assets while obtaining return on investment (ROI).⁸

(2) Build-Transfer-Lease Method: the ownership of the infrastructure facilities shall be transferred to the state upon the completion of construction. The government shall also grant the right to operate the facilities to the concessionaire while the concessionaire obtains the lease payment and the operational cost.⁹

(3) Build-Operate-Transfer Method: the concessionaire remains the ownership of the infrastructure facilities for a specific period of time after the completion of the construction. After the termination of the concession agreement, the ownership shall be transferred to the government.¹⁰

(4) Build-Own-Operate Method: The concessionaire invested its capital to the project. After the completion of construction, the concessionaire shall have an ownership of the infrastructure throughout their life span.¹¹

However, the private sector may propose other types of PPP through unsolicited projects under article 9 or modification of the master

⁷ Jay-Hyung Kim, Jungwook Kim, Sung Hwan Shin and Seung-yeon Lee, Public-Private Partnership Infrastructure Projects: Case Studies from the Republic of Korea Volume 1: Institutional Arrangements and Performance, 12 (1st ed. 2011).

⁸ Act on Public Private Partnerships in Infrastructure Article 4

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

plan under article 12 and adopted by the competent authority as it deems reasonable.¹²

2.1.3 Key Success Factors

The PPP laws and regulations of the South Korea is consistent and systematic leading to a number of successful PPP projects in this country. One of the most important factors to bring the South Korea to be a successful country in respect of PPP project development is the Public Private Infrastructure Investment Management Center (PIMAC) which is an efficient agency with responsibilities to support all aspects relating to PPP projects. The PIMAC undoubtedly helps to facilitate both local and foreign private investors as well as related authority to process and achieve the PPP projects.

2.2 Public Private Partnership in the United States

2.2.1 The Public Private Partnership Law

The concept of PPP has been introduced for many years, but the term public private and partnership was used in the United States (the “US”) in the late 1990s and early 2000s.¹³

(1) Characteristics of Public Private Partnership

The definition of the PPP defined by the U.S. Government Accountability Office (the “GAO”) in 1999 contained two factors which are as follows: (i) a specific form of government contract which is a method of procurement; and (ii) the actual combination of responsibilities assumed by private partner.¹⁴ In the context of the state government, there are both similar and contrast to each other.¹⁵ In addition, the private parties in the PPP are expected to contribute their resources such as capital, expertise and asset and share risks among partners. It should be noted that there is no co-ownership in the PPP.¹⁶

(2) Eligible Infrastructure

Some states create their own PPP in the state statutory while some do not absorb the concept of the PPP.¹⁷ There are thirty-one states having PPP legislation for highways, roads and bridges, whereas, twenty-one states having PPP legislative for transit projects.

(3) Solicited and Unsolicited Project

Most of the states in the US accept the unsolicited project to be proposed by the private entities, whereas only a few decline the idea of the unsolicited project. However, the unsolicited project has no criteria to meet

¹² *Id.*

¹³ Dominique Custos and John Reitz, “Public-Private Partnerships”, 58 Am. J. Comp. L. Supp. 555, 555 (2010).

¹⁴ *Id.*

¹⁵ Anika Guevara, “PUBLIC-PRIVATE PARTNERSHIPS:AN INNOVATIVE SOLUTION FOR A DECLINING INFRASTRUCTURE”, 47 Urb. Law. 309, 2 (2015).

¹⁶ *Id.*

¹⁷ Custos and Reitz *supra* note 13 at 557.

and no outline to plan and predict the impact to community. The only thing the state can provide is to sponsor the new ideas.¹⁸

(4) State Approval

In general, the PPP projects to be developed must be approved from some authorized agencies prior to implementing, while there are nine states that the each PPP project needs to be approved by the state legislature prior to developing the projects. The legislative approval may guarantee the success of the project, yet time consuming, which has the negative impact on cost of the projects.¹⁹

2.2.2 Failure Factors

Each state has its own PPP laws which are different from each other. This contributes the US's PPP law to be unsystematic and inconsistent. It is recommended to enact the federal PPP law or the uniform law of the PPP, so that all states will have to follow this rule as of enacting its own PPP law. This approach will help to alleviate the desperately insufficient infrastructure in the US.

3. Public Private Partnership in Thailand

The concept of the PPP has been introduced since in the era of King Rama V the Great. In the period of King Rama VI and VII, there was the Control on Trading Affecting Safety and Peace of the Public Act B.E. 2471.²⁰ And then it was repealed by the Revolutionary Council Order No. 58. Due to corruption during the process of approval by politicians, it was substituted by the Private Participation in State Undertaking B.E. 2535 (the “PPSU Act”).

3.1 The Private Participation in State Undertaking B.E. 2535

After the PPSU Act had been effectively used in Thailand for several years, it was found that the provisions regarding what project was the Participation in the State Undertaking which would be subject to the PPSU Act are ambiguous and frequently practically contribute the problems.

Since the Council of State has a duty to render legal opinion to the State agencies for the purpose of clarifying rules in performing official

¹⁸ Emilia Istrate and Robert Puentes, “Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units” December 2011, http://www.brookings.edu/~media/research/files/papers/2011/12/08%20transportation%20istrate%20puentes/1208_transportation_istrate_puentes.pdf. (25 May 2016)

¹⁹ *Id.*

²⁰ เข็มชัย ชุตินวงศ์, “ปัญหาการจัดทำสัญญาในโครงการให้เอกชนลงทุนในโครงสร้างพื้นฐานหรือบริการสาธารณะ”, เอกสารประกอบการสัมมนา โครงการสัมมนาพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ: เปิดมิติใหม่ร่วมลงทุนรัฐ เอกชน เล่ม 2, 12-13 (2556). (Chemchai Chutiwong, “Issue on Drafting Public Private Partnerships in Infrastructure or Public Services”, Document of the Private Investment in State Undertaking Act: New Dimension in Public Private Partnerships Book 2, 12-13, (2013))

duties within the scope of legitimacy.²¹ Therefore, there are a number of cases sent to the Council of State, in order to construe that whether a particular action was subject to the PPSU Act. It can be concluded as set out below.

3.1.1 Scope of the State Undertaking

(1) The Council of State looks up to the objectives of the organization imposed in the act establishing such organization. Provided that the objectives cover the issued activity, the Council of State will determine it as the State Undertaking. It can be obviously seen that the Council of State does not concern whether such activities are public service or not.

(2) The Council of State had opinion regarding state's property as follows:

- The Council of State defined the Properties in this definition as same as the meaning under section 138 of the Civil and Commercial Code²². Moreover, the Council of State was of the opinion that the electronic commercial data in the system of Ministry of Commerce and the traffic right which Thailand acquired according to the Convention on International Civil Aviation and related bilateral treaty was the property of the government.²³

- The Property in which a governmental body purchased from foreign country is not considered as natural resources and state's property under the PPSU Act.

- The state's property in context of the PPSU Act means the property which is the core asset in respect of operating the organization's business, not include the general asset such as building, office equipment, cash or deposit in bank account.

3.1.2 Scope of the Participation

(1) Selling shares of state owned enterprises whether selling the existing ordinary shares or subscribing the new shares is not the Participation under the PPSU Act. In contrast, the Ministry of Finance sold

²¹ Office of the Council of State, Philosophy , Mandate and Organization Chart, http://www.krisdika.go.th/wps/portal/general_en!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g_A2czQ0cTQ89ApyAnA0_EIOAQGdXAwM_Y30_j_zcVP2CbEdFAFGmRScI/dl3/d3/L2dJQSEvUUt3QS9ZQnZ3LzZfTjBDNjFBNDJFUUJSQjBJT1QwUFFDRTAwVjA/. (6 June 2016).

²² Section 138 under the Civil and Commercial Code

²³ กิตติพงศ์ อรุณพิพัฒน์พงศ์, “มุมมองของเอกชนต่อพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ”. เอกสารประกอบการสัมมนา โครงการสัมมนาพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ: เปิดมิติใหม่ร่วมลงทุนรัฐ เอกชน เล่ม 2, 107-108, (2556). (Kitipong Aurapeepattanapong, “Private Sector Aspects toward the new PPP Act”, Document of the Private Investment in State Undertaking Act: New Dimension in Public Private Partnerships Book 2, 107-108, (2013))

its shares in Thai Airway International Public Company Limited was considered as the Participation in State Undertaking under the PPSU Act.

(2) When a governmental agency purchases and holds shares in private company, it is considered as the Participation under the PPSU Act. On the contrary, if there is an agreement imposed a governmental agency to purchase shares in a private company when holding shares by such is not the Participation under the PPSU Act.

(3) The contract of works under the Civil and Commercial Code section 587 is not the Participation under the PPSU Act.

(4) The Participation under the PPSU Act includes only the project initiated by the governmental agencies.

In conclusion, the commentaries of the Council of State was construed the scope of public private partnership under the PPSU act widely and complicated, this would be an obstacle for the private investors intending to invest in the PPP project.

3.1.3 The effects of non-compliance with the Private Participation in State Undertaking Act B.E. 2535

The Council of State has commented that given that amendment of the PPP agreement did not comply with the process pursuant to the PPSU Act, such agreement shall not be binding to the governmental agency.²⁴

According to the Supreme Administrative Court Judgment no.Ao 349/2549, the amendment of the PPP project's contract which failed to approve by the Cabinet shall not be legally binding the government. Therefore, the court was unable to enforce the state following to arbitration award.²⁵

3.2 Private Investment in State Undertaking Act B.E. 2556 (the "PISU Act")

Despite amendment of various provisions was enacted to be the solutions of many problems, there is no change in definition of what activity is the Investment in the State Undertaking under the PPUS Act. This would lead to the same problems as in the PPSU Act faced.

3.2.1 Resolution of the unclear scope of Investment in the State Undertaking

During the process of enactment the PISU Act, (meeting of Council of the State (Special Committee) no.1/2554²⁶ and 2/2554²⁷ dated July 7th,

²⁴ The Council of State's Commentary no. 570/2542, 291/2550, 292/2550, 293/2550 and 294/2550

²⁵ Supreme Court Judgment no.2503/2552

²⁶ สำนักงานคณะกรรมการกฤษฎีกา, บันทึกการประชุมคณะกรรมการกฤษฎีกา (คณะพิเศษ) ครั้งที่ 1/2554 วันที่ 7 กรกฎาคม 2554 ณ ห้องประชุม สมภพ โหตระกิตต์. (The Council of State, Minutes of Meeting of the Council of State (Special Committee) no.1/2011 dated 7 July 2011 at Sompop Hotrakit Meeting Room)

²⁷ สำนักงานคณะกรรมการกฤษฎีกา, บันทึกการประชุมคณะกรรมการกฤษฎีกา (คณะพิเศษ) ครั้งที่ 2/2554 วันที่ 14 กรกฎาคม 2554 ณ ห้องประชุม สมภพ โหตระกิตต์. (The Council of State, Minutes of Meeting of

2011 and July 14th, 2011 respectively), one of the committees referred that the unclear definition issue can be solved by these following solutions:

(1) Compliance with the Council of State's commentaries

Aurapeepattanapong is of the opinion that the unchanged definition of Investment or Participation would cause the inappropriate interpretation, on the ground that the Council of State has been commented the definition of Investment (Participation) too wide and has no scope to limit that which project fails under the law.²⁸

(2) Judgment made by the PPP Committee

There is no provision to impose the process for consulting the PPP committees regarding the PISU Act. As a result, the host agency has to conduct all the feasibility study before having a chance to know whether the project is subject to the PISU Act or not which leads to time and budget consuming.

(3) Enacting the Royal Decree as specified in section 7

The Vice-Secretary of Ad Hoc Committees to Consider the Bill suggested that at first stage it needs to consider of which action is qualified as State Undertaking prior to enacting the Royal Decree to exempt a particular action.²⁹ Therefore, this mean cannot resolve the problem of unclear definition of Project under the PISU act.

3.2.2 Effects of Non-Compliance with the Private Investment in State Undertaking Act B.E. 2556

(1) The project established before and during effectiveness of the PPSU Act

If such project has not involved in any dispute settlement, the authorized minister designates a group of committees to consider the appropriate resolution including termination, amendment, remaining effective of the contract and propose such resolution to the cabinet to make an order.³⁰

(2) The new project

The SEPO shall notify the Host Agency to give the explanation of facts and appropriate approaches for submission to the PPP Committees for direction. The PPP Committees may terminate, amend or remain the effectiveness of the contract and propose the cabinet to approve.

the Council of State (Special Committee) no.2/2011 dated 14 July 2011 at Sompop Hotrakit Meeting Room)

²⁸ Aurapeepattanapong *supra* note 23 at 107.

²⁹ สำนักงานคณะกรรมการกฤษฎีกา, บันทึกการประชุมคณะกรรมการพิจารณาวิสามัญพิจารณาร่างพระราชบัญญัติการให้เอกชนร่วมลงทุนในกิจการของรัฐ พ.ศ. ... สถาปนาพรราชฎร ครั้งที่ 1 วันที่ 22 พฤษภาคม 2555 ณ ห้องประชุมคณะกรรมการธิการ หมายเลข 219 ชั้น 2 อาคารรัฐสภา 2. (The Council of State, Minutes of Meeting of Ad Hoc Committee to consider the bill of the Private Investment in State Undertaking B.E. ... House of Representative no.1 dated 22 May 2012 at Ad Hoc Committee Meeting Room no.219 2nd Floor, Statehouse 2.)

³⁰ The Private Investment in State Undertaking Act B.E. 2556 section 72

3.3 Analysis on Investment in the State Undertaking under the law of Thailand to the PPP Project under the Law of the Republic of Korea

To analysis the Korean PPP Act and the PISU Act, it can be clearly seen that the PISU Act should be revised in various aspects such as the scope of the PPP project, the investment method subject to the PISU Act, the process to designate the unsolicited project as well as establishment of an independent PPP Unit. This will lead the PISU Act to be more conceivable and explicitly. The consistent and clear laws and regulations can induce the private sectors to invest in country's infrastructure facilities. In addition, it should have a PPP Unit to support both public and private parties in all aspects of the PPP project.

3.4 Analysis on Investment in the State Undertaking under the law of Thailand to the PPP project under the law of the United States

Turning to the United States, despite of being a sheer size of infrastructure market, the US, in respect of the PPP legislation, has fallen behind many nations in the world especially the European countries. The fragmented of the US PPP law is an illustration of many developing countries to learn the outcome of inefficient PPP law. After analysis the law of the United States and Thailand, it is undeniably that the US and Thailand are confronting similar problems of inefficient PPP law. Therefore, Thailand should learn the US's failure to resolve its problems regarding the PPP law.

4. Conclusions and Recommendations

4.1 Conclusions

Due to plenty of advantages, the PPP recently has been one of the most favorable forms in worldwide regarding private sector participation. Interestingly, there is no official definition of the PPP. Each country and organization defined its own definition but there are some identicalities of concepts among those definitions. This thesis has examined those definitions and reached to the conclusion that the general concept of the PPP is *"an agreement between public and private sector with the purpose to provide public service by any means to ensure the sharing of risks."*

In the context of PPP in Thailand, it was firstly introduced as the power to approve infrastructure project which was solely authorized ministers caused the dramatic corruption across the nation. The government in that time, as a result, enacted the PPSU Act as the first PPP law which after that led to several problems and one of the most important points is the scope of the Participation in the State Undertaking under this act. There are a number of cases sent to the Council of State, in order to construe that whether a particular action was subject to the PPSU Act. However, it came out that the commentaries of the Council of State was construed the scope of public private partnership under the PPSU act widely and complicated.

The new PPP law known as the PISU Act was effective in 2013 to ensure the practicality and transparency. However, the scope of Participation in the State Undertaking remains the same, and this incurs the same problems as in the PPSU Act. Despite the during the enacting of the

Act, one of the committees referred that the unclear definition issue can be solved by Compliance with the Council of State's commentaries, judgment made by the PPP Committees and enacting the Royal Decree as specified in section 7 of the PISU Act. Nevertheless, it was analyzed in this paper that all of these resolutions are impractical to solve the problems.

In the context of the PPP in the South Korea, the scope of the PPP project was precisely described the qualifications and process of both solicited and unsolicited project. Moreover, it also specifies the types of investment method of the PPP project. The main factors to contribute the South Korea to achieve in the PPP project are certain laws and regulations as well as a strong supportive agency known as the PIMAC.

Turning into the US, due to the pressure of the lack of infrastructures in the nationwide, it has desperately needed budget in order to deliver the infrastructure to the public. As a result, the PPP concept becomes a good option to raise budget. However, there is no federal PPP law in the US. Most of the states have established their own PPP legislation. It was agreeable the federal government should concern on enact the Uniform PPP law.

After analysis of the PPP law in the South Korea and the US as well as characteristics of PPP in global, it can be concluded that Thailand should apply the PPP law of the South Korea and revise the scope of Private Investment in the State Undertaking to conform with the characteristics of the PPP used in international. This is to ensure the efficiency and transparency of the PPP project in Thailand.

4.2 Recommendations

The definition of Project, State Undertaking and Investment specified in section 4 of the PISU Act should be deleted, since the new definitions which are the PPP Project and Public Service will be substituted by applying from the characteristics of PPP in international and the PPP law of the South Korea. In addition, it is necessary to impose the qualifications of the investment method in PPP project, in order to restrain the confusion. Moreover, the process to purpose the unsolicited project and the measure to protect rights of the private party should be imposed.

In order to encourage the efficiency and transparency of the relating parties in the PPP project, the structure and qualifications of the PPP Committees should be revised as well as the establishment of the independent administrative body to support the PPP project in Thailand.

LEGAL MEASURES FOR AMBUSH MARKETING IN THAILAND*

*Nattakorn Tamkaew***

Abstract

Ambush marketing comprises a broad range of marketing operations by business organizations seeking affiliation with an event without bearing any financial burden of sponsorship. Although the ethical topics related to ambush marketing are still controversial, it clearly causes disadvantages to the sponsorship business by devaluing the sponsorship relationship between official sponsors and organizing committees. It is reasonable that this marketing practice should be regulated under an appropriately designed legal framework.

Many attempts have been made in other countries to deal with ambush marketing. The United States of America and the United Kingdom have introduced event-specific legislation to guard against ambush marketing for the Olympic Games, as requested by the International Olympic Committee. New Zealand and South Africa have provided protection for any events considered ‘major event’ with an umbrella legislation which is not specifically designed for the Olympic Games or any other single event.

In Thailand, although there are some legal grounds that make it possible to formulate a claim against ambush marketing, such as trademark infringement, civil passing off, and basic tort claims as well as consumer protection law, it appears that such existing laws are insufficient to deal with this controversial marketing activity due to various non-infringing techniques of ambush marketing.

Consequently, a single piece of new legislation should be enacted. Business relationships between event organizers and official sponsors must be protected while achieving a balance among the rights of sponsors, property owners, and other affected parties. Therefore, ambush marketing legislation should focus on clear-cut definition, declaration of the protected event, and legal protection for ambush marketing by way of association and intrusion, time limitations, and exceptions of violation.

Keywords: Ambush marketing, Sponsorship, Trademark law, Passing off, Law of tort, Consumer protection law.

* The article is summarized and rearranged from the thesis “Legal Measures for Ambush Marketing in Thailand”, Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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บทคัดย่อ

การตลาดแบบซุ่มโจมตีคือรูปแบบของกิจกรรมทางการตลาดแบบต่างๆ ที่เกิดขึ้นโดยองค์กรธุรกิจที่มุ่งหวังที่จะสร้างความเชื่อมโยงระหว่างตนเองกับมหกรรมใดๆ โดยมีได้รับอนุญาตและมีได้จ่ายเงินสนับสนุนหรือค่าสปอนเซอร์ให้แก่มหกรรมนั้น ซึ่งแม้ว่าประเด็นด้านจริยธรรมของการตลาดแบบซุ่มโจมตีนั้นยังคงเป็นที่ถกเถียงกันอยู่ แต่ก็ชัดเจนว่าวิธีการทำการตลาดเช่นนี้ย่อมสร้างความเสียหายให้แก่ธุรกิจทางด้านสปอนเซอร์ เนื่องจากการตลาดแบบซุ่มโจมตีทำให้คุณค่าของสัญญาการให้การสนับสนุนระหว่างผู้สนับสนุนอย่างเป็นทางการกับผู้จัดงานมหกรรมนั้นด้อยค่าลง ดังนั้น การทำการตลาดแบบซุ่มโจมตีจึงควรได้รับการควบคุมภายใต้มาตรการทางกฎหมายที่เหมาะสม

ได้มีความพยายามในหลายประเทศที่จะสร้างมาตรการทางกฎหมายเพื่อรับมือกับการทำการตลาดแบบซุ่มโจมตี โดยประเทศสหรัฐอเมริกาและสหราชอาณาจักรได้ออกกฎหมายสำหรับป้องกันการทำการตลาดแบบซุ่มโจมตีโดยเฉพาะสำหรับการแข่งขันโอลิมปิกเกมส์ที่ประเทศดังกล่าวเป็นเจ้าภาพตามข้อเรียกร้องของคณะกรรมการโอลิมปิกสากล ในขณะที่ประเทศนิวซีแลนด์และประเทศแอฟริกาใต้ได้ให้ความคุ้มครองมหกรรมที่ได้รับการพิจารณาให้เป็น “มหกรรมที่สำคัญ” โดยการออกกฎหมายที่ให้ความคุ้มครองแบบครอบคลุม โดยมีได้จำกัดเฉพาะโอลิมปิกเกมส์หรือมหกรรมใดมหกรรมหนึ่ง

สำหรับประเทศไทย แม้ว่าบทบัญญัติและหลักกฎหมายบางเรื่อง เช่น หลักกฎหมายการละเมิดสิทธิในเครื่องหมายการค้า การลวงขาย กฎหมายละเมิด และกฎหมายคุ้มครองผู้บริโภค อาจจะสามารถปรับใช้ได้สำหรับการดำเนินการทางกฎหมายต่อการทำการตลาดแบบซุ่มโจมตี แต่กฎหมายที่มีอยู่นั้นก็ไม่เพียงพอที่จะรับมือกับการทำการตลาดเช่นว่านั้นได้อย่างครอบคลุม เนื่องจากผู้ทำการตลาดได้พัฒนาวิธีการทำการตลาดแบบซุ่มโจมตีโดยอาศัยช่องว่างทางกฎหมายและหลีกเลี่ยงการกระทำที่ฝ่าฝืนต่อบทบัญญัติและหลักกฎหมายดังกล่าวข้างต้น

ด้วยเหตุนี้ ประเทศไทยจึงควรพิจารณาออกกฎหมายใหม่สำหรับการควบคุมการทำการตลาดแบบซุ่มโจมตี โดยมีหลักการสำคัญในการคุ้มครองความสัมพันธ์ทางธุรกิจระหว่างผู้จัดงานมหกรรมและผู้สนับสนุนอย่างเป็นทางการ ควบคู่ไปกับการสร้างความสมดุลและความเป็นธรรมระหว่างผู้สนับสนุนอย่างเป็นทางการ เจ้าของสิทธิในทรัพย์สินของมหกรรม และผู้ที่ได้รับผลกระทบจากกฎหมายฉบับนี้ทุกฝ่าย ดังนั้น กฎหมายสำหรับการตลาดแบบซุ่มโจมตีควรให้ความสำคัญกับการกำหนดนิยามของการตลาดแบบซุ่มโจมตี ขั้นตอนในการพิจารณาการให้การคุ้มครองมหกรรม มาตรการทางกฎหมายสำหรับป้องกันการตลาดแบบซุ่มโจมตีทั้งโดยการเชื่อมโยงและโดยการแทรกซอน กำหนดระยะเวลาการให้ความคุ้มครอง และข้อยกเว้นการกระทำผิด

คำสำคัญ: การตลาดแบบซุ่มโจมตี, การให้การสนับสนุน, กฎหมายเครื่องหมายการค้า, การลวงขาย, กฎหมายละเมิด, กฎหมายคุ้มครองผู้บริโภค

Introduction

Commercial companies have various ways of acquiring customers in order to build up their businesses. Amongst all the marketing activities, commercial sponsorship represents one of the most significant marketing developments over recent decades and has become prevalent in society. The great value and exclusivity right will be given to the official sponsors in exchange for the sponsoring amount that they have paid. This exclusivity creates a challenge to the competitors of the official sponsors who are not able to legitimately capitalize on the event due to the exclusivity policy, and ambush marketing has become an effective weapon for non-sponsors to do so.

Many attempts have been made in other countries to deal with ambush marketing. In addition to the traditional form of legal protections, the United States of America and the United Kingdom have introduced event-specific legislation to guard against ambush marketing for the Olympic Games, as requested by the International Olympic Committee. New Zealand and South Africa have provided protection for any events considered ‘major event’ with an umbrella legislation which is not specifically designed for the Olympic Games or any other single event.

In spite of not having any specifically designed legislation or legal measures to handle ambush marketing in Thailand, there are some legal grounds which could allow a claim of ambush marketing to be made. In the Trademark Act B.E. 2534, a trademark infringement claims and the law of passing off are the applicable existing laws.¹ However, a trademark infringement claim can be used only in some circumstances since the ambusher is normally aware how to avoid trademark infringement. Moreover, the short lifecycle of the event may cause difficulties to the owner of an unregistered mark in establishing the actual use of its trademark in order to enjoy the passing off protection under the Trademark Act of Thailand.

Alternatively, the event organizers may pursue a basic tort provision under the Civil and Commercial Code of Thailand against unauthorized usage of the event’s mark in ambushing activities if such unauthorized use is believed to be an abuse of their rights. However, it would be very difficult for the trademark owner to identify the ambusher’s unlawful act since many ambushing strategies are not obviously illegal in Thailand and the use of tort claim is not well developed in the field of ambush marketing.²

Furthermore, although Thai consumer protection law may represent an alternative way for organizing bodies and official sponsors of the event to counter ambush marketing, it is not specifically designed for this phenomenon and may not be effective enough to cover all subtle strategies of ambush marketing.

By the abovementioned movements of other countries and the benefit of legal measures for ambush marketing, it may imply that the benefits that each of the countries takes from providing legal controls to ambush marketing is worthwhile enough. This article therefore aims to study and analyze the existing applicable Thai laws in comparison with the legal measures which govern ambush marketing in foreign countries, as

¹ Siraprapha Rungpry, “*Dealing with Ambush Marketing*”, www.asiaiplaw.com/article/41/747/ (accessed October 21, 2015)

² Somboon Earterasarn & Clemence Gautier, “*Protection of Major Sports Events and associated commercial activities through Trademarks and other IPR*”, <https://www.aippi.org/download/committees/210/GR210thailand.pdf> (accessed October 14, 2015)

well as to propose new legislative solutions and recommendations in order to enhance sponsorship investment in Thailand.

Ambush Marketing and Related Issues

1. Definition and Characteristics

Ambush marketing is an attempt to gain benefits from the popularity and goodwill of a particular event by way of establishing an association between oneself and the event, without explicit authorization from the event organizer and without spending any requisite fees to be an official sponsor.³ It is sometimes called “parasite marketing” since the value and quality of the sponsorship opportunity and the efficacious message of the official sponsor are reduced and devalued by this marketing activity.⁴

This marketing practice has attracted much debate amongst marketing scholars. Some researchers argue that it is an unethical and illegitimate marketing activity because it devalues the sponsorship between the event and official sponsor⁵ and sometimes misleads consumers into believing that ambushers are actually providing a sponsorship fee.⁶ Other researchers take the completely opposite view stating that it is not illegal because it is the natural result of healthy competition. Although the ethics of ambush marketing remain controversial, it clearly causes disadvantages to the sponsorship business by devaluing the sponsorship relationship between official sponsors and organizing committees. Therefore, ambush marketing should be controlled under an appropriate legal measure.

2. Types of Ambush Marketing

It is extensively acknowledged that ambush marketing can be categorized into two types; ambush marketing by way of “association” and “intrusion”.⁷

(1) Ambush Marketing by Association

An association can be exploited by ambush marketers in order to create confusion and deceive consumers into believing that they actually contribute to the sponsorship revenue of the event and that they are an

³ Steve Mckelvey & John Grady, “*Ambush Marketing: The Legal Battleground for Sport Marketers*”, 21 **WTR Ent. & Sports Law** 8, 9 (2004).

⁴ Tony Meenaghan, “*Ambush Marketing: A Threat to Corporate Sponsorship*”, 38 **Sloan Management Review** 103, 109 (1996).

⁵ Information Resources Management Association, **Marketing and Consumer Behavior: Concepts, Methodologies, Tools, and Application** 102 (2015).

⁶ Gabriela Bodden, “*Ambush Marketing and Trademark Infringement in the Caribbean*”, <http://www.lexology.com/library/detail.aspx?g=2098fdec-cd56-4d4f-9a86-9dbc6cf549ad> (accessed December 5, 2015)

⁷ Philip Johnson, **Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event** 7 (2008).

officially authorized sponsor. This can be achieved by utilizing the emblem of the event or an emblem which is confusingly similar to the actual event's emblem. Ambush marketing by way of association can also be done by persuading consumers in some way that the ambusher or its brand is connected with the event,⁸ for examples, using symbolic images or words relating to the event in advertising, sponsoring athletes individually instead of the event, and distributing free tickets or event souvenirs, such as free shirts or caps, in an advertising campaign.

(2) Ambush Marketing by Intrusion

Intrusive ambush marketing is when the ambushing companies cunningly use the environment of the event to show their trademark or brand name and simultaneously create brand awareness and recognition by virtue of the media reporting or broadcasting of the event when they are not entitled to do so.⁹ The most famous instance of this was probably the presence of the Bavaria Beer girls at the FIFA World Cup 2010. Bavaria Beer ambushed Budweiser's official sponsorship during the 2010 FIFA World Cup by sending 36 women wearing orange dresses that looked suspiciously similar to the sales promotion items given away with purchases of Bavaria beer to the stadium in order to get media coverage for its business.¹⁰

3. Ambush Marketing Strategies

To create an implied association with an event, a non-sponsor may simply utilize a registered event's trademark on merchandise without explicit authorization, or falsely pretend to be an official supporter of a particular event.¹¹ However, these marketing strategies are considered illegal and normally have a clear-cut remedy under the law. Therefore, instead of engaging in ambushing strategies equivalent to piracy, non-sponsors are knowledgeable and usually utilize their creativity to develop more subtle strategies of ambush marketing, for examples, sponsoring a subcategory of the event or the event's broadcast, establishing advertising activities surrounding the event venue, and other creative advertising strategies that coincided with the event, for which legal remedies are less clear-cut.

⁸ Dean Crow & Janet Hoek, "Ambush Marketing: A Critical Review and Some Practical Advice", http://iimkbltn-dev.massey.ac.nz/V14/MB_V14_A1_Crow.pdf (accessed October 20, 2015)

⁹ Bodden, *supra* note 6.

¹⁰ Datamonitor, "Ambush Marketing Case Study: successfully leveraging high-profile events to raise brand profile", <http://acervo-digital.espm.br/cases/306395.pdf> (accessed December 5, 2015)

¹¹ Rukmani Seth, "Ambush Marketing – Need for legislation in India", 15 **Journal of Intellectual Property Rights** 455, 456 (November 2010).

4. Effects of Ambush Marketing

The major effect may be that companies no longer take an interest in supporting such events since the advantages of being an official sponsor are regularly weakened by the action of ambushing companies.¹² If that is so, the major event organizer will lack financial assistance in order to organize the event because commercial companies are not willing to make an investment in something from which they cannot take any benefit.¹³

Legal Measures for Ambush Marketing in Foreign Countries

1. The United States of America

Although there is currently no specific legislation regarding ambush marketing in the United States of America,¹⁴ right holders and official sponsors can legally challenge ambushing activities using legal protections provided by an intellectual property protection under the Lanham Act, the doctrine of misappropriation in the common law, and the Olympic and Amateur Sport Act.¹⁵

(1) Intellectual Property Protection

In most ambush marketing situations, an ambusher is smart enough not to use the official trademarks but rather circuitously associate itself with the event. And even though it actually uses a mark, it is most likely unregistered. Therefore, in most cases, the cases relevant to ambush marketing in the United States will place the focus on Section 43(a)¹⁶ which codifies the facts that give rise to the right of action on behalf of the person whose trademark is not officially registered in the State, and also provides protection against persons making false representations or engaging in unfair competition, even in a case that does not involve trademarked goods or services.

Nevertheless, in order to be successful in a false advertising claim under this Act, the plaintiff has the burden of showing that the defendant's activities are likely to create confusion among consumers.¹⁷ It is difficult for a plaintiff to prove consumer confusion as a consequence of ambush marketing. There is consumer behavior research which shows that consumers lack knowledge about the different levels of sponsorship and the

¹² Zaman Kala, "Ambush Marketing in the Context of the 2012 London Olympic Games", Master's Thesis, University of Central Lancashire (2012) 9.

¹³ Philip Johnson, **Ambush Marketing and Brand Protection: Law and Practice** 3 (2nd ed. 2011).

¹⁴ The Global Advertising Lawyers Alliance, **Ambush Marketing: A Global Legal Perspective** 158 (2014).

¹⁵ Lori L. Bean, "Ambush Marketing: Sports sponsorship confusion and the Lanham Act", 75 **Boston University Law Review** 1099,1109 (1995).

¹⁶ 15 U.S.C. § 1125

¹⁷ *Id.* at 1114.

rights associated with the various sponsors.¹⁸ Consumers appear to place little emphasis on the industry of the ambushing company. The sponsorship targets tend to perceive as an official sponsor the brand whose television commercial they viewed most recently in the context of the event. Therefore, it seems difficult to prove that it is the ambushing which creates confusion.

(2) Common Law

In the context of common law, an event organization or official sponsor can also challenge ambush marketing with the doctrine of misappropriation. The misappropriation doctrine is one of the bodies of unfair competition law which operates against another person trying to reap some of the benefits which it has not sown, by misappropriating the value of the products or services.¹⁹ An ambush marketer could be accused of adopting unfair business practices even without misusing a trademark or creating consumer confusion.

However, the ambushing activities usually do not rise to the level of fraud, misrepresentation, or otherwise misleading practices which are generally required for a successful cause of action for unfair business practices.²⁰ An injured person may face difficulties in showing harm in a traditional legal sense.

(3) Event-Specific Legislation

The Olympic and Amateur Sport Act (OASA) grants privileged status to the United States Olympic Committee (USOC). USOC is given the exclusive right to control the usage of Olympics' properties such as trademarks, symbols, and words, regardless of whether their unauthorized use creates a likelihood of consumer confusion.²¹ The unauthorized use of certain Olympic trademarks and mottos are also prohibited by the Act.

2. The United Kingdom

There is no specific legislation in the United Kingdom which prohibits ambush marketing in general, although special event-specific legislation such as The Olympic Symbol (Protection) Act 1995 and the London Olympic Games and Paralympic Games Act 2006, which is no longer in force, were enacted to guard against unauthorized commercial

¹⁸ David Shani & Dennis M. Sandler, "Ambush Marketing: Is Confusion To Blame for the Flickering of the Flame?", 15 **Psychology & Marketing** 367, 367 (1998).

¹⁹ Michelle L. Spaulding, "The doctrine of Misappropriation", <http://cyber.law.harvard.edu/metaschool/fisher/linking/doctrine/> (accessed on November 20, 2015)

²⁰ Gerlinde Berger-Walliser, et al., "Bavarian Blondes Don't Need a Visa: A Comparative Law Analysis of Ambush Marketing", 21 **Tulane Journal of International and Comparative Law** 1, 5 (Winter 2012).

²¹ Matthew J. Mitten, **Sports Law in the United States** 190 (2011).

association with the London Olympic Games 2012.²² Thus, the event organizers and their official sponsors have generally challenged ambush marketing using the traditional forms of intellectual property protection such as trademark infringement and passing off. Other legal frameworks in the United Kingdom such as advertising standards and consumer protection regulations may also be invoked as legal measures to combat ambush marketing.

(1) Intellectual Property Protection

Section 10 of the Trademark Act 1994 offsets out the infringement of a registered trademark and demonstrate that a trademark infringement claim is likely to be an adequate way of dealing with ambush marketing, especially in situations where a mark which is similar or identical to the event's registered mark is used in relation to similar or identical goods and services. However, as it has been noted, the trademarks of major events may potentially face difficulties in the objection process of the trademark registration due to the fact that the registration process is somewhat burdensome. Moreover, there are several ambushing strategies that could easily circumvent trademark protection.

Passing off represents one of the traditional forms of intellectual property protection that could possibly be used to formulate a claim against ambush marketing. It prevents one marketer from misrepresenting its goods or services by claiming that it has some connection or affiliation with some other; it also prevents a marketer from claiming goods or services are some other goods and services.²³ However, in order to be successful in a passing off claim, the following criteria must be proven before the court: the existence of goodwill, misrepresentation, and damage to goodwill.²⁴ Hence, to bring an action on the ground of passing off, the right holder needs to present all of the following: reputation or goodwill has been established in the event in the course of examination; the other has made an untrue representation causing the customers to believe that its supplied goods are those of the right holder; and the event organizer or official sponsor has suffered or is likely to suffer damage.

(2) Advertising Standards

The United Kingdom's advertising regulatory standards, the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code), can also be invoked as a legal measure to combat ambush marketing. It requires that all advertisements in the UK must be lawful, proper, true and honest.²⁵ The CAP Code also prohibits advertisers from taking unfair advantage of a competitor's trademark and requires them to hold evidence as to the genuineness of any endorsements.

²² The Global Advertising Lawyers Alliance, *supra* note 14, at 154.

²³ "Passing off", <https://duhaime.org/LegalDictionary/P/PassingOff.aspx> (accessed October 24, 2015)

²⁴ *Id.*

²⁵ Clause 1.1 of the CAP Code

(3) Consumer Protection Regulations

There are regulations that prohibit misleading actions, including marketing practices which are composed of incorrect information, those which contain factually correct information but which is likely to mislead consumers, and those that create confusion with a competitor's distinguishing marks.²⁶ These legal grounds might be invoked by interested parties to oppose ambushing activities that contain the abovementioned misleading actions.

(4) Event-Specific Legislations

Event organizers have experienced problems confining the variety of ambushing activities within the scope of the traditional forms of protection. Due to this, they have, in recent years, required the host country of the event to enact an effective anti-ambush marketing legislation. Given the above fact, the UK government passed The Olympic Symbol (Protection) Act 1995 and the London Olympic Games and Paralympic Games Act 2006. Under the Olympic Symbol (Protection) Act 1995, the proprietor of the right is given an Olympics Association Right (OAR) which is an exclusive right related to the utilization of the Olympic properties,²⁷ and is entitled to preclude unauthorized commercial usage of a representation of the Olympic insignia, Olympic slogan, or a protected phrase, or anything confusingly similar to that Olympic insignia, Olympic slogan, or a protected phrase as to be likely to establish an implied association in the public mind.²⁸

With regard to the London Olympic Games and Paralympic Games Act 2006, the London Organizing Committee of the Olympic and Paralympic Games (LOCOG) was the proprietor of the LOAR and received the exclusive right to establish a commercial connection with the London Games; it was also given the authority to grant authorizations to utilize a London Representation.²⁹ This Act states further that the commercial use of certain combinations of words, including "Games", "2012", "Two Thousand and Twelve", "Twenty Twelve", "Gold", "Silver", "Bronze", "Medals", "Sponsor", "London" and "Summer", in advertising by a non-sponsor could establish a presumption of being likely to create an implied association in the public mind.³⁰

²⁶ Section 5 of the Consumer Protection from Unfair Trading Regulations 2008

²⁷ Section 2(1) of the Olympic Symbol (Protection) Act 1995

²⁸ Section 3 of the Olympic Symbol (Protection) Act 1995

²⁹ Warren L. Phelops, *"Unauthorised Association with the London Olympics"*, <http://www.klgates.com/unauthorised-association-with-the-london-olympics-08-01-2005/> (accessed April 22, 2016)

³⁰ Paragraph 3(3) and (4) in Schedule 4 of the London Olympic Games and Paralympic Games Act 2006.

3. New Zealand

The New Zealand government introduced the Major Events Management Act 2007 (MEMA) in order to ensure that major events in New Zealand would be effectively organized without disruption, and to provide event organizers and official sponsors with a certain amount of protection around the investment that official sponsors make in a major event. Unlike the event-specific legislation in the UK and the US, this Act can be used on multiple occurrences for any events that have been announced by the New Zealand authorities as major events. There have been many events that have been given the status of ‘major event’ and organized under the MEMA, for example, the 2008 FIFA Under-17 Women’s Football World Cup, the 2010 ICC Under-19 Cricket World Cup, and the 2011 Rugby World Cup.³¹

MEMA includes three essential principles which are the declaration of a major event;³² the prohibition of unauthorized representation of association with a major event which is in order to guard against ambush marketing by association;³³ and the declaration of clean zones, clean transport routes, and clean periods which is in order to protect major event from ambush marketing by intrusion.³⁴ It also includes a number of exceptions, the most notable of which allows businesses to carry on their ordinary activities.³⁵ Therefore, it is considered the strongest legislation to prevent ambush marketing in New Zealand.

4. South Africa

South Africa then introduced two additional pieces of legislation, which are the Merchandise Marks Act and the South Africa’s Consumer Protection Act, in order to specifically safeguard against ambush marketing in their country. The first legal approach towards ambush marketing in the Republic of South Africa came under Section 15A of the Merchandise Marks Act. It provides legal protection against an abuse of a trademark on the basis of ‘designated event legislation’ which means this provision comes into action when an event has been designated as a ‘protected event’. The significant matter of this provision is that, during the protection period, a legitimate proprietor of a registered trademark can be prohibited from using its own trademark in relation to the event without explicit

³¹ New Zealand Major Events, “*Protection From Ambush Marketing*”, <http://www.majorvents.govt.nz/major-events-management-act-2007/protection-from-ambush-marketing> (accessed April 13, 2016)

³² Section 7 of the Major Events Management Act 2007

³³ Section 10 of the Major Events Management Act 2007

³⁴ Section 16 of the Major Events Management Act 2007

³⁵ Section 22 of the Major Events Management Act 2007

authorization of the event's organizer.³⁶ This provision therefore initiates the legal protection for ambush marketing by intrusion.

Another legal approach applicable for ambush marketing comes under Section 29 of the Consumer Protection Act of 2008. According to the statute, a commercial business shall not market any goods or services, with regard to the sponsoring of any event, in a misleading, fraudulent or deceptive manner. This provision is considered another legal measure applicable to ambush marketing by association in South Africa.

Legal Measures for Ambush Marketing in Thailand

Due to the growth of sponsorship investment in Thailand, activating ambush marketing strategies in commercial activities has increased over time among Thai entrepreneurs. There are some Thai legal grounds that make it possible to formulate a claim against ambush marketing, such as trademark infringement, civil passing off, and basic tort claims as well as consumer protection law.

(1) Trademark Infringement

To exploit an unauthorized association with an event in order to mislead the public into believing that they are an authorized sponsor or contributor associated with it, non-official sponsors may use the trademark of the event or trademarks which are confusingly similar to it. Therefore, a trademark infringement claim could be one of the main legal frameworks that could be invoked for combating ambushing activities in Thailand.³⁷ Unauthorized use of the registered trademark of an event by non-official sponsors is strictly prohibited by Section 44 of the Trademark Act of Thailand B.E. 2534. This Act gives an owner of a registered trademark the exclusive right to use such a registered mark for the goods for which it is registered, and excludes any person which uses a trademark that is similar or identical to the registered mark.³⁸

Although it demonstrates that a trademark infringement claim seems to be adequate to deal with some ambushing strategies where a mark which is similar or identical to the event's registered mark is utilized in relation to similar or identical goods and services, it has limited application to most creative ambush marketing activities since a protected event's trademark is not always used in well-planned ambushing activities. Moreover, the provision does not cover the situation where the event's trademark is not officially registered in Thailand. The provision seems to be

³⁶ Coenraad Visser, *"The Soccer World Cup 2010: Special Event and Ambush Marketing Protection in South Africa"*, 11 **Intellectual Property Law and Policy** 567, 568 (2010).

³⁷ Rungpry, *supra* note 1.

³⁸ ไชยศ เหมะรัชตะ, *ลักษณะของกฎหมายทรัพย์สินทางปัญญา* 328 (พิมพ์ครั้งที่ 9, 2555) (Chaiyos Hemarajata, **The Nature of Intellectual Property Law** 328 (9th ed. 2012)).

ineffective to guard against ambush marketing, especially for intrusive marketing in which the non-sponsors use their own trademark or brand name in the ambushing activity.

(2) Passing Off

A passing off claim could also be another legal framework for event organizers or official sponsors to handle ambush marketing issues, especially in the case that the event's trademark is not officially registered, or it is not registered in connection with relevant classification that grants an action ground for bringing a lawsuit under the Trademark Act of Thailand.³⁹ In order for the owner of an unregistered trademark to be afforded the legal protection for passing off under Section 46 paragraph 2 of the Trademark Act of Thailand, such an owner has to prove that the mark have actually been launched into the market prior to the unauthorized use of the infringer in order for the mark to gain its reputation among consumers.⁴⁰

Even though the provision gives protection to the unregistered trademark of the event and is likely to provide a broader scope of protection against ambush marketing, it is still problematic to apply this provision to ambush marketing in Thailand due to the fact that the short lifecycle of events may cause difficulties in establishing the actual use of an unregistered trademark in order to enjoy the passing off protection by virtue of this provision.

(3) The Law of Tort

In the case that non-sponsors use an event's properties, such as marks or emblems, and establish a commercial connection with the event without the consent of the owner of the event's properties, non-sponsors may be said to commit a wrongful act under this provision and may be bound to compensate for their fault. In using this provision as a legal ground for combating ambush marketers, the proprietor of an event's properties would have to prove that he or she has legal rights over these, and such unauthorized use of the event's property right is considered illegal and harmful to his or her legitimate rights.⁴¹ Furthermore, event organizers and their official sponsors could possibly also pursue a civil action against ambushers based on Section 421 of the Civil and Commercial Code in the case that ambushers have exercised their legitimate right by using their own trademark in their commercial activity with the intention to ambush and

³⁹ Earterasun & Gautier, *supra* note 2, at 4.

⁴⁰ เหมะรัชตะ (Hemarajata), *supra* note 38, at 341.

⁴¹ เพ็ง เพ็งนิตติ, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยละเมิด ความรับผิดชอบทางละเมิดของเจ้าหน้าที่ และกฎหมายอื่นที่เกี่ยวข้อง 10 (พิมพ์ครั้งที่ 6, 2552) (Peng Pengniti, **Description of the Civil Code of Thailand: The Act of Tort, The Tort Liability by Officer and Other Related Laws** 10 (6th ed. 2009)).

devalue the sponsorship relationship of the event organizers and official sponsors.

However, event organizers and their official sponsors may face difficulties in proving an unlawful act of the ambusher due to the fact that many ambushing strategies are not clearly outlawed in Thailand. Furthermore, even though a civil action against ambush marketing could possibly also be formulated under Section 421, it still leaves rooms for varying interpretations of the provision since this provision is not specifically designed to deal with ambush marketing nor well-developed in this area.

(4) The Consumer Protection Act

Organizers and official sponsors of an event may potentially refer to Section 22 of the Consumer Protection Act to oppose an ambush marketer in the event that its advertisement consists of an incorrect or deceptive statement which misleads the consumer into perceiving that the ambusher is an official sponsor of the event, as this provision prohibits marketers from advertising a statement that is unfair to public consumers, which includes deceptive statement and any other statements that creates misunderstanding in the substantial elements in regard to goods or services.⁴²

Despite inclusion of suitable concepts for the protection against ambush marketing such as the prohibition of deceptive advertising, this provision only prohibits the misleading advertisement which is concerned with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or services. It seems the provision cannot be applied to the misleading advertisement with regard to the sponsoring of an event.

Conclusion and Recommendations

The study implicitly indicates that the legal measures to combat ambush marketing in Thailand are far from adequate to protect the commercial relationship between an event organizer and its official sponsors from ambush marketing either by way of intrusion or association when compared to the legal measures found in other countries. Consequently, specific legislation for ambush marketing is needed. This would provide positive results for sponsorship investment in Thailand and increase the likelihood of Thailand qualifying as a host country for world major events which would result in deriving an infrastructure legacy, increasing tourism, enhancing its reputation, as well as other economic benefits of being a host country which can be felt for years after the events.

Business relationships between event organizers and official sponsors must be protected while achieving a balance among the rights of sponsors, property owners, and other affected parties. In doing this, the

⁴² สุขุม สุภนิษฐ์, คำอธิบายกฎหมายคุ้มครองผู้บริโภค 171 (พิมพ์ครั้งที่ 8, 2556) (Susom Supanit, **Description of Consumer Protection Law 171** (8th ed. 2013)).

author recommends that the following principles should be provided under the new ambush marketing legislation:

1. The clear-cut definition of ambush marketing should be provided.

2. Any events that need to be protected under the specific legislation have to be declared by the government authority as a protected event. In determining a major event, the government authority may take into account matters of fact such as the number of spectators, the number of participants, the required and involved level of professional management, the tourism opportunities for Thailand, global reputation of Thailand during the event, and the level of international media coverage. The event must be able to create valuable long-term and short-term economic, cultural and social advantages for Thailand.

3. The protection of the protected event should have time limitation.

4. Any unauthorized representations which are likely to imply to the public that there is a legitimate commercial connection between a protected event and its brand, its goods or services, or a person who supplies such goods or services, shall be prohibited during the protection period. However, such specific protection ought not to be applied to any single generic term as long as the usage of such a generic term is not able to establish a false recognition of an event's sponsorship.

5. A clean zone should be able to be established in and around the protected event's venues during a reasonable limited period of time.

6. Some exceptions for ongoing marketing activities to fairly balance commercial free speech rights and sponsorship relationship should be carefully and appropriately provided. For example, non-commercial speech and pre-existing advertising which has been done by an organization that continues to carry out its ordinary activities should be allowed as long as it does not create an implied association between the event and a non-sponsor or a false implication of sponsorship or confusion among the public.

PROBLEMS OF TAX INCENTIVE ON RESEARCH AND TECHNOLOGY DEVELOPMENT: COMPARISON WITH MALAYSIA AND SINGAPORE

Nattapol Techaprasertporn

Abstract

We cannot refuse that the growth of this current world is based on technology and innovation. Governments in many countries use different measures for stimulating Research and Development (R&D) activities among private entities. One of the most effective measures used is granting tax incentives. Since other countries are searching for the way to add value to its product and service by improving technology and innovation, Thailand cannot avoid going through the same path with those countries. In Thailand, there are some measures that have been enforced to promote R&D, such as the exemption of income equal to the amount spent for R&D activities under Royal Decree issued under the Revenue Code regarding reduction and exemption from revenue taxes (No. 297) B.E. 2539 (The Royal Decree No.297). Under this measure, companies can spend money on hiring a registered R&D service provider to conduct R&D on their behalf in order to qualify for the exemption. In practice, if a company or R&D Unit would like to become a R&D service provider, they have to file an application to Ministry of Finance (MOF) through the Revenue Department. If a company hires the approved R&D service provider, they will be entitled to the exemption, while those registered R&D service provider will only gain more business.

Since the R&D tax incentive program was implemented in Thailand in 1996, there are questions concerning proper implementation of this measure, and whether or not the Thai R&D tax incentive scheme really stimulates R&D investment in the country. Questions also arise whether the 200 per cent of tax allowance was enough to effectively encourage private sectors to invest in R&D. Even though Thailand has recently enacted the Royal Decree issued under the Revenue Code regarding reduction and exemption from revenue taxes (No. 598) B.E. 2559 (The Royal Decree No.598) for the expenditures paid on research and development of technology and innovation in February 2016, considerations must still be taken on the appropriateness of this Royal Decree towards the promotion of R&D, and whether such new tax scheme would encourage private entities to invest in R&D. It is also important to consider whether such investment would be sufficient to solve the current R&D issues in Thailand.

This thesis aims to expand on the understanding of Thailand's current R&D tax policy, compared to other countries, as well as providing recommendations on how to promote R&D activities or R&D investments in the private sector more effectively.

Keywords: Tax Incentive, R&D, Royal decree No.297, Royal Decree No.598

บทคัดย่อ

เราไม่สามารถปฏิเสธได้ว่าความก้าวหน้าของโลกในยุคปัจจุบันนั้นเกิดขึ้นบนพื้นฐานของเทคโนโลยีและนวัตกรรม รัฐบาลในหลายประเทศใช้มาตรการที่แตกต่างกันในการกระตุ้นการวิจัยและพัฒนา (R&D) ในภาคเอกชน หนึ่งในมาตรการที่มีประสิทธิภาพมากที่สุดคือการให้สิทธิประโยชน์ทางภาษี ในขณะที่ประเทศต่างๆ กำลังมองหาวิธีที่จะเพิ่มมูลค่าให้กับผลิตภัณฑ์และบริการของตนโดยการพัฒนาเทคโนโลยีและนวัตกรรม ประเทศไทยก็ยังไม่สามารถที่จะหลีกเลี่ยงไม่เดินไปในแนวทางนี้ได้เช่นกัน ในประเทศไทย รัฐบาลได้มีการออกมาตรการทางภาษีเพื่อส่งเสริมการวิจัยและพัฒนาเช่นการได้รับการยกเว้นภาษีเงินได้นิติบุคคลจากรายได้เท่ากับจำนวนเงินที่ใช้สำหรับกิจกรรมเพื่อการวิจัยและพัฒนาตามพระราชกฤษฎีกาออกตามความในประมวลรัษฎากรว่าด้วยการยกเว้นรัษฎากร (ฉบับที่ 297) พ.ศ. 2539 (พระราชกฤษฎีกา ฉบับที่ 297) ภายใต้อำนาจของพระราชกฤษฎีกาฉบับนี้ บริษัทสามารถนำค่าใช้จ่ายที่ได้จ่ายไปเป็นค่าจ้างให้แก่หน่วยงานที่ขึ้นทะเบียนเป็นผู้รับทำการวิจัยและพัฒนาแล้ว มาขอใช้สิทธิประโยชน์ทางภาษีได้ สำหรับหน่วยงานรัฐหรือเอกชนใดที่ต้องการที่จะเป็นผู้รับทำการวิจัยและพัฒนาเทคโนโลยีดังกล่าว ต้องยื่นคำขอต่อกรมสรรพากรเพื่อพิจารณาเสนอรัฐมนตรีว่าการกระทรวงการคลัง หากบริษัทผู้ว่าจ้างได้ว่าจ้างผู้รับทำการวิจัยและพัฒนาที่ได้รับการรับรองแล้วก็มีสิทธิที่จะได้รับการยกเว้นภาษีดังกล่าวได้ ในขณะที่ตัวแทนทางด้านผู้รับทำการวิจัยก็จะได้รับผลประโยชน์ทางธุรกิจมากขึ้นด้วย ตั้งแต่ประเทศไทยได้นำเอามาตรการทางภาษีเพื่อส่งเสริมการวิจัยและพัฒนาขึ้นมาใช้ในปี พ.ศ. 2539 ก็มีการตั้งคำถามเกี่ยวกับความเหมาะสมของการใช้มาตรการนี้ และยังไม่มีความแน่ชัดว่ามาตรการทางภาษีเพื่อส่งเสริมการวิจัยและพัฒนาดังกล่าวได้ช่วยกระตุ้นให้เกิดการลงทุนทำวิจัยและพัฒนาในประเทศไทยได้จริงหรือไม่ นอกจากนี้ยังมีคำถามเกี่ยวกับ มาตรการยกเว้นภาษี 200% นี้ ว่าเพียงพอที่จะช่วยสนับสนุนให้ภาคเอกชนมาลงทุนทำวิจัยและพัฒนา ได้มีประสิทธิภาพมากน้อยเพียงใด

แม้ว่า เมื่อไม่นานมานี้ ประเทศไทยได้มีการตราพระราชกฤษฎีกาออกตามความในประมวลรัษฎากรออกตามความในประมวลรัษฎากรว่าด้วยการยกเว้นรัษฎากร (ฉบับที่ 598) พ.ศ. 2559 (พระราชกฤษฎีกา ฉบับที่ 598) สำหรับค่าใช้จ่ายที่จ่ายในการวิจัยและพัฒนาเทคโนโลยีและนวัตกรรมในเดือนกุมภาพันธ์ ปี พ.ศ. 2559 เรายังคงต้องวิเคราะห์ต่อไปถึงความเหมาะสมของพระราชกฤษฎีกานี้ต่อการส่งเสริมการวิจัยและพัฒนา และมาตรการส่งเสริมการวิจัยและพัฒนาตามพระราชกฤษฎีกาฉบับใหม่นี้ จะมีผลต่อการดึงดูดจากเอกชนเพื่อมาลงทุนทำวิจัยและพัฒนาอีกน้อยเพียงใด และยังคงต้องพิจารณาอย่างให้ความสำคัญต่อไปว่าพระราชกฤษฎีกาฉบับนี้เพียงพอที่จะแก้ปัญหาการลงทุนทำวิจัยและพัฒนาในประเทศไทยในปัจจุบันได้หรือไม่

วิทยานิพนธ์ฉบับนี้ผู้จัดทำมีวัตถุประสงค์เพื่อขยายความเข้าใจในมาตรการทางภาษีเกี่ยวกับการวิจัยและพัฒนาของประเทศไทยในปัจจุบันเมื่อเทียบกับประเทศอื่นๆ นอกจากนี้ยังมีการให้คำแนะนำเกี่ยวกับวิธีการส่งเสริมกิจกรรมวิจัยและพัฒนาหรือการลงทุนวิจัยและพัฒนาในภาคเอกชนอย่างมีประสิทธิภาพ

คำสำคัญ: มาตรการทางภาษี, การวิจัยและพัฒนา, พระราชกฤษฎีกา ฉบับที่ 297, พระราชกฤษฎีกา ฉบับที่ 598

Introduction

Due to increasing intensity of domestic and international competition in global free trade, research and development of products and manufacturing processes are vital to the continued expansion of Thailand's

economy that may lead to the creation of long-term competitive advantage for the country. Since Thailand has been losing its competitive advantage in labor costs, which are now higher than neighboring countries, and most natural resources are limited, it is essential that the country will have to restructure its basic industrial structure from traditional use of labor to a more sophisticated utilization of research and development activities.¹

In terms of research and development expenditure, Thailand lags behind a number of middle-income countries and behind the now high-income countries. Comparing the investment on research and development in Thailand in 2014, it is found that investment in research and development (R&D) has been stable over the past decade. Thailand has spent very little on R&D, totaling only 0.39 percent of gross domestic product (GDP), which is lower than many countries in Asia such as South Korea, China, and Japan, whose R&D spending was around 4.15, 2.01 and 3.4 percent respectively. In comparison with Thailand's neighboring countries in ASEAN², Singapore and Malaysia invest 2.15% and 1.13% of its GDP on R&D.³ In terms of developers and researchers⁴, there are very few R&D personnel at only 9.3 out of 10,000 people comparing to other developed countries in Asia such as China at 19.3 out of 10,000 people, Malaysia at 42.1, Singapore 116.8 and South Korea at 128.1, which are over ten times more than Thailand.⁵ So, it is not surprising why Thailand has lost its ability to compete against other countries. Thus the urgent need for the state to promote more R&D activities and to encourage the private sector to overcome its weakness in knowledge-based infrastructure.

Backgrounds and Problems

Tax incentive is where the government uses tax to stimulate or to change people's behavior for a certain purpose. R&D stands for Research and Development. When a company invest in something, they expect something in return, such as the development or improvement of products. The problem companies often face for doing research is that the results are not guaranteed. Businesses spend millions of baht to improve existing systems, some may fails, while others may work. Yet the outcome may not be marketable due to the high cost of research. Thus, to obtain certain

¹ National Science and Technology Development Agency, R&D Project Approval for Income Tax exemption for expenses paid out as R&D expenditures;; See <http://www.nstda.or.th/rdc/index.php/aboutrdp>, September 9, 2015

² World Bank, "*World Development Indicators*", See: <http://data.worldbank.org/data-catalog/world-development-indicators>, accessed on May 16, 2016

³ Data for Thailand are for 2011, Data for the Republic of Korea and the People's Republic of China are for 2013; data for and Singapore and Malaysia are for 2012.

⁴ UNESCO Institute for Statistics, Data Centre, See: <http://www.uis.unesco.org/datacentre/pages/default.aspx>, accessed on May 16, 2016.

⁵ Data refer to full-time equivalent number of researchers from various fields. Data for Thailand are for 2011; for Republic of Korea, and for the People's Republic of China 2013; data for and Singapore and Malaysia are for 2012.

know-hows, many companies opt towards a shortcut by asking someone else to conduct the research on their part and paying them a royalty fee. The purchase of technology may allow a company to grow to a certain level, but the company may never learn to develop the technology by itself and may have to keep paying the royalty fee, which may be more and more expensive every day. So in many countries, tax measures are applied to stimulate R&D activities among private entities through the offering of tax benefits.

There are several methods to encourage more research and development, but the most interesting and effective mean for encouraging the private sector to invest in R&D is creating tax incentives towards research and development activities by offering additional tax deduction of the expenditure paid towards research and development activities. In order to promote and encourage the private sector to invest in research and development of technology in Thailand, the government issued the Royal Decree No. 297 (1996) to provide income tax exemption for the income of the company or partnership amount to 100% of the expenses paid out as an expenditure incurred on research and development activities. However, statistics show that the growth of Thailand R&D activities has been lower than it should be, with a small number of companies adopting this measure for the proposed benefits. Most of these companies are large companies with enough money to be set aside for such big investments. The Tax incentive in place since 1996 for companies with R&D projects are not very attracting and have had limited results so far. Having considered the current R&D definition as defined by The Notifications of MOF No.3, which is not clearly understandable and not applicable for Thailand's industrial or commercial activities, in addition to the content of the Royal Decree No.297 concerning a 200 per cent of tax allowance, the incentive is not enough to encourage private sectors to invest in R&D. It is also not suitable for uplifting Thailand's current R&D capabilities. This tax scheme does not offer enough benefits to encourage start-up companies, which have insufficient budget for operating its business, let alone conducting R&D activities. In the case of a loss-incurring situation, if the R&D expenditures are more than the net income received in the same year, the exempted amount of R&D expenses cannot be deducted to an amount exceeding the gross amount of income.

Although Thailand has already issued the Royal Decree under the Revenue Code regarding reduction and exemption from revenue taxes (No. 598) B.E. 2559 (The Royal Decree No.598) to increase the rights and privileges of companies or juristic partnerships in relation to expenses incurred in connection with research and development innovation in February 24, 2016, the new R&D tax scheme under The Royal Decree No.598 does not meet the private sector's demand concerning R&D activities, and thus, is insufficient to solve current R&D issues in Thailand.

The Definition of R&D

The most authoritative definition of Research and Development (R&D) comes from Organization for Economic Co-operation and Development (OECD) Frascati Manual. The Frascati Manual is not only a standard for R&D data collection in the OECD member countries, but a result of initiatives by the OECD, UNESCO, the European Union and various regional organizations.⁶ Today, the guidelines of the Frascati Manual have become de facto standard for both for collecting and analyzing R&D activities across the globe.

The latest definition of R&D proposed by the Frascati is as follow:

“Research and experimental development (R&D) comprise creative work undertaken on a systematic basis in order to increase the stock of knowledge, including knowledge of man, culture and society, and the use of this stock of knowledge to devise new applications”⁷

Definition of R&D in Thailand

Tax incentives are given to R&D activities under section 3 of Royal Decree No. 297. The Research and Development definition is stated as such in The Notifications of MOF No.3. There are two types of R&D identified in clause 4: Basic Industrial Research and Applied Research. After having considered the definition, Thailand has opted to apply the definition of R&D from the General Agreement on Tariffs and Trade Agreement on Subsidies and Countervailing Measure (GATT).⁸ Thus, the definition of R&D as stated is too general, lacks clarity and cannot be applicable for Thai industrial or commercial activities⁹. Since the Royal Decree No.598 was issued, the Notification of MOF on Income Tax No. 391 by virtue of Section 4 of the Decree under the Revenue Code Regarding the Tax Exemption No. 598 has amended the previous definition and provides an additional definition of “Innovation” to encourage private sectors to invest, and create new innovation in order to develop the capability of R&D in Thailand¹⁰.

⁶ OECD (2015), “*Frascati Manual 2015: Guidelines for Collecting and Reporting Data on Research and Experimental Development*”, **The Measurement of Scientific, Technological and Innovation Activities**, OECD Publishing, Paris, 4 (2015)

⁷ OECD (2002), “*Frascati Manual 2002: Proposed Standard Practice for Surveys on Research and Experimental Development*”, **the measurement of scientific and technological activities**, OECD Publications, 31, (6th edition,2002)

⁸ See “*Agreement on subsidies and countervailing Measure*”, part iv, article 8.2A in **GATT** (1994, p. 237).

⁹ Dr. Somkiat Tangkitvanich, Interview by Nattha Komolvadhin, Kid yok kum lung 2, the Thai, August 23, 2013.

¹⁰ The definition of R&D defined by The Notification of MOF No.391 are defined as follow:

a. **The Research and Development work** is creative by nature, and is conducted under systematic procedures with the goal of product development or development

Notification of MOF No. 391 provides a clearer and more comprehensive definition of R&D. The definition of ‘basic research’ remains almost the same as the existing definition (Notification of MOF No. 3). A new definition has been given to ‘applied research’, where the research is categorized into two types - applied research, and experimental development research. Furthermore, the previous condition stating that “R&D project cannot be modified or applied for industrial or commercial purposes” has been removed. However, there are still some issues that have not yet been resolved. Although the definition has become clearer and more understandable, it is broad and does not provide the details of what characteristics are to be included or excluded in R&D, and hence, lacking a clear guideline for applicants on what type of activities would qualify for the proposed R&D tax incentives

Methods of R&D Promotion

Incentives applied to stimulate R&D and innovation activities can generally be divided in two main methods: 1) delivered directly to business in the form of grants, subsidies, loans or contracts, and 2) delivered indirectly through tax incentives. Incentives are an important and effective tool to be used as an economic stimulus as they reduce certain costs of

of new production process; the Research and Development work involved is innovative and is different from that of other activities, involving the application of science and technology to solve various problems. The different types of Research and Development work are as follow:

- i. **Basic Research** – a theoretical study or research in a laboratory in search for new knowledge without the development of a product or service
- ii. **Applied Research** – a study in search of new knowledge with the purpose or goal of applying the results obtained from the research into practice or to seek new alternatives to obtain the desired goal
- iii. **Experimental Development Research** – a systematic study utilizing known knowledge and information to create new resources, tools, products, processes, systems, or services, or to develop and improve on existing processes; however, experimental development research does not include natural changes or changes that typically occur during the product life cycle, or the life cycle of concurring production process, service, or business procedure, even if such changes may result in development progress
- b. **Innovation** involves applying scientific knowledge and technology to create new, innovative product or process, which can be classified into various types of innovation as such:
 - i. **Product Innovation** – applying to good use new product and service, or product and service that has been highly improved; this type of innovation includes any clearly visible changes and improvements on physical and technical properties, on compositions, materials used, including software that are user-friendly, easily applicable to various usage.
 - ii. **Process Innovation** – involves clearly improved production process or distribution process, including technical changes, changes in equipment or software used.

R&D and innovation activities. An increasing number of OECD countries are also using tax incentives to spur R&D and innovation as they recognize the fact that these incentives are key to enhancing productivity and performance¹¹.

Types of R&D Tax Incentives

Each country adopts different kinds of tax incentives to encourage R&D activities of companies.¹² These include:

- i. Tax allowances, or enhanced allowances, or extra amounts over current business expenses: deducted from gross income to arrive at taxable income. The net benefit to be obtained from these allowances depends on the tax rate.
- ii. Tax credits or amounts deducted from tax liability: a lump sum deduction. Their net effect is independent of income level, and is equal for all taxpayers since a certain amount of money or a certain share of payment is deducted from tax payments for all taxpayers, irrespective of the marginal tax rate.
- iii. Tax Rate Reduction: taxing a class of taxpayers or activities at a lower rate (sometimes even at 0 % rate). In some systems, tax relief can be deducted from tax due, whereas in others, it can be deducted from the tax base or taxable income e.g. lower corporate tax rate for high-tech companies in China, or lower income tax rate for foreign researchers in Denmark.
- iv. Tax Exemption (Tax Holiday): particular income is exempted or excluded from the tax base e.g. tax exemptions for R&D centers in Poland.
- v. Tax Deferrals: a specific form of tax incentive, which are reliefs in the form of a delay in payment of a tax e.g. depreciation allowances.

The main type of tax incentives used by Thailand to promote R&D activities are in the form of enhanced R&D expenditure deduction from taxable income, similar to Malaysia, where enhanced tax deduction is selected in preference to tax credit. Nevertheless, even an advanced economy such as Singapore prefers enhanced deduction to tax credit.

R&D Tax Incentive in Singapore

For encouraging R&D activities in its country, Section 14D of Singapore Income Tax Act (SITA) provides that new product and process development costs must be amortized by allowing current deductions for R&D expenditures incurred by a taxpayer in the conduct of its trade or

¹¹ OECD, "Tax Incentive for research and Development Trend And Issues", Science Technology Industry, 2

¹² Tanja Tanayama, "*Overview of R&D Tax Incentives*", National Audit Office of Finland, 192

business. Company carrying on business may enjoy tax deduction, under this Section the deduction is available for expenses on R&D, irrespective of whether done in Singapore or abroad. The tax deduction under section 14D is equal to 100% of the amount of eligible R&D expenditure.

According to section 14DA of ITA, company that incur expenses in respect of R&D activities which are carried out in Singapore will be qualified for an additional deduction of 50% of qualifying expenditures. That mean the 150% tax deduction will be granted to R&D that has been carried out by company itself in Singapore or which has been outsourced to R&D organization in Singapore¹³.

In the year 2010, the government has introduced the Productivity and Innovation Credit (PIC)¹⁴ as a major enhancement to spur a broader range of innovative activities with generous tax benefits.¹⁵ With PIC scheme the Deduction for qualifying R&D will further enhanced to 400 percent on qualifying R&D expenditure according to Section 14DA(2) of SITA. This super deduction is granted on the first S\$400K of qualifying R&D expenditures incurred per year. Exceeding the cap will still enjoy 150% tax deduction if the R&D is done in Singapore. Any other R&D expenditure, done overseas, also still enjoy 100% base tax deduction.

R&D Tax Incentive in Malaysia

In Malaysia, Companies performing R&D to further its business are allowed to claim 200% deductions for (non-capital) expenditures incurred in qualifying R&D under Section 34A (1) of Malaysian Income Tax Act (MITA). However Approval of research project by the Minister of Finance is required before double deduction is allowed¹⁶.

In addition, this double deduction is also available for cash contributions or donations made to approved research institutes¹⁷ and

¹³ IRAS e-Tax Guide, "Research and Development Tax Measures (Fourth edition)", 28, See: https://www.iras.gov.sg/irashome/uploadedFiles/IRASHome/e-Tax_Guides/etaxguide_IIT_RnDTaxMeasures_2015-01-22.pdf, September 9, 2015

¹⁴ The Productivity and Innovation Credit (PIC) was introduced in Budget 2010. It provides enhanced deductions of 250 percent cap at S\$300,000 for investments under each of six activities of the innovation chain: automation equipment, training, acquisition and registration of IPRs, R&D and design. For Year of Assessments 2016 to 2018, the expenditure cap for each activity is S\$120,000.

¹⁵ Budget 2010 Key Budget Initiatives 1, "*Raising Productivity: Skills, Innovation And Economic Restructuring*", See: http://www.singaporebudget.gov.sg/budget_2010/speech_toc/download/FY2010_Key_Budget_Initiatives1.pdf , accessed on September 9, 2015

¹⁶ ACCA, "Tax incentives for Malaysia as a regional hub and for research and Development", SA Technical, 9 (2011), See: http://www.accaglobal.com/content/dam/acca/global/pdf/sa_nov2011_RandD3.pdf, accessed on September 9, 2015

¹⁷ An approved research institution includes the following: (a) all government research institutions, including institutions corporatized under Section 24 of the

payments for the use of the services of approved research companies¹⁸, contract R&D companies and R&D companies which are revenue in nature subject to Section 34B (1) of MITA.

To qualify for double tax deduction, the research expenditure must first obtain prior approval from the Minister of Finance. The subject of research does not need to be related to the business carried out by the business entity; however, it must be incurred in the basis period.

R&D Tax Incentive in Thailand

For Thailand, in order to promote and encourage the private sector to invest in research and technology development, the Revenue Department has launched two forms of tax incentives to promote R&D since 1996. The first form of incentive is a special initial depreciation on the date of acquisition of the machinery (including all related equipment) used in R&D projects at the rate of 40 percent of the total acquisition cost. The second feature is the tax allowance measure which is the main tax incentive in Thailand under the Revenue Code allowing companies and partnerships investing in R&D to deduct a higher amount of expenditures paid for R&D activities from their taxable income. Under the Royal Decree No. 297, the additional deduction is equal to 100% of eligible expenditures incurred on R&D activities, carried out in Thailand, paid out to an approved R&D service provider. However, in 2016, the Royal Decree No. 598 was issued, extending the 200% corporate tax deduction for R&D expenses under Royal Decree No. 297 to also include Innovation expenses paid out for hiring an authorized R&D organization to undertake Innovation activities for the entity. Thus, a new five-years 300% corporate tax incentives for R&D and innovation expenses was introduced.¹⁹ The main features of the incentive include²⁰: the exemption of corporate income tax for juristic partnership and companies for expenditures paid for research and

Companies Act 1965; (b) government funded universities which undertake research that conform to the definition of R&D as indicated above.

¹⁸ An “approved research company” means a company, other than a company licensed under Section 24 of the Companies Act 1965, approved by the Minister to mainly carry on research in an industry specified in the approval and to commercially exploit the benefit of such research thereof;

¹⁹ MGR Online, “Ministry of Science proceeds with 300% tax exemption aiming to increase investment in research”, **SME News**, March 25, 2016 (ผู้จัดการออนไลน์, “ก.วิทย์ฯ เดินหน้ามาตรการเว้นภาษี 300% เป้าเพิ่มสัดส่วนทุนวิจัย”, ข่าว SME, March 25, 2016); See: <http://www.manager.co.th/iBizChannel/ViewNews.aspx?NewsID=9590000031049> accessed on May 15, 2016

²⁰ EY Global Tax Alert, “Thailand Approves increased tax incentive for research and development expenses”, See: <http://www.ey.com/GL/en/Services/Tax/International-Tax/Alert--Thailand--approves-increased-tax-incentive-for-research-and-development-expenses>, September 9, 2015

development on technology and innovation to public or private organizations as published in the Government Gazette at three times the amount of the expenses paid out as R&D expenditures. However, this amount must not exceed the percentage of gross income in the calculation of net profit before deduction of any expenses in an annual accounting period. A triple deduction is also available, although capped at the following limits calculated based on gross revenue:

Amount of Gross Income	Capped Amount
For gross income not exceeding 50 million baht	60% of the gross income amount
For gross income not exceeding 50 million baht but not exceeding 200 million baht	9% of the gross income amount
For gross income exceeding 200 million baht	6% of the gross income amount

The incentive is effective for eligible R&D expenditures incurred from January 1, 2015 to December 31, 2019.

Tax Issues Found in the R&D Tax Incentive Scheme after the Royal Decree 598 has been enacted.

Considering the contents of Decree No. 598, it can be seen that the Decree has provided additional benefits to those who wish to invest in R&D, where previously investors would receive a tax exemption benefit of twice the amount of income tax; with the newly issued Decree, investors will now be eligible for a triple amount of tax exemption on expenses paid for R&D of technology and innovation. Although the proprietor of the R&D project may apply for tax exemption thrice the amount of the actual expenses paid for R&D of technology and innovation, the exemption amount shall not exceed the cap prescribed for tax exemption. The proprietors will be divided based on business size, which dictates the exemption rate as such: those who have income of not more than 50 Million Baht will be eligible for the tax exemption of the R&D expenses at the maximum rate of 60% of income; those earning a revenue of between 50-200 Million Baht will be eligible for an additional tax exemption of 9% on that portion of revenue, and those earning revenue of more than 200 Million Baht will be eligible for additional tax exemption of 6% for that portion of revenue.²¹ The government does not, in any case, grant a benefit of 300% tax exemption to all proprietors. In the case where the company has a low turnover but high costs for R&D, the company may be granted a benefit limited by the stipulated cap, or, in the case of a large proprietor with high turnover and high cost of R&D, the benefits derived from investing in R&D will also be restricted. Therefore, it can be summarized that the Decree No.

²¹ Section 5 of the Royal Decree No. 598

598 stipulates tax benefits for R&D based on the income level of the company. The purpose of this is to provide equal benefits to all size of businesses, ranging from large enterprise to small and medium enterprise or SME, thereby mitigating the income gap effect. This has been done with no considerations of the actual expenses invested by investors. The amount of benefit received may not be as much compared to the amount invested by the company if the expenses for R&D are disproportionate to the revenue generated by the proprietor.

Another issue that has not yet been resolved by the Decree No. 598 is where the proprietor faces a loss, or where the proprietor's expenses of R&D or innovation is higher than the net income of the same accounting year such expenses are incurred. The company will not be able to deduct the expenses eligible for additional tax deduction from the revenue of company if the total amount is more than the net income for that particular year. This is because the content of the Decree only provides benefits in the form of tax exemptions of the business' net income prior to expenses deduction. Therefore, in the case where the proprietor's income is insufficient to be eligible for the benefit, the proprietor will not be able to fully receive the benefit.

The last issue concerning the definition of R&D, the Notification of MOF on Income Tax (No. 391) by virtue of Section 4 of the Decree under the Revenue Code Regarding the Tax Exemption (No. 598) has provides an additional definition of "Innovation" to encourage private sectors to invest, and create new innovation in order to develop the capability of R&D in Thailand, uplifting the country's ability to compete with current market trends, which are mainly driven by technology and innovation. The Notification of MOF No. 391 provides a clearer and more comprehensive definition of R&D. The definition of 'basic research' remains almost the same as the existing definition (Notification of MOF No. 3). A new definition has been given to 'applied research', where the research is categorized into two types - applied research, and experimental development research. Furthermore, the previous condition stating that "R&D project cannot be modified or applied for industrial or commercial purposes" has been removed. Nonetheless, even though the definition has been improved in terms of clarity and comprehensibility, the definition is still too broad as it does not provide the details of what characteristics are included or excluded to be considered an eligible R&D activity, and hence, the applicants lack a clear guideline on what type of R&D activities would be eligible for the tax incentives.

Recommendation

To be conclusion, The system of R&D tax incentives is one important way of encouraging R&D from research, Although the R&D tax incentive in Thailand seem less effectiveness, this does not imply that the incentive is not desirable. The recommendation is not to abolish the policy

but to modify it and improve the existing measures in order to enhance effectiveness.

1. Definition

Although the definition under the Notification of MOF No. 391 has become clearer and more understandable, it is too generally and does not provide the details of what characteristics are to be included or excluded as R&D, and hence, lacking a clear guideline for applicants on what type of activities would qualify for the proposed R&D tax incentives.

Comparing to Singapore and Malaysia's definition of R&D, it is seen that the definition of R&D defined by these two countries are defined broadly, such as the case in Thailand. However, there has been a clear identification of R&D activities that does not fall under the scope of the general definition at the end of the decree. This allows the readers to be able to interpret the definition of R&D more specifically. Thus, it is suggested that specific details should be provided to define those R&D activities that does not qualify under the scope of the R&D definition provided at the end of Section 2 in the Notification of MOF no. 391

2. Increasing to 200% Exemption

After the Royal Decree No. 598 has been enacted in 2016, tax incentives have been increased for expenses incurred for research and development (R&D) on technology and innovation. Investors will now be eligible for the tax exemption at a triple amount of the expenses paid for R&D on technology and innovation. But this amount may not exceed the limit caps prescribed for tax exemptions. However, it can be seen that the government does not, in any case, grant a benefit of 300% tax exemption to all investors. In the case where the company has a low turnover but high costs for R&D, the company may be granted a benefit limited by the stipulated cap, or, in the case of a large company with high turnover and high cost of R&D, the benefits derived from investing in R&D will also be restricted. Therefore, it can be summarized that the Decree No. 598 stipulates tax benefits for R&D based on the income level of the company. This has been done without considering the actual expenses that the investors have invested. The amount of benefit received may not be as much as the amount invested by the company if the expenses for R&D are disproportionate to the revenue of the investor.

The author would, thus, like to suggest that the increasing rate of tax exemption should apply to all types of corporations, in particularly the SMEs. The policy should increase the deduction for R&D expenditure to 300%, subjected to a cap of 1-2 million baht in research expenditure per year. Therefore, Section 5 of the Royal Decree No. 598 should be amended to state that Income Tax shall be also exempted under Division 3, Chapter 3, Title 2 of the Revenue Code to any companies or partnerships, for the income of any companies or partnerships amounting to 100% of the expenses incurred in the R&D of technology and innovation from January

1, 2015 to December 31, 2019 for any expenses paid towards R&D on technology and innovation amounting to not more than 2 million baht per annum. This is in addition to the tax exemption on Income Tax as prescribed under Section 4 for any additional expenses subjected to ordinary tax exemption besides from the additional exemption on Income Tax on R&D expenses in the first portion not exceeding the stated ceiling limit. The policy should also include the option to convert R&D deductions into non-taxable cash grants to ease potential cash-flow problems faced by SMEs.

3. Loss-Making Situation

In the case of a loss-making situation, losses can be carried forward up to five accounting periods under the general provisions of the Revenue Code. As a result, loss-making firms will also enjoy the benefits. However, because of Thailand use an exemption of income method instead of using double deduction on expenses if the R&D expenditures are spent out more net incomes received in the same year. The exempted amount of R&D expenses cannot be deducted exceed the gross amount of incomes. It can be stated that where the investor faces a loss, or where the investor's expenses of R&D or innovation is higher than the net income of the same accounting year such expenses are incurred. The company is still unable to deduct such additional expenses from the revenue of the company more than the net income if the total amount is more than the net income for that particular year.

In order to encourage R&D activities among SMEs or Startups, which are large in number, and at the same time requires the most supportive efforts from the government, amending the tax incentive measure to consider the carrying forward of losses is necessary to encourage these two groups to invest in R&D. This is so that SMEs and Startups can feel that they will receive the full benefit of the tax incentives imposed. Thus, it is recommended that amendments be made to the Revenue Code on Tax Exemption to allow for tax deductions at an amount of more than the actual expenditure amount in place of the tax exemption measure, as is adopted by Singapore and Malaysia.

However, to amend the Revenue Code must obtain approval from the parliament. The process of obtaining approval may take a long time. Therefore, to accelerate and facilitate the process so that the law will be enacted in accordance with the current situation, the writer would like to suggest that the Revenue Code should be amended in section 3 of the Revenue Code to allow the Revenue Department, to issue a Notification giving a special deduction for expenses paid for R&D other than reduction of tax rate and tax exemption. The Royal Decree should be enacted to give a special deduction for expense paid for R&D. This would be beneficial for the purpose of enacting laws to deduct expenses incurred from other matters which may incur or increase in the future.

4. Establishment of National Research and Development Fund

To stimulate more R&D investment in the private sector and enhance its effectiveness. Thailand should establish the National Research and Development Centers may be in the form of Fund which was established by the Thai Government as an independent state agency. With it objective to establish a national R&D fund to promote and encourage R&D In Thailand and in the population and to support long-term sustainable investment for any private sector who are interested in R&D activities including to conduct studies and research, or encourage the conduct of the study and research, training or organization of meetings with regard to R&D promotion.

In establishing the aforementioned funds, the Thai Government must issue a Legislative Act to establish the National R&D Fund. Before the enactment of the legislative act, the Government is required to submit a draft to the legislative assembly, where the Government should consider drafting the proposal for the establishment of a National R&D Fund. Once the draft of this Legislative Act concerning the Establishment of the National R&D Fund has received approval from the senate, it shall be published in the Government Gazette and became effective.

5. Tax Incentive for Donor and Researcher

Thailand should provide special tax incentives for individuals or corporations to donate to R&D institutions already registered under the approval of government agencies such as The Thailand Research Fund, TDRI, NECTEC, etc. The donations or contributions could be in the form of money or in kind. Special tax incentives maybe given in form of tax allowance or double deduction (tax exemption). However, there should be a ceiling on the deduction or allowance a taxpayer can claim each year, such as the capped ceiling of 10% of taxable income

For any person or partnership engaged in the supply of R&D services are eligible for a tax exemption on 50% of the income earned from research activities. This aim is for trying to get more people to enter the fields of R&D and encouraging the existing researcher to undertake more research since there is a shortage of people to conduct this research in Thailand.

The tax incentive scheme aims to encourage investors or private entities to carry out more R&D activities in order to receive more tax benefits. However, the enactment of this policy may cause the government to lose a significant portion of income from taxes. However, with increasing R&D activities by the private sector will allow the government to indulge in increased tax revenue from other types of income taxes such as the VAT, corporate income tax, and individual income tax derived from the sales of value-added products and services, or from the increase in employment. Research shows that the increase in opportunities derived from increasing

R&D activities will allow the government to generate much more revenue than the revenue lost from excising the tax incentive schemes²².

The recommendations made on the tax incentive schemes to promote R&D activities on Technology and Innovation are only initial measures to stimulate and support those who are interested in investing on R&D activities. However, the implementation of such schemes to achieve an effective outcome must be derived from the collaboration of all involving parties in order to establish a sustainable development of technology for the country to become on par with other countries in the world's competitive landscape in the future.

²² MGR Online, *supra* note 18

PROVISIONAL PROTECTION MEASURES AGAINST COPYRIGHT INFRINGEMENT ON THE INTERNET*

*Naweena Watthanapradit***

Abstract

Prior to the enforcement of the Copyright Act (No.2) B.E. 2558 Thailand did not have the law related to provisional measures of protection for internet copyright piracy. In case the copyright piracy occurs, the Copyright Act B.E.2537 would be applied.

Understanding the social context, at present, has rapidly changed, technology has played much more crucial role in our daily life, especially the internet access. As a result, the copyright piracy through internet network has been increasing. Therefore, to have the enforcement of technology strategy to protect copyright work, Thai government has stipulated the Copyright Act B.E.2537 amended by Copyright Act (No.2) B.E.2558, coming into force on August 4, 2015. The act has applied the 'safe harbor' principles of the United States of America and Europe in drafting as the model, with the purposes of protecting the creators and the initiators of the new works that disseminated through the internet and also in accordance with the internet users' behaviors.

Section 32/3 has mentioned the setting up of liability limitation of Internet Service Provider(ISP) to protect the internet service providers from risk in being sued in case of copyright piracy. The copyright owners can ask the Court to order Internet Service Provider(ISP) to take down pirated files from their websites whereas the copyright owners has to show enough evidences to the Court. After, the Internet Service Provider(ISP) has followed the Court's order to take down the pirated file, the Internet Service Provider(ISP) do not have the liability of the pirated action.

In Section 32/3, it was found that the process in suppression of copyright piracy and the protection of copyright of the copyright owners has focused on court procedure which it takes time consume and also has impacts on suppression since technology changed all the time. This leads to overwhelming cases in Court of Justice. In addition, the internet copyright piracy deals with technology where it needs technology expertise and experts to more efficiently solve the problems and provide guidelines than the past.

From the observations mentioned earlier, in the researcher's point of view, it is noted that the Copyright Act (No.2) B.E.2558 is difficult to put into action and cannot solve the problems of intellectual property

* The article is summarized and rearranged from the thesis "PROVISIONAL PROTECTION MEASURES AGAINST COPYRIGHT INFRINGEMENT ON THE INTERNET" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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infringement and internet copyright piracy. As the result, Thailand will remain the country of Priority Watch List (PWL) according to the Special 301 Report of the United States Trade Representatives.

Keywords : Copyright Piracy , Internet, Internet Service Provider(ISP), Liability

บทคัดย่อ

ก่อนมีการบังคับใช้บทบัญญัติแห่ง พระราชบัญญัติลิขสิทธิ์(ฉบับที่ 2) พ.ศ. 2558 ประเทศไทยยังไม่มีกฎหมายที่เกี่ยวข้องกับเรื่องการละเมิดลิขสิทธิ์ทางอินเทอร์เน็ตโดยตรง แต่หากมีการแก้ไขเกี่ยวกับการละเมิดลิขสิทธิ์ดังกล่าว ก็จะนำเอากฎหมายลิขสิทธิ์ พ.ศ.2537 และ มาปรับใช้

ในปัจจุบันบริบททางสังคมได้มีการเปลี่ยนแปลงไปอย่างรวดเร็ว เทคโนโลยีได้เข้ามามีบทบาทในชีวิตประจำวันของคนมากขึ้น โดยเฉพาะอย่างยิ่งการเข้าถึงในเครือข่ายอินเทอร์เน็ต จึงทำให้เกิดมีการละเมิดลิขสิทธิ์บนเครือข่ายอินเทอร์เน็ตมากขึ้น ดังนั้นเพื่อให้มีมาตรการบังคับใช้กฎหมายทางเทคโนโลยีเพื่อคุ้มครองงานอันมีลิขสิทธิ์ รัฐจึงได้มีการตราพระราชบัญญัติลิขสิทธิ์ (ฉบับที่ 2) พ.ศ.2558 ขึ้น โดยมีผลบังคับใช้ตั้งแต่วันที่ 4 สิงหาคม 2558 เป็นต้นไป ซึ่งกฎหมายดังกล่าวรับเอาหลักการมาจากหลัก safe harbor ของประเทศสหรัฐอเมริกา และ ยุโรป มาเป็นแม่แบบในการร่างกฎหมาย พระราชบัญญัติลิขสิทธิ์ฉบับใหม่นี้ โดยมีเป้าหมายเพื่อคุ้มครองผู้สร้างสรรค์ผลงานทุกประเภทที่เผยแพร่ทางอินเทอร์เน็ต พร้อมทั้งยังสอดคล้อง กับพฤติกรรมผู้ใช้งานอินเทอร์เน็ตอีกด้วย

มาตรา 32/3 ซึ่งวางหลักเกี่ยวกับการกำหนดข้อจำกัดความรับผิดของผู้ให้บริการอินเทอร์เน็ต เพื่อให้ผู้ให้บริการอินเทอร์เน็ต ไม่ต้องเสี่ยงต่อการถูกฟ้องร้องละเมิดลิขสิทธิ์ โดยให้เจ้าของลิขสิทธิ์สามารถร้องขอให้ศาลสั่งให้ผู้ให้บริการอินเทอร์เน็ตนำไฟล์ละเมิดลิขสิทธิ์ออกจากเว็บไซต์ ซึ่งเจ้าของลิขสิทธิ์จะต้องแสดงหลักฐานต่างๆ ต่อศาลอย่างเพียงพอ และเมื่อศาลได้มีคำสั่งให้เอาไฟล์ละเมิดออกจากเว็บไซต์แล้ว และเจ้าของเว็บไซต์ดำเนินการตามคำสั่งศาล เจ้าของเว็บไซต์ไม่ต้องรับผิดเกี่ยวกับ การกระทำที่อ้างว่าเป็นการละเมิดลิขสิทธิ์ดังกล่าว

จากบทบัญญัติในมาตรา32/3 นั้น พบว่ากระบวนการในการปราบปรามการละเมิดลิขสิทธิ์และการคุ้มครองงานอันมีลิขสิทธิ์ของเจ้าของลิขสิทธิ์นั้น เป็นกระบวนการที่เน้นขั้นตอนทางศาลเป็นหลัก ซึ่งทำให้เกิดความล่าช้า ส่งผลกับการปราบปรามทางเทคโนโลยีซึ่งมีการปรับเปลี่ยนรูปแบบอยู่ตลอดเวลาและปัญหาที่ ตามมาอย่างหลีกเลี่ยงไม่ได้คือมีคดีขึ้นสู่ศาลเพิ่มมากขึ้น อีกทั้งในเรื่องการละเมิดลิขสิทธิ์ทางอินเทอร์เน็ตนั้นมีการกระทำความผิดเกี่ยวกับเทคโนโลยีซึ่งต้องอาศัยความรู้ความสามารถ ของผู้เชี่ยวชาญทางด้านเทคโนโลยี เข้ามาเกี่ยวข้องเพื่อให้เข้าถึงปัญหาและหาแนวทางแก้ไขได้อย่างมีประสิทธิภาพมากขึ้นกว่าในอดีต

ข้อสังเกตที่ได้กล่าวในข้างต้น อาจทำให้มีการตั้งข้อสังเกตได้ว่ากฎหมายฉบับนี้ยากต่อการบังคับใช้ และไม่สามารถนำมาใช้เพื่อแก้ไขปัญหาการละเมิดทรัพย์สินทางปัญญาได้ จนทำให้กฎหมาย ลิขสิทธิ์ฉบับนี้กลายเป็นกฎหมายที่ไม่ถูกนำมาใช้ในการแก้ปัญหาการละเมิดลิขสิทธิ์ทางอินเทอร์เน็ต และอาจส่งผลกระทบต่อเนื้อให้ประเทศไทยถูกจัด อันดับเป็นประเทศที่ต้องเฝ้าระวังเป็นพิเศษ PRIORITY WATCH LIST (PWL) ต่อเนื่องเป็นปีที่ 10 ได้

คำสำคัญ: การละเมิดลิขสิทธิ์ , อินเทอร์เน็ต, ผู้ให้บริการ, ความรับผิด

1. Introduction

The problem of copyright infringement in the computer system in Thailand has been more developed to response the customer's needs. It now becomes a crucial problems which the organizations, both public and private sectors, have to collaborate each other in order reduce the infringed action. In the past, the violation action conducted by copying CDs and MP3 but now it has been developed in the form of downloading the infringed file through internet system where it is difficult to control and suppress. Understanding that the copyright piracy dealing with technology lasted for a very short time. Accordingly, it leads to copyright owners' damages themselves and at the same time, it also results to the economy of the country.

2. Copyright Act B.E.2537 amended by Copyright Act B.E.2558 (NO.2)

Since technology rapidly changed. Many procedures have been used to protect and infringement

1. Contract Procedure

The copyright limited the right of user through form of contact

2. Technological Protection Measures (TPMs)¹

The technological measure is the method for the copyright owners to control the usage of their works. While the copyright owners use the technological measure to protect their works, there are many computer technology experts find the measure to avoid the technology measure (circumvention of technological measure) to access and gain the benefit from others' works.

The Copyright Act B.E.2537 is silent on the technological measure. Technological measure is stated in the drafted of new Copyright Act came from the agreement of free trade area between the United States and other countries, for example, the agreement between the United States and Singapore Free Trade Area (FTA) in Article 16.4.7(b)² "...effective technological measure means any technology, device, or component that, in the normal course of its operation, controls access to protected work, performance, phonogram, or other subject matter, or protects any copyright or any rights related to copyright" which enacted in Copyright Act B.E.2537 amended by Copyright Act B.E.2558, No.2,.

Section 3³ states that "Technological Measure is the technology that is designed to protect the copy, control the access to the copyright works effectively.

¹ Jakrit Kuanpoj and Nandana Indananda, **Right in Digital Era Technological Measure and the option for Thailand, Thammasat printing** : pp.63

² Electronic frontier foundation "Seven lessons from a comparison of the Technological Protection Measure Provisions" <https://www.eff.org/pages/seven-lessons-comparison-technological-protection-measure-provisions> (Accessed on July 21,2016)

³ Copyright Act B.E.2537 amended by Copyright Act B.E.2558

One of crucial observations found that the Copyright Act B.E.2537 amended by Copyright Act (No. 2) B.E. 2558 (A.D. 2015) is that it is difficult to enforce and cannot apply to solve the problem of copyright infringement.

2.1 The arising of Copyright Act B.E.2537 amended by Copyright Act B.E.2558 (No.2)⁴

Earlier, the copyright law of Thailand did not have the provision covered the aspect of internet copyright infringement where its action involved with a lot of people. Therefore, in August 2015, the enforcement of the law regarding the copyright piracy in that case has come into force, by adding the action of internet piracy as a guideline to enforce the copyright law pertaining to the liability of Internet Service Provider (ISP). As it was mentioned in Section 32/3 of the Copyright Act (No. 2) B.E. 2558 (A.D. 2015) that if legitimate evidence has been produced to prove an infringement of copyright in a computer system by a ISP, the copyright owner may file a petition with the Court for the ISP to be restrained from infringing such copyright.

2.2 Section 32/3 Copyright Act B.E.2537 amended by Copyright Act B.E.2558 (No.2)⁵

2.2.1 Service Provider

For the benefit of this section, “Service Provider⁶” means:

(1) A Service Provider to others in accessing the internet or enabling others to contact one another by other means through a computer system whether the Service Provider does so under his name, or those of others or in the interests of others.

(2) Service Provider for computer information storage for the Interest of others.

In Thailand, the law did not force the copyright owner to go to the court. The copyright owner can contact Internet Service Provider(ISP) directly or the copyright owner can go to the court asking for the petition to forced the Internet Service Provider(ISP) to take down the piracy contents.

2.2.2 The Petition

⁴ The Department of Intellectual Property, Ministry of Commerce (Thailand) “Copyright Law to compel Digital Economy” Protection of the creator in the internet Penalties 10,000-400,000 or in prison or both”. https://www.ipthailand.go.th/index.php?Option=com_content&view=article&id=1618:digital-economy-10-000-400,000&catid=8:news&Itemid=332 (Accessed on July 20,2016)

⁵ Copyright Act B.E.2537 amended by Copyright Act B.E.2558 (No.2) <https://ictlawcenter.etda.or.th/files/law/file/52/9b3da7a8a28d49b9d78fd88171695e8b.pdf> (Accessed on July 20,2016)

⁶ Copyright Act B.E.2537 amended by Copyright Act B.E.2558 (No.2) Section 32/3 paragraph2

The petition to be submitted to the Court must contain specifying the following details⁷:

1. Name and address of the Service Provider.
2. Details of the copyright work which is infringed.
3. Details of the copyright work which has been made by the Infringer.
4. Evidence showing how the infringement of the copyright. Material has been found on the Service Provider's Computer system i.e. date, time and details of the investigation.
5. Details of the damages that is likely to occur as a result of the above mentioned infringement of the copyrighted work.
6. Execution request for the Service Provider to remove the infringed work from the Service Provider's computer system or such other action whereby they shall refrain from infringing the copyrighted work by other means.

2.2.3 Court

When the Court receives the petition⁸, the Court shall conduct inquiries. If the Court finds the petition contains appropriate details and has necessary causes for it to consider issuing the petition, then it shall order the Service Provider to refrain from infringing the copyright or to remove the infringed work from the computer system of the Service Provider within a specified period of time as specified in the court order. The order of the Court is immediately executable and can be notified to the Service

Provider without delay. The owner of the copyright material can take the Court order and serve it on the Service Provider who must comply with such order within the timeframe specified in the Court order.

2.2.4 Liability of the Internet Service Provider⁹

In case the Service Provider is not the one who control, initiate or command the infringement of the copyrighted material in their computer system and such Service Provider complies with the Court order, they will not be liable for those acts relating to the infringement of copyright that occurred prior to the Court order and after the court order is no longer effective. The Service Provider shall not be liable for any damages that arise due to its compliance with the Court's order. The said Section 32/3 has mentioned the specifying of liability limitation of Internet Service Provider(ISP) to protect them from risk in being sued in case of copyright infringement. The copyright owners can ask the Court to order Internet Service Provider(ISP) to take down infringed files from their websites whereas the copyright owners have to present enough evidences to the Court. After, the ISP has followed the Court's order to take down the infringed file, the ISP do not have the liability of the infringed action.

The majority of copyright laws pertaining to infringed action through internet and liability of Internet Service Provider(ISP) derived from

⁷ *Id*, paragraph 3

⁸ *Id*, paragraph 4

⁹ *Id*, paragraph 5,6

Digital Millennium Copyright Act (DMCA) of the United States, but there have been changes in some details to be suitable for the problematic conditions of each country.

3. Digital Millennium Copyright Act (DMCA) of the United States

3.1 Internet Service Provider (ISP)

The United States Internet Service Providers can be divided into 3 categories as in 17 U.S.C., Section 512 (2006)¹⁰

“the service provider offering the transmission, routing or providing the connections for the digital online communication between or among points specified by a user, material or the user’s choosing without modification to the contents of the material as sent or received or a provider of online service or network access or the operator of facilities therefore.”

There are three terms for Service Provider:

1. Internet Service Provider (ISP): a business or organization that offers a user access to the Internet and related services which allow a subscriber to communicate with others and access information on the internet.

2. Online Service Provider (OSP), including ISP, and IAP: provides Internet access to the subscriber.

3. Internet Access Provider (IAP)

3.2 Safe-Harbor

3.1.1 Notice and Take Down¹¹

The Digital Millennium Copyright Act (DMCA) contains safe-harbor provisions for online service providers from copyright infringement claims made by their customers or users. To take advantage of this provision, the Internet Service Provider needs to receive notice and take down procedures by removing infringed contents. The copyright does not have to be registered with the United States Copyright Office to take advantage of this DMCA provision.

Internet Service Provider in each country will provide services in various categories such as the United States of America which is in the common law system¹², They crucially pays attention to knowledge and benefit of Internet Service Provider (ISP). In case they find the circumstance of the infringed action through internet, copyright owner can inform ISP to take down or limit access¹³ the users to the infringed content.

¹⁰ Section 512 limits online Service Provider liability for direct liability and indirect liability (contributory and vicarious liability)

¹¹ Notice, Takedown, and the good faith standard: How to protect internet user from bad-faith removal of web content <http://heinonline.org/HOL/LandingPage?handle=hein.journals/stlpl29&div=26&id=&page=> (Accessed on July 20,2016)

¹² Common Law Office of America <http://www.usacommonlaw.com/legal.html> (Accessed on July 18, 2016)

¹³ DMCA Protect your content <http://www.dmca.com/FAQ/Creating-a-Takedown-case-using-DMCAcom> (Accessed on 18 July,2016)

The ISP is immunity from the damages¹⁴ if removes or block access to the infringing materials in notification.

3.1.2 Counter Notification

To protect erroneous action, the law or DMCA law allow the subscriber to send counter notification¹⁵ to show that the material was removed or disabled through a mistake or misidentification and that subscriber has the right to ask their materials to be put back. The DMCA provides safe harbor for the ISP for the exemption from liability¹⁶ of transitory network community, system caching, online storage, or linking of infringing materials if ISP removes infringed content immediately.

4. Finding

Although the Copyright law of Thailand has not set up the promulgation for the right owners who are infringed through internet to use the rights court, but from the study of laws of the countries using taking down and notification measures, found that taking down measure may impact on the personal right in freedom of expression where some countries realized as a fundamental rights.

The promulgation in Section 32/3, although a supplementary law, the study found that the process of suppression the copyright infringement and the protection of copyright work of the right owner is focused on juridical procedure and it takes time consume and has impacts on suppression. That provision leads to overwhelming cases in Court. In addition, the internet copyright piracy deals with technology where it needs technology expertise and experts to more efficiently solve the problems and provide guidelines than the past.

5. Conclusion and Recommendations

The adding of Court provision in punishing Internet Service Provider (ISP) has been recommended by the researcher. For example, in case the copyright owner has informed ISP pertaining to the copyright infringement but ISP did not have any action to the infringed content. Or there has been ISP's duty transform in some countries to monitor and inspect the infringed action in their computer system. This is to alleviate the damages of the copyright owners promptly. Therefore, it is not necessary to bring the case to the Court.

The grant of authority to the ISP to inspect the copyright infringement within their internet system should be mentioned as an effective option. There should also be a focal point organization to control

¹⁴ Martin Charles Golumbic **"Fighting Terror Online :The Convergence of Security, Technology, and the law"**, 2008 pp.54

¹⁵ The Digital Millennium Copyright Act (DMCA) Section 512(g)(1)

¹⁶ Legal Protection of the Digital Information, Congress Codifies the Decisions <http://digital-law-online.info/lpdi1.0/treatise33.html> (Accessed on July 20,2016)

and inspect ISPs since they receive benefits from providing space for the users.

Apart from that, there should be a provision to protect repeat infringement for ISP to delete the users' accounts in case they repeat sharing the copyrighted work of the others. This is to avoid duplicate prosecution that leads to the increasing numbers of the cases in the Court.

PROBLEM ON APPLICATION OF “BUSINESS INTERFERENCE” UNDER TRADE COMPETITION ACT 1999*

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Abstract

Competition laws across the world have the same mission – to promote free and fair competition in economic environments and control anti-competitive practices. Business interference is one of many conducts prohibited by Torts Law and Competition Law. Under Thai Competition Law, unreasonable or improper interference by dominance position is prohibited by the Trade Competition Act 1999 Section 25 (4). However, confusion on application of business interference under the Trade Competition Act is a huge problem and caused by the law not being as efficient as it should be. This article aims to study the application of business interference conduct under the Competition Law and its historical development, and related theories of provisions of treaties, laws, and regulations of the United State Antitrust Law, the European Union Competition Law, and Thailand Competition Law to propose appropriate measures to achieve legislations intent on business interference provision under the Trade Competition Act 1999.

This article focuses mainly on the study of the measures and existing legislations in the United States and the European Union regarding control and protection of market efficiency from business interference. These will then be compared to find appropriate solutions for the improvement of Section 25(4) of the Trade Competition Act 1999 of Thailand.

The current legal provisions of the United States and the European Union on application of business interference under the Competition Law illustrate confusion in the application of business interference under the Trade Competition Act 1999, deeming it inefficient. This can be solved by amending the law by empowering and giving responsibility to the Trade Competition Commission in order to announce a guideline for Section 25, which consists of elements to allege business interference.

Keywords: Competition Law, Antitrust Law, Business interference, Intervention in business relation

* This article is summarized and rearranged from the thesis “Problem on Application of Business interference under Trade Competition Act 1999”, the Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University.

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บทคัดย่อ

กฎหมายแข่งขันทางการค้าทั่วโลกล้วนมีวัตถุประสงค์เดียวกันได้แก่การสนับสนุนการค้าที่เสรีและเป็นธรรม ตลอดจนความพยายามในการควบคุมพฤติกรรมที่ไม่พึงประสงค์ต่างๆอันมีผลเป็นการกีดกันทางการค้าและขัดขวางวัตถุประสงค์ของกฎหมาย การแทรกแซงทางธุรกิจเป็นหนึ่งในพฤติกรรม ที่กฎหมายไม่อนุญาตให้กระทำ ทั้งภายใต้กฎหมายละเมิดและกฎหมายแข่งขันทางการค้า ภายใต้กฎหมายแข่งขันทางการค้าของประเทศไทย การแทรกแซงการประกอบธุรกิจของผู้อื่น โดยผู้ประกอบธุรกิจซึ่งมีอำนาจเหนือตลาดโดยไม่มีเหตุผลอันสมเป็นพฤติกรรมต้องห้ามภายใต้มาตรา 25(4) แห่งพระราชบัญญัติแข่งขันทางการค้า พ.ศ.2542 อย่างไรก็ตามความสับสนและความไม่เข้าใจในคัวบทกฎหมายเกี่ยวกับการแทรกแซงทางธุรกิจภายใต้กฎหมายแข่งขันทางการค้านี้ได้กลายเป็นปัญหาหลักที่ทำให้การบังคับใช้มาตรานี้ไม่สอดคล้องกับวัตถุประสงค์ของกฎหมาย ดังนั้นบทความเรื่องนี้จะจึงได้มีวัตถุประสงค์เพื่อศึกษาถึงองค์ประกอบและการบังคับใช้บทบัญญัติเกี่ยวกับการแทรกแซงทางธุรกิจภายใต้กฎหมายแข่งขันทางการค้า โดยศึกษาประวัติความเป็นมา การพัฒนาของกฎหมายของประเทศสหรัฐอเมริกาและกลุ่มประเทศยุโรป เพื่อนำมาเปรียบเทียบกับกฎหมายแข่งขันทางการค้าของประเทศไทยและหาแนวทางที่เหมาะสมเพื่อให้การบังคับใช้กฎหมายดังกล่าวบรรลุวัตถุประสงค์อย่างที่เราจะเป็น

บทความเรื่องนี้มุ่งเน้นศึกษาถึงมาตรการและกฎหมายที่เกี่ยวข้องกับการควบคุมและป้องกันประสิทธิภาพของตลาดจากการแทรกแซงทางธุรกิจที่มีอยู่ปัจจุบันของประเทศสหรัฐอเมริกา กลุ่มประเทศยุโรป โดยใช้เปรียบเทียบเพื่อหาแนวทางที่เหมาะสมในการแก้ปัญหาและพัฒนาการบังคับใช้มาตรา 25(4) ของพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542

จากการศึกษากฎหมายแข่งขันทางการค้าปัจจุบันของประเทศสหรัฐอเมริกาและกลุ่มประเทศยุโรปได้สะท้อนให้เห็นถึงปัญหาความสับสนและความไม่เข้าใจในบทบัญญัติเรื่องการแทรกแซงทางธุรกิจโดยผู้ประกอบธุรกิจซึ่งมีอำนาจเหนือตลาดภายใต้มาตรา 25(4) นั้นมาจากความไม่ชัดเจนของบทบัญญัติซึ่งส่งผลให้การใช้กฎหมายไม่มีประสิทธิภาพ ดังนั้นการแก้ไขบทบัญญัติในมาตรานี้โดยการมอบอำนาจและหน้าที่ให้แก่คณะกรรมการการแข่งขันทางการค้าเพื่อออกประกาศกำหนดแนวทางการพิจารณาการกระทำที่เป็นความผิดตามมาตรา 25 จะเป็นแนวทางในการแก้ไขปัญหาดังกล่าวได้

คำสำคัญ: กฎหมายการแข่งขันทางการค้า, การแทรกแซงการประกอบธุรกิจ

Competition laws across the world have the same mission – to promote free and fair competition in economic environment and control anti-competitive practices. Promotion and seeking to maintain market competition is a tool to stimulate economic growth, believing that competitive markets are the best way to generate economic efficiency and thus maximize total social welfare. Ultimately, benefits will lie on consumers through fair and reasonable prices and increasing choice and offers. The law protects the competitive market by prohibit any conduct that harm the competition environment for example tying, predatory pricing, cartel etc. Business interference is one of many conducts that restraint trade that can occur in both vertical and horizontal competition. If it occurs between vertical competitors, it will reduce the bargaining power of the interfered competitor, unlike among horizontal competitors, which could eliminate one out of the market. Therefore, interference in business relations by horizontal competitors will affect the market as a whole.

Under Thai Competition Law, the Trade Competition Act 1999 Section 25 states conduct considered as the abuse of dominant position to serve market efficiency protection under Competition Law. Business interference provision relies on Section 25(4), which protects competition and market efficiency from unreasonable interference by dominant positions. The obscure provision has become a problem, causing confusion in interpretation and may lead to case dismissal. This article focuses mainly on the study of the measures and existing legislations in the United States and the European Union regarding control and protection of market efficiency from business interference. These will then be compared to find appropriate solutions for the improvement of Section 25(4) of the Trade Competition Act 1999 of Thailand.

I. Introduction to Competition Law

Competition Law is very complicated. It is not about fairness or morality, unlike in other laws, like murder in Criminal Law or liability to deliver on commitments, but reflects economics. Thus, the welfare effects of Competition Law are generally considered from a microeconomic standpoint. There is probably no concept in all of economics that is at once more fundamental and pervasive, yet less satisfactorily developed than the concept of competition.¹ Some countries called Competition Law an economic constitution² with a very close relation to mainstream economics. Neoclassical economic theory has been used to explain the modern market economic based on consumer welfare in a perfectly competitive market.³ Perfect competition or perfect market and price are market mechanism reflected from demand and supply. Demand shows the quantity of a good that consumers will buy at a certain price within a specific time period, and supply shows the quantity of goods and services which will be offered for sale at a certain price within a specific period, which means that price matters. Without exception, in the non-price influence clause, such as veblen goods⁴ or others factors⁵, a high price could reduce the quantity of demand while encouraging firms to produce more, while low price will increase the quantity of demand while discouraging production. It could

¹ Daniel J. Gifford and Leo J. Raskind, **American casebook series: Federal Antitrust Law cases and materials**, 8 (1983).

² Sakda Thanitcul, Explication and case study of Trade Competition Act 1999, 37 (2nd ed. 2010). (ศักดิ์ ธนิตกุล, คำอธิบายและกรณีศึกษาพระราชบัญญัติการแข่งขันทางการค้า พ.ศ.2542, 37, พิมพ์ครั้งที่ 2 (2553)).

³ Barry J Rodger and Angus MacCulloch, **Competition Law and Policy in the EC and UK**, 11 (4th ed. 2009).

⁴ for example; luxury goods, high-end brand name that changing of price will not effect to demand or supply of the goods.

⁵ for example; consumer income, substitute or complements price change which affect to consumer decision.

therefore be said that market efficiency is reflected from an efficient market mechanism.

Competition Law has a long history and has developed through centuries. The doctrine of restraint of trade in early common law became the precursor to modern competition law, which developed in the Middle Ages as the United States Antitrust statutes and the European Community Competition Laws were developed after World War II.

the most developed notions of Competition Law – the Harvard School approach and the Chicago School approach – under the Antitrust Law of the United States, which try to balance an enforcement of the Competition Law in the market system through centuries; these were also used to develop the European Community Competition Laws. While there are other approaches to antitrust, these two are employed due to their widespread use. The “per se rule” and “rule of reason”, invented by the US Supreme Court to aid the interpretation of the antitrust law in the United States, will also be explicated.

The Harvard School or Pluralist School had been present since the 1930s. It places great emphasis on the market structure paradigm known as S-C-P (the Structure-Conduct-Performance Paradigm): structure, concerned with the number of competitors in the relevant market; conduct, concerned with the behavior or decisions of competitors related to pricing and objective matters; and performance, concerned with the welfare effects from structure and conduct of competitors in terms of efficiency distribution and others, such as impact on price and consumer choices.⁶ The S-C-P paradigm believes that market structures will prescribe the conducts of business operators and the conduct will refer to market performance. Therefore, it focuses on market structures as key, for example, disallowing mergers or any behavior that forces others competitors out of the market.

The Chicago School approach appeared in the 1970s, resulting from several studies by Robert Bork, William Posner and George Stigler. This approach believes is that some business or activities may promote competition and could correct against any competitive imbalances. The Chicago School considers market imperfections overstated, as it sees the potential of welfare-enhancing efficiency resulting from a high concentration, which is against the approach of the Harvard School. Therefore, this approach does not support and enforce intervention in the competitive process. It usually considers competition problems by using the price theory to observe in the real market, which differs from the Harvard School, which examines competition problems on the basis of empirical research. As the Chicago School approaches weight on the rule of reason, therefore, defendants could win owing to plaintiffs being unable to prove the economic effects of particular types of conduct, which are mostly difficult and complicated.

⁶ Raj Kumar, “*Structure – Conduct – Performance Paradigm.*” **Industrial Economic, Delhi University.**

The “per se rule” and “rule of reason” were introduced by the US Supreme Court to aid interpretation in the Sherman Act, which is a very broad spectrum.⁷ The application of both these tests requires the court to undergo an extensive factual analysis of the claim⁸ – that if such a challenged activity does not fall within the category required in the per se rule, then the rule of reason shall be applied.

II. Business interference under Law of Torts and Competition Law

Business interference occurs when person(s) intentionally interfere with another contractual in a written or verbal or business relationship, which is expected to occur with the third person and cause damages. It can be found in both the Law of Torts and Competition Law; however, a significant difference in both laws is an objective of protection from different perspectives.

Under the Law of Torts, plaintiff is required to prove damages occurred to themselves, or economic losses, for example, lost profits, cost of plaintiff’s direct expenses, damages for partially completed project, etc. The law focuses on the effect of the challenged behavior on the plaintiff or private damage action.

On the other hand, Competition Law focuses on the market, market power, and the effects of the challenged behavior on competition or public enforcement. Therefore, plaintiff needs to show that damages due to the interference of the defendant impacted competition in the market or the market as a whole, and not only the competitors or players.

Therefore, claiming business interference under the Law of Torts needs to prove only damages to the plaintiff or competitor, while claiming under Competition Law needs to prove the impact on competition or the market as a whole.

III. Business Interference in the US, EU, and Thailand Competition Laws

1. Business interference in the United States Law

Competition Law in the United States, known as the Antitrust Law, reflects a national commitment to the principal source of economic growth, the use of free markets, allocating resources efficiently, and spurring innovation. The main statutes in the federal law are the Sherman Act 1890, which restricts restraint of trade, creation of a monopoly, and abuse of monopoly power; the Clayton Act 1914, which restricts mergers and acquisitions; and the Federal Trade Commission Act 1914, which prohibits unfair competition conducts. Most states’ Antitrust Laws follow the

⁷ Per se rule was created in 1897 in Trans Missouri case, and rule of reason has been added in Standard Oil case after that in 1911.

⁸ Richard C. Stanley and Noel J. Darce, “*Antitrust Law*,” **Loyola Law Review**, 703 (1989). available from HeinOnline, <http://heinonline.org> (accessed October 29, 2015).

Sherman Act, with only a few issues differing with states.⁹ However, due to federal law supremacy, those states' Antitrust Laws will not come to conflict according to the provision in Article 6 of the US constitution. The main goal was to protect market efficiency and not consumers, because the law sees that the consumers will eventually benefit from an efficient market. Therefore, American Antitrust Laws prohibit the use of power to control the marketplace, resulting in the structure control system in the United States Antitrust Law.

1.1 Business interference under Torts Law

The tortious interference protects practically all contracts, except those under conditions provided by laws: void by law, contracts terminable at will, or unenforceable by operation of law.¹⁰ The four basic elements that a plaintiff needs to establish in order to fulfill the cause of action of tortious interference,¹¹ although announced differently by states, but are similar.

First, a plaintiff need to show an existence of a valid contractual relationship or business expectancy. There are three categories of tortious interference that courts have recognized: tortious interference with contracts, business relationships, and prospective economic opportunities.¹² In case of a claim on interference in business relations which rely on an existing contract, plaintiff must generally allege the existence of a specific contractual relationship that he has with the third person. The plaintiff is also required to show the actual harm or damage resulting from such interference. In case of tortious interference with business relations, plaintiffs bear to show that such business relationships will probably occur if not interfered by the defendant. In case that there is a valid business expectancy which has a reasonable likelihood or probability to come to fruition. In case there is a valid business expectancy which has a reasonable likelihood or probability to come to fruition. In order to prove the existence of a valid business expectancy.

⁹ Barry E. Hawk and Laraine L. Laudati, "Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison," **Fordham International Law Journal**. Vol. 20, Issue 1, Article 2: 25 (1996).

¹⁰ Jesse Max Creed, "Integrating Preliminary Agreements into the Interference Torts," **Columbia Law review**, Vol. 110:1253: 1258 (2010), available from HeinOnline, <http://heinonline.org> (accessed October 5, 2015).

¹¹ David N. Anthony, "Tortious Interference with Contract or Business Expectancy: An Overview of Virginia Law," **The Virginia Bar Association News Journal**,⁹ (October-November 2006).

¹² Zachary G. Newman and Anthony P. Ellis, "Navigating the Nuances of Tortious Interference Claims," **Business Torts Journal American Bar Association Section of Litigation**, Vol. 18, 20 (November 4 summer 2011).

Second, the plaintiff is required to allege actual knowledge of defendant. Implied knowledge or constructive knowledge in general are insufficient.¹³ Otherwise, the court will dismiss the claim.

Third, is the essential element, in that the defendant should have an intention to interfere with the plaintiff's contractual relations. In order to impose liability under the provision of tortious interference, the plaintiff must prove defendant action with knowing that the act done under this improper purpose will interfere with the plaintiff's contractual relation with the third person and harm the plaintiff.

There are some cases that Courts recognize its validity of the cause of actions for example, a contract terminable at will, a contract itself violating the rule of law, an unenforceable covenant not to compete, a lawfully terminated lease, a contract to which the defendant himself is a party, a non-binding letter of intent to negotiate in good faith.

1.2 Business interference under Antitrust Law

Business interference that could be considered as violating the Antitrust Law shall be considered as anticompetitive conduct under Section 2 of the Sherman Act, when such conduct has monopolized or attempted to monopolize. This section establishes three offenses: monopolization, attempt to monopolize, and conspiracy to monopolize, which will be considered under the scope of relevant markets, and can be defined to two dimensions: a relevant product market and a relevant geographic market. A rival or competitor in a specific market that can control prices and exclude competitors will be deemed by law to possess monopoly power under Section 2.

In order to claim for business interference under Section 2 of the Sherman Act, three fundamental elements must be present. First, the defendant must have engaged in predatory or exclusionary conduct which means application of Tort standards of wrongfulness will not be sufficient to discover whether improper conduct should be considered exclusionary under the Sherman Act. Conduct, lawful and unlawful, may force another competitor out of a market. However, not every lawful and unlawful act will be considered to fall under the provisions; only conduct that is anticompetitive will be considered improperly exclusionary, and thus, violating Antitrust Laws.¹⁴ The second requirement is the claimed conduct must be undertaken by a defendant who has monopoly power or has the potential to achieve monopoly power under the relevant market. Third, it has to be proved that such conduct harms competition in the relevant market. These elements make a tortious interference claim rise to anti-

¹³ *Id.*

¹⁴ Kevin McCann and Alyse L Katz, "When Business Torts Give Rise to Antitrust Liability," (October 17, 2011).

competition claim by proving that they pose harmful effects to the market as a whole, and not only individual competitors, as required by Tort Law.¹⁵

Sometimes, the same conduct could turn out another way, for example, an exclusive agreement, an aggressive competition, etc. Therefore, the Court will usually will consider based on the facts and on a case-by-case basis.

2. Business interference in EU Competition Law

The very first Community competition control was the Treaty of Paris in 1951, which established the European Coal and Steel Community after World War II. Around six years after that, in 1957, the European Community was formed by an international agreement, which established the European Economic Community (TEC), known as the Treaty of Rome. This foundation further established the European Economic Community (EEC), which later developed to the European Community (EC). In 1992, the Treaty of European Union (TEU), known as the Maastricht Treaty – an amendment of the Treaty of Rome – created a European Union and the single European currency. Again, the treaties of Amsterdam, which devolved certain powers from the national government to the European Parliament, were amended, along with the Nice Treaty, which reformed the institutional structure of the European Union and the treaties of Lisbon, also known as the Reform Treaty. The Treaty of Lisbon formed the constitutional basis for the European Union (EU), and the Treaty of Rome or the TEC was renamed to the Treaty on the Functioning of the European Union (TFEU) in 2009. The TFEU reformed details of the basis of the EU law and stated new legislatures and principles of the law under the EU, including renumbering of all the Articles.¹⁶

EU Competition Laws have two objectives – to deal the problems that can arise when an undertaking exercises a significant degree of market power, and the creation of a single market within the European Single Market. A principal objective of the EU Competition Law is to prevent business from distorting or dividing up markets. It is based on the notion of the treaty that supports and maintains the competitive market environment of an internal market from any anticompetitive behavior from companies within the union, including national authorities.

2.1 Abuse of dominant position under EU Competition Law

The EU Competition Law has a provision to prohibit any abuse of the dominant by one or more undertakings under Article 102 of TFEU.¹⁷

¹⁵ *Id.*

¹⁶ European Union, “*EU treaties*,” (September 2015). available at http://europa.eu/eu-law/decision-making/treaties/index_en.htm.

¹⁷ Article 102 ex Article 82 of TEC which renumbering by the TFEU in year 2009.

Article 102 focuses on protecting competition and consumer benefit from competition through lower prices, choice, better quality, innovation, and not simply protecting competitors. Any abuse conduct by one or more undertakings is prohibited. The Guideline given by the Commission specify three basic elements which need to be met for claiming under this Article.

First, a conduct must have done by one or more undertaking of a dominant position. In order to access the dominant position, other factors shall be applied as well, which the Commission and the courts will consider based on the facts and on a case-by-case basis. Two main elements shall be met in order to test the dominant position: first, the ability to act independently refers to an economic view of market power, and second, the ability to prevent other potential competitors from entering the market, known as market barrier. Because the dominant position can only exist in a particular market, therefore, the relevant market shall be first examined. The step after defining the relevant market, is the position of economic strength or market position of the mentioned undertaking in the relevant market.

Second is a conduct must be an abusive conduct. Merely holding a dominant position will not be found illegal unless that position is abused. Same as in the US Antitrust Law, there is no exact definition of an abusive conduct in the EU Competition Law; the courts will identify on a case-by-case basis whether the conduct or behavior in question is abusive or not. In proving whether a conduct by dominance undertaking is an exclusionary conduct, several factors will be used, for example, behavior that establish increase market power, behavior that entrench market power, and behavior that exploit market power.

Third, is the possibility that trade between member states may be affected.

2.2 Business interference under EU Competition Law

Business interference can be found in the Torts Law of each country of the EU, which is also known as business torts. The objective is most likely with the US Torts Law, which concerns harm to the individual. There are many forms of competition-related tortious actions and such claim on tortious interference or economic torts will normally be determined based on general principles of liability on tortious prohibition as a breach of the statutory duty.¹⁸

Under the EU Competition law, an intentional interference or intervention in other business relationship or contract by dominant position is not specifically mentioned in the provision of the TFEU. However, it may be prohibited by the EU Competition law provisions under Article 102 as an abusive dominant position.

Business interference will be prohibited by the EU Competition Law Article 102 when the defendant is dominance undertaking with the

¹⁸ *Supra* note 3, 25-26.

intention to establish or increase their own market power or entrench market power, or exploit market power by interfering in others' business contract or relations, and such interference has an impact on competition in the market due to his dominant power in the market, for example by having other competitors eliminated from the market. Therefore, if an impact occurs with an individual or just competitors, then it will not fall under the Competition Law.

3. Business interference in the Trade Competition Act 1999

In 1979, the Thai Ministry of Commerce established the Price Fixing and Anti-Monopoly Act to protect consumers that could be affected by price fixing by business operators through¹⁹ antimonopoly provisions. Unfortunately, this Act was ineffective, creating huge problems in interpretation and enforcement. In 1999, the Trade Competition Commission, a competition agency, and the Office of Trade Competition Promotion under the Ministry of Commerce separated fixing price from antimonopoly, which then became two Acts: Trade Competition Act 1999 (TCA) and Price of Goods and Services Act 1999. It is clear that here, the objective of protection of consumers and market efficiency have been officially separated.

The objective of the TCA are to separated provisions of price fixing and anti-competition, systemize provisions of anti-competition and restraint of trade, promote fair and free trade with competitive environment, and prevent an unfair competition practices.²⁰ Due to the notion that the best way to promote economic efficiency and maximize total economic welfare is the competitive market, the provision of the Trade Competition Act aims to protect, promote and maintain fair and free competition environment in the market place rather than an individual competitor.²¹ In the Trade Competition Act, as it has been separated to protect, promote and maintain competition, we will not see any provision in this Act referring directly to the consumer. However, it believes that the competitive market will finally benefit the consumer through more efficient pricing and increased choice in product and services.

¹⁹ Duenden Nikomborirak, "Building Constituency in Competition Policy: Thailand Competition Law & Policy," **Thailand Development Research Institute**, 5 (August 2002).

²⁰ Anan Chantara-Opakorn, "Basic knowledge on Competition Law," **Law Journal** 29, No. 3, 339-340 (September 2542). (อนันต์ จันทราโอภากร, "ความรู้พื้นฐานเกี่ยวกับกฎหมายการแข่งขันการค้า," วารสารนิติศาสตร์ ปีที่ 29 ฉบับที่ 3, กันยายน 2542)

²¹ Sakda Thanitcul, "Competition Law in Thailand: A preliminary Analysis," **Washington University Global Studies law Review**, Vol. 1, 174 (2002).

3.1 Section 25 Abuse of dominant position

Section 25 of the Trade Competition Act 1999 is a provision to control unlawful conduct of a business operator who is considered having market domination, focusing on prohibiting unlawful conduct of a business operator with market domination on price, quantity, and business interference. The TCA defines business operator with market domination in Section 3 that “business operator with market domination means one or more business operators in the market of any goods or service who have the market share and sales volume above that prescribed by the Commission with the approval of the Council of Ministers and published in the Government Gazette, having regard to the market competition.” This section provides requirements for consideration of a dominant position that depends on market share and total sales volume prescribed by the Commission. In 2007, the Commission announced the notification concerns on the consideration of dominant position.

To apply the dominant position according to the notification, the relevant market of the product or service in question will be defined first. This will depend upon what counts as competing in that market. In 2009, guidelines for Section 25 were announced by the commission to define consideration of the relevant market by using categorization of products or services based on factors such as supply substitutability, demand substitutability, barrier to entry, and the structure of the market.

Second, business operators’ market shares and sales volume under the relevant market are evaluated alone. Market share and sales volume are general tools for evaluating the power of the business operator, and whether it has a dominant power as determined in the notification and meets the qualifications of Section 25. Evaluating business operators’ market share and sales volume does not mean market share or sales volume of both plaintiff and defendant; it calculates that of the defendant alone. In case there is a conspiracy abuse of dominant by two or more business operators, calculating market share or sales volume shall be concluded together.

It is very important to deliberate over horizontal and vertical. Due to the intent of Section 25, protection of any abuse from dominant position should be only a practice against opponent competitor by the competitor in the horizontal market that will affect market efficiency. It is the reason why Section 25 prevents any action that could impact market efficiency as it is required that it be done by the player who is/are in a dominant position. If such conduct is done by such an operator, it will be deemed as having an impact on the market as a whole.

3.2 Business interference under Section 25 (4)

Business interference, which appeared in Section 25(4) of the Trade Competition Act 1999, states:

“A business operator having market domination shall not act in any of following manners...

(4) Intervening in the operation of business of other persons without justifiable reasons.”

Business interference is prohibited under this section when such conduct is done with an intention to interfere or intervene with other business’s operation by one or more dominant position without justifiable reasons. This section has no guidelines over how to examine or interpret on the application of business interference under the TCA Section 25(4) issue and no guidelines to give greater clarity on this section. The study also shows that the core problem on application of business interference under the Trade Competition Act 1999 is an ambiguity of the provision under Section 25(4) caused by three circumstances.

First, from 1999 – 2015, for almost sixteen years, there has been no court precedent regarding the provision of business interference under TCA Section 25(4).

Second, a confusion on application of business interference under TCA Section 25(4). A good case study showing confusion using the business interference provision is the case between two hypermarkets, Big C and Tesco Lotus. Big C claimed Tesco Lotus on the grounds of business interference under Section 25(4), saying that Tesco Lotus interfered with Big C business operation. Big C, after acquiring Carrefour from Cencar, jointly conducted an advertising and promotion campaign by issuing cash coupons worth 80 baht to its customers to use for discount when they purchased products at either store in future visits. Following this, Tesco Lotus launched an advertisement inviting holders of Big C and Carrefour cash coupons to use them at its store, along with offering double values in order to compete for customers. The case did not succeed in claiming under Section 25(4) of the Trade Competition Act because abuse of dominant position under Section 25 requires a dominant position, and Tesco Lotus alone is not qualified, due to, at the time, having only 40.4 percent of market share in the relevant market. Tesco Lotus was ordered by the court to pay damage compensation of 4 million baht to Big C and Cencar on grounds of unlawful marketing campaigns launched in the year 2011 under Section 421²² of the Civil Code. With regard to claiming under the Trade Competition Act, the Court has maintained silence.

However, this conduct cannot count as business interference under TCA Section 25(4), because it neither impacts the competition of the market nor consumer benefits, but promotes competition, and benefits consumers. Therefore, it shall be considered an aggressive competitive conduct or hardcore competition, and not business interference. Another reason why it cannot qualify as business interference is the lack of a specific contractual relationship between BigC, Carrefour and their customers, which is not enough to be an expectancy on business relationship. It is just an offer that BigC and Carrefour gave their

²² Section 421 “The exercise of a right which can only have the purpose of causing injury to another person is unlawful.”

customers, and it is the customer's right to choose to use the coupon without being bound by such an offer.

Third, as business interference has a criminal sanction and shall be proved beyond a reasonable doubt, unclear provisions will be a huge obstruction for plaintiff to prove and may cause case dismissal. As plaintiffs bear to allege on the allusion, unclear provisions will make plaintiffs unable to meet the burden of proving the adverse economic effects of particular types of conduct. Not only is it hard to prove beyond a reasonable doubt, but considerable interpretation cost and time which needs to be spent. An explicit provision on the application of business interference Section 25(4) would help guide and give greater clarity for everyone, especially business operators, to know exactly what provisions to protect, what they can do for competing in the market, and what will cross the line. Most of all, without confusion in the provisions, the law will be effectively used as it should be.

Conclusions and Recommendations

The Competition Law in most countries have the same view – that competitive market is the best way to promote economic efficiency and maximize social welfare, and the consumer will benefit through price choices, quality, and innovation. To maintain a competitive market, the market mechanism needs to work by itself without any interference. However, there are many factors in the market that demand supply buyers or sellers. All business operators want profits and success, and some strategies to achieve their aim could destroy the competition environment due to the differentiation of power in the market of the competitors. The Competition Law therefore, creates and maintains a good atmosphere for competitors and new rivals by setting down rules for everyone equally. Hence, the Competition Law concerns competition and consumer benefits, and not competitors or others individual. Consumers are found to be indirectly harmed by the reduction of competition, or other competitors in the market are harmed due to such abusive conduct.

Business interference is involved in Torts Law, Contract Law, and Competition Law. The law of tortious interference, like Antitrust, recognizes that competition and efficiency are significant social values.²³ However, the core difference is that Competition Law focuses on the importance of competition, while the business Torts Law has a less direct consideration of these economic issues on market competition. Therefore, consideration of business interference cases must concern whether such interference has any effect on the market competition. If the answer is no, then it will be considered an act against individual right under Torts Law. On the other hand, if such an act affects competition in the market, then Competition Law shall be applied to the case.

²³ Gary Myers, "The Differing Treatment of efficiency and competition in Antitrust Law," **Minnesota Law Review**, Vol. 77:1097: 12 (1993).

The study so far found that the current legal provisions of the United States and the European Union on application of business interference under the Competition Law illustrate confusion in the application of business interference under the Trade Competition Act 1999, deeming it inefficient. This can be solved by amending the law by empowering and giving responsibility to the Trade Competition Commission in order to announce a guideline for Section 25, which consists of elements to clarify the application of business interference that Section 25(4) requires to be met.

CONCEPTUALIZING THE INTERPRETATION AND APPLICATION OF THE PRINCIPLE OF FAIR AND EQUITABLE TREATMENT UNDR BILATERAL INVESTMENT TREATIES*

*Nuttiya Wiboonchokseit***

Abstract

The objective of this research was to study Fair and Equitable Treatment (hereinafter “FET”) as one of an investment protection standards contained in most Bilateral Investment Treaties (hereinafter “BITs”) nowadays.

Due to the absence of its definition provided in such BITs, this research thus continue examining Investor-State Dispute Settlement (ISDS) in relation to FET based claims under BITs: the International Centre for Settlement of Investment Disputes (ICSID) and Ad-hoc arbitration including FET based claims brought before the International Court of Justice (ICJ) in order to determine how arbiters in particular cases applied and interpreted the FET standard under BITs.

Furthermore, this research was also try to identify the differences (if any) of the interpretation of FET under BITs among international dispute settlement organizations in practice.

In addition, each elements as well as the criteria that arbiters take into account for rendered their decisions and/or awards were pointed out in order to give a more certain view of the interpretation and application as well as the current legal status of FET standard to assist both investors and host States to handle with the upcoming FET based claims in this age.

Keywords: International Law, International Investment Law, Investment Protection, Standard of Investment Protection, Transnational Investment, Foreign Direct Investment

บทคัดย่อ

วิทยานิพนธ์เรื่องนี้มีวัตถุประสงค์เพื่อศึกษาหลักประติบัติที่เป็นธรรมและเท่าเทียมกัน (Fair and Equitable Treatment) ในฐานะที่เป็นมาตรฐานที่ให้ความคุ้มครองแก่การลงทุนของคนต่างชาติที่มีความสำคัญมากในขณะนี้ นอกจากนั้น สนธิสัญญาว่าด้วยการส่งเสริมและคุ้มครองการลงทุน (Bilateral

* This article is summarized and rearranged from the thesis “Conceptualizing the Interpretation and Application of the Principle of Fair and Equitable Treatment under Bilateral Investment Treaties”, the Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University.

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Investment Treaties) แทบทุกฉบับในปัจจุบันนี้นิยามกำหนดหลักประคับค้ำที่เป็่นธรรมเนียมและเท่าเทียมกันไว้ในข้อบทของสนธิสัญญาด้วย

อย่างไรก็ตาม แม้ว่าสนธิสัญญาว่าด้วยการส่งเสริมและคุ้มครองการลงทุนจะมีการกล่าวถึงหลักประคับค้ำที่เป็่นธรรมเนียมและเท่าเทียมกันไว้ในข้อบทของสนธิสัญญานั้นๆ แต่ก็ไม่ปรากฏว่าได้มีการให้คำจำกัดความหรือคำนิยามของหลักประคับค้ำที่เป็่นธรรมเนียมและเท่าเทียมกันไว้แต่อย่างใด ผู้เขียนจึงมุ่งเน้นที่จะศึกษาค้นคว้าเกี่ยวกับการระงับข้อพิพาทระหว่างรัฐกับเอกชนในกรณีพิพาทเรื่องหลักประคับค้ำที่เป็่นธรรมเนียมและเท่าเทียมกันภายใต้สนธิสัญญาว่าด้วยการส่งเสริมและคุ้มครองการลงทุน ทั้งคดีที่มีการนำขึ้นสู่ศูนย์ระหว่างประเทศสำหรับการระงับข้อพิพาทการลงทุน (International Centre for Settlement of Investment Disputes หรือ ICSID) รวมถึงคดีที่ขึ้นสู่อนุญาโตตุลาการแบบเฉพาะกิจ (Ad-hoc Arbitration) และคดีที่ขึ้นสู่ศาลยุติธรรมระหว่างประเทศ (International Court of Justice) เพื่อพิจารณาและวิเคราะห์ถึงหลักปฏิบัติของอนุญาโตตุลาการในการตีความและปรับใช้หลักประคับค้ำที่เป็่นธรรมเนียมและเท่าเทียมกันภายใต้สนธิสัญญาว่าด้วยการส่งเสริมและคุ้มครองการลงทุน

นอกจากนี้ วิชานิพนธ์ฉบับนี้ยังมุ่งเน้นที่จะจำแนกความแตกต่างในทางปฏิบัติ (หากมี) ในการตีความหลักประคับค้ำที่เป็่นธรรมเนียมและเท่าเทียมกันขององค์กรระงับข้อพิพาทระหว่างประเทศทั้งหลาย รวมถึงมุ่งเน้นที่จะศึกษาถึงหลักเกณฑ์ที่อนุญาโตตุลาการนำมาใช้พิจารณาในการตัดสินข้อพิพาทว่าด้วยเรื่องหลักประคับค้ำที่เป็่นธรรมเนียมและเท่าเทียมกัน ด้วยความมุ่งหวังว่าการศึกษานี้จะช่วยให้ผู้อ่านทราบถึงสถานะทางกฎหมาย รวมถึงการตีความและปรับใช้หลักประคับค้ำที่เป็่นธรรมเนียมและเท่าเทียมกันได้อย่างแน่นอนชัดเจนยิ่งขึ้น ทั้งนี้ เพื่อประโยชน์แก่ทั้งนักลงทุนและรัฐผู้รับการลงทุน โดยในฝ่ายของนักลงทุนนั้นสามารถนำหลักการที่อนุญาโตตุลาการใช้ในการตัดสินคดีมาเป็นข้อเตือนใจว่าในกรณีใดที่ถือว่ารัฐผู้รับการลงทุนละเมิดข้อบทของหลักประคับค้ำที่เป็่นธรรมเนียมและเท่าเทียมกัน และสำหรับฝ่ายรัฐผู้รับการลงทุนนั้นสามารถนำหลักการที่อนุญาโตตุลาการใช้ในการตัดสินคดีมาเป็นกรณีศึกษาเพื่อเตรียมรับมือและป้องกันข้อพิพาทเกี่ยวกับหลักประคับค้ำที่เป็่นธรรมเนียมและเท่าเทียมกันที่อาจเกิดขึ้นในอนาคตได้

คำสำคัญ: กฎหมายระหว่างประเทศ, กฎหมายการลงทุนระหว่างประเทศ, การคุ้มครองการลงทุน, มาตรฐานคุ้มครองการลงทุน, การลงทุนข้ามชาติ, การลงทุนโดยตรงจากต่างประเทศ

Introduction

The origin of the concept of Fair and Equitable Treatment (hereinafter “FET”) can be traced back to the Havana Charter for an International Trade Organization (1948). The concept was intended to protect foreign investments and ensure fair and equitable treatment from the host country.

FET, in recent years, has become a key feature of investment protection standard which is contained mostly in bilateral investment treaties (hereinafter “BITs”), the main source of law in the field of investment, and many multilateral trade agreements. As a result of a growing number of international investments, the use of Investor-State Dispute Settlement (hereinafter “ISDS”) has rapidly developed. Meanwhile investors tend to bring FET based claims against host countries with a considerable rate of success. However, the scope of application of the FET standard in dispute settlement system has remained contentious and, in most

cases, the definition of FET has to be sought from arbitral decisions or judgments case by case depending on the discretion of the tribunal(s) or judicator(s). Consequently, host countries may carry a heavy burden of the obligation to accord FET to foreign investments.

To promote foreign investment in the country, Thailand also provides foreign investors with fair and equitable treatment through the Agreements for the Promotion and Protection of Investment or BITs. However, Thailand has very little experience in this field and had just recently lost a claim relating to the breach of FET obligation under BITs¹ which caused a severe impact on the Thai economy.

This thesis therefore aims to study Investor-State Dispute Settlement pertaining to FET based claims under BITs, particularly International Centre for Settlement of Investment Disputes (hereinafter “ICSID”) and Ad-hoc Arbitration. Furthermore, it will focus on how the International Court of Justice (hereinafter “ICJ”) and other decision-making bodies have interpreted the FET standard to understand the current scope of the application of the FET standard in disputes involving BITs in order to minimize the risk of loss and protect host countries against FET based claims.

I. Historical Background and Development of the Fair and Equitable Treatment Standard

Today, it is undeniable that Fair and Equitable Treatment is a significant standard of protection granted to foreign investors although its exact scope and meaning have been hotly debated. This chapter will begin with the origin of the concept of Fair and Equitable Treatment and its development. This will be followed by a discussion of the current use of the Fair and Equitable Treatment Standard in international investment laws and state practice. Lastly, it will delve into the formulations found in the investment instrument, particularly bilateral investment treaties, all of which share a common substantial vagueness. The problems of applying the Fair and Equitable Treatment Standard in Bilateral Investment Treaties will also be addressed.

The concept of Fair and Equitable Treatment firstly originated in post-war decolonization period, the newly independent states wanted to protect their independence by way of nationalization through a direct expropriation. This was accompanied by the refusals of the host countries to compensate foreign investors. This attitude obviously contradicts the generally recognized conception of economic benefits brought about by foreign investments and caused inconsistent national policies.²

At that time, the only instrument that granted foreign investors the right to claim damages due to an unjust action of the host countries was the

¹ Walter Bau AG (in Liquidation) v The Kingdom of Thailand.

² IOANA TUDOR, **The Fair and Equitable Treatment Standard in the International Law of Foreign Investment** 1 (Oxford University Press, 2008).

diplomatic protection of their home states. However, this kind of protection is considered an indirect protection because the investors had to rely on the will of their own states to engage in such procedures against the host countries.³ Private foreign investors thus craved for the more direct mechanism to enforce their rights against host countries.

Fair and equitable treatment (hereinafter “FET”) is one of the prominent standards included in international investment agreements (hereinafter “IIAs”) to solve such problem. The FET obligation is often stated, together with other standards, as part of the protection due to foreign direct investment by host countries.⁴ Due to its significant feature that allows an investor to directly bring a case against a host country without any references to other investments, the FET standard is also known as an “absolute”, “non-contingent” standard of treatment⁵, as opposed to the “relative” standards embodied in “national treatment” (hereinafter “NT”) and “most favored nation” (hereinafter “MFN”) principles which define the required treatment by reference to an initial treatment or situation established by the host countries.

The phrase “equitable treatment” first appeared in the Article 23 (e) of the League of Nations Covenant which stated that “. . . the Member of the League . . . to secure and maintain freedom of communications and of transit and *equitable treatment* for the commerce of all Members of the League . . .”⁶. The league convened an International Conference on the Treatment of Foreigners to develop an applicable standard of treatment under Article 23 (e) and later adopted a Draft Convention on the matter, which did not, however refer to FET obligation.⁷

³ *Ibid.*

⁴ OECD, “**Fair and Equitable Treatment Standard in International Investment Law 2**” (OECD Working papers on International Investment, 2004/3, OECD Publishing, 2004), <http://dx.doi.org/10.1787/675702255435> (accessed on December 8, 2015).

⁵ A standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application. Please See, Stephan W. Schill, **The Multilateralization of International Investment Law** 78 (Cambridge University Press 2009); Rudolf Dolzer & Margrete Stevens, **Bilateral Investment Treaties** 58 (Martinus Nijhoff Publishers 1995); Katia Yannaca-Small, **Fair and Equitable Treatment Standard: Recent Developments**, in **Standards of Investment Protection** 111 (August Reinisch ed., Oxford University Press 2008); also cited in OECD *supra* note 4.

⁶ Please see the analysis of the Theodore Kill, **Don’t Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations** 869 (Michigan Law Review 2008).

⁷ *Ibid.*, p. 870-871. Please also see, Patrick Dumberry, **The Fair and Equitable Treatment Standard A Guide to NAFTA Case Law on Article 1105** 29 (Kluwer Law International 2013).

Subsequently in 1948, the Havana Charter for the International Trade Organization (hereinafter “Havana Charter”) had adopted the principle that foreign investments should be guaranteed a “just and equitable treatment” in its Article 11 (2). Even though the Havana Charter dealt with trade issues, it also contained many provisions pertaining to investments including the envisagement that the future trade organization would make recommendations for bilateral or multilateral agreements to assure just and equitable treatment for investments to another Member.⁸

Due to several controversial issues, the Havana Charter never came into force. Nevertheless, the Havana Charter is generally considered as the first legal instrument that made a reference to the FET standard.⁹

In addition, the Ninth International Conference of American States that took place in 1948 the Economic Agreement of Bogota (hereinafter “Bogota Agreement”). Its Article 22 provided that “foreign capital shall receive equitable treatment”.¹⁰ Yet, it was never ratified.

In 1959, Mr. Hermann Abs and Lord Shawcross together with a group of European businesspersons and lawyers drafted the Abs-Shawcross Draft Convention on Investments Abroad, which granted a protection to property of foreign investors in accordance with the “fair and equitable treatment”¹¹ and included “full protection and security” and “discrimination”.

In 1967, the Organisation for Economic Co-operation and Development (hereinafter “OECD”) had developed the Draft Convention on the Protection of Foreign Property (hereinafter “Draft Convention”) in order to protect private property by requiring that “each party shall at all times ensure fair and equitable treatment to the property of the nationals of the other parties”. Since then, the developed countries had adopted the 1967 OECD Draft Convention, even though was never opened for signature, as a model for drafting their own bilateral investment treaties (hereinafter “BITs”). The Draft Convention was subsequently incorporated into BITs between developed and developing countries with FET clause therein.

⁸ Havana Charter for an International Trade Organization, 24 March 1948, Article 11(2), in: U.N. Conference on Trade & Employment, Final Act and Related Documents 8-9, U.N. Doc. E/Conf. 2/78, U.N. Sales No. 1948.II.D.4 (1948).

⁹ See Kill, *supra* note 6, p. 871-873.

¹⁰ Organisation of American States, Economic Agreement of Bogota, Article 22, May 1948, L. Treaty Ser. No. 25, OAS Doc. No. OEA/Ser.A/4 (SEPF). The full provision reads as follows: “[f]oreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied”.

¹¹ Article 1. Hermann Abs & Hartley Shawcross, *The Proposed Convention to Protect Private Foreign Investment: A Round Table: Comment on the Draft Convention by its Authors*, 9 J.P.L., October 1967, 7 ILM 117 (1967).

Therefore, it can be said that the 1967 OECD Draft Convention was a prominence threshold of FET clause contained in BITs nowadays.

II. The Current Usage of the Fair and Equitable Treatment Standard in International Investment Agreements and State Practice

As aforementioned, the OECD had profoundly influenced both developed and developing countries to incorporate the FET clause in their respective IIAs since the late 60s. In recent years, the FET clause has commonly been included in the majority of BITs as well as multilateral instruments. It has even appeared in the treaties concluded by countries traditionally favor national control over foreign investments and generally use national treatment rather than the FET standard¹².

Due to the belief held by developing countries that the term “fair and equitable treatment” is applied by developed countries to replace the term “minimum standard of treatment”, which is one of the most controversial protection standards in international law because of its uncertainties and ambiguities, the negotiation of multilateral instruments between developed and developing countries hardly achieves its goal, which ultimately leads both parties to enter into BITs instead¹³. The use of BITs had begun from the 1990s onwards.

There are presently over 2,900 bilateral treaties listed in UNCTAD database, 2,276 of which have come into force.¹⁴ The majority of those BITs were concluded with the FET clause. The first group that endorsed the FET clause in their BITs was the European States (including Germany and Switzerland).¹⁵ The latest BITs that granted the FET protection to foreign direct investments was concluded between Canada and the Republic of Serbia in April, 2015.¹⁶ As for the Kingdom of Thailand, it has currently signed 41 bilateral treaties.¹⁷

From my examination, it can be summarized that BITs that exclude a reference to the FET standard are presently the exception rather than the rule. The FET clause hence has become a common feature found in BITs.

¹² ICSID, *Investment Laws of the World: Bilateral Investment Treaties* (1972).

¹³ Salacuse, Jeswald W., **The Treatification of International Investment Law: a Victory of Form Over Life? A Crossroads Crossed?**, 3(3) *Transnational Dispute management* 219 (2006); Paparinskis, **The International Minimum Standard and Fair and Equitable Treatment** 90-92 (Oxford University Press, 2013).

¹⁴ UNCTAD, **International Investment Agreements Navigator**, UNCTAD, available at <http://investmentpolicyhub.unctad.org/IIA> (accessed on November 30, 2015).

¹⁵ The first BITs that endorsed a FET clause, in the early 1960s, were Germany and Switzerland. See Tudor, *supra* note 2.

¹⁶ It was signed by both parties on September 1, 2014 and came into force on April 27, 2015. It is also incorporated FET clause in its Article 6 Clause 1. See **Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments** (2014) available at

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3152>

¹⁷ Please see Table 2.1

As aforesaid, the FET clause is principally found in the majority of BITs. Furthermore, it is also discovered in many multilateral and regional instruments pertaining to foreign investments. These regional and multilateral instruments commonly recommend that the FET clause should be endorsed on every instrument in order to accord foreign investments with fair and equitable treatment.

The regional category of conventional instruments is established by agreements that normally create a customs union or a free trade area that cope with foreign investments such as the Bogota Agreement¹⁸, the Investment of Arab Capital in the Arab States¹⁹, the African, Caribbean and Pacific Group of States²⁰ (hereinafter “ACP”), the European Union had signed the Fourth Convention of the African, Caribbean and Pacific Group of States and the European Economic Community of so-called “Lomé IV”²¹, the Common Market for Eastern and Southern Africa (hereinafter “COMESA”)²², the North American Free Trade Agreement (hereinafter “NAFTA”), the MERCOSUR²³, The Energy Charter Treaty (hereinafter “ECT”)²⁴, the Agreement for the Promotion and Protection of Investments among the Association of South East Asian Nations (hereinafter “ASEAN”), the 1967 OECD Draft Convention, the Abs-Shawcross Draft Convention on Investments Abroad²⁵, the 1983 Draft United Nations Code

¹⁸ Bogota Agreement, *supra* note 10.

¹⁹ All member States of the League but Algeria and the Comoros had ratified the agreement and it came into force on September 7, 1988. Eleventh Arab Summit Conference, *Unified Agreement for the Investment of Arab Capital in the Arab States* (signed on November 26, 1980) available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2394>.

²⁰ An organisation generated by Georgetown Agreement (officially called “ACP-EC Partnership Agreement” or “Cotonou Agreement”) in 1975 of which purpose is for coordinating cooperation between its members and European Union pertaining to negotiation and implementation of agreements concluded by them; ACP website available at <http://www.acp.int/node/7> (accessed on December 2, 2015).

²¹ The effective period of this agreement was 10 years; came into force on March 1, 1990.

²² Africa, *Common Market for Eastern and Southern Africa* (signed on June 3, 1991) available at http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf (accessed on December 2, 2015).

²³ Mercado Común del Sur or “Common Market of the South” was created by Argentina, Brazil, Paraguay and Uruguay in 1991. UNCTAD, “*Investment Policy Hub: International Investment Agreements Navigator/ Membership of MERCOSUR*”, available at <http://investmentpolicyhub.unctad.org/IIA/CountryGroupingDetails/40#iiaInnerMenu> (accessed on December 2, 2015).

²⁴ *Ibid.* p. 53.

²⁵ Abs & Shawcross, *supra* note 11.

of Conduct on Transnational Corporations²⁶, the Convention Establishing the Multilateral Investment Guarantee Agency²⁷ (MIGA), etc.

Lastly, in 1998, the OECD also established the Draft of Multilateral Agreement on Investment which endorsed the FET clause. For example, in the general treatment of investment protection provision, it is stated that “fair and equitable” treatment and full and constant protection and security will be covered to all contracting parties whose investments incurred in OECD territories.²⁸

III. Formulations and Problems of the Application of Fair and Equitable Treatment Standard

1. Formulations of the Fair and Equitable Treatment Standard in International Investment Agreements

UNCTAD, after finishing its decennary survey of BITs, concluded that FET language found in the surveyed BITs varied under different circumstances. UNCTAD hence categorized those different formulations of the FET standard contained in BITs into seven categories in 2007²⁹ as follows:

1.1 BITs that accord covered investments “fair and equitable treatment” without a reference to international law or other standards;

1.2 BITs that distinctly express that treatment granted to both relative investors and investments shall not be less favorable than national treatment (hereinafter “NT”) or Most Favored Nation treatment (hereinafter “MFN”);

1.3 BITs that endorse supplementary obligation to the FET clause. This additional obligation stipulates the obligation of host countries to refrain from diminishing the investment through irrational or discriminatory criteria;

1.4 BITs that link the FET clause to international laws.

²⁶ UNCTC, *The Draft United Nations Code of Conduct on Transnational Corporations* Art. 48 (1983) UN Doc. Also available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/>

2891 (accessed on December 2, 2015).

²⁷ MIGA came into force on April 12, 1988 and later amended by the Council of Governors of MIGA and went into effect on November 14, 2010. Multilateral Investment Guarantee Agency, *the Convention establishing the Multilateral Investment Guarantee Agency* Art. 12 (d) (Washington, D.C., World Bank, 2010) available at http://www.miga.org/documents/miga_convention_november_2010.pdf (accessed on December 2, 2015).

²⁸ OECD, *the Draft Multilateral Agreement on Investment* (1998) Article 4 (1) (1.1) available at <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> (accessed on December 2, 2015).

²⁹ UNCTAD (2007), *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* 30-33 available at http://unctad.org/en/docs/iteiia20065_en.pdf (accessed on December 2, 2015).

1.5 BITs with a reference to international law. Nevertheless, this category provides a wider coverage by incorporating additional language of the FET obligation which goes beyond the international minimum standard of treatment. Moreover, its wording leaves very little discretion to a potential arbitral tribunal;

1.6 BITs whose FET language relying on the domestic legislation of the host country; and

1.7 BITs that takes into account the issues debating in NAFTA arbitrations. The appearance of this kind of BITs therefore provides the FET clause as well as full protection and security by making a reference to customary international law minimum standard of treatment. Moreover, they also contain a further explanation of “fair and equitable treatment” and “full protection and security” within the same article.

2. The Problems of the Application of Fair and Equitable Treatment Standard under Bilateral Investment Treaties

Nevertheless the seventh approach had been established by UNTACD, as explained in the previous section, the scope of application and the exact meaning of the FET clause under BITs are still ones of the most controversial issues in the field of international law due to the proliferation of claims brought before tribunal in relation to FET violation. Because of the absence of the precise meaning of FET endorsed in the majority of BITs and the intrinsic language used in BITs to give arbitrators and judicators the possibility to determine the scope and meaning of the FET clause by taking into account the objective of particular disputed treaty, the scope of application and definition of the FET standard contained in BITs can be traced to awards or judgments rendered in particular cases. However, since there is very little guidance given to adjudicators, the discretion of tribunals thus plays a significant role in this part. In the other way, it can be concluded that the concept of “fairness” and “equity” depends on tribunals’ discretion which can be varied case by case.

I hence opine that examining the awards and judgments rendered in relation to the interpretation of FET under BITs, which will be discussed later, can generate an abstract of the FET standard under BITs in order to provide tribunals a guidance on how FET should be translated and applied to particular claim which can help solve one of the most contentious issues in international law. In addition, it can provide guidance for host countries to minimize the risk of breaching the FET obligation and for foreign investors to protect their investments in such territory.

IV. Analysis of Viewpoints Endorsed by International Decision Making Bodies

In recent years, the sleeping standard “fair and equitable treatment” has been invoked by investors due to an increase in success rate for FET based claims. This leads the principle of FET in international investment law to be much in vogue. The FET standard has become one of the most

controversial investment protection standards due to its lack of precise meaning. Many institutions (which will be selected and addressed below) have, therefore, attempted to seek the accurate interpretation of FET.

I examined some selected ICJ judgments³⁰ and After examining references to the FET principle in ICJ judgments, I found that the ICJ has hardly dealt with the FET interpretation issue and we have to seek its definition by looking further in Arbitral awards which will be analyzed in the next Chapter. Examining such arbitral awards may give us a clearer view of current legal status and its interpretation under BITs context.

V. Analysis of Selected Arbitral Awards Regarding FET Obligations

Historically, most of the cases brought before international tribunals involve the protection of foreign investments.³¹ Investment treaty protection and investment arbitration have hence become a cornerstone of international investment law since they, when applied together, provide foreign investors a productive protection.

The earliest investment treaty based claim concerning the violation of the FET obligation under BIT, and not a NAFTA based, was rendered on 21 February 1997.³² Afterwards, FET based claims under BIT had been drastically increased along with the vagueness surrounding its context i.e. a precise meaning of the FET standard.

Consequently, the author, in this chapter, will only focus on FET based claims at the BIT level of which a legal mechanism for bringing investment claims is typically found in Investor-State Dispute Settlement or ISDS provision.³³ Both arbitration under ICSID Convention and an ad-hoc arbitration under the rules of the United Nations Commission for International Trade Law (hereinafter “UNCITRAL”) are ones of the most

³⁰ ICJ, *Case concerning Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo* [hereinafter “Diallo”], Judgment of November 30, 2010. ICJ, *Case concerning Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo* [hereinafter “Diallo”], Judgment of June 19, 2012. ICJ, *Case concerning The Barcelona Traction, Light and Power Company, Limited* [hereinafter “Barcelona Traction”], Judgment of February 5, 1970. ICJ, *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* [hereinafter “ELSI case”], Judgment of July 20, 1989.

³¹ TUDOR, *supra* note 2, p. 1.

³² *American Manufacturing & Trading, Inc v Democratic Republic of Congo* (AMT case) (ICSID, ARB/93/1, Final Award rendered on 21 February 1997) (Sucharitkul.Golsong.Mbaye).

³³ There, each State sets forth its advance consent to submit investment disputes to international arbitration. Once a covered investor provides its own written consent, the State’s offer becomes legally binding, and the investor can bring proceedings directly against the State without the need for any additional approval. Latham & Watkins, *Investment Treaty Arbitration: A Primer*, Client Alert No. 1563, July 29, 2013: p.3 available at <https://www.lw.com> (accessed on December 8, 2015).

popular legal mechanism established in such provision. This chapter will thus analyze relative arbitral awards in order to understand the way tribunals have interpreted the FET standard, in particular BIT, and how they have applied the standard to cases. Then the concepts of ICSID and ad-hoc tribunals will be addressed by means of a comparison in order to provide a guideline for foreign investors and also host countries who may encounter this circumstance.

I examined ICSID awards³⁴ including Ad-hoc arbitration awards³⁵ and acknowledged that the tribunal under both arbitrations had endorsed a similar set of key elements of the FET obligations by host States under BITs as follows:

1. Denial of Justice

The obligation of host countries not to deny of justice in criminal, civil or administrative in accordance with the principle of due process lays in customary international law. As to a responsibility of host countries for the actions of its court, thus in case that fundamentally unfair manner in justice system is appeared against foreign investors, the tribunal shall considered such action of host countries as a breach of this obligation. However, the preliminary condition required for claiming of denial of justice against host countries is that all available procedural remedies by

³⁴ ICSID, *American Manufacturing & Trading (AMT), Inc. (US) v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award of February 21, 1997. ICSID, *Robert Azinian and others (US) v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award of November 1, 1999. ICSID, *Metalclad Corporation (US) v. United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award of October 31, 2001. ICSID, *Emilio Agustin Maffezini (Argentina) v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award of January 31, 2001. ICSID, *Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of October 31, 2005. ICSID, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award of January 1, 2006. ICSID, *Middle East Cement Shipping and Handling Co. S.A. (Greece) v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award of April 12, 2002. ICSID, *8Mondev International Ltd. (Canada) v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002. ICSID, *Mondev International Ltd. (Canada) v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002. ICSID, *Tecmed S.A. (Spain) v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003. ICSID, *11The Loewen Group, Inc. and Raymond L. Loewen (Canada) v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award of October 31, 2005. ICSID, *Waste Management, Inc. (US) v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of April 30, 2004.

³⁵ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award rendered on August 3, 2005. *Saluka Investments B.V. (The Netherlands) v. the Czech Republic* case issued a Partial Award on March 17, 2006. The Partial Award was made public on 22 March, 2006. *Walter Bau AG v. Kingdom of Thailand*. *CME v. The Czech Republic of Argentina*, UNCITRAL, Award rendered on December, 2007.

local courts must be proceeded. Like the statement of Newcombe & Paradell³⁶ which provided that “denial of justice arises where a national legal system fails to provide justice – not where there is a single procedural irregularity or misapplication of the law at some level of the judicial system”.

To be considered denial of justice, Miss Chotamano had concluded that there are two factors that ICSID tribunal take into account: denial of access to justice and the refusal of domestic courts to decide as well as failure to execute final judgments or arbitral awards.

2. Due Process of Law

Host countries were bound by an obligation to respect due process in their administration of justice. Moreover, this element are also closely connected with transparency, good faith and unlawful discretion of administration.³⁷

Due process of law is a fundamental principle in administrative law which requires officials to be bound under rules and regulations enacted by Administration. In addition, it also requires officials to protect the infringing of rights, freedom or any other righteous rights of any individuals or private sectors.

In brief, due process of law is an action or omission that deny of justice which shall be considered as a violation of FET obligation.

3. Full Protection and Security

Full protection and security is generally accepted in international law for ages. It evolved by the United States of America and considered as one of investment protection standards in customary international law.

Full protection and security have ordinarily been found together with the FET clause in the majority of BITs. Full protection and security mainly emphasized the protection that States given to aliens whilst FET is focusing on the treatment accord to investors. Moreover, full protection and security are always identified broadly in BITs. This action hence imposes an onerous level of liability on host countries as to its limited resources. This obligation undoubtedly relates to the physical protection of the investors and their assets and prohibits host countries, both State organs and private parties, from violating individuals and properties.

4. Non-Discrimination

States, in international law, are not prohibited to provide in its legislation certain types of distinction of treatment between nationals and

³⁶ Newcombe & Paradell, *supra* note 26, p. 240-241.

³⁷ M. Sornarajah, *The International Law on Foreign Investment* 337, 2nd ed. (Cambridge, United Kingdom: Cambridge University Press, 2004).

aliens.³⁸ Non-discrimination required state to provide nationals and aliens an equal standard of treatment. This can be divided into two points: “Most-Favored Nation or MFN” and “National Treatment or NT”. To prove to a tribunal that non-discrimination has been breached is to thus determine onerous liability as to many factors. Both investors and investments have to also be taken into account.

FET obligation and Non-Discrimination are a delicate issue in international law since there are a number of controversies whether or not FET is equate to NT. Some authors identified the uniformity of FET and NT while others established NT as a minimum standard of treatment under FET.

5. Expropriation, Nationalization and Compensation

Robert L. Bledsoe and Bolesaw A. Boczek, in the International Law Dictionary, had defined an expropriation as a seizure of aliens’ assets and transfer the ownership to host countries which is allowed under limited conditions and considered as an exceptional action under international law. The expropriation can be exercised for the sake of public interests with neither discrimination nor retaliation. In addition the expropriated parties are entitled to be paid with a prompt, adequate and effective compensation. Expropriation, nevertheless, has to be proceeded in accordance with a treaty and under due process of law otherwise it is called “Confiscation”.

Nationalization does not equate Expropriation because nationalization can occur to assets of either nationals or aliens. The common feature of both nationalization and expropriation is to be done merely for public interests together with compensation³⁹ or it will be considered as an illegal action.

From the examination I found that a compensation paid to aliens in developed and developing countries were considered on a different basis. Developing and underdeveloped countries believe that compensation accord to aliens from expropriation should be treated equally to their own nationals and depend on the ability to pay of State rather than an appropriate compensation (prompt, adequate and effective) which was adopted by developed countries.

6. Good Faith

The principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage that might result

³⁸ *Grand River v. United States*, US Counter-Memorial (December 22, 2008), para.472, 473, 475; *Methanex v. United States*, US Amended Statement of Defense (December 5, 2003), para 367.

³⁹ M. Sornarajah, *supra* note 57, at 194.

from a literal and unintended interpretation of the agreement between them.”⁴⁰

Furthermore, a position of good faith is considered a natural law which is a fundamental of public international law. In addition, good faith has a great impact on customary international law which reflected in a great number of BITs and given also a clarification of Article 31 (1) of the Vienna Convention on the Law of Treaties.⁴¹

7. Transparency

Transparency is yet to be defined as a customary international law but in some arbitration awards identified transparency as one of the elements compounded in the FET standard. Therefore, a breach of such element shall be considered as a FET breach.

8. Legitimate Expectations

Lord Scott⁴² however discovered the increasing prominence of legitimate expectations doctrine in English law in 2008 and it has recently become a fashionable doctrine in international investment law. Lately, ICSID tribunals have regularly taken for granted the notion that a breach of investor’s expectations may be conducive to a violation of an investment treaty particularly the FET standard. The invocation of legitimate expectations has thus extremely been founded on precedent, that is, ICSID awards citing to previous awards that have referred to the concept.⁴³

In summary, it is likely that, after examining the aforementioned judgments and awards, the interpretation and the application of FET are found to be even more variable depending on surrounding circumstances, yet the manner in which they have been interpreted and applied are considerably similar. However, it can be argued that the FET standard has been defined broadly in ICJ trials while in the arbitration proceedings, the FET standard was defined more thoroughly; for instance, its elements have been addressed as to the development and drastically increasing of investment disputes nowadays.

⁴⁰ Anthony d’Amato, “Good Faith” in *Encyclopedia of Public International Law* (1992) at 599 available at <http://anthonydamato.law.northwestern.edu/encyclopedia/good-faith.pdf> (accessed on December 11, 2015).

⁴¹ UN, *the Vienna Convention on the Law of Treaties* (Vienna on May 23, 1969), United Nations available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (accessed on December 11, 2015).

⁴² *EB (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41, para. 31 per Lord Scott.

⁴³ ICSID Review (Spring 2013) 28 (1): 88-122, Michele Potestà, *Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept* (first published online on February 27, 2013) at 2 available at <http://icsidreview.oxfordjournals.org/content/28/1/88.full.pdf+html> (accessed on December 11, 2015).

The subjective elements of the FET standard in present day can be traced to the precedent awards or judgments as follows:

- (1) Non-Denial of Justice;
- (2) Due Process of Law
- (3) Full Protection and Security
- (4) Non-Discrimination;
- (5) Expropriation, Nationalization and Compensation;
- (6) Good Faith;
- (7) Transparency; and
- (8) Legitimate Expectations.

Conclusions and Recommendations

Fair and Equitable Treatment (FET) has been recognized as a general principle abided by civilized nations to provide protection to foreign direct investment. The influx of FET based claims in recent years has been accompanied by various interpretations of FET and a lack of its precise meaning, I thus decided to examine relevant arbitral awards as well as legal cases in order to extract some of the elements taken into account, at least subjectively, by the tribunals to interpret the meaning of FET when considering a breach of FET obligations at BIT level.

The initial appearance of FET language was found in 1948 and it has been used frequently in international investment treaties particularly in BITs since the 1960s onwards. FET is a standard that seeks to protect both international investors and investments fairly and equally. However, the FET language has been used differently in different treaties. UNCTAD in 2007 thus categorized the formulations of FET language generally found in the majority of IIAs. Such variation further led the tribunals to face the problems of interpretation and application of FET which have been examined in this thesis.

Precedents of relevant arbitral awards and judicial judgments reveal that even the FET standard has been interpreted and applied in the same manner, yet it is slightly different in each trial depending on surrounding circumstances. I assumed that the principle of the FET standard had been created intentionally as a flexible approach to let the tribunal exercises its appropriate discretion depending on the circumstances encompassing the disputes.

In summary, the conceptualization of interpretation and application of the FET standard under BIT can be traced primarily to judicial judgments which defined FET widely. Subsequently, such precedent had been adopted in international arbitration proceedings and had been given more details as explained earlier which led to the application of the FET standard to disputes as a general principle of law.

2. Recommendations

Thailand is one of the significant developing countries in South-East Asian Area with expanding volume of foreign direct investments

(FDIs). In addition, Thailand has concluded more than 40 BITs in order to promote its investments as well as to attract the investments into its territory. As discussed earlier, the majority of BITs nowadays accord investors and investments a fair and equitable treatment, including BITs signed by Thailand.

Concerning FET based claims which have been drastically increased, Thailand has very little experience in dealing with these type of claims. Moreover, it has recently lost the case in *Walter Bau v. Thailand* which rendered the final award in favor of the claimant. Thailand is bound by such award and obliged to pay compensation in the amount of 29.21 million Euros plus interests to the claimant causing a severe impact to Thailand's financial status.

The following recommendations, concerning the present flow of international investments, are that Thailand, in order to minimize the risks from the upcoming FET based claims, should: first, modify its current Model BIT by providing a clearer clarification of the FET obligations as well as adding the provisions of Policy Space; second, keep the relevant authorities up to date on the information pertaining to the FET obligations including providing a guideline on the ISDS proceeding and also illustrations of what actions or omissions can be determined as a breach of the FET obligations.

REPORTING AND DISCLOSING THE POLLUTION INFORMATION UNDER THE FACTORY ACT B.E. 2535

Pakarat Sricharoensukphak

Abstract

The objective of this thesis is to study the issue of the reporting and disclosing of pollution information and related problems. In particular, this thesis will focus on comparing Thailand's existing laws with the concepts and legal controls of reporting and disclosing pollution information under United States law and Japanese law. An investigation is also conducted into the problems and hindrances relating to the enforcement of these laws. This includes looking at ways to improve the requirements of the law for reporting and disclosing pollution information so that better prevention and problem-solving can be effectively implemented.

The study found that the industrial factory sector is governed by the Factory Act B.E. 2535 (1992) which is the relevant law to enforce the reporting of pollution information. However, this law does not effectively allow for prevention and problem solving. This could be a result of the restrictions of the scope of the law and the lack of sanctions found in it. Another issue is that the existing laws only enforce the reporting of pollutants that are released into the air and water. The reporting of pollutants released into the soil is done according to the Ministerial Regulation of Controlling on Soil and Groundwater Contamination Criteria within Factory Act B.E. 2559 (2016). This was recently been enacted on April 29, 2016 by the virtue of the provisions in Section 6 Paragraph 1 and Section 8 (4) - (8) of Factory Act B.E. 2535 (1992). However, this regulation stipulates only that industrial factories must report information of soil and groundwater contamination criteria within the factory area, not outside the factory area. Additionally, on disclosing pollution information, there are no laws under Factory Act B.E. 2535 (1992) to disclose pollution information to the public. There is only the Official Information Act B.E. 2540 (1997) which requires that the government agencies disclose information to the public. However, disclosing or accessing such information is limited to information that is in the possession of the government agency or state enterprises. This does not include the information that is in the possession of factories in the private sector. This is a big problem because people need to access this information in order to protect themselves from the dangers of pollutants.

Therefore, this thesis will amend Ministerial Regulation of Controlling on Soil and Groundwater Contamination Criteria within Factory B.E. 2559 (2016) which is the subordinate legislation of Factory Act B.E. 2535 (1992) to enforce that industrial factory reports the pollution information which is contaminated into the soil and groundwater within factory area, and covering outside factory area. Moreover, it should enact a

new subsection of Section 8 of Factory Act B.E. 2535 (1992) to directly force industrial factories in the private sector to disclose their pollution information to the public or give the public the right to access the environmental information and pollution information of the industrial factory.

Keywords: Report, Disclosure, Pollution, Pollutant, Information, Environment

บทคัดย่อ

วิทยานิพนธ์นี้มุ่งศึกษากฎหมายที่เกี่ยวข้องกับการรายงานและเปิดเผยข้อมูลมลพิษ รวมถึงปัญหาอื่นๆ โดยมุ่งเปรียบเทียบระหว่างกฎหมายการรายงานและเปิดเผยข้อมูลมลพิษของประเทศไทยที่มีอยู่ในปัจจุบัน กับกฎหมายการรายงานและเปิดเผยข้อมูลมลพิษของประเทศสหรัฐอเมริกาและประเทศญี่ปุ่น โดยจะศึกษาถึงปัญหาและอุปสรรคที่เกี่ยวข้องกับการบังคับใช้กฎหมาย รวมถึงมุ่งหาแนวทางในการปรับปรุงและพัฒนากฎหมายเกี่ยวกับการรายงานและเปิดเผยข้อมูลมลพิษของประเทศไทย ทั้งนี้ เพื่อเป็นการป้องกันและแก้ไขปัญหาที่เกิดขึ้นได้อย่างมีประสิทธิภาพ

จากการศึกษาพบว่า พระราชบัญญัติโรงงาน พ.ศ. 2535 ซึ่งเป็นกฎหมายที่เกี่ยวข้องกับการรายงานข้อมูลมลพิษของโรงงานอุตสาหกรรม ยังไม่มีประสิทธิภาพในการบังคับใช้อย่างเพียงพอ จึงทำให้ไม่สามารถป้องกันและแก้ไขปัญหาที่มีอยู่ได้ในปัจจุบัน ดังเช่น ในปัจจุบันกฎหมายไทยครอบคลุมถึงการรายงานข้อมูลมลพิษที่ถูกปล่อยจากโรงงานอุตสาหกรรมในกรณีของน้ำและอากาศเท่านั้น ส่วนในกรณีของการรายงานข้อมูลมลพิษที่ปนเปื้อนในดินและน้ำใต้ดินนั้น กฎกระทรวงควบคุมการปนเปื้อนในดินและน้ำใต้ดินภายในบริเวณโรงงาน พ.ศ. 2559 ซึ่งประกาศเมื่อวันที่ 29 เมษายน พ.ศ. 2559 โดยอาศัยอำนาจตามความในมาตรา 6 วรรคหนึ่ง และมาตรา 8 (4) – (8) แห่งพระราชบัญญัติโรงงาน พ.ศ. 2535 เพียงกำหนดให้ผู้ประกอบกิจการโรงงานมีหน้าที่ตรวจสอบและรายงานผลการปนเปื้อนในดินและน้ำใต้ดินภายในบริเวณโรงงานเท่านั้น ซึ่งการรายงานดังกล่าวยังไม่ครอบคลุมถึงตรวจสอบและรายงานผลการปนเปื้อนในดินและน้ำใต้ดินภายนอกบริเวณโรงงานด้วย นอกจากนี้ ในปัจจุบันภายใต้พระราชบัญญัติโรงงาน พ.ศ. 2535 ยังไม่มีการบังคับให้มีการเปิดเผยข้อมูลมลพิษต่อสาธารณชน มีเพียงพระราชบัญญัติข้อมูลข่าวสารของราชการ พ.ศ. 2540 ที่กำหนดให้หน่วยงานของรัฐมีหน้าที่ในการเปิดเผยข้อมูลสิ่งแวดล้อมเฉพาะที่อยู่ในความครอบครองของหน่วยงานรัฐต่อสาธารณชนเท่านั้น โดยไม่ครอบคลุมถึงข้อมูลที่อยู่ในความครอบครองของเอกชนด้วย ซึ่งสิ่งเหล่านี้ถือว่าเป็นปัญหาที่สำคัญอันเป็นการขัดขวางสิทธิการรับรู้และเข้าถึงข้อมูลข่าวสารของประชาชนในการที่จะป้องกันตนเองจาก ภัยอันตรายของสารพิษที่อยู่รอบตัว

ดังนั้น วิทยานิพนธ์นี้จึงมุ่งเสนอให้มีการแก้ไขกฎกระทรวงควบคุมการปนเปื้อนในดินและน้ำใต้ดินภายในบริเวณโรงงาน พ.ศ. 2559 ซึ่งเป็นกฎหมายที่อาศัยอำนาจแห่งพระราชบัญญัติโรงงาน พ.ศ. 2535 โดยมีวัตถุประสงค์ให้ผู้ประกอบกิจการโรงงานมีหน้าที่ต้องตรวจสอบและรายงานผลการปนเปื้อนในดินและน้ำใต้ดินภายในบริเวณโรงงาน และให้ครอบคลุมถึงบริเวณนอกโรงงานด้วย นอกจากนี้ ยังเสนอให้มีการเพิ่มอนุมาตราในมาตรา 8 แห่งพระราชบัญญัติโรงงาน พ.ศ. 2535 โดยบังคับให้ผู้ประกอบกิจการโรงงานมีหน้าที่ในการเปิดเผยหรือให้สิทธิประชาชนสามารถเข้าถึงข้อมูลสิ่งแวดล้อมและข้อมูลมลพิษของโรงงานได้โดยตรงอีกด้วย

คำสำคัญ: การรายงาน, การเปิดเผย, มลพิษ, สารพิษ, ข้อมูล, สิ่งแวดล้อม

Introduction

Nowadays, many industrial factories are established around the world and tons of *their pollutants* are released. This affects the health of

our water, land and air every year. These pollutants have severe impacts upon people who live near the source of the pollution and may cause serious health problems. Moreover, it can also have an adverse effect on wildlife and the environment.

Therefore, reporting and disclosing the amount of pollution released from the industry factory is particularly important if there is an accident or emergency, such as an explosion or a factory leak of hazardous chemicals. If the public is aware of the aforementioned information, it will benefit because this information will protect their own health from pollution as well as make them aware of the dangers of pollutants that can affect animals and the environment around us. At the same time, the government is able to use the information as a tool in managing and controlling the release of pollution at source. This will help enforce the appropriate policies to manage and control the release of pollutants that is appropriate in cooperation with every sector that contributes to sustainable development activities in the future.¹

Advantages of Reporting and Disclosing Pollution Information

1. Government Sector

The state agency can use the pollution information in estimating the rate of risks that will occur and the effect on people, animals and the surrounding environment in case of an accident or emergency, such as an explosion or a factory leaking hazardous chemicals which cause contamination in the environment.² Apart from this, reporting and disclosing pollution information has benefits for state agencies when monitoring the situation and progress in the release of substances or contaminants that exceed the standard. This will lead to reducing the amount of pollutants to within a safe threshold.³

2. Industrial Sector

Reporting and disclosing pollution information provides an opportunity for the factory operator to demonstrate his sincerity,

¹ Journal of Environmental Management, “PRTR: Measures of Management and Control Pollution Problems”, <file:///C:/Users/sony/Downloads/26420-58327-1-SM.pdf> (last visited Apr 17, 2016).

² Developing Team of Manual of PRTR Assessment for Chemical and Petrochemical Industrial in Thailand, “Manual of PRTR Assessment for Chemical and Petrochemical Industrial in Thailand”, <http://www2.diw.go.th/env/admin/Chem-Petrochem.pdf> (last visited Apr 14, 2016)).

³ Project Development in the legal of reporting and disclosing the pollution information to the public, “Advantages of reporting PRTR”, <http://www.learnprtr.net/index.php?lay=show&ac=article&Id=539649252&Ntype=9> (last visited Apr 14, 2016).

responsible nature and to reassure the public and society.⁴ This is a way for the factory operator to acquire good standing in society. It also makes it possible for industry to coexist with the community peacefully. It also allows the factory operator to become aware of the chemicals used in their business operations. They will be able to ensure they are used according to required standards and not negatively affecting the environment through the contamination with pollutants in quantities that exceed the threshold. It is also a way of enhancing the standard of care and good business operation.⁵

3. Private Sector

Reporting and disclosing pollution information makes the public aware of the significance of released pollution around them and allows it to easily access information on pollutants and harmful chemicals that have been released into the environment.⁶ As a result, people who live close to the industrial factory areas will be able to carefully and adequately take control of protecting themselves in their daily lives.⁷ In the event of an incident or an emergency situation, these people will also be able to effectively and appropriately deal with the problem.

Reporting and Disclosing the Pollution Information under United States law

In 1986, the US Congress approved the U.S. Emergency Planning and Community Right-to-know Act (EPCRA). EPCRA is part of the Superfund Amendments and Reauthorization Act of 1986 (SARA), also known as SARA Title III. EPCRA has established requirements for the industrial sector to plan for emergencies, as well as ordering compliance with the Community Right-to-Know reporting and disclosing on pollutant emissions as required by the government. The Community Right-to-Know provision is aimed at protecting the public in the event of a release of dangerous substances. It is also aimed at encouraging and supporting increased public awareness and access to information such as information on the presence of chemicals in the communities, releases of chemicals and waste management activities involving chemicals. This provision provides the public with the fundamental "right-to-know" of information pertaining to hazardous substances that have been released into the environment by industrial factories.⁸

⁴ Developing Team of Manual of PRTR Assessment for Chemical and Petrochemical Industrial in Thailand, *supra* note 2.

⁵ Journal of Environmental Management, *supra* note 1.

⁶ *Id.*

⁷ PRTR, "Advantages of PRTR", http://prtr.pcd.go.th/inner_3.html (last visited Dec 13, 2015).

⁸ Sidney M. Wolf, **Pollution Law Handbook : A Guide to Federal Environmental Laws** (The United States of America, Quorum Books, 1988).

This Act is divided into 2 parts:⁹ emergency planning and notification, and community right to know.

1. Emergency planning and notification (Sections 301-304)

This law requires that the government and community who live around industrial factories prepare for emergency situations which may result from the release of chemical substances.

2. Community right to know (Sections 311-313)

Under this law, the public is given the right to access information about chemicals used and emissions that are released by factories with no intervention from the government.¹⁰

The industrial factories which release, use or produce chemical substances, known as pollution, into the natural environment during their business operations have a duty to report their annual emissions of chemicals according to type, presence and quantity of hazardous chemicals to the U.S. Environmental Protection Agency (U.S. EPA)¹¹ and the appropriate state or tribe by July 1st of each year.¹² When a report is created, the U.S. EPA will publish preliminary information in Toxics Release Inventory (TRI) form¹³ in late July. The TRI data will be analyzed and national reports will be prepared and published by December of each year. The TRI data at the state level is a function of that state, the state publishes data to the public through specific, already established sites. All states have individual systems for publishing TRI data which are only used in that state.¹⁴

However, there are the sanctions in case that the industrial factory does not comply with reporting requirements, as follows:¹⁵

⁹ อัทชา สงฆ์เจริญ, **สิทธิในการเข้าถึงข้อมูลสิ่งแวดล้อมในความครอบครองของเอกชน**, (วิทยานิพนธ์นิติศาสตรมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2557) (Atcha Songjaroen, **Right of Access to Environmental Information Held by Private Sector**, Master of Laws Thesis, Faculty of Laws Thammasat University, 2014).

¹⁰ *Id.*

¹¹ The Emergency Planning and Community Right-to-Know Act, Section 311 and 312.

¹² **Project Development in the legal of reporting and disclosing the pollution information to the public**, “Toxic Release Inventory : PRTR system in U.S.A”, <http://www.learnprtr.net/index.php?lay=show&ac= article&Id=539650144&Ntype=11> (last visited Jan 5, 2016).

¹³ The Emergency Planning and Community Right-to-Know Act, Section 313.

¹⁴ **Project Development in the legal of reporting and disclosing the pollution information to the public**, *supra* note 12.

¹⁵ *Id.*

I. Where an industrial factory does not comply with reporting requirements, civil and administrative penalties of \$10,000 to \$75,000 per violation or per day per violation will be applied.

II. Where an emergency release notification is knowingly and willfully not provided, there are criminal penalties up to \$50,000 or 5 years in prison.

III. If any person knowingly and willfully discloses information that is entitled to protection as a trade secret, there are penalties not more than \$20,000 and/or up to one year in prison.

Reporting and Disclosing the Pollution Information under Japanese law

The Environment Agency of Japan (presently the Ministry of the Environment) currently concerned about protecting against future environmental risk and emissions from chemical substances. This concern has caused the Environment Agency of Japan to enact the Act on Confirmation, etc. of Release Amounts of Specific Chemical Substances in the Environment and Promotion of Improvements to the Management Thereof or “PRTR System”.¹⁶

The Pollutant Release and Transfer Register (PRTR) aims to support reducing pollution from the release of chemical substances and preventing any obstacles to the preservation of the environment by taking measures to ensure that releases and transfers of pollution and chemical substances into the environment are reported and disclosed.¹⁷ PRTR is a scheme that requires the factory operator¹⁸ who release, use or produce chemical substances, known as pollution, into the natural environment during their business operations to have a duty to manage and report the amounts of the hazardous chemical substances which are released into the air, water or soil¹⁹ and transfer²⁰ to their regional or municipal governmental

¹⁶ Ministry of the Environment Government of Japan, “**Background to Japanese PRTR**”, [https:// www env.go.jp/ en/chemi/prtr/about/index.html](https://www.env.go.jp/en/chemi/prtr/about/index.html) (last visited Dec 7, 2015).

¹⁷ Ministry of the Environment Government of Japan, “**Overview of the PRTR system**”, [https://www.env.go.jp/ en/chemi/prtr/about/overview.html](https://www.env.go.jp/en/chemi/prtr/about/overview.html) (last visited Dec 1, 2015).

¹⁸ Ministry of Economic, Trade, and Industry, “**Outline of the PRTR system**”, [http://www.meti.go.jp/policy/chemical management/english/files/PRTRsystem.pdf](http://www.meti.go.jp/policy/english/files/PRTRsystem.pdf) (last visited Dec 1, 2015).

¹⁹ “**Release**” means the emission into the environment (e.g. air, water, soil, and landfill).

²⁰ “**Transfer**” means the disposal as sewage or waste.

authorities.²¹ The factory operator shall submit a PRTR notification from April 1st to June 30th every fiscal year.²²

When the factory operator reports in a PRTR notification, the Ministry of the Environment and the Ministry of Economy, Trade and Industry will work together in collecting and sorting the reported information. This information will then be released as a public announcement. The PRTR notification, which is information regarding pollution, is also disclosed on the PRTR website which is looked after by the National Institute of Technology and Evaluation (NITE),²³ the Ministry of the Environment website (<http://www2.env.go.jp/chemi/prtr/prtrinfo/e-index.html>), and the Ministry of Economy, Trade and Industry website (http://www.meti.go.jp/policy/chemical_management/law/prtr/6.html).²⁴

However, in case that the industrial factories fail to give a notification, have given a false notification, have failed to make a report, or have made a false report, they will be liable for the payment of a fine not more than 200,000 yen.²⁵

Reporting and Disclosing the Pollution Information under Thai law

The Factory Act B.E. 2535 (1992) is to control the industrial operations regarding pollution emissions, contamination and disposal of waste by industrial factories. The main objective is to minimize the environmental impacts of factory waste and emissions.²⁶

According to the Factory Act Section 8 (7) of Factory Act B.E. 2535 (1992)²⁷ and Ministerial Regulation No. 3 B.E. 2535 (1992) issued

²¹ Environment Economic and Policy Studies, *“First inventory of pollutant release and transfer register in Japan”*, <http://link.springer.com/article/10.1007%2FBF03353931#page-2> (last visited May 21, 2016).

²² *Id.*

²³ ChemSafetyPro, *“PRTR Law in Japan”*, http://www.chemsafetypro.com/Topics/Japan/Japan_PRTR_Law.html (last visited Dec 6, 2015).

²⁴ **Project Development in the legal of reporting and disclosing the pollution information to the public, “PRTR system in Japan”**, <http://www.learnprtr.net/index.php?lay=show&ac=article&Id=539650355&Ntype=18> (last visited May 21, 2016).

²⁵ Act on Confirmation, etc. of Release Amounts of Specific Chemical Substances in the Environment and Promotion of Improvements to the Management Thereof, Article 24.

²⁶ วรากรณ์ जानโอ, ปัญหามาตรการทางกฎหมายเกี่ยวกับมลพิษทางดินจากภาคอุตสาหกรรม (วิทยานิพนธ์นิติศาสตรมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2554) (Waraporn Janoh, **Problems on Legal Measure relating to Soil Pollution arising from Industrial Sector**, Master of Laws Thesis, Faculty of Laws Thammasat University, 2011).

²⁷ Factory Act B.E. 2535 (1992), Section 8.

pursuant to the Factory Act B.E. 2535 (1992), the industrial factory that adversely impacts the environment shall keep a record on inspection of efficiency of pollution control system, analysis of pollutants in pollution control system, and environmental quality examination and report such information in accordance with the form and method prescribed²⁸ by the Notification of Ministry of Industry regarding preparation of type and quantity of pollutants discharged from a factory B.E. 2558 (2015). This notification provides that the industrial factories²⁹ have a duty to report on the type and amount of pollutants emissions into the water and air.³⁰ The report does not specify the reporting of emissions into the ground or other channels that emissions can take at all. The industrial factories are required to submit the report according to the specifications made by the Department of Industrial Works as follows:³¹

- I. RoWo 1 Form (when reporting information on water pollution and air pollution)³²
 - II. RoWo 2 Form (when reporting information on water pollution)³³
 - II. RoWo 3 Form (when reporting information on air pollution)³⁴
- Industrial factories are required to submit a report to the Department of Industrial Works via an electronic system, as per the following:

I. First round: The report covering pollution information from January to June must be submitted by 1st September of the year that the report is made.

II. Second round: The report covering pollution information from July to December must be submitted by 1st March of the next year.³⁵

²⁸ Ministerial Regulation No. 3 B.E. 2535 (1992) issued pursuant to the Factory Act B.E.2535 (1992), Clause 1 and Clause 4.

²⁹ Notification of Ministry of Industry regarding preparation of type and quantity of pollutants discharged from a factory B.E. 2558 (2015), Article 5.

³⁰ Notification of Ministry of Industry regarding preparation of type and quantity of pollutants discharged from a factory B.E. 2558 (2015), Article 4.

³¹ Notification of Department of Industrial Works Subject: Type or category of factory required to prepare a report of type and quantity of pollutants discharged from a factory B.E. 2559 (2016), Article 4.

³² Department of Industrial Works, “*Manual of using type and quality of pollutants discharged from the industrial factory (RoWo.1, RoWo.2, RoWo.3, RoWo.3/1 for the factory operator)*”, <http://hawk.diw.go.th/eis/manual-user.pdf> (last visited May 6, 2016)).

³³ *Id.*

³⁴ *Id.*

³⁵ Notification of Ministry of Industry regarding preparation of type and quantity of pollutants discharged from a factory B.E. 2558 (2015), Article 13.2

About the sanction, if any person violates or fails to comply with the measures stated under the ministerial regulations to inform the government from time to time or within a specific period of information relating to the operations in the industrial factory sector, the punishment shall be subject to a fine not exceeding 20,000 Baht.³⁶

However, in case of the soil pollution, the Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016) requires the factory operator³⁷ to monitor and report only the soil and groundwater contaminated within the industrial factory's area.³⁸ to the Department of Industrial Works within the timeline, as follows:.

1. If the industrial factory was established after the date that the Ministerial Regulation came into force³⁹

The factory operator must monitor the quality of soil and groundwater as well as writing a report about the condition of the soil and groundwater. The report shall be kept in the factory and shall be ready to be checked by the Department of Industry Works before starting operation.

The factory operator must monitor the quality of soil and groundwater for a second time after 180 days after the operation date has passed. Also, the factory operator must report on the results of this check to the Department of Industry Works or the Office of Local Industry where the factory is located within 120 days since the 180 days has passed. Also, the factory operator must submit the report in accordance with paragraph 1 to the Department of Industry Works or the Office of Local Industry where the factory is located as well.

1. If the factory was established before the date that the Ministerial Regulation came into force⁴⁰

The factory operator must monitor the quality of soil and groundwater within 180 days after the Ministerial Regulation has come into force and the factory operator must publish the results of his checks and submit it to the Department of Industry Works or the Office of Local Industry where the factory is located within 180 days from the first 180 days that passed.

The factory operator must monitor quality of soil and groundwater for the second time 180 days after the factory operator monitors them in accordance with paragraph 1. The report shall be submitted to the Department of Industry Works or the Office of Local Industry where the

³⁶ Factory Act B.E. 2535 (1992), Section 46.

³⁷ Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016), Article 2.

³⁸ Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016), Article 2.

³⁹ Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016), Article 4.

⁴⁰ Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016), Article 5.

factory is located within 120 days from 180 days since the second monitoring passed.

2. If the period of time under I. and II has passed⁴¹

The factory operator must monitor the quality of the soil every 3 years and must monitor the groundwater every year. Also, the factory operator must write and submit the report to the Department of Industry Works or the Office of Local Industry where the factory is located within 120 days since the date that the factory operator monitored the soil or groundwater.

Monitoring to determine whether the soil and groundwater qualifies has to be done by private laboratories that are registered with the Department of Industry Works or private laboratories that it approves.⁴²

However, if the contamination of the soil or groundwater exceeds the standard, the industrial factory must publish a report that shows the solution and the measures to control and decrease the contamination so that it does not exceed the standard. The report shall be submitted to the Department of Industrial Works or the Office of Local Industry where the factory is located within 180 days from when it found the contamination to be above the standard. Moreover, the industrial factory must state in the report about the timeframe that the industrial factory can control the level of contamination.⁴³ Moreover, if any person violates or fails to comply with the measures stated under the ministerial regulations to inform the government from time to time or within a specific period of information relating to the operations in the industrial factory sector, the punishment shall be subject to a fine not exceeding 20,000 Baht according to Section 46 of Factory Act B.E. 2535 (1992).⁴⁴

In case the disclosure the pollution information to the public, there is only the Official Information Act B.E. 2540 (1997) assigned public authorities the responsibility to disclose information to the public with details. However, the information which is disclosed must be in the possession or control of a state agency, whether it is information on the operations of the state or information regarding the private sector.⁴⁵ It does not include the information in the possession or control of the industrial factory which is the private sector.

⁴¹ Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016), Article 6.

⁴² Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016), Article 7.

⁴³ Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016), Article 10.

⁴⁴ Factory Act B.E. 2535 (1992), Section 46.

⁴⁵ Official Information Act B.E. 2540 (1997), Section 4.

Conclusion and Recommendations

Relating to the duty to report pollution information come under the Factory Act B.E. 2535 (1992), this study found that the existing law does not sufficiently allow for prevention and resolution of problems due to the release and transfer of pollution. Factory Act B.E. 2535 (1992) only enforces the reporting of pollutants that are released into the air and water. In the case of the reporting of pollutants that are released into the soil, the Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016) stipulates only that industrial factories must report information of soil and groundwater contamination within the factory area, not covering outside factory area. Moreover, at present, the Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016) does not require a specific format and forms for the verified reporting on the quality of soil and groundwater contamination, and neither does it have a specific method of monitoring the quality of soil and groundwater nor a standard of the quantity needed to verify the quality of soil and groundwater contamination. Moreover, this regulation only lists 12 types of industrial factory which have a duty to provide a quality monitoring process and report on the soil and groundwater contamination to the Department of Industrial Works. However, in the present, many types of the industrial factory are causes or risk factors to be the soil pollution or the soil or groundwater contamination. Thus, there are more types of industrial factory which should have a duty to do this.

Furthermore, existing Thai laws do not hand out heavy enough punishments to force industrial factories to report their pollution information to the government or related authorities. These inadequate punishments may result in the factory operator neglecting or avoiding to report pollution information because they may feel that the reporting does not benefit their own operation activities and may even led to extra unnecessary costs.

Additionally, there are no laws under the Factory Act B.E. 2535 (1992) which force the government or related authorities to disclose pollution information to the public. There is only the Official Information Act B.E. 2540 (1997) requiring that the government agencies disclose information to the public for acknowledgement. However, disclosing or accessing such information is limited to information that is in the possession of the government agencies or state enterprises. It does not include information that is in the possession of the factories which is the private sector. This means that the public may not have the opportunity to find out about or access this valuable information which is necessary for the many people who live near industrial factories to know, especially when an accident occurs. This is a big problem because they will therefore not be able to protect the community, manage the pollution risks or find methods to solve to problem.

Therefore, the author shall suggest some recommendations to solve these problems, as follows:

1. To amend the Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016) which is the subordinate legislation of Factory Act B.E. 2535 (1992) to forces the industrial factory to report pollution information that occurs within the factory area, and covering outside factory area. Moreover, a new Notification under the Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016) should be enacted to limit the distance outside the factory area to report the soil and groundwater contamination because, if it does not have the limitation, it will be the exceeding cost for the industrial factory to do the report and the industrial factory may be avoid reporting such information.

2. To enact a new Notification under the Ministerial Regulation on Soil and Groundwater Contamination within Factory B.E. 2559 (2016) that specifies the format and forms for the verified report on the quality of soil and groundwater contamination, define the method of monitoring the quality of soil and groundwater, and define the standard of the quantity to verify the quality of the soil and groundwater contamination.

3. To amend Section 46 of Factory Act B.E. 2535 (1992) to enforce heavier punishments for the industrial factories who fail to accurately report their pollution information to the Department of Industry Works. A fine not exceeding 20,000 Baht may be inadequate punishment to force the factory operator to report his pollution information because the factory operator may feel that the reporting does not benefit his own operating activities and may even led to extra unnecessary costs. The factory operator may neglect or avoid to report the pollution information. A heavier punishment may include imprisonment (criminal penalty), a temporary suspension of operations or even revoking the license to operate the plants that have repeatedly ignored warnings to report and disclose the required information.

4. To enact a new subsection of Section 8 of Factory Act B.E. 2535 (1992) to directly force industrial factories in the private sector to disclose their pollution information to the public or give the public the right to access the environmental information and pollution information of the industrial factory without intervention from the government. This is necessary because the existing laws under the Factory Act B.E. 2535 (1992) only force industrial factories to report pollution information to the Department of Industry Works, and the Official Information Act B.E. 2540 (1997) requires that the government agencies disclose information in the possession of the government agency or state enterprises for public knowledge. The problem to be overcome is that this does not include information that is in the possession of factories in the private sector. However, it should enact a new Ministerial Regulation under the Factory Act B.E. 2535 (1992) to determine the disclosure method to the public.

THE IMPACT OF THE AMENDMENT TO THE PRINCIPLE OF SURETYSHIP UNDER THE CIVIL AND COMMERCIAL CODE AMENDMENT ACT, (NO.20 AND NO.21), ON THE SECURITY FORMS UNDER THE CONSTRUCTION CONTRACT FOR LARGE PROJECT¹

Pakorn Sirinanthanon²

Abstract

A guarantee, which is given by any third party, is one of the important securities required under a construction contract for large projects. Throughout the terms of construction contract, the contractor has many duties, responsibilities and obligations which are executed in accordance with the terms and conditions thereunder. Significant duties of the contractor are (i) the duty to complete the construction work within the schedule, which can be divided into sub schedules, called milestones, and (ii) the duty to achieve all guaranteed figures of the construction work. If the contractor fails to make the construction work in accordance with their duties, the owner shall be entitled to claim the damages from the contractor. In order to ensure that the contractor has capability to pay the damages to the owner, the owner shall require an additional security from the contractor and it is most likely a third party guarantee is one.

There are many types of third-party guarantee which are used in the construction business in Thailand, for instance, a performance guarantee, a retention money guarantee, and an advance payment guarantee, but most of these third-party guarantees, which are used, are subject to the law of suretyship under Thai Civil and Commercial Code (“CCC”). The amendment to significant principles of the law of suretyship in 2014 and 2015 introduced (i) additional duties, for instance, duty to notify the guarantor when the contractor has defaulted or the contractor and the owner have an agreement concerning the reduction of the secured amount, and (ii) the prohibition against an agreement that the guarantor binds himself as primary obligor or grants an advance consent on the time extension, although exceptions thereof were added by the latter amendment.

This research studied (i) the suitability of the third-party guarantee, which is governed by the amendments to the principle of suretyship under

¹ This article is summarized and rearranged from the thesis “The Impact of the Amendment to the Principle of Suretyship under the Civil and Commercial Code Amendment Act, (No.20 and No.21), on the Security Forms under the Construction Contract for Large Project,” the requirements for the degree of Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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the CCC, to be an additional security under the construction contract for large projects and (ii) the possibility of using the guarantees from the third party under international laws or practices, namely a standby letter of credit in accordance with International Standby Practices (“ISP98”) and an independent guarantee and a stand-by letter of credit (“Undertaking”) in accordance with United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (“Convention”), in lieu of this third party guarantee by comparing the advantages and disadvantages on issues of third-party guarantees.

From the study, it is found that the additional duty of the owner, as a creditor to the construction contract, to notify the guarantor is dissimilar from international laws and practices that the construction contract for large projects mostly has to comply with. Hence, if the third-party guarantee was used in the construction contract, as suretyship, related parties have to educate himself and understand this amended principle to practice accordingly. The research also explored whether the additional duties and prohibitions under the amended principle of suretyship can be relieved by the use of a standby letter of credit covered by the ISP 98 and an independent guarantee and a stand-by letter of credit covered by the Convention, but, either of them also has an issue concerning the application mechanism under Thai Law. If parties to the construction contract wish to use these international laws and practices, such parties have to take this issue into consideration, and apply international laws and practices, whether the ISP 98 or the Convention which is fitted for their fact and situation.

Keywords: Guarantee, Suretyship, Amended Principle of Suretyship, Standby Letter of Credit, Independent Guarantee, ISP 98, United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, Construction Contract, Large Projects

บทคัดย่อ

การรับประกันโดยบุคคลภายนอกเป็นหลักประกันประเภทหนึ่งซึ่งมักถูกนำมาใช้ควบคู่กับสัญญาก่อสร้างโครงการขนาดใหญ่ ภายใต้การก่อสร้างโครงการขนาดใหญ่ผู้รับจ้างมีหน้าที่ และความรับผิดชอบหลากหลายประการ และหนึ่งในหน้าที่ที่สำคัญของผู้รับจ้างคือ หน้าที่ในการก่อสร้างสิ่งปลูกสร้างให้แล้วเสร็จสมบูรณ์ ทั้งในด้านเวลาซึ่งผู้รับจ้างจะต้องก่อสร้างสิ่งปลูกสร้างให้แล้วเสร็จภายในระยะเวลาที่กำหนด และในด้านคุณภาพซึ่งสิ่งปลูกสร้างนั้นจะต้องมีคุณภาพ, คุณสมบัติ และเป็นไปตามข้อกำหนดต่างๆ ตามที่ระบุไว้ในสัญญา ในกรณีที่ผู้รับจ้างไม่สามารถดำเนินการก่อสร้างสิ่งปลูกสร้างให้แล้วเสร็จสมบูรณ์ตามที่ระบุไว้ในสัญญา ผู้ว่าจ้างย่อมมีสิทธิเรียกหรือค่าเสียหายที่เกิดขึ้นจากผู้รับจ้าง ทั้งนี้ เพื่อให้การรับประกันแก่ผู้ว่าจ้างว่า เมื่อผู้ว่าจ้างเรียกหรือค่าเสียหาย ผู้รับจ้างจะสามารถชำระค่าเสียหายที่เกิดขึ้นดังกล่าวแก่ผู้ว่าจ้างได้ ผู้ว่าจ้างจะเรียกหรือให้ผู้รับจ้างส่งมอบหลักประกันการชำระหนี้ให้แก่ตน ซึ่งการรับประกันโดยบุคคลภายนอกก็เป็นรูปแบบหนึ่งของหลักประกันดังกล่าว

การรับประกันโดยบุคคลภายนอกซึ่งใช้ในธุรกิจก่อสร้างมีหลายประเภท เช่น หลักประกันสัญญา (Performance Guarantee), หลักประกันการรับเงินค่าจ้างล่วงหน้า (Advance Payment Guarantee) และหลักประกันการรับเงินประกันผลงาน (Retention Money Guarantee) เป็นต้น

เนื่องจากการรับประกันโดยบุคคลภายนอกอยู่ภายใต้หลักกฎหมายค้ำประกันแห่งประมวลกฎหมายแพ่งและพาณิชย์ ดังนั้นการแก้ไขเพิ่มเติมหลักกฎหมายดังกล่าวย่อมส่งผลกระทบต่อหลักการรับประกันโดยบุคคลภายนอก วิทยานิพนธ์ฉบับนี้ศึกษาเกี่ยวกับประเด็นดังต่อไปนี้ (1) ความเหมาะสมของการใช้การรับประกันโดยบุคคลภายนอกภายใต้หลักกฎหมายค้ำประกันที่มีการแก้ไขเพิ่มเติมเป็นหลักประกันภายใต้สัญญาก่อสร้างโครงการขนาดใหญ่ และ (2) ความเป็นไปได้ในการใช้การรับประกันโดยบุคคลภายนอกภายใต้หลักกฎหมายระหว่างประเทศหรือธรรมเนียมการค้าระหว่างประเทศหลักประกัน ซึ่งได้แก่ สแตนด์บายเลตเตอร์ออฟเครดิต ภายใต้กฎเกณฑ์ International Standby Practices (ISP 98) และอินดิเพนเดนทการันตีและสแตนด์บายเลตเตอร์ออฟเครดิต ภายใต้อนุสัญญาสหประชาชาติว่าด้วยอินดิเพนเดนทการันตีและสแตนด์บายเลตเตอร์ออฟเครดิต (United Nation Convention on Independent Guarantees and Stand-by Letters of Credit)

แทนที่การใช้การรับประกันโดยบุคคลภายนอกภายใต้หลักกฎหมายค้ำประกันที่มีการแก้ไขเพิ่มเติม โดยการเปรียบเทียบข้อดีและข้อด้อยในแต่ละประเด็นของการรับประกัน โดยบุคคลภายนอกภายใต้หลักกฎหมายต่าง ๆ

จากการศึกษาพบว่าหลักกฎหมายค้ำประกันที่มีการแก้ไขเพิ่มเติม นั้น ได้เพิ่มเติมหน้าที่ให้แก่เจ้าหนี้ (ซึ่งภายใต้สัญญาก่อสร้างคือผู้ว่าจ้าง) ในกรณีที่ลูกหนี้ (ซึ่งภายใต้สัญญาก่อสร้างคือผู้รับจ้าง) ผิดนัดภายใต้สัญญาก่อสร้าง หรือในกรณีที่ผู้ว่าจ้างและผู้รับจ้างตกลงกันลดจำนวนหนี้ที่มีการรับประกันลด โดยให้แจ้งไปยังผู้รับประกันภายใน 60 วันนับแต่วันที่ผู้รับจ้างผิดนัดหรือวันที่คู่สัญญาทั้งสองฝ่ายตกลงร่วมกัน แล้วแต่กรณี ซึ่งหน้าที่ในลักษณะดังกล่าวไม่ได้ถูกกำหนดไว้ภายใต้หลักกฎหมายระหว่างประเทศหรือธรรมเนียมการค้าระหว่างประเทศเกี่ยวกับการรับประกันโดยบุคคลภายนอก ดังนั้นถ้าคู่สัญญาภายใต้สัญญาก่อสร้างโครงการขนาดใหญ่ตกลงที่จะนำการรับประกันโดยบุคคลภายนอกภายใต้หลักกฎหมายค้ำประกันที่มีการแก้ไขเพิ่มเติมมาใช้แก่สัญญาก่อสร้างดังกล่าวแล้ว หากคู่สัญญาฝ่ายใดฝ่ายหนึ่งหรือทั้งสองฝ่ายยื่นข้อโต้แย้งการใช้การรับประกันโดยบุคคลภายนอกภายใต้หลักกฎหมายระหว่างประเทศหรือธรรมเนียมการค้าระหว่างประเทศ คู่สัญญานั้นจะต้องศึกษาหลักกฎหมายค้ำประกันที่มีการแก้ไขเพิ่มเติมโดยละเอียดเพื่อหลีกเลี่ยงการปฏิบัติที่ไม่สอดคล้องกับหลักกฎหมายดังกล่าวอันจะทำให้สูญเสียสิทธิที่พึงได้รับ

ยิ่งไปกว่านั้นจากการศึกษาพบว่าผลกระทบที่สำคัญต่างๆ ต่อการรับประกันโดยบุคคลภายนอกอันเกิดจากการแก้ไขเพิ่มเติมหลักกฎหมายค้ำประกันนั้น สามารถลดลงได้ด้วยการใช้ สแตนด์บายเลตเตอร์ออฟเครดิต ภายใต้กฎเกณฑ์ไอเอสพี 98 และอินดิเพนเดนทการันตีและสแตนด์บายเลตเตอร์ออฟเครดิต ภายใต้อนุสัญญาสหประชาชาติว่าด้วยอินดิเพนเดนทการันตีและสแตนด์บายเลตเตอร์ออฟเครดิต อย่างไรก็ตามการนำหลักกฎหมายระหว่างประเทศหรือธรรมเนียมการค้าระหว่างประเทศดังกล่าวมาใช้ ก่อให้เกิดประเด็นเกี่ยวกับการบังคับใช้หลักกฎหมายดังกล่าวภายใต้หลักกฎหมายไทย ดังนั้นถ้าคู่สัญญาแห่งสัญญาก่อสร้างโครงการขนาดใหญ่ต้องการนำหลักกฎหมายระหว่างประเทศหรือธรรมเนียมการค้าระหว่างประเทศเกี่ยวกับการรับประกันโดยบุคคลภายนอกมาใช้แล้ว ภายใต้หลักกฎหมายไทยแล้ว ประเด็นเกี่ยวกับการบังคับใช้ดังกล่าวเป็นประเด็นที่คู่สัญญานั้นจะต้องนำมาพิจารณาต่อไป และเลือกใช้หลักกฎหมายระหว่างประเทศหรือธรรมเนียมการค้าระหว่างประเทศเกี่ยวกับการรับประกันโดยบุคคลภายนอกที่เหมาะสมกับข้อเท็จจริงเป็นกรณี ๆ ไป

คำสำคัญ: หลักประกัน, การค้ำประกัน, การแก้ไขเพิ่มเติมกฎหมายว่าด้วยการค้ำประกัน, สแตนด์บายเลตเตอร์ออฟเครดิต, อินดิเพนเดนทการันตี, ไอเอสพี 98, อนุสัญญาสหประชาชาติว่าด้วยอินดิเพนเดนทการันตีและ สแตนด์บายเลตเตอร์ออฟเครดิต, สัญญาก่อสร้าง, โครงการขนาดใหญ่

1. Introduction

One of the significant obligations of the Contractor is an obligation to guarantee. Under the construction contract for large project,

many kinds of guarantee were given by the Contractor to the Owner, for instance, (i) the completion guarantee wherein the Contractor guarantees that a construction work will be completed within the agreed timeline, or (ii) the performance guarantee wherein the Contractor guarantees that the completed construction work will be achieved or will meet any and all guarantee figures. In the event that any guarantee is not achieved for reason attributable to the Contractor, the Owner shall be entitled to demand the Contractor to pay the damages. Additionally, in order to ensure that the Owner will receive such damages, a guarantee from any third party ("Third Party Guarantee"), as additional security, shall be required by the Owner from the Contractor. Since there is no specific law concerning Third Party Guarantees in Thailand, the principle of law which is used to govern or interpret the Third Party Guarantee should be the principle of suretyship under Thai Civil and Commercial Code ("CCC").

In B.E. 2557 and B.E. 2558, the principle of suretyship under the CCC was amended. The amendment to the principle of suretyship introduced (i) additional duties, and (ii) prohibitions.

This research studied (i) the suitability of the Third Party Guarantee, which is governed by the amendments to the principle of suretyship under the CCC, to be an additional security under the construction contract for large projects and (ii) the possibility of using the guarantees from any third party under international laws or practices, in lieu of the Third Party Guarantee governed by the amended principles of suretyship by comparing the advantages and disadvantages on key issues of the Third Party Guarantee.

From the study, the significant impacts of the use of the amended principles of suretyship on the Third Party Guarantees under the construction contract for large projects are identified, together with the advantages and disadvantages among the standby letter of credit in accordance with International Standby Practices ("ISP98"), the independent guarantee and stand-by letter of credit ("Undertaking") in accordance with United Nations Convention on Independent Guarantees and Stand-by Letters of Credit ("Convention") and the Third Party Guarantee which is governed by the amended principles of suretyship.

2. The third party guarantee under the construction contract for large projects

Under the construction contract for large projects, if the Contractor breaches any of his obligations, the Contractor shall be liable for any and all damages occurred to the Owner. To ensure that the Owner will receive such damages whether the actual damages or the liquidated damages, an additional security from the Contractor may be requested by the Owner. One of the widely used additional securities in the construction business is the Third Party Guarantee.

The Third Party Guarantees were used as an additional security for various purposes.³ Many international construction contract forms, for instance, the FIDIC® Conditions of Contract for Construction for Building and Engineering Works designed by the Employer (“FIDIC Red Book”), and the FIDIC® Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant, and for Building and Engineering Works designed by the Contractor (“FIDIC Yellow Book”) have the provisions related to the use of the Third Party Guarantee.

2.1 Types of the Third Party Guarantee under the Construction Contract

The Third Party Guarantees, which are usually used under the construction contract for large projects, can be summarized as follows:⁴

Performance Guarantee

The purpose of a Performance Guarantee is to secure that the Contractor shall duly and timely perform his obligations under the construction contract.⁵

Advance Payment Guarantee

The purpose of a Performance Guarantee is to protect the Owner from the risk of non-repayment of the advance payment which the Contractor requests from the Owner to assist Contractor’s cash flow at the initial stage of a construction project.⁶

Retention Money Guarantee

Under some construction contract for large projects, the Owner shall be entitled to retain a fixed percentage from any progress payment made as per the execution of the construction work by the Contractor. The money retained is called “Retention Money”. The purposes of Retention Money are to provide another additional security, in the form of a fund, against the Contractor’s failure to complete any construction work in accordance with the terms of the construction contract and to remedy any defects or damages and problems in respect of any other liabilities of the Contractor to the Owner.⁷ Although the Contractor agrees with the Owner about the Retention Money, many Contractors propose to provide the Retention Money Guarantee to the Owner instead of the Retention Money itself, in order to protect the Contractor’s cash flow.

Parent Company Guarantee

³ Ellos Baker, Ben Mellors, Scott Chalmers and Anthony Lavers, **FIDIC Contracts: Law and Practice**, (London: Informa, 2009), 379-381.

⁴ Joseph A. Huse, **Understanding and Negotiating Turnkey and EPC Contracts**, 2nd Edition (London: Sweet&Maxwell, 2002), 64.

⁵ Ellos Baker and others, *Supra* note 1, at 389.

⁶ The Office of Prime Minister, “Letter Number NorRor (KorWorPor) 1202/Vor 112 Examples of Bid Documents for Sale and Service Contracts, Letter of Guarantee, Material Accounts and Equipment Lists,” 1 April B.E. 2535, 4-49.

⁷ Ellos Baker and others, *Supra* note 1, at 393.

In the event that the Contractor is a subsidiary or affiliate of another larger company, a group of companies, a joint venture or a consortium, the Owner may require the Contractor to provide a Parent Company Guarantee. In the Parent Company Guarantee, the Contractor's parent company, including the Contractor's shareholder or ultimate holding company, guarantees the due performance of all of the Contractor's obligations under the construction contract and agrees to indemnify the Owner in the case of the Contractor's non-performance.⁸

2.2 Principles of Guarantee under the Construction Contract

There are various forms of the Third Party Guarantees under the construction contract for large projects, each form is used for specified propose. However, the principle of each form is not different. The followings are the brief summary of the key co-principles of the Third Party Guarantee under the construction contract.

Parties to the Third Party Guarantee

The parties to the Third Party Guarantee shall consist of a guarantor, a principal and a beneficiary. The guarantor is the person who agrees to guarantee to pay to the Owner, as a beneficiary, if the Contractor, as a principal, fails to perform his obligation and to act in accordance with the construction contract.⁹

The Statue of Guarantor

The guarantor under many forms of the Third Party Guarantee, for instance, letter of guarantee (Performance Security)¹⁰ and Parent Company Guarantee¹¹ agree to be jointly liable with the Contractor as the primary obligor.

Payment Condition

The guarantor to the Third Party Guarantee agrees unconditionally to guarantee to pay to the Owner on their first demand or after the receipt of a written request from the Owner.¹²

Extension of Time

The guarantor agrees to give the advance consent to grant a time extension of the guarantee to the Owner.¹³

3. The amendment of suretyship and the impact to the third party guarantee under the construction contract for large projects

Because Thailand does not have specific law concerning Third Party Guarantee or independent guarantee, the closest principle that can be applicable is the principle of suretyship under the CCC.

⁸ Ellos Baker and others, *Supra* note 1, at 393.

⁹ The Office of Prime Minister, *Supra* note 4, at 4-47 – 4-51.

¹⁰ The Office of Prime Minister, *Supra* note 4, at 4-47.

¹¹ FIDIC, **FIDIC® Condition of Contract for Construction**, 1st Edition (Switzerland: FIDIC, 1999), 23.

¹² The Office of Prime Minister, *Supra* note 4, at 4-47 – 4-51.

¹³ The Office of Prime Minister, *Supra* note 4, at 4-47 – 4-51.

3.1 The Amendments to the Principle of Suretyship

The principle of suretyship under the CCC is one of the principles that had not been amended since Book 3 of the CCC was firstly promulgated in B.E. 2471. However, in B.E. 2557, the first amendment to the principle of suretyship was introduced by the Civil and Commercial Code Amendment Act, (No.20), B.E. 2557 (“CCC Amendment No.20”) which was announced in the Royal Gazette on 13 November B.E. 2557 and became effective on 11 February B.E. 2558. Consequently, the Civil and Commercial Code Amendment Act, (No.21), B.E. 2558 (“CCC Amendment No.21”) was proclaimed in the Royal Gazette on 14 July B.E. 2558 and became effective on 15 July B.E. 2558. The followings are the brief summary of the amended principle of suretyship under the CCC.

(1) As most of the creditors generally request the surety to be jointly liable with the debtor.¹⁴ In order to protect the surety from such agreement, the CCC Amendment No.20 prohibits an agreement which the surety agrees to be jointly liable with the debtor.¹⁵ However, the exception thereof was added by the CCC Amendment No.21. Therefore, to the extent that the surety is the juristic person, even the provision of the amended principle of suretyship which specified that the surety agree to be jointly liable with the debtor is void, such provision shall be enforceable.¹⁶

(2) Under the ordinary principle of suretyship, the creditor shall be entitled to claim against the surety whenever the debtor is in default.¹⁷ In practice, some creditors intend not to notify the surety and execute their right to claim against the surety. This will cause the interest, compensation, or charge (if any) to grow.¹⁸ Hence, in order to protect the surety from this unfair practice of the creditor, the CCC Amendment No.20 and No.21 added the mechanism concerning the notification by the creditor in such event.

In the event that the debtor is in default, the creditor shall notify such default to the surety within sixty days from the default date. Before such notification has been received by the surety, the creditor shall not be entitled to claim against the surety.¹⁹ If the creditor fails to notify the surety within sixty days from the default date, the surety shall be released from an

¹⁴ Suda Visrutpich. “*Explanation of Laws of Suretyship and Mortgage Amended by the Civil and Commercial Code Amendment Act, No. 20, B.E. 2557*” **Memory Book of Khun Chumpol Juntratip** (December 19, 2014): 285-286.

¹⁵ Section 681/1 of the CCC that was amended by the CCC amendment No.20.

¹⁶ Section 681/1 paragraph 1 and 2 of the CCC that was amended by the CCC Amendment No.20 and the CCC Amendment No.21.

¹⁷ Section 686 of the CCC.

¹⁸ Suda Visrutpich, *Supra* note 12, at 292-293.

¹⁹ Section 686 paragraph 1 of the CCC that was amended by the CCC Amendment No.20.

interest, any compensations, or charges which are occurred after such period of time.²⁰

(3) The underlying transaction and the suretyship are separate transactions. Therefore, if the creditor agrees to reduce a secured amount under the underlying transaction to the debtor, and the creditor or the debtor does not inform the surety, the surety shall not be aware of such information.²¹ Hence, the surety, who is a secondary debtor, shall be liable to the creditor in the full amount of the secured obligation, while the debtor shall be liable to the creditor only in the reduced amount. In order to protect the surety from such unfair practice, the CCC Amendment No.20 and No.21 added the mechanism concerning the notification by the creditor to the surety in such event.²²

In the event that the creditor and the debtor have an agreement to reduce the secured amount, the creditor shall notify such agreement to the surety within sixty days from the date of agreement. If (i) the debtor pays the remained secured amount in whole, or (ii) the debtor pays the reduced secured amount in part and the surety has paid for the remaining, or (iii) the surety has paid the reduced secured amount in whole, the surety shall be discharged.²³

(4) Under the principle of suretyship, to the extent that the secured obligation is to be performed at a definite time, if the creditor grants a time extension of such obligation without the consent of the surety, the surety shall be discharged. However, the surety is allowed to give advance consent to the creditor. In practice, most of the creditors will require the surety to give advance consent on such extension of time by the creditor, which results in the extension of period of suretyship and the surety shall also be liable for any interest, compensation and charges, which are occurred during such extension period.²⁴ To protect the surety from such unfair practice, the CCC Amendment No. 20 prohibits the creditor from requesting advance consent on such extension of time.²⁵ However, the exception thereof was added by the CCC Amendment No.21. Therefore, if the surety is a financial institution or person who undertakes suretyship business for remuneration, such advance consent on time extension shall be enforceable.

²⁰ Section 686 paragraph 2 of the CCC that was amended by the CCC Amendment No.20.

²¹ Suda Visrutpich, *Supra* note 12, at 296-297.

²² Section 691 paragraph 1 of the CCC that was amended by the CCC Amendment No.21.

²³ *Id.*

²⁴ Suda Visrutpich, *Supra* note 12, at 298-299.

²⁵ Section 700 paragraph 2 to the CCC that was amended by the CCC Amendment No.20.

3.2 The Key Impacts of the Amended Principle of Suretyship to the Third Party Guarantees under the Construction Contract

As the significant principles of suretyship were amended, hence, the amendments of the principles of suretyship cause significant effects to the provisions of the Third Party Guarantee under the construction contract for large projects.

Joint Liability of Guarantor

The amended principle of suretyship prohibits the surety from agreeing to be jointly liable with the debtor as the primary obligor, unless the surety is a juristic person.²⁶ Most of the Third Party Guarantee forms under the construction contract are issued by financial institutions or juristic persons, which are not subject to this prohibition under the amended principle of suretyship. However, one of the Third Party Guarantee forms, which are the Parent Company Guarantee, may be affected. Only the event that Parent Company Guarantee is given by shareholders of the Contractor, if the shareholder is not a juristic person, such shareholder is then prohibited from being jointly liable with the Contractor. Thus, such shareholder, as guarantor, will have the following refusal rights: (i) the right to request the Owner to demand performance from the Contractor first,²⁷ (ii) the right to request the Owner to make an execution against the property of the Contractor first,²⁸ and (iii) the right to request the Owner to make an execution against the real security of the Contractor which the creditor has already held first.²⁹

Extension of Time

During the execution of the construction work, if the Contractor fails to complete any part thereof within the specified time, the Owner shall be entitled to claim liquidated damages, as specified in the construction contract. However, the Owner sometimes agrees to extend such specified time for the Contractor due to various reasons. The guarantor shall be discharged if the guarantor does not give the consent to grant such time extension to the Owner.³⁰ Thus, in order to ensure that the guarantor shall not be discharged, advance consent from the guarantor must be obtained. Under the amended principle of suretyship, an agreement that the guarantor has made in advance as regards his consent to the extension of time before the Owner grants a time extension to the Contractor is not enforceable,

²⁶ Section 681/1 paragraph 2 to the CCC that was amended by the CCC Amendment No.21.

²⁷ Section 688 of the CCC.

²⁸ Section 689 of the CCC.

²⁹ Section 690 of the CCC.

³⁰ Section 700 paragraph 1 of the CCC.

unless the guarantor is a financial institution or a person undertaking suretyship business for remuneration.³¹

Even though, most of the Third Party Guarantee forms under the construction contract are issued by financial institution, one of the Third Party Guarantee forms, which are the Parent Company Guarantee, shall be affected as a person who issues this Third Party Guarantee, is mostly not a financial institution or a person in suretyship business. Hence, to the extent that the Owner requires the Contractor to provide a Parent Company Guarantee, the Owner must request consent from the guarantor before granting the Contractor time extension.

Default of the Contractor

According to the amended principle of suretyship, when the Contractor is in default, the Owner has a duty to notify all guarantors under any Third Party Guarantees of the contractor contract within sixty days from the default date. If the Owner fails to notify any guarantor within the said period, such guarantor shall be discharged from the interest and reimbursement including any charges which occurred after the said period.³²

This new principle generates more burdens to the Owner who receives a Third Party Guarantee from the Contractor, which may be summarized as follows:

(1) It is rather difficult to consider whether there is any event of default by the Contractor under the construction contract for large projects. Therefore, the period of sixty days for the default date may not enough to consider such issue.

(2) As the amended principle of suretyship does not provide any detail on the commencement of such period of sixty day. For example, in the event that the Owner considers and notifies the Contractor that he is in default, if the Contractor denies such default, there must be dispute settlement. After the completion of the settlement of dispute, if the period of dispute settlement consumes more than sixty days, whether the right of the Owner to claim interest, compensation, or charges occurred after the period of sixty day will be nullified. Whether, when, the period of sixty days starts, either on actual default date or on default date, as agreed by the Owner and the Contractor, is still an issue which requires further clarification.

(3) In the event of delay in performance of the Contractor resulting in default by the Contractor, the Owner shall be entitled to claim the liquidated damages for delay. In such case, the Owner shall notify the default to the guarantor. However, at the time of notification, the Owner has not known the exact amount of these liquidated damages. The amount of liquidated damages for delay increases daily and the exact amount will be

³¹ Section 700 paragraph 3 to the CCC that was amended by the CCC Amendment No.21.

³² Section 686 to the CCC that was amended by the CCC Amendment No.20.

finalized only when the delayed work is completed.³³ Hence, the Owner can only specify in the notification to the guarantor that the Contractor is in default without giving the exact amount of liquidated damages for delay. In this situation, even the guarantor is liable to pay liquidated damages for delay under the amended principle, the guarantor cannot perform as he also does not know the exact amount thereof. Furthermore, the amended principle does not expressly specify whether or not the Owner has to notify the guarantor the exact amount of liquidated damages for delay again once the work is completed. If the Owner does not re-notify the guarantor such exact amount, whether or not, the guarantor will not be able to execute his right under this amended principle.

(4) In some construction contracts, the Contractor has to provide four types of the Third Party Guarantee to the Owner. When the Contractor is in default, the Owner has to send at least four notifications to all guarantors. Hence, additional monitoring procedure in order to notify the default to the guarantors is required and the Owner needs more manpower to observe and comply with the procedures.³⁴ In addition, because the Third Party Guarantee under the construction contract is a guarantee to the future obligation within the period of the construction, if the Contractor is in default during the period of construction more than one time, the Owner has to notify any and all default to all guarantors under the construction contract, whether the Owner wishes to claim from such Third Party Guarantees or not. This notifying duty put more burden and costs to the Owner.

Reduction of the Debt for the Contractor

In the event that the Owner has an agreement to reduce the amount of secured debt with the Contractor, under the amended principle of suretyship, in the Owner shall notify such agreement to the guarantor within sixty days from the agreement date.³⁵

Under the construction contract for large projects, an arrangement on the waiver or reduction of the liquidated damages is not made due to mere kindness of the Owner. Instead, it is initiated because it is more beneficial to the Owner and the Contractor, or because it is easier for the Owner to manage the construction project, or because the Owner has actually contributed in causing the default by the Contractor. For examples, the Owner requests the Contractor to put additional effort to speed up the delay part of construction work by increasing manpower or working hours and the Contractor, in exchange, requests the Owner to waive or reduce the

³³ Joseph A. Huse, *Supra* note 2, at 63.

³⁴ Panita Nguansiri, "Problems with the Suretyship Provisions in the Civil and Commercial Code of Thailand Amendment Act (No.20) B.E. 2557 (2015)" (Master's Individual Research Paper, Faculty of Law, Chulalongkorn University, 2014), 38.

³⁵ Section 691 paragraph 1 to the CCC that was amended by the CCC Amendment No.21.

liquidated damages.³⁶ As a result, the Owner and the Contractor may not wish to notify this agreement to any third party. Furthermore, because of additional duty to notify all guarantors, the Owner and the Contractor are even more prone to not make any debt reduction, but instead make a side arrangement between each other.

4. Mitigation of the impacts of the amendment of principle of suretyship by using the third party guarantee under the isp 98, and the convention

To consider the possibility of using the standby letter of credit in accordance with the ISP98 and the Undertaking in accordance with the Convention in order to mitigate the impacts of the amended principle of suretyship to the Third Party Guarantee, each impact thereof was compared with the use of the ISP 98 and the Convention as follows:

Joint Liability of Guarantor

As the standby letter of credit covered by the ISP 98³⁷ and the Undertaking covered by the Convention³⁸ are independent from the construction contract, both of the Third Party Guarantees covered by the ISP 98 and the Convention do not prohibit an agreement which binds the issuer or guarantor to be jointly liable with the Contractor.

Thus, an agreement, which binds the issuer or guarantor to be jointly liable with the Contractor, that is specified in standby letter of credit covered by the ISP 98 and the Undertaking covered by the Convention is enforceable, while such agreement is enforceable under the Third Party Guarantee governed by the CCC only to the extent that guarantor is juristic person.

Extension of Time

As the standby letter of credit covered by the ISP 98³⁹ and the Undertaking covered by the Convention⁴⁰ are independent from the construction contract, so, if the Owner and the Contractor have an agreement to extend the time for any performance under the construction contract, the issuer or guarantor will not be discharged from the standby letter of credit and the Undertaking.

Thus, to the extent that the Owner grants an extension of time for the secured obligation, the guarantor to the Third Party Guarantee governed by the CCC will be discharged, unless the guarantor agrees with such extension of time on time to time basis, while the issuer to the standby letter of credit or the guarantor or issuer to the Undertaking will not be discharged whether such person agrees with such extension of time.

Default of the Contractor

³⁶ See Joseph A. Huse, *Supra* note 2, at 9-16.

³⁷ Rule 1.06 (c) of the ISP 98.

³⁸ Article 3 (a) and (b) of the Convention.

³⁹ Rule 1.06 (c) of the ISP 98.

⁴⁰ Article 3 (a) and (b) of the Convention.

As the standby letter of credit covered by the ISP 98⁴¹ and the Undertaking covered by the Convention⁴² are independent from the construction contract, in the event that the Contractor is in default, the Owner to the standby letter of credit and the Undertaking shall not be requested to notify such default to the issuer or guarantor.

Thus, to the extent that the Contractor is in default under the construction contract, the Owner to the Third Party Guarantee shall notify the guarantor within sixty day from the date of default, while the Owner to the standby letter of credit or the Undertaking shall not be requested to notify such default to the issuer to the standby letter of credit or the guarantor or issuer to the Undertaking and shall not subject to the consequential effect, as specified in the amended principle of suretyship under the CCC.

Reduction of the Debt for the Contractor

As the standby letter of credit covered by the ISP 98⁴³ and the Undertaking covered by the Convention⁴⁴ are independent from the construction contract, in the event that the Owner and the Contractor have an agreement to reduce the amount of secured debt, the Owner to the standby letter of credit and the Undertaking shall not be requested to notify such agreement to the issuer or guarantor.

Thus, to the extent that the Owner and the Contractor have agreed to reduce the amount of secured debt under the construction contract, the Owner to the Third Party Guarantee governed by the CCC shall notify such agreement to the guarantor within sixty day, while the Owner to the standby letter of credit or the Undertaking shall not be requested to notify such agreement to the issuer to the standby letter of credit or the guarantor or issuer to the Undertaking and shall not be subject to the consequential effect, as specified in the amended principle of suretyship under the CCC.

5. CONCLUSION

From the study, the significant impacts of the use of the amended principles of suretyship on the Third Party Guarantees under the construction contract for large projects can be mitigated by the use of the standby letter of credit covered by the ISP 98 and the Undertaking covered by the Convention, but, either of them also has an issue concerning the application mechanism under Thai Laws.

The standby letter of credit covered by the ISP 98 is only an international rule of practice, not international law. The ISP 98 therefore binds the party to the standby letter of credit as the provision of contract, not as binding international law. Thus, if Thai Court considers that some

⁴¹ Rule 1.06 (c) of the ISP 98.

⁴² Article 3 (a) and (b) of the Convention.

⁴³ Rule 1.06 (c) of the ISP 98.

⁴⁴ Article 3 (a) and (b) of the Convention.

provision of the ISP 98 is contrary to the public order or good morals, such provision shall be void.⁴⁵

Meanwhile, the application of the Undertaking under the Convention shall be allowed only when the place of business of the guarantor or issuer of the Underlying is in the Contracting State and the Undertaking shall be used solely in international transactions where any two of the guarantor/issuer, the Contractor or the Owner are in different states.

Hence, if the Owner and the Contractor wish to use the standby letters of credit cover by the ISP 98 or the independent guarantees or the stand-by letters of credit covered by the Convention to mitigate the effect from the amendment of the principle of guarantee to the Third Party Guarantee under the construction contract for large projects, the Owner and the Contractor shall take the foregoing issues into account and apply suitable Third Party Guarantee covered by the ISP 98 or the Convention for their situation.

⁴⁵ Section 150 of the CCC.

LEGAL PROBLEMS ON DUTY OF DISCLOSURE UNDER MARINE INSURANCE CONTRACT*

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Abstract

The duty of disclosure is important duty under utmost good faith doctrine that assists the party to marine insurance contracts have an equal status prior execution of the contracts. The party to the contracts shall entitle to obtain material circumstances from another for their own of risk assessment. This duty causes controversial problems in practice, for example, the assured's duty is too onerous, extension of compliance scope for the post-contractual period and unfair remedy.

Those problems affect to the development of marine insurance law in several jurisdictions. It is significant to highlight a change from 'duty of disclosure' to 'duty of fair presentation' in the United Kingdom where originated the ancient of marine insurance law. The new duty imposes the insurer to have more active part at the pre-contractual period and include imposing a fair remedy. Noticeably, the new duty attempts to close the loophole in accordance with the duty of disclosure.

In Thailand, there is no direct provision governing the duty of disclosure under the marine insurance contracts. The previous judgments ruled the applicable law to the marine insurance cases in two ways; one, the application of Marine Insurance Act 1906 and another, the application of insurance law under the Civil and Commercial Code. The application of both laws led to significant questions and legal problems respectively. With a purpose to resolve these problems and build a trust to players, the marine insurance law provision regarding to duty of disclosure should be enacted with the provisions to state equitable duty between the assured and insurer, limitation of the duty's scope at the pre-contractual period and imposing a fair remedy.

Keywords: duty of disclosure, marine insurance, utmost good faith, duty of fair presentation

บทคัดย่อ

หน้าที่เปิดเผยข้อเท็จจริงเป็นหน้าที่ที่สำคัญภายใต้หลักสุจริตอย่างซึ่ง ซึ่งช่วยให้คู่สัญญาในสัญญา ประกันภัยทางทะเลมีสถานะเท่าเทียมกันก่อนที่จะเข้าทำสัญญา คู่สัญญาแต่ละฝ่ายย่อมมีสิทธิได้รับข้อเท็จจริงที่เป็น สาระสำคัญจากคู่สัญญาอีกฝ่าย เพื่อประเมินความเสี่ยงของตนก่อนที่จะคู่สัญญาแต่ละฝ่ายจะเข้าทำสัญญาประกันภัย

*This article is summarized and rearranged from the thesis "Legal Problems on Duty of Disclosure under Marine Insurance Contract", Master of Laws in Business Law (English Program), Faculty of Law, Thammasat University, 2015.

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ในทางปฏิบัติ หน้าที่เปิดเผยข้อเท็จจริงได้ก่อให้เกิดข้อถกเถียงในปัญหาต่าง ๆ อย่างแพร่หลาย อาทิ เช่น ผู้เอาประกันภัยรับการกระทำหน้าที่เปิดเผยข้อเท็จจริงเกินควร, การขยายขอบเขตการปฏิบัติตามหน้าที่ภายหลังที่สัญญาได้ทำขึ้นแล้ว และความไม่เป็นธรรมอันเกี่ยวกับวิธีการแก้ไขเยียวยาสำหรับการปฏิบัติหน้าที่ที่เปิดเผยข้อเท็จจริง

จากปัญหาที่เกิดขึ้นดังกล่าว ได้ส่งผลให้เกิดการพัฒนาการของกฎหมายประกันภัยทางทะเลในหลาย ๆ ประเทศ โดยเฉพาะอย่างยิ่ง ประเทศสหราชอาณาจักรซึ่งเป็นต้นกำเนิดของกฎหมายประกันภัยทางทะเลที่เก่าแก่ ได้แก้ไขเพิ่มเติม ‘หน้าที่เปิดเผยข้อเท็จจริง’ และเรียกหน้าที่ดังกล่าวขึ้นใหม่ว่า ‘หน้าที่เปิดเผยข้อเท็จจริงอย่างยุติธรรม’ ทั้งนี้ หน้าที่เปิดเผยข้อเท็จจริงอย่างยุติธรรมได้กำหนดให้ผู้รับประกันภัยให้มีบทบาทมากขึ้นสำหรับระยะเวลาก่อนเข้าทำสัญญา และรวมถึงการแก้ไขบทบัญญัติที่ไม่เป็นธรรมอันเกี่ยวกับวิธีการแก้ไขเยียวยา อย่างไรก็ตาม เป็นที่น่าสังเกตว่า หน้าที่เปิดเผยข้อเท็จจริงอย่างยุติธรรมได้พยายามที่จะแก้ไขปัญหาดังกล่าว ที่เกิดขึ้นอันเกี่ยวกับหน้าที่เปิดเผยข้อเท็จจริงอีกด้วย

สำหรับประเทศไทย ปัจจุบันยังไม่มีกฎหมายที่จะบังคับใช้กับหน้าที่เปิดเผยข้อเท็จจริงภายใต้สัญญาประกันภัยทางทะเลแต่อย่างใด คำพิพากษาที่ผ่านมาได้วางหลักอันเกี่ยวกับ กฎหมายที่จะปรับใช้แก่สัญญาประกันภัยทางทะเลไว้สองลักษณะ ลักษณะแรก คือ การนำ Marine Insurance Act 1906 ของประเทศสหราชอาณาจักร มาปรับใช้ และ ลักษณะที่สอง คือ การนำกฎหมายประกันภัย ภายใต้ประมวลกฎหมายแพ่งและพาณิชย์ของประเทศไทยมาปรับใช้ การปรับใช้กฎหมายทั้งสองลักษณะดังกล่าวได้ก่อให้เกิดคำถามและปัญหาทางกฎหมายที่สำคัญอย่างยิ่ง ดังนั้น เพื่อที่จะแก้ปัญหาดังกล่าวและสร้างความเชื่อมั่นแก่ผู้ที่ต้องปฏิบัติตามหน้าที่นี้ ประเทศไทยควรออกกฎหมายประกันภัยทางทะเล ว่าด้วยเรื่อง หน้าที่เปิดเผยข้อเท็จจริงเพื่อบังคับใช้กับสัญญาประกันภัยทางทะเล โดยกำหนดให้การเปิดเผยข้อเท็จจริงเป็นหน้าที่ของคู่สัญญาทั้งสองฝ่าย, จำกัดขอบเขตการปฏิบัติหน้าที่ไว้เฉพาะช่วงเวลาที่จะเข้าทำสัญญา ตลอดจนกำหนดบทบัญญัติที่เป็นธรรมเกี่ยวกับวิธีการแก้ไขเยียวยาสำหรับการปฏิบัติหน้าที่ที่เปิดเผยข้อเท็จจริงด้วย

คำสำคัญ: หน้าที่เปิดเผยข้อเท็จจริง, ประกันภัยทางทะเล, หลักสุจริตอย่างยิ่ง, หน้าที่เปิดเผยข้อเท็จจริงอย่างยุติธรรม

Introduction

Since a contract of marine insurance is considered to be unequal contract, the utmost good faith doctrine would therefore require the duty of disclosure applying to both assured and insurer before a conclusion of contract. In practice, the duty of disclosure is mainly imposed to the assured. The insurer's duty is likely to be less important than it should be. It could explain that the assured is strictly obliged for disclosing all material facts before the execution of contract as those facts would effect to the insurer for entering into the contract and identifying premium rate. However, this duty causes controversial issues for the marine insurance business as follows:

First, the assured's duty is too onerous as the insurer has more bargaining power than the assured. And, if the assured fails to disclose his facts because of his unknown, the insurer may also take this benefit for acting in bad faith in order to disclaim their liabilities.

Second, the compliance scope of this duty is extended to the post contractual period. This extension scope is contradicted to the law stating that this duty is to perform before a conclusion of contract.

Third, the broker involves to the marine insurance business by acting on behalf of the assured for the contract execution. As observed, there is no provision of law identifying the broker's liability if he ignores to disclose the assured's facts to the insurer.

Forth, the avoidance of insurance contract is unfair remedy to be imposed against the assured's breach. It should consider whether this remedy is fair to the assured if such breach is arisen from his unknown.

Fifth, Thailand has no direct provision governing the duty of disclosure under the marine insurance contracts. The application of Marine Insurance Act 1906 and insurance provision under the Civil and Commercial Code may not be appropriate for applying to Thai's marine insurance business.

Overview Duty of Disclosure

The duty of disclosure has been developed from a case named *Carter v. Boehm*². It was a landmark case regarding to the historic ocean marine insurance case.³ The court ruled that the insurer's knowledge should not only rely on the assured's knowledge but also including the knowledge deriving from others. Lord Mansfield also opined that the facts disclosed to the insurer should not be limited to the assured's knowledge only. The insurer should ask further queries to the assured or others prior to execute the insurance contracts and the assured obliges to disclose every material circumstance regardless of whether such disclosure circumstance will be considered as a material circumstance.⁴ This duty has been subsequently codified and given statutory authority in Section 17, 18 and 19 of the Marine Insurance Act 1906.⁵

(1) Objective

The objective of this duty is therefore to ensure that a party would honestly disclose material facts to another for the risk assessment.

(2) Is it a legal duty?

The duty of disclosure has been stated in the marine insurance law. Under a case named *Bell v. Lever Brothers Ltd.*⁶, it clearly concluded that

² *Carter v. Boehm* (1766) 3 Burr. 1905 cited in Professor Alexander von Ziegler, *The "Utmost Good Faith" in Marine Insurance Law on the Continent, Marine Insurance at the Turn of the Millennium* Volume 2, **ANTWERP** 22 (2000).

³ Francis Achampong, *Uberrima Fides in English and American Insurance Law: A Comparative Analysis*, 36 **International and Comparative Law Quarterly** 329 (1987).

⁴ *Lindenau v. Desborough* (1828), 8 Barn & Cr. 586.

⁵ John Birds, Ben Lynch and Simon Milnes. **MacGillivray on Insurance Law**. 12th ed. London, Sweet and Maxwell Limited, 476 (2012).

⁶ *Bell v Lever bros* [1932] AC 161.

the duty of disclosure cannot be derived from the contract if this duty were existed before the actual formation of the contract. Therefore, the duty to disclose is a legal duty not a contractual duty.

(3) The person who require to comply the duty of disclosure

The parties to marine insurance contracts are generally required for compliance with the duty of disclosure. The assured is required for disclosing all facts that those are in his knowledge. Also, the insurer is required for disclosing the facts i.e. insurer's name and premises, details of insurance policy throughout premium, termination and others.⁷ Additionally, the duty of disclosure is considered to be extended to the broker as the course of business may demand one party shall affect insurance on property on behalf of another.⁸

(4) Types of disclosed facts

The assured has to disclose facts which are generally classified in two groups;⁹ one is facts that the assured know, ought to know and presumed to be known in the ordinary course of business and another is material circumstances which should be the circumstances that have influenced to the prudent insurer for making a decision either indicate the insurance premium or accept the marine perils.¹⁰ While, the insurer has to disclose facts which are the insurer's facts, insurance policy, and insurance contract.¹¹

(5) Compliance issues

The applicable period is significant issue on the duty of disclosure. As observed the practice of marine insurance, the duty disclosure is requested both pre-contractual and post-contractual period. In the application form of marine insurance policy, the prospective assured will be requested to declare his disclosure to the insurer in the application form at the pre-contractual period. While, at the post-contractual period, the duty of disclosure will be also required to be performed by the assured even the marine insurance policy has been issued.

(6) Non-compliance issues

In case the duty of disclosure has failed to be performed by the assured, the insurance contract shall be voidable as remedy against the insurer. Subsequently, both parties shall be restituted to the condition that

⁷ นิติศาสตร์ สายสุนทร, *หลักสุจริตอย่างยิ่งในสัญญาประกันภัยทางทะเล*, วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์, 6 (2552). (Nitisat Saisoonthorn, *Utmost Good Faith under Marine Insurance Contract*, Master of Law's Thesis. Thammasat University, 6 (2009)).

⁸ John Birds, *supra* note 4, at 1245.

⁹ สายสุนทร (Saisoonthorn), *supra* note 6, at 27-35.

¹⁰ สายสุนทร (Saisoonthorn), *supra* note 6, at 30

¹¹ *Id.*, at 21.

they were previously. However, this remedy seems to be unfair because there is disregard to the degree and reason of such failure.

Foreign Laws regarding to the Duty of Disclosure

(1) United Kingdom

The Insurance Act 2015 is introduced new duty named “duty of fair presentation” for applying to commercial insurance¹² in lieu of the duty of disclosure. The duty of fair presentation merges disclosure and misrepresentation rules into a holistic duty where the overall information presented to the insurer will be assessed on how fair a representation was made,¹³ however, the new duty still retains the concept of the disclosure of information.¹⁴ The assured’s obligation is to make a fair presentation of the risk to the insurer and the aforesaid obligations shall exclude any circumstance that the insurer knows, ought to know or is presumed to know it. It could further clarify that an intention of duty of fair presentation is to force insurers to involve information gathering process by removing some of assured’s burden.¹⁵ Interestingly, this Act has been reformed the remedies based on the insurer’s point of view.¹⁶ The remedies could separate cause to be either deliberate, reckless or others. It should note that this reform is a significant change to the United Kingdom’s marine insurance law and possibly reflect to the global of marine insurance industry inevitably.

(2) Norway

The Nordic Marine Insurance Plan of 2013, Version 2016 is the latest version of the Norwegian Marine Insurance Plan. It is not the marine insurance law but it is an agreed document in accordance with the standard marine insurance contractual terms as well as the Institute Clauses used in the London Market.¹⁷ The person effecting the insurance is obliged to comply with the duty of disclosure.¹⁸ Besides, the insurer is still required to comply with the duty of give notice without undue delay and clarify that the

¹² Laura Reeves, “*The Duty of Pre-Contractual Disclosure in English Insurance Law: Past and Future –Does the Law Need to be Changed?*”, **Southampton Student Law Review** Vol.5, 8 (2015).

¹³ *Id.*, at 2.

¹⁴ *Id.*, at 10.

¹⁵ Michael Axe, ‘*Insurance Disputes: ‘full disclosure’ or ‘fair presentation’ – what’s the difference?*’ in “Commercial Disputes, Disputes, Insurance Disputes”, <http://www.rawlisonbutler.com/news/insurance-disputes-full-disclosure-or-fair-presentation-whats-the-difference/>.

¹⁶ Laura Reeves, *supra* note 11, at 10.

¹⁷ Poomintr Sooksrpaisarnkit, *Reform of ‘non-disclosure’ in UK Marine Insurance Law: Exotic Approach or Original Understanding*, Doctor of Philosophy’s Thesis. University of Leicester, 34 (2006).

¹⁸ § 3-1 Para 1 of Chapter 3 under Norwegian Marine Insurance Plan of 1996, Version 2010

insurer has intend to invoke in case the insurer become aware that incorrect or incomplete facts has been given.¹⁹ This Norwegian Marine Insurance Plan is required the duty of disclosure to perform at the conclusion of contract. The remedies arising from non-compliance with the duty of disclosure have been provide in several scenarios i.e. the contract shall not bind the insurer if the person effecting insurance fraudulently fails to perform this duty and etc.

(3) The People's Republic of China

Under the Maritime Code of the People's Republic of China, the assured has obliged to inform a truthful of material circumstances to the insurer before the conclusion of contracts.²⁰ The said disclosure should be material circumstanced effecting to the insurer's making decision to enter marine insurance contracts. In the event the assured does not comply with the duty to disclose, the remedies are separated cause between intentional act and no intentional act. For intentional act, the remedy for breach is that the insurer could terminate marine insurance contracts without any refund of premium throughout he shall not be liable for any loss that those are caused by the perils assured against prior the termination of contracts.²¹ For unintentional act, the remedy for breach is that the insurer could either terminate marine insurance contracts or demand a corresponding for increasing the premium.²²

Duty of Disclosure in Thailand

There is no direct provision of law governing a contract of marine insurance for Thailand. Section 868 under Civil and Commercial Code is only the reference provision not a provision to resolve the issue of marine insurance contracts. The insurance law under this Civil and Commercial Code could not be applied to the marine insurance contracts because the intention of drafter is to exclude the marine insurance contracts from the insurance contracts or those called as non-marine insurance.²³ And, the marine insurance has the difference characteristics from non-marine insurance, for example, perils, insurable interest and etc. Besides, the general provisions of insurance law could not be applied because the marine insurance contracts should be governed by the specific provisions even the general provisions of insurance law are rooted from the law of marine insurance.

For the duty of disclosure terms under the marine insurance contracts, the Unfair Contract Terms Act B.E. 2540 may be relevance. To

¹⁹ § 3-6 of Chapter 3 under Norwegian Marine Insurance Plan of 1996, Version 2010

²⁰ Article 222 of Maritime Law of the People's Republic of China

²¹ Article 223 Para 1 of Maritime law of the People's Republic of China

²² *Id.*

²³ จิตติ ดิงศกัทธิย์, กฎหมายแพ่งและพาณิชย์ว่าด้วย ประกันภัย 4 (พิมพ์ครั้งที่ 12 2543) (Jitti Tingsapat, Textbook on Insurance 4 (12nd ed. 2000)).

extent that, if the unfair terms, i.e the assured is requested to comply with the duty of disclosure after the contract execution, are imposed as a standard terms and the party who has not imposed this unfair term agrees to accept due to less of bargaining power, whether this unfair term could be enforced. It could explain that there is generally considered to be unfair terms because one, the duty of disclosure is generally required to perform before the contract execution and another, such terms would let the assured to accept more burden than it should be. Therefore, the acceptance of the aforesaid party could not let the unfair terms to be enforced.

Apart from the above, in the absence of the specific provision for governing marine insurance in Thailand, the local custom, the provision most nearly applicable and the general principles of law as stated in Section 4 under the Civil and Commercial Code must be taken into consideration respectively. It should note that this section has been applied to the marine insurance cases and it also leads to problems in the previous judgments. To extent that, the Court ruled the judgments in accordance with the applicable law to marine insurance cases in two ways. One,²⁴ the application of Marine Insurance Act 1960 that is the internal law of the United Kingdom which has widely accepted for the marine insurance industry in a global. It was applied to the marine insurance case as the general principle of law. It leads to further legal problems because this is a foreign law and the Court could not apply this internal law of foreign country for applying to Thai marine insurance cases without being requested and proved this law by the parties to the dispute. Although the parties to the dispute agree to bring this foreign law into the case, the Conflict of Laws B.E. 2481 needs to be involved in this issue. Second,²⁵ the application of insurance provisions under the Civil and Commercial Code into Thai's marine insurance cases, it was applied to the marine insurance case as analogy to provision most nearly applicable. It also leads to further legal problems because a difference of characteristics between marine insurance and insurance against loss.

Recommendations

In order to find out solutions for the problems to be addressed in above, the proposals of recommendation are provided as follows:

First, the duty of disclosure needs to balance between the assured and insurer. The insurer's duty needs to be added and clarified that what kind of facts that the insurer need to be disclosed.

Second, the duty to disclose should be limited to perform at the time before the execution of marine insurance contract only in order to reduce the uncertainty in practices.

Third, the duty of disclosure provision should be clearly extended to the broker who performed the duty on behalf of the assured. In addition, the reasonable penalty against the broker's breach of duty should be imposed.

²⁴ Supreme Court Judgment No. 7530/2537

²⁵ Supreme Court Judgment No. 6649/2537

Fourth, the remedy should be provided in several degrees, for example, the non-compliance arising from either intention or non-intention should have difference remedies. The concept of remedy should be provided to the assured and insurer.

Fifth, Thailand should have its own marine insurance law. The benefit of having its own marine insurance law may reduce the problems arising from a judgment and build a trust to players. Therefore, the marine insurance law should compose of specific provisions regarding to the duty of disclosure stating the details as follows:

(a) The duty of disclosure should be applied to both assured and insurer. The broker who acts on behalf of the assured is also included as the responsible person to this duty.

(b) It should clearly state the material circumstances by giving example throughout clarify the difference of facts that will be disclosed by the assured and insurer.

(c) Exceptions of material circumstances should clearly provide in order to avoid data dumping and further dispute.

(d) This duty should be limited at the period before execution of marine insurance contracts. After the execution of marine insurance contracts, the legal consequence arising from non-compliance with the duty should not be considered.

(e) The remedy should grant to the assured and insurer. The avoidance of marine insurance contracts may be remained as the highest degree of remedy and it should be imposed by the court's discretion only. Besides, the assured should entitle a remedy against the broker's breach.

LEGAL PROBLEM CONCERNING NON-SMOKER'S HEALTH PROTECTION

Pathama Siamhan

Abstract

In decades past, the topic of second-hand smoke was commonly mentioned in the medical profession. Scientists stated that toxic chemicals in second-hand smoke cause harm to people's health and that there is also no safe level of exposure to second-hand smoke. Second-hand smoke contains a mixture of particulate matter and thousands of chemicals such as carcinogens and formaldehyde which are cancer-causing; it has harmful chemicals which are similar to those which smokers inhale. Since much research concerning the hazards of second-hand smoke are well-known, people are beginning to want to live in smoke-free society. Many rights were established to protect people from the hazard of second-hand smoke. The right to live in healthy environment and the right to breathe clean air are two such rights.

In Thailand, to protect non-smokers' health from exposure to tobacco smoke, the Thai government enacted the Non-Smokers' Health Protection Act B.E. 2535 two decades ago. The law gives the power to the Minister to define non-smoking areas and if smokers are smoking in non-smoking areas which are provided by law, they shall be subject to a fine not exceeding two thousand baht. However, exposure of second-hand smoke to non-smokers is not only restricted in non-smoking areas, but also the non-smoker who lives outside the non-smoking areas should have protected the rights to breath clean air by law similar to the people who also live in non-smoking areas. A protection for the right to breathe clean air should not restrict only in specific places but law should protect everyone equally.

The purpose of this study is to study legal measures for the non-smoker's health protection outside non-smoking areas, are which provide by law. Domestic and Foreign laws, theories of human rights and related international laws have been researched to see whether Thai law can protect non-smokers outside non-smoking areas from hazard of second-hand smoke and the justifications for doing so. If Thai laws are not capable of protecting non-smokers' health outside non-smoking areas, research must be conducted to find the cause of this problem and to make improvements to the law. This study would be conducted as a qualitative research by researching and gathering related documents from various information sources, then analyzing the data and compiling with the content of the study in each chapter.

Keywords: Second-hand smoke, Non-smoker's Health Protection, Non-smoking areas

หลายทศวรรษที่ผ่านมาประเด็นเกี่ยวกับควันทู่มือสองถูกพูดถึงกันอย่างกว้างขวางในวงการทางการแพทย์ นักวิทยาศาสตร์กล่าวว่าสารพิษในควันทู่มือสองสามารถส่งผลกระทบต่อสุขภาพของผู้คนได้และไม่มีระดับความปลอดภัยใดๆในการสัมผัสควันทู่มือสอง ควันทู่มือสองประกอบไปด้วย อนุภาคต่างๆรวมไปถึงสารเคมีกว่าพันชนิด ไม่ว่าจะเป็นฟอร์มาลดีไฮด์ หรือสารที่ก่อให้เกิดมะเร็ง ควันทู่มือสองนั้นมีสารพิษที่อันตรายไม่แตกต่างไปจากการที่ผู้สูบบุหรี่นั้นได้รับสารพิษจากการสูบบุหรี่ด้วยตนเอง ตั้งแต่วิจัยเกี่ยวกับอันตรายของควันทู่มือสองเป็นที่รู้จักมากขึ้นประชาชนก็เริ่มที่จะให้ความสำคัญกับการดำรงอยู่ในสังคมปลอดควันทู่มือสอง ลิทธิต่างๆถูกกล่าวอ้างเพื่อที่จะปกป้องผู้คนจากอันตรายของควันทู่มือสอง เช่น ลิทธิที่จะอยู่ในสิ่งแวดล้อมที่ดี และ ลิทธิที่จะได้รับอากาศบริสุทธิ์ เป็นต้น

สำหรับประเทศไทย เพื่อปกป้องสุขภาพของผู้ไม่สูบบุหรี่จากควันทู่มือสอง สภานิติบัญญัติจึงได้ออกกฎหมาย พระราชบัญญัติคุ้มครองสุขภาพของผู้ไม่สูบบุหรี่ พ.ศ.2535 มาบังคับใช้เป็นระยะเวลาสองทศวรรษแล้ว พระราชบัญญัติคุ้มครองสุขภาพของผู้ไม่สูบบุหรี่ พ.ศ.2535 ได้วางหลักให้คณะรัฐมนตรีมีอำนาจในการกำหนดว่าพื้นที่ใดควรเป็นเขตปลอดควันทู่มือสองและหากผู้ใดฝ่าฝืนสูบบุหรี่ในเขตปลอดควันทู่มือสองที่กำหนดโดยกฎหมายต้องระวางโทษปรับไม่เกิน 2,000 บาท แต่อย่างไรก็ตามการได้รับควันทู่มือสองนั้นมิได้จำกัดเฉพาะในเขตที่กฎหมายกำหนดให้เป็นเขตปลอดควันทู่มือสองเท่านั้น แต่ผู้ไม่สูบบุหรี่ที่อยู่นอกเขตปลอดควันทู่มือสองก็ควรที่จะได้รับการปกป้อง ลิทธิที่จะได้รับอากาศบริสุทธิ์เช่นเดียวกับผู้ที่อยู่ในเขตปลอดควันทู่มือสอง การคุ้มครองลิทธิที่จะได้รับอากาศบริสุทธิ์นั้นไม่ควรจำกัดอยู่ในสถานที่ใดสถานที่หนึ่ง ทุกคนควรได้รับการปกป้องลิทธิที่จะได้รับอากาศบริสุทธิ์อย่างเท่าเทียมกัน

ดังนั้น วิจัยฉบับนี้จึงได้ทำการศึกษาถึงมาตรการทางกฎหมายในการคุ้มครองสุขภาพของผู้ไม่สูบบุหรี่ภายนอกเขตปลอดควันทู่มือสองที่กำหนดโดยกฎหมาย โดยศึกษาทั้งกฎหมายภายในประเทศ กฎหมายต่างประเทศ ทฤษฎีเกี่ยวกับสิทธิมนุษยชน และกฎหมายระหว่างประเทศที่เกี่ยวข้อง เพื่อศึกษาว่ามาตรการทางกฎหมายในประเทศไทยสามารถคุ้มครองสุขภาพของผู้ไม่สูบบุหรี่ที่อยู่นอกเขตปลอดควันทู่มือสองได้หรือไม่ เพราะเหตุใด และหากยังไม่สามารถคุ้มครองได้เกิดจากปัญหาใดและมีแนวทางในการแก้ไขปรับปรุงกฎหมายให้คุ้มครองสุขภาพของผู้ไม่สูบบุหรี่ที่อยู่นอกเขตปลอดควันทู่มือสองได้อย่างไร โดยการดำเนินการวิจัยเป็นแบบการวิจัยเชิงคุณภาพ ใช้วิธีการศึกษาด้วยการค้นคว้าและรวบรวมเอกสารที่เกี่ยวข้องจากแหล่งข้อมูลต่างๆแล้วจึงทำการวิเคราะห์ข้อมูลที่ได้เรียบเรียงอ้างอิงประกอบเนื้อหาการศึกษาในแต่ละบทต่อไป

คำสำคัญ: ควันทู่มือสอง, การคุ้มครองสุขภาพของผู้ไม่สูบบุหรี่, เขตปลอดควันทู่มือสอง

1. Introduction

In a modern society, rights and liberty necessary for integration in that society are the most essential needs for which people should have awareness. Everyone has equal rights for existence, but these rights must not infringe upon the rights of others¹, meaning that the possession of such rights must be held under the rules of morality, without exploitation or violation of others. Thus, any actions taken under privilege of individual rights that result in harm or misfortune to others are unacceptable. This is

¹ ฟาดาว คงนคร, พื้นฐานความเป็นพลเมืองในระบอบประชาธิปไตย, พิมพ์ครั้งที่1, กรุงเทพมหานคร: สำนักการพิมพ์สำนักงานเลขาธิการสภาผู้แทนราษฎร, 2556 (Fhadao Kongnakorn, "Fundamentals of Citizenship in Democracy". (1st ed. Bangkok: The Secretariat of the House of Representatives Publishing, 2013))

especially in cases of healthcare. If someone has health problems, they deserve to be treated without difficult or wasted time. Moreover, such negative action caused by others without consent is extremely unacceptable. A tobacco smoker who exposes others to second-hand smoke is the best example of this. Non-smokers are subjected to unnecessary health risks from the hazards of cigarette smoke originating from smokers. It is unfair to non-smokers to face possible risk from this type of situation, especially in public places meant for general access by all people in society; everybody should have equal right to use public spaces without undue risk. The argument is not whether smokers have the right to smoke, but rather that smokers should not abuse their right by infringing on the right of others around them to breathe clean air, which is a fundamental right.

2. Rights of Non-smoker

The right of non-smokers to be free from second-hand smoke has been mentioned in many principles, as follows:

1) Rights under the Constitution

Under the concept of human dignity, rights and liberties in Section 4, the Constitution of the Kingdom of Thailand B.E.2550 also details the concept to provide fundamental rights in Chapter 3 as “Rights and Liberties of the Thai People.” Under Section 32 of this chapter, it is stated that “*A person shall enjoy the right and liberty in his or her life and person.*” Therefore, it can be said that a person shall have the right and liberty to do anything they want or be everything they want to be. Further, the state should protect this right from the interference of others. However, the state should also be restrictive if such action infringes on the rights of other persons. Likewise is the right to smoke for smokers. Smokers have the right and liberty in their life and person. They can do everything they want, even smoke. However, this right should be restricted if such smoking infringes on the right of non-smokers. Smokers cannot exercise their right or liberty where it is harmful to the health of others or infringes on the right to live in a good environment and breathe clean air.

2) Right to the Environment

The desire to produce better conditions for life on earth is a common need of both environmental law and human rights principles. The benefit of the environment and benefit of mankind on both a local and global scale is the aim of environment law, which seeks to protect. However, it has been restricted by inter-state relations and the behavior of some economic actors. Human rights are a principle of fundamental aspirations for human beings, which are also a mechanism to allow people to claim their rights. The issue of environmental measures in human rights has become a significant view of the recognition of the widespread influence of both local and global environmental conditions upon the realization of human rights.

It is obvious that preservation, conservation and restoration of the environment are necessary and important to the rights to health, food and

life, including a good quality of life. Therefore, it is clear that a right to environment can be coordinated into the objective of the human rights protection, such as the principle of human dignity.²

3) Right to Breathe Clean Air

Clean air is what people need and also essential to have a good health, therefore everyone has the right to live in a good environment for his or her health and well-being, in condition of protection and improvement the environment for the present and the next generations.³

3. The Rights of the Child

According to the principles of the Convention on the Rights of the Child 1989, there are 2 fundamental rights as follows:

1) Inherit right

Under Article 6 of the Convention, the government should ensure that children have a right to live, including the right to survive and develop healthily. For example, Article 7 of the Convention states that all children have the right to a legally registered name, officially recognized by the government, the right to a nationality and the right to know and, as far as possible, to be cared for by their parents.⁴

2) The best interests of the child

The Convention on the Rights of the Child shall undertake measures for implementation to protect and develop both mental and physical factors or at least recognize this convention without an action that harms the future and life of children. For example, Article 24 of the convention calls for states parties to recognize the right of the child to the enjoyment of the highest attainable standard of health. States parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. States parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. The Convention should provide support and promote the ability for children to develop at a level which causes children to be good

² Philippe Cullet, “*Definition of an Environmental Right in a Human Rights Context*”, available at <http://www.ielrc.org/content/a9502.pdf>, (last visited December 26, 2015.)

³ Alan Andrews, “*The Clean Air Hand Book: A Practical Guide to EU Air Quality Law*”, available at <http://www.clientearth.org/reports/20140515-clientearth-air-pollution-clean-air-handbook.pdf>, (last visited December 19, 2015.)

⁴ ปานรัตน์ นิมตลุง, “บทที่ 2 แนวความคิดว่าด้วยสิทธิเด็กตามหลักการสากลและกลไกในการทำงานด้านเด็กของประเทศไทยในปัจจุบัน”: โครงการวิจัย การปรับเปลี่ยนกลไกเชิงสถาบันเพื่อเสริมสร้างสมรรถนะในการทำงานด้านเด็กขององค์กรปกครองส่วนท้องถิ่น, 2552. (Panrat Nimalung, “*Chapter 2: Concept of right of the child under the international principle and children performance mechanisms in Thailand*”, Research Proposal on the modification of institutional mechanisms for enhance the children performance capability of local administrative, 2552.) http://www.dla.go.th/upload/ebook/column/2012/7/2012_5042.pdf, (last visited June 10, 2016.)

persons in the future. Therefore, in any action of government should take into consideration the best interests of the child.⁵ For example, Article 3 of the convention states that the best interests of children must be the primary concern in making decisions that may affect them, no matter undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. All adults should do what is best for children and when adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and law makers.^{6 7} Article 4 of the convention states that governments have a responsibility to take all available measures to make sure that children's rights are respected, protected and fulfilled, whether undertaken by all appropriate legislative, administrative, and other measures for the implementation of rights.^{8 9}

4. Framework Convention on Tobacco Control

The WHO Framework Convention on Tobacco Control (WHO FCTC) was the first treaty negotiated under the auspices of the World Health Organization. It was adopted under Article 19 of the WHO Constitution, which confirms the right of all people to the highest standard of health.¹⁰ This convention shows how countries viewed the need to develop, like an international legal instrument. To protect non-smoker's health from tobacco smoke, FCTC provided section 8 to protect the rights of non-smoker from air polluted by tobacco smoke toxins under the human right theory which everybody should have an equal right to breath clean air. Section 8 have two related objection, the first is to support a member states in meeting their obligation under FCTC in manner consistent with scientific evidence regarding to hazard of second-hand tobacco smoke and the best practice in the implementation of non-smoking measures, and the second objective is to identify the key elements of legislation necessary to effectively protect people from exposure to tobacco smoke.¹¹

To comply with the provisions of the WHO Framework Convention on Tobacco Control and the willingness of the Conference of the Parties, the Guideline on Protection from Exposure to Tobacco Smoke collects the best available evidence and experience of parties that have succeeded as effective measures to reduce exposure to tobacco smoke. Moreover, these

⁵ *Id.*

⁶ The Convention on the Rights of the Child

⁷ UNICEF, "*Fact Sheet: A summary of the rights under the Convention on the Rights of the Child*", available at http://www.unicef.org/crc/files/Rights_overview.pdf, (last visited June 10, 2016.)

⁸ *Id.*

⁹ The Convention on the Rights of the Child, art.4

¹⁰ World Health Organization, "*About the WHO Framework Convention on Tobacco Control*", <http://www.who.int/fctc/about/en/>, (last visited December 10, 2015)

¹¹ Guidelines on Protection from Exposure to Tobacco smoke, Section 8

guidelines are defined to cover statements of principles and definitions of relevant terms agreed upon between parties. In addition, the guidelines also specify the measures necessary to reach effective protection from the harm of second-hand smoke. Parties should encourage using these guidelines to not only achieve their legal duties under the Convention, but also follow best practices in protecting public health.

- Fundamental Considerations

The development of the Guideline on Protection from Exposure to Tobacco Smoke has been influenced by the following fundamental considerations:

(a) The duty to protect people from tobacco smoke exposure as mentioned in Article 8 of the WHO Framework Convention on Tobacco Control is under fundamental human rights and freedoms. This duty is implicit in the right to life and the right to the highest attainable standard of health, which is recognized in the constitutions of many countries and provided in many international legal instruments including the WHO Framework Convention.

(b) The duty to protect people from tobacco smoke exposure is one of the obligations for which a government has to enact law to protect people from threats to their fundamental rights and freedoms. Most importantly, this obligation has to extend to all persons and not only certain populations.

(c) Several scientific organizations have shown that second-hand tobacco smoke contains carcinogens. Therefore, beyond the requirement of Article 8, parties shall have the obligation to emphasize the hazard of exposure to tobacco smoke in accordance with existing law to cover exposure to harmful substances, including second-hand tobacco smoke.¹²

- Statement of Principles underlying Protection from Exposure to Tobacco Smoke:

The following principles should be guidelines for the implementation of Article 8 of the Convention

Principle 1: Eliminate tobacco smoke to create 100% smoke free places,

Principle 2: Protect everyone – don't allow exemptions,

Principle 3: Use legislation not voluntary measures,

Principle 4: Provide resources for implementing and enforcing the law,

Principle 5: Include civil society as an active partner,

Principle 6: Monitor and evaluate smoke free laws,

Principle 7: Be prepared to extend the law if needed.

5. Legal Measure to Protect Non-smoker's Health in California

¹² อมรรัตน์ โพธิ์พรก. การคุ้มครองสุขภาพจากควันบุหรี่มือสอง, พิมพ์ครั้งที่2, กรุงเทพฯ: เจริญดีมั่นคงการพิมพ์, 2551 (Amornrat Photipak. **Health Protection from Second-hand Smoke**, 2nd ed., Bangkok: Chareon Mankong Publishing, 2008)

California is a state in the US that has had strong and innovative non-smoker protection and tobacco control laws for a long time. For example, the City Council of San Rafael, a city located north of San Francisco, approved the strictest type of smoking ordinance in the country by passing a law to prohibit smoking in any homes that share common walls, whether apartments, condominiums, and even multi-family residences that hold three units or more.¹³ And in case of private car, California Health and Safety Code Sections 118947–118949, smoking or possessing a lighted pipe, cigar, or cigarette containing tobacco in any motor vehicle in which there is a minor under 18 years of age, regardless of whether the vehicle is in motion or at rest, is prohibited by law. A violation of this section shall be subject to fine not exceeding one hundred dollars (\$100) for each violation.¹⁴

6. Legal Measure to Protect Non-smoker's Health in Thailand

By the virtue of the power vested by the provision of section 4(3) and section 15 of the Non-smoker's Health Protection Act B.E.2535, Ministry of Public Health Notice B.E.2553 (Volume 19) divided smoke-free areas into 2 types: total non-smoking areas and non-smoking areas which can be designed with a specific smoking area.¹⁵

At present, solving the problems with the Non-smoker's Health Protection Act B.E. 2535 not covering beyond the protection of health of non-smokers outside non-smoking areas means the officer will interpret the sources of nuisance under the Public Health Act B.E. 2535. This act provides legal measures to protect people from nuisance by giving power to the local officials. Section 25 (4) of the Public Health Act B.E. 2535 states, *"In the event of an occurrence that may cause annoyance to residents in the neighboring area or expose persons to the following, it shall be a source of nuisance:(4) 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"*. Thus, a person or any organization taking actions which cause pollution to the odor, light, ray noise, heat, vibration, dust, soot, ash or other toxic matter, such as the burning of waste, burned grass resulting in soot, ash, percussion / hitting / banging metal, etc. which cause a deterioration or health hazard shall be deemed a nuisance. Such actions must be done regularly until affecting the lives of neighboring residents.

¹³ Jess Remington, *"It Is Now Illegal To Smoke In Your Own Home In San Rafael, California"*, available at <http://reason.com/blog/2013/11/25/it-is-now-illegal-to-smoke-in-your-own-h>, (last visited June 10, 2016)

¹⁴ *Id.*

¹⁵ ปกป้อง ศรีสนิท, *รวมกฎหมายยาสูบ*, พิมพ์ครั้งที่ 2, กรุงเทพฯ: โรงพิมพ์มหาวิทยาลัยธรรมศาสตร์, 2555. (Pokpong Srisanit, **Tobacco Law**, (2nd ed., Bangkok: Thammasat University Publishing, 2012))

7. Legal Problem of Non-smoker's Health

1) Legal Problem concerning Non-Smoking Areas

From the study of the Non-smoker's health protection Act B.E.2535, the writer found that protection the Non-smoker's health protection Act B.E.2535 are not covered beyond to the place outside non-smoking area which providing by law despite the fact that non-smoker who lives outside the non-smoking areas should have protected the rights to breath clean air by law like people who live in non-smoking areas also. However, in order to solve the problem which the Non-smoker's Health Protection Act B.E.2535 did not cover beyond to protect health of non-smoker outside non-smoking area, the official will interpret this issue to be a source of nuisance under the Public Health Act B.E.2535. But in actually, the Public Health Act B.E.2535 have an objective and management in a field of hygienic and environment health or environment sanitation, the Act did not intend to protect people health from tobacco smoke exposure indirectly and power to control or eliminate source of nuisance under the Public Health B.E.2535 is on the local official which has to do under the complicated process. So, The Public Health Act B.E.2535 are not suitable for protect people from tobacco smoke exposure.

2) Legal Problem concerning on lack of children protection in House and Car

According to the Non-smoker's Health Protection Act B.E.2535, It can be seen that whether will be a total non-smoking areas or non-smoking areas but can designating a specific smoking areas, the protection under the Non-smoker's health Protection Act B.E.2535 is prohibit only public place, the law does not covered beyond house and car where have a great effect to the children. Despite the fact that the main objective of the Non-smoker's Health Protection Act B.E.2535 is to protect health of non-smoker especially children from the cigarette smoke but at present many children still exposure to second-hand smoke in house and car without the protection of the law.

3) Legal Problem concerning Legal Enforcement

At present the power to enforcing the Non-smoker's Health Protection Act B.E.2535 was given to be a liability of the inquiring officer, the police officer shall have a power to arrest and impose a fine under the process of criminal procedure code. The authority under the Non-smoker's Health Protection Act B.E.2535 has only a power to patrol, they have only a duty to collect the evidence such as a photo while smoking and pass the case to the inquiring officer to apprehended or fine. However, the gathering of evidence and apprehended or fine under the criminal procedure is almost impossible and hardly take any benefit to the law enforcement. Because in nature of smoking, smoker will not take a long time to smoke and when the smoking is finish, the smoker is suddenly going out from such area. The enforcement process under the criminal procedure make the police officer cannot impose to fine the offender because before the police arrived, the

offender has already gone. The law enforcement which has to take a long time to perform will make the law enforcement ineffective and cannot achieve to the objective of the law. Law enforcement is the most importance step to achieve the objective of the law, Even the law will define the more protections but the law enforcement is ineffective, non-smoker is also get a risk to exposure toxic of second-hand smoke in anyways.

8. Conclusions and Recommendations

Under the objective of the Non-smoker's Health Protection Act B.E. 2535, the aim is to protect the right to breathe clean air by non-smokers from second-hand tobacco smoke. The law gives power to the Minister to design some public places as non-smoking areas. In actually, however, there are children and non-smokers who are outside the non-smoking areas and remain at risk to exposure from the toxins in tobacco smoke. The law does not protect them. In order to protect children and non-smokers who are outside smoking areas from the hazards of tobacco smoke, the law should be extended to cover the right to breathe clean air by non-smokers outside non-smoking areas as well.

1. In cases of legal issues concerning non-smoking areas

In order to protect the right of non-smokers to breathe clean air outside non-smoking areas, the law should specify the protection of non-smoker's health outside non-smoking areas in the Non-smokers' Health Protection B.E. 2535 to achieve protection for non-smokers' health directly and give power to the authority under the Non-smokers' Health Protection Act B.E. 2535 to make enforcement easier. Such action would also awaken flagrant incidents by enacting an exception to the right to smoke outside non-smoking areas, such as defining that "any areas which are not arranged as non-smoking areas, smoking is allowed except when such smoking causes damage to life, body, health or any right of another person. If any person infringes on others, they shall be subject to fine under the law."

2. In cases of legal problems concerning the lack of child protection in homes and vehicles

In order to achieve the objective of the Non-smoker's Health Protection Act B.E. 2535, which intends to protect children from the hazards of second-hand smoke, the law should be improved with a legal measure to cover the rights of children in a house and car. Even though a house and car are private places, no children should be exposed to cigarette smoke to any degree. According to the Convention on the Rights of the Child 1989, the government should take into consideration the best interest of the child in essence. Children have the right to live and survive as well as develop healthily, including the right to reach the highest attainable standard of health. The government shall have the responsibility to take all effective and appropriate measures to protect children from the hazards of second-hand smoke.

Under the objective of the Non-smoker's Health Protection Act B.E. 2535, the law was provided to protect the health of non-smokers against cigarette smoke only in public places. Therefore, protecting children from the hazards of second-hand smoke in homes and vehicles, which are private places, compels this writer to recommend that the Non-smoker's Health Protection Act B.E. 2535 be amended to include protected coverage beyond a home and vehicle. Children can be protected by enacting a specific regulation extending protection to children in homes and vehicles. For example, in the case of a car, the law may have defined that "smoking in any motor vehicle where there is a minor under 18 years of age, regardless of whether the vehicle is in motion or at rest, is prohibited by law". In the case of a house and in order to balance the rights and liberty of the dwelling with the right to breathe clean air by non-smokers, the law may be defined as "All units of a duplex or multi-family residence, including any associated exclusive-use enclosed areas or unenclosed areas in all indoor and outdoor areas such as a private balcony, porch, deck, or patio shall be designated places that protect the health of non-smokers and are declared tobacco-free areas". However, smoking areas can be established provided such areas are not located within 100 feet of enclosed areas primarily used by children and enclosed areas used to facilitate physical activity, such as playgrounds, swimming pools, and school campuses".

3. In cases of legal problems concerning law enforcement

In order to achieve the objective of the Non-smokers' Health Protection Act B.E. 2535, the law should be comprised of proper implementation and adequate enforcement, including solid efforts and effective instruments for implementation.

Therefore, this writer recommends that the effectiveness of law enforcement and achieving the true intention of the Non-smokers' Health Protection Act B.E. 2535 requires affording power to the authority to impose a fine by operating under administrative procedure. The immediate and serious enforcement will make an offender afraid of committing wrongdoing and create orderliness as a result. Moreover, the implementation of administrative procedure assists the law achieve its intention without causing smokers to have a criminal record if found to be in violation, such as by criminal fine penalty.

Furthermore, this writer recommends that increasing the effectiveness of law enforcement with respect to the Non-smokers' Health Protection Act B.E. 2535 requires the law to impose the duty on operators to prohibit smoking in their places, as well as the duty to control and dissuade smoking in non-smoking areas. The cooperation of officers and operators will make enforcement of the Non-smoker's Health Protection Act B.E. 2535 much easier and more effective.

PROBLEMS ON LIABILITY OF INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS*

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Abstract

It is true that each time people pursue their own interests; they interfere with the prospective economic advantage of others. Nevertheless, if they only gently outbid, or offer the attractive interests to induce the others' potential customers or would-be contracting party not to enter into the future relationship, with such party and enter into contract with them instead, the inducers' acts are totally lawful. However, if the interferer's conduct engaged in improper means or abuse of right, there should have any measures to eliminate the culpable conduct and any compensation to award the injured person.

Multiple jurisdictions have, both expressly and impliedly, recognized the liability of unlawful interference with economic relations allowing a person who suffered as a result of the unlawful interference with his business expectancy to sue for damages notwithstanding the absence of the existing contract. Thai law does not have specific provision regarding this liability. Lack of specific requirement may create the flexibility on a case-by-case basis but it may also generate an inconsistency in the jurisprudence.

The right of "prospective economic relations" may be regarded as the right to compete or the right to pursue reasonable interests without undue interference. Under Thai tort law, the interpretation of "other right" under 420 can cover this kind of right. Even if there is no express provision regarding this kind of liability, section 420 (general provision), section 423 (civil defamation), section 421 (abuse of right) and section 5 (good faith principle) is sufficient to cope with this area of law. Hence, it may be better to leave the court using the discretion based on a case-by-case basis than to stipulate the specific provisions relating to this area of law.

Keywords: Intentional Interference with Prospective Economic Relations or Business Expectancy, Tortious Interference, Interference with Future Contract

บทคัดย่อ

*This article is summarized and rearranged from the thesis "Problems on Liability of Intentional Interference with Prospective Economic Relations", the Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University.

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แต่ละครั้งที่บุคคลแสวงหาผลประโยชน์เพื่อตน การกระทำของเขาข่มแทรกแซงผลประโยชน์ที่บุคคลอื่นควรจะได้รับ อย่างไรก็ตาม หากบุคคลนั้นเพียงแต่เสนอราคาหรือผลประโยชน์ที่ดีกว่าเพื่อจูงใจให้ลูกค้าของคู่แข่ง หรือคนที่เขาเข้ามาเป็นคู่สัญญากับคู่แข่ง ไม่เข้าทำสัญญากับคู่แข่งและเข้าทำสัญญากับคนแทน การกระทำเช่นว่านั้นถือว่าชอบด้วยกฎหมาย แต่หากในการแทรกแซงนั้น ผู้กระทำใช้วิธีการอันมิชอบด้วยกฎหมายหรือใช้สิทธิโดยไม่ชอบแล้ว สมควรที่จะมีมาตรการเข้ามาควบคุมพฤติกรรมที่ไม่เหมาะสมนั้น รวมทั้งมีการชดเชยค่าเสียหายให้แก่บุคคลที่ต้องเสียหายอันเนื่องมาจากการแทรกแซงโดยมิชอบ

หลายประเทศยอมรับหลักการในเรื่องความรับผิดชอบในการแทรกแซงการเข้าทำสัญญาหรือการได้มาซึ่งผลประโยชน์ของบุคคลอื่น ซึ่งอนุญาตให้บุคคลที่ถูกแทรกแซงในการประกอบธุรกิจหรือในการเข้าทำสัญญาสามารถฟ้องร้องบุคคลที่เข้ามาแทรกแซงได้ โดยไม่จำเป็นต้องมีสัญญาเป็นองค์ประกอบในการฟ้องร้อง กฎหมายไทยไม่มีกฎหมายเฉพาะในเรื่องดังกล่าว แม้ว่าการไม่มีบทบัญญัติที่ชัดเจนจะส่งผลดีให้เกิดความยืดหยุ่นในการบังคับใช้กฎหมาย แต่ขณะเดียวกันย่อมก่อให้เกิดความขัดแย้งหรือไม่เป็นอันหนึ่งอันเดียวกันในการบังคับใช้กฎหมาย

สิทธิในผลประโยชน์ที่อาจคาดหมายได้ อาจถือได้ว่าเป็นสิทธิในการแข่งขันหรือสิทธิในการได้มาซึ่งประโยชน์ใดๆ ที่สมควรได้ โดยปราศจากการแทรกแซงที่ไม่เป็นธรรม เมื่อพิจารณากฎหมายละเมิดของไทย “สิทธิอย่างหนึ่งอย่างใด” ตามมาตรา 420 ของประมวลกฎหมายแพ่งและพาณิชย์สามารถตีความให้ครอบคลุมสิทธิดังกล่าวได้ แม้ว่ากฎหมายไทยจะไม่มีบทบัญญัติเฉพาะในความรับผิดชอบนี้ แต่ มาตรา 420 (บทบัญญัติทั่วไป), มาตรา 423 (หมิ่นประมาททางแพ่ง), มาตรา 421 (การใช้สิทธิโดยไม่ชอบ) และมาตรา 5 (หลักสุจริต) ของกฎหมายละเมิดของไทยอาจสามารถนำมาพิจารณาปรับใช้กับกรณีดังกล่าวได้ ด้วยเหตุนี้ จึงไม่มีความจำเป็นต้องมีการบัญญัติมาตราเฉพาะเพื่อมาแก้ไขปัญหาดังกล่าว แต่ควรนำหลักกฎหมายละเมิดมาปรับใช้แทนโดยให้เป็นดุลพินิจของศาลในการพิจารณาคดีต่อไป

คำสำคัญ: การแทรกแซงการได้มาซึ่งผลประโยชน์หรือการประกอบธุรกิจ, การแทรกแซงโดยละเมิด, การแทรกแซงในการเข้าทำสัญญา

I. Introduction

As long as an individual interferes with the economic expectancy of others and not with an existing interests or contract, it will be deemed as competitive activity. Nonetheless, if he interferes with another's existing contract, he can be held liable for inducement tort as called in the common law world. When the contract is formalized and if any party breached the contract due to the third party's interference, the other party may claim for damages incurred from the breaching party as well as the third party who interferes. However, the major limitation of this principle of liability is that only interference with interests under an existing contract can be grounds for claiming damages. Consequently, is there legal protection against an act of interference in a reasonable business expectancy which has not yet evolved into a contract, but is not far too remote so as to be unrealistic? Can this interest be protected and how?

In the common law world, a claim for intentional interference with economic relations¹ has been recognized in many jurisdictions even its basis

¹Intentional interference with economic relations is variously known as “unlawful interference with economic relations”, “interference with a trade or business by unlawful means”, “interference with prospective economic relations” “interference

varies widely from jurisdiction to jurisdiction. This claim enables an individual who suffered from the third party's interference with their interests to sue for damages notwithstanding the absence of contract. Unlawful interference occurs when the defendant commits an unlawful act which interferes with the plaintiff's trade or business interest² Likewise, it also incurs in case that the defendant causes the third party not to enter into a business relationship with a plaintiff that would probably have occurred as well as any acts of the defendant which hinder the plaintiff from establishing or maintaining relationships with the third party.³ Usually, the false claims and accusations are made against a business's reputation for the purpose of driving their customers away.⁴

II. History of Liability of Intentional Interference with Prospective Economic Relations

The origin of the tort of interference reaches back to the Roman law concepts of the *manus and patria potestas*⁵ which concerns the protection of interference in familial relation.⁶ It allowed a master to bring a suit against violence done to his household's members.⁷ The common law also recognized such liability in fourteenth century and expanded to cover the act of driving away a business's customers or a church's donors.⁸ But a cause of action under common law was strictly limited and only applies to a case which improper mean or actual violence were employed. For centuries, the common law continued to allow civil actions for interference with one's customers or other prospective business relationship; however, the actor's

with prospective contract", "interference with economic opportunities", "intentional interference with business expectancy" and other similar terms. (Larry Watkins, "Tort Law – Tortious Interference with Business Expectancy – A Trap for the Wary and Unwary Alike", 34 **U. Ark. Little Rock L. Rev.** 619 (2012), available at <http://lawrepository.ualr.edu/lawreview/vol34/iss3/6/>.)

For the purpose of this Article, the term "unlawful interference" will be used in a way that includes all synonymous terminology.

²Duhaime's Law Dictionary, <http://www.duhaime.org/LegalDictionary/U/UnlawfulInterferencewithEconomicInterests.aspx>

³Restatement (Second) of Torts, §766B

⁴Lyn L. Stevens, "Interference with Economic Relations: Some Aspects of the Turmoil in the Intentional Torts", 12 **Osgoode Hall Law Journal**. 595 (1974), available at <http://digitalcommons.osgoode.yorku.ca/ohlj/vol12/iss3/5>

⁵Peter H. Eulau, "Inducing Breach of Contract: A Comparison of the Laws of the United States, France, the Federal Republic of Germany and Switzerland", 2 **B.C. Int'l & Comp. L. Rev.** 41 (1978), available at <http://lawdigitalcommons.bc.edu/iclr/vol2/iss1/3>

⁶Eulau, *supra* note 5, at 44.

⁷George C. Christie et al., **Advanced Torts, Cases and Materials** (2004).

⁸*Id.*

conduct must be tortious in character or engaged in violence, fraud, or defamation.⁹

Furthermore, it involves with the employer's protection against inducement of his servant or laborer.¹⁰ The threshold of tort of interference appears in English case *Lumley v. Gye* (1853).¹¹ In this case, the defendant persuaded an opera singer who had contract with the plaintiff to sing at the plaintiff's theatre to break her contract and sing at his theater instead. Even if the plaintiff had a direct claim against the singer and can sue her for breach of contract, the defendant became liable for inducing a breach of contract.¹² Pursuant to this famous case, it is laid that the person procuring a breach of contract can be held liable as accessory to the liability of the contracting party.¹³ A main limitation of inducement tort is that if there is no existing contract, a person is not entitled to recover from such tort.

History of tort of unlawful interference differs from tort of inducing of breach of contract. It originates in the case of *Garret v. Taylor*¹⁴ in 1620. In such case, the defendant drove customers away from the plaintiff quarry by threatening them with violence and vexatious action. Besides, in the case of *Tarleton v. M'Gawley*¹⁵ in 1790, the defendant was held liable on the grounds of deterring the plaintiff from trading with natives (plaintiff's prospective customers) by shooting its cannon to the natives' canoe. The defendant's liability does not depend upon any other wrong conduct (no existing contract is breached). It is primary liability for injuring the plaintiff's interest by interfering with the liberty of the others.¹⁶ Even if the loss of the plaintiff was the decision of the potential customers not to trade with the plaintiff, the potential customers did not trade because of the defendant's disruption.

III. Rationale of this Liability (Notion of Free Market and Fair Competition)

Exactly, a free market is significant and no liability should be imposed in the course of competition; however, there should be a rule of the game to control and ensure the fair competition. Although the predominant

⁹*Id.*

¹⁰Eulau, *supra* note 5, at 44.

¹¹*Lumley v. Gye* [1853] EWHC QB J73, (1853) 118 ER 749 (cited in Steven F. Rosenhek & Brad Freelan, "The Torts of Good Faith Bargaining, Inducing Breach of Contract and Intentional Interference with Economic Interests", FASKEN (Apr. 2006), <http://www.fasken.com/en/torts-of-duty-of-good-faith-bargaining/>)

¹²*Id.*

¹³*Id.*

¹⁴*Garret v. Taylor* (1620) Cro Jac 567, 79 ER 485 (KB) (cited in *OBG Ltd v Allan* [2007] UKHL 21)

¹⁵*Tarleton v. M'Gawley* (1793) 170 ER 153 (KB) (cited in *OBG Ltd v Allan* [2007] UKHL 21)

¹⁶*OBG Ltd v Allan* [2007] UKHL 21, at 3.

motive while committing the conduct may be for the purpose of advancing his own business or gaining his living, a person is not entitled to disrupt with another's business by using illicit means. While claim for breach of contract may not be available due to lack of privity, this liability may provide a valuable remedy especially in the aggressive competition.¹⁷

Nevertheless, some argue that this liability may restrain the free market system by giving the interesting example that supposing you love a beautiful girl and she is neither married nor have a steady boyfriend, but you know that another man is in love with such girl, do you have to wait until that man fails to win her heart before you can approach the girl?

The answer for the above scenario is absolutely not. Here, there is no existence of a relationship, no marriage and no contract. This is a free market where everyone can pursue his own interests and compete with others. No one is more justified or more privileged under this situation. However, supposing you are competing based on fair rule, you give her precious gift and taking care about her but your competitor uses the philter to lure and entice her, or simply drug her.

You may think that this is not fair and wonder how you can recover from this grievance. In this situation, it may be difficult to award any damages because of its nature and it may be hard to identify that you have reasonable expectancy to be her boyfriend. But, this example merely aims to demonstrate that if the competition is fair, no one should be liable in any circumstances because competition is not a tort; everyone can use every trick in the book to be the winner provided that the action must be legitimate. However, there should be measures to protect against the use of blameworthy means and provide a remedy for any damage which may arise therefrom.

This liability is designed to draw the boundaries between the acceptable and blameworthy competitive conducts. In the course of doing the business or any dealings, the individual desires to be ensured that he can run the business or conduct his dealings without any undue disruption. This tort can serve as a protection of a person's dealing without unlawful interference. As Lord Hoffmann's statement, the purpose of this right of action is to enforce basic standard of civilized behavior in economic competition.¹⁸

Simply, not every act that disturbs a prospective contract or business expectancy is actionable. If the interferer only gently persuades, outbids, or offers the attractive interests to induce the others' potential customer or prospective partner not to enter into the future contract, trade or business, the interferer does not commit any unlawful act unless he engaged

¹⁷Adam D.H. Chisholm, "*Shine a Light: New Perspectives on Intentional Interference with Economic Relations*", MCMILLAN, <http://www.mcmillan.ca/102040> .(last visited Jul. 17, 2015)

¹⁸ SJ Berwin LLP. "*Claims without Contract: Economic Torts Come of Age*", LEGAL 500 (Mar. 2009), <http://www.legal500.com/developments/6629>

in unlawful conduct or commit the conduct with an intention to injure others or abuse of right are employed.

IV. Liability for Intentional Interference with Prospective Economic Relations in Foreign Countries

Unlawful interference emerges in the area of economic torts and has appeared to be the issue of increasing legal comments in many countries. Each country offers different approaches and various requirements to constitute the cause of action. It may be useful to explore foreign laws to see the development of this liability in each country and to see how foreign laws cope with this matter. In this article, laws of Canada, France, Germany, the United Kingdom and the United States will be studied.

As to the basic concept of this liability in foreign jurisdictions, the common law system which is based on judge-made law will be reviewed. First of all, regarding UK jurisdiction which is the origin of this claim, the UK court recognized the tort of “causing loss by unlawful means or interference with trade or business by unlawful means”¹⁹, which is separable from the inducement tort. The House of Lords clarified the basis of this tort in *OBG* case (2007)²⁰. The unlawful interference tort enables a plaintiff to file suit against a defendant for economic infliction resulting from the defendant’s unlawful conduct notwithstanding the absence of an existing contract.

Secondly, referring to Canadian jurisdiction, the Supreme Court of Canada, followed the UK court, recognized tort of “unlawful interference with economic interests” where there was no breach of contract.²¹ The claim permits a plaintiff to bring a suit against a defendant for economic loss resulting from the defendant’s unlawful interference despite the absence of the existing contract. The basis of this kind of liability remained novel for long period of time until in 2014 where the decision of *A.I. Enterprise* was released; the Court laid the principle of unlawful interference which was narrowed and clarified.²²

¹⁹*OBG Ltd v Allan* [2007] UKHL 21 at 3.

²⁰*Id.*

²¹Brandon Kain & Anthony Alexander, “*The Unlawful Means Element of the Economic Torts: Does a Coherent Approach Lie Beyond Reach?*”, MCCARTHY, https://www.mccarthy.ca/pubs/The_Unlawful_Mean_Element_of_the_Economic_Torts_Does_a_Coherent_Approach_Beyond_Reach.pdf (last visited Jan. 17, 2016)

²²David S. Morritt et al., “*Canada: Supreme Court clarifies “Unlawful Means” Requirement in Tort of Unlawful Interference with Economic Relations*”, OSLER (2014), <https://www.osler.com/en/resources/regulations/2014/supreme-court-clarifies-unlawful-means%E2%80%9D-requireme>. (See *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177)

Thirdly, in the case of the United States, the *Lumley v Gye* Principle of the UK law has been widely accepted in the US and the English case of *Temperton v Russel*²³ had a deep impact on the evolution of the tort in the United States which leads to the protection of commercial expectations.²⁴ This liability is officially recognized in Restatement (Second) of Torts as well as state case law. Most states formally recognized this liability in various ways. Some states follow the principle suggested by the Restatement while other states create their own criteria to evaluate the claim.

Likewise, the civil jurisprudence whose case is based on the codified law is also explored and briefed. Primarily, with respect to French approach, Article 1382²⁵ which is the general provision of French tort law has generous view to protect all rights and interests except illegal interests. When a person who has already known of the existing relations between the parties engaged in negotiation thereof and this conduct leads to the failure of execution of the contract, it may not be deemed as a fault based on competition notion unless it is done by an intention to cause loss or is accompanied by fraudulent misrepresentation.²⁶

Next, under German tort law, the prospective interests may be protected under section 826 BGB.²⁷ The person's wealth is protected based on this section. Even if the scope of section 826 BGB seems to be at first glance wider than section 823(1) BGB²⁸ to the extent that its application is not limited to the violation of specific interests but provides for compensation even of pure economic loss, it is narrower as it is available only in case of willfully inflicted damage.²⁹ Even if it seems to be broad in nature, the German courts have applied this section in the case similar to English torts, such as intimidation, inducing breach of contract and deceit.³⁰

It is apparent that all three common law countries recognized the unlawful interference with economic relations claim separate from the claim of inducing a breach of contract; however, the underlying principle for the cause of action is different; they use various approaches or different causes of action when applying this kind of claim and the extent of their applicability. The UK court recognized the claim but its application is limited. The UK practice is followed by the Canadian court while the US

²³*Temperton v Russell* [1893] 1 QB 715

²⁴Hazel Carty, *An Analysis of the Economic Torts* (2010).

²⁵Article 1382 of *Civil Code* "Any act of a person which causes injury to another obligates him by whose fault it occurred to make reparation."

²⁶Raymond Youngs, *English, French and German Comparative Law* (1998)

²⁷Section 826 BGB "a person who willfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage."

²⁸Section 823 BGB "a person who, willfully or negligently, unlawfully injures the life, body, health, freedom, property or any other right of another is bound to compensate him for any damage arising there from."

²⁹Gerald Spindler & Oliver Rieckers, *Tort law in Germany* (2011)

³⁰Youngs, *supra* note 26.

law has a specific provision and state case law also creates its own rule. Moreover, the US law goes beyond the UK law which is the origin of this tort.

The civil law system has no specific provision regarding this area of law. However, the general provision of tort can be applied, for example, the general and very wide basis of Article 1382 of French tort law can apply if the defendant engaged in wrongful conduct or acted with the intention to cause loss. Under Thai law, the interests protected under this claim should be regarded as “other right” under section 420 so that the plaintiff is allowed to sue for damages if other requirements are satisfied. Also, if the defendant’s conduct was committed for the sole intent to cause loss, he may be subject to liability and abuse of right.

V. The Substantial Requirement to Establish the Liability for Intentional Interference with Prospective Economic Relations

1) Existence of Business Expectancy

Generally, the tort protects non-formalized or anticipated business relationships³¹ which are reasonably certain to occur, but which are nonetheless prospective.³² This tort protects expectancies engaged in ordinary commercial dealings. In the United States, some states have provided some guidance to determine economic relation that it is “something less than a contractual right, something more than a mere hope and exists only when there is a reasonable probability that a contract will arise from the parties’ current dealings.”³³

The scope of prospective interests is so broad that the entire specific interests protectable under this claim cannot be enumerated, instead, only the general outline or main basis to determine the interests can be given. However, the scope of prospective advantage may summarily refer to an ability to obtain the favorable interests in the general commercial dealings e.g., ability to obtain the contract, sell of business, sell of goods, provide services, employ the employees, as well as any other similar activities. Furthermore, the scope of interests should also protect interest expected to

³¹The terms “business advantage”, “business expectancy”, “business interests”, “business relations”, “economic advantage”, “economic interests”, “economic relations” and any others similar terms are interchangeably used.

³²ABA Section of Antitrust Law, **Business Torts and Unfair Competition Handbook**, 2nd ed. (2006)

³³Zachary G. Newman & Anthony P. Ellis, “*Navigating the Nuances of Tortious Interference Claims*”, 18 **ABA Sec. Litig.**1, 20 (2011), available at http://www.hahnhausen.com/uploads/39/doc/2011_06_zgn_ae_navigatingnuances.pdf

obtain from the bid if the plaintiff has a reasonable expectancy to get the bid but lost the bid because the winning bidder engaged in unlawful act.³⁴

After contemplating the concept of interests in different countries, the proposed scope of prospective interests should cover two principal areas; prospective contract and trade or business expectancy. It is reasonable that the scope of economic advantage should include the reasonable probability to enter into the contract regardless of the types of contract, as well as the potential to establish the business relation or to reasonably acquire any interest protected by law.

The business interest can be broadly identified as appeared in the previous topic; however, the degree of certainty must also be considered. It is quite difficult to determine what degree of business expectancy can establish the elements of unlawful interference. However, some factors can be deemed as existence, for example, the length of the relationship if the relationship remained for long period of time, or regular prior dealings in similar matters. There are two divergent approaches given in defining the existence of business expectancy. The first one relates to the lenient approach of allowing the expectation in general; it is not required to identify the specific reasonable business expectancy. The second approach involves the stricter rule of requiring the plaintiff to identify the specific potential customers.

Indeed, where specific prospective customers do not exist, it is too remote to count as a business expectancy. When the specific customers are not required to be identified, it may not maximize competition. However, in case the action is perpetrated against people in general as presented in the first above case where no actual customer can be identified, how can the plaintiff recover his loss? It may be useful to apply the lenient approach to leave open to the court to decide based on case-by-case basis. Regarding the unidentified prospective customers, the plaintiff has to show some evidence to reasonably establish that the relationship is certain to occur, e.g. in the case of redeeming coupons.

However, noting that even if the requirement of existing business expectancy is fulfilled, it does not mean that the claim can be sustained because there are other requirements left to be satisfied like unlawful means.

³⁴See *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* 234 Cal.App.4th 748 (Cal. App. 2d Dist., 2015) (the California Court of Appeal concluding that a second-place low bidder on public works projects may sue the winning bidders for intentional interference with prospective economic advantage. In this case, the defendant can win the bid because of failure to pay its worker the prevailing wage. The appeal court ruled that the relationship between the plaintiff and the public agency that had awarded the contracts existed and it is adequate to maintain the cause of action for intentional interference with prospective economic advantage. See also, *Korea Supply Co. v. Lockheed Martin Corp* 29 Cal. 4th 1134 (2003)

2) Unlawful Conduct

Preventing others from obtaining economic interests or business expectancy can be justified on the grounds of competition or acquisition of one's own interest even if it causes economic loss to others. However, if the interference involves improper conduct, the interferer should be liable under some legal principles. After exploring the concept of unlawful means in different countries, each jurisdiction copes with this matter in various ways.

With regard to the common law system, under the English law, to satisfy the unlawful requirement, the defendant's act must be directed towards the third party and actionable by that third party; and ultimately interferes with the third party's liberty to deal with the plaintiff.³⁵ Like the UK law, the Canadian courts follow the concept of the UK law and spelled out that the plaintiff can constitute the tort only when the defendant's act give rise to a civil action by the third party³⁶; however, it does not mention whether the interference must affect the third party's liberty to deal with the plaintiff as appeared in UK law. Although these two common law countries recognize this claim but the application is narrow. This reflects the common law perspective which is reluctant to support fair competition.

As regards US law, even if the United States derives this liability concept from UK law, the US admits and applies this claim in the broader manner than its origin because it does not restrict the defendant's act to be directed at the third party, otherwise it only focuses on the nature of the defendant's act whether it is improper or not. The basis of this liability is expressly provided in Restatement (Second) of Tort as well as in state case law. Many states like California and Texas refuse to apply such basis due to lack of clear explanation and create its own rules that the conduct must amount to independent tort.³⁷ In other words, the defendant's act must violate other recognized tort apart from the act of interference³⁸

With reference to civil law system, the blameworthy conduct is based on the general provision of tort. In France, the defendant's action must fall within the definition of a fault requirement pursuant to Article

³⁵Kain & Alexander, *supra* note 21 at 88. (See *OBG Ltd v Allan* [2007] UKHL 21, at 3)

³⁶Bradley Phillips, "Claims Against Competitors for Business Interference Must Meet Strict New Supreme Court Test to Succeed", BLANEY MCMURTRY (2014), <http://www.blaney.com/articles/claims-against-competitors-business-interference-must-meet-strict-new-supreme-court-test> (See *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177)

³⁷See *Wal-Mart Stores, Inc. v. Sturges* 52 S.W.3d 711 (2001) ("By 'independently tortious' the court means conduct that would violate some other recognized tort duty."³⁷ Simply, it means conduct that is already recognized to be wrongful under the common law or by statute.")

³⁸See *Della Penna v. Toyota Motor Sales, U.S.A., Inc* 11 Cal.4th 376, 45 Cal.Rptr.2d 436, 902 P.2d 740 (1995)

1382. Any breach of the law constitutes a fault under this section.³⁹ Under German law, section 826 BGB can be considered to protect prospective interests. Even at first glance, this section is wider than section 823 because it allows recovery of pure economic loss or people's wealth but its application is limited that the defendant's act must be against good moral or public policy.

Additionally, in civil law system, there is the development of good faith principle and abuse of right concept that no one should suffer damage from others' exercise of right. Even the defendant does not engage in unlawful conduct, he may be liable if motivated by malicious intent or sole purpose to cause loss to others. Conversely, the abuse of rights concept is not readily recognized in the common law systems.⁴⁰

VI. Liability for Intentional Interference with Prospective Economic Relations in Thailand

The Constitution of the Kingdom of Thailand B.E.2550 (2007), section 43⁴¹, ensures a person's liberty to trade or gain interests; freedom to make a living or trade is confirmed. When the defendant induces the customers not to purchase the goods from any shop or undermines the plaintiff's business so that the plaintiff cannot operate the business, the defendant should be liable.⁴² This right may be regarded as a right to compete or a right to pursue reasonable interests without undue disruption.

³⁹Youngs, *supra* note 26.

⁴⁰Michael Byers, "Abuse of Rights: An Old Principle, A New Age", 47 **McGill LJ** 389 (2002), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5574&context=faculty_scholarship

⁴¹Section 43 "A person shall enjoy the liberties to engage in an enterprise or an occupation and to undertake a fair and free competition."

⁴²Nopparat Sananpanichkul. "Any Right Pursuant to Section 420: Study on Historical Dimension and Comparative Law." Master's thesis, Thammasat University, Laws, 1995.

(นพรัตน์ สนั่นพานิชกุล. "สิทธิอย่างหนึ่งอย่างใดตามบทบัญญัติมาตรา 420: ศึกษาในแง่ประวัติศาสตร์และหลักกฎหมายเปรียบเทียบ." วิทยานิพนธ์ปริญญาโทบัณฑิต, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2538) With regard to the decision of the Supreme Court no. 809/2487, in the event the defendant hindered the plaintiff from operating its business and gaining his interests, the defendant can be liable.⁴² As to the fact of this decision of the Supreme Court no. 809/2487, the plaintiff was a temple conducting the amusement. On the night of the amusement, the defendant thwarted the performance of Thai traditional southern dance (Norah) by using weapon and the performance fell through. The plaintiff lost profit from collecting money from the audience. The defendant's conduct directly injured the right of the plaintiff's freedom according to law. The court held that the defendant's conduct interfered with the business operation's freedom of the plaintiff given by law so that the plaintiff lost any prospective economic advantage.

In accordance with Thai law, the term “any right” pursuant to section 420⁴³ of Thai Civil and Commercial Code must be interpreted in the broader manner than section 823(1) BGB of German law because in Thai law, there is no specific provision as appeared in section 826 BGB. In relation to any other right under Section 420 of Thai Civil and Commercial Code, Professor Jitti Tingsaphat⁴⁴ opined in case of any other right according to section 420 that it must be broadly interpreted and must include the case that a third party persuades a contracting party to breach a contract.⁴⁵ No comments were given in terms of interference with prospective contract or business expectancy. In this author’s view, the prospective interests under this claim may also be deemed as other right for the purpose of this section.

When glancing at Thailand Civil and Commercial Code, there are four main approaches to be taken into account to settle the issue, which are general tort provision, good faith principle civil defamation and abuse of right. As to good faith principle, it is prescribed in section 5⁴⁶ which provides that in the exercise of right, the individual must act in good faith. This provision lays a very wide and general basis. Consequently, if applying this section with the case, vagueness will arise and the case can be interpreted in different ways. However, it should be used when no specific provisions can be applied.

Regarding general tort provision pursuant to section 420, if the actor’s conduct is against the law and results in damages of prospective economic advantage of another, he should be liable under this section even it fits into a particular type of tort i.e. defamation, misrepresentation of trade secrets or bribery. However, liability under tort law does not have the express stipulation to determine which conduct is unlawful. In other words, if the individual’s conduct injures the rights of a person, which are the rights to life, body, health, freedom, property or any other right, the perpetrator can be held liable under tort law. Next, as to committing an act willfully or negligently, it means any act committed with consciousness and awareness that such act may result in injury to others. If being conscious that the conduct may injure the others’ right, it can be deemed as willful act. Then, relating to damage suffered by another, if no damage occurs then

Therefore, the plaintiff was entitled to recover damages. The court held based on section 420 and awarded damages pursuant to section 438 and 446.

⁴³Section 420 “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 there for.”

⁴⁴Jitti Tingsaphat, **Civil and Commercial Code Part II section 354-452 Relating to Source of Obligations** (1983)

(จิตติ ดิงสภักดิ์, ป.พ.พ. บรรพ 2 มาตรา 354 – 452 ว่าด้วยมูลหนี้ (2526))

⁴⁵*Id.*

⁴⁶Section 5 “Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith.”

there is no liability. Damage must occur to the person protected under the law and must be certain. Finally, the causation between conduct and damage must be considered.

If, in the course of competition, conducting business or dealing, the rival competitor asserts any untrue statements which injure the person's reputation even if he does not know of its untruth, but he ought to know it, he may be liable under section 423.⁴⁷ However, if the defamatory statement is true, he will not be liable under this section despite the fact that it may cause loss to others. Likewise, if he does not know that such statement was untrue and he has rightful interest in it, he will not be subject to liability. However, when applying this section in case of unlawful interference, it can only apply to the specific area of defamation in the course of competition, if it occurs outside this scope, the general provision must be taken into account.

Lastly, in terms of abuse of right, a person has the right to exercise but such exercise causes any detriment to others to the extent not permitted by law. Abuse of rights involves the conduct that intentionally injures another, exercising the right without gaining any interests or damage which occurs to another person is greater than the benefit that the person will acquire. Therefore, although the person has a legitimate right to pursue his own interests, he has to be aware not to exceedingly use his right that can cause loss to person more than it should occur in the reasonable course of business, otherwise, he may be liable under section 421.⁴⁸

In brief, the liability for unlawful interference may rely upon the general tort law under section 420 if the interference is wrongful itself or the defendant's conduct satisfies the cause of action requirement. Likewise, if the defendant's conduct is lawful but done with the pure malice or sole intent to injure the plaintiff or against the *bona fide* principle, his conduct may be wrong under section 5. Similarly, if the defamatory statement causing harm to others' reputation, credit, earning or prosperity was asserted, the person asserting the statement may be liable for civil defamation under section 423. Moreover, in case of improperly exercising the right or abuse of right, even if there is no malicious intent to cause harm, if the person uses the right in the manner that cause loss to another more than it should be, the liability may also be imposed pursuant to section 421.

⁴⁷Section 423. "A person who, contrary to the truth, asserts or circulates as a fact that which injurious to the reputation or the credit of another or his earnings or prosperity in any other manner, shall compensate the other for any damage arising therefrom, even if he does not know of its untruth, provided he ought to know it. A person who makes a communication the untruth of which is unknown to him, does not thereby render himself liable to make compensation, if he or the receiver of the communication has a rightful interest in it."

⁴⁸Section 421 "The exercise of a right which can only have the purpose of causing injury to another person is unlawful."

By examining Thai law, in spite of lack of specific provisions as appeared in US or any basis given as appeared in UK and Canadian court, the general tort provision of Thai tort law can be applied in this situation. In this author's opinion, to satisfy the unlawful requirement, it should be classified into two types. Firstly, the defendant's act must be independently unlawful which means it is against the law apart from the act of interference itself under section 420, the defendant's conduct must breach a statute or is in violation of any law. The violation of industry standard or ethical practices should not be sole grounds for a cause of action to avoid any uncertainty in this area of law. Secondly, if the conduct of the defendant is not against the law, but is committed with the sole intent to injure the plaintiff and satisfies the abuse of right requirement, the perpetrator should be liable for his malicious intent under section 421.

As for independent wrongful conducts, such as; defamation, conspiracy, bribery, threat or assault, the defendant may act directly against the plaintiff in order to ruin the plaintiff's business by means of illegal conduct like defamation or acts directly to the third party and it then results in plaintiff's injury. For instance, the defendant threatens the third party (plaintiff's potential customers) that he will hurt them, if they still buy goods from the plaintiff. Such threat may be actionable by the third party based on assault but it would not be actionable by the plaintiff, therefore allowing this claim may be a valuable remedy for the plaintiff.

Regarding abuse of right, the doer has liberty to commit but he abuses his right and cause damages to others pursuant to section 421. In addition, if person only gently persuades, outbids, or offers the attractive interests to induce the others' potential customer or prospective partner not to enter into the future contract, trade or business, the inducer does not commit any unlawful act unless the improper means or abuse of right are employed. For instance, the double of the value of coupon issued to other's potential customer can be deemed as pursuing its own business interests but it can be regarded as exercising the right to cause loss to others, which is abuse of right.⁴⁹

The following hypothetical case is demonstrated to describe how the claim handles with this issue.

When A offers to sell a used car to B for the amount of 320,000 baht, but before B accepts such offer within the specified time, C offers A to purchase such car for the amount of 350,000 baht. A therefore sells such

⁴⁹Big C v. Lotus Case (Tesco Lotus announced that it will take the coupons valued 80 baht issued by Carrefour and will double the value of the coupon to be 160 baht provided that the customer shall purchase the goods in Tesco Lotus supermarket. Tesco's operation is obviously to scramble for Big-C's customers. In 2013, the court of first instance held that Tesco Lotus's conduct was wrongful against section 421.)

car and delivers it to C.⁵⁰ Due to the fact that B's acceptance has not reached A, the contract between A and B does not yet occur. Hence, A will not be liable to B under the contract. However, A's sale of the car to C infringes the provisions of law as set forth in section 354 of Thailand Civil and Commercial Code⁵¹ on the grounds that A cannot withdraw his offer within the specified time. Although A does not breach the contract with B because when A sells and delivers the car to C, the contract between A and C is not established yet, A's conduct may be deemed as a wrongful act under section 420.⁵²

In such case, is there any liability against C? Can C's inducement be deemed as interference with future contract which B reasonably expects to enter into? Ability to obtain the reasonable prospective contract may be deemed as one genre of potential interests in the meaning of "any other right" under section 420. In light of absence of existing contract, this is exactly free market where an individual can compete with others for gaining his own benefits.

It is clear that C's action interferes with B's prospective economic interests by offering A the better price while it is in the specified duration for B to accept the proposal. In this case, C's conduct is lawful; however, the law will verify the intention of C, not only look at his conduct. If C knows the existence of negotiation between A and B that A already makes an offer and it is during the time for acceptance by B, C's conduct may be against the *bona fide* principle and may be liable for abuse of right if C has malicious intent or ill will under section 421. Besides, if C employs any unlawful conduct, for instance, threatens A to offer him the deal, or C may disseminate false claims about A, C's act is independently unlawful and should be liable for the unlawful interference under section 420.

VII. Conclusion and Recommendation

It is acceptable that a person has the right to compete for his own interests or financial gain even exercising such right may cause damage to another. Interference with others' prospective economic advantage is justified so long as it does not involve any unlawful conduct and the interference is not performed for the sole purpose of injuring others. The liability for intentional interference with prospective economic relations is designed to draw the line between fair and culpable competitive activities. It does not restrain free market system because if the improper conduct is ignored, it actually ruins the competition.

⁵⁰Paijit Punyapan,, "Precontractual Liability and Concurrent Liability", 47 **Dullapaha**. 3 (2000).

(ไพจิตร ปุญญพันธ์, "ความรับผิดก่อนสัญญากับความรับผิดซ้อนกัน", 47 **ดูลาพา**. 3 (2543))

⁵¹Section 354 "An offer to make a contract in which a period for acceptance is specified cannot be withdrawn within such period."

⁵²Paijit, *supra* note 50.

The right of “prospective economic relations” may be regarded as the right to compete or the right to pursue reasonable interests without undue interference. Under Thai tort law, the interpretation of “other right” under 420 of Thailand Civil and Commercial Code can cover this kind of right. Even if there is no express provision providing liability on interference with prospective economic advantage, section 420, section 421 (abuse of right) and section 5 (good faith principle) is sufficient to cope with this area of law. Hence, it may be better to leave to the court to exercise its discretion on a case-by-case basis rather than to stipulate the specific provisions relating to this area of law. Nevertheless, this Article will propose the outline for two essential elements required to constitute this liability as follows:

- 1) Despite the absence of a contract, the prospective interests of a person should be protected from unlawful conduct. The prospective interests, or any similar term, should refer to an ability to obtain benefits from general commercial dealings. This prospective advantage should be regarded as a protectable right under the term “other right” under section 420 of Thai tort law.

- 2) Regarding the defendant’s conduct in the course of interference, the defendant’s act must be independently unlawful which means it is proscribed by some laws apart from the act of interference itself. Besides, the defendant’s act should not be limited only to the act directed at the third party as suggested by the UK and the Canadian courts.

THE RIGHT OF THE EMPLOYER OVER ELECTRONIC INFORMATION CREATED IN THE COURSE OF EMPLOYMENT¹

*Penkea Thitipraganwong ***

Abstract

In recent decades, most workplaces have been using computers to do business and the computers have become an important business tool to operate business. However, the employer, who employed the employee to create the work in electronic information, still has insufficient laws to protect his right over such electronic information under Thai laws. Despite, the employer invests in the economy but he cannot protect the electronic information created during the employment.

An electronic information created by employee in the course of employment during the employment period is admittedly belonging to the employer as same as the corporeal work. Nevertheless, some electronic information can be the copyright work, which the copyright law in the United States of America provide the right over the copyright work, which made for hire, to the employer. As well as, the United Kingdom and German also specify some copyright works belong to the employer. However, the copyright law of Thailand provides the protection of copyright work in the course of employment to the author, not the employer.

Furthermore, the electronic information is not the things under the definition of the Criminal Code, thus it's not object of theft offence. The Computer-Related Crime Act B.E.2550 may not protect the electronic information of employer if employee has an authorization to access the computer. Moreover, the protection by trade secret law is not applicable to protect the electronic information in the digital age as it is easy to access and distribute.

This thesis will study and analyze the existing applicable laws in Thailand need to amend in order to protect right of the employer over electronic information created under the employment based on the concept of German copyright law to balance the right of employee as the author of works and seek a criminal measure to protect the right of employer o

ver electronic information from the bad faith action of employee

Keywords : Electronic Information, Copyright, Work made for Hire and Trade Secret.

¹ This article is summarized and arranged from the thesis "The Right of the Employer over Electronic Information Created in the Course of Employment" Master of laws in Business law (English Program), Faculty of Law Thammasat University, 2015.

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บทคัดย่อ

ในทศวรรษล่าสุดที่ผ่านมา สถานที่ประกอบการส่วนใหญ่ได้นำคอมพิวเตอร์เข้ามาช่วยในการประกอบธุรกิจ และคอมพิวเตอร์ได้กลายเป็นเครื่องมือส่วนสำคัญในการดำเนินธุรกิจ อย่างไรก็ตาม นายจ้างซึ่งได้ว่าจ้างลูกจ้างทำงานนั้นมีลักษณะเป็นข้อมูลอิเล็กทรอนิกส์ ยังไม่มีกฎหมายให้ความคุ้มครองสิทธิของนายจ้างในข้อมูลอิเล็กทรอนิกส์อย่างเพียงพอภายใต้กฎหมายไทย ทั้งนี้ นายจ้างเป็นผู้ลงทุนทางด้านเศรษฐกิจแต่ไม่สามารถปกป้องสิทธิในข้อมูลอิเล็กทรอนิกส์ที่จะสร้างขึ้นในระหว่างการจ้างงาน

ข้อมูลอิเล็กทรอนิกส์ที่สร้างขึ้นโดยลูกจ้างในการทางที่จ้างระหว่างการจ้างงาน เป็นที่ยอมรับโดยทั่วกันว่า เป็นของนายจ้าง เช่นเดียวกับการสร้างงานที่เป็นวัตถุที่มีรูปร่าง อย่างไรก็ตาม ข้อมูลอิเล็กทรอนิกส์บางงานสามารถเป็นงานอันมีลิขสิทธิ์ได้ ซึ่งงานอันมีลิขสิทธิ์ในประเทศสหรัฐอเมริกากำหนดให้งานที่สร้างขึ้นจากการทำงานของนายจ้าง เช่นเดียวกับกฎหมายประเทศอังกฤษ และเยอรมันที่ได้กำหนดให้งานอันมีลิขสิทธิ์บางงานตกเป็นของนายจ้าง อย่างไรก็ตาม กฎหมายลิขสิทธิ์ของประเทศไทยได้ให้ความคุ้มครองงานที่สร้างขึ้นในฐานะพนักงานให้งานนั้นเป็นผู้สร้างสรรค์ ไม่ใช่ของนายจ้าง

ยิ่งไปกว่านั้น ข้อมูลอิเล็กทรอนิกส์ไม่ถือว่าเป็นทรัพย์สินภายใต้ประมวลกฎหมายอาญา ฉะนั้นจึงไม่อาจเป็นวัตถุในความผิดฐานลักทรัพย์ได้ พระราชบัญญัติว่าด้วยการกระทำความผิดทางคอมพิวเตอร์ พ.ศ. 2550 ก็ไม่ได้คุ้มครองข้อมูลอิเล็กทรอนิกส์ของนายจ้างหากว่าลูกจ้างได้รับอนุญาตให้ใช้และเข้าถึงคอมพิวเตอร์นั้น ๆ นอกจากนี้ ความคุ้มครองตามกฎหมายความลับทางการค้า ไม่สามารถนำมาใช้ปฏิบัติเพื่อปกป้องข้อมูลอิเล็กทรอนิกส์ในชุดดิจิทัลได้ เนื่องจากข้อมูลอิเล็กทรอนิกส์สามารถเข้าถึงและเผยแพร่ได้โดยง่าย

วิทยานิพนธ์ฉบับนี้มุ่งที่จะศึกษาและวิเคราะห์กฎหมายที่ใช้บังคับอยู่ในปัจจุบันของประเทศไทย ว่าสมควรที่จะมีการแก้ไข เพื่อปกป้องสิทธิของนายจ้างในข้อมูลอิเล็กทรอนิกส์ซึ่งสร้างขึ้นภายใต้การจ้างงาน โดยศึกษาจากกฎหมายลิขสิทธิ์ของประเทศเยอรมัน โดยเพื่อที่จะยังคงรักษาสิทธิของลูกจ้างในฐานะผู้สร้างสรรค์งาน และปกป้องสิทธิของนายจ้างในข้อมูลอิเล็กทรอนิกส์ ทั้งมาตรการทางอาญาในกรณีที่ถูกจ้างกระทำการโดยมีเจตนาไม่บริสุทธิ์

คำสำคัญ: ข้อมูลอิเล็กทรอนิกส์ ลิขสิทธิ์ งานอันมีลิขสิทธิ์ที่เกิดขึ้นจากการว่าจ้าง ความลับทางการค้า

Introduction

In recent decades, most workplaces have been using computers to do business and the computers have become an important business tool to operate business. The works are mostly created in electronic form and stored it in the computer, the physical papers are less to use.

However, the employer, who employed the employee to create the work in electronic information², still has insufficient laws to protect his right over such electronic information under Thai laws. Despite, the employer invests in the economy but he cannot protect the electronic information created during the employment.

² In this Thesis if there is the word referred to “Electronic Information”, “Electronic Data” or “Electronic File” herein are the same meaning by meant that any information or data generated by computer and kept, stored, saved in computer in form of electronic file.

If electronic information is a copyrighted work created by employee in the course of employment under the copyright law³, the owner of such copyright work shall vest in the author, herein means employee. Unlike in German⁴, the United States of America⁵, and the United Kingdom, the works made for hire in employment shall vest of the ownership in an employer.

On the other hand, if electronic information is not a copyrighted work, it also cannot be protected by the other laws. In trade Secret law, it is not easy to apply the trade secret law to the electronic information, which employee possesses it for work, it is hard to proof whether, especially in this modern age, information can be easily accessed from anywhere by remote access into employer's server via visual private network (VPN)⁶ or employee is allowed to bring company laptop to work outside company. The essential elements of trade secret law the information must be kept in secret with the proper measures in maintaining its secrecy⁷, but some electronic information is opened for every employee to access and use as information base, thus the trade secret law shall not apply for some electronic information. However, if electronic information can be protected by the Trade Secret law, but the previous cases in Thai Court, the owner of information have rarely won the cases because the employer did not have enough evidence to support his own claims to meet the elements of trade secret.

In the view of the Computer-Related Crime Act B.E.2550 (CRCA), if employee has been provided computer to use for working, he also has the right to access into his own working computer, therefore when employee copies an employer's electronic information from his own working computer is not committed the illegally accesses computer data.⁸

Especially, stealing the employer's electronic information is not protected by the Criminal Code of Thailand, as the Supreme Court had the final decision on the case no. 5161/2547⁹ that the employee took away the employer's information by copying into the diskettes, the Court viewed that the employee's action did not commit the theft offense, because information could not be stolen because information is not "things"¹⁰ by referred to the meaning of "things" in Civil and Commercial Code.

³ See Section 9 of the Copyright Act B.E. 2537,

⁴ See Article 69b of Act on German Copyright and Related Rights (Copyright Act), 1965

⁵ See § 201 - Ownership of copyright of U.S. Code, Title 17.

⁶ King Mongkut's University of Technology Thonburi, "ระบบเครือข่ายส่วนตัวเสมือน (Virtual Private Network)", http://www2.kmutt.ac.th/thai/CUR_STU/cur_vpn.html

⁷ Sitta Kunapatarawong, "Trade secrets between employer and employee", Master of Law Thesis of Thammasat University (2013), 75

⁸ See Section 7 of the Computer-Related Crime Act B.E.2550.

⁹ Supreme Court Decision no. 5161/2547, "www.deka2007.supremecourt.or.th/"

¹⁰ Section 137 of Thai CCC B.E. 2535, "Things are corporeal objects."

Ownership of copyrighted works in foreign countries

For the purpose of thoroughly analyzing the right of employer over electronic information in Thailand, it is necessary to comparatively study the laws of other countries.. Focusing on the ownership of electronic information, which is classified as the copyright work and made in the course of employment or called “work made for hire” in German law, US law and UK law.

German also specifies the initial owner of copyright in a work is always the natural person, who creates the copyright works as same as other civil law countries. In Article 43 of UrhG. Even though, Article 43 maintain the ownership in the original author, who create the work regardless of contract status, the final provision as operate to permit German court to imply the transfer in term of nature shall be made in writing, ownership of completed work may transfer¹¹. Under German law, the transfer of copyright, whether express or implied, shall be limited to the exploitation rights, which can transferable, whether there is the scope in the agreement or absence of specific agreement pursuant of Art. 31, and 34 of UrhG¹². However German law specifies the cimenatographic and audiovisual works and computer software are subject to the exception of the principle rule, which the work shall be vested in the employer as Section 69b

In the United States, the works made for hire is an exception to this principle of initial ownership, which are two separated ways that a work made for hire can occur. The Copyright Act of 1976, 17 U.S.C. §101¹³ defines a work made for hire as either:

(1) A work prepared be an employee within the scope of his or her employment; or

(2) A work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as an answer material for a test, or as an atlas, if the party expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Two parties cannot enter into a work-made-for-hire agreement to create a commissioned work that is not in one of above categories. For example, a work-made-for-hire agreement for a commissioned painting (not used as a part of collective work) would not be valid. From the first method of creating the work made for hire, the work must be created within the scope of employment. Therefore, if a programmer creates a software

¹¹ “*Analysis of International Work-for -Hire Laws*”, 2004 Sutherland Asbill & Brennan LLP, at <http://www.sutherland.com/portalresource/lookup/poid/Z1tOI9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEuS3Dr0!/fileUpload.name=/WorkforHireLaws.pdf>

¹² See Article 34 of UrhG

¹³ Copyright Act of 1976, 17 U.S.C. Section 101

program before beginning employment at a computer company that software will not be a work made for hire. If the work is created as a work made for hire, the hiring party shall be named as the author when registration can be an organization, a company, or an individual.

In the United Kingdom, the work made for hire specifying the primary works as literary, dramatic, musical and artistic to be vested in the employer, not the author if such works are created in the course of employment. For the type of sound recordings, broadcasts, and cable programs will vest initially in creator of works, herein means the employee under the Copyright, Designs and Patents Act 1988, Section 9 (2)¹⁴.

Ownership of copyrighted work in thailand

The electronic information itself does not exist, it has to store in some of "physical object" for example, in CD ROM, hard disk, thumb drive, server or computer. As it is always embedded in the physical object, can it be constituted a physical object or not because it is shown in a physical form. It also argued that it should be possible to state someone is in possession of something if they have physical control over that something and intends and is able to exclude others from accessing it. Furthermore, it is claimed that a database should be treated as a document that is physical in nature and can therefore be possessed.

The author of work is usually being the owner of copyright as specified in Section 8 of the Copyright Act B.E. 2537¹⁵, except the work, which created under the employment relation, unless it is agreed in writing between the author and employer to specify that employer will be the owner of such copyrighted work as specified in Section 9 of the Copyright Act B.E. 2537. Or in case of a work created under the course of commission or hire of work, the employer will be the owner of such work as specified in Section 10 of the Copyright Act B.E. 2537¹⁶.

In general, the author of works shall be the owner of the copyrighted work as defined in Section 4 of the Copyright Act. Only the owner of a copyrighted work can have the exclusive right to use his works as he wishes and preventing the others from using the work without his prior permission. The right under copyright can be classified into two types; the "Economic Rights", which the owner can take the financial reward from the other who use the works and "Moral Rights", which allow the owner to take the certain actions as specified by laws to preserve the personal link between himself and the work.¹⁷

Unlike, the work made in the course of commission under Section 10, the copyright shall vest in the employer as well as the work made in the

¹⁴ See Section 9 (2) of Copyright, Designs and Patents Act 1988

¹⁵ Thai Copyright Act B.E. 2537, Section 8.

¹⁶ Thai Copyright Act B.E. 2537, Section 10.

¹⁷ *Id.* at 13.

course of employment by order or control of Government under Section 14 to be protected under the Copyright Act B.E. 2537.

Problem of protection of the right of employer over electronic information in thailand

In the relation of employment, there are no law in Thailand to identify, who will be the owner of works generated in the employment period, except the works, which is the copyright works shall be protected under the Copyright law, and the copyright law has specified for certainly that the owner of such works will be employee, except stipulated otherwise in writing. Even though the hire of services contract is not required the contract to confirm the relationship of employer and employee but nowadays mostly of the employers will ask the employees to sign on the employment contract to specify the duties, salary, welfare, starting date, rule and regulation to be complied, including the protection clause of the result of work are belonging to the employer or the confidential information of the employer, not allow the employee to disclose, reveal to the third party, or even among the employee, who does not need to know, in order to protect the confidential in formation of employer. There is no specific law to define the property created under the employment period belong to the employer but it is in the principle of law, who vested in should harvest such work to its own proprietary.

Generally, under the Trade Secrets Act, B.E. 2545 (2002) there are two types of trade secrets to be protected, which are information and data or test results. "Information" includes formulary, technical procedures, designs, compiled or assembled works, or business operation methods. The owner of secret information will normally wish to prevent it from being disclosed to a third party. The information must have commercial value and must not yet be widely known or known by people related in the trade only. From the past cases of trade secret. Thailand, the employers have rarely won the cases because the basic principle of trade secret itself that the secret electronic information; (i) not yet publicly known, or (ii) not yet accessible by person who normally connected with such information, (iii) use the appropriate measures to maintain the secret, and (iv) having commercial value from the secrecy. Therefore, Trade Secret Act is not sufficiency to protect the right of employer.

In the criminal law protection, the Supreme Court case no. 5161/2547 ¹⁸ had judged on the case of stealing the employer's information that the plaintiff that an information could not be stolen because it cannot be "things" to be took away in the theft offence.

In the view of Section 7 of The Computer-Related Crime Act, if employee has been provided computer to use for working, he also has the right to access into his own working computer, therefore when employee

¹⁸ Supra note **Error! Bookmark not defined.**

copies an employer's electronic information from his own working computer is not committed the illegally accesses computer data.

However, some employer has the policy to use employee devices at work instead of using employer's device and employer will compensate employee of using his own devices for work by allowance paid per month or year, for example bring his own car, phone or computer, laptop. The policy is called Bring Your Own Device (BYOD) or BYOC (Bring Your Own Computer) policies. If employee brings his own computer to work, the electronic files stored in the employee computer, which is belonging to employer, will be under controlled and possessed by employee, which of course he has the right to access his own computer. Therefore, the Section 7 of The Computer-Related Crime Act cannot protect the employer's electronic information when the employment relationship is terminated.

Proposed solutions

From the different result of the ownership over an electronic information generated by the employee during the employment, which accept that it's valuable property to the economy but it's there are no laws to determine those valuable properties are belong to which parties, except the copyrighted work under the Copyright Act, therefore the suggestions to amend the following law would be proposed as follows;

It should be amended the Copyright Act Section 9, to be the employer to be the owner in order to eliminate the confusion of the ownership of work between the copyrighted work and non-copyrighted work, all of them shall be treated as the property of the employer with the justified reason that the employer, who is paying for employee to work for him and created the work under the scope of work should be the owner of such works and all above of reason the employer invests the money and the most of information relating to employer's business should be valuable to the employer more than employee. Therefore, Section 9 of Copyright Act B.E. 2537, suggest to be amended as follows;

"Copyright in a copyrighted works created by an author in the course of employment shall vest in the "employer", the employer shall be entitled to exercise all economic rights unless otherwise agreed in writing, provided that the author shall be entitled to communicate and identify such work to the public in accordance with the purpose of the employment"

Thereafter, it should have the criminal punishment when employee bad faith intends to delete, copy, obtain the information when he has an authorization to access the computer data or while under his possession in second paragraph of Section 7;

"Section 7 If any person illegally accesses computer data, for which there is a specific access prevention measure not intended for their own use available, then he or she shall be subject to imprisonment for no longer than two years or a fine of not more than forty thousand baht or both."

If any person intentionally accesses a computer and thereby deletes, transmits, obtains confidential information of other person shall be subject to imprisonment for no longer than two years or a fine of not more than forty thousand baht or both."

**PROBLEMS ON PROTECTION OF SHAREHOLDER'S
RIGHTS FROM INVESTING IN EQUITY
CROWDFUNDING: STUDY ON
LIMITED COMPANY***

*Phi Ploenbannakit***

Abstract

Crowdfunding Platform allows SMEs with limited resources to jump from the old-fashioned funding schemes to new forms of relief via the internet. In other words, SMEs use online funding as a channel to get funding sources. Furthermore, Crowdfunding Platform has been developed to serve commercial purposes in which the investors expect the returns from their investment.

Equity Crowdfunding, as recently adopted by the Securities and Exchange Commission (SEC), generally relies on the concept of capital increase and offering for the sale of shares in the limited company under the umbrella of the Civil and Commercial Code (CCC) and Securities and Exchange Act B.E. 2535. However, unlike that of the typical provisions, the new SEC's rules grant the exemption to the limited company to offer the shares for sale publicly subject to the conditions imposed. In other words, it aims to unblock the restrictions of existing provisions in order to facilitate Equity Crowdfunding whereby the limited company is entitled to offer its shares for sale to other investors in addition to the original shareholders who have a shortage of funds at the early stage of the start-up and may not be able to inject more capital to continue the business. More importantly, the Crowdfunding exemption under the SEC's Notifications allows the private limited company to raise funds by offering the shares for sale to the public or public offering which is a similar concept to that of a public limited company except this public offering by a private limited company must be done online.

Thai law, which is SEC's Notifications as aforementioned by virtue of Securities and Exchange Act B.E. 2535 comparing the US law and the UK law, does provide proactive measures to protect prospective investors. However, it is doubtful whether those involved in the sale afterwards continue to receive protection without a certain exit for the shareholders and whether there is an appropriate fiduciary duty for the controlling shareholders, including the controlling authority. Unlike the typical limited company whose shares belong to a close group of shareholders, Equity Crowdfunding limited companies offer its shares for sale to the public.

* The article is summarized and rearranged from the thesis "Problems on Protection of Shareholders' Rights from Investing in Equity Crowdfunding: Study on Limited Company" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2015

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Therefore, a comparative study of these foreign laws and Thai laws concerning the protection of shareholders' rights in a limited company relying on Equity Crowdfunding should help in implementing effective rules to balance fundraising promotion with investors' rights after the funds have been injected. In this regard, the laws of the United Kingdom and the United States are subject matters to study as both nations have concrete statutory laws and case laws governing Equity Crowdfunding and protection of minority shareholders for this high value industry. The significant amount of investment and the number of concerning parties that have entered into this fundraising scheme with the express purpose of promoting startups and SMEs has been taken into account as well. In addition, it is worth noting that Equity Crowdfunding is the way to consume financial product where the fruits of this product are expected rather than the product itself.

Keywords: Equity Crowdfunding, Limited Company, Shareholders, Issuer, Funding Portal, Crowd Investor, Shareholders Protection

บทคัดย่อ

การระดมทุนจากประชาชนหมู่มากโดยวิธีการที่เรียกว่า Crowdfunding ช่วยให้วิสาหกิจขนาดกลางและขนาดย่อม (Small and Medium Enterprises – SMEs) ซึ่งแต่เดิมมีข้อจำกัดในการเข้าถึงแหล่งเงินทุนสามารถเข้าถึงแหล่งเงินทุนได้ง่ายขึ้นผ่านช่องทางออนไลน์หรืออินเทอร์เน็ต โดยการระดมทุนจากประชาชนหมู่มากนี้เป็นวิธีการระดมทุนโดยการเสนอขายหุ้นของบริษัทให้แก่ประชาชนเป็นการทั่วไป การระดมทุนโดยวิธีดังกล่าวนี้ถูกพัฒนาขึ้นมาเพื่อวัตถุประสงค์เชิงพาณิชย์ ซึ่งนักลงทุนต่างก็คาดหวังผลตอบแทนจากการลงทุน

สำนักงานคณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ (ก.ล.ด.) ได้ออกประกาศที่เกี่ยวข้องขึ้นเพื่อเปิดให้มีการระดมทุนจากประชาชนหมู่มากตามหลักการเพิ่มทุนและการเสนอขายหุ้นตามประมวลกฎหมายแพ่งและพาณิชย์ และพระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ พ.ศ. 2535 โดยมีวัตถุประสงค์ในการยกเว้นบทบัญญัติที่มีอยู่เพื่อให้บริษัทจำกัดสามารถเสนอขายหุ้นให้แก่ประชาชนเป็นการทั่วไปได้ตามเงื่อนไขที่กำหนด กล่าวคือ เป็นการยกเว้นข้อจำกัดในการเสนอขายหุ้นของบริษัทจำกัดเพื่อให้บริษัทจำกัดสามารถขายหุ้นให้แก่บุคคลอื่นโดยตรงเป็นการทั่วไปนอกจากผู้ถือหุ้นเดิมของบริษัทจำกัด เนื่องจากผู้ถือหุ้นเดิมซึ่งอยู่ในช่วงเริ่มต้นธุรกิจอาจไม่มีเงินทุนเพียงพอในการเข้าซื้อหุ้น เพื่อให้บริษัทนำเงินจากการขายหุ้นมาดำเนินกิจการต่อไปได้อีกหนึ่ง ข้อยกเว้นตามประกาศ ก.ล.ด. ที่ให้บริษัทจำกัดสามารถระดมทุนจากประชาชนหมู่มากได้นั้น มีความคล้ายคลึงกับการระดมทุนโดยการนำหุ้นออกขายให้แก่ประชาชนเป็นการทั่วไปของบริษัทมหาชน เพียงแต่การระดมทุนโดยวิธีนี้จะต้องเป็นการระดมทุนผ่านช่องทางออนไลน์

แม้ว่าประกาศ ก.ล.ด. ที่เกี่ยวข้องซึ่งออกตามความในพระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ พ.ศ. 2535 เมื่อเปรียบเทียบกับกฎหมายของสหรัฐอเมริกาและสหราชอาณาจักร จะได้กำหนดมาตรการทางกฎหมายเพื่อคุ้มครองนักลงทุนซึ่งเป็นประชาชนหมู่มากไว้แล้ว แต่กลับไม่ปรากฏว่ามีมาตรการทางกฎหมายที่แน่นอนและชัดเจนในการคุ้มครองนักลงทุนในฐานะผู้ถือหุ้นหลังจากการระดมทุนประสบความสำเร็จ อีกทั้งยังไม่ปรากฏว่ามีบทบัญญัติที่เกี่ยวข้องโดยตรงกับหน้าที่ในฐานะผู้ที่ได้รับความไว้วางใจของผู้ถือหุ้นข้างมาก (Fiduciary Duty) เหมือนดังกฎหมายของสหรัฐอเมริกาและสหราชอาณาจักร ตลอดจนไม่ปรากฏว่ามี

หน่วยงานที่เกี่ยวข้องซึ่งมีอำนาจหน้าที่ในการกำกับดูแลที่เพียงพอ ทั้งๆ ที่บริษัทจำกัดซึ่งระดมทุนโดยการเสนอขายหุ้นให้แก่ประชาชนหมู่มาช่อมมีผู้มีส่วนได้เสียมากขึ้นตามไปด้วย ซึ่งต่างจากบริษัทจำกัดทั่วไปซึ่งมีเพียงผู้ถือหุ้นในวงจำกัดเท่านั้น และการลงทุนด้วยวิธีนี้ยังเปรียบเสมือนการบริโภคผลิตภัณฑ์ทางการเงินประเภทหนึ่ง (Financial Product) ซึ่งนักลงทุนเป็นผู้บริโภคผลิตภัณฑ์ทางการเงินย่อมความหวังในผลตอบแทนที่จะได้จากผลิตภัณฑ์ทางการเงินด้วย

เพราะฉะนั้น การศึกษาเปรียบเทียบระหว่างกฎหมายของสหรัฐอเมริกาและสหราชอาณาจักรกับกฎหมายไทยที่เกี่ยวข้องกับการคุ้มครองสิทธิของผู้ถือหุ้นในบริษัทจำกัดที่ระดมทุนโดยการเสนอขายหุ้นให้แก่ประชาชนหมู่มาช่อม ก็น่าจะก่อให้เกิดการนำมาตรการทางกฎหมายที่มีประสิทธิภาพมาบังคับใช้เพื่อสร้างความสมดุลระหว่างการส่งเสริมการลงทุนและสิทธิของนักลงทุน ทั้งนี้ เนื่องจากกฎหมายของทั้งสองประเทศที่ได้หยิบยกมาศึกษาเปรียบเทียบนั้น มีกฎหมายสารบัญญัติและแนวทางคำพิพากษาซึ่งเกี่ยวข้องกับการระดมทุนจากประชาชนหมู่มาช่อมและการคุ้มครองผู้ถือหุ้นข้างน้อยที่มีประสิทธิภาพ อีกทั้ง ภาพรวมการระดมทุนจากประชาชนหมู่มาช่อมของทั้งสองประเทศยังมีมูลค่าสูงมากเมื่อพิจารณาจากจำนวนเงินลงทุนและจำนวนผู้มีส่วนเกี่ยวข้องทุกฝ่าย โดยมีวัตถุประสงค์หลักเช่นเดียวกันในการส่งเสริมกิจการเกิดใหม่ (Startups) ตลอดจนวิสาหกิจขนาดกลางและขนาดย่อม

คำสำคัญ: การระดมทุนโดยการเสนอขายหุ้นให้แก่ประชาชนหมู่มาช่อม, บริษัทจำกัด, ผู้ถือหุ้น, ผู้ระดมทุน, ตัวกลางระดมทุน, นักลงทุนซึ่งเป็นประชาชนหมู่มาช่อม, การคุ้มครองผู้ถือหุ้น

Introduction

Generally, Crowdfunding can be classified in two main categories; namely Non-commercial Crowdfunding or Community Crowdfunding and Commercial Crowdfunding or Investment Crowdfunding.¹ The clear cut between these categories as brought up above is the expectation of profit in return of the money given. That is to say that people who contribute to the non-commercial campaigns do not financially benefit from their contribution, whilst people that invest in the latter do so in hopes of a return in their investment as the term straightforwardly prescribes. There are four sub-categories of Crowdfunding: (i) Donation Crowdfunding, (ii) Reward Crowdfunding, (iii) Lending Crowdfunding, and (iv) Equity Crowdfunding. Donation and Reward Crowdfunding can be collectively referred to as Non-commercial Crowdfunding. On the other hand, Lending and Equity Crowdfunding fall under the umbrella of Commercial or Investment Crowdfunding.²

The big difference between Crowdfunding and other typical fundraising mechanisms is that it is done online via the intermediary or the online portal. The online portal is a platform whose function is to arrange and operate the beginning of Crowdfunding process until the end. In other words, it is simply a website that the fund seekers post their campaigns

¹ Andrew C Fink, “Protecting the Crowd and Raising Capital Through Crowdfunding Act”. **90 U. Det. Mercy L. Rev.** 1, 4 (2012).

² IOSCO. “*IOSCO crowdfunding an infant industry growing fast.*” (2015) <http://www.iosco.org/research/pdf/swp/Crow-funding-An-Infant-Industry-Growing-Fast.pdf> (accessed on 14 November 2015).

which are available to anyone who is interested to fund their campaigns regardless of how they are called in accordance with each type of Crowdfunding. The online portal as the operator other than being an online venue for the fundraisers to present their campaigns through various forms of media, will also apply the procedure for fundraising in which the fundraisers have to follow. This fundraising procedure is a combination of the target amount of funds required and time limits to achieve said target. That is to say that the campaigns must be able to collect the full amount of money requested from the crowd within a certain period of time. Otherwise, the campaigns will be deemed a failure and the funds will be returned to the individual investors. Thus, online portals can be considered an underwriter and at the same time, an escrow agent, if the fund is pledged with it. Alternatively, the funds could be remitted from the crowd once the collective amount eventually hits the target within a stipulated period.

Overview of Equity Crowdfunding

Equity Crowdfunding mainly involves four connecting parties: (i) issuers or the companies seeking fund, (ii) funding portals, (iii) escrow agents, and (vi) crowd investors.³

(i) Issuers

The issuer in Equity Crowdfunding refers to the startups that need funds to grow their business but are limited to other funding resources due to their lack of credit and collateral, such as, banks, financial institutions, or even venture capital, etc. Since the equity or share of the issuer is given to the investors in exchange for financial support, by offering shares for sale, the issuer by its nature must be a legal entity in the form of either a publicly-held or closely-held corporation.⁴ In other words, the issuer must have already been established as a limited company which can be either a private limited company or a public limited company where the share capital is the key element available for such legal entity to raises in exchange for issuing the ownership to the investor in form of shares.⁵ Given that the issuers are startups with limited resources even if they have high business potential, it is reasonably that most of them are incorporated as a limited company. The issuer's main responsibility is to disclose the up-to-date and correct information to the crowd investors in the early stage of the

³ Zachary Robock, "The Risk of Money Laundering Through Crowdfunding : A Funding Portal's Guide to Compliance and Crime Fighting", **4 Mich. Bus. & Entrepreneurial L. Rev.** 113 (2014).

⁴ Notification of the Capital Market Supervisory Board No.TorChor.7/2558, Clause

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⁵ Notification of the Capital Market Supervisory Board No.TorChor.7/2558, Clause

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campaign launch and thereafter, which is the duty of disclosure.⁶ This duty of disclosure is vital and linked to the fraud protection as soliciting the investors with false information is deemed violating the investors' right and a criminal offense.⁷

(ii) Funding Portals

The Funding Portal as an online intermediary is a website where a campaign is launched to the public and advertises to crowd investors to buy the shares being offered for sale by the startups. In other words, its role is similar to that of the underwriter in the stock market, but with the less complications and less regulated functions since they are not allowed to give or provide any advice to the investors.⁸ The Funding Portal's main role is to provide a forum for the issuers and the crowd investors whereby it is responsible in verifying and categorizing the background and knowledge of the investors and determining whether or not they are sophisticated enough to invest through Equity Crowdfunding.

In this regards, the Funding Portal is basically regulated and licensed by the Securities and Exchange Commission and obligated to verify the identity of the issuers as per the disclosure compliance and professional courtesy including to make the agreement with the issuers in order to ensure that they shall proceed responsibly throughout the fundraising and thereafter if the campaign becomes successful. Such agreement shall include the subscription procedures with a cooling-off period, updates on the significant changes of the issuers' details which may affect the investors' rights, updates on the use of funds having been raised, verification of investment limit for individual investors, etc.⁹ In addition, the Funding Portal shall announce the risk warning for investing in Equity Crowdfunding given the illiquid condition of this kind of securities.¹⁰ More importantly, the Funding Portal is not allowed to hold the fund even if it is the funding intermediary.¹¹ The Funding Portal is required to arrange the escrow agent to manage the fund transfer which is pledged by the investors during the fundraising to the issuers if the campaign is achieved within a stipulated period on the basis of "All or Nothing".¹²

⁶ Sharon Yamen, Yoel Godfeder. *"Equity Crowdfunding – A Wolf in Sheep's Clothing : The Implications of Crowdfunding Legislation under the JOBS Act"*. **11 BYU Int'l L. & Mgmt. R.** 41 (2015).

⁷ *Supra* note 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Notification of the Capital Market Supervisory Board No.TorChor.7/2558, Clause 23

¹² Douglas J. Cumming, Gael Leboeuf, Armin Schwienbacher, *"Crowdfunding Models : Keep-It-All vs. All-Or-Nothing"* (2015),

(iii) Escrow Agents

The escrow agent in crowdfunding plays the same role as it does in the ordinary course of business. Which is to mean it is the intermediary who supervises the contract compliance of both parties including holding and releasing the money pledged by one party to the other party when the condition of contract is fulfilled.¹³ Given the concept of “All or Nothing”¹⁴, the escrow agent will oversee when the fund hits the target which is the issuers’ expected and sufficient amount to achieve the campaign and run the business. Once the target is met or, in other words, when the offer meets with the acceptance under the condition that the accumulated amount of funds promised by the crowd investors to invest in the campaign reaches the total amount as stipulated by the issuers, the escrow agent will arrange the transfer of funds pledged by the crowd investors to the issuers.¹⁵

(iv) Crowd Investors

The main target investors of Equity Crowdfunding is the mass individual investors consisted of those who have a variety of experiences and knowledge in investments and those who do not, but are eager to invest in the business when they find the campaign interesting and worth the risk after taking into account of the potential return of investment.¹⁶ In other words, they are the middle class whose annual net worth relies on limited sources of incomes and their financial status is hardly considered wealthy.¹⁷ These crowd investors are categorized into two types namely the sophisticated or accredited investor and non-accredited or unsophisticated investor.¹⁸

The level of sophistication to determine whether the investor is qualified to invest through Equity Crowdfunding as the accredited or sophisticated investor depends on the variety of criteria under the different jurisdictions, but they share the same concept that the sophisticated or accredited investors shall possess the financial and business knowledge that allows them to appreciate the risks of the investment and are able to fend for themselves if they are provided with the appropriate type and amount of information or the access to this information.¹⁹ The sophistication is also

<http://leeds-faculty.colorado.edu/bhagat/CrowdfundingModels-KeppItAll-AllorNothing.pdf> (accessed on 26 November 2015).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Notification of the Capital Market Supervisory Board No. TorChor. 7/2558, Clause 27

¹⁶ Jorge Pesok, “Crowdfunding : A New Form of Investing Requires A New Form of Investor Protection”, 12 Dartmouth L.J. 146 (2014)

¹⁷ *Supra* note 3.

¹⁸ *Supra* note 16.

¹⁹ Joan MacLeod Heminway, Shelden Ryan Hoffman, “*Proceed at Your Peril : Crowdfunding and Securities Act of 1933*”, **Tennessee Law Review**, Vol. 78, p.

based on the wealth of the investors as their ability to take risks in regards to the investment through Equity Crowdfunding depends on how much money they have available and also their ability to recover such loss by other means or if such loss creates only slightly decreases their wealth. It should be fair to say that the more sophisticated or wealthier investors are presumed to be able to analyze the investment opportunity for themselves or bear the financial risks.²⁰

On the contrary, the non-accredited or unsophisticated investor has the adverse qualifications as to the experiences and knowledge in investment including their annual income and/or net worth. In other words, they have limitations in analyzing the risks of investment as well as in bearing such risks due to the financial constraints and their ability to recovery the loss by other means. However, most of the crowd investors which the issuers, through the Equity Crowdfunding scheme, aims to raise the money from, are the non-accredited investors. Thus, the laws concerning equity crowdfunding provide the limit of investment or investment cap for each individual investor. The Funding Portal is also required to evaluate the sophistication of the crowd investors by arranging a quiz that tests basic knowledge in regards to investing in this platform before allowing them to participate in the campaign.²¹

Analysis of Problems on Protection of Crowd Investors and Minority Shareholders according to the Comparative Study of Foreign Laws (the United States of America and the United Kingdom) and Thai Laws

1. Consumer Protection Perspective

Although Equity Crowdfunding is the investment platform, the investors in Equity Crowdfunding are treated as consumers under the UK and US laws, especially, the retail or unaccredited investors who are the main target source of funds, whilst the Thai SEC tends to treat them with the same standard as applied to sophisticated investors whom are assumed to be aware of the associated risks before investing in companies seeking funds via Equity Crowdfunding. Above all, Thailand does not have any direct responsible authority who actively monitors and takes action in case there is any issue that arises from Equity Crowdfunding other than the SEC's Notifications imposed on the Funding portal for the procedures and requirements regarding the primary stage of fundraising which mostly ends when the campaign succeeds. Their responsibility is to make the updated information of the issuers available after the sale of shares. To retain no

879, 2011, University of Tennessee Legal Studies Research Paper No. 154 , page 32

²⁰ Douglas S. Ellenoff, "Making Crowdfunding Credible", **66 VAND. L. REV. EN BANC** 19 (2013), Page 20

²¹ Notification of the Capital Market Supervisory Board No.TorChor.7/2558, Clause 23

effective sanction, save for the revocation of certificate and restriction, allows the campaign to resume operating should the Funding Portal fail to do so.

The duty to disclose the correct information of the business and company details by the issuers is also loosely implemented as the SEC assumes no responsibility for any misleading information or any misfiling. The sale of shares in a limited company and public limited company, regardless whether are listed or non-listed by virtue of SEC's exemption on Equity Crowdfunding, is not subject to the available sanction concerning filings under the umbrella of Securities and Exchange Act. In addition, the SEC does not scrutinize the information provided by the issuers since the disclosure is carried out on a basis of self-declaration under the supervision of Funding Portal. In case investors suffer any damages caused by such misconduct of the issuers, the investors may have to pursue a civil remedy against the issuers on their own under the contract and tort laws set forth in the CCC. Unlike other similar cases including but not limited to directors' misconduct, fraud, embezzlement, etc., the SEC is entitled to take action when the investors are defined as Client according to the provisions concerning sale and offering for sale of shares under the Securities and Exchange Act.²²

According to the UK Financial Conduct Authority (FCA), Investment-based Crowdfunding or Commercial Crowdfunding, to be precise, Equity Crowdfunding is regulated under the scope of FCA consumer protections since they are allowed by this new type of investment platform to invest in new or established businesses by buying shares which is termed by the FCA as "non-readily realizable securities" where they are not listed on regulated stock markets and carry significant risks and specifically when they are sold over the internet.²³ The FCA also plays a very active role in supervising the Equity Crowdfunding by engaging with the Funding Portal and the issuer's management. They monitor their websites and review monthly management information. This is to ensure that the consumers are properly protected with regards to allowing only the appropriate type of investors to invest according to the criteria of COBS. The financial promotions are clear, fair and not misleading in term of the nature and performance of the assets invested in and the exit opportunities available for the investors.²⁴ By virtue of Financial Services and Markets

²² Busara Jatejumnongjit. *"The Protection for Minority Shareholders in a Limited Company"*. Thesis for Master of Law (Business Law). Faculty of Law. Chulalongkorn University. (2000). Page 122.

²³ Financial Conduct Authority, Policy Statement re: *"The FCA's regulatory approach to crowdfunding over the internet, and the promotion of non-readily realizable securities by other media – Feedback to CP13/13 and final rules"* (2015), <https://www.fca.org.uk/news/ps14-04-crowdfunding> (accessed on 7 December 2015).

²⁴ *Id.*

Act 2000 (FSMA), in addition to the FCA's active role in supervising the Equity Crowdfunding, the UK has another two authorities. These are the Financial Services Compensation Scheme (FSCS) and the Financial Ombudsman Service (FOS) which have been established to protect the retail or self-certified sophisticated individual investor from the unwanted consequences of investing through Equity Crowdfunding due to misleading investment advice, negligence management of investments, misrepresentation, or fraud caused by the Funding Portal or issuers.

Similar to that of the UK, the US Federal Trade Commission (FTC) and its Bureau of Consumer Protection has recently taken an active role in investor protection in Crowdfunding as they took legal action against Erik Chevalier in *FTC v. Chevalier* in the District Court of Oregon²⁵. Although the case was filed for fraudulent crowdfunding caused by the misuse of money raised under the regime of Reward-based Crowdfunding, it is worth noting that the FTC also recognizes Crowdfunding in view of consumer protection under its scope of responsibility and function of its dual mission to protect consumers as well as promote competition²⁶. It can be seen that whilst the US's SEC regulates the safe harbor or exemption for Equity Crowdfunding and supervises the process from the early stage of fundraising until the campaign is achieved as the FCA does in the UK, the FTC is proactively taking actions in implementing the same investor protection as the FSCS and FOS do.

Although Thailand has the Office of the Consumer Protection Board (OCPB), its power is still questionable as OCPB may not be capable to extend its protection to Equity Crowdfunding as there is no clear decision as to whether or not the investors should be treated as if they were consumers or if they do not deserve the associated risks that ordinarily arise out of investing. Therefore, adopting the concept of Equity Crowdfunding without concrete and specific authority like those of the UK and the US to look after the issuer may cause problems down the road that will need to be solved.

2 Shareholders Protection Perspective

According to the law a limited company is managed by the Board of Directors (BOD), and subsequently, the BOD is controlled by a meeting of the shareholders. This means that the meeting of shareholders may pass a resolution to elect or dismiss a board member. The meeting of shareholders can also pass any resolution to ratify the directors' action or approve the transactions in relation to the business. When the meeting of shareholders considers and resolves the agendas, the majority voting is a standard criteria

²⁵ Jeffrey Becker. "FTC ruling sheds some light on investor protection in crowdfunding." **Chicago Diary Law Bulletin**. Volume 161, No. 126, June 29, 2015, http://www.smbtrial.com/RC1ACS162/assets/files/Documents/18273_LB_reprint_Swanson_Jun29-2015.pdf (accessed on 17 December 2015).

²⁶ Federal Trade Commission. "What We Do." <https://www.ftc.gov/about-ftc/what-we-do> (accessed on 17 December 2015).

applied to conclude the decision of the meeting. The vote can be counted according to the number of shareholders physically attending the meeting with voting rights or the amount of shares being held by each shareholder in case a poll is requested by at least two shareholders under the CCC.²⁷ In other words, it is simply a rule of one share - one vote, which may also be agreed upon in the Articles of Association (AOA).

Thus, this majority rule applied in favor of majority shareholders significantly prejudices the voting rights of minority shareholders since the majority always overcomes the minority and may pass any unfair or unfavorable resolution over the minority. More importantly, the retail investors who have become the shareholders by purchasing the shares according to the limited amount as specified by SEC through Equity Crowdfunding, will then automatically fall into the status of minority shareholder and the AOA initiated by the issuers who are the original majority shareholders despite having no chance to otherwise agree to nor modify the terms earlier.²⁸

2.1 Election of Directors

It is of course the wish of every shareholder to have influence over the company's direction since they have signed up as the investors by purchasing company shares. Given that the law does not prevent shareholders from taking a position in the board, they can play a proactive role in leading the business by becoming the directors or by nominating any other natural person to preside on their behalf.²⁹ As the directors must be elected or dismissed by the resolution of the meeting of shareholders, the majority rule shall apply to the voting.³⁰

In case the poll is requested by at least two shareholders or as specified by AOA to implement the one share - one vote rule by counting the amount of shares acquired by the shareholders attending the meeting to conclude a resolution, the majority of shareholders who are the same persons as the original group of issuers will definitely win the vote because of the larger amount of shares on hand compared to the very few held by the retail investors.³¹ Thus, this does not guarantee that the right and interest of minority shareholders will be prudently considered by the directors whom are nominated by the different group of majority shareholders. More importantly, the majority shareholders may take advantage of such criteria to promote only themselves onto the board or their relatives and overlook those nominated by the minority shareholders in order to take absolute control over the company. As a result, it is very unlikely that the minority shareholders will be treated fairly, since they do not have any meaningful influence over the company.

²⁷ Civil and Commercial Code, Sec. 1190

²⁸ Civil and Commercial Code, Sec. 1108

²⁹ Civil and Commercial Code, Sec. 1150

³⁰ Civil and Commercial Code, Sec. 1151

³¹ Civil and Commercial Code, Sec. 1182

2.2 Dividends

The distribution of dividends also requires the majority votes of the meeting of the shareholders, it all depends on the majority shareholders whether they want to retain cash flow generated from the business growth or return them in the form of dividends to the investors in accordance with the portion of shares acquired. This condition also applies to the distribution of interim dividends by the BOD except that the BOD's resolution shall be passed by counting the major number of directors who agree with the agenda since each director has one vote. If the directors are also nominated by the same group of majority shareholders, it is difficult to expect a resolution to the conflict on the same matter from the meeting of the BOD when the meeting of the shareholders says no when they all are on the same side.

There is no statute allowing shareholders to claim the distribution of dividends under the CCC even when the company has become profitable and has cash positive growth. The expectation on the return of investment that the retail investors had when backing the campaign by buying the shares offered can be failed by the issuers. This can happen when the issuers are the majority shareholders as well as the directors and have absolute control over the company. That is to say that the issuers are in a position to easily take advantage of the investors via Equity Crowdfunding as the return on investment is subject to the issuers' discretion, especially if they did not promise nor guarantee the fruitful investment in the first place. Above all, withholding the distribution of dividends does not fall under the breach of directors' duty causing damage to the company as the money is still listed as a company's assets. More importantly, the CCC neither provides any remedy nor any available legal actions to be taken by the minority shareholders against the majority shareholders in the case of failing to pay dividends other than the revocation of illegitimate meeting in regards to the quorum, the process of holding a meeting, and voting.³²

2.3 Class of Shares

There are mainly two classes of shares in a limited company: ordinary shares and preference shares in accordance with the CCC. The distinction between these classes of shares is the right attached to them. The ordinary share contains ordinary rights pertaining to the voting and receiving of dividends where the shareholders holding this class of share is entitled to one vote per ordinary share and annual dividends if the company is profitable subject to the resolution of the shareholders' meeting. The right attached to preference share may vary on the terms of AOA with the different rights from that of ordinary share.³³ As it is termed 'preference', the right attached may be greater or less than that of the ordinary share. Whilst the preference share may provide holders the guaranteed amount of dividends for example, 10 percent of the profit generated at the end of each

³² Civil and Commercial Code, Sec. 1195

³³ Civil and Commercial Code, Sec. 1108

fiscal year, the voting right can be less such as five preference shares per one vote or even none.

It is crucial for the investors to understand their right that they may enjoy before subscribing to differently classed shares being offered by the issuers in Equity Crowdfunding as there exists no regulation regarding which class of shares shall be offered by the issuers and to what extent the rights are attached to the preference share, if issued and offered for sale, shall be specified. Especially, in case they did not have a chance to agree with the contents of the AOA and the right attached to preference shares once specified cannot be altered thereafter under the CCC.³⁴ As a result, the issuers may arbitrarily impose whatever conditions they want on the preference shares and sell them to the investors in order to weaken the influence of minority shareholders over the control of company by limiting their voting rights. Although this may be arguable to some extent as the investors do not wish to take a key role in running the business, it does not logically make sense for people to give away their money without any recourse.

2.4 Dilution of Shares

The dilution of shares is also a major concern since it directly impacts the voting rights of minority shareholders who are the retail investors with limited economic capability. The dilution of shares is a result of capital increase under the CCC whereby the new shares are issued for sale to raise more capital. In order to enable capital increases, a special resolution must be passed by the meeting of shareholders requiring three-fourths of the total share capital to be presented at the meeting. In other words, it requires 75 percent of the majority vote, which is higher than the majority votes required to pass a normal resolution at over 50 percent of the total share capital present at the meeting. Nevertheless, the majority of the shareholders who are the issuers in the crowdfunding company can still push forward the scheme.

Although the CCC provided the pre-emption right or the right of first refusal for the original shareholders including minority shareholders to buy the newly issued shares in order to secure the same portion of shares and voting rights, the retail investors are unlikely to spend more money in doubling the acquired shares especially if the company is not profitable and there is no guarantee on the distribution of dividends. Even if they wish to do so, the SEC's Notification still limits the maximum amount of 50,000 Baht for a purchase of shares in each crowdfunding company.³⁵ Hence, if they have fully invested in accordance with the limit, they are not entitled to buy more newly issued shares in response to the capital increase. Given the above scenario, the portion of shares and voting rights of minority

³⁴ Civil and Commercial Code, Sec. 1142

³⁵ Notification of the Capital Market Supervisory Board No. KorChor. 3/2558, Clause 2

shareholders will gradually be diluted every time the capital is increased.³⁶ Eventually, the minority shareholders power and influence will fade from the company even though they are still holding the same amount of shares.

2.5 Conflict of Interest and Related Party Transactions

A related-party transaction is a business deal or arrangement between two parties who are joined by a special relationship prior to the deal, say, a business transaction between a major shareholder and the corporation such as a contract for the shareholder's company to perform renovations to the corporation's offices, would be deemed a related-party transaction. The original shareholders are also the majority shareholders and the directors of the limited company raising funds via Equity Crowdfunding. The crowd investors who then become the minority shareholders in such a company by purchasing the shares could easily be taken advantage of as they are not eligible to control nor manage the business operation. This conflict of interest, if conducted by the directors, could be subject to a lawsuit brought on by the stakeholders which could be any of the shareholders against such directors.³⁷ However, it is merely a civil remedy and time consuming litigation with additional cost that the shareholder must bear in advance without any guarantee that it can finally be recovered as the result depends on the court's discretion.

2.6 Liquidity and Secondary Market

The SEC's exemption altered the concept of a limited company by enabling the sale of shares issued by a limited company to the public similar to the public offering in public limited company. However, such an exemption does not provide an exit for the shareholders to resell their acquired shares in the open market unlike those bought in the stock exchange. Thus, the transfer of shares in a limited company still falls under the typical regime of the CCC where the transfer of shares entered into a name certificate shall be effective by executing the share transfer instrument and subsequently being registered on the share registration book of the company book.³⁸ In addition, the advertisement for both the first sale by the issuers and the resale by the investors are prohibited.³⁹

According to the SEC's Notifications, the shareholders may resell their acquired shares of a limited company by virtue of this financial promotion specifically to less than or equal to 50 accredited or sophisticated investors within a period of twelve months, or to institutional investors, such as commercial banks, venture capital, private equity, or to original shareholders of the company i.e. the founders and other investors who have

³⁶ Civil and Commercial Code, Sec. 1222

³⁷ Civil and Commercial Code, Sec. 1169

³⁸ Civil and Commercial Code, Sec. 1129

³⁹ Civil and Commercial Code, Sec. 1102

joined the campaign and have become shareholders for the project after it was launched on the website.⁴⁰

As a result, there is not really a proper exit available by virtue of the CCC for the shareholders or retail investors. When the business does not perform well or is being financially taken advantage or jeopardized under direction of the majority shareholders who are the founders and business owners and who play a key management role on the board. On the other hand, if the company is so profitable, it is worth noting that the CCC does not allow the company to buy back shares from the shareholders as a limited company is prohibited from holding its own issued shares, even if this could possibly be the simplest exit because the founders do not have to spend their personal funds to buy back shares from the retail investors.⁴¹

Conclusion and Recommendations

The Equity Crowdfunding exemption has totally changed the principle of limited company since it turns a closely-held corporation into a publicly-held corporation, even if its legal status remains unchanged as a limited company and the laws concerning limited company are still fully and effectively applied to the corporate entity and legally outline the relationship and liability among all parties involved. It is undeniable that the associated risks on the crowd investors who are the main target source of funds in Equity Crowdfunding prevent this financial promotion from achieving success as the mechanism to provide SMES with the more flexible sources of fund will eventually turn to affect the issuers because nobody would want to take such risks. Therefore, the measures to protect the crowd investors and the minority shareholders need to be appropriately implemented in addition to the existing protections under the SEC's Notifications and the CCC in response to the success of this fundraising scheme.

In light of the above problems on the protection of shareholders' rights, in other words, the crowd investors' rights in the post-stage Equity Crowdfunding after they have backed the campaign by buying the shares and become the shareholders in a limited company, the recommendations in view of the comparative study of the UK and US laws that Thailand should adopt and implement are as follows:

(1) Direct Controlling Authority having the same roles and responsibilities in term of consumer protection for financial products as that of the UK's FCA, FOS, FSCS and the US's FTC;

(2) Mandatory Provisions of AOA for a limited company relying on Equity Crowdfunding in favor of the crowd investor who later become the minority shareholders, such as, fixing dividends for preferential shares issued to the group of crowd investors, grouping the shareholders separately

⁴⁰ Notification of the Capital Market Supervisory Board No. TorChor. 8/2558, Clause 2

⁴¹ Civil and Commercial Code, Sec. 1143

into the original shareholders' group and the crowd investors' group where the shareholders' meeting requires the participant and vote of the crowd investors' group, and tag-along right for the mutual exit if the original shareholders want to sell their shares;

(3) Minimum Shares Offered to the crowd investors so that the group of crowd investors will have minimum shares with voting rights to summons the shareholders' meeting;

(4) Share Repurchase allowing the company to buy back the shares from the crowd investors as the alternative exit by using the company's profits instead of the original shareholders' pocket to retrieve the shares;

(5) Shareholders' Fiduciary Duties owed by the majority shareholders to the minority shareholders in order to prevent the original shareholders from taking advantage of the crowd investors by utilizing the majority votes on hand; and

(6) Court Claim against Majority Shareholders by the minority shareholders for relevant injunctions or orders under the specific provisions of Act in addition to the claim based on the tort law and contractual laws.

LEGAL MECHANISMS FOR CONSUMER PROTECTION IN SWEEPSTAKES PROMOTION*

*Porntavan Imchai***

Abstract

Sales promotion is a marketing strategy that is designed to entice customers to purchase goods or services. Sweepstakes promotion is a form of sales promotions which attract consumers by offering them the chance to win valuable prizes. The most common example of sweepstakes in Thailand is the competition of two drink green tea businesses by launching sweepstakes campaigns in which maybe affects the consumers' decision. Furthermore, some traders misrepresent the likelihood of actually winning through the sophisticated use of graphics which manipulates type size and text to hide the conditions. As a matter of fact, the traders do not have the intention of giving away the prizes.

As a result, a legal issue has been raised about the characteristics of sweepstakes, how businesses benefit from their use and the legal mechanisms to control sweepstakes promotion including whether the consumers' right to claim remedies for financial loss in illegitimate sweepstakes promotion.

Considering foreign laws regarding consumer protection, namely European Union, United Kingdom and Japan, there are specific legislation on consumer protection in sweepstakes promotion. The European Union ("EU") imposed the Directive 2005/29/EC on Unfair Commercial Practices. The UCPD stated a specific concept of false prize winning including claiming to offer prize promotion without awarding the prizes described, which aims to prohibit unfair commercial activity. The United Kingdom has the Consumer Protection from Unfair Trading Regulations 2008 ("CPRs") implemented the Unfair Commercial Practices Directive. While Japan, the Fair Trade Commission enacted the Act against Unjustifiable Premiums and Misleading Representations ("AAUPMR").

Since Thailand is also currently facing the problem in consumer protection in sweepstakes promotion, therefore, this study will explore and compare Thai Law along with foreign Laws which mentioned earlier. Sweepstakes promotion can be controlled in Thai Civil and Commercial Code (the CCC) and Consumer Protection Act (the CPA). However, there are some obstacles or limitation to the application of sweepstakes promotion since Civil and Commercial Code (the CCC) mostly focuses on protecting individual consumers who has rights to claim the remedy according to the contract law or promises but not every sales promotion is

* The article is summarized and rearranged from the thesis "Legal mechanisms for consumer protection in sweepstakes promotion"

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applicable to the CCC. While the study of Consumer Protection Act (the CPA) found that the CPA may not cover the marketing strategies such as sweepstakes promotion.

Thus, the author will explore the downfall of the Consumer Protection Act B.E.2522 in order to achieve the suitable recommendation for the amendment of the Act regarding legal measures to control sweepstakes promotion and legal measures on consumers' right to claim the remedy as following;

(1) legal measure to control sweepstakes promotion

The author suggests imposing the important of the principles of sweepstakes promotion in consideration of forbidding the misleading and obscure sweepstakes promotion. According to the Consumer Protection Act B.E.2522, the Committee of Advertising and Sales Promotion was established and assigned the power to enforce legal measures to control sweepstakes promotion by changing the committee of advertising to the committee of advertising and sales promotion. The said legal measures are pre-market control and post-market control. Pre-market control requires the traders to report the suspicious illegitimate sweepstakes promotion to the Committee of Advertising and Sales Promotion whereas post-market control is imposed by the Committee of Advertising and Sales Promotion to prohibit the traders who infringe the law.

(2) legal measure on right to claim the remedy the consumer

The author suggests that the right to terminate the contract must be conveyed to the consumers so the consumers acknowledge their right and able to exercise the right according to the law.

Keywords: Consumer Protection, Sweepstakes Promotion

บทคัดย่อ

กลยุทธ์การส่งเสริมการตลาดได้ถูกออกแบบมา เพื่อดึงดูดผู้บริโภคให้ซื้อสินค้าหรือรับบริการ ซึ่งการส่งเสริมการขายก็เป็นรูปแบบหนึ่งของการส่งเสริมการขาย ที่เปิดโอกาสให้ผู้บริโภคร่วมสนุกชิงรางวัล ซึ่งตัวอย่างที่เห็นกันทั่วไปของการจับรางวัลชิงโชคในประเทศไทย คือ การแข่งขันกันระหว่างสองธุรกิจน้ำดื่มชาเขียว ที่ได้ต่างปล่อยแคมเปญการร่วมชิงโชครางวัล ที่อาจส่งผลต่อการตัดสินใจในการซื้อสินค้าของผู้บริโภค ที่ยิ่งไปกว่านั้น คือ ผู้ประกอบการบางรายบิดเบือนความเป็นไปได้ที่จะได้รางวัลจริงผ่านความซับซ้อนของกราฟิก ที่แต่งเติมขนาดของตัวตัวอักษร และข้อความที่ซ่อนหลักเกณฑ์เอาไว้ ซึ่งในความเป็นจริงแล้ว ผู้ประกอบการไม่เจตนาที่จะแจกของรางวัล

จึงทำให้เกิดเป็นประเด็นกฎหมายขึ้นเกี่ยวกับลักษณะของการชิงโชครางวัล, ธุรกิจเช่นนี้ได้รับประโยชน์อย่างไรจากการชิงโชค, กลไกทางกฎหมายในการควบคุมการส่งเสริมการขายชิงโชค รวมถึงสิทธิการขอใช้เยียวยาของผู้บริโภคจากการสูญเสียซึ่งทรัพย์สินจากการชิงโชคอย่างไม่ถูกกฎหมาย เมื่อศึกษาถึงกฎหมายต่างประเทศในแง่ของการคุ้มครองผู้บริโภค ซึ่งได้แก่กลุ่มประเทศยุโรป ประเทศอังกฤษ และประเทศญี่ปุ่น ประเทศเหล่านี้มีการบัญญัติกฎหมายในการคุ้มครองผู้บริโภคจากการชิงโชคโดยเฉพาะ ในประเทศ

ยุโรปได้กำหนดกฎหมายการค้าที่ไม่เป็นธรรม ซึ่งได้บัญญัติหลักเกณฑ์โดยเฉพาะของการไม่ได้รับรางวัลจากการชิงโชค รวมถึงสิทธิในการอ้างสิทธิเรียกร้องเพื่อให้ได้มาซึ่งของรางวัล ที่ถูกห้ามว่าเป็นการค้าที่ไม่เป็นธรรม ส่วนในประเทศอังกฤษมีการคุ้มครองผู้บริโภคจากการค้าที่ไม่เป็นธรรม ที่มีการดำเนินการตามแนวของการค้าที่ไม่เป็นธรรมของสหภาพยุโรป ในขณะที่ประเทศญี่ปุ่น สำนักงานคณะกรรมการการค้าอย่างยุติธรรมได้บัญญัติกฎหมายเกี่ยวกับการแสดงข้อความของแจ็กแถม

ตั้งแต่ที่ประเทศไทยกำลังประสบปัญหาในการคุ้มครองผู้บริโภคจากการส่งเสริมการชิงโชค ดังนั้น แนวการศึกษาจะเป็นการสำรวจและเปรียบเทียบกฎหมายของไทยกับกฎหมายของต่างประเทศ ที่ได้กล่าวมาแล้วข้างต้น ซึ่งการส่งเสริมการชิงโชคของไทยสามารถควบคุมได้ภายใต้ประมวลกฎหมายแพ่งและพาณิชย์ และพระราชบัญญัติคุ้มครองผู้บริโภค อย่างไรก็ตามยังมีอุปสรรค หรือข้อจำกัดบางอย่างในการปรับใช้กับการส่งเสริมการชิงโชค ตั้งแต่ประมวลกฎหมายแพ่งและพาณิชย์เน้นคุ้มครองผู้บริโภคเป็นรายบุคคล ที่มีสิทธิเรียกร้องการเสียหายได้ตามกฎหมายสัญญาหรือค่าน้ำว่าจะให้รางวัล แต่ไม่ใช่ว่าทุกการส่งเสริมการขายจะปรับใช้กับประมวลกฎหมายแพ่งและพาณิชย์ได้ ขณะที่จากการศึกษาพระราชบัญญัติคุ้มครองผู้บริโภคพบว่าอาจจะไม่ครอบคลุมทุกกลยุทธ์ทางการตลาด เช่น อย่างการส่งเสริมการขายแบบชิงโชค ดังนั้น ผู้เขียนจึงขอเสนอแนะให้มีการแก้ไขเพิ่มเติมมาตรการทางกฎหมายที่เกี่ยวข้องในการควบคุมการส่งเสริมการขายแบบชิงโชค และมาตรการทางกฎหมายที่เกี่ยวข้องในการชดเชยชดใช้เสียหายผู้บริโภค เอาไว้ในพระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. 2542 ดังนี้

(1) มาตรการทางกฎหมายที่เกี่ยวข้องในการควบคุมการส่งเสริมแบบชิงโชค

ผู้เขียนขอเสนอแนะให้กำหนดหลักเกณฑ์การชิงโชค ที่อาจก่อให้เกิดความเข้าใจผิด และกำหนดคณะกรรมการว่าด้วยโฆษณาและการส่งเสริมการขายขึ้นมา ตามพระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. 2542 เป็นหน่วยงานที่มีอำนาจในการกำกับดูแลควบคุมการชิงโชค โดยเปลี่ยนชื่อจาก “คณะกรรมการว่าด้วยโฆษณา” เป็น “คณะกรรมการว่าด้วยโฆษณาและการส่งเสริมการขาย” รวมทั้งกำหนดแนวทางการตรวจสอบก่อนที่จะปล่อยการส่งเสริมการขายแบบชิงโชคเข้าสู่ตลาด โดยการกำหนดให้ผู้ประกอบการธุรกิจส่งแนวทางการชิงโชคที่สงสัยว่าจะผิดกฎหมายไปให้คณะกรรมการว่าด้วยโฆษณาและการส่งเสริมการขายเป็นผู้ตรวจสอบ และกำหนดแนวทางการตรวจสอบหลังจากที่การชิงโชคเข้าสู่ตลาดแล้ว โดยบัญญัติเพิ่มอำนาจแก่คณะกรรมการว่าด้วยโฆษณา และการส่งเสริมการขายมีอำนาจสั่งห้ามผู้ประกอบการที่ฝ่าฝืนกฎหมาย

(2) มาตรการทางกฎหมายที่เกี่ยวข้องในการชดเชยชดใช้เสียหายผู้บริโภค

ผู้เขียนขอเสนอแนะมาตรการเพิ่มเติมโดยกำหนดให้ผู้บริโภคมีสิทธิเลิกสัญญาได้ทันที ดังนั้น ผู้บริโภคก็จะได้รับรู้ถึงสิทธิของตนเองและสามารถบริหารจัดการสิทธิของตนได้อย่างถูกต้องตามกฎหมาย

คำสำคัญ: การคุ้มครองผู้บริโภค, การส่งเสริมการชิงโชค

1. INTRODUCTION

At present, global business scenario depends greatly on sales and sales volume in order to survive the ferocious market system. It is found that sales promotion is an important technique to increase the sale of any product. Traders spend large amounts of budget on publicizing and personal merchandising to inform, persuade and remind consumers. There are different types of sales promotion undertaken by the traders, one is known

as sweepstakes¹ which is a very popular marketing strategy of sales promotion in many places. The prize offered in sales promotion can be broadly classified into two categories; the first category is a trip to a foreign location such as Paris, London, or Singapore or Thailand as a promotional attraction. The second category is durable products which can be in the form of car, watch, television, and gold, etc. which attract consumers by offering them the chance to win a valuable prize. Moreover, sweepstakes promotion can directly harm consumers' economic interests when there is no intention to provide the prizes or the prizes are not provided as offered. Since the sweepstakes offer are promoted in bad faith by exploiting misunderstanding of the consumers who thought that they will obtain the prize from sweepstakes promotion. It can be either misleading or aggressive commercial practices which are divided as follows;

1) The traders offer prize promotion without awarding the prizes described; and

2) The traders create the false impression that the consumer has already won but in fact the prizes are unavailable and the customers need to pay an extra amount of money in order to achieve the prizes.

2. LEGAL MECHANISMS TO CONTROL THE SWEEPSTAKES PROMOTION

Legal measures for consumer protection in Thailand is not only following The Consumer Protection Act ("CPA") B.E. 2522 (1979), but also many specific laws which aim to protect the rights of consumers. Thus, the author shall study the CPA and related laws in legal mechanism control, the supervisor authority, and sanction as following;

2.1 Analysis related law involved sweepstakes promotion

With reference to the definition defined in Section 3 of the CPA. An advertisement states that an "Advertisement" includes any act which, by whatever means, causes the statement to be seen or known by an ordinary person for trading purposes".

The author discovers that the definition of sales promotion is not provided in Section 3 of the CPA. However, sales promotion has objectively focuses on attracting consumer to make a purchase which is commercially benefited to trader like advertisement. Therefore, sweepstakes offer is one of sales promotion on the fallen subject to advertisement under the CPA. But, when considering the law in this Act. The Act does not impose prohibition the traders uses the sweepstakes promotion which cause damage to the consumer.

However, as the discussed above the author analysis that the principle law and the definition of the word "advertising", If the traders'

¹ Josette Grech. "Sweepstakes, prize draws and competitions." <http://www.timesofmalta.com/articles/view/20150527/business-news/sweepstakes-prize-draws-and-competitions.569880> (accessed November 3, 2015)

actions do not follow the CPA, the traders found not guilty of crime because the sanction of the CPA is penal code which must be interpreted strictly by the letter of the law only.

Furthermore, according to consideration is to be given according to section 29 of The Competition Act B.E. 2542 (1999), some trades uses sweepstakes promotion to promote high value prize to compete with other businesses. Using this tactics, consumers are likely to switch the brand more often which causes the cease of business.

2.2 Supervisory authority

The study of law that may be involved the sweepstakes promotion above found that no agency has the authority specifically to oversee the use of the sweepstakes promotion. The study of law in UK, The Office of Fair Trading (OFT) was responsible for protecting consumer interests throughout the UK. the British Code of Advertising, Sales Promotion and Direct marketing (the “CAP Code”) as guidance that a consumer must not be required to incur any cost whatsoever in order to ascertain whether they have won a prize, to gain information about their prize, or to claim it. The most important and fundamental aspect of this code is the requirement that advertising must not mislead consumers. The “CAP Code administered by the Advertising Standards Authority and published by the Committee of Advertising Practice which is an industry body made up of those engaged in the advertising industry including advertisers and agencies.

While in Japan, the Act against Unjustifiable Premiums and Misleading Representations (the “AAUPMR”)² regulates excessive extra incentives premiums and representations so as to keep them within a reasonable range. Specially, the sections dealing with unfair trade practices, forbid unjust and deceptive consumer inducement and misleading advertising claims and exaggerated giveaways designed to induce purchase through misrepresentation and coercion. This law is enforced by the premium and representations of the Fair Trade Commission.

The author suggests that the Thailand should impose the committee of advertising to have more power to regulate the operation of sweepstakes promotion by changing the name of Supervise Authority from “the committee of advertising” to “the committee of advertising and sales promotion”. The advantage of this amendment is to both watching over advertising and promoting. There are the similarities between advertising and promoting since they both support each other for the greater success of each campaign launching by traders or Business Company.

Moreover, the committee of advertising and sales promotion follows the AAUPMR which is divided into 2 main measures in the same Act; the first is prohibition the prize value such as no more than 20 times

² The Office of Fair Trading. “The Consumer Protection from Unfair Trading Regulations: a basic guide for business.” https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284446/of979.pdf

the transaction amount of the cost product or exceed JPY 100,000 (limits on the value of premiums) including concern premiums over products' quality. The second is forbidden misleading information.

2.3 Regulation to control

As mention earlier, Thailand has no legal mechanism for consumer protection in sweepstakes promotion. Thus, in this part shall analysis legal mechanism for consumer protection in sweepstakes promotion of European Union with consumer protection against advertising of the CPA in order to find appropriate solutions in Thailand as following;

2.3.1 Pre-market Control Measure

The legal control measure of advertisement in the CPA has pre-market control measure under section 22. In this case, any trader who is doubtful whether the advertisement will violate or does not conform with this Act may apply to the Committee on Advertisement for consideration and opinion on such matter before advertising Section 29 of The Consumer Protection Act B.E. 2522.

While in The UCPD constitutes legislation of the European Union regulating misleading advertising and other unfair commercial practices in business-to-consumer (B2C) transaction. It applies to all commercial practices that occur before (i.e. during advertising or marketing), during and after a business-to-consumer transaction has taken place. It applies not only at the marketing stage, but also "...during and after a commercial transaction in relation to a product" according to UCPD, article 3 (1).

2.3.2 Post-market Control Measure

For post-market control measure, in the case where the Committee on Advertisement concludes that an advertisement violates section 22, the Committee on Advertisement has the power to issue one or several of the following orders in section 27 of the CPA:

- (1) To rectify the statement of method of advertisement;
- (2) To prohibit the use of certain statements as appeared in the advertisement;
- (3) To prohibit the advertisement or the use of such method for advertisement;
- (4) To correct by advertisement the possible misunderstanding of the consumers in accordance with the rules and procedure prescribed by the Committee on Advertisement.

The author thought on post-market control measure regulates advertising and sales promotion, the committee of advertising and sales promotion may make some useful comment before advertisement are launching. In other words, the traders should present the sweepstakes promotion to the committee of advertising and sales promotion before launching into the market to further prevent any loose of the consumers as well creating the good will of the company.

In respect of post-market control measure regulates advertising and sales promotion. The Committee on Advertisement and sales promotion has the power to rectify the statement of method of advertisement, to prohibit

the use of certain statements as appeared in the advertisement, or to prohibit the advertisement. The author thinks that it is suitable legal mechanisms to apply with the sweepstakes promotion. In other word, the committee of advertising and sales promotion has authority order the traders rectify the statement, prohibit the use of certain statement and prohibit the advertisement or the use of such method for advertisement.

2.4 Summary of the relevant legal measures related to control sweepstakes promotion in Thailand

As analysis and compare between Thai Law and Foreign Laws above, the author's opinion is the Consumer Protection Act B.E.2522 should amend in case of the sweepstakes promotion as below;

(1) The definition

Adding the definition of "premiums" as used in this Act means any article, money or other kinds of economic gain which are given as means of inducement of customers, irrespective of whether a direct or indirect method is employed, or whether or not a lottery method is used, by an entrepreneur to another party in connection with a transaction involving goods or services which he supplies.,etc.

(2) Supervisory Authority

Imposing the committee of advertising to be more powerful in order to regulate the sweepstakes promotion is essential. The changing from "the committee of advertng" to "the committee of advertising and sales promotion" give advantages to all since advertising and promoting support each other's works. Thus, in this case, it is no increasing duty to anyone only good not harm.

(3) Regulation to control measure

To regulate the sweepstakes promotion, sweepstakes have no choice but to pay taxes in advance to receive sweepstakes winnings. This method called Pre-market. Pre-market Control proposed the committee of advertising and sales promotion to order the trades to rectify the statement, prohibit the use of certain statements as appeared in the advertisement and prohibit the advertisement

2.5 Consumer legal remedies in sweepstakes promotion

The study found that Legal measure related the remedy of consumers who affect from sweepstakes promotion statue in the Competition Act B.E. 2542 (1999) and The Consumer Cases Procedure Act B.E.2551 (2008) are able to claim remedy in civil law. The sweepstakes offers need to considering about fraud or promises to give back their consumers.

3. ANYLYSIS MEASURES ONCLAIM REMEDY UNDER CIVIL LAW

3.1 The problem of Fraud

Since there is no clear law measure here in Thailand, many traders often send out the sweepstakes promotions to random consumers. Within the promotion itself explained the rules and valuable prizes they can win

after sending back some kind of form, application, fees, coupons, gift vouchers. The worst the traders are asking consumers to even making a purchase before joining any campaign available.

Because of these justifiable reliance on fraud or a misrepresentation about some important fact and the contract or obligation have been accepted by the innocent party relying on the deception or misleading, when there is no actual sweepstakes drawing or prizes, the contract is considered voidable according to Section 159 of the CCC. Thus, the contract can be rescinded by consumer who was affected and treated as the contract had never been. However, the contracting party in bad faith is liable for damages resulting from the fraud and such party can only claim compensation for damage resulting from such fraud according to section 161 Civil and Commercial Code.

3.2 The problem of Promises to giving

A person who by advertisement promises that he will give a reward to whoever shall be a certain act is bound to give such reward to any person who does the act, even if such person did not act with a view to the reward according to Section 362 of the CCC. So, the traders offer prize in sweepstakes promotion to the consumers. Contract by advertising between the traders and consumers is occurred under Section 362 of the CCC which, a person who by advertisement promises that he will give a reward to whoever shall be a certain act is bound to give such reward to any person who does the act

4. SUMMARY OF LAWS RELATED TO CLAIM REMEDY OF CONSUMER

As analysis to the legal measures of claim remedies of consumer who was affected from the sweepstakes promotion under civil law and specific law compare with the foreign law. The author would like to propose the rights to claim remedy from sweepstakes fraud specially. Because the right to claim the remedy in civil law is complicated. The consumer has to proceed himself many steps and time-consuming. And in the case of consumer protection where the Board thinks it is fit to institute legal proceedings in the infringement of the consumer's rights or upon receipt of complaints from the consumers whose rights were infringed, the Board has the power to appoint a public prosecutor with the approval of the Director-General of the Department of Public Prosecutions, or an office of the Consumer Protection Board according to section 39

5. CONCLUSION

Sweepstakes promotion is extremely important to increase the consumption of products and services. However, sweepstakes offers used as a marketing strategy may have caused major problems for the consumers since the offer may be ambiguous and can be interpret as suggestions to purchase the products in order to get the prize. The victims are deliberately lured into believing that they have just won or are likely to win

a sweepstakes when in fact they have neither won nor are in fact likely to win such a prize.

6. RECOMMENDATIONS

The followings are recommendations for improving the legal mechanisms for consumer protection in sweepstakes promotion in Thailand. Therefore, the author suggests the Consumer Protection Act (“CPA”) B.E. 2522 should be amended to subject of consumer protection in sweepstakes promotion for consumer protection are effective, up to date, fair, and appropriate as following;

(1) The definition

Adding the definition of "premiums" as used in this Act means any article, money or other kinds of economic gain which are given as means of inducement of customers, irrespective of whether a direct or indirect method is employed, or whether or not a lottery method is used, by an entrepreneur to another party in connection with a transaction involving goods or services which he supplies.,etc.

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Imposing the committee of advertising to be more powerful in order to regulate the sweepstakes promotion is essential. The changing from “the committee of advertizing” to “the committee of advertising and sales promotion” give advantages to all since advertising and promoting support each other’s works. Thus, in this case, it is no increasing duty to anyone only good not harm.

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THE INTERNATIONAL CARRIAGE OF DANGEROUS GOODS BY AIR IN THAILAND

Praewpun Sutitreratanakul

Abstract

In recent years, the carriage of goods by air in Thailand has increased and continues to rise because the transportation by aircraft is widely used. The carriage is not only limited to general goods but also includes chemicals and raw materials which are categorized as dangerous goods. Such increase in activity and demand results in several issues which consist of the carriage routes having to pass through communities followed by the increase in risks of collateral damage from accidents caused by the goods.

Hence, owing to the problem on the carriage of dangerous goods, international organizations made regulations to control the carriage of dangerous goods in order to prevent damage instead of specifying the remedy.

Therefore, it is crucial to enact the law and regulatory measures that control and monitor the carriage of dangerous goods as well as limit the accidental damage as low as possible in order to ensure the safety for both the public and the activity itself.

The objective of this thesis is to study the means of enacting a specific law governing the regulation of the carriage of dangerous goods by air. The methodology includes study and comparative analysis of the international regulations, namely United Nations Recommendations on the Transport of Dangerous Goods, IATA Dangerous Goods Regulations, Annex 18 of Chicago Convention, and Technical Instructions for the Safe Transportation of Dangerous Goods by Air, Foreign Laws and Thai law that concerns and governs the carriage of dangerous goods.

According to a study, it is evident that Thai law governing the carriage of dangerous goods by air is still inadequate due to the insufficiency of the regulations. In addition, it does not meet the requirement of ICAO; both legal and practical.

Such issues lead to a necessity in amending the related law. To make the law appropriate for the current social and economic state, the author suggests the resolution of these issues by enacting the specific law and amending the general rules as well as transportation and penalty rules stated in the same act in order to fit with the current situation and be sufficient for enforcement.

Keywords: carriage, dangerous goods, by air

บทคัดย่อ

ในปัจจุบันการขนส่งสินค้าทางอากาศในประเทศไทยเพิ่มขึ้นอย่างต่อเนื่อง เนื่องจากการขนส่งทางอากาศเป็นที่นิยมอย่างแพร่หลาย การขนส่งนี้ไม่ได้จำกัดเพียงแต่สินค้าทั่วไป แต่ยังรวมถึงสารเคมีและวัตถุอันตราย

ได้รับการจำแนกว่าเป็นสินค้าอันตราย การเพิ่มขึ้นของปริมาณความต้องการและการผลิตมีผลต่อการเพิ่มขึ้นของความเสียหายและความเสียหายอันเกิดจากอุบัติเหตุในการขนส่งสินค้า ฉะนั้นจากปัญหาที่เกิดขึ้นจากการขนส่งสินค้าอันตราย องค์การระหว่างประเทศได้จัดทำกฎระเบียบเพื่อควบคุมการขนส่งสินค้าอันตราย เพื่อที่จะป้องกันความเสียหายที่จะเกิดขึ้น

การออกกฎหมายและมาตรการควบคุมและจัดการการขนส่งสินค้าอันตรายนั้นเป็นสิ่งที่สำคัญ ซึ่งจะสามารถช่วยลดความเสียหายจากอุบัติเหตุที่เกิดขึ้นให้น้อยที่สุดเท่าที่จะเป็นไปได้ เพื่อให้เกิดความปลอดภัยต่อสังคมและส่วนรวม

งานเขียนนี้มีวัตถุประสงค์ที่จะศึกษาการออกกฎหมายเฉพาะเพื่อควบคุมการขนส่งสินค้าอันตรายทางอากาศ ซึ่งจะใช้วิธีการศึกษาโดยการวิเคราะห์เปรียบเทียบกฎเกณฑ์ระหว่างประเทศ ได้แก่ United Nations Recommendations on the Transport of Dangerous Goods, IATA Dangerous Goods Regulations, Annex 18 of Chicago Convention, and Technical Instructions for the Safe Transportation of Dangerous Goods by Air กฎหมายต่างประเทศและกฎหมายไทยที่เกี่ยวกับการขนส่งสินค้าอันตรายทางอากาศในประเทศไทย

จากการศึกษาพบว่ากฎหมายไทยที่ควบคุมการขนส่งสินค้าอันตรายทางอากาศยังไม่เพียงพอ เนื่องจากยังขาดกฎระเบียบบางประการ นอกจากนี้ยังพบว่า การขนส่งสินค้าอันตรายทางอากาศยังไม่ตรงตามเงื่อนไขมาตรฐานสากลของ ICAO

ดังนั้นประเด็นดังกล่าวจึงนำไปสู่ความจำเป็นในการแก้ไขเพิ่มเติมกฎหมายที่เกี่ยวข้องกับการขนส่งสินค้าอันตรายทางอากาศ เพื่อพัฒนากฎหมายของไทยให้เหมาะสมกับสภาพสังคมและเศรษฐกิจ ผู้เขียนจึงเห็นควรให้มีการออกกฎหมายเฉพาะและกำหนดให้มทบตท.ให้เข้ากับสถานการณ์ปัจจุบันและมีการบังคับใช้อย่างเหมาะสม

คำสำคัญ: การขนส่ง, สินค้าอันตราย, ทางอากาศ

1. Introduction

In recent years, the carriage of goods by air in Thailand has increased and continues to rise because the transportation by aircraft is widely used. The carriage is not only limited to general goods but also includes chemicals and raw materials which are categorized as dangerous goods. In the carriage of dangerous goods, one should be more careful because it can cause harm to life, property, and environment. To prevent this damage, it is crucial for the government to impose statutory and regulatory measures to control and monitor the carriage of dangerous goods as well as limit the accidental damage as low as possible to ensure the safety for the public and the activity.

Due to rapid development in the world, the demand for these dangerous goods has also increased exponentially. Because of the obvious advantages of air carriage, great deal of these dangerous goods are transported by the aircrafts. With an increasing demand of dangerous goods, the role of air transportation in their carriage is becoming more important than ever.

Since they are transported every day by air around the world, there is an International Standard that the contracting states of Chicago Convention have to apply in their respective national legislations to ensure the safety of the aircrafts. This, in turn, ensures that the carriage of

dangerous goods has been controlled within the safety standard, thereby providing a worldwide harmonization in aviation.¹

The carriage of dangerous goods by the airline in Thailand still does not meet the requirements of International Civil Aviation Organization (ICAO) and has resulted in the issuance of Significant Safety Concerns (SSC) by ICAO. Since Thailand does not have any distinct regulation on the carriage of dangerous goods by airlines, it should be concerned about this matter and comply with the international regulations such as Annex 18 of Chicago Convention which states about the procedure, inspection, training and emergency procedures.² For these reasons, more attention should be paid on the carriage of dangerous goods by air in both legal and practical sense. Thailand should also consider it imperative to have a specific law to handle the carriage of dangerous goods by air which covers all aspects on this matter.

2. Basic Concepts of Dangerous Goods

2.1 The Importance of International Civil Aviation

International civil aviation has become one of the most closely regulated activities in the world. Practically all its activities are related to the operations of international air services and the carriage of goods. With the continuous development of civil aviation and airline operations, the existing regulations and authorizations have to be continuously adapted to meet the new situations.³

There are mainly two ways to regulate international civil aviation:

- A) agree on common general principles and apply these principles to the operation of international air services; or
- B) for individual states to try and enlarge their sphere of influence in international civil aviation by any available means.⁴

2.2 Definition of Dangerous Goods

In the term of aviation, dangerous goods are the articles which can cause harm to the aircraft if they are carried and therefore must be forbidden if these are not in compliance with specific instructions on the

¹International Civil Aviation Organization, “*The Transport of Dangerous Goods by Air*”, <http://www.icao.int/safety/DangerousGoods/Pages/background.aspx> (last visited Jan. 4, 2016).

² Thaipublica, “การดำเนินการแก้ไขปัญหามาตรฐานการบิน” (“*The Resolve of Civil Aviation Problems*”), <http://thaipublica.org/2015/06/icao-4/> (last visited Jan. 4, 2016).

³ **H.A.** Wassenbergh, **Public International Air Transportation Law in a new era**, Henkes Senefelder, (1997).

⁴ *Id.*

packaging, carrying, stowage location, proximity to the other items, or class of flight.⁵

UN Recommendations on the Transport of Dangerous Goods define the meaning of dangerous goods as “articles or materials that can cause damage or injury to human, health, property, or environment when transported in a sizeable amount”.⁶ It also covers the items of daily use, for example, perfumes, paint, can, etc.

Even though most of the transport regulations are now framed so as to adhere to basic principles under the UN Recommendations, the regulations for the road, air, rail, and sea vary as per the specific requirements of different modes of transportation.⁷

The classification of Dangerous Goods is based on the standard determined by the “United Nations Committee of Experts” (CoE). This classification determines the acceptability of the articles and substances for air transportation as well as the conditions for their transportation. It is the duty of the shipper of the cargo to decide if the articles and substances are dangerous goods or not, and if dangerous goods, to determine the correct class or division.⁸ These classes are;

- 1) Explosive
- 2) Gas
- 3) Flammable Liquid
- 4) Flammable Solid
- 5) Oxidizing Substance
- 6) Toxic and Infectious Substance
- 7) Radioactive Material
- 8) Corrosive
- 9) Miscellaneous Dangerous Goods⁹

3. The Carriage of Dangerous Goods by Air in Foreign Countries

3.1 Australia

The Australian airline is the leader in the development of airline system, flight data record, crew performance, time monitoring and safety and security system that can detect the problem from a major safety issue.¹⁰ The evidence that supports this idea is that Australia’s Qantas is the

⁵ “Definition of Dangerous Goods”, http://www.skybrary.aero/index.php/Dangerous_Goods (last visited Jan. 4, 2016).

⁶ UN Recommendations On The Transport Of Dangerous Goods, “Definition of Dangerous Goods”, <http://www.businessdictionary.com/definition/dangerous-goods.html> (last visited Jan. 4, 2016)

⁷ *Id.*

⁸ UN Recommendations on the Transport of Dangerous Goods, “The 9 Classes of Dangerous Goods”, <http://www.dgiglobal.com/classes> (last visited Jan. 4, 2016).

⁹ *Id.*

¹⁰ The Telegraph, “The world’s safest and least safe airlines revealed”,

world's safest airlines of 2016 ranking from the world's plane safety and product rating website. It got this prize continuously for 3 years. It has never had any fatal accident or incident in the aircraft era.¹¹

Australia is one of the members of the International Civil Aviation Organization and signatories of the Chicago Convention. It has applied the provisions that are detailed in the Technical Instructions to its regulations to reach a higher safety standard.

There are many regulations that provide the carriage of goods by air. In the carriage of dangerous goods by air, there are "Australian Civil Aviation Act 1988" and "Civil Aviation Safety Regulations 1998" which are regulated by the Civil Aviation Safety Authority. They enact the regulations for the carriage of dangerous goods, consignment, the training of aircraft personnel and the shipper of dangerous goods. They also enact the regulations for the cargo shipper to declare the goods which are not dangerous and a description of the contents.¹²

Civil Aviation Safety Regulations Part 92, the law on governing the carriage of dangerous goods by air, was adopted with the ICAO Technical Instructions through the act.¹³ Moreover, there is the competent organization Civil Aviation Safety Authority that authorizes and fulfills this role. These regulations include all details that are require for the global harmonized standard and they are applied to all aircraft related matters.

3.2 New Zealand

The world's second safest airline belongs to "Air New Zealand", the national airline of New Zealand, it offers the greatest peace of mind when flying. According to the safety aviation network, the results of the accidents are well below the 10-year average and it has not suffered from any significant incidents.¹⁴

<http://www.telegraph.co.uk/travel/news/The-worlds-safest-airlines-revealed/> (last visited Jun. 30, 2016).

¹¹ Christine Forbes Smith, "Who are the world's safest airlines for 2016?", <http://www.airlinerratings.com/news/630/who-are-the-worlds-safest-airlines-for-2016> (last visited Jun. 30, 2016).

¹² Australian Government Civil Aviation Safety Authority, "Dangerous Goods-Risk Reduction Strategy", <https://www.casa.gov.au/standard-page/dangerous-goods-risk-reduction-strategy> (last visited May. 17, 2016).

¹³ Civil Aviation Safety Authority, "How to use the Civil Aviation Safety Regulations 1998", <http://www.recreationalflying.com/tutorials/regulations/guidcasr.pdf> (last visited Jun. 30, 2016).

¹⁴ NZ Herald, "Air NZ world's second safest airline", http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11183011 (last visited Jun. 30, 2016).

In the case of New Zealand, the airlines in this country are concerned about the safety measures both the legal and practical. There is Civil Aviation Rule Part 92 which controls the carriage of dangerous goods and it has the same content as Technical Instructions for the safe transport of dangerous goods by air, and the IATA Dangerous Goods Regulations include the necessary detail about airline industry standard and convention.¹⁵

4. The Carriage of Dangerous Goods by Air in Thailand

4.1 Legal problem analysis in the Carriage of Dangerous Goods by Air in Thailand

1) Insufficient Details of the Act

Hazardous Substances Act B.E. 2535 (1992) is the Act that deals with the production, importation, exportation and possession of dangerous goods, but it does not cover in details the carriage of such dangerous goods. This act regulates only the general principle, for example, the label in the carriage has to clearly present the state of dangerous goods or the container, equipment etc. in the carrier have to be carefully inspected during the transportation. Following the above example, the Act does not specify in details how the correct transportation and equipment should be. Although, this Act is applicable to all kinds of transportation, it is not suitable in practice and the ministry concerned does not have competency because each kind of transportation is different in detail, technicality and procedure so it is difficult to enforce all kinds of transportations using the same standard.

In the case of the Air Navigation Act B.E.2497 (1954), it was enacted since B.E. 2497 (1954) and the substances of this act do not cover all the matter of the international carriage by air. There are only a few provisions stating about dangerous goods and they are not enough for the current situation. Therefore, some sections of the act should be amended such as the carriage of dangerous goods, penalties to be suitable in practice.

For the Department of Civil Aviation Regulation No.92, although it is compatible with some parts of Technical Instruction such as Chapter 8 Operator's Responsibilities, it still lacks some details such as limitation on the transport of dangerous goods by air, shipper's responsibilities, dangerous goods transportation documents, compliance and inspection systems etc., because it was enacted urgently to solve the encountering problem. It also does not clarify some sections such as packing, labeling and marking that should specify more details in these matters.

Moreover, there is no provision which states about the penalties in this regulation. So in effect the problem persists regarding the responsibility and penalties for the persons who do not comply with the regulation.

¹⁵ Civil Aviation Authority of New Zealand, **The Offering Of Dangerous Goods For Carriage By Air**, (2010)

2) Implementation Problems

Because the dangerous goods accidents can severely affect humans, properties and environments, it is imperative to have clear regulations to control the carriage of dangerous goods procedure to prevent the damages that can happen, and solve the problem in this matter.

All the regulations and the measures to control the carriage of dangerous goods are the subordinate legislations that are enacted by respective organizations. It means that each part of the carriage including production, packaging and transportation is controlled by different organizations which lead to obstruction for the entrepreneurs in doing business.

Moreover, the organizations concerned may neglect or refuse to take responsibility in case of any problems arising because they have a limited authority and the problem may be under the jurisdictions of other organizations. So it is necessary to have a competent authority be responsible directly in the carriage of dangerous goods by air for the harmonization and convenience.

In Thailand, although there are some related regulations on the carriage of dangerous goods by air, they are not adequate. The existing laws are not able to regulate the carriage of dangerous goods efficiently and sufficiently because most of them are subordinate laws, they cannot be applied uniformly to all cases and are too complicated in practice. Since the dangerous goods accidents can severely harm life, health, property or environment, it should have a law that can be strictly enforced. For example, in Department of Civil Aviation Regulation No.92, there is no provision which mentions about the penalties so it is necessary to have the specific law to enforce in this matter.

Moreover, the law on the carriage of dangerous goods by air should be amended every two years, as suggested by the UN recommendation. It should be done through the enactment of a ministerial regulation because it is simpler and faster to amend the ministerial regulation than enacting the act. The reason to amend this law every two years is because of the various types of dangerous goods and the continuous improvements in the transportation technologies, thereby increasing the chance of causing more damage than the past. Therefore, the law should be amended and updated appropriately for the current situation.

To solve Thailand's civil aviation and for it to be in compliance with the standards of the ICAO, according to SSC, some of the important measures are to improve the certification of transportation of dangerous goods by air by setting up a special unit responsible for issuing the rules and regulations concerning transportation of dangerous goods as well as drafting a Dangerous Goods Manual and a Dangerous Goods Inspector Manual.¹⁶

¹⁶ PPTV, "Civil Aviation Standard in Thailand", <http://www.pptvthailand.com/news> (last visited Jun. 30, 2016).

The organization that will enforce the specific law should have the knowledge and understanding in the carriage and state of dangerous goods. Therefore, a specialist committee should be appointed to consider the specific law. Furthermore, the personnel is an important part in controlling the carriage of dangerous goods and needs to be of the same standard as the international one. Thus, there should be a training course on the carriage of dangerous goods by air for the personnel to improve its potential and specialization in this matter.

In conclusion, Thailand should make amendments to laws to make the carriage of dangerous goods by air meet the international standards. This is because airline industries play an important role in the national economic system. Furthermore, it is also for the protection of people's life, health, property and development of Thai airline industries simultaneously.

3) Problems of the substance of the law

According to the study, there are some regulations that can be enforced in the carriage of dangerous goods by air but they are still inadequate because they do not cover all the matters as desired.

In Department of Civil Aviation Regulation No.92, they were adopted and translated from the Technical Instruction for the transportation of dangerous goods. However, there are some parts that this regulation does not applied and it can be effected in practice such as the limitation on the transport of dangerous goods, shipper's responsibilities, dangerous goods transportation documents, compliance and inspection systems. Moreover, in Air Navigation Act B.E.2497 (1954), which is the parliamentary act, does not have the penalty in the carriage of dangerous goods by air that can cause the problem such as the punishment in the event of an infringement.

4.2 The Advantages of the Specific Law on Carriage of Dangerous Goods by Air

There are many advantages if Thailand enacts the specific law on carriage of dangerous goods by air as follow:

1) The advantage for business and economy

By having a specific law on the carriage of dangerous goods by air in Thailand, the carriage can be controlled systematically and effectively. It can reduce the risk that causes the accident and the problem of the standard in carriage of dangerous goods. It can also make the carriage business more convenient and can increase the confidence of the foreigners to travel in and accept the Thai airlines. Moreover, it can support investment in the carriage of dangerous goods more than the past.

2) The advantage for society

If there is a specific law to control in this matter, it can improve the safety standard in the carriage of dangerous goods by air. It can prevent and minimize the dangers that cause severe harm to life, health, property or environment. Moreover, if there is a specific law, it can reduce the incident or accident that can occur from dangerous goods.

3) The advantage for public

Accidents that are caused by the dangerous goods can severely affect not only the private operators but also the state ones. Such accidents can reduce the confidence of carriers from the other countries. So if there is a specific law which can control the carriage and make it more systematic and effective, it will be advantageous for public. It can make the standard in Thai's airline industry to meet the international requirement and increase the confidence to the foreign countries.

5. Conclusions and Recommendations

In Thailand, it appears that the carriage of dangerous goods has not been given sufficient consideration, according to the case study in 2015 which observed that Thai DCA does not meet the requirement of ICAO in Significant Safety Concerns (SSC)¹⁷. Resultantly, it has had an effect on the Thai airlines, and therefore, Thailand should consider enacting the specific law on the carriage of dangerous goods by air for safety, standard and harmonization with the international regulation.

In conclusion, as a preliminary solution, the author suggests enacting the ministerial regulations under the Air Navigation Act B.E. 2497 as soon as possible, because they can provide more details under the existing act and can be promptly amended or implemented with the international regulations. Since enacting the act has to be considered by the legislative assembly, it has a complicated process and also takes time to enact the law. So it cannot be immediately amended or applied with the current situation and may affect the development of society and economy. Therefore, the ministerial regulation is the suitable way to solve the encountering problem because it can provide more details under the existing act and can be promptly amended or implemented together with the international regulations.

However, for the long-term goal, there should be an act on the carriage of dangerous goods by air because the law on this matter is essential as it has an effect on the society and people if there is any accident or damage, it can severely affect people's health, life, state properties and the environment. Thus, a new act should be brought into force to cover all aspects of this matter by considering the international regulations.

¹⁷ PPTV, *supra* note 14.

INTERNET ADVERTISING: CLICK FRAUD*

*Prapavarin Aphaivongs***

Abstract

There are many categories of internet advertising nowadays, one that has legal issues is “search engine marketing” which is a source of Click Fraud. Since Thailand has just begun using internet advertising, it still has gaps of laws for this legal issues. Therefore, it is necessary to study laws from other developed countries in order to understand and realize what Thai laws should be amended.

Search engine marketing has a special payment method for the business operators or advertisers, called “Pay-Per-Click”, which an advertiser will be charged whenever there is a click on its internet advertisement and the advertiser has to pay to an advertising agency or an advertisement publisher. A person who makes Click Fraud in this payment method with knowledge creating a fraud click to the displaying internet advertisement. There are two main categories of Click Fraud; the publisher click fraud which made by the advertising publisher or the advertising agency, and the competitor click fraud which made by the competitive business operator. The consequence of the above mentioned Click Fraud is a new type of cybercrime which has become known to the potential victim advertiser with huge damages and harm left to the internet advertising business.

This article presents the study about laws of developed countries like the United States of America, China, and Japan, which has faced to this cybercrime for many years. They provide their own domestic laws in order to govern the Click Fraud issue. However, although there are many laws relating to cybercrimes protection, there are still gaps of law which cannot apply to Click Fraud issue. Therefore, this article will present analysis of how Thai laws could not govern to Click Fraud and the recommendation of solution in order to make Thai laws effective and enforceable.

Keywords: Internet Advertising, Click Fraud, Search Engine, Computer Crime

บทคัดย่อ

ในปัจจุบันผู้โฆษณาได้มีการเลือกใช้บริการโฆษณาทางอินเทอร์เน็ตในหลากหลายรูปแบบ แต่ทว่ามีการโฆษณาทางอินเทอร์เน็ตในรูปแบบของโปรแกรมค้นหา หรือเสิร์ชเอนจินนั้นได้เป็นต้นกำเนิดของการฉ้อโกงด้วยการกดเข้าชมโฆษณา (Click Fraud) ทั้งนี้ เนื่องจากประเทศไทยยังเป็นประเทศที่อยู่ในช่วงเริ่มต้นของการใช้บริการโฆษณาทางอินเทอร์เน็ตทำให้ประเทศไทยนั้นยังคงมีปัญหานี้ในเรื่องของช่องว่างทางกฎหมายเกี่ยวกับอาชญากรรมทาง

* This article is summarized and arranged from the thesis “Internet Advertising: Click Fraud” Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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คอมพิวเตอร์ ดังนั้น ในการที่จะแก้ปัญหาดังกล่าว ประเทศไทยจึงจำเป็นต้องศึกษาข้อมูลและกฎหมายที่เข้ามามีบทบาทในการจัดการแก้ไขปัญหาของการฉ้อโกงด้วยการกดเข้าชมโฆษณาจากกฎหมายของประเทศที่พัฒนาแล้วเพื่อนำมาใช้ปรับปรุงแก้ไขกฎหมายที่มีอยู่ของไทยให้สามารถครอบคลุมได้ทั่วถึงต่อไป

จากการที่โปรแกรมการค้นหาค้นหาเป็นแหล่งกำเนิดของการฉ้อโกงด้วยการกดเข้าชมโฆษณา ทั้งนี้ เนื่องมาจากว่าโปรแกรมการค้นหาค้นหาที่มีรูปแบบการเรียกเก็บค่าใช้บริการจากผู้โฆษณาโดยการจ่ายเท่ากับจำนวนคลิก (Pay-Per-Click) ให้แก่ตัวแทนในการแสดงโฆษณาบนอินเทอร์เน็ต หรือผู้แสดงโฆษณาบนอินเทอร์เน็ต ผู้ที่กระทำการฉ้อโกงด้วยการกดเข้าชมโฆษณานั้นจะต้องเป็นการกระทำที่รู้ถึงการโฆษณาในลักษณะดังกล่าวซึ่งสามารถแบ่งแยกประเภทของผู้กระทำได้สองประเภท คือ ผู้กระทำการฉ้อโกงด้วยการกดเข้าชมโฆษณาเป็นผู้แสดงโฆษณาบนอินเทอร์เน็ตเอง หรือเป็นตัวแทนในการแสดงโฆษณาทางอินเทอร์เน็ต และผู้กระทำการฉ้อโกงด้วยการกดเข้าชมโฆษณานั้นเป็นคู่แข่งทางการค้าของผู้โฆษณา ผลของการฉ้อโกงด้วยการกดเข้าชมโฆษณานั้นสามารถสร้างความเสียหายให้แก่ผู้โฆษณาเป็นเงินจำนวนมากและสร้างความเสียหายในเชิงธุรกิจของการโฆษณาด้วย

บทความนี้จึงนำมาซึ่งการศึกษาข้อมูลกฎหมายของประเทศที่พัฒนาแล้ว อาทิ ประเทศสหรัฐอเมริกา ประเทศจีน และประเทศญี่ปุ่น ซึ่งประเทศเหล่านี้ล้วนเป็นประเทศที่ต้องประสบกับปัญหาการฉ้อโกงด้วยการกดเข้าชมโฆษณาในธุรกิจโฆษณามาแล้วนานแล้ว จึงได้มีการประกาศบังคับใช้กฎหมายภายในประเทศในการควบคุมปัญหาและผลกระทบจากการฉ้อโกงด้วยการกดเข้าชมโฆษณาดังกล่าว ในขณะที่ถึงแม้ว่าประเทศไทยจะมีกฎหมายหลายฉบับที่เกี่ยวข้องกับอาชญากรรมทางคอมพิวเตอร์ แต่ทว่ายังไม่มียกกฎหมายฉบับไหนที่สามารถครอบคลุมไปถึงปัญหาการฉ้อโกงด้วยการกดเข้าชมโฆษณาได้ ฉะนั้น บทความฉบับนี้จะแสดงให้เห็นถึงการวิเคราะห์เปรียบเทียบระหว่างกฎหมายไทยและกฎหมายต่างประเทศที่จะนำมาสู่การแก้ปัญหาช่องว่างทางกฎหมายของไทยได้

คำสำคัญ: การโฆษณาทางอินเทอร์เน็ต การฉ้อโกงด้วยการกดเข้าชมโฆษณา โปรแกรมการค้นหา อาชญากรรมคอมพิวเตอร์

The advanced technology especially the advertising business on the internet network has played a great role since 1990s to supersede the old methods of advertising. We may recall the methods of communications from the previous time such as postal mail, land line telephone and cable telegraph were all replaced by the new advanced technology of internet network advertising. The internet network can easily connect everyone together beyond territory and frontier. From this advantage, therefore, the internet network plays a significant role in business activities and advertisement on it which becomes an integral part of advertising business later.

The internet network advertising can be of a success business by targeting on each commercial product for appropriate customers in advertising market. The internet network can help advertising business to easier target the customers by age, gender, or location. From this benefit, the advertising through the internet network has been widely used and kept growing rapidly in the recent years. As advertising business operators, they can aim their advertisements to various group of people by using the internet network and displaying the advertisement on a website or an internet browser, which many people can access. Subsequently, many

business operators have changed their way of advertising their businesses to use the internet advertising instead of normal paper publishing or other media advertising display. During the year 2014 to 2015, there are expenses of the internet advertising business in the United States of America worth more than ten billion US dollar each year¹. Whereas, almost six hundred million Baht spent on the internet advertising business in Thailand even it has lately begun, comparing to the U.S. These are the reasons why the number of internet advertising business and the amount of money used in this industry keep growing.

The internet advertising is categorized in five categories which are (i) Digital Advertising; (ii) Affiliate Marketing; (iii) Social Network Advertising; (iv) Search Engine marketing; and (v) Mobile Advertising.² The internet advertising also has many payment methods which can be agreed and chosen by an advertiser and an internet advertising publisher or an internet advertising agency. The payment method that has legal issue here is “Pay-Per-Click” payment method. It is generally used in search engine marketing and social network advertising. Hence, whenever the internet advertising has been displayed on the internet website, the advertiser will be charged upon the amount calculated from the number of clicks on such advertisement and the price as agreed under an advertising agreement. Notwithstanding, the charge would be different depends on the consideration under each contract between the advertiser and the advertising agency or the publisher. Therefore, this Pay-Per-Click payment method likely lead to a new form of cybercrime called “Click Fraud” which is conducted by using an unintentional click on the internet advertisement in order to cause more charges from the advertiser to the internet advertising publisher or the internet advertising agency.

As Click Fraud arises from the Pay-Per-Click payment method by a fraudster who is with bad faith intends to damage the advertiser or exhaust the displaying internet advertisement in order to obtain its own benefits. Click Fraud can be categorized in two types³; the first one is “Publisher Click Fraud” which is conducted by the internet advertising publisher itself which intends to gain more money from its clients, it can make fraud clicks by hiring other

people to click on the displaying advertisement or by using clickbot. Another type of Click Fraud is “Competitor Click Fraud”. The Competitor Click Fraud does not cause for monetary intention but for other benefits. This category likely happened since there are more than one

¹ Stephanie Davidson, Dorothy Gambrell, and Adam Pearce, “How Much of Your Audience is Fake?”, <http://www.bloomberg.com/features/2015-click-fraud/>

² Boundless, “Types of Internet Advertising.”, <https://www.boundless.com/marketing/textbooks/boundless-marketing-textbook/social-media-marketing-15/introduction-to-social-media-digital-marketing-98/types-of-internet-advertising-483-10593/>

³ *Id.*

advertiser in the same publishing platform.⁴ For instance, there are many internet advertisements in Google Search Engine and the fraudster is one of the advertiser who does not want to pay much money in order to have a better rank on the search engine result. Then the fraudster creates many fraud clicks in the competitor's advertisement which was paid for the best rank on the Google Search Engine to make such advertisement exhausted. After that when the competitor's internet advertisement is exhausted, it will be removed from the top ranking as it has been paid for. The internet advertising of the fraudster will move to a better rank of Google Search Engine result whilst the charge payable to the internet advertising publisher still remained the same. Therefore, these two categories of Click Fraud are nowadays a new cybercrime that needs to be considered as a serious legal issue.

Thailand is one among many developing countries which has not sufficient or appropriate law to govern the cybercrime on Click Fraud issue on internet network, while some other developed countries have been using it for many years. Therefore, it needs to have a comparative study to such developed countries on how they solve Click Fraud issue in the internet advertising business. The countries which are chosen here for studying in this thesis are the United States of America, China, and Japan. The United States of America which is the biggest countries operating internet advertising business has implemented its own domestic law together with the technology development. Even there are some lawyers who propose against the Congress' opinion not to establish a new specific law about computer crimes in the U.S. because it would be redundant, however, the U.S. finally enforces the laws relating to Click Fraud

issue which are Computer Fraud and Abuse Act, Federal Trade Commission Act, and Wire Fraud Act.

Under the Computer Fraud and Abuse Act implemented in the United States, there is a famous Click Fraud case brought to the court by Microsoft Corporation.⁵ Microsoft sued Lam and other defendants due to their Click Fraud conducts on the other internet advertisements displayed by Microsoft Live Search, a part of Microsoft's business. This case related to the Competitor Click Fraud Scheme since the defendants had benefit from their Click Fraud conducts by exhausting another advertisement that had a better position on the Microsoft Live Search in order to make such advertisement finally removed and disappeared from the better position in Microsoft Live Search and, consequently, the defendants' advertisement moved to the better position of the result of Microsoft Live Search. This case is a precedent case of Click Fraud that Microsoft alleged under the Computer Fraud and Abuse Act ("CFAA") Section 1030: Fraud and related

⁴ Ronald L. Johnston, Arnold & Protor, "The Computer & Internet Lawyer" (2010), [http://thejordanlawgroup.com/OLDSITE/media/computerinternetlawyer mag.pdf](http://thejordanlawgroup.com/OLDSITE/media/computerinternetlawyer%20mag.pdf)

⁵ *Microsoft v. Lam et al.*, case number 09-cv-0815, in the U.S. District Court for the Western District of Washington, (filed June 15, 2009).

activity in connection with computers, (a)(4) and (a)(5) violation to the fraudster. This both sections determine how it would be violation when any person accesses a protected computer with intention to defraud and cause damage or loss to the computer owner. Additionally, these sections also determine compensation with damages, injunctive relief, or other equitable relief. Therefore, in *Microsoft* case, the element of scienter element is satisfied by Click Fraud scheme because clicking on an advertisement with such purpose is substantial. However, interpreting the CFAA by the court decision should be careful because of the favor decision to Microsoft can make most effect to the viability of online advertising support. Moreover, there is some arguments that the CFAA should not be applied to Click Fraud because it will be redundant but the supporters to CFAA said that the CFAA is likely fitted and applicable to Click Fraud litigation.

The U.S. also applies the Federal Trade Commission Act (the “FTC Act”) to this Click Fraud scheme since it relates to the competition trade law. In the FTA Act § 45, it provides the rule to protect the consumers from unfair methods of competition unlawful; prevention by commission (Section 5) which prohibits the unfair acts or practices in or affecting commerce. However, there are some complaints about no direct reaction and nothing is done with the Click Fraud by the FTC. Moreover, the FTC itself has provided a comment in the article that it concerns about the conduct that damages or affects the consumers rather than the advertisers.⁶

Besides these two acts, there is another act that is applicable to Click Fraud, the “Wire Fraud Act”. Under the 18 U.S. Code § 1343 or the Wire Fraud Act, the court divided essential elements of wire fraud in 4 substantial elements which are: “(1) that the defendant voluntarily and intentionally devised or participated in a scheme to defraud another out of money; (2) that the defendant did so with the intent to defraud; (3) that it was reasonably foreseeable that interstate wire communications would be used; and (4) that interstate wire communications were in fact used.”⁷ In this situation, the Wire Fraud Act is applicable to Click Fraud because the key element of Click Fraud is that the fraudster intends to defraud other people in order to get money through the internet advertisement clicking. Therefore, Click Fraud could be governed by the Wire Fraud Act in order to protect internet users.⁸

⁶ Danny Sullivan, “Clickfraud: Whose Problem, FTC, Search Engines or Advertisers?” (Oct 13, 2004), available at <http://searchenginewatch.com/sew/news/2063644/clickfraud-whose-problem-ftc-search-engine-or-advertisers>

⁷ *United States v. Profit*, 49 F.3d 404, 406 n. 1 (8th Cir.) and *United States v. Hanson*, 41 F.3d 580, 583 (10th Cir. 1994)

⁸ Amy Tracy, Technology Law - Great Google-y Moogley: The Effect and Enforcement of Click Fraud and Online Advertising, 32 U. Ark. Little Rock L. Rev. 347 (2010), available at: <http://lawrepository.ualr.edu/lawreview/vol32/iss3/5>

Apart from the U.S., other countries that we should consider in parallel are China and Japan which are the greatest

technology development countries in Asia. In China, Click Fraud firstly happened for many years ago since the internet enhancement and then cybercrimes became serious issues.⁹ The big issue is non-human traffic or clickbot which is the other kind of fraud made by a robot. To solve this issue, the Chinese government has established the protection of click fraud under the Advertising Law of People's Republic of China¹⁰. Particularly, Article 20 of the Advertising Law specified that an advertisement publisher must obligate under an advertising contract that the publisher has made with an advertiser. In click fraud scheme, if a fraudster is a party under the advertising agreement, then the click fraudster shall be liable and may compensate to the injured party because the fraudster violates its obligation to the contracting party under their advertising agreement. Furthermore, Article 21 provides a regulation of prohibition of unfair competition. This Article prohibits the unfair competition in the advertising business not to be arisen in the advertising activities published by an advertiser, including its agent and publisher. Moreover, this Click Fraud scheme is subjected to the Civil Law of People's Republic of China, Article 117, and the Penal Code of People's Republic of China, Article 13, which are trying to discourage the click fraudsters and try to stop them from committing computer fraud crime.

In Japan, they have a different Click Fraud scheme from others countries called "One Click Fraud" crime, the cybercrime that occurred when internet users click on the internet advertisement which is a trap of scam.¹¹ This One Click Fraud crime arose from the Japanese's habit which they would not resist on humiliation by strangers to their own social, for instance, family and colleges.¹² Therefore, the fraudster uses this point in order to get money in exchanging not to humiliate them. Normally, this situation would be found in the porn websites which persuade the internet users to click on such advertisement. This causes a huge number of victims and monetary damages. However, the Japanese government concerns about this fraud which is similar and probably be categorized as same as scam. The government provides a regulation in order to control One Click Fraud and protect an innocent person such as Article 246 and 246-2 of the Penal Code of Japan which rules the violation of fraud, specifically in computer,

⁹ CHEN Jia, "Click Fraud and Exploration of Its Prosecution in China", available at <http://wenku.baidu.com/view/f91d5023bcd126fff7050b96.html>.

¹⁰ "Online Fraud – the Biggest Problem of Chinese Digital Advertising", available at <http://sampi.co/fraud-the-biggest-problem-of-chinese-digital-advertising/#ixzz45fDz sj1r> (2015)

¹¹ Nicolas Christin, Sally S. Yanagihara, and Keisuke Kamataki, "Dissecting One Click Frauds", Carnegie Mellon University Technical Report CMU-CyLab-10-011 (2010)

¹² *Id.*

with the imprisonment with work for not more than 10 years.¹³ Therefore, Japanese Penal Code likely can govern over One Click Fraud crime in Japanese internet fraud presently. Even there are a large number of victims and damages in Japan, at present, they have a law that is capable to bring the fraudsters to the court and punish them for their offenses.

Comparing to Thai laws, although Thailand does not have any specific law about the internet advertising: Click Fraud, it is necessary to study other related laws even they are lacks of protection for this issue. The first law is the Competition Act of Thailand B.E. 2542 (1990). This Act provides a general rule in Section 29 that a business operator is not allow creating an unfair competition that affect other business operators or prevent others from carrying out business. This Act seems like it is applicable to competitor click fraud but we should consider deeper about the meaning of “a business operator”.¹⁴ The term “business operator” under this section is the business operator who has domination or power over a market and has the market share and sales volume competition exceed the threshold defined by the Commission and approved by the Council of Ministers and published in the Government Gazette. Therefore, under the Click Fraud issue, especially the Competitor Click Fraud, if allcompetitors in the internet advertising do not have domination over the market, such Click Fraud could not be considered as a matter under the Competition Act, Section 29. Moreover, the Publisher Click Fraud cannot be applied by this Competition Act because an internet publisher and an advertiser are not in the same business market.

Next, the Civil and Commercial Code of Thailand is the essential law that should be considered to Click Fraud issue. In Book II: Obligations, Title V: Wrongful Acts, a general concept of wrongful acts is provided in Section 420 and 421. Indeed, such provisions are not directly applied to the Click Fraud issue due to the substantial legal elements of both sections. For the wrongful acts under Section 420, the substantial element is that a person has to willfully or negligently act to another and cause injury to another unlawfully.¹⁵ Analyzing from these elements, Click Fraud would not be subjected to this Section because Click Fraud is not a conduct infringing the law and, in the other words, it is not unlawfully act to another person even if it is willful or negligence. However, the Wrongful Acts of the Civil and Commercial Code provides another section, Section 421, which intends to fill the gap of the law in Section 420. This Section defines that the exercise of a right which can only have the purpose of causing injury to another person is unlawful. However, the meaning of exercising rights in Section 421 is limited since it has been interpreted that ‘rights’ in this provision

¹³ *Id.*

¹⁴ Sakda Thanitkul, “Competition Act B.E. 2542 Explanation and Case Study”, Vinyuchon Publishing (2551).

¹⁵ Sak Sanongchart, “Wrongful Acts and Responsibility Explanation”, Niti-Bannagarn publishing, 8th edition (2015).

means ‘rights under laws’, not ‘the natural rights’.¹⁶ Even Click Fraud can be considered as the exercising of rights with an intention to damage an advertisement owner or an advertiser, the rights that have been exercised were not constituted by any law. Therefore, Click Fraud is unlikely to be treated as a wrongful act under Section 421 of the Civil and Commercial Code of Thailand. For the punishment relating to Click Fraud issue, the Penal Code of Thailand has the provisions about fraud offences in Chapter III, Section 341 to Section 348. The main related Section to the aforementioned Click Fraud is Section 341, the general legal concept of fraud offences in the Penal Code of Thailand. A person who has an intention to deceive another person in order to obtain property of another person or a third person is convicted as the offender and shall be imprisoned or fined. However, not every Click Fraud case shall possibly be applied to fraud offences in the Penal Code since there are some publisher click fraud and competitor click fraud which do not have an intention of deceiving another person in order to obtain others’ property. Notwithstanding the foregoing, there is another specific criminal law in relation to computer named the “Computer Related Crime Act” B.E.2550 (2007). This Act has promulgated since the computer technology is fully entered into Thailand. The technology development made the existing laws not appropriate to govern over Click Fraud crime issue. The objective of this act is to control the protected computer and electronic data of other person, including the way of accession to protected computer or any electronic data without authorization, and electronic data disclosure. Unfortunately, there is no computer fraud or Click Fraud was controlled by the provision stipulated in this Act. Therefore, if focusing only on Click Fraud, this Act is not sufficient enough to govern this new cybercrime

Besides the Civil and Commercial Code and the Penal Code, the Electronic Transaction Act of Thailand is likely to be one of the laws that may relate to this kind fraud. However, it could not apply to Click Fraud issue since this Act is focusing on how the electronic transaction would be enforceable and acceptable in actual under the laws and in litigation, including the electronic signature in a transaction. In spite the fact that Click Fraud is one of electronic transaction, this Act cannot control or protect an innocent person from Click Fraud in the internet advertising business.

Since the internet advertising is a business that relates to consumers’ interests, therefore, the Consumer Protection Act needs to be considered in this case as well. Although the existing Consumer Protection Act of Thailand provides the restriction and regulates general advertising to the publisher in order to protect its consumers, however, there is only restriction to the internet advertiser that should not publish a misleading or

¹⁶ Jitti Tingsapat as amended by Khemapoom Bhumithavara, Chawin Oinpat, and Amnart Tangkiriphimarn, “Civil and Commercial Code Explanation: Management of Affairs Without Mandate, Undue Enrichment, and Wrongful Acts”, (2557).

fault advertising which could risky cause damages or injury to consumers. Click Fraud is not likely related to the procession of advertising establishment, instead, it comes from the third party or, sometimes, from the publisher itself deceives an advertiser. Therefore, the Consumer Protection Act could not restrict or be effective to Click Fraud protection.

Recently, the National Legislative Assembly who has been appointed by the National Council for Peace and Order (NCPO) are now drafting amendments to the existing laws and regulations and trying to adopt a new enactment. However, the drafts are at this time still be in the process which would possibly take more than a year from now (2016) until they can be promulgated and enforced.

When comparing Thai laws to others, it gives us a very concerned result. For instance, Section (a)(4) and (a)(5) of the FTC Act includes the accession of data from the protected computer without authorization and causes damage to another either with recklessness or intention is effectively applied to the click fraudsters of the *Microsoft* case unlike Thai regulations which have not specified that the fraudster has to be liable and punished for his conduct which causes damage to another's property either with intention or recklessness. Moreover, the Competition Act of Thailand still has gaps that could not govern and cover to all mentioned Click Fraud issues because of its main reason of the term 'a business operator' which is narrower than the FTC Act's term. Furthermore, the Consumer Act of Thailand is not effective enough to protect the consumers of the internet advertising business in Thailand unlike the Chinese Advertising Law which can control the unfair method of advertising business to an advertiser. Additionally, the Computer Related Crime Act of Thailand is still insufficient to the Click Fraud issue here since there is no specific section that possibly controls computer fraud issue unlike the CFAA of the US.¹⁷

Therefore, although Thailand does not have many serious Click Fraud cases in the internet advertising business as other developed countries are confronted since we are in the beginning period of the internet advertising business, it would be better and necessary to have some specific laws and regulations for controlling and preventing any damages which may incurred from Click Fraud caused by the click fraudster whether in domestic or international. Therefore, from the author's opinion, the existing Thai laws still has gaps which could not govern and protect an innocent advertiser from Click Fraud issue. The amendment or enactment of a new specific law initiated by the legislative of Thailand will fulfill these gaps in our legal system like the United States of America, China, and Japan, in order to govern and regulate this Click Fraud issue in the internet advertising business.

¹⁷ See *Microsoft v. Lam et al.*

ANTI-MONEY LAUNDERING AGAINST VIRTUAL CURRENCY IN CASE OF USING BITCOIN *

*Pratya Apaiyanukorn ***

ABSTRACT

Anti-Money Laundering is a set of rules and guidelines designed and agreed among countries to use as standard policies and framework in establishing their domestic laws on prevention and suppression of money laundering activities.

The expansion of the financial sector and businesses brings about the continuous development of innovative and new financial instruments to facilitate the businesses. In parallel with this development, criminals also take advantages of the unfamiliarity to the newly developed innovation and create new money laundering methods. In this circumstance, and whilst the financial sector is a foundation of the national economic, the government and relevant state authorities have to monitor closely and supervise such new innovations. Among other innovations, virtual currency is created to facilitate financial transactions. It was found that virtual currency is the new financial innovation and also the system that used to connect with the customers through the online network via the internet. The key points of this currency are the description of it which are anonymous account and the system used in the transaction which is the peer-to-peer or blockchain connection system. These features are different from the standard financial instruments such as fiat currencies, financial institution, bank and non-bank business.

The virtual currency is considerably new in Thailand. To date, the laws have not been developed to effectively govern the transactions using the said virtual currency. Exchangers, administrators, and users of the virtual currency are not within the scope of governance of the Anti-Money Laundering Act; nor are they subject to any other regulations. In other words, obligations and requirements under the Anti-Money Laundering laws do not apply to the virtual currency transactions and/or the involving parties. Thus, there are certain loopholes for some criminals to use the virtual currency instead of money in various financial transactions to avoid detection by the state authorities. Lacking of government supervision in this part leads to a new risk of money laundering through the virtual currency.

* The article is summarized and rearranged from the thesis “Anti-Money Laundering Against Virtual Currency in Case of Using Bitcoin” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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This thesis studies the Anti-Money Laundering processes in the United States in comparison with those in Thailand, specifically focusing on the issues of money laundering using a kind of virtual currency: Bitcoin. Bitcoin is the most prevalent kind of virtual currency and is addressed widely and extensively in US laws, regulations and court judgments. Those laws can be useful guidelines for Thailand to develop its appropriate solutions for the problem of money laundering through the virtual currency. The key preventive measures under the Anti-Money Laundering Act are customers profile verification and transactions monitoring and recording. These measures are the essential procedures to control and monitor transactions to reduce the risk of money laundering. Also, it can also examine the suspicious transactions or suspect profiles of each customer. These methods could apply to the virtual currency and their relating business for supervision and manage the risk of money laundering as same as the other financial business under the Anti-Money Laundering law and regulation.

Keywords: Virtual Currency, Crypto Currency, Digital Currency, Bitcoin, Anti-Money Laundering, Customer Due Diligence

บทคัดย่อ

การป้องกันและปราบปรามการฟอกเงินคือกฎระเบียบและแนวทางที่ได้รับการยอมรับจากบรรดาอารยประเทศ ที่จะใช้เป็นนโยบายมาตรฐานและเป็นเค้าโครงในการบัญญัติกฎหมายภายในของแต่ละประเทศบนพื้นฐานของการป้องกันและปราบปรามกิจกรรมการฟอกเงินต่าง ๆ การขยายตัวของภาคการเงินและภาคธุรกิจนำมาซึ่งการพัฒนานวัตกรรมและเครื่องมือทางการเงินใหม่ ๆ อย่างต่อเนื่อง เพื่อประโยชน์ในการทำธุรกิจ ในทางคู่ขนานกับการพัฒนาการดังกล่าว เหล่าบรรดาอาชญากรรมจึงได้รับประโยชน์จากสิ่งแปลกใหม่ที่ได้รับการพัฒนานวัตกรรมขึ้นใหม่และสร้างวิธีการฟอกเงินแบบใหม่ ๆ ขึ้นมา ในสถานการณ์ดังกล่าวนี้ ในขณะที่ภาคการเงินซึ่งเป็นรากฐานสำคัญของเศรษฐกิจของประเทศ รัฐบาลและองค์กรของรัฐที่เกี่ยวข้องจะต้องตรวจสอบและดูแลนวัตกรรมใหม่ ๆ เหล่านี้อย่างใกล้ชิด ท่ามกลางนวัตกรรมที่หลากหลาย เงินตราเสมือนนั้นถูกสร้างขึ้นมาเพื่ออำนวยความสะดวกในธุรกรรมทางการเงินต่าง ๆ นอกจากนี้ยังพบว่าเงินตราเสมือนคือนวัตกรรมทางการเงินสิ่งใหม่และยังใช้ระบบที่เชื่อมต่อระหว่างลูกค้าผ่านทางเครือข่ายออนไลน์โดยอินเทอร์เน็ต หลักสำคัญของเงินตราดังกล่าวนี้ คือลักษณะของมันที่เป็นบัญชีไม่ระบุตัวตน และระบบที่ใช้ในการทำธุรกรรมนั้น คือ ระบบการเชื่อมต่อแบบ peer-to-peer หรือ blockchain ลักษณะเหล่านี้แตกต่างจากเครื่องมือทางการเงินที่เป็นมาตรฐานเช่น เงินตราสถาบันทางการเงิน ธนาคาร และ ธุรกิจทางการเงินอื่น ๆ ที่ไม่ใช่ธนาคาร

เงินตราเสมือนเป็นสิ่งที่ใหม่อย่างมากในประเทศไทย ในขณะนี้ยังไม่มีมีการพัฒนากฎหมายที่จะมาควบคุมดูแลการทำธุรกรรมที่ใช้เงินตราเสมือนได้อย่างมีประสิทธิภาพ ผู้ทำธุรกิจแลกเปลี่ยน ผู้ควบคุมจัดการระบบแลกเปลี่ยน และผู้ใช้งาน ของเงินตราเสมือนเหล่านี้ไม่ตกอยู่ภายใต้ขอบเขตของการกำกับดูแลของกฎหมายว่าด้วยการป้องกันและปราบปรามการฟอกเงิน อีกทั้งยังไม่ตกอยู่ภายใต้กฎหมายหรือข้อบังคับใด ๆ แต่อย่างใด กล่าวอีกนัยหนึ่งคือ หน้าที่ต่างๆ และกฎเกณฑ์ข้อบังคับภายใต้กฎหมายป้องกันและปราบปรามการฟอกเงินไม่นำมาปรับใช้กับธุรกรรมเงินตราเสมือน และ/หรือ คู่สัญญาที่เกี่ยวข้อง ด้วยเหตุนี้จึงมีข้อสงสัยสำหรับอาชญากรที่จะใช้เงินตรา

เสมือนแทนที่เงินตราที่แท้จริงในการทำธุรกรรมทางการเงินเพื่อหลีกเลี่ยงการตรวจจับของเจ้าหน้าที่รัฐ การขาดการกำกับดูแลของรัฐบาลในเรื่องดังกล่าวนี้นำไปสู่ความเสี่ยงใหม่ในการฟอกเงินผ่านเงินตราเสมือน

วิทยานิพนธ์นี้ศึกษากระบวนการป้องกันและปราบปรามการฟอกเงินในประเทศสหรัฐอเมริกา โดยการเปรียบเทียบกับประเทศไทย โดยมุ่งเน้นศึกษาในเรื่องการฟอกเงินโดยใช้เงินตราเสมือน เช่น บิทคอยน์ เป็นต้น โดยบิทคอยน์เป็นเงินตราเสมือนที่แพร่หลายมากที่สุด และมีการกล่าวถึงอย่างกว้างขวางและมีรายละเอียดอยู่ในกฎหมายและกฎข้อบังคับรวมถึงคำพิพากษาในประเทศสหรัฐอเมริกา กฎหมายเหล่านั้นสามารถนำมาใช้เป็นแนวทางที่เป็นประโยชน์สำหรับประเทศไทยที่จะพัฒนากฎหมายหรือแนวทางแก้ไขปัญหาก็ได้เหมาะสำหรับปัญหาการฟอกเงินผ่านเงินตราเสมือน

มาตรการป้องกันที่สำคัญภายใต้กฎหมายว่าด้วยการป้องกันและปราบปรามการฟอกเงินนี้คือ การตรวจสอบข้อมูลประวัติส่วนบุคคลของลูกค้า และการตรวจสอบการทำธุรกรรมและการบันทึกข้อมูลต่าง ๆ โดยมาตรการดังกล่าวนี้ เป็นกระบวนการที่สำคัญในการควบคุมและตรวจสอบธุรกรรม เพื่อลดความเสี่ยงของการฟอกเงิน และยังสามารถตรวจสอบธุรกรรมต้องสงสัยหรือข้อมูลประวัติส่วนบุคคลของบุคคลต้องสงสัยที่เป็นลูกค้าได้ กระบวนการเหล่านี้สามารถนำมาปรับใช้กับเงินตราเสมือนและธุรกิจที่เกี่ยวข้อง เพื่อการควบคุมดูแลและการจัดการความเสี่ยงในการฟอกเงินเช่นเดียวกับการประกอบธุรกิจการเงินอื่น ๆ ภายใต้กฎหมายและกฎระเบียบว่าด้วยการป้องกันและปราบปรามการฟอกเงิน

คำสำคัญ: เงินตราเสมือน, เงินคริปโต, เงินดิจิทัล, บิทคอยน์, การป้องกันและปราบปรามการฟอกเงิน

1. Introduction

The Virtual Currency is the new financial innovation that brings many issues in the term of Anti-Money Laundering because the criminal use this currency instead of the real currency to launder the proceeds of crime such as disorderly involved persons, transparency problem, extraterritoriality, and convertibility to the legal currency. It uses the digital technology and the complex codes in the transaction via the online network that is different from the formal financial transaction.¹

The virtual currency and the relating parties are not the objective to the predicate offence in Anti-Money Laundering Act (AMLA) in Thailand because it is not the real money or the party under the law. So the offender can use virtual currency instead of the actual money for the purpose of money laundering which is a lack of supervision and difficult to examine the exchange transactions to know the information of each user in the system. The essential milestone to enable government officials, law implementation and own division substances to identification the liable to AML risk of this currency as a new channel of payment system is how virtual currency operate. Another concerning is the process of seizing, freezing, or forfeiting the virtual currency which is not a real money and intangible so the tools and methods to take measures should be the same as the real money or not.

¹ Law of Electronic Banking by Melanie L. Fein, Aspen Law & Business A division of Aspen Publishers, Inc. Gaithersburg, New York, 2000, page xxv-xxvi.

2. Anti-Money Laundering Legal Regime and Virtual Currency Aspect in Thailand

2.1 Anti-Money Laundering Legal Regime

Presently Anti-Money Laundering (AML) is one of the important issues of the international level because it is related or associated with the severe crime through the groups of terrorist or the organizations across borders and difficult to suppress. Money laundering is a procedure whereby the returns of proceeds from the offences changed into lawful money or different properties. It can see that the unlawful money continues to launder to legitimize the cash. The term of 'Money laundering' is presently broadly utilized. The procedure of making unlawfully picked up continues (which is "dirty money") seem lawful (which is "clean"), this can make via the person or company through the transfer or withdraw the cash.

There are varied and sophistication methods by which money can launder. So the primary purpose of the money laundering is to focus on the money or asset which came from the illegal activities, these products have to proceed to be lawful money or property and cannot be traced back to the source of the crime.

The primary measurements of the Anti-Money Laundering Act are the process of verifying the data profile of the customers and also the monitoring of the transaction recording data. These processes are the essential procedures to control and monitor transactions to reduce the risk of money laundering.

2.2 Virtual Currency Aspect in Thailand

The legal status of virtual currency in Thailand is still unclear like the other countries. The government and the financial authority try to consider this type of financial innovation with carefully. Now Thailand has no specific legislations or any regulate on virtual currencies, and others involved businesses operation about it.

Bitcoin is the first virtual currency which was captured by the state officials, so it becomes the most popular virtual currency and has the highest value compared to the others.² It is an electronic coin as a chain of digital signatures. This thing uses as an intermediate of exchange goods and services instead of the real currency through an electronic payment system to testify trust by using cryptographic technology. This system allowing the parties to deal directly with each other without the trusted from the third party.

The most important feature of Bitcoin is the decentralized system different from the government authority. There are no physical bitcoin, only balances within the digital public and private keys which store in a general

² The Financial Crimes Enforcement Network, *FIN-2013-G001: Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, 2013.

ledger. Bitcoin transactions have to verify the accuracy through the multi-layer complex code in each transaction.³ For this reason, it operates comply with the idea of privacy and anonymity must be outright, however, that clients should even now have an approach to entrust in the validness of the transaction.⁴ The Bitcoin system was expressly intended to serve as electronic payments through peer-to-peer network tools which operate on the internet trade basis. It was planned to empower clients to transfer bitcoin or other decentralised virtual currencies directly to each other and settling those exchanges in actual close time without any financial institution or third party.

These technology does not have the central administrating authority and also does not have the essential monitoring center and supervision from the Government officials. Not only bitcoin but this P2P network also applied in another kind of virtual currencies. The issue about the decentralised system effect to the financial situation that making it difficult to determine and oversight the virtual currency transaction in this present.

3. Anti-Money Laundering Against Virtual Currency and The Case Study in The United States

3.1 The United States Regulations

The virtual currency plays a role in this matter due to the criminal activity that changes from the general processes of money laundering which use the channel of the financial institutions, banks to launder the money to use virtual currency instead of the money in the exchange transaction. This circumstance causes the risk of money laundering because it is difficult to monitor and supervise the virtual currency transaction.

However, the US amend the laws, regulations, and guidelines of virtual currency and the relating business to take control and manage the risk of virtual currency. It also determines the definition of virtual currency, the relating business, and the involving person, to make it clear under the applicable law and regulations.

The major regulations which related to the virtual currency in the United States are The Financial Crimes Enforcement Network ("FinCEN"), the Bank Secrecy Act ("BSA"), the Patriot Act, and The Money Laundering Suppression Act ("MLSA"). There is also the state regulation; particularly that is the regulation of New York State which is the beginning endeavor by

³ Calvery, Jennifer S., 'Statement of Director Financial Crimes Enforcement Network United States Department of the Treasury Before the United States Senate Committee on Banking, Housing, and Urban Affairs Subcommittee on National Security and International Trade and Finance Subcommittee on Economic Policy', 2013.

⁴ Greene, Olivia. 'Risk Advisory, Risks and Challenges Associated with Bitcoin Transaction Monitoring for AML', 2015. https://www.dhglp.com/Portals/4/ResourceMedia/publications/Risk-Advisory_Bitcoin.pdf (last visited Jun 5, 2016).

Regulators at legalizing this kind of currency as a feature of payment in the United States.

These laws and regulations try to enlarge the meanings of existing regulations to include this currency under the laws. These regulations are new and have to determine the result of the virtual currency enforcement by money laundering matters. In the term of law enforcement, it will focus on the case studies that show the possible process which can be the guidelines to apply the existing laws in the country around the world and also in Thailand. It has to study and comprehend the regulation to improve with these new definitions of commit the crimes and the new process in advance with the virtual currency.⁵

3.2 The Case Study in The United States

(1) The Liberty Reserve Case

The subject matter of this case should focus on the license of operating money transmitting business which related to the money launder offence by acting as a medium of exchange by providing virtual currency service to their customer for the purpose of using it instead of fiat money. Moreover, it also has the additional service that intends to make anonymity account to conceal the real owner and difficult to verify the information of the transaction. For this reason, it creates the convenience financial transfer system for customers and also criminals which can use it to launder the money by the digital services and virtual currency without any monitoring data of their customers in compliance with KYC & CDD procedures according to the law and regulation. So it has to be punished for the offence of operating the unlicensed business which violated the relating regulation.

(2) Silk Road Case

Silk Road is the hidden website for the purpose of buy and sell illegal drugs, weapons, stolen identity information and other unlawful goods and services within anonymous criminal transactions and not under the law enforcement also outside the regulation of drug trafficking, computer hacking, and money laundering conspiracies.⁶ In addition to the network, it accepts only bitcoins for payment. Silk Road only using this virtual currency as the intermediate for buyers and sellers to another conceal their identity via the shared peer-to-peer (P2P) framework. Bitcoin exchanges are distinguished just by the unknown bitcoin address or record which clients can get boundless addresses and can choose one location for every exchange. Also, there is another additional choice which is "anonymisers" past the general administration into Silk Road exchanges to hide and cover the real identity and the source of the transaction.⁷

⁵ Pamplin, Berkley A., 'Virtual Currencies and The Implications for U.S. Anti-Money Laundering Regulations'. Master of Science in Economic Crime Management, Utica College, 2014.

⁶ USA v. Ulbricht, 2014

⁷ *Id.*

However, the most important factor is the capability of the law enforcement to examine and detect the criminals online within the scope of the law. The concept of the anonymous is the core of the problem because it brings the complex data and process to examine the real person behind each account. The criminal will use this system to commit the money laundering online pass the closed network that difficult to detect any related party of the transaction. Bitcoin exchanges were intended to be entirely anonymous. However, the aftereffect of the Silk Road examination brings up the issue of the monitoring in virtual currency clients that could be distinguished and supervising the Bitcoin framework.

(3) Trendon T. Shavers Case

This case is about the fraud trading of securities by Shavers and the Bitcoin Savings and Trust (“BTCST”), a Bitcoin-designated Ponzi scheme that is established and performed by Shavers. It is involved with Bitcoin, so the court has defined that Bitcoin (“BTC”) is “a virtual currency that may trade on online exchanges for conventional currencies, including the U.S. dollar, or used to purchase goods and services online. BTC has no single administrator, or central authority or repository.”⁸ The court accepted bitcoin as money or form of money which is an intermediary in exchange of goods and services depending on each or social that recognize this thing can be used instead of the money.⁹ So, it can exchange to the other formal currency such as U.S. dollar, Euro or Baht. It also can be used as a channel to get the interest from the bitcoin investment.

4. Anti-Money Laundering Against Virtual Currency Under Thailand Regulation

4.1 Current Thailand regulation on Virtual Currency Money Laundering

The method of the virtual currency is higher risk in the case of money laundering by using this thing instead of the usual money. Because there are no specific legislations to be considered in the case about virtual currency. However, the government, related institutions, and other authority beware and warn about this currency and try to manage or control against the offense. The government does not accept this kind of the digital data unit which use as the money that can pay in legal tender. Many regulations could be used to enforce or regulate the virtual currency but in this article, it will focus on the Anti-Money Laundering Act B.E. 2542 first and try to interpret and adapt other provisions to resolve this issue.

The Anti-Money Laundering Act B.E.2542 (“AMLA”)

⁸ Securities and Exchange Commission v. Trendon T. Shavers, et al. The Complaint, (2014). <https://www.sec.gov/litigation/complaints/2013/comp-pr2013-132.pdf> (last visited Jun 7, 2016).

⁹ *Id.*

This act is aimed to prevent money laundering, force against the offender and manage the asset or money from the offence to eliminate the proceeds of crime which can be the fund for the criminal to commit another offence. There are three issues that should consider about AMLA against virtual currency.

(1) Predicate Offence

It does not have predicate offences which related to the VC or VC service business because this thing is a new financial innovation and new business which is not under this regulation or the other laws. So, this situation causes a risk of money laundering through the VC instead of the money.

(2) Assets under AMLA

The money or property or the proceeds of crime under the AMLA definition have many kinds of property that involved with the predicate offence. It is the other important issue about VC because it is not one of the property meaning under this regulation. The Virtual Currency does not accept or treat like the money or assets, and the status is still unclear. So, the government or BOT just caution about the risk of using VC, but they do not recognize on VC status to be legal in Thailand.

(3) The Financial Institutions and Designated Non-Financial Businesses and Professions

Under this Act, it defines the duties of the financial institutions and other related business to follow the requirements of this law which can be divided into three things as follows:

(3.1) The duty to report the transaction

It does not have the regulation to control or supervise the virtual currency service business and also includes the requirement about the criteria of the amount of virtual currency transaction which have the duty to report to AMLO like the cash or property transactions.

(3.2) The duty to identify and review the information of the customers.

KYC and CDD are the processes of examining about the identification of the customer which is the important procedure to prevent and detect the money laundering offence. This principle will reduce the risks associated with the predicate offense under the AMLA which based on international standards.

(3.3) The duty of retaining the data

The law also requires the operators to store the data of customers within the specified time under this law depending on each type of information.

However, AMLA does not have any regulations that related to the VC or VC business at all. For this reason, it must be interpreted and applied to other laws that may be relevant to the feature of VC and VC business.

4.2 Other Thailand Regulations which can apply to Virtual Currency

Under the AMLA, it does not have any article which mentioned about the Virtual Currency or the business which related with the VC. From the primary rules about Anti-Money Laundering, it should focus on the other regulations which can comply with AMLA to regulate or supervise VC. Therefore, this part will diagnose the regulations that related with the financial and also the electronic transaction for the purpose of finding the proper guidelines to determine and regulate the VC and related business.

4.2.1 The Electronic Transaction Act, B.E. 2544

In generally the VC transaction occurs in the online network which is not face to face dealing. Therefore, it could be compared to the electronic transaction that should fall under the provision of the law as the same. VC can interpret as well as data message and the electronic transaction that should be the subject under this law.

- The Royal Decree on Security Procedures for Electronic Transactions Act B.E. 2553

This regulation is an extension of the Electronic Transactions that encourage the administration and security of information in the transactions. To have acceptance and confidence in the electronic data even more according to the Electronic Transactions Act section 25 stipulates that “any electronic transaction is done by the security procedures prescribed in the ordinance, then it presumed to be reliable.”¹⁰ The security model of this regulation can divide into three levels which are strict level, middle level, and basic level.¹¹ It must use the security procedures with VC transaction under this regulation for the reliability of such transactions. From the pattern of the VC transaction, it should be classified in the strict level of the electronic transaction due to the decentralized system and anonymity account.

4.2.2 The Computer Crime Act B.E. 2550

The virtual currency service business and all relating person can be under the Computer Crime Act. It is causing an obligation for the person or juristic person to follow the laws. So under this law, it imposes the duty of service provider to store computer traffic data or information of service user about the data that input into a computer system at least ninety days or not exceeding two years depending on the order of relevant competent official.¹² The virtual currency service business must store their information and computer traffic data within the period to be supported to the formal and establish the credibility and a clear status of virtual currency, including reducing the risk of a channel for money laundering.

4.2.3 Financial Institution Businesses Act B.E. 2551

¹⁰ The Electronic Transaction Act B.E. 2544 sec. 25 [hereinafter *The Electronic Transaction Act*].

¹¹ The Royal Decree on Security Procedures for Electronic Transactions B.E. 2553 sec 4. [hereinafter *The Royal Decree on SPET*].

¹² The Computer Crime Act B.E. 2550 sec. 26

Typically the financial institution business under this act also including “the commercial banking business, finance business and credit foncier business and shall include the undertaking of specialized financial institution business.”¹³ These businesses must be the public limited company and get the license by the Minister with the recommendation of the Bank of Thailand. It granted with rules as the Minister deems appropriate.¹⁴

Although, this act does not mention about VC and VC service business because it is not the subject under this law. However, it has the provision that may apply to VC and VC service business which the regulation about other business “involving with public fundraising through deposit acceptance or any other means, granting of credits or undertaking financial business, affects the overall economy of the country, and there is no particular law governing such business. BOT may propose for an enactment of a Royal Decree prescribing such business to be subject to the enforcement of this Act, either in whole or in part, including related penalty provisions. In this regard, supervisory regulations of such business may also be prescribed.”¹⁵

4.3 The Decisions of Thai Supreme Court

The subject matter is the status of VC under Thai laws and regulations. The related agency or government did not accept this financial innovation as one of the media of exchange or payment method or treat it like the money. If there is the issues that involved with VC in Thailand, the court or the state authorities have to interpret the status of this things not only the object under the laws but also include a process to implement the preventive measure and suppression measure.

The court determined about the electricity and telephone signal wave that are the things that can be theft under the Criminal Code. Under this law, it does not have the meaning of the things. Therefore, it has to require other legislation to interpret the meaning under the law in vice-versa.

The issues are about the property which can be enforced by the AMLA. The property that can confiscate must relate to the predicate offense as prescribed in AMLA section 3 (1).¹⁶ And it has to meet the asset definitions under this regulation. If there is the case that involving with the virtual currency, so it will have the problem in the process of confiscation under the AMLA. Because it has to interpret the status of VC that meets the asset definition under this law or not.

¹³ The Financial Institution Businesses Act B.E. 2551 sec. 3 [hereinafter *The Financial Institution Business Act*].

¹⁴ The Financial Institution Businesses Act, *supra* note 15. sec 9.

¹⁵ The Financial Institution Businesses Act, *supra* note 15. sec 5.

¹⁶ AMLA, *supra* note 101.

5. Conclusion

The problem of money laundering is not only focused on the drug trafficking or tax avoidance offence, but it must highlight on the risk of each customer and business transaction. Bank directors and controllers should likewise combat with the impacts and potential outcomes of money laundering on the banking frameworks. As the Basel Committee thinks about the issue on a multinational level, to developing the international legal structure on money laundering not only the real money but also the virtual currency (digital money) as well.

6. Recommendations

Virtual Currency or Bitcoin has kept up their system and clients record with no immediate security rupture to the entire system by utilizing cryptography or peer-to-peer innovation. It is hard to distinguish the majority of the exchanges which running using the computerized, so the particular framework or organization has essential influence in the advancement of Bitcoin or other virtual currency, however, it does not decide its prosperity.¹⁷ The government has to propose further proceeding by related authorities against wrongdoers of the anti-money laundering laws or related regulations and improve the operation that will be enforced in actually which can be determined into two parts as follows:

6.1 Amendment the legislations to cover the offence against Virtual Currency

Anti-Money Laundering Act (AMLA) has to add more provision about the virtual currency. The first one is to amend the new definition of virtual currency and virtual currency service business to make it clear legal status under the law. The AMLA should be the primary law to supervise and enforce about the virtual currency to manage the risk of money laundering through virtual currency. Moreover, another key provision of this Act that should be amended is the requirement of financial institutions and other businesses that tend to be used as vehicles for money laundering report all cash transactions of THB two million or more. The Institution which related with the Virtual Currency or Bitcoin (Money Exchangers, Website-Administrators, etc.) should have the same duty as the other financial institution under this act.

6.2 Monitoring approach

This method about the acquisition of customer data and data preservation which is significant for monitoring the virtual currency overall because all of the process on the internet which is broadcasting in the global network. So it is connecting every country together in the system to do the transaction via the computer or mobile phone. The involved person and corporation that is acting as the intermediary in the transaction have duties under the regulation and security procedures which related to the

¹⁷ Peng, Starry. 'BITCOIN: Cryptography, Economics, and the Future.' School of Engineering and Applied Science, University of Pennsylvania, December 2013.

information of the customer; data transfer history and another valuable data that involved with the transaction to do KYC and CDD with every customer. Moreover, they must keep the record within the specified period for the purpose of examination.

LEGAL PROBLEMS ON LABOUR PROTECTION ACT BE.2541 FORTRANSPORTING NGV BY TRUCK IN ASPECT OF WORKING HOURS

Prin Ekmanochai

Abstract

The energy consumption rate in Thailand has been continuously increasing. In relativity, the decrease in oil and gas reserves in Thailand has led to the increase in importation from foreign countries. The prices of oil and gas imported are noticeably expensive and the fuel price fluctuates at all times uncontrollably. Moreover, most of fuels, such as gasoline, diesel and liquid petroleum gas can cause many problems to environment, such as air pollution, particularly in the big cities and industrial areas. Therefore, one of the key energy policies of Thailand is to search for alternative clean energy to substitute and decrease the import of fuels from abroad for internal consumption, especially in the transportation sector.

Natural Gas for Vehicles (NGV) is an alternative energy that is selected to be an alternative fuel for vehicles. NGV is a clean, safe fuel and inexpensive. As a result, it is a favorable choice to support and substitute other fuels. Accordingly, the Thai government has promoted all sectors to use NGV as an alternative fuel for vehicles.

However, while pipeline networks normally deliver natural gas, which are located in central Thailand, the demand for consumption of NGV is widespread around the country. Transporting NGV to all stations is situated out of the pipeline areas, which shall be served by trucking. Trucks and trailers will deliver NGV from their mother stations, which are located at pipeline areas to daughter stations, located outside of the pipeline areas. On-time delivery is the key factor of transporting NGV. If a truck cannot deliver the gas to any daughter station before the gas is depleted, the shortage of gas will trigger an immediate demand for NGV from the consumers. Therefore, the network and system of transportation must be efficient to deliver gas within the specified period.

However, transporting NGV has its special characteristics that are different from any other mode of transportation. One of them is its transport per round trip. Since there is no storage tank for NGV stations, a trailer become a special kind of storage tank, is used to distribute NGV at the daughter station to vehicles. All trailers must be circulated efficiently by running per round trip. However, distances between the mother stations to daughter stations vary. Some routes are short, but most of them are too long to drive within the period prescribed by law.

As required by Ministerial Regulation No. 12 B.E. 2541, which is issued by virtue of Labour Protection Act B.E. 2541, this regulation defines

hours of work and rest period for all kinds of road transportation. A driver is permitted to work up to 8 hours per day and can work overtime for not more than 2 hours. Moreover, an employer must specify to their employees their start time and end time of work, which is called “time for commencement and ending of work”. On the other hand, if the transportation of NGV is grouped as transportation for hazardous substance, the driver will be restricted to work not more than 7 hours per day without overtime as required by Ministerial Regulation No. 2 B.E. 2541.

There are various problems concerning the application of the Labor Protection Act B.E. 2541 to the transportation of NGV. Firstly, whether the transportation of NGV should be classified as hazardous work or normal work. The answer would have an effect on the working hours of drivers. Secondly, due to its unique characteristics of transporting NGV, such as the distances between mother and daughter stations, systems of circulation of trucks and trailers, time spent for loading, unloading and stands by for the gas, and hours of work designated by Ministerial Regulation No. 12 clause 2 is not suitable for transporting NGV if the law does not separate driving time and working hours. Thirdly, in transporting NGV, the time of commencement and ending of work for each working day required by Clause 2 of the Ministerial Regulation No. 12 cannot be specified since nobody knows exactly the time of start and ending of work for transporting NGV. As the nature of the work is different from other land transportation, special regulations are required

However, these problems can be solved by adopting the concepts in international law and foreign law to apply to this kind of transportation in Thailand. This thesis proposes that the International Labor Convention, EU regulations and US law for road transportation regarding working hours, driving time and rest periods of transporting NGV should be used as a model.

Firstly, ILC, EU regulations and US law have no restriction on working hours for transportation of hazardous substance, but they are strict on safety standards, such as qualification of drivers, trucks and safety equipment. Secondly, ILC, EU regulations and US law separate driving time from working hours, and there are clear provisions on the working hours and driving time obviously to apply for transporting NGV. Thirdly, ILC, EU regulations and US law do not require employers to specify the time of start and ending of employee’s work in each day.

Therefore, ILC, EU regulations and US law should be taken into consideration to solve the problems of NGV land transportation of Thai law. If possible, the criteria of ILC, EU regulations and, US law should be modified to apply to both NGV transportation and other kinds of transportation in Thailand.

Keywords: Transporting NGV, Working Hours, Driving Time, Rest Period

บทคัดย่อ

อัตราการใช้พลังงานในประเทศไทยนั้นเติบโตขึ้นอย่างต่อเนื่อง ในขณะที่ปริมาณสำรองน้ำมันและก๊าซในประเทศไทยลดลงไปทุกขณะ ดังนั้นเราจึงต้องนำเข้าน้ำมันและก๊าซจากต่างประเทศซึ่งมีราคาแพง และไม่สามารถควบคุม ราคาที่ผันผวนได้ตลอดเวลา ยิ่งไปกว่านั้นเชื้อเพลิงส่วนใหญ่เช่นน้ำมันเบนซิน ดีเซล และก๊าซปิโตรเลียมเหลว (LPG) ก่อให้เกิดปัญหาด้านมลภาวะสิ่งแวดล้อมโดยเฉพาะในเมืองใหญ่ และบริเวณเขตอุตสาหกรรม ดังนั้นหนึ่งในนโยบายพลังงานของรัฐบาล ก็คือการหาพลังงานที่สะอาด และถูกเพื่อมาแทนที่น้ำมัน และลดการนำเข้าเชื้อเพลิงจากต่างประเทศโดยเฉพาะในภาคขนส่งก๊าซธรรมชาติสำหรับยานยนต์ (NGV) คือพลังงานทางเลือกที่ถูกนำมาขึ้นมาเป็นพลังงานทดแทนที่ใช้เป็นเชื้อเพลิงสำหรับยานยนต์ NGV เป็นพลังงานที่สะอาด ปลอดภัย และไม่แพง ดังนั้นรัฐบาลจึงพยายามสนับสนุนให้ทุกหน่วยงานหันมาใช้ก๊าซ NGV แต่อย่างไรก็ตามโดยปกติก๊าซธรรมชาติจะถูกส่งโดยทางท่อ ซึ่งแนวท่อส่วนใหญ่จะอยู่ในบริเวณพื้นที่ภาคกลางของประเทศ ในขณะที่ความต้องการใช้ก๊าซ NGV มีอยู่ทั่วประเทศ ดังนั้นการขนส่งก๊าซ NGV ไปยังสถานที่ที่ตั้งอยู่นอกแนวท่อก๊าซ จึงต้องส่งโดยวิธีใช้รถเทเลเลอร์บรรทุกก๊าซ

การขนส่งให้ตรงต่อเวลาเป็นหัวใจสำคัญในการขนส่งก๊าซ NGV เนื่องจากหากผู้ประกอบการไม่สามารถขนส่งก๊าซไปยังสถานีลูกได้ทันก่อนที่ก๊าซจะหมด สถานีนั้นก็จะไม่มีก๊าซ NGV ให้บริการแก่ประชาชน ดังนั้นระบบและโครงข่าย การขนส่งก๊าซ NGV โดยรอบบรรทุก จึงต้องมีระบบการขนส่งที่มีประสิทธิภาพมาก เพื่อส่งก๊าซให้ได้ทันภายในระยะเวลาที่กำหนด แต่อย่างไรก็ตามการขนส่งก๊าซ NGV โดยรอบบรรทุกนั้นมีความแตกต่างจากการขนส่งประเภทอื่น ๆ คือ การขนส่ง ก๊าซ NGV จะต้องขนส่งในรูปแบบไปกลับ (per round trip) คือลากตู้หนักที่บรรจุก๊าซเต็มจากสถานีแม่ ไปส่งที่สถานีลูกและลากตู้เปล่ากลับสู่ที่ไม่มีก๊าซกลับจากสถานีลูก เพื่อนำมาอัดก๊าซที่สถานีแม่ต่อ เนื่องจากสถานี NGV ไม่มีถังเก็บก๊าซ ดังนั้น ก๊าซที่ถูกบรรจุอยู่ในถังซึ่งติดตั้งอยู่ในรถเทเลเลอร์จึงกลายเป็นแหล่งจำหน่ายก๊าซของสถานีนั้น ดังนั้นเมื่อก๊าซ ในถังซึ่งติดตั้ง อยู่ในรถเทเลเลอร์หมด พนักงานขับรถจึงต้องรับลากตู้เปล่ากลับไปเติมก๊าซที่สถานีแม่เพื่อนำไปส่งให้กับสถานีลูกต่อไปแต่ละระยะทางระหว่างสถานีแม่และสถานีลูกในแต่ละแห่งนั้นมีระยะทางที่แตกต่างกันไป บางเส้นทางก็มีระยะทางที่ใกล้ที่สามารถวิ่งไปกลับได้ตามชั่วโมงการทำงานที่กฎหมายกำหนด แต่ในบางเส้นทางไม่สามารถวิ่งไปกลับได้ตามระยะเวลา ที่กฎหมายกำหนด

ตามกฎหมายกระทรวงฉบับที่ 12 ซึ่งออกโดยอาศัยอำนาจตามพระราชบัญญัติคุ้มครองแรงงาน พ.ศ. 2541 ได้กำหนดชั่วโมงการทำงานและชั่วโมงพักสำหรับธุรกิจประเภทขนทางบกส่งเอาไว้ ซึ่งบังคับใช้กับกิจการขนส่งในเชิงธุรกิจทุก ประเภท โดยที่พนักงานขับรถสามารถทำงานได้วันหนึ่งไม่เกิน 8 ชั่วโมงและสามารถทำงานล่วงเวลาได้วันหนึ่งไม่เกิน 2 ชั่วโมง ทั้งนี้ยังต้องกำหนดระยะเวลาเริ่มต้นและสิ้นสุดของการทำงานปกติของลูกจ้างในงานขนส่งทางบกด้วย ในทางกลับกันหากการขนส่งก๊าซ NGV โดยรอบบรรทุก ถูกจัดให้เป็นการขนส่งวัตถุอันตราย ชั่วโมงการทำงานจะถูกจำกัดเหลือเพียง 7 ชั่วโมงต่อวันและไม่สามารถทำงานล่วงเวลาได้

ด้วยเหตุดังกล่าวการขนส่งก๊าซ NGV โดยรอบบรรทุกจึงเกิดปัญหาเกี่ยวกับชั่วโมงการทำงานที่จะต้องปฏิบัติตาม ข้อกำหนดในกฎหมายคุ้มครองแรงงาน พ.ศ. 2541 กล่าวคือประเด็นแรกการขนส่งก๊าซ NGV จัดเป็นงานอันตราย หรือ เป็นงานทั่วไปที่ไม่ถือว่าเป็นงานอันตราย ประเด็นที่สองจากลักษณะเฉพาะของการขนส่งก๊าซ NGV เช่นระยะทางระหว่าง สถานีแม่และสถานีลูก ระบบการหมุนเวียนตู้เทเลเลอร์ให้มีประสิทธิภาพ ระยะเวลาในการรอโหลดก๊าซที่สถานีแม่และ สถานีลูก ทำให้ชั่วโมงการทำงานตามที่กำหนดในกฎกระทรวงฉบับที่ 12 นั้นไม่เหมาะสมที่จะนำมาบังคับใช้กับการขนส่งก๊าซ NGV ทางรอบบรรทุก เนื่องจากกฎหมายดังกล่าวไม่ได้แยกชั่วโมงการขับออกจากชั่วโมงการทำงาน ประเด็นสุดท้ายการขนส่งก๊าซ NGV ทางรอบบรรทุก นายจ้างไม่สามารถกำหนดเวลาเริ่มต้นและเวลาสิ้นสุดของการทำงานให้กับลูกจ้าง ตามที่กำหนดในข้อ 2 ของกฎกระทรวง

ฉบับที่ 12 ได้ เนื่องจากไม่มีใครทราบเวลาเริ่มต้นและสิ้นสุดของงานประเภทนี้ได้ อย่างแน่นอนว่าจะเริ่มเวลาใด และจะสิ้นสุดเวลาใดอย่างชัดเจน

อย่างไรก็ตามปัญหาดังกล่าวข้างต้นสามารถแก้ไขได้ โดยนำหลักการและแนวคิดของกฎหมายระหว่างประเทศ และกฎหมายต่างประเทศมาปรับใช้ ดังนั้นวิทยานิพนธ์ฉบับนี้จึงขอเสนอแนวทางของ กฎหมายองค์กรแรงงานระหว่าง ประเทศ กฎหมายยุโรป และกฎหมายของสหรัฐอเมริกา เกี่ยวกับกฎหมายแรงงานสำหรับการขนส่งทางถนนในส่วนที่เกี่ยวข้องกับชั่วโมงการทำงาน ชั่วโมงการขับรถ และชั่วโมงพักผ่อน ของลูกจ้างที่ทำหน้าที่ขับรถมาปรับใช้กับการขนส่งก๊าซ NGV ในประเทศไทย

ในประเด็นแรก กฎหมายองค์กรแรงงานระหว่างประเทศ กฎหมายยุโรป และกฎหมายของสหรัฐอเมริกา ไม่ได้มีข้อจำกัดเกี่ยวกับชั่วโมงการทำงานสำหรับงานขนส่งวัตถุอันตราย เหมือนกับของประเทศไทย แต่จะมุ่งเน้นในเรื่อง ของความปลอดภัยในการขนส่งวัตถุอันตราย เช่นคุณสมบัติของผู้ขับขี่ รถบรรทุก และอุปกรณ์ความปลอดภัยที่จะต้องมี ประเด็นที่สองกฎหมาย ดังกล่าวแยกชั่วโมงการขับรถออกจากชั่วโมง การทำงาน และได้กำหนดลักษณะของชั่วโมงการทำงาน ว่าหมายถึงกิจกรรมประเภทใดบ้างไว้อย่างชัดเจน รวมทั้งยังมี แนวทางการกำหนดค่าเฉลี่ยของชั่วโมงการทำงาน ในแต่ละวันและในแต่ละสัปดาห์ ด้วย ประเด็นสุดท้าย กฎหมาย ดังกล่าวไม่ได้ระบุให้นายจ้างกำหนดเวลาเริ่มต้น และเวลา สิ้นสุดของการทำงานให้กับลูกจ้าง

ดังนั้น หลักการในเรื่องดังกล่าวของกฎหมายองค์กรแรงงานระหว่างประเทศ กฎหมายยุโรป และกฎหมาย ของสหรัฐอเมริกา จึงควรถูกนำมาพิจารณาและปรับใช้กับการขนส่งก๊าซ NGV ทางรถบรรทุกในประเทศไทย นอกจากนั้น หากเป็นไปได้ หลักการและแนวความคิดในเรื่องของชั่วโมงการทำงาน และชั่วโมงการขับรถ ควรจะถูกนำมาปรับใช้กับธุรกิจการขนส่งประเภทอื่นในประเทศด้วย

Background and Problem

In 1998, the Thai government enacted Ministerial Regulation No.12 B.E. 2541 by virtue of the Labor Protection Act B.E. 2541. This regulation defined hours of work and rest period for all kinds of road transportation and the employer must specify the time of commencement and ending of work to the employees. As a matter of fact, most entities have faced the problem that drivers end up working for more than 8 hours because of factors that include long distance, speed limit, traffic jam, stand-by for the work and order. One of the key problems is that the law has not separated driving time from working hours. Moreover, many kinds of this business are unable to define exactly the start time and ending time of work due to the special character of the business. Consequently, in order to survive in this business, employers offer extra remuneration to the employees to work more than working hours, and employees are willing to accept to do so voluntarily because their remuneration are not enough if they comply legally with working hours. According to a seminar of the Labor Crisis Center on 23 January 2011, most entrepreneurs are unable to comply with Ministerial Regulation No. 12.¹

The problem may result from the fact that the legislators or agency, which drafted the regulation, are neither experts in the field nor operating

¹ See <http://www.labourcrisiscenter.com/index.php?lay=show&ac=article&Id=539165352&Ntype=5>

transportation businesses. On the other hand, people in this field may not have the opportunity to join drafting the law, but are subject to the enforcement of the law.

Therefore, there have been problems in the field of business for transportation that comes in the form of long working hours. However, this problem is very distinguished in the transportation of NGV because it has more unique and exclusive elements than any other kind of transportation, which can cause complications in the many aspects as follows:

First of all, whether the transportation of NGV should be classified as general transportation or hazardous transportation. It could explain why the hours of work for transportation of general goods of Thai law are distinct from transportation of hazardous substances. If the transportation of NGV is categorized as transportation of general goods, a driver is able to work for 8 hours per day and can work for overtime up to 2 hours.² On the other hand, if the transportation of NGV is grouped as transportation of hazardous substances, the driver will be restricted to work for only 7 hours per day without overtime.³

Secondly, there are other key factors that influence working hours to consider such as the location of NGV stations, systems of circulation of trucks and containers, time spent for loading, unloading and stand-by for gas. The hours of work as designated by Clause 2 of the Ministerial Regulation No. 12 should separate driving time and working hours.

Thirdly, we cannot specify the time spent to transport NGV as required by Clause 2 of the Ministerial Regulation No. 12 because there are many steps in between the start to the end of work for its transportation.

Transporting NGV in Thailand

Natural gas consumption in Thailand is derived from domestic and neighbor countries. Most of them are consumed domestically, at approximately 77% and, the other imports from Myanmar around 23%. Gulf of Thailand is the biggest source of natural gas.⁴ Therefore, the method of transporting natural gas from the sources to the destinations such as power plants, gas separation plants or NGV stations shall be delivered by pipeline. Meanwhile NGV stations located out of pipeline areas will be delivered by trucks.

² Ministerial Regulation No. 12 B.E. 2541 clause 2 and 3 enacted under the power of Labour Protection Act B.E.2541 section 6 and 22

³ Ministerial Regulation No. 2 B.E. 2541 sub clause 2 enacted under the power of Labour Protection Act B.E. 2541 section 6 and 23 paragraph 1

⁴ Where does natural gas in Thailand come from? available at <http://www.scan-inter.com/en/node/42>

Transporting Natural Gas by Pipeline. Since the state of natural gas at its normal temperature and pressure is in gas form, transporting natural gas from the sources to industrial areas must be solely transported by pipeline. Pipeline's networks in Thailand have two main lines, which are East and West lines. The East line starts from the Gulf of Thailand to Maptaphud, Chonburi, Bangpakong power plant, Bangkok South power plant, Wangnoi power plant Ayutthaya province, and Kangkoi District Saraburi province for cement industry. The West line starts from Andaman sea of Myanmar to Thongphaphum District Kanjanaburi province, Rajburi power plant and Bangkok north power plant. However, the transportation of NGV by pipeline is not enough to cover all NGV stations. Transporting NGV by truck is the other choice to deliver the gas from NGV stations located at the pipeline areas to NGV stations situated outside of the pipeline areas.

Transporting NGV by Trucks. Normally, there are two types of NGV stations, namely mother stations and daughter stations. A NGV mother station is the station situated at the pipeline areas, with the function to compress natural gas to NGV and contribute the NGV to other NGV stations situated out of pipeline areas. A NGV daughter station is a station located out of pipeline area and must receive gas from the mother station by trucking. Currently, there are 19 mother stations to contribute 357 daughter stations around the country⁵ with approximately more than 1,632 trucks to transport NGV between mother and daughter stations⁶

“Per round trip” describes the system of transporting NGV, where NGV is delivered from a mother to daughter station, and then the haul empty trailer is transported back to the mother station from the daughter station to reload gas. NGV will be loaded at a mother station into empty cylinders installed in the trailer of the truck.⁷ When a NGV daughter station is running out of gas, an officer at the daughter station will order an officer at the mother station will call a driver to take the truck parking at the mother station to haul the trailer loaded full gas to deliver such gas to the daughter station.

There is no storage tank for NGV at daughter stations. The function of the trailer will become a storage tank of the daughter station for distributing the gas to consumers. Therefore, when the driver discharges the full trailer at the daughter station, the empty trailer, placed at the daughter station, will be hauled back immediately to the mother station in order to reload the gas and circulate the trailer to another daughter station.

When a driver arrives to a mother station, the driver may not depart immediately because gas must be loaded at the mother station. Usually,

⁵ List of NGV stations by Thailand Energy Business Department, *available at* http://www.doeb.go.th/info/data/datangv/station_ngv.pdf

⁶ Vehicle for transporting NGV, *available at* <http://www.scan-inter.com>

⁷ *Id.*

such process takes around 2-4 hours, depending on the size of the compressor. Moreover, the time spent to await the arrival of the truck (usually around 1-4 hours) is included within the working hours of the driver. As a result, the real driving time remains less than 8 hours.

Two Drivers per Round Trip. Many routes that take more than 8-10 hours will be managed by providing two drivers for one truck. The two drivers shall alternate in routes that take 16-20 hours per round trip. With this method, each driver shall drive the truck 2 days (48 hours without rest) and take a one-day rest, or in some routes each driver shall work 4 days (96 hours without rest) and then rest 2 days. This method may exhaust the drivers, but some drivers are pleased, as they are able to drive long trips, and receive higher salaries. However, the statistic of accidents for this method is high and contain many problems, both legally and management wise.

Hub House. Due to the disadvantage of two drivers, the PTT is currently creating the new system for transporting NGV called “Hub House.” Hub House is a station for switching a trailer located at the midway between a mother and a daughter station where the first truck will transport the full NGV trailer from the mother station to the hub house and then discharge the trailer loaded full NGV at the hub house so that the second truck can take the trailer to the daughter station. On the other hand, the second truck will take back the empty NGV trailer from the daughter station to the hub house so that the first truck can take back the empty trailer to the mother station for reloading gas. The drivers shall work not more than 11 hours and take not more than 1 hour of rest. This can be achieved by working from the 1st - 4th hour and taking a 30 minutes rest, and then proceed to continue working from the 5th -8th hour and take another rest for 30 minute then working 9th-11th hour.

However, the method of two drivers and hub have still violated working hours as required by Ministerial Regulation No.12.

Working Hours and Rest Period of Employees for Land Transportation in Thai Law

The first issue for considering hours of work as required by Thai law is to classify which work should be considered as normal or dangerous work. Daily and weekly hours of working applied for each work are certainly different. For normal work, eight hours per days and 48 hours per week are applied for normal work and, with the consent of employees, employers may request the employees to work overtime and work on holidays.⁸ While working hours for dangerous work of employees are only 7 hours per day and 42 hours per week without working overtime and working on holidays.⁹

⁸ Labour Protection Act B.E. 2541 Section 24 and 25

⁹ Labour Protection Act B.E. 2541 Section 31

The second issue, Thai law does not give the definition of working hours and does not separate driving time from working hours.

The third issue, according to Section 2 of Ministerial Rule no. 12, the employer shall specify the time of commencement and ending of the employees' work. For example, it is stipulated that employees of Company A shall start to work at 8 am until 5 pm. Therefore, the time of commencement of employee's work is fixed at 8 am and ending at 5 pm.

Working Hours and Rest Period for Road Transportation of International Labour Organization (ILO), EU Regulations and US Law

The first issue, ILO, EU regulations and US law have no specific hours of work of transportation for hazardous substance, but it emphasizes on preventive measures and, safety and health of workers of transportation for hazardous substance. Therefore, hours of work for transportation for hazardous substance shall be applied by working hours and rest periods as the same with transport for general goods.

The second issue, ILO EU regulations and US law gives the definition of working hours obviously.

The definition of working hours of ILO, is driving and other work during the running time of the vehicle; and subsidiary work in connection with the vehicle, its passengers or its load. Moreover, it separate driving time from working hours clearly. The working hours, driving time, and rest period are demonstrated as the tables below:

The definition of working hours of EU regulations is time devoted to all road transport activities such as driving, loading and unloading, cleaning and technical maintenance. During the time that drivers cannot be available to spend their time freely and required to be ready at the work station to perform their work including the time waiting for loading or unloading.

The definition of working hours of US law is all the time that drivers start to work or are required to be ready to perform their work till the time that they are released from duty and all responsibilities such as all the time at a plant, terminal, facility, or other property of a motor carrier or shipper, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier, driving time and, all time spent for loading or unloading

ILO, EU regulations and US law separate working hours and driving time and set the period of working hours, driving time and rest period appropriately

The third issue, ILO, EU regulations and US law do not stipulate the certain time of commencement and ending of work. However, the time of commencement and ending of work of mobile workers shall start when they are at the workplace and ready to perform their work till they are out of disposal without the specific exact time.

Table 1: Driving Time and Working Hours

DRIVING TIME/ WORKING HOURS				
LAW	Daily Working Hours	Weekly Working Hours	Daily Driving Time	Weekly Driving Time
ILO	8 hours exclude OT 10 hours 12 hours	40 hours exclude OT	9 hours max - more than 9 but not exceed 48/ week	48 hours max
EU	10 hours if a driver works at night in any 24 hours	48 hours max 60 hours average 4 months not exceed 48 hours	9 hours 10 hours not more than twice a week	56 hours/week 90 hours/2 weeks
US	14 hours	60 hours per 7 days 70 hours per 8 days (operate every days)	11 hours	during on duty 60 or 70 hours
THAI	8 hours 10 hours including OT	48 hours no OT 60 hours including OT	-	-

Table 2: Rest Periods

REST PERIOD			
LAW	Rest Break	Daily Rest	Weekly Rest
ILO	- Drive 4 take a rest - Work 5 take a rest	10 consecutive hours ILO 11 consecutive hours ILC	24 hours can be cumulated a longer time
EU	- drive 4.5 hours break 45 min - work 6-9 hours break 30 min - work more than 9 hours break 45 min	11 hours 9 hours not exceed 3 times in any two weeks	45 hours every two weeks 45 hours one week and 24 hours for the next week
US	Drive 8 hours break 30 min	10 consecutive hours	34 consecutive hours for off duty
THAI	- Drive 4 hours break at least 20 min total break 1 hours per day - Work 5 hours break 1 hours	10 consecutive hours	work 6 days rest 1 day

Solution and Recommendations

First of all, working hours of transporting NGV shall not be construed under transportation for hazardous substance as working hours of this kind of transport is only 7 hours which is impossible to apply for transporting NGV. However, to avoid any doubt, the government should rectify Ministerial Rule no. 2 by abolishing transportation for hazardous

substance out of hazardous substance. While ILO, EU law and, US law have no restriction of working hours for transportation for hazardous substance but they are strict on safety standard such as qualification of drivers, trucks and safety equipment.

Secondly, it must separate driving time from working hours by following the criterion of ILO, EU law and, US law. Moreover, driving time, working hours and, rest period shall be issued appropriately by taking into account the key factors of transporting NGV such as safety, specific character of transporting NGV, fatigue of driver including revenue of drivers.

Table 3: Propose Driving Time and Working Hours

	Daily Working Hours	Weekly Working Hours	Daily Driving Time	Weekly Driving Time
Proposal	Not more than 12 hours	Not more than 60 hours	Can't exceed 10 hours during 12 hours consecutive hours	during on duty 60 hours

Table 4: Propose Rest Period

	Rest Breaks	Daily Rest	Weekly Rest
Proposal	Drive 4 hours break at least 20 min total 1 hours for driving 8 hours in one day drive more than 8 hours break further 20 minutes work 5 hours break 1 hour	10 consecutive hours	36 hours

Thirdly, specifying the time of commencement and ending of work is unable to apply to transporting NGV so it should be repealed and replaced by giving a definition of on and off duty time of the drivers.

Moreover, if Thai government accepts three principles as above, these principles shall not be limited only transporting NGV but they can

apply to all kinds of transport. Thus, Thai government should pay attention to take these principles to apply to all kinds of transport to both passenger and goods because the efficiency, management and safety will be better.

Therefore, Ministerial Rule no. 12 of Labor Protection Act B.E. 2541 should not apply to transporting NGV. The government should set the meeting among all stakeholders to discuss and issue appropriate rules and regulation to allow the Minister enact specific rules and regulations to apply to transporting NGV by truck. For instance, US law has specific provisions to regulate hours of services for oilfield operations that is different from general transportation.

GOOD CORPORATE GOVERNANCE: ROLES, DUTIES AND RESPONSIBILITIES OF REMUNERATION COMMITTEE*

*Ratchanikarn Suwadist***

Abstract

Since 1997, when Thailand's economic crisis was partially caused by poor governance, the Thai capital market has awakened to corporate governance principle improvement. Board of director is expected to act in the best interests of the company and shareholders. Remuneration committees were established to increase board effectiveness. Yet extant laws on their role, duty, and responsibility do not suffice to oblige companies listed on the Stock Exchange of Thailand (SET) to remain in compliance with good corporate governance principles. Public Limited Companies Act, B.E. 2535 (1992) and the Securities and Exchange Act BE 2535 (1992) were studied, along with Securities and Exchange Commission Thailand announcements, The Principle of Good Corporate Governance for Listed Companies 2012, and remuneration committee guidelines. These were compared to the United States corporate governance model, influential in developing international capital markets such as Thailand's.

Results were that some rules, such as remuneration committee structure, shareholder rights and transparency needed improvement to demonstrate good governance in compliance with international standards. Some corporate governance recommendations should be retained as already conforming to U.S. regulations and international standards. One such is that executive remuneration determination should be a flexible guideline, complied with individually by each company. . Some U.S. legal provisions should not be added, such as exclusive presence of independent members, and individual executive remuneration disclosure.

Keywords: Corporate governance, Remuneration committee, Thailand

บทคัดย่อ

นับตั้งแต่ปี พ.ศ. 2540 ซึ่งเป็นปีที่วิกฤติเศรษฐกิจของไทยมีส่วนหนึ่งมาจากการกำกับดูแลกิจการที่ไม่ดีนั้น ตลาดหลักทรัพย์ของไทยจึงเกิดความตื่นตัวที่จะพัฒนาหลักบรรษัทภิบาลเรื่อยมา ด้วยเหตุนี้ คณะกรรมการจึงถูกคาดหวังที่จะทำหน้าที่ของตนเพื่อประโยชน์อันสูงสุดของบริษัทและผู้ถือหุ้น อีกทั้งได้มีการก่อตั้งคณะกรรมการพิจารณาค่าตอบแทนเพื่อเพิ่มประสิทธิภาพในการทำงานของคณะกรรมการ ถึงกระนั้นกฎหมายที่บังคับอยู่ในปัจจุบันเกี่ยวกับบทบาท หน้าที่ และความรับผิดชอบของคณะกรรมการนี้ยังไม่เพียงพอที่จะทำให้บริษัทจด

* The article is summarized and rearranged from the thesis “Good Corporate Governance: Roles, Duties and Responsibilities of Remuneration Committee” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2014.

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ทะเบียนในตลาดหลักทรัพย์ของไทยดำเนินการได้สอดคล้องกับหลักบรรษัทภิบาลที่ดี ทั้งนี้พระราชบัญญัติบริษัทมหาชน พ.ศ. 2535 และพระราชบัญญัติตลาดหลักทรัพย์ พ.ศ. 2535 ได้ถูกนำมาศึกษาควบคู่ไปกับประกาศของคณะกรรมการตลาดหลักทรัพย์ หลักบรรษัทภิบาลที่ดี ประจำปี 2555 และคู่มือคณะกรรมการพิจารณาค่าตอบแทน กฎหมายและหลักเกณฑ์เหล่านี้ถูกนำมาเปรียบเทียบกับหลักบรรษัทภิบาลของประเทศสหรัฐอเมริกาซึ่งเป็นประเทศที่มีอิทธิพลต่อการพัฒนาของตลาดหลักทรัพย์ทั่วโลก รวมถึงประเทศไทยเช่นกัน

ผลการศึกษาคือกฎเกณฑ์บางเรื่องเช่น โครงสร้างของคณะกรรมการพิจารณาค่าตอบแทน สิทธิของผู้ถือหุ้นและความโปร่งใสนั้นมีความจำเป็นที่จะต้องพัฒนาเพื่อแสดงให้เห็นถึงการกำกับดูแลกิจการที่ดีโดยสอดคล้องกับมาตรฐานสากล นอกจากนี้ข้อเสนอแนะในเรื่องหลักบรรษัทภิบาลที่ดีควรคงไว้เช่นเดิมเนื่องจากเรื่องเหล่านี้เป็นไปตามมาตรฐานที่ยอมรับทั่วไป ซึ่งได้แก่ การกำหนดค่าตอบแทนของผู้บริหารควรมีลักษณะที่เป็นแนวทางที่ชัดเจนได้เพื่อนำไปปรับใช้กับแต่ละบริษัท อย่างไรก็ตาม หลักกฎหมายบางประการของประเทศสหรัฐอเมริกาไม่มีความเหมาะสมที่จะนำมาปรับใช้ ตัวอย่างเช่น การมีกรรมการอิสระเพียงอย่างเดียวในคณะกรรมการพิจารณาค่าตอบแทน และการเปิดเผยค่าตอบแทนของผู้บริหารเป็นรายบุคคล

คำสำคัญ: บรรษัทภิบาล, คณะกรรมการพิจารณาค่าตอบแทน, ประเทศไทย

1. Introduction

The evidence that has emerged about the economic crises in 1997 suggests that its cause was the result of poor corporate governance. The weaker firms corporate governance mechanisms are the greater agency problem they have, since the incongruity between ownership and control is naturally structured in corporations¹ where the company's managers who directly control the activity act as agents of the principals who are its owners or shareholders, and from this there may arise a conflict of interest.² While corporate governance is now continually receiving attention, payment of the board of directors is one of the high-ranking concerns because the determination of remuneration reflects the effective performance of corporations.³ Nevertheless, remuneration alignment is not easy owing to the agency problem. The reason is that executives (agents) may pay themselves excessive remuneration in various forms such as salaries, bonuses and stock options, rather than paying as dividends for shareholders (principals).⁴ Hence, the executive payments higher than the firm's performance would be the result of a lack of productive corporate

¹ Core et al. Corporate governance, chief executive officer compensation, and firm performance. *Journal of Financial Economics* 51, (1999): 371–406.

² In legal perspective, a board of director is regarded as the agent of the company not the shareholders. See The Thai Commercial Code Section 1167

³ Organization for Economic Co-operation and Development. Corporate Governance and the Financial Crisis <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/43056196.pdf> (accessed on August 25th, 2015)

⁴ Mohammad Talha. et al. Corporate governance and directors' remuneration in selected ASEAN countries. *The journal of applied business research* 25,2 (2009): 31-40.

governance. The importance of good corporate governance has brought about the examination of the possible options in order to make managers act in the best interest of shareholders. These options are the roles of the board of directors which is the appointment of a remuneration committee (also referred to as a compensation committee) to take full responsibility for the remuneration framework and the disclosure of financial information.

In Thailand, according to the survey of listed companies, only 64% of listed companies have established remuneration committees,⁵ while the promulgated rules and regulations do not specify clear prohibitions and penalties for the board structure, especially independent qualification, duties, and responsibilities.⁶ In addition, the remuneration policies among listed companies contain discrepancies because of the lack of practical guidelines to accommodate a uniform remuneration scheme. Most shareholders do not anticipate that the executive remunerations are as expected.⁷

2. Corporate governance and remuneration committee

2.1 Corporate governance

Corporate governance is commonly defined as “...the system by which companies are directed and controlled”.⁸ It is designed as a mechanism which decreases the pursuit of self-interest pursuit by the board and increases the firm’s value. Thus, good corporate governance should motivate a board of directors to perform for the best interest of the company and its shareholders, as well as facilitate effective monitoring.⁹

In the aftermath of the 1997 economic crisis, Thailand learned lessons from the weak corporate governance performance. As a result, the continual collaboration of the associations which are the Securities and Exchange Commission (SEC), The Stock Exchange of Thailand (SET) and the Thai Institute of Directors (IOD) has developed and launched an effort

5 อุทัยชัยสมศิริ, ษนิดาปิยะพันธุ์พงศ์ศศิธรมโนทรัพย์ศักดิ์, ฐฐานันท์จรัสเชวงพงศ์และณฤดี โรจนคงยอ. ู้ CGCorner: การกำหนดค่าตอบแทนกรรมการและผู้บริหารระดับสูง, Disclosure Focus, ตุลาคม 2558, 11-13. (Usanee Somsiri, Chanita Piyapunpong, Sasitorn Manosupsuk, Nuchanun Charaschawengpong and Naruedee Rojanakongyoo. CG Corner: director and executive compensation determination, Disclosure Focus, October 13th, 2015, 11-13.)

6 ฝ่ายพัฒนากฎหมายสำนักงานคณะกรรมการกฤษฎีกา. การเพิ่มค่าตอบแทนให้แก่ผู้บริหารใน สหรัฐอเมริกา. ข่าวสารพัฒนากฎหมาย, ลาี คับี ที่ 72, 2 พฤษภาคม 2554, 1-2. (Law Reform Commission, Office of the Council of State. The increasing of executive compensation in the United States of America. Law Reform News, No. 72, May 2, 2011, 1-2)

7 *Id.*

8 Cadbury, Adrian. Report Of The Committee On The Financial Aspects Of Corporate Governance. (1992). 16

9 Organization for Economic Co-operation and Development. OECD Principles of Corporate Governance. (2004)

to baseline corporate governance practices for listed companies. The timeline of regulatory evaluation can be concluded as shown below

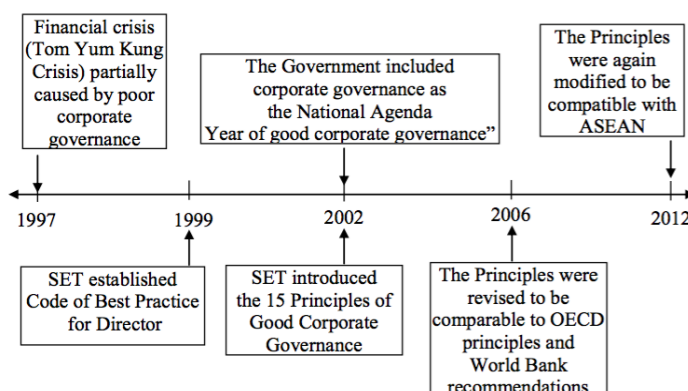


Figure
 „Session 5: The role of Stock Exchanges in Promoting Corporate Governance in Asia—ten years from now?“ (Asian roundtable on corporate governance 10-year anniversary, Manila, Philippines, September, 9-10 2009).

2.2 Remuneration committee

The board of director plays the important roles of monitoring managers, evaluating management, and ensuring the managers' performance. Even though the advantage of this model is that the board's functions theoretically permit the separation of decision-management from decision-control,¹¹ it may not be able to effectively oversee the power of management.¹² As a result, the board may set up various committees, including remuneration committee to carry out some its duties, to provide effective checks and balance mechanisms and to handle serious problems, such as setting executive compensation, which is a significant device for reducing the agency problem arising from the corporation's management. Nevertheless, the board of directors still retains its responsibility to oversee the performance of these committees.

Since the establishment of a remuneration committee demonstrates the awareness of the value of the specialist, it must play a key role in deciding the policy and levels of director and executive remuneration by implementing good corporate governance. This study considers the

11 Lauren A. Burnhill. Overview: The US Governance Model https://centerforfinancialinclusionblog.files.wordpress.com/2013/02/us_and_european_governance_model_presentation.pdf (accessed June 1st, 2016)

12 Securities and Exchange Commission. Part I Overview of the Current Situation. www.sec.or.th/EN/Documents/Information/part%20I-V.doc (accessed on May 29th, 2016)

remuneration committee with regard to the corporate governance principles provided by SET as follows:

1. Equitable treatment of shareholders¹³

The transparent nomination of a remuneration committee is credible to the outside world. Moreover, the specific qualities of its members raise the shareholders' confidence that it is able to approve matters concerning remuneration without conflict of interest and bias. Its own qualifications will ensure that any decisions made by the committee shall be to the advantage of the company.

2. Disclosure and transparency¹⁴

Important company information, sufficiently reported to the shareholders or public, improves the stakeholders' participation and monitoring. The disclosure includes both financial and non-financial information with correct and accurate reporting, for instance a remuneration policy for the board members and key executives.¹⁵ This information is of concern to shareholders because they are interested in the link between remuneration and company performance.

3. Responsibilities of the board¹⁶

The remuneration committee has responsibilities imposed by law, the board of directors, the articles of association or the resolutions of the meeting of shareholders. Since the committee is a group of directors who have specific tasks in the compensation area, they must act on a fully informed basis, in good faith, with due care, and in the best interest of all stakeholders. In addition, they must align top executive and board of director remuneration with the long-term interests of the company and its shareholders.¹⁷

3. The United States of America laws in relevance to the remuneration committee

3.1 Remuneration committee establishment requirement and its composition

Neither the Exchange Act nor US Securities and Exchange Commission (SEC) rules requires listed companies to set up a remuneration committee. It is upon stock exchanges to state such requirement in their listing standards. However, each remuneration committee member is required by the Exchange Act to be both the member of the board and independent.¹⁸ Listed companies are authorized by law to retain a

13 Stock Exchange of Thailand. The Principles of Good Corporate Governance for Listed Companies 2012. (2012), 68

14 *Id.* at 80

15 *Id.* at 22

16 *Id.* at 88

17 Organization for Economic Co-operation and Development. *Supra* note 9.

18 The Exchange Act, Section 10C(a)(2)

compensation consultant, legal counsel, or other adviser¹⁹ in order to guide their view on the optimal remuneration and on other peer company comparison.²⁰ Compensation consultants and other advisers shall be qualified by specific independence factors identified by the US SEC, which are required to meet the basic factors provided by law.²¹ according to Section 10(b) (2) of the Exchange Act.

3.2 Remuneration committee's responsibilities

The director remuneration responsibilities are not required to be delegated to any particular committee, such as a remuneration committee, it is recommended by the exchange's listing standards to assign such responsibilities.²² The reason is that the remuneration plan determined must be approved by the directors who may directly benefit from that proposed plan and this is not protected by a court, as noted in the business judgment topic.

Executive remuneration shall be recommended by the remuneration committee to the full board of directors.²³ Furthermore, it needs to include these following important requirements:

1. Say on Pay

The shareholders who are regarded as owners of the company have a direct signal to approve any type of compensation of executives who are regarded as employees working for the owners.²⁴ The authority of shareholders on executive remuneration approval does not only increase transparency, but also the company's disclosure obligations.²⁵ In addition, shareholders are allowed to vote on how frequently to hold the say on pay vote, which is also a non-binding vote.

2. Pay for Performance²⁶

The executives' remuneration determination shall not be paid as

19 The Exchange Act Section 10C(b)(1)

20 Skadden et al., 2015 Compensation Committee Handbook https://www.skadden.com/sites/default/files/2015_remuneration_Committee_Handbook_111814b.pdf (accessed July 17, 2015).

21 The Exchange Act Section 10(b) (2)

22 Wachtell, et al, Remuneration committee guide http://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_Compensation_Committee_Guide_02062015.pdf (accessed on August 25th, 2015)

23 *Id*

24 พิกพ อุตร. ผลตอบแทนผู้บริหารภายใต้หลักธรรมาภิบาลต้นแบบจากสหรัฐอเมริกาสู่ระดับนานาชาติ, วารสารสื่อพลัง (2012): 34-29. (Pipop Udorn. Executive compensation according to good governance: from a US model to a global level. Power The Thought. 2,3 (2555): 34-29)

25 New York country lawyers' association. Investor Protection of Dodd-Frank Act and enhanced professionalism, presented at New York country lawyers' association March 25th, 2014.

26 The Dodd-Frank Act Section 953(a)

they please, since annual proxy statements have to present the relationship between compensation and performance. The company is required to report information that shows the relationship between executive compensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions.

3. Recovery of erroneously awarded remuneration policy

The obligation to clawback requires the duty to exclusively recover incentive-based compensation (including stock options) from current and former executives who are paid based on improper financial statements or a material non-compliance with any financial reporting requirement under the SEC Rules during the prior three years after the year in which the errors were made in the report.²⁷

3.3 Disclosure

The disclosure requirements in Regulation S-K and Regulation S-X provided by the US SEC consider ways to improve the disclosure regime for the benefit of both companies and investors.²⁸ A remuneration committee of a listed company is obliged to improve their disclosure policy to meet not only the requirements stated by law, but also the good corporate governance standard. A remuneration committee reports sufficient information through public disclosure contributes to increased transparency including:

1. Compensation committee governance: the description of describing the scope of the committee's authority, the roles of any compensation consultants, and the company's process of remuneration design.

2. Compensation Discussion and Analysis (CD&A): the necessary material for understanding the listed company's compensation policy and decisions

3. Remuneration committee report: the signature of each member in the report in order to state whether they have approved the CD&A or not

4. Executive compensation table and additional annual disclosure regarding Named executive officer

5. Director compensation table

6. Pay ratio disclosure: the comparison of the chief executive officer's compensation and the median compensation of other employees

7. Risk and board-based compensation programme: the remuneration programmes for employment mainly cause risks and unfavourable effects on the company.

²⁷ Pipop Udorn., *Supra* note 24.

²⁸ The U.S. Securities and Exchange Commission. Disclosure effectiveness. <http://www.sec.gov/spotlight/disclosure-effectiveness.shtml> (accessed on March 1st, 2016)

3.4 Remuneration committee's duties and liabilities

Remuneration committee' business decision is presumed to be made in good faith and with due care, unless a third person is able to prove that the director has not met the duty of care or loyalty. The business judgement rule is subject to a counterpart of fundamental fiduciary duties named the duty of care which a committee has an obligation to perform, on an informed

basis, monitoring and management with the care of a person in a like position under similar circumstances concerning the relevant materials and appropriate consideration.²⁹ In addition, the committee shall perform the duty of loyalty in order to act in good faith for the best interest of the company and all stakeholders.

Furthermore, the Exchange Act states the liabilities concerning the remuneration committee including:

1. With reference to Section 10(C)(a)(1), Listed companies must comply with the relevant factors used to determine the independence of the committee members.

2. In the implementation of the clawback requirement by virtue of Section 10D(a), the national securities exchanges are required to prohibit the listed companies who do not comply with the clawback requirement.

3. If the filing of the remuneration disclosure statements required by law, such as Form K-08, were false or misleading, any person who made or caused to be made the said statement shall be liable for damages caused by such reliance³⁰.

4. Thai laws in relevance to remuneration committees

4.1 Remuneration committee's responsibilities

Listed companies may delegate to a remuneration committee to consider the remuneration of directors and the subcommittee by taking into account various factors and to present a report to the board before being approved by a shareholders' meeting. In addition, With regard to Section 90 of the Public Company Act, directors shall be strictly compensated under the articles of association stipulated by the company. The rules set out in the article should be clear enough so that the board of directors does not determine its own remuneration, such as the exact amount of director fee or a gratuity for directors as a percentage of net profit.³¹

Unlike director remuneration, the existing law does not exactly regulate the executive remuneration approval. According to the

29 See e.g., *Smith v. Van Gorkom*, 488 A.2d 858, 874 (Del. 1985)

30 The Exchange Act Section 18

31The Securities and Exchange commission. *Directors' handbook Vol.1: Roles, duties and responsibilities of directors and board of directors.* (2007).

Corporate Governance Principles, it is suggested that the executive remuneration package is considered by a remuneration committee in compliance with the company's regulations and related recommendations before presenting to a board of directors.

4.2 The existence of a remuneration committee and its composition

A listed company is not required to establish a remuneration committee. It is, however, suggested that a committee be set up³² as an additional board committee, which could be helpful in developing accountability.³³

There are no regulations for remuneration committee membership and composition, however, the SET suggests that the committee should consist of at least three members.³⁴ Its majority members should be either independent directors or non-executive directors including its chairman.³⁵ At the same time, the chairman of the board of directors should not be the chairman of the remuneration committee or a member. However, unlike the US, there are no rules or recommendations of the SET providing requirements to consider the selection of these consultants.

4.3 Remuneration committee's duties

There are no regulations providing specific enforcement to the remuneration committee. However, since the members of the committee are a group of directors who perform the duty in lieu of the board of directors, they still have legal duties to prescribe how each individual director should perform his/her duties. The committee has the fundamental duty to conduct the business in accordance with the law, the company's objectives, the company's articles of association and the resolutions of the meeting of shareholders in good faith and care³⁶. the vague interpretation of what constitute the care and honesty duties is more obviously stated in the Securities and Exchange Act.

The specific duties in relevance to remuneration committee are the director remuneration shall be determined the remuneration strictly according to either the articles of association or the resolutions of the meeting of shareholders.³⁷ Furthermore, the Securities and Exchange Act

32 The Stock Exchange of Thailand, *Supra* note 13, at 94.

33 Report on the observance of standards and codes: Corporate governance country assessment Thailand <http://www.sec.or.th/TH/Documents/CGROSC.pdf> (accessed on March 5th, 2016)

34 The Stock Exchange of Thailand, "Remuneration committee guidelines 2008" http://www.set.or.th/sustainable_dev/en/cg/files/2008/RCinEngPublishing.pdf (accessed June 28th, 2015)

35 The Stock Exchange of Thailand, *Supra* note 13, at 95.

36 The Public Company Act, Section 85

37 The Public Company Act Section. 90

requires listed companies to disclose information in their reports to promote transparency.

4.4 Disclosure

The Public Company Act specifies that the board of directors shall deliver the annual report of the board to the shareholders.³⁸ In addition, relevant to remuneration committee disclosure, Section 56 of the Securities and Exchange Act regulates that the company shall prepare the disclosed report for additional information as specified in the notification of the Capital Market Supervisory Board³⁹ named the Annual information disclosure form (Form 56-1).

1. Information relating to the remuneration committee structure

The company is required to list the names of directors including the position held in the company.⁴⁰ The nomination of the remuneration committee and the process of election are also filed in the Form 56-1. In addition, the company shall file the number of meetings attended by each member. As required by law, the members of a remuneration committee, especially independent directors, shall also disclose their qualifications and any conflict of interest that they may have.

In the case of remuneration consultants, the law does not require the company that retains these consultants to disclose their conflict of interest. It is just recommended by the Principles of Good Corporate Governances for Listed Companies 2012 that the said information should be reported.

2. Information relating to financial statements and reports

The Public Companies Act requires the board of directors to report the benefits which directors receive from the company, including remuneration, shares, and debentures, to the shareholders.⁴¹ In addition, the Form 56-1 specified in the notification of the Capital Market Supervisory Board requires listed companies to disclose a financial statement including:⁴²

1) The director's remuneration is disclosed as the type and the amount of remuneration paid to each director of the company.

2) The board shall also disclose the total remuneration paid to all executives including the number of executives and types of remuneration.

3) The non-financial remuneration of directors and executive

38 The Public Company Act, Section.114(4)

39 Notification of Capital Market Supervisory Board TorChor. 44/2556 Rules, RE: Conditions and Procedures for Disclosure regarding Financial and Non-financial Information of Securities Issuers

40 The Public Company Act Section. 114(4)

41 *Id.*

42 สำนักงานคณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์, แบบแสดงรายการข้อมูล แบบ

56-1แบบ69-1, กรุงเทพฯ: ฝ่ายพัฒนาริษัท (2556). (The Securities and Exchange Commission, Form 56-1 c[d] Form 69-1, Bangkok: Company development (2013))

earnings from the company shall be reported and each type of remuneration described, such as the employee stock option plan and provident fund.

4.5 Remuneration committee liabilities

1. Liability for director remuneration

According to Section 91 of the Public Company Act, if the payment of money or giving of other property to a director is not in accordance with either the articles of association of the company or the resolution of the meeting of shareholders, the director shall be jointly liable for any damage to the company.

2. Liability for disclosure

Section 207 of the Public Company Act states that if the information presented by the board of directors is incomplete or inaccurate as to truthfulness, the board shall be liable to a fine.

3. Liability for the failure of directors' duties

If a director acts in breach of the fiduciary duties and his performance causes loss or damage, he will be criminally liable.⁴³

4. Liability for the conflict of interest disclosure

With reference to Section 281/3 of the Securities and Exchange Act, a director shall be liable to a fine if he does not file a report with the company on his interest or a related person's interest in relation to management of the company or the subsidiary.

4.6 The rights of shareholders

The shareholders currently exercise their rights relating to the remuneration committee by obtaining relevant and adequate information on the company, as well as by participation and voting in shareholder meetings. While the directors' compensation is a matter approved at the shareholders' meeting,⁴⁴ the law does not require executive remuneration to be approved by shareholders. In practice, the managerial remuneration presented by a remuneration committee is decided by the board. The SET suggests that the remuneration of both executives and directors should not only be in accordance with the board policy, but also be within the limit approved by shareholders.

5. Conclusions and recommendations

The assessment of Thai listed companies' corporate governance provided by the SET in collaboration with IOD reflects that Thailand is in a position where its governance practice is at an acceptable level and continually developing to meet the international standard. In the same way, the role of a remuneration committee is emphasized as a governance mechanism, maximizing shareholders' values by the issue of the Good

⁴³The Securities and Exchange Act, Section. 281/2

⁴⁴The Public Company Act Section 90

Corporate Governance Principles and the Remuneration Committee guidelines. The above scenario illustrates that the rules and regulations concerning executive and director remuneration, especially the structure of the remuneration committee, the exercise of shareholders' rights and transparency, are not sufficient to force the companies listed in the stock exchange to manage and operate in compliance with good corporate governance principles. As a result, regulation must obviously be improved in order to demonstrate good governance in compliance with the international standard.

The SET should provide compulsory regulation requiring the establishment of remuneration committees consisting of a majority of independent directors. Furthermore, the law should specify that the shareholders have the right to exercise a non-binding vote on executive remuneration. The objective of this vote is to strengthen the remuneration committee and the board, who must perform with fiduciary duty, and not oversee the remuneration, because this advisory vote does not immediately affect the board decision. Lastly, the listed companies should be required to disclose:

- 1) Nomination of the remuneration committee's members and its consultants
- 2) Non-cash remuneration of executives
- 3) The discussion relating to rationales of executive payment including the relationship between the firm's performance and the level of executive remuneration.

OWNERSHIP IN SOCIAL MEDIA ACCOUNT AND ITS CONTENTS IN LIGHT OF THAI LAWS

Sineenat Wannuruk

Abstract

As general comprehension, the intellectual property is one type of properties as it falls into the definition of “property” pursuant to Section 138 of Civil and Commercial Code B.E. 2535, property laws of other foreign countries, court judgments, as well as legal experts’ opinions. Even though the copyright law is basically stipulated for the purpose of protection of intangible things, those intangible things have value and can be appropriated. As similar with the intellectual property law, we can consider that the social media account and the digital contents are intellectual property and also property, resulting in that they can be owned. When the social media account and contents are properties and become valuable, the disputes over the ownership of the account and contents can ordinarily be expected as found in some foreign cases. When it comes to either transactions or disputes involving social media account and contents, as aforementioned that social media account and the digital contents are intellectual property and also property, therefore copyright law as well as Civil and Commercial Code B.E. 2535 govern those transactions and disputes.

It is known that Instagram and Facebook endorse the terms and conditions to allow their users to have their own ownership in the account and any contents uploaded to their websites, however, they claim their authority to access, disseminate or even allow the privilege to third individual to access on users' digital copyrighted contents without asking for the user’s authorization. These acts seem to appear that the social media sites exercise the exclusive rights as joint copyright owners with user or as licensees. Even though the current Terms of Use employed by most social media sites do not evidently claim that the ownership in the contents belong to social media sites, (however Instagram ambiguously states in its current Terms of Use that service contents are owned by Instagram),¹ the practice and exercise by social media sites nowadays, by allowing the contents of one user to be distributed or exploited by other users, by availing users’ profile and postings through search engine websites, by interchanging the contents between the two social media sites belonging to one entrepreneur, are considered that those social media sites are exercising the exclusive rights as joint copyright owners or as a licensees.

The objective of this research is to examine whether there are any valid legal principles that the social media sites could employ to exercise

¹ Instagram, **Terms of Use** [Online], 1 March 2013. Available from <http://instagram.com/about/legal/terms/>.

copyright owner's exclusive rights with the user on social media sites. The author investigated two approaches which could constitute the rights for social media site to exercise the exclusive rights as a joint copyright owner or as a licensee, namely, approaches relating with contract, and approaches relating with copyright laws.

บทคัดย่อ

ตามที่เร้าเข้าใจกันโดยทั่วไปว่า ทรัพย์สินทางปัญญาเป็นทรัพย์สินชนิดหนึ่ง เพราะดกอยู่ภายใต้คำจำกัดความคำว่า “ทรัพย์สิน” ตามมาตรา 138 แห่งประมวลกฎหมายแพ่งและพาณิชย์ พ.ศ. 2535 และตามกฎหมายทรัพย์สินของต่างประเทศ คำพิพากษาต่างๆ และตามความคิดเห็นผู้เชี่ยวชาญด้านกฎหมายหลายๆท่าน ถึงแม้ว่ากฎหมายลิขสิทธิ์ได้ถูกตราขึ้นเพื่อคุ้มครองทรัพย์สินที่ไม่มีรูปร่าง หากแต่ทรัพย์สินที่ไม่มีรูปร่างนั้นก็มีความสามารถและสามารถถือเอาได้ดังเช่นทรัพย์สินประเภทอื่นๆ ในทางพิจารณาเช่นเดียวกับกฎหมายทรัพย์สินทางปัญญา เราสามารถถือได้ว่าบัญชีโซเชียลมีเดียต่างๆ และเนื้อหาดิจิทัลต่างๆในบัญชีเหล่านั้นที่เป็นทรัพย์สินทางปัญญาถือเป็นทรัพย์สินประเภทหนึ่ง ดังนั้นบัญชีโซเชียลมีเดียและเนื้อหาดิจิทัลต่างๆ เป็นสิ่งที่มิใช่เจ้าของ เมื่อบัญชีโซเชียลมีเดียและเนื้อหาดิจิทัลต่างๆ เป็นทรัพย์สิน และหากมีค่าขึ้นมาแล้ว ผู้คนต่างก็แข่งขันและต้องการที่จะเป็นเจ้าของขึ้นมา เป็นเรื่องไม่น่าแปลกใจที่มีข้อโต้แย้งในเรื่องความเป็นเจ้าของในบัญชีโซเชียลมีเดียและเนื้อหาดิจิทัลอย่างที่พบได้ในคดีที่เกิดขึ้นที่ต่างประเทศ เมื่อถือว่าบัญชีโซเชียลมีเดียและเนื้อหาดิจิทัลต่างๆ เป็นทั้งทรัพย์สินในแง่กฎหมายทรัพย์สินและเป็นทั้งทรัพย์สินทางปัญญา เมื่อมีธุรกรรมหรือข้อโต้แย้งเกี่ยวกับบัญชีโซเชียลมีเดียและเนื้อหาดิจิทัลต่างๆ จึงต้องใช้ประมวลกฎหมายแพ่งและพาณิชย์ พ.ศ. 2535 และกฎหมายลิขสิทธิ์ มาบังคับกับธุรกรรมหรือข้อโต้แย้งเหล่านั้นร่วมกัน

สำหรับผู้ที่ใช้เล่นเฟสบุ๊คหรืออินสตาแกรม อาจทราบได้ว่าโซเชียลมีเดียเหล่านี้อนุญาตให้ผู้ให้บริการเป็นเจ้าของบัญชีและเนื้อหาต่างๆของคนที่ใช้ไปลงในเว็บไซต์ อย่างไรก็ตามโซเชียลมีเดียเหล่านี้ขอสงวนสิทธิ์ที่จะเข้าถึง แจกจ่าย หรือแม้แต่อนุญาตให้บุคคลภายนอกเข้าไปดูและเผยแพร่ต่อเนื้อหาอันมีลิขสิทธิ์ โดยไม่จำเป็นต้องมาขออนุญาตจากเจ้าของเนื้อหา การกระทำเช่นนี้ถือได้ว่าโซเชียลมีเดียกำลังใช้สิทธิ์แต่เพียงผู้เดียวของเจ้าของลิขสิทธิ์ ซึ่งผู้ที่ได้รับอนุญาตให้ใช้สิทธิ์นี้ได้นอกจากเจ้าของลิขสิทธิ์แล้ว ก็คือเจ้าของลิขสิทธิ์ร่วมหรือผู้ได้รับอนุญาต (licensee) ถึงแม้ว่าในปัจจุบันโซเชียลมีเดียส่วนมากจะอนุญาตให้ผู้ใช้ไม่ได้แสดงออกอย่างโจ่งแจ้งว่าเนื้อหาในบัญชีเป็นของโซเชียลมีเดีย (หากว่าปัจจุบันอินสตาแกรมก็ยังจะระบุเงื่อนไขที่ออกแนบไม่ชัดเจนว่า เนื้อหาที่ปรากฏในการบริการของอินสตาแกรมเป็นของอินสตาแกรม) แต่ในทางปฏิบัติและข้อเท็จจริงที่เกิดขึ้น ได้แก่ การที่โซเชียลมีเดียสร้างเทคนิคให้ผู้ให้บริการสามารถแจกจ่ายหรือใช้ประโยชน์ในเนื้อหาของบริการรายอื่นได้ สาธารณชนทั่วไปสามารถเรียกดูโปรไฟล์หรือโพสต์ของผู้ใช้บริการได้ทางเว็บไซต์หรือแอปพลิเคชันต่างๆ การอนุญาตให้เนื้อหาของผู้ใช้บริการแลกเปลี่ยนไปมาไต่ระหว่างสองโซเชียลมีเดียที่มีเจ้าของโซเชียลมีเดียเป็นรายเดียวกัน การกระทำต่างๆนี้ ถือได้ว่าโซเชียลมีเดียกำลังใช้สิทธิ์แต่เพียงผู้เดียวของเจ้าของลิขสิทธิ์ดังเช่นเจ้าของลิขสิทธิ์ร่วมหรือผู้ได้รับอนุญาต (licensee)

ผู้เขียนทำวิจัยครั้งนี้มีจุดประสงค์เพื่อค้นหาวามีหลักการทางกฎหมายใดที่อนุญาตให้โซเชียลมีเดียใช้สิทธิ์แต่เพียงผู้เดียวของเจ้าของลิขสิทธิ์ได้ ไม่ว่าจะเป็นในฐานะเจ้าของลิขสิทธิ์ร่วมหรือในฐานะผู้รับอนุญาต ผู้เขียนแบ่งเนื้อหาการวิจัยออกเป็น 2 วิธี ซึ่งแต่ละวิธีสามารถทำให้โซเชียลมีเดียใช้สิทธิ์แต่เพียงผู้เดียวของเจ้าของลิขสิทธิ์ได้ ได้แก่ วิธีการทางสัญญา และ วิธีการทางกฎหมายลิขสิทธิ์

จากการศึกษาพบว่า ไม่มีบทบัญญัติใดตามกฎหมายลิขสิทธิ์ทั้งของไทยและสหรัฐอเมริกาที่โซเชียลมีเดียสามารถใช้เป็นข้ออ้างสิทธิในการใช้สิทธิ์แต่เพียงผู้เดียวของเจ้าของลิขสิทธิ์ในฐานะเจ้าของลิขสิทธิ์ร่วม และเมื่อพิจารณาตามข้อถกเถียงการละเมิดลิขสิทธิ์ตามกฎหมายลิขสิทธิ์ของไทย การกระทำของโซเชียลมีเดียไม่เข้า

ข้อกเว้นการละเมิดลิขสิทธิ์ในเนื้อหาของผู้ใช้บริการ และข้อกเว้นการละเมิดลิขสิทธิ์ของประเทศสหรัฐอเมริกา ต้องพิจารณาข้อเท็จจริงเป็นรายคดีไปว่าการกระทำของผู้ละเมิดกระทบต่อตลาดอันมีศักยภาพของเจ้าของลิขสิทธิ์หรือไม่ หรือเกี่ยวข้องกับการหากำไรทางการค้าหรือไม่

เมื่อศึกษาแล้วได้ผลสรุปว่า เงื่อนไขการใช้บริการ (Terms of Use) ที่โซเชียลมีเดียนำมาใช้มีผลสมบูรณ์บังคับใช้ได้ตามกฎหมายสัญญาของประเทศไทย แต่ก็ถือว่าเงื่อนไขดังกล่าวเอาเปรียบผู้ใช้บริการอยู่เกินสมควร ในทางกฎหมายลิขสิทธิ์ เงื่อนไขการใช้บริการ (Terms of Use) จะถือว่าเป็นการโอนไปซึ่งความเป็นเจ้าของลิขสิทธิ์หรือไม่ หากเห็นว่า เงื่อนไขการใช้บริการ (Terms of Use) ดังกล่าวเข้าข่ายเป็นการโอนไปซึ่งความเป็นเจ้าของลิขสิทธิ์ การที่เงื่อนไขการใช้บริการ (Terms of Use) ไม่ได้ทำตามรูปแบบที่กำหนดไว้ในมาตรา 17 ของ พ.ร.บ. ลิขสิทธิ์ พ.ศ. 2537 ที่กำหนดให้สัญญาต้องทำเป็นหนังสือลงลายมือชื่อคู่สัญญาทั้งสองฝ่าย ถือว่าสัญญาเป็นโมฆะ ตาม มาตรา 152 ของประมวลกฎหมายแพ่งและพาณิชย์ พ.ศ. 2535 หากจะถือว่าเงื่อนไขการใช้บริการ (Terms of Use) ดังกล่าวเป็นสัญญาอนุญาตให้ใช้ลิขสิทธิ์ เนื่องจากตามลักษณะของเงื่อนไขการใช้บริการ (Terms of Use) เป็นสัญญาสำเร็จรูปอย่างหนึ่ง จึงตกอยู่ภายใต้บังคับของ พ.ร.บ. ข้อสัญญาที่ไม่เป็นธรรม พ.ศ. 2540 ดังนั้น เงื่อนไขการใช้บริการ (Terms of Use) ดังกล่าว จึงบังคับได้เท่าที่เป็นธรรมและพอสมควรแก่กรณี

ในเมื่อ เงื่อนไขการใช้บริการ (Terms of Use) ใช้บังคับได้เท่าที่เป็นธรรมและพอสมควรแก่กรณี จึงเกิดเป็นปัญหาอีกว่าและจะบังคับได้ในขอบเขตเพียงใด เพื่อหลีกเลี่ยงปัญหาการตีความดังกล่าว และเพื่อหลีกเลี่ยงสถานการณ์ที่อาจเกิดขึ้นในกรณีที่ผู้ใช้บริการไม่ได้เลือกใช้ Privacy Setting ซึ่งถือเป็นการที่ผู้ใช้บริการเลือกที่จะไม่เข้าร่วม (opt-out) ในกลไกที่มีไว้เพื่อสงวนสิทธิของตน จึงถือว่าผู้ใช้บริการสละสิทธิของตนเองแล้วหรือมีเจตนาโดยปริยาย (implied) ที่จะสละสิทธิของตน การที่โซเชียลมีเดียเนื้อหาของผู้ใช้บริการไปใช้ จึงไม่ถือเป็นการละเมิดลิขสิทธิ์ ผู้เขียนจึงเสนอแนวทางแก้ไขให้แก่ มาตรา 15 (5) ของ พ.ร.บ. ลิขสิทธิ์ พ.ศ. 2537 ให้สัญญาอนุญาตต้องทำเป็นหนังสือ ลงลายมือชื่อของทั้งผู้อนุญาตและผู้รับอนุญาต

1. Introduction

Nowadays, social media sites become very famous, such as Facebook, Instagram, Twitter. etc. These social media sites disseminate users' copyrighted contents in many forms, such as messages, data, photos, etc. These disseminated copyrighted contents of the social media users are protected under Copyright Act B.E. 2537. The problem arises from the implicit attempt on the social media sites' part to become joint copyright owners or licensees of the user's contents. These attempts can be seen from their Terms of Uses forcing users to grant license or transfer rights in copyrighted contents to social media sites, for examples Terms of Use imposed by Facebook,² Instagram,³ YouTube,⁴ and Twitter.⁵ Even though

² You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition: 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

the current Terms of Use employed by most social media sites do not evidently claim that the ownership in the contents belong to social media sites, (however Instagram ambiguously states in its current Terms of Use that service contents are owned by Instagram)⁶, the practice and exercise by social media sites nowadays, by allowing the contents of one user to be distributed or exploited by other users, by availing users' profile and postings through search engine websites, by interchanging the contents between the two social media sites belonging to one entrepreneur, are considered that those social media sites are exercising the exclusive rights as joint copyright owners or as a licensees.

your IP content or your account unless your content has been shared with others, and they have not deleted it. From <<https://www.facebook.com/legal/terms>> (last visited July 15, 2014).

³ Instagram does not claim ownership of any Content that you post on or through the Service. Instead, you hereby grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content that you post on or through the Service, subject to the Service's Privacy Policy' from <<http://instagram.com/legal/terms/#>> (last visited July 15, 2014).

⁴ 7.2 You retain all of your ownership rights in your Content, but you are required to grant limited licence rights to YouTube and other users of the Service. These are described in paragraph 8 of these Terms.

8.1 When you upload or post Content to YouTube, you grant:

A. to YouTube, a worldwide, non-exclusive, royalty-free, transferable licence (with right to sub-licence) to use, reproduce, distribute, prepare derivative works of, display, and perform that Content in connection with the provision of the Service and otherwise in connection with the provision of the Service and YouTube's business, including without limitation for promoting and redistributing' part or all of the Service (and derivative works thereof) in any media formats and through any media channels;

B. to each user of the Service, a worldwide, non-exclusive, royalty-free licence to access your Content through the Service, and to use, reproduce, distribute, prepare derivative works of, display and perform such Content to the extent permitted by the functionality of the Service and under these Terms.

8.2 The above licenses granted by you in Content terminate when you remove or delete your Content from the Website. The above licenses granted by you in textual comments you submit as <<http://www.youtube.com/t/terms>> (9 June, 2010) (last visited July 14, 2014).

⁵ 5. 'You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).' <<https://twitter.com/tos>> (last visited July 14, 2014)

⁶ Instagram, **Terms of Use** [Online], 1 March 2013. Available from <http://instagram.com/about/legal/terms/>.

In theory, the user is the rightful owner of information shared or posted through his/her account. However, in practice, user has no choice but being forced to accept the terms and conditions unilaterally imposed by social media site so that social media site can access, avail or sub-license to third parties the information in user's account. This action is considered as an unfair trade practice, unfair contract term, breach of privacy rights of user, and copyright infringement.

2. In property law's perspective

In property law's perspective of several countries and from judicial rulings, social media account and contents can be regarded as property because property is defined to include intangible things, rights and obligations. If the social media account is considered in terms of its characteristics (or even with respect to Thai property law),⁷ social media account possesses characteristics of property, i.e. it has value because it has potential to generate income. With respect to appropriation, only the user of specific account can have a user name and password to access and manage his own account and at the same time he can restrict others from disturbing his possession. Once we consider that social media account and its contents are property, Civil and Commercial Code B.E. 2535 governs the transactions and disputes regarding the social media account and contents.

3. In intellectual property law's perspective

In Intellectual Property law's perspective of several countries and from judicial rulings, social media account can be regarded as an intellectual property. Intellectual property is one kind of property⁸ and as mentioned above, property includes tangible and intangible property. The IP owner is yet guaranteed to have exclusive rights towards his/her creation. The copyright laws are enforced together with Civil and Commercial Code B.E. 2535 to determine whether Terms of Use are valid and enforceable.

4. Social Media Sites' Terms of Use

Social media site's Terms of Use is an approach related with contract laws. It is enforceable according to contract laws, due to the contract was already formed between the user and social media site. The user cannot raise concealed intention⁹ to void Terms of Use as the social media sites are not aware of the actual intention of the user. Moreover the user cannot raise the expression of intention by mistake in the essential

⁷ Civil and Commercial Code B.E. 2535 sec. 138.

⁸ CDPA 1988 sec. 90, Patent Act 1977 sec. 30.

⁹ Civil and Commercial Code B.E. 2535 sec. 154.

element of the Terms of Use,¹⁰ as the user is already given an opportunity to read and understand the Terms of Use before clicking “I ACCEPT”.

Upon considering that Terms of Use possess same characteristics as Clickwrap License Agreement,¹¹ many foreign court judgments¹² regarded the Clickwrap License Agreement to be valid and enforceable, so the same consideration should be given to the social media sites’ Terms of Use. Clickwrap License Agreement is widely used as software program license agreement employed by the software developer on the internet and it is well-known to us before we could install any software program for our use. The author opines that Clickwrap License Agreement is not completely unfair to the internet user as the user has an opportunity to read the agreement before clicking “I ACCEPT”. The determination of the issue of unfairness depends on the contents of the agreement.

However, in terms of Unfair Contract Terms Act B.E. 2540, the Terms of Use falls into the definition of standard form contract,¹³ therefore the Terms of Use are governed by Unfair Contract Terms Act B.E. 2540. Upon considering the contents of the Terms of Use which force the users to transfer or assign rights in the contents to social media sites, Terms of Use are considered to be unfair for the users. The Term of Use favors on social media site too unreasonably over the users and users cannot negotiate with the social media sites. According to Unfair Contract Terms Act B.E. 2540, the Terms of Use is enforceable as reasonably and equitably as the case may be.

5. U.S. and Thai Copyright Laws

5.1 Copyright Acquisition and Copyright Protection

Different contents circulated on the social media sites, whether writing, pictures, sounds, paintings, photos, videos, etc, are mostly protected under Section 6 of Copyright Act B.E. 2537 and Section 102 of US Copyright Act 1976. Copyright ownership is derived in many ways, either as the first author¹⁴ or as other statuses.¹⁵ The author must be the person who originally creates the work with his/her own labor and creativity. The protection of two similar copyrighted works may be possible

¹⁰ Civil and Commercial Code B.E. 2535 sec. 156.

¹¹ Hoye, J. C., Click-Do WE Have a Deal? [Online], 2001 (Mar. 17, 2016), Available from

www.lexix.com.

¹² CompuServe, Inc. v. Patterson 89 F.3d 1257 (6th Cir. 1996), Hotmail Corp. v. Van\$ Money Pie, Inc., 1998 WL 388389, 47 U.S.P.Q.2d (BNA) 1020

(N.D. Cal. 1998), Caspi v. The Microsoft Network, 323 N.J. Super. 118, 732 A.2d 528 (1999).

¹³ Unfair Contract Terms Act B.E. 2540 sec. 4.

¹⁴ Copyright Act B.E. 2537 sec. 8, US Copyright Act 1976 sec. 102 (a)

¹⁵ Copyright Act B.E. 2537 sec. 9-14.

as long as those two works are created independently. There is later developed concept that the protected work must have modest quantum of creativity. However, the work is not required to be elegant or has much artistic value. The photos of the movie stars or the products images circulated on Instagram are deemed valuable.

The protection of copyright is automatic and the registration is not required for the protection. However, the acquisition of copyright between Thailand and US. is different in that the protected work pursuant to US copyright law must be fixed in material or has material evidence. The contents on social media sites can be traced back in the server and therefore it deems that the contents are fixed in the material or has material evidence.

In terms of Copyright Act B.E. 2537, Terms of Use do not contain signatures of both parties, Terms of Use may not be considered as assignment of copyright ownership.¹⁶ Even though Electronic Transactions Act provides that Terms of Use may deem valid as the agreement is already made in writing electronically, the author opines that lack of the assignor's signature on the user's part would invalidate the assignment.

Also the same principle applies with US copyright law, Section 204 of US Copyright Act 1976 dictates that transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. Upon the above situation, the ownership still belongs to the user and is not transferred to the social media sites.

Upon considering the above methods of copyright acquisitions, the author does not agree that the social media sites could by all means exercise the copyright owner's exclusive rights with the user. Moreover, the social media sites could not claim that the users employ their space and tools to create the work and therefore the act would entitle the social media sites to acquire the joint copyright ownership with the user. There are no such provisions which could support the social media sites' claim.

Copyright Act B.E. 2537 entitles the copyright owner/user with the exclusive rights in reproduction and communication of their work to public, license and assignment of his work.¹⁷ Copyright Act 1976 entitles the copyright owner/user with the exclusive rights.¹⁸ Only the copyright owner has the exclusive rights to act, authorize other persons to act, or prohibit other persons to act against the following exclusive rights of the owner.

The act of social media site in exploiting or availing the user's contents deems copyright infringement of licensing right of the copyright owner.¹⁹ The act that user disseminates other user's contents by clicking

¹⁶ Copyright Act B.E. 2537 sec. 17, US Copyright Act 1976 sec. 204

¹⁷ Copyright Act B.E. 2537 sec. 15.

¹⁸ Copyright Act 1976 sec. 106.

¹⁹ Copyright Act B.E. 2537 sec. 15 (5).

“LIKE” or “SHARE” is considered as copyright infringement of reproduction as well as communication to public or public display rights of the copyright owner under Thai and US copyright laws.

5.2 Exception of Copyright Infringement

Fair use in Thai Copyright law is based on two prerequisite principles, that the act does not conflict with a normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate right of the owner of copyright. These fair uses do not provide exceptions for copyright infringement in the case of social media sites which share or exploit the user’s copyrighted contents. Section 32 paragraph 2 (2) allows the use for personal benefits and only among family members and close relatives, exclusive of friends. The social media sites’ acts unreasonably prejudice the legitimate right of the owner of copyright. Although Section 32/3 regarding liability exemption of ISP was introduced by Copyright Act. B.E. 2537 as amended by Copyright Act. (No. 2) B.E. 2558, the exemption tends to be applied with those ISPS who do not control, initiate, or instruct the copyright infringement.

According to US Copyright Act 1976,²⁰ there are four factors to analyze whether such use is a fair use or not: 1) Purpose and Character of the Use 2) Nature of the Copyrighted Work 3) Amount and Substantiality of the Portion Used and 4) Effect of the Use.

The U.S. court judgments reflected that the judge’s consideration was given on the effect of the use upon the potential market, and whether the act involves a commercial purpose. If the act impacts on the exploitation of the copyright owner in the potential market, or involves the commercial benefits, the fair use cannot be adopted in those circumstances. The author opines that if the user posts some valuable copyrighted materials through social media sites and they were exploited by some other users or by social media sites without authorization, such act of copyright infringement cannot be compromised with fair use, if it is proved that the act affects with the exploitation of the copyright owner in the potential market or the infringer receives commercial benefits out of the user’s contents. Additionally, social media sites receive advertising remuneration from operating their services, indirectly gain the commercial benefits out of the user’s contents.²¹

Implied copyright License

The law is silent on the format of licensing, therefore licensor and licensee do not need to do licensing in writing or have evidence in writing.²²

²⁰ US Copyright Act 1976 sec. 107.

²¹ Bluemoon, (Infographic) What are different sources of revenues derived for Facebook? [Online] available at <http://faceblog.in.th/2011/01/infographic-business-behind-facebook/>. (accessed July 15, 2016)

²² Copyright Act B.E. 2537 sec. 15(5).

Implied copyright license is a concept of voluntary license²³ and is valid on the copyright license. US Court ruled that where the copyright owner employs to opt-out any mechanism provided to reserve their exclusive rights, it deems that copyright owner waive such exclusive rights.

From the act that users do not employ or opt-out Privacy Setting with their account, and also in the context of sharing technology of social media sites, which the users should realize that their works would be disseminated further, it could constitute an implied license on the user's part for other persons, including social media site, to disseminate/use their works further.

The communication of copyrighted contents to public through techniques set up by the social media site as aforementioned is not a copyright infringement because, according to court judgements, it deems that the user authorizes implicitly for the social media site to communicate the copyrighted work to public by not setting up the privacy. However, if this interpretation is applicable in all situations and for all the copyrighted contents, the rights of the copyright owner in the copyrighted contents are very much affected. If the implicit authorization is perceived by all the users that they can perform whatever act with the shared copyrighted contents on the social media sites, any persons can exploit benefits out of the shared copyrighted contents freely as if there is no copyright ownership in that work. This situation poses an important problem because the author's rights are not protected. This problem can be cured by the amendment of copyright license agreement clause as

“The copyright license agreement must be made in writing with the signatures of the licensor and the licensee.”

6. UK Enterprise and Regulatory Reform Act 2013: Act enacted to cope with orphan works and Instagram's previously amended Terms of Use; Is it suitable?

The Enterprise and Regulatory Reform Act 2013 or Instagram Act was enacted to solve with orphan works and the problem resulted from Instagram's previously amended Terms of Use stating the copyright in user's contents belong to Instagram. The Act demands that independent governmental entity is established to search for the copyright owner of the orphan work. The entity must coordinate between the copyright owner and a person desiring to use the copyrighted work so that the authorization is duly obtained before using of such copyrighted work. The Act stipulates the procedures and details of licensing, such as procedure of searching the

²³ Newman Christopher, *What exactly are you implying?": The Elusive Nature of the Implied Copyright License*, 32 Cardozo Arts & Entertainment L. J. 501-559 (2014).

copyright owner, royalty fees, etc.²⁴ However, the copyright protection is still automatic, there is no need for any registration nor notification with the government authorities. The protection according to Enterprise and Regulatory Reform Act 2013 may give too much burden to the government in establishing the independent entity searching for the copyright owner. The Act may also deem to protect the private party too unreasonably because it should be the copyright owner's duty to maintain the protection of his/her copyrighted work with the changing technology.

The Act may give better protection to the copyrighted work disseminated through online social networks because the outsiders can know the actual ownership, obtain authorization from the copyright owner and can then use the work accordingly. It means that any person who desires to disseminate or share the orphan work must always obtain the authorization from the copyright owner. The Act would totally conflict with the nature of online social networks which are developed for the quick dissemination or sharing of news and information. When authorization of the copyright owner must always be obtained before sharing any work, such online social networks are useless and therefore the Act is not effective for the social media sites' or online social networks' operations.

7. Conclusions

Social media site's Term of Use is an approach related with contract laws. Although it is enforceable according to contract laws, the Terms of Use is considered to be unfair for the users. According to Unfair Contract Terms Act B.E. 2540, the Terms of Use is enforceable as reasonably and equitably as the case may be. However, if such Terms of Use is considered as an assignment of copyright ownership, it does not comply with the format specified by Section 17 of Copyright Act B.E. 2537 and therefore Terms of Use is null and void pursuant to Section 152 of Civil and Commercial Code B.E. 2535.

From the study, there are no provisions in copyright laws of both Thailand and U.S. which entitled the social media sites to exercise the exclusive rights as joint copyright owners. Additionally, exceptions of copyright infringement as stated in Copyright Act B.E. 2537²⁵ are not provided in the case of the social media sites disseminate further or exploit the user's contents. Exception of copyright infringement as stated in US Copyright Act 1976 depends on the consideration whether the social media

²⁴ The Enterprise and Regulatory Reform Act 2013 Section 77 Licensing of copyright and performer's rights.

²⁵ Copyright Act B.E. 2537 sec. 32.

site's use affects on the user's potential market or involve commercial benefit.²⁶

The copyrighted contents posted on the social media sites belong to the user, the right of communication of such copyrighted contents to public should also belong to the user, except that the user authorizes for the communication of the works to public implicitly, as all the users of online social networks should realize that everything released to social media sites is ordinarily forwarded further and further as if the user donates the work to public domain. The way that users do not employ Privacy Setting with their account can be considered as opt-out technique as recognized in US court cases. The users who do not employ Privacy Setting deem to allow the social media sites to communicate their work further and the act constitutes implied license for social media sites.

However, if it deems that all copyrighted contents circulated on social media sites are of the public domain which any persons can exploit or receive commercial value, the act would completely undermine the rights of the user (the copyright owner), although most users do not have intention to obstruct other persons to exploit their work. Some users exploit other persons' copyrighted works in a commercial manner and receive income/profit out of other persons' works. If those copyrighted contents are not well protected, the copyright owner will lose the rights he/she deserves. In order to avoid the problem of interpretation on scope of implied license, the author recommends to amend Section 15 (5) of Copyright Act B.E. 2537 to be "The copyright license agreement must be made in writing with the signatures of the licensor and the licensee."

²⁶ US Copyright Act 1976 sec. 107.

THE SIGNIFICANCE OF REGULATING VIRTUAL CURRENCY SERVICE BUSINESSES IN THAILAND*

*Sirima Wiriyaphochai***

Abstract

Traditional financial models and businesses are disrupted by the integration of finance and technology or financial technologies. Virtual currency is a product of financial technologies. It has been developed and increasingly used as alternative mean of payment. Bitcoin is the most popular decentralized virtual currency which being used as medium of exchange for goods and services and also exchanged for legal currencies including Thai Baht. The price value of Bitcoin is determined by demand and supply which can change easily. That is where people find an opportunity for investment or speculation similar to those stocks and other securities. The reasons behind Bitcoin popularity include a number of benefits. User's privacy remains undisclosed and transactions can be done without relying on third party like financial institutions. Additionally, Bitcoin transactions are quick, cheap and irreversible. Unfortunately, it has been taken advantages by criminals and money launderers. They sometimes use virtual currency to perform illicit activities such as illegal trading, dirty money launderings, fraud, cybercrimes and tax evasion. Likely, virtual currency service businesses which administering or exchanging virtual currencies for Baht or other virtual currencies are found with potential to facilitate those illicit activities.

It has been arguing what virtual currency like Bitcoin is under the existing laws in foreign countries and Thailand. The questions of legal currency, foreign currency, electronic money, securities, commodity and property have been discussed. It is also a concern how virtual currency service businesses should properly be regulated in order to manage the potential risks while avoid the over-regulation. United States is a country which actively responds to those issues. Though regulators and courts find it is possible to apply the existing laws to virtual currency and the related businesses, they are aware of the significant difference between financial technologies and traditional financial businesses. United States regulators instead develop the new regulations to ensure putting in place guardrails that protect consumers and rooting out illicit activity without stifling beneficial innovation.

* The article is summarized and rearranged from the thesis "The Significance of Regulating Virtual Currency Service Businesses in Thailand" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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Accordingly, this thesis explores the approaches to regulate virtual currency and the related businesses properly. Fundamentally, the approaches are based on Thai existing laws. The regulatory developments in United States shall essentially be guidelines to provide the appropriate recommendations for Thailand's regulations. In conclusion, this thesis proposes that virtual currency and virtual currency services business should be, on a timely basis, regulated under the securities regulations. In order to do so, the Securities and Exchange Commission should issue the regulations to specify virtual currency as securities and to establish the licensing regime to regulate the conduct of virtual currency service businesses appropriately. The regulations are proposed to help reduce the incentive for criminals, money launderers and tax evaders using virtual currency services business to facilitate illegal purposes. This licensing regime will ensure that consumers are treated properly and will also mitigate cyber-attack risks of this business.

Keywords: Virtual currency, Digital currency, Bitcoin, Licensing, Securities

บทคัดย่อ

รูปแบบการทำธุรกิจและโครงสร้างอุตสาหกรรมด้านการเงินแบบดั้งเดิมได้เปลี่ยนแปลงไป อันเป็นผลสืบเนื่องมาจากการพัฒนาการของเทคโนโลยีประยุกต์ด้านการเงิน (Financial Technologies) เงินตราเสมือนหรือเงินดิจิทัลซึ่งเป็นหนึ่งในผลิตภัณฑ์ของเทคโนโลยีประยุกต์ดังกล่าว ได้ถูกนำมาใช้เป็นสื่อกลางการแลกเปลี่ยนทางเลือกใหม่ในปัจจุบัน บิทคอยน์ถูกจัดว่าเป็นเงินตราเสมือนประเภทหนึ่ง ซึ่งใช้ศูนย์กลางในการควบคุมที่กำลังได้รับความนิยม โดยสามารถใช้แลกเปลี่ยนกับสินค้าและบริการต่าง ๆ ตลอดจนแลกเปลี่ยนเป็นสกุลเงินจริง รวมทั้งเงินบาทด้วย มูลค่าของบิทคอยน์ขึ้นอยู่กับอุปสงค์และอุปทานของผู้ใช้งานเป็นหลัก ทำให้มีความผันผวนง่าย และถูกใช้ในลักษณะเก็งกำไรทำนองเดียวกับการลงทุนในหุ้นหรือหลักทรัพย์ประเภทอื่น ข้อดีประการสำคัญที่ทำให้บิทคอยน์ได้รับความนิยม คือ ผู้ใช้งานไม่จำเป็นต้องเปิดเผยตัวตนในการทำธุรกรรม และธุรกรรมระหว่างผู้ใช้งานบิทคอยน์ไม่ต้องอาศัยตัวกลางประเภทสถาบันการเงิน นอกจากนี้ ธุรกรรมดังกล่าวมีความรวดเร็ว ต้นทุนต่ำ และเพิกถอนไม่ได้ อย่างไรก็ตาม ในบางคราวกลับพบว่า บิทคอยน์ถูกบุคคลกลุ่มหนึ่งนำไปใช้ในทางที่ผิดกฎหมาย เช่น ใช้ซื้อสินค้าผิดกฎหมาย ใช้เป็นเครื่องมือในการฟอกเงิน ซื่อโกง ก่ออาชญากรรมทางคอมพิวเตอร์ และเลี่ยงภาษี เป็นต้น อีกทั้งพบว่า ธุรกิจที่ให้บริการแลกเปลี่ยนบิทคอยน์และเงินตราเสมือนประเภทอื่นเป็นเงินบาท และ/หรือ เป็นเงินตราเสมือนประเภทอื่นอาจกลายเป็นแหล่งให้ความสะดวกแก่บุคคลกลุ่มดังกล่าวในการกระทำความผิดข้างต้นได้ บิทคอยน์ถูกตั้งคำถามเกี่ยวกับสถานะทางกฎหมายทั้งในประเทศไทยและต่างประเทศ แต่ปัจจุบัน ข้อสรุปเกี่ยวกับสถานะดังกล่าวยังไม่ชัดเจนและเป็นที่ยุติ รวมไปถึงมาตรการทางกฎหมายในการกำกับดูแลธุรกิจที่ให้บริการแลกเปลี่ยนบิทคอยน์อย่างเหมาะสมด้วยเช่นกัน จากการศึกษาพบว่า ประเทศสหรัฐอเมริกาได้ให้ความสำคัญกับกรณีดังกล่าวค่อนข้างมาก โดยแม้ว่าหน่วยงานรัฐและศาลของประเทศสหรัฐอเมริกาก็จะพิจารณาว่าบิทคอยน์และธุรกิจที่เกี่ยวข้องอาจอยู่ภายใต้การกำกับดูแลของกฎหมายปัจจุบันของประเทศตนเองได้ก็ตาม แต่ในขณะเดียวกัน ประเทศสหรัฐอเมริกาก็ตระหนักถึงความแตกต่างระหว่างอุตสาหกรรมด้านการเงินแบบดั้งเดิมกับพัฒนาการของเทคโนโลยี

ประยุกต์ด้านการเงินแบบใหม่ จึงได้พัฒนาแนวทางการกำกับดูแลรูปแบบใหม่ที่มีความเหมาะสมกับเทคโนโลยีประยุกต์ดังกล่าวขึ้นเป็นการเฉพาะ

วิทยานิพนธ์ฉบับนี้มุ่งศึกษาและวิเคราะห์หาแนวทางพัฒนาการกำกับดูแลเงินตราเสมือนและธุรกิจที่เกี่ยวข้องอย่างเหมาะสม โดยเน้นศึกษาและปรับใช้บทบัญญัติของกฎหมายไทยในปัจจุบันเป็นสำคัญ รวมทั้งศึกษาและวิเคราะห์พัฒนาการทางกฎหมายของประเทศสหรัฐอเมริกาเพื่อใช้เป็นแนวทางพัฒนากฎหมายของประเทศไทยด้วย โดยสรุปแล้ว วิทยานิพนธ์ฉบับนี้เสนอให้เงินตราเสมือนและธุรกิจที่เกี่ยวข้องอยู่ภายใต้การกำกับดูแลของกฎหมายหลักทรัพย์และตลาดหลักทรัพย์ โดยสำนักงานคณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ควรออกประกาศกำหนดให้เงินตราเสมือนเป็นหลักทรัพย์ประเภทหนึ่ง และการประกอบธุรกิจที่เกี่ยวข้องต้องได้รับใบอนุญาต รวมทั้งจัดให้มีระบบการปฏิบัติงานที่เหมาะสม เพื่อลดความเสี่ยงของการถูกนำไปใช้เป็นเครื่องมือกระทำความผิดตามกฎหมาย และสร้างความเชื่อมั่นให้แก่ผู้บริโภค

คำสำคัญ: เงินตราเสมือน, เงินดิจิทัล, บิทคอยน์, การออกใบอนุญาต, หลักทรัพย์

1. Introduction

Traditional financial models and businesses are disrupted by the integration of finance and technology or “Financial Technologies” (FinTech).¹ Virtual currency is a product of FinTech. It has been developed and increasingly used as alternative mean of payment.² It can also be exchanged for legal currencies including Thai Baht. There is a number of virtual currencies. Bitcoin³ is probably the most well-known and successful decentralized virtual currency widespread accepted at this time.⁴

This new development provides various benefits for financial system. However, every coin has two sides. This is another great challenge for regulators to provide the proper approach managing risks which this technology bring.

2. Virtual Currency and Virtual Currency Service Businesses

Bitcoin, in brief, is a system designed and implemented in 2008 by Satoshi Nakamoto, the pseudonym of a computer programmer.⁵ It has initially been proposed for electronic transactions without relying on any trusted third party like financial institutions to process electronic payments.⁶

¹ UK Government Chief Scientific Adviser, **FinTech Futures** (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/413095/gs-15-3-fintech-futures.pdf (last visited Oct 3, 2015).

² United States Government Accountability Office, **Report to the Committee on Finance, U.S. Senate : Virtual Economies and Currencies** (2013), <http://www.gao.gov/assets/660/654620.pdf> (last visited Dec 29, 2014).

³ Bitcoin with a capital “B” would be the name of the system software; bitcoin with a lowercase “b” would mean the units of currency.

⁴ European Central Bank, **Virtual Currency Schemes 1** (2012).

⁵ Satoshi Nakamoto, **Bitcoin: A Peer-To-Peer Electronic Cash System 1** (1 ed. 2008), <http://bitcoin.org/bitcoin.pdf> (last visited May 5, 2015).

⁶ *Id.*

The reasons behind Bitcoin popularity include a number of benefits. User's privacy remains undisclosed and transactions can be done without relying on third party like financial institutions. Additionally, Bitcoin transactions are quick, cheap and irreversible. Unfortunately, it has been taken advantages by criminals and money launderers. They sometimes use virtual currency to perform illicit activities such as illegal trading, dirty money launderings, fraud, cybercrimes and tax evasion.

In law, the status of virtual currency is still hardly to be explicitly classified. Basically, it is not legal currency in any countries including in Thailand. Many foreign countries responded to this new technology differently. A few countries explicitly prohibited the use of virtual currency as a substitute of legal money such as Russia.⁷ While the banks and financial and payment institutions in China are barred from dealing businesses with Bitcoin.⁸ In contrast to another group of countries such as Germany, Canada, United of Kingdom and United States of America, virtual currency is allowed to continue developing as an alternative medium of payment. In Thailand, virtual currency is not legal tender but only an electronic data unit.⁹ The Bank of Thailand has publicly warned that virtual currency by itself is valueless and further suggested that conducting businesses with virtual currency is risky. Investors should be aware that dealing with it is not sufficiently efficient.¹⁰

Though virtual currency itself is valueless, it is possible to find the daily price value. Generally, the price value of virtual currency is determined by demand and supply¹¹ which can change easily. That is where people find an opportunity for investment or speculation similar to those stocks and other securities. In 2013, the market price of a bitcoin fluctuated

⁷ Reported by Russia Today (RT), the leading Russian news organization, See Rt.com, *'You can play with you bitcoins, but you can't pay with them': Russia may ban cryptocurrencies by 2015* (2014), <http://rt.com/business/187440-bitcoin-ban-russia-cryptocurrency/> (last visited Dec 26, 2014).

⁸ 关于防范比特币风险的通知[Notice on Precautions Against the Risks of Bitcoins] (issued by the People's Bank of China, the Ministry of Industry and Information Technology, China Banking Regulatory Commission, China Securities Regulatory Commission, and China Insurance Regulatory Commission, Dec. 3, 2013) YIN FA, 2013, No. 289, available at http://www.pbc.gov.cn/publish/goutongjiaoliu/524/2013/2013120515315683222251/20131205153156832222_251_.html (China).

⁹ ธนาคารแห่งประเทศไทย, ข้อมูลเกี่ยวกับ **Bitcoin** และหน่วยข้อมูลทางอิเล็กทรอนิกส์อื่นๆ ที่ลักษณะใกล้เคียง (2014). (The Bank of Thailand, **Information on Bitcoin and other similar electronic data** (2014)). <http://www.bot.or.th/Thai/PressAndSpeeches/Press/News2557/n0857t.pdf> (last visited Dec 26, 2014).

¹⁰ *Id.*

¹¹ Bitcoin.org, **FAQ - Bitcoin** (2015), <https://bitcoin.org/en/faq#why-do-bitcoins-have-value> (last visited May 5, 2015).

between \$13 and \$1,200 USD.¹² In 2014, it fluctuated between \$320 and \$1,000 USD.¹³ On September 18, 2015, one bitcoin was valued at around \$233 USD.¹⁴ The financial data including price and volume of Bitcoin trading are publicly available on the websites of businesses providing the service of Bitcoin exchange.

In Thailand, the businesses providing the exchange services for virtual currency and Thai Baht or other virtual currencies can be found online operating. Such businesses are allowed to run freely under Thai laws. However, they are not categorized as any specific business under the laws. They are then only required to provide the very general information about their businesses for registration with the commercial registration office. This sort of service businesses are sometimes found with potential to be places facilitating illegitimate activities not only fraud, cybercrime, black market trade, but also money laundering.

In spite of such risks, it should not be an option to ban or prohibit the use of virtual currency or related businesses in Thailand. The face of technology development is changing every day. It will never stop developing. Outright banning FinTech product like Bitcoin will only take Thailand many steps backward from other developed countries.

It would be better for Thai regulators to allow virtual currency technology to continue developing while also monitor it closely. At the meantime, the regulations should readily be slowly adopted to prepare for those potential risks. Carefully, the over-regulation should be avoided. Excessive regulations can be obstacle for technology and innovation development in Thailand.

2. Legal Aspects of Virtual Currency in Thailand and United States of America

2.1 Thailand

Currently, virtual currency like Bitcoin is not legal tender in Thailand. It is not recognized as Thai currency by the Currency Act B.E. 2501.¹⁵ So far, it is not legal tender in any country. It is therefore not foreign currency under the Exchange Control Act B.E. 2485.¹⁶ Bitcoin does not fall within the definition of electronic money as prescribed by the Royal Decree Regulating Electronic Payment Service Business

¹² Bitcoincharts.com, **Bitcoin Charts / Charts** (2015), <http://bitcoincharts.com/charts/bitstampUSD#rg60zcsg> 2013-01-01zeg2013-12-31ztgSzm1g10zm2g25zv (last visited May 3, 2015).

¹³ Bitcoincharts.com, **Bitcoin Charts / Charts** (2015), <http://bitcoincharts.com/charts/bitstampUSD#rg60zcsg> 2014-01-01zeg2014-12-31ztgSzm1g10zm2g25zv (last visited May 3, 2015).

¹⁴ Bitcoincharts.com, **Bitcoin Charts / Charts** (2015), <http://bitcoincharts.com/charts/bitstampUSD#rg60zigDailyzcsg> 2015-09-18zeg2015-09-18ztgCzm1g10zm2g25zv (last visited September 20, 2015).

¹⁵ The Currency Act B.E. 2501 sec.7.

¹⁶ The Exchange Control Act B.E. 2485 sec. 3.

B.E. 2551,¹⁷ thus, it cannot be categorized as electronic money. The definition of securities under the Securities and Exchange Act B.E. 2535 is specifically defined.¹⁸ Unfortunately, virtual currency does not fall within any of them, it is then not securities under this Act.

Virtual currency is not goods as defined by the Price of Goods and Services Act B.E. 2542¹⁹ and the Derivatives Act B.E. 2546.²⁰ However, it may be arguable whether virtual currency like Bitcoin can be goods under the Consumer Protection Act B.E. 2522 because it is possible to be possessed for sale as defined by this Act.²¹ Virtual currency can also be property under the Civil and Commercial Code²² because it is an incorporeal object susceptible of having a value and of being appropriated.

2.2 United States of America

Virtual currency is neither US money nor issued by Federal Reserve banks or national banks as described by Section 31 U.S.C. 5103 under the Coinage Act of 1965 and the related laws, it is not US legal tender. However, Bitcoin has recently been discussed in US courts that it was a form of money.²³ In contrast to the point of view of US Internal Revenue Service which stated that even virtual currency is capable of serving real currency functions, it does not have legal tender status in any jurisdiction.²⁴

So far, virtual currency is not currency of any foreign country other than US. Accordingly, it is not foreign currency under US laws at all.²⁵ Though virtual currency exists digitally and the transfers among users are electronically executed, those transactions are not considered as electronic fund transfers under the Electronic Fund Transfer Act of 1978.²⁶ However, Bitcoin is possibly a securities under the Securities Act of 1933 in

¹⁷ The Royal Decree Regulating Electronic Payment Service Business B.E. 2551 sec. 3.

¹⁸ The Securities and Exchange Act B.E. 2535 sec. 4 [hereinafter *The Securities and Exchange Act*].

¹⁹ The Price of Goods and Services Act B.E. 2542 sec. 4.

²⁰ The Derivatives Act B.E. 2546 sec. 3.

²¹ The Consumer Protection Act B.E. 2522 sec. 3.

²² The Civil and Commercial Code sec. 138 [hereinafter *Thai CCC*].

²³ See *SEC v. Shavers*, Case No. 4:13-CV-416 (E.D.Tex.) and *U.S. v. Faiella*, Case No. 14-cr-00243 (U.S. District Court, Southern District of New York).

²⁴ Irs.gov, **IRS Virtual Currency Guidance : Virtual Currency Is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply** (2015), <http://www.irs.gov/uac/Newsroom/IRS-Virtual-Currency-Guidance> (last visited Oct 3, 2015).

²⁵ Code of Federal Regulations Title 26 Chapter I Subchapter A Part 1 Section 1.6045-1, the section related to the returns of information of brokers and barter exchanges, for purposes of this section “Foreign currency means currency of a foreign country.”

²⁶ 15 U.S.C. § 1693(a)(6).

accordance with the US court judgment. The court determined that Bitcoin is a security because it is an investment contract as broadly defined by this Act.²⁷ Virtual currency can also be a commodity under the Commodity Exchange Act according to the announcement of chairman of the Commodity Futures Trading Commission.²⁸ Property in US laws can be differently defined under different scope of laws. Possibly, virtual currency like Bitcoin is falling within the definitions of property under some US laws.²⁹ This issue is supported by US Internal Revenue Service announcement which stated that virtual currency like Bitcoin is not legal currency but in contrast is viewed as property for US federal tax purposes.³⁰

3. Virtual Currency Service Businesses Regulations in Thailand and United States of America

In this article, virtual currency service business means a business which is administering or exchanging virtual currencies for legal currency, Baht, or other virtual currencies.

3.1 Thailand

Virtual currency service business is providing service by electronic media via internet system and is also a central market for virtual currency services by electronic media via internet system (e-marketplace) under the Business Registration Act B.E. 2499 and the related regulations.³¹ It is therefore required to apply for e-commerce registration³² and to provide some general information about its business for registration, for example, name, age, nationality, address, capital money, business starting date and business description. These laws are only providing the minimum information of businesses. They are lack of requirements which should be established properly for a specific business like virtual currency service business.

In the aspect of following current laws which meant to regulate the conduct of specific businesses, it appears that virtual currency service business does not fall within the scope of those laws at present. It is neither prohibited nor subject to the Exchange Control Act B.E. 2485 and the

²⁷ *SEC v. Shavers*, Case No. 4:13-CV-416 (E.D.Tex.)

²⁸ Cftc.gov, **Testimony of Chairman Timothy Massad before the U.S. Senate Committee on Agriculture, Nutrition & Forestry** (2015), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-6> (last visited Oct 3, 2015).

²⁹ For example, the 12 US Code 5433 and 21 U.S. Code § 853 - Criminal forfeitures.

³⁰ Irs.gov, *supra* note 24.

³¹ Regulation of Ministry of Commerce on Persons who Have the Duties for Commercial Registration (No. 11) B.E. 2553 sec. 5(3) and sec. 5(6) [hereinafter *Regulation of Ministry of Commerce*].

³² Regulation of Ministry of Commerce, *supra* note 31, sec. 5.

related regulations.³³ This sort of business is not a financial institution business under the Financial Institution Business Act B.E. 2551.³⁴ It is not an electronic payment service provider under the Electronic Transaction Act B.E. 2544 and the related regulations.³⁵ It is neither a securities exchange³⁶ nor securities business³⁷ in the capital market under the Securities and Exchange Act B.E. 2535.

However, a transaction with virtual currency is subject to contract law in general. Indeed, it is a reciprocal contract³⁸ which one party agrees to transfer virtual currency for payment and another party agrees to pay for the transferred virtual currency. Each party of the contract has a duty to perform his obligation. If one of them fails to perform, the other party has the right to refuse to perform his obligation and/or right to rescind the contract. After rescinding the contract, the breaching party has perform something in order to restore the injured party to his former condition. The injured party also has the right to claim for damages. Merely, such relationship is a personal right between parties. If one party fails to perform his obligation, the other party may only be entitled to claim the right by bring a case to the court for compulsory performance. The injured party is unable to enforce the right by himself.³⁹

The Consumer Protection Act B.E. 2522, the Anti-Money Laundering Act B.E. 2542 and the Computer Crime Act B.E.2550 are relevant laws that this writer also studies and finds that they are not established to regulate the conducting of any business in Thailand.

3.2 United States of America

(1) US Current Laws

US Financial Crimes Enforcement Network (FinCEN) has guided that participants involving certain virtual currency activities are money transmitters and are subject to the Bank Secrecy Act regulation.⁴⁰

³³ The Exchange Control Act B.E. 2485 and Ministerial Regulation No. 13 B.E. 2497 issued under the Exchange Control Act B.E. 2485.

³⁴ The Financial Institution Business Act B.E. 2551 sec. 4.

³⁵ The Electronic Transaction Act B.E. 2544 and the Royal Decree Regulating Electronic Payment Service Business B.E. 2551.

³⁶ The Securities and Exchange Act, *supra* note 18, sec. 153.

³⁷ The Securities and Exchange Act, *supra* note 18, sec. 4.

³⁸ Thai CCC, *supra* note 22, sec. 369

³⁹ รองศาสตราจารย์ ดร. สุนทร มณีสวัสดิ์, **คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์** หน้ 313 (พิมพ์ครั้งที่ 3, 2555) (Sunthorn Manisawat, **Commentaries on the Civil and Commercial Code: Obligation Law** 313 (3rd ed. 2012)).

⁴⁰ See FIN-2013-G001: Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies, FIN-2014-R001: Application of FinCEN's Regulations to Virtual Currency Mining Operations, FIN-2014-R002: Application of FinCEN's Regulations to Virtual Currency

Fundamentally, money transmitter in US is required to be registered, conduct a comprehensive risk assessment of its exposure to money laundering, implement an anti-money laundering program based on such risk assessment and comply with the recordkeeping, reporting and transaction monitoring obligations.

In the view of securities regulations, though a US court accepted virtual currency as a security, any specific guidance on how US Securities and Exchange Commission regulate business related to virtual currency has not been found yet.

(2) US Regulatory Developments

Even virtual currency and its related businesses are likely under US existing regulations, they are different from many traditional regulated things. US is greatly aware of the development of new FinTech. US regulators instead develop the new regulations, both model and state levels, to ensure they put in place guardrails that protect consumers and root out illicit activity without stifling beneficial innovation.

In model level, the CSBS Model Regulatory Framework for State Regulation of Certain Virtual Currency has been introduced by the Conference of State Bank Supervisors,⁴¹ a US nationwide organization of banking regulators. The Model Framework appears to be a guideline for the state regulators to develop their financial regulatory regimes applying to virtual currency activities to provide licensing requirements for entities engaged in virtual currency activities and robust licensing systems. The components of a model licensing regime have widely been outlined.

In state level, the licensing regime has also been established in New York and California. “BitLicense” is commonly known as the regulation proposed to govern the conduct of business involving virtual currencies in New York.⁴² It includes provisions providing for consumer protections, anti-money laundering program, cyber security program and customers safeguarding assets program.⁴³ While in California, Assembly Bill No. 1326 (AB 1326)⁴⁴ is proposed to amend the Financial Code relating to virtual

Software Development and Certain Investment Activity, FIN-2014-R011: Request for Administrative Ruling on the Application of FinCEN’s Regulations to a Virtual Currency Trading Platform and FIN-2014-R012: Request for Administrative Ruling on the Application of FinCEN’s Regulations to a Virtual Currency Payment System.

⁴¹ Csbs.org, **Model Regulatory Framework** (2015), <https://www.csbs.org/regulatory/ep/pages/framework.aspx> (last visited Oct 3, 2015).

⁴² Dfs.ny.gov, **Speech - June 3, 2015: NYDFS Announces Final Bitlicense Framework for Regulating Digital Currency Firms** (2015), <http://www.dfs.ny.gov/about/speeches/sp1506031.htm> (last visited Oct 3, 2015).

⁴³ Title 23 Chapter I. Part 200 : Regulations of the Superintendent of Financial Services, Virtual Currencies.

⁴⁴ Leginfo.legislature.ca.gov, **Bill Analysis**, <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml> (last visited Apr 5, 2015).

currency. Basically, AB 1326's purpose is very similar to New York's BitLicense. However, it mostly sets requirements to provide and ensure the consumer protection while the anti-money laundering program has not been found yet.

4. Analysis and Recommendations

Though virtual currency has been used as well as money in many areas in Thailand and other countries, it is not legal currency in any country. It is not going to replace traditional money easily. It needs to be much further developed and widely accepted among people than it is being now in order to gain significant attention from traditional money regulators. National banking regulators in most countries including Thailand may not supervise the businesses related to virtual currency any time soon.

In contrast to securities industry, virtual currency has the potential to continue developing in this industry. Its value changes quickly. People find it an opportunity for investment or speculation like they do with stocks or other securities. Related businesses are facilitating the exchange of virtual currency and Baht which make it easier to make profit or suffer loss. This activity is more likely to be an investment and should be supervised under the securities regulations. Thus, it is significant for Thai regulators to prepare developing the proper regulations for this specific business.

Virtual currency services business is different from traditional businesses. It should be specifically regulated. First of all, it should be brought into the legal system to reduce the incentive for criminals, money launderers and terrorists using virtual currency services business to facilitate illegal purposes. At this time, consumer protection may be the priority issue. Unavoidably, the other issues like illegal trading, money laundering, cyber security and tax collecting are required to be on a timely basis managed. Thus, two directions on regulation are recommended as follows.

(1) Proactive approach on securities regulations

Virtual currency has the potential to be specified as securities by the authority of the Securities and Exchange Commission of Thailand (SEC). Virtual currency service businesses are also possible to and should be supervised under the securities regulations. Therefore, the securities regulations should be amended and should establish the proper regime to regulate the conduct of virtual currency service businesses appropriately.

Firstly, the SEC should issue the regulations to specify virtual currency as securities in accordance with Section 4 of the Securities and Exchange Act B.E. 2535. Then, it should issue the regulations to specify that the offer for sale of securities like virtual currency shall not be applied by the provisions in chapter 3 of the Act, but shall be subject to the notification of the SEC. Accordingly, the notification of the SEC should contain the provisions establishing the proper regime to regulate the conduct of virtual currency service businesses in accordance with Section 64(3) of this Act.

Fundamentally, license should be required for any person engaging in any virtual currency service business offering for sale of virtual currency in exchange for Baht or other virtual currencies. This will ensure that consumers are dealing with reliable business man. Accordingly, it will reduce the potential of fraud committed by such business. Furthermore, the business is required to know its customers and to keep record of transactions. An effective cyber security program is also required to establish and maintain. In conclusion, it will reduce the incentive for criminals, money launderers and terrorists using virtual currency for illegal purposes and mitigate the risks of being hacked by cybercriminals. Likely, it may reduce the incentive for tax evaders who hiding their revenue from the authority by using virtual currency

(2) Reactive approach on consumer protection regulations

At this time, it may be arguable whether this is the right time to establish the proactive approach supervising virtual currency services business due to its market capitalization and the widespread popularity. Undeniably, this sort of business exists in Thailand and so its consumers do. Consumers should be at least protected by the consumer protection regulations. Even such regulations do not mean to proactively prevent business man from misconduct but only to ensure that consumers will be fairly treated in general. When the disputes occur, they empower the authority to resolve problems for consumers. This, in this writer's opinion, is a reactive approach.

However, it is unclear whether virtual currency service business is business man and its customers are consumer under this regulations. This writer finds it is possible for those parties to fit in the definitions but it is required to be clearer. Therefore, the Consumer Protection Board should exercise its powers under the Consumer Protection Act B.E. 2522 by issuing or publicizing information explaining that virtual currency service business is a business man who renders services which have potential risks to cause damage to or be prejudicial to the right of the consumers for the purpose of the Act. Accordingly, customer of such business is consumer who obtains services from a business man under the Act. Consequently, the Consumer Protection Board shall have the powers and duties to resolve problems for consumers when the disputes occur in accordance with Section 10 of the Act.

5. Conclusion

Technology will never stop developing. Not only virtual currency like Bitcoin and its related businesses, but other Fintech will continually be developed and will disrupt the traditional financial system. Unsurprisingly, this will be another financial challenge that people in financial sectors and regulators need to get prepared and to keep monitoring it closely. Even this article specifies the significance of regulating virtual currency service businesses in Thailand, it does not mean that every Fintech will always need regulations. Financial regulations should be provided only to ensure

putting in place guardrails that protect consumers and rooting out illicit activity without stifling beneficial innovation

AN ANALYSIS OF DAMAGES TO NATURAL RESOURCES: A CASE STUDY OF AO PHRAO, SAMED ISLANDS*

*Tamon Nakaprawing***

Abstract

The ecological impact caused by an oil spill is not as straightforward to assess as other kinds of impacts. It can be difficult to evaluate, since marine animals may not be directly killed, but may still suffer from habitat damage or reduced reproduction. This paper will focus on PTTGC's oil spill case and an analysis of damages to natural resources. The problem of how to calculate damages exists on the government entity's side and the judge's side. This paper demonstrates the economic methods that should be applied to identify reasonable damages related to the environment and proposes a summary of methodologies for natural resource damage assessment that the United States of America, Europe, New Zealand, and China use to solve similar problem, in order to identify the proper remedies for oil spillage damage calculation cases in Thailand. The conclusions are as follows:

In Thailand, official reform measures on regulations, guidelines and working mechanisms concerning damage assessment should be proposed and conducted. A Natural Resource Damage Assessment Institution should be established, in order to be responsible for technical and research support, along with the assessment, monitoring, and training process.

The terms "value of natural resources" and "damage" following Section 97 of The Enhancement and Conservation of National Environmental Quality Act of 1992 (NEQA), should be defined in the Act in order to avoid misinterpretation and to make the terms clearer. The scope of coverage of the term "damage" in the NEQA is to "the damage to marine ecosystems, biodiversity, habitat, marine aquatic resources, species distribution and species reproduction" in order to ensure that the interpretation of the court will cover these areas.

Keywords; Natural Resource Damage Assessment, Damages, Damage to natural resources, PTTGC oil spill, Ao Phrao

บทคัดย่อ

การพิจารณาความเสียหายทางนิเวศวิทยาจากกรณีน้ำมันรั่วนั้นไม่ได้ตรงไปตรงมาอย่างความเสียหายด้านอื่น เนื่องจากมีความยากในการประเมินความเสียหายที่เกิดขึ้น เนื่องจากในบางครั้งไม่ได้มีการสูญเสีย

* This article is summarized and arranged from the thesis "An Analysis of Damages to Natural Resources: A Case Study of Ao Phrao, Samed Islands" Master of laws in Business law (English Program), Faculty of Law Thammasat University, 2015

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สัตว์น้ำ แต่สัตว์น้ำได้รับผลกระทบต่อแหล่งที่อยู่อาศัย และการสืบพันธุ์ เอกสารฉบับนี้มุ่งพิจารณากรณีน้ำมันรั่วที่เกิดจากบริษัทพีทีที โกลบอล เคมิคอล จำกัด (มหาชน) และการกำหนดค่าเสียหายต่อทรัพยากรธรรมชาติ ปัญหาในการพิจารณาค่าเสียหายนั้นคงอยู่ ทั้งในมุมมองของหน่วยงานของรัฐ และมุมมองของผู้พิพากษา เอกสารฉบับนี้ชี้ให้เห็นถึงแนวทางทางเศรษฐศาสตร์ที่นำมาใช้ในการกำหนดค่าเสียหายที่เหมาะสมจากผลกระทบที่มีต่อสิ่งแวดล้อม พร้อมทั้งเสนอแนะแนวทางโดยสรุป ในเรื่องวิธีการในการพิจารณาค่าเสียหาย อันเกิดจากผลกระทบต่อทรัพยากรธรรมชาติที่นานาชาติ ทั้งประเทศสหรัฐอเมริกา ยุโรป นิวซีแลนด์ และจีน ได้ใช้ในการแก้ปัญหาที่ใกล้เคียงกัน เพื่อที่จะปรับใช้ในการเยียวยา และกำหนด ค่าเสียหายที่มีต่อทรัพยากรธรรมชาติกรณีมลพิษน้ำมันในประเทศไทย ผลสรุปจากการศึกษาในครั้งนี้ มีดังต่อไปนี้

แนวทางในการแก้ปัญหากฎหมายไทยนั้น เห็นควรว่า มีความจำเป็นในการปรับปรุงในเรื่องของกฎ ระเบียบ และหน่วยงานที่ดำเนินการในเรื่องของการพิจารณาค่าเสียหายต่อทรัพยากรธรรมชาติ และเห็นควรให้มีการจัดตั้งสถาบันเฉพาะทางเกี่ยวกับความเสียหายที่เกิดต่อทรัพยากรธรรมชาติ เพื่อทำหน้าที่รับผิดชอบ พร้อมทั้งเป็นผู้เชี่ยวชาญทำงานด้านการวิจัย ร่วมกับการประเมินค่า ติดตามผล และการฝึกอบรมในเรื่องดังกล่าว คำว่า “มูลค่าทั้งหมดของทรัพยากรธรรมชาติ” และ “ทำให้เสียหาย” ตามบทบัญญัติในมาตรา ๘๙ แห่งพระราชบัญญัติส่งเสริมและรักษาคุณภาพสิ่งแวดล้อมแห่งชาติ พ.ศ. ๒๕๓๕ นั้น ไม่ได้มีการกำหนดคำนิยามไว้ในพระราชบัญญัตินี้ดังกล่าว ดังนั้น เพื่อเป็นการหลีกเลี่ยงการตีความผิดพลาด และทำให้คำทั้งสองมีความชัดเจนขึ้น ตัวอย่างเช่นขอบเขตของคำว่า “ทำให้เสียหาย” ควรต้องทำให้ครอบคลุม และชัดเจนรวมไปถึง “การทำให้เสียหายต่อระบบนิเวศ ความหลากหลายทางชีวภาพ แหล่งที่อยู่อาศัย ทรัพยากรทางทะเล การแพร่กระจาย รวมถึงการกำเนิด และการสืบพันธุ์ของสิ่งมีชีวิต” เพื่อที่จะทำให้การตีความของศาลได้ครอบคลุมถึงความเสียหายในส่วนดังกล่าวด้วย

คำสำคัญ: การกำหนดความเสียหายต่อทรัพยากรธรรมชาติ, การเรียกค่าเสียหาย, ความเสียหายต่อทรัพยากรธรรมชาติ, เหตุการณ์น้ำมันรั่วบริษัทพีทีที โกลบอล เคมิคอล จำกัด (มหาชน) , อ่าวพร้าว

1. INTRODUCTION:

PTT Global Chemical Plc's oil spill is a major oil spill in Thailand. On July 27, 2013, around 50,000 litres of crude oil leaked from an offshore pipeline operated by PTT Global Chemical (PTTGC) off the coast of Map Ta Phut, Rayong province.

The recent PTTGC oil spill in the Gulf of Thailand has raised important questions: “How to calculate the cost of oil spill damage?” and “Who will bear the cost of environmental damages?”. Surprisingly, there is no legislation specifically addressing on environmental damage assessment and liability for natural resource restoration.

An oil spill is an acute environmental disruption and a disaster to the natural *environment*. Both people and the State are rarely compensated for the long-term effects of an oil spill because it is difficult to assess the actual damage in an oil spill case.

In Thailand, there are no current specific laws or guidelines that focus on civil liability for damage caused by oil spillage and its

environmental damage. The only existing laws which are only partially relevant to oil spills are the Thai Civil and Commercial Code, Acts on Navigation of Thai Waters Act, B.E.2456 (1913) and The Enhancement and Conservation of National Environmental Quality Act, B.E.2535 (NEQA 1992).

2. PROBLEMS OF NATURAL RESOURCE DAMAGE ASSESSMENT IN THAILAND:

Harm to the environment is difficult to assess and highly complex, considering its effects to species and natural habitats. The Thai traditional method of damage calculation for the judge is currently based on the court's discretion. Thailand does not have guidelines for the court of justice, or provisions to lay down the methods, regarding how to evaluate natural resource damages or the methods of calculating the damage to the affected environment. The problem of acceptability and accountability of the valuation methods used in damage assessment of natural resources is the major obstacle for the case, relating to environmental damage or destruction of natural resources in the Thai court.

Natural resource damage assessment is very unorganized and inconsistent in Thailand. The traditional economic valuation approach by counting the death toll of marine life or the use of a single method are not sufficient to deal with natural resource damage assessment in oil spill cases. Oil spill incidents materially affect the well-being, livelihood, body mechanism and reproduction system of marine animals and corals in the affected area. Marine life dies immediately, and after that, people were unable to fish, earn income and enjoy their lives. Despite efforts to remove oil from the surface, adverse effects to the environment and natural resources persist.

3. ECONOMIC METHODS FOR NATURAL RESOURCE DAMAGE ASSESSMENT AND APPLICATION TO AO PHRAO'S OIL SPILL CASE:

Economic analysis is just one of the many different methods used in natural resources damage assessment. Analysis on what method is suitable for damage assessment in Thailand and Ao Phrao's Case is as follows:

1. Market Price or Market Value Approach: Under this method, we will consider the impact of oil spills on the economic benefits and costs of market goods.¹ Let's take for example, that fish around Koh Samed are seriously injured by an oil spill. The market price can be the first method to be selected in this case, since the primary natural resources affected is aquatic animals, especially fishes that are generally caught for commercial activity. However, this raises the issue of a conserved resource that is

¹ Uddin Sarwar Ahmed & Keinosuke Gotoh, **Cost-Benefit Analysis of Environmental Goods by Applying Contingent Valuation Method**, (Tokyo: Springer, 2002) 9

prohibited or unable to trade in the market, such as coral reefs. The price of fish can also be increased due to the shortage, imbalance of demand and supply and consumption behavior.

2. Hedonic Pricing Method: The hedonic pricing method is used to estimate the economic values for natural resources or ecosystem, by considering their impact on market goods.² However, this method is mostly “applied to variations in housing prices that reflect the value of local environmental attributes.”³ The selling price of hotels in the location of the contaminated site, would be lower than the non-affected area, due to the quality of the environment.

3. Production Function Method or Productivity Method:

The productivity method is applied in cases where natural resources are used to produce goods in the market, by considering their contribution in the production of goods.⁴ In cases where pollution affects quality of water, the cost of irrigation or purification will be higher. Due to the above, this method might be difficult to apply to this oil spill’s case, since it is too complex to assess.

4. Travel Cost Method: This method can be applied by measuring the economic benefits of the natural resources, or how much people are willing to pay to travel in the site. “Entry Ticket fees, on-site-expenditures, amount of travel time spent and/or the opportunity cost of travel time, and fuel costs” can be all considered as “Travel costs”.⁵ After processing by an economist, the demand curve and the consumer surplus would be shown, and the value of Ao Phrao could then be processed and revealed under this method.

5. Contingent Valuation Method (CVM): This method uses survey to determine the willingness to pay, or the willingness to accept, for goods and services.⁶ This method can measure both the use and the non-use values of natural resources. The public determines the values of the natural resources via the surveys, and that value later becomes a monetary amount. In order to measure the value of natural resources, surveys under this

² Ece Ozdemiroglu, **Resource Equivalency Methods for Assessing Environmental Damage in the EU**, Remede conference, June 3, 2008

³ Ahmed & Gotoh, *supra* note 1

⁴ Christopher M. Fleming & Averil Cook, “*The Recreational Value of Lake McKenzie: An Application of the Travel Cost Method*”, The 51st Annual Conference of the Australian Agricultural and Resource Economics Society, Queenstown, 2007

⁵ Mark Christensen, “*Valuation of Natural Assets under the Resource Management Act*”, <http://www.andersonlloyd.co.nz/wp-content/uploads/2013/08/Valuation-of-Natural-Assets.pdf> (accessed on July 14, 2015)

⁶ Edward H.P. Brans, **Liability for Damage to Public Natural Resources Standing, Damage and Damage assessment**, (n.p.: Kluwer International, 2001), 154

method would provide information to create a better understanding to respondents as follows:

- Photos of marine lives which were killed by the spill;
- Comparison photos of the area from before the oil spill, to after the oil spill;
- A satellite photo or map identifying the area of the oil slick;
- A chart comparing pre-spill estimation and post-spill estimation of fishes, shellfishes, crabs.

6. Contingent Choice Method: Under this method, respondents will be asked to make a decision or single choice based on a simulation. The major difference compared to the Contingent Valuation Method, is that the respondents will not state the value amount clearly in Contingent Choice Method.⁷ The choice they make will be applied to determine the value of natural resources.

7. The Restoration - Based Approach/Habitat Equivalency Analysis (HEA): This method is used by the National Oceanic and Atmospheric Association to claim damages against parties responsible for natural resource damage resulting from oil spill incidents.⁸ It is applied by comparing the service or lost services that the ecosystem provides, to the biotic component in Ao Phrao's case.

4. COMPARATIVE STUDY:

This paper explores how the U.S.A., European Union, China and New Zealand handle natural resource damage assessment. Any existing laws in Thailand, which are only partially relevant to oil spills, are the Thai Civil and Commercial Code, The Acts on Navigation of Thai Waters Act, B.E.2456 (1913), and The Enhancement and Conservation of National Environmental Quality Act, B.E.2535 (NEQA 1992). Given the extreme consequences and costs involved with oil spills, it is necessary to have rules or specific guidelines concerning natural resource damage assessment.

Economic methods of natural resource damage assessment are widespread among many countries, except Thailand. In respect to the economic analysis of damage calculation and legal implementation, economic methods or theories can give useful ideas to be applied in the Thai legal system and practices.

The valuable experiences of the U.S.A., in terms of NRDA, have been extensively studied and pave the way for other countries in the world.

⁷ Dennis M. King, Marisa Mazzotta, "Contingent Choice Method", <http://www.ecosystemvaluation.org/uses.htm> (accessed on October 10, 2014)

⁸ The Under Secretary for Oceans and Atmosphere (NOAA Administrator) acts on behalf of the Secretary of Commerce as a Federal trustee for natural resources under the Act CERCLA (42 U.S.C. § 9601 *et seq.*), the Clean Water Act (33 U.S.C. § 1251 *et seq.*), the National Marine Sanctuaries Act (16 U.S.C. § 1431 *et seq.*), and the 1990 Oil Pollution Act ("OPA"; 33 U.S.C. § 2701 *et seq.*).

The USA has applied several economic methods to the oil spillage cases. In the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Oil Pollution Act (OPA) of the U.S.A., the definitions of Natural Resource Damage Assessment are closely similar.⁹ The amount of damages refers to the amount and cost to restore the injured natural resources to baseline condition. Similar to the CERCLA, the OPA guarantees the right of states to perform the duty as trustees in order to protect and preserve natural resources and to recover damages for injury to natural resources.¹⁰ The trustees can choose which method should be applied and deemed appropriate for damage assessment.¹¹

The damage schedule is an alternate method of valuing environmental damage. The designed schedule is derived from the assessment of community preferences with respect to changes in natural resource value.¹² The damage schedule approach has been proposed in Washington and Florida, in which they implement their own rules and regulations for damage assessment. A compensation schedule is defined as “the set of procedures enumerated in Washington Administrative Code (WAC) 173-183-300 through 173-183-870 to determine the public resource damages resulting from an oil spill for cases in which damages are not quantifiable at a reasonable cost.”¹³ Florida also enacted their own compensation schedule which is used for assessment of damage caused by small discharges, that is to say 25 to 30,000 gallons.¹⁴ Section 376.121 of the 2015 Florida Statutes defines the rule about the Florida Compensation schedule, in order to decrease unnecessary delay and expense in determining the values of damage to the state’s natural resources.¹⁵

China has established a Judicial Authentication Management System. The Judicial Authentication in China allows expert witness to apply science, specific methods, specialized skill, and past experiences to test, authenticate, and identify damage to an environment. Various methods for a calculation system in China, apart from similar methods under the U.S. legal system, have been recognized, such as the statistical estimation method, the production effect method, the simulation experimental method, the fish eggs and larvae estimation method, and other interesting methods, which could be very useful.

⁹ CERCLA §101(16) and OPA §1001(20)

¹⁰ CERCLA 42 U.S.C. §9607(f); OPA 33 U.S.C. §2702 (b)

¹¹ Edward, *supra* note 6 at 50

¹² Ratana Chuenpagdee, Jack L. Knetsch and Thomas C. Brown, “*Environmental Damage Schedules: Community Judgments of Importance and Assessment of Losses*”, 1

¹³ WAC 173-183-100

¹⁴ Edward, *supra* note 6 at 170

¹⁵ FLA STAT § 376.121

Under the European Union White Paper, the term “damage” is clearly identified as environmental damage, which includes: Damage to biodiversity, Damage in the form of contamination of sites, and traditional damage. However, Thailand does not have a Directive that provides the scope of damages. The White Paper does not provide an indication of what is the appropriate restoration measure,¹⁶ and does not give much detail as to which conditions each method will use, and can cause difficulty in providing an appropriate solution.

In New Zealand, no laws or guidelines are directly concerned with methods of natural resource damage assessment, and this characteristic is closely similar to the Thai system. According to the primary research, the economic valuation on a natural resource is concluded as an important aspect to consider under the Resource Management Act 1991 (RMA). However, non-market valuation approaches have been applied by those in charge of environmental valuation in policy planning in New Zealand.¹⁷

5. PROPOSED SOLUTIONS

(a) Firstly, the term “value of natural resources” following Section 97 of The Enhancement and Conservation of National Environmental Quality Act of 1992 (NEQA)¹⁸ should be defined in the Act. When the term “value of natural resources” is not clearly defined, it may lead to various interpretations.

In the author’s opinion, the “total value” of natural resources destroyed, lost or damaged by an unlawful act or omission under NEQA should be defined to include both Direct Use Value and Indirect Use Value, as widely accepted in foreign countries. The value of natural resources is not simply limited to “Consumptive Use Value”, and the total value is not limited to only the “Use value”. Both the Use Value and Non-Use Value can be considered in the value of natural resources. However, only the Use Value (both Direct Use Value and Indirect Use Value) should be taken into account for the total economic value calculation for natural resource damage assessment in Thailand, since the application of Non-Use value is

¹⁶ Michael Bowman and Alan Boyle, **Environmental Damage in International and Comparative Law Problems of Definition and Valuation**, (n.p.: Oxford University Press, 2002), 328

¹⁷ New Zealand Institute of Economic Research (NZIER), “*Valuing Natural Assets*”, NZIER Working Paper 2013-03, Wellington, May 2013

¹⁸ **Section 97** of The Enhancement and Conservation of National Environmental Quality Act of 1992 “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.”

hard to achieve without controversy. This is beyond the scope that can be accepted in Thailand.

(b) The NEQA1992 does not provide the definition of “damage to natural resources”. It is unclear if damage to natural resources extends to “functional (service) damage”. It is also interesting that in many cases, the pollution also contributes to the decrease of birthrates, as a consequence of adverse effects on reproduction systems.

In the author’s opinion, the definition of “damage” in Section 97 of the NEQA should be specified as “the damage to marine ecosystems, biodiversity, habitat, marine aquatic resources, species distribution and species reproduction and/or other damage that is considered appropriate”.

The author has an opinion to include the above mentioned definitions in NEQA because the NEQA is a specific law which deals with pollution. The term “damage” is not easily defined in the Thai Civil and Commercial code because it relates to personal injuries, property damage and other areas.

(c) Since there are no specific regulations or guidelines dealing with civil liability of oil spills, which can provide a model to calculate the damage and how to assess environmental damage, the improvement of standards for environmental impact assessment mechanisms is highly called for.

In reality, the process of passing laws takes a longer time than the guidelines. If a specific law is too difficult to enact, the author suggests issuing “Guidelines on how to calculate environmental damages” by the Court of Justice.

Guidelines on how to calculate environmental damages by the Court of Justice should be implemented to visualize and avoid obstacles in determining injuries and assessing damages for judges sitting in environmental cases. The application of economic valuation analysis for natural resource damage assessment does not aim to overrule the discretionary power of judges. Judges will have the full independent right to decide on these cases.

(d) The application of interesting methods from other countries in the Thai compensation system would be a good solution in oil spill cases. In China, there are various types of methods provided by the Ministry of Agriculture: for example, the Direct calculation method, the Comparative method, the Site-specific harvesting method, the Corraling statistical method, the Statistical estimation method, the Survey statistical method, the Simulation experimental method, the Production effect method, the Production statistical method, the Expert assessment method, the Fish eggs and larvae estimation method, and other methods as stated earlier.¹⁹

¹⁹ EU-China Environmental Governance Programme, “*General situation of legislation and practice of environmental damage assessment and compensation*”, April 2014, 8

(e) The process of natural resource damages assessment should be clearly specified under the laws or regulations as well. Government agencies spend a lot of time, which causes a delay in performing their duty of natural resource damage assessment. This problem is caused by the lack of a clear damage assessment methodology in the laws or regulations. Many developed countries, such as the U.S.A., have set up compensation systems which comprise of these areas: the scope of compensation to environmental pollution, steps of damage assessment, investigation reports, public participation, and guidelines by the Court of Justice to award damage in the environmental cases. They also set up an administrative agency to study and develop calculation methods.

(f) A Natural Resource Damage Assessment Institution should be established to be responsible for technical and research support, together with the assessment, monitoring, and training process. This institution should include economists, ecologists, scientists, and legal officers. Because of their understanding of biology, ecologists can work with economists to help trustees to deal with Natural Resource Damage Assessment cases.

In other countries like China, the configuration of assessment agencies are also established to deal with environmental damage assessment. In China, the local agencies have been set up to deal with environmental damage assessment. It would be ideal to have this kind of organization in Thailand. Thailand should set up an agency or a commission which can be considered an administrative agency, mainly responsible for natural resource assessment and what quantity of oil spillage impacts the ecology.

(g) A limitation of time for the government agency to complete the process of natural resource damage assessment should be amended from ten years (the general limitation of time), to two years. The claim should be submitted in the court to challenge natural resource damages within two years, because the money that the state will receive as damages can be used for the restoration and recovery of damage to natural resources. Ten years may be too late to recover damage to natural resource.

(h) Support for more environmental research by government authorities, and the development of valuation standards should be enacted. For example, seawater quality tests can show the level of petroleum hydrocarbon and mercury of seawater, to determine the oil spill's impacts on marine and coastal ecology. This empowers judges and government officers to understand the impact and helps them make a decision. For instance, judges can simply use information from research of silt in seawater or marine animals in Ao Phrao area to compare the level of hydrocarbon in silt before and after an oil spill.

6. CONCLUSION

The terms “value of natural resources” and “damage” under Section 97 of The Enhancement and Conservation of National Environmental Quality Act of 1992 (NEQA) should be defined in the Act. The benefit of adding the definition of “damage” in the NEQA is to cover damage to diversity, habitat, marine aquatic resources, species distribution, species reproduction, and other types of damage. Under the terms specified above, the damage to the habitat and reproduction systems of marine aquatic resources are included. The “total value” of natural resources destroyed, lost or damaged by an unlawful act or omission under NEQA should be defined to include both Direct Use Value and Indirect Use Value.

Different kinds of damage assessment methods should be applied in practice to generate an estimate of damage or monetary value of destroyed resources in oil spill cases in Thailand.

Without the guidelines or guidance, it will be difficult for authorities to handle damage assessment. To conclude, due to the severe harm to natural resources *resulting from* a spill, it is necessary to have specific guidelines and/or effective provisions, in order to have a legal framework for the concerning authorities to deal with an analysis of damages to natural resources caused by an oil spill, measures focused on assessment, working mechanisms, and remedies for oil spillage cases in the future.

ANALYSIS ON THE BUSINESS COLLATERAL ACT B.E.2558 (2015): A CASE STUDY OF USING TRADEMARK AS COLLATERAL^{*}

Tanaporn Apikeeratikul^{**}

Abstract

As a result of the financing constraints today, many companies are seeking alternative sources of capital. To use Intellectual Property (IP) as a collateral is the interesting choice that the investors chose to secure their loan.

Other than the tangible assets, offering valuable IP assets to the financial institution can also increase a financing opportunity. In the old days, few of intangible assets are accepted to be a collateral. The forms of assets that accept to be collateralized in Thailand many years ago are (1) a movable property by pledge; and (2) a land registered, a building or some certain types of moveable property by mortgage.

The financial institution normally give loans only to the companies who have operating business histories because those companies are well-known and more reliable. Using IP as collateral is a business option that may offer a financing to the startup and small sized companies who need an additional capital for their starting.

The researcher investigated the scope and methodology to use trademark as collateral in Thailand according to the Business Collateral Act B.E. 2558 (A.D. 2015) (BCA) compare with the Uniform Commercial Code (UCC), Article 9. The law did allow trademark to be used as collateral under the BCA, Section 8, but did not mention any measure and procedure to support it. Due to the special characteristics of trademark, the more specific terms then should be prescribed in the law.

Keywords: Business collateral, Security interest, Trademark, Mortgage, Pledge

บทคัดย่อ

ผลจากข้อจำกัดทางการเงินในปัจจุบัน บริษัทต่างๆ เริ่มแสวงหาแนวทางการสร้างทุนเพิ่มเติมให้แก่บริษัทและการนำทรัพย์สินทางปัญญามาเป็นหลักประกันในการชำระหนี้ก็เป็นอีกแนวทางหนึ่งที่นักลงทุนต่างให้ความสนใจกันเป็นจำนวนมาก

^{*} This article is summarized and arranged from the thesis “Analysis on the business collateral act b.e.2558 (2015): a case study of using trademark as collateral” Master of laws in Business law (English Program), Faculty of Law Thammasat University, 2015.

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นอกเหนือจากทรัพย์สินที่มีรูปร่างแล้ว การเสนอมูลค่าของทรัพย์สินทางปัญญาแก่สถาบันการเงินเป็นอีกแนวทางหนึ่งที่ช่วยเพิ่มโอกาสทางการเงินได้ ในสมัยก่อนมี “ทรัพย์สินที่ไม่มีรูปร่าง” เพียงบางประเภทเท่านั้นที่สามารถนำมาใช้เป็นหลักประกันทางธุรกิจได้ เมื่อหลายปีก่อนประเภทของทรัพย์สินที่สามารถนำมาใช้เป็นหลักประกันทางธุรกิจในประเทศไทยจำกัดเพียงแค่ (1) ทรัพย์สินที่เคลื่อนที่ได้โดยการจำนำ (2) ที่ดินจดทะเบียน, อาคาร สิ่งปลูกสร้าง, หรือ ทรัพย์สินที่เคลื่อนที่ได้บางประเภทโดยการจำนอง

ปกติสถาบันการเงินจะอนุมัติสินเชื่อเงินกู้ให้แก่บริษัทที่มีประวัติความเป็นมาทางธุรกิจ ด้วยเหตุที่บริษัทดังกล่าวมีชื่อเสียงและสามารถไว้วางใจได้ในระดับหนึ่ง การนำทรัพย์สินทางปัญญามาเป็นหลักประกันทางธุรกิจจะช่วยเพิ่มช่องทางการเงินทุนให้แก่บริษัทที่ก่อตั้งใหม่และบริษัทขนาดเล็ก

ผู้สืบค้นได้ทำการศึกษาถึงขอบเขตและแนวทางสำหรับการนำเครื่องหมายการค้าเป็นหลักประกันทางธุรกิจในประเทศไทยตามหลักในพระราชบัญญัติหลักประกันทางธุรกิจ พ.ศ. 2558 โดยเปรียบเทียบกับหลักใน Article 9 แห่ง Uniform Commercial Code (UCC) ของประเทศสหรัฐอเมริกา เนื่องจากพระราชบัญญัติหลักประกันทางธุรกิจ พ.ศ. 2558 นั้นเพียงแต่ขยายขอบเขตให้เครื่องหมายการค้าสามารถนำมาเป็นหลักประกันทางธุรกิจได้โดยใจความตามมาตรา 8 แต่หาได้วางหลักการ วิธีการและขั้นตอนอื่นใดเพื่อสนับสนุนการขยายขอบเขตดังกล่าวไว้ด้วยไม่ เนื่องด้วยลักษณะพิเศษของเครื่องหมายการค้าข้อกำหนดและแนวทางที่เป็นการเฉพาะจึงควรถูกกำหนดไว้เพิ่มเติมในกฎหมาย

คำสำคัญ: หลักประกันทางธุรกิจ, หลักประกัน, เครื่องหมายการค้า, จำนอง, จำนำ

1. INTRODUCTION

Collateral is a specified asset that provides a security interest and serves a protection or a guarantee against a debtor's default to a creditor. In the old days, the creditor trusted that only tangible asset and real estate can be collateralized to secure loan. The creditors did not pay much attention to intangible assets. Only a few types of intangible assets, which provided by law, can be pledged as a collateral.

The laws concerning a security over asset, which are popular and always used in Thailand are (i) mortgage of immovable property and certain types of movable property and (ii) pledge of movable property. There was no specific law stipulated intangible assets to be collateral in the past. An Intellectual Property (IP) which is one of those valuable intangible assets has also been ignored.

As a technological age, the business world nowadays realizes that many intangible assets, especially IP, are priceless and should also be able to collateralize. By using intangible assets as collateral, the investors will greatly increase channels to get more credit in the loan market. Many countries then has revised and updated their laws, regarding the business collateral, to include the intangible assets as collateral. Thailand also agree with this principle and has just enacted the new law at the end of last year, namely “The Business Collateral Act B.E. 2558 (2015) (BCA).”

According to the BCA, many intangible assets, which had been ignored in the old days, become available as collateral. The Intellectual

Property (IP) is also defined in Section 8, sub-section (5) to be usable as collateral.

Among various types of Intellectual Property (IP), trademark is of interest to the investors and the financial institutions to be used as collateral in the security agreement. Trademark is a symbol that represents the company's reputation, products and services. With the trademark, the customers can distinguish their preferred goods or services from the variety of goods or services in the market. Trademarks will make it easier for the customers to make a decision when they do their shopping. Many people, without experience, simply choose the products of the famous brands because they trust the standard quality of such companies. An extensive use of trademarks will build up and establish "goodwill" when the business is doing well. It is obvious that the fame and popularity adhere to the trademarks itself. Hence, trading a trademark in the loan market would give a high credit to secure financing.

Nevertheless, it seems that the BCA just inserted IP in the Act as an afterthought as evidenced by the various terms that is not suitable for IP. For example, the words "loss" and "damage" in the enforcement step have no involvement with IP. As for trademarks, they are normally protected since the date of first use in commerce or have been registered and shall be renewed indefinitely.

There are many outstanding issues which still have to be clarified, such as the methodologies to use and to enforce IP, the valuation of IP, etc. This paper will focus on the problems of and the solutions to the use of trademarks as collateral studying from the leading role of the U.S. Law.

THE IMPORTANCE OF TRADEMARK IN BUSINESS WORLD

As a recognized sign which connects with the appearance of the company, the trademark has an effect in driving a customer's purchasing decision. Many consumers decide to buy a product by viewing the trademark that they know and/or believe in its quality.

In the business perspective, there are many substantial reasons showing that trademark is so much important and useful in commerce. The top reasons are exemplified below.¹

1. An effective communication tool.

Trademarks can convey a sentimental quality of the products and/or services and noting an overview of the company's profile and reputation to the customer in the first place.

2. Very economical tools to communicate with the customers.

Without any additional costs incurred on advertising or marketing activities, the trademark itself can promote products and/or services and

¹ Abigail Rubinstein, "7 Reasons Why Trademarks Are Important to Your Business," <https://www.entrepreneur.com/article/235887>. (Accessed on January 15, 2016)

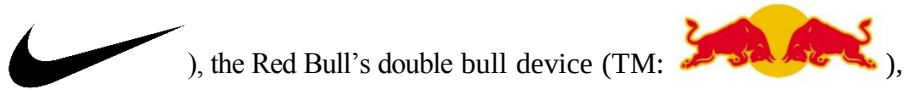
persuade the consumer's demand by permitting the consumers to quickly choose products and/or service items from among other competitive company's offerings.

3. Easy to find our products and/or services from those of the competitors.

With a main duty to distinguish the products of owner from others and/or to specify the origin of the products, trademark is a tool to capture the customer's attention and make the products and/or services outstanding from those of other competitors in the market.

4. Bringing a possible marketing and advertising across borders, cultures, nations, and languages.

Since the trademark could also be a device, symbol, and/or design, problems on the differences in borders, cultures, nations, and/or languages then could be cleared away. For example, the Nike's swoosh design (TM:



the McDonald's M logo design (TM:



), the Starbucks's woman's

face within a green circle design (TM:



) , etc. . These

trademarks are globally recognized, even if they do not show any word or phrase in the specific local language such as Chinese, Japanese, Burmese, or Spanish. The customers would immediately know the brand or the products and/or services of the owner instantly when viewing the trademark.

5. Allowing the business to be utilized on the social media and Internet.

Being a keyword, a phrase, or a major term, trademark can help your products and services to be easily looked for by entering into a search engine (Google, Yahoo, Bing) or in the social media platform (Instagram, Facebook, Pinterest, Twitter). This can help increase the volume of sale products through another channel. Some company uses this channel not only for marketing but also for selling via online shopping.

6. The value of trademark can be appreciated over time.

"The more your business reputation grows the more valuable your brand will be." Trademarks can lead the way to expand your business to the third parties such as a franchisee, and can also be absolutely sold for a specified value from one to another. Sometimes trademark can lead to the merger and acquisition of the business by a larger company and conduce to the conglomerate company.

7. Make the company more attractive for the candidate on job vacancies.

Trademark can inspire a positive feeling in the people's minds. Many people will be interested in finding a job in the famous company. The well-known trademark would persuade a smart person to compete for the job in the company.

8. Trademark will never be expired and the value will increase more and more every day.

In other words, the company will not lose but will receive an income from it from time to time. Trademark can be renewed, normally, in every ten years, and will not be released to the public or any other person without a permission from the original holder. Some trademarks, such as Mercedes and Pepsi-Cola, have been recognized for more than a hundred years.

USING TRADEMARK AS COLLATERAL UNDER THE U.S. LAW

Article 9 of the Uniform Commercial Code (UCC) governs any transaction that creates a security interest in personal property (U.C.C. - ARTICLE 9 - § 9-109 (a) (1).) The secured party under the definition of the UCC, Article 9 - § 9-102 (a) (72) are as follows.

“a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;

- (a) a person that holds an agricultural lien;
- (b) a consignor;
- (c) a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold;
- (d) a trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or
- (e) a person that holds a security interest arising under Section 2-401, 2-505, 2-711(3), 2A-508(5), 4-210, or 5-118.”

Intellectual Property (IP) is not obviously identified in the definition. The Official Comment uses the catch-all term, given “Intellectual Property” as an example of the terms “general intangible” in Article 9 - § 9-102 (a) (42). Trademarks which are generally known as one of the intellectual property, hence included in this term as well.

Like those over other personal property, a security interest over an intellectual property in the United States can be created and attached by filing a “UCC-1 financing statement” with the Secretary of State in which the debtor is located.

To perfect a security interest in collateral under the UCC, Article 9 - § 9-203 (b), there are three important clauses which should be stated as follows:²

1. Value of the collateral must be indicated.

The subject trademark will have to be appraised well before perfecting a security interest with the Secretary of State.

2. The debtor has rights in the collateral or the power to transfer it to a secured party. The debtor, in this regard, can be a trademark owner itself or the assignee who has an exclusive right over that trademark.

3. There is an agreement that the property will be put up to be collateral or an agreement that allows the secured party to take a possession over the collateral.

However, since intellectual property has a unique characteristic, it is advisable to record either a “short-form intellectual property (IP) security agreement” or “confirmatory document” with the “United States Patent and Trademark Office (USPTO)” for trademarks and patents, or with the “United States Copyright Office (USCO)” for registered copyrights. This is for the purpose of data protection in order to help protect some privacy covenants and detailed terms of the contract to the public.³

USING TRADEMARK AS COLLATERAL UNDER THAI LAW

To maximize value of non-performing assets and increase effectiveness of enforcement, recently in November 2015, the Business Collateral Act B.E. 2558 (BCA) has been enacted. The main proposed of this Act is to conform the law to "social change" and "modernity" at the present age. Due to the limited types of property provided by law, many properties of worthiness have been overlooked and missed out. The definition of security asset (also known as “business collateral”) has been defined more broaden to cover “an intellectual property” appears in the Section 8 of the BCA.

In spite of the fact that, previously, the lender hesitated to loan an intangible asset because this type of property has a lack of trust and is hard to evaluate, the fifth in section 8 “intellectual property” becomes available to use as a security. Many companies have been inspired and realized that assets derived from an idea or creativity is priceless. Intellectual property portfolios become an important part of the company’s assets. In addition to the fixed assets and current assets, intellectual property is also accepted by banks and other financial institutions to secure loan.

² Robert K. Weiler, “Basics Of Creation And Perfection Of Security Interests Under Article 9 Of The Uniform Commercial Code,” <http://bhlawpllc.com/wp-content/uploads/2014/04/CREATION-AND-PERFECTION-OF-SECURITY-INTERESTS-RKW1.pdf> (Accessed on May 11, 2016)

³ Svetlana Attestatova, “Intellectual Property – Make Sure You Are Perfected,” <https://www.lendinglawreport.com/2011/04/articles/collateral/intellectual-property-make-sure-you-are-perfected/>. (Accessed on May 11, 2016)

As an intangible asset, it is hard to assess the value of a trademark precisely. An evaluation will also include a goodwill and/or a fame of the business which can rise and fall at any time. The value of a trademark will be high up if it has obtained a legal protection. In general, the value will be considered from (1) intentions of the party; (2) general practice in commerce; and (3) the judicial decision.⁴

4.1 The Cost Approach

The most basic approach which calculates the value from the invested cost since the initial stages of the brand's creation by pointing out the actual cost occurred. This approach examines the direct costs associated with the brand at creating, replacing or reproducing it.

4.2 The Market Approach

This approach is a comparative method to study the price which the customers have paid for similar valuable assets in the similar market. Data on the price paid for comparable brands is collected and adjustments are made to compensate for the differences between those brands and the brand under review.

4.3 The Income Approach

Amongst the three financial analysts, this is the most popular approach which has been widely accepted and used as a brand valuation method in the United States. This approach is to find out the present value of the trademark from its ability to generate revenues in each period of such trademark and predict the future cash flows and profits of it. The future revenue of the brand is involved with the valuation. The unexpected future cash flows may be taken into the discount rate if and when reflected.

CONCLUSION AND RECOMMENDATIONS

The value of trademark is rapidly rising in recent years. Trademarks become so important to the business world. While registering trademark incurred only incidental fees, the registration will give a high profit subsequently. The business world finally found that not only for protection, but the trademark is also possible for trading in the market. There are many channels of trade and distribution that the trademark can be put in benefit. Securing trademark becomes a remarkable choice for the investors from both big company and small company who are interested in financing. Nevertheless, as an intangible asset, securing an intellectual property especially in trademarks is still hard to be perfected.

⁴ Chalermchai Kokkeadtikul, "Method for valuing intellectual property, Office of The National Broadcasting and Telecommunications Commission," <http://chalermchai-nbtc.blogspot.com/2013/06/intangible-asset-present-value-future.html>. (Accessed on July 30, 2016)

To be applicable, an additional principle, regarding use, appraisal and enforcement of an intellectual property which have been used as collateral, should be added into the Business Collateral Act B.E. 2558 (BCA.) In terms of an intellectual property, the specific methodologies should have been specified as well in the Act.

Since the Department of Intellectual Property (DIP) would be the most appropriate division that can deal with the rules for valuing and enforcing legal rights of an intellectual property, the BCA should empower the DIP in the act as to control some legal activity when an intellectual property has been taken to be collateral.

The valuation expert such as “The Valuers Association of Thailand” and “Thai Valuers Association” should play a role. This is to offer price valuation services and set up a standard valuation method. The parties to the security agreement then can have a fair price of the collateral. It is obvious that the financial institution or the court does not have sufficient experience in a specialized field of intellectual property. The provision regarding measure and procedure to appraise the value should be controlled by the IP expert. The valuation if depended on the discretion may be imprecise, unfair, or delay. The BCA should additionally described that the value of the subject intellectual property should be guaranteed for a fair price from “The Valuers Association of Thailand” or “Thai Valuers Association” before taken into the security agreement as collateral. The trademark value should be able to appraise by both of (1) a specialist or a specialized organization or (2) the legislative organization set up by law for righteousness. The non-profit organization of the government would build up trustworthiness to the contracting parties. The debtor will have more confident when securing their trademark with the secured party. The confidence of which would guarantee that a given loan is worthy.

LEGAL MEASURES FOR MANAGING THE DECEASED'S DIGITAL ASSETS IN ONLINE ACCOUNTS*

Tulsiri Wata^{**}

Abstract

In the Internet Age, the digital media play an increasingly important role in people's lives since a lot of people conduct more and more activities online. For example, they may store their photos in social media sites, write their personal blogs on websites and back up their document files in the cloud storage services. As a result of these activities, the online users have created their digital assets which are stored in their online accounts. These digital assets, undeniably, possess economic or sentimental value, which should be considered as part of their estate after their death and shall be passed on to their heirs in the similar way as other tangible property. In this connection, if the digital assets are qualified as copyright works, the heirs shall continue to have copyrights over such digital assets for a period of fifty years after the death of online users.

This thesis concerns inheritance problems of digital assets which are usually barred by the terms of services (TOS), as set out by the internet service providers (ISP). These TOS generally restrict the right of survivorship and transferability of the digital assets in order to protect the online users' data privacy and to reduce their administrative cost. As a result, these terms inevitably prohibit the succession of digital assets by the online users' heirs who have the legal rights to enjoy the benefits of these digital assets. Moreover, Thai law does not currently recognize nor facilitate the access and management of such digital assets by the heirs.

In contrast, certain states in the United States have passed laws and regulations to govern the access and management of these digital assets after the death of the online users since 2005 as several internet service providers, e.g. Apple, Facebook, Google, and Yahoo!, are located there. Therefore, it may be more appropriate for us to learn from the United States' development in order to draft the new law to manage the digital assets of the deceased online users.

As such, this thesis explores the legal approaches under the laws of the United States which govern the access and management of digital assets of the deceased users. Pursuant to the study, the writer is of the view that

*The article is summarized and rearranged from the thesis "Legal Measures for Managing the Deceased's Digital Assets in Online Accounts" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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passing a particular law to deal with the access and management of the digital assets after the death of the online users should be an appropriate approach for Thailand. This is because the proposed law can facilitate the digital executor in accessing the digital assets by requiring the internet service providers to disclose online accounts, while respecting the privacy of the online users.

Keywords: Digital Asset, Online Account, Succession

บทคัดย่อ

ในยุคอินเทอร์เน็ต สื่อดิจิทัลเป็นสิ่งที่มีบทบาทสำคัญต่อการดำเนินชีวิตของผู้คนในสังคมมากขึ้น นับแต่ผู้คนเหล่านั้นมีการดำเนินกิจกรรมทางออนไลน์เพิ่มขึ้น อาทิ การเก็บบันทึกภาพถ่ายไว้บนเว็บไซต์สื่อสังคมออนไลน์ หรือการเขียนบล็อกส่วนตัวลงบนเว็บไซต์ในลักษณะต่างๆ รวมทั้งการเก็บรักษาแฟ้มข้อมูลผ่านทางการใช้บริการเก็บข้อมูลบนคลาวด์ (cloud storage services) อันจะเห็นได้ว่า ผู้ดำเนินกิจกรรมทางออนไลน์ได้มีการสร้างทรัพย์สินในรูปแบบดิจิทัลขึ้น ซึ่งจะถูกเก็บไว้ในบัญชีออนไลน์ของผู้ใช้แต่ละราย ซึ่งล้วนแล้วแต่มีมูลค่าทั้งทางเศรษฐกิจและทางจิตใจ ด้วยเหตุนี้ ทรัพย์สินดิจิทัลเหล่านั้นจึงถูกจัดเป็นทรัพย์สินมรดกอย่างหนึ่งของผู้ตายซึ่งเป็นเจ้าของบัญชีออนไลน์ดังกล่าว และสามารถตกทอดไปยังทายาทได้ในลักษณะเดียวกันกับทรัพย์สินมรดกที่มีรูปร่างอングไปกว่านั้น หากทรัพย์สินดิจิทัลมีลักษณะเป็นงานอันมีลิขสิทธิ์ด้วยแล้ว ยังเป็นการก่อให้เกิดสิทธิแก่ทายาทในการฟ้องคดีเป็นระยะเวลาห้าสิบปีหลังจากเจ้าของบัญชีออนไลน์เสียชีวิตลง

วิทยานิพนธ์ฉบับนี้ ศึกษาเกี่ยวกับปัญหาการตกทอดทางมรดกของทรัพย์สินดิจิทัล ซึ่งโดยทั่วไปแล้ว มักจะถูกจำกัดโดยข้อกำหนดและเงื่อนไขในการใช้บริการ (TOS) ของผู้ให้บริการอินเทอร์เน็ต (ISP) โดยข้อกำหนดและเงื่อนไขในการใช้บริการดังกล่าว มักจะจำกัดสิทธิการเข้าถึงบัญชีออนไลน์ของผู้ใช้บริการ และห้ามการส่งต่อบัญชีออนไลน์ของผู้ใช้บริการให้แก่บุคคลอื่นเพื่อคุ้มครองความเป็นส่วนตัวทางข้อมูลของผู้ใช้บริการ ในขณะที่บางคนก็เป็นการลดค่าใช้จ่ายในการดำเนินการของผู้ให้บริการอีกทางหนึ่งด้วย ซึ่งแสดงให้เห็นว่าข้อกำหนดและเงื่อนไขเหล่านั้นมีลักษณะเป็นการห้ามการตกทอดทางมรดกของทรัพย์สินดิจิทัลไปยังทายาทของผู้ตายซึ่งเป็นเจ้าของบัญชีออนไลน์ ทั้งที่ในความเป็นจริงแล้ว ทายาทเหล่านั้นมีสิทธิทางกฎหมายที่จะได้รับและเข้าใช้ประโยชน์ในทรัพย์สินดิจิทัลดังกล่าว อังไปกว่านั้น กฎหมายไทยที่เกี่ยวข้องที่มีผลบังคับใช้อยู่ในปัจจุบัน ก็ยังไม่มีทั้งมาตรการรับรองหรืออำนวยความสะดวกให้แก่ทายาทของผู้ตายในการเข้าถึงและจัดการทรัพย์สินดิจิทัลที่ถูกเก็บอยู่ในบัญชีออนไลน์ดังกล่าว

ในทางกลับกัน มลรัฐต่าง ๆ ในประเทศสหรัฐอเมริกา ได้มีความพยายามในการผลักดันกฎหมายเพื่อให้สามารถเข้าถึงและจัดการทรัพย์สินดิจิทัลของผู้ตายซึ่งเป็นเจ้าของบัญชีออนไลน์มาตั้งแต่ปี ค.ศ. 2005 เนื่องจากผู้ให้บริการอินเทอร์เน็ตส่วนมากมีสำนักงานใหญ่ตั้งอยู่ที่ประเทศสหรัฐอเมริกา อาทิ Apple, Facebook, Google และ Yahoo! ดังนั้น การศึกษาพัฒนาการทางกฎหมายในประเทศสหรัฐอเมริกา จึงเป็นแนวทางที่เหมาะสมแนวทางหนึ่งที่สามารถนำมาปรับใช้และพัฒนากฎหมายในประเทศไทยซึ่งเกี่ยวข้องกับการจัดการทรัพย์สินดิจิทัลของผู้ตายบนบัญชีออนไลน์

วิทยานิพนธ์ฉบับนี้มุ่งศึกษาและวิเคราะห์ถึงมาตรการทางกฎหมายของประเทศสหรัฐอเมริกาที่นำมาใช้เพื่อการเข้าถึงและจัดการทรัพย์สินดิจิทัลของผู้ตายบนบัญชีออนไลน์ จากการศึกษาในประเด็นดังกล่าว ผู้เขียนเห็นว่า การตรากฎหมายฉบับใหม่เพื่อการเข้าถึงและจัดการทรัพย์สินดิจิทัลของผู้ตายบนบัญชีออนไลน์เป็นมาตรการทางกฎหมายที่เหมาะสมกับประเทศไทย เนื่องจากกฎหมายฉบับดังกล่าวจะให้อำนาจแก่ผู้จัดการมรดกดิจิทัลในการ

เข้าถึงทรัพย์สินดิจิทัล โดยผู้ให้บริการอินเทอร์เน็ตต้องเปิดเผยบัญชีออนไลน์ของผู้ตายแก่ผู้จัดการมรดกดิจิทัล ประกอบกับมีมาตรการคุ้มครองความเป็นส่วนตัวของข้อมูลของผู้ตายซึ่งเป็นเจ้าของบัญชีออนไลน์ควบคู่กันไปด้วย

คำสำคัญ: ทรัพย์สินดิจิทัล, บัญชีออนไลน์, การตกทอดทางมรดก

1. Introduction

In the digital era, nearly everyone around the world increasingly conducts more and more activities online, e.g. storing their photos in social media sites, writing their personal blogs on websites, and backing up their document files in the cloud storage services, via their smartphones, tablets, and computers with different purposes, e.g. entertainment, education, work, and business purposes. Undeniably, the number of the Internet users is fast growing in Thailand. As a result of the global growth of the Internet users, there has been a rapid and large increase of data and information from such uses. Many online users have created their digital assets. Accordingly, they not only store such assets on their own digital devices, e.g. smartphones, tablets, external hard disks, memory cards, or flash drives, but they also store them¹ via the Internet, also known as cloud services organized by internet service providers (ISP), e.g. email accounts, social media sites, cloud storage services, or blogs with user names and password-protected accounts.

The question arises in aspect of what will happen to the online accounts with the digital assets stored therein in the post-mortem world.² The digital assets certainly have the economic value such as computer data,³ the law articles, the science theories, and the outstanding photos created by the famous photographers in the forms of digital media. To support the value of digital assets, McAfee survey in 2011 found that the average Americans believed his or her digital assets to be worth about \$55,000.⁴ Moreover, in a global survey, McAfee found that digital assets stored in digital devices are worth more than \$35,000.⁵ Surprisingly, the survey shows that personal memories, e.g. photos, videos, are the digital assets women value the most. Therefore, these digital assets, undeniably, possess

¹ Evan E. Carroll, et al., *Helping Clients Reach Their Great Digital Beyond: Estate Planning for Electronic Assets*, 150 TR. & EST. 66, 66 (2011).

² John Conner, *Digital life after death: The issue of planning for a person's digital assets after death*, 3 Est. Plan. & Community Prop. L.J. 301, 303 (2011).

³ พินัย วน นคร, *คำอธิบายกฎหมายล้มละลายมรดก*, พิมพ์ครั้งที่ 4 (กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน, 2558), น.41. (Pinai Nanakorn, *Commentaries on Succession Law*, 4th ed. (Bangkok: Winyuchon Press, 2015), p.41.)

⁴ Katy Steinmetz, *Your Digital Legacy: States Grapple with Protecting Our Data After We Die*, TIME (Nov. 29, 2012), available at <http://techland.time.com/2012/11/29/digital-legacy-law/> (last visited July 17, 2016).

⁵ Robert Siciliano, *How Do Your Digital Assets Compare?*, Consumer Blog (May 14, 2013), available at <https://blogs.mcafee.com/consumer/digital-assets/> (last visited July 17, 2016).

economic or sentimental value, which should be considered as part of the users' estate after their death and shall be passed on to their heirs in the similar way as other tangible property under the law of succession. In this connection, if the digital assets are qualified as copyright works, the heirs shall continue to have copyrights over such digital assets for a period of fifty years after the death of users.⁶

Nevertheless, inheritance problems of digital assets are usually barred by the terms of services (TOS), as set out by the internet service providers (ISP). These TOS⁷ generally restrict the right of survivorship and transferability of the digital assets in order to protect the online users' data privacy and to reduce their administrative cost. Consequently, these terms inevitably prohibit the succession of digital assets by the online users' heirs who have the legal rights to enjoy the benefits of these digital assets. Another problem is whether such contractual terms are considered as unfair or unconscionable clauses under the principle of contract law.

As above mentioned, the users shall have the ownership rights and copyrights over the digital assets, but their rights to bequeath the digital assets to the heirs are restricted by the terms of service agreements. Noticeably, the access and management of digital assets may result in either positive or negative outcomes. In aspect of positive outcome, this provides both sentimental and economic value to the heirs. In terms of negative outcome, it may lead to the access of the users' data privacy and confidentiality such as private photos, contents of communications, and confidential files.

Hence, the users' privacy interest tends to be a key problem that some legal scholars will claim as the drawbacks of such access. However, the good value of digital asset inheritance should outweigh the disadvantage of privacy issue.

It is, therefore, important to find suitable solutions dealing with this issue. To maintain the balance between acquiring economic and sentimental benefits for the heirs, protecting the right to privacy of the deceased and persons whom the deceased responded to, and protecting ISPs from liability in case of disclosure of the deceased's accounts should be a desired goal in this study.

2. Digital Assets and Terms of Services Agreements

Definition of digital asset is needed to be broad enough to cope with the rapid growth of technologic development in this digital era, and is required to be sufficiently clear for the best management of the deceased users' digital assets, the protection of ISPs and the general public

⁶ See Section 18 and 19 Thai Copyright Act B.E. 2537

⁷ Such terms of service refer to "No Right of Survivorship," "Non Transferability," or similar terms.

understanding.⁸ Thus, the definition officially provided by the Uniform Law Commission (ULC)⁹ is in part: “*Digital Asset means an electronic record in which an individual has a right or interest.*”¹⁰

Whereas an online account is separate from the digital asset. The online account means “*an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.*”¹¹ The meaning of online account is a broad range to completely cover any contractual arrangement under a terms-of-service agreement designed by ISPs.

The digital assets, commonly known as intangible property, hold a definable form that enables to be named and transferred to others, for example, sending an email with the photo collections to a friend. There is a variety of digital assets in digital forms, e.g. PDFs files, documents, photographs,¹² and blog posts. Significantly, these digital assets can be transformed into physical forms. For instance, digital assets can be printed out as pictures or document papers. These assets may have economic, sentimental, or cultural value.¹³ It is, therefore, required the legal protection for the right of ownership over digital assets, and the digital assets should be considered as part of the deceased users’ estate.¹⁴

Terms of service agreements are relationship between the users and the internet service providers. The ISPs rule all relevant details by their absolute power in the terms and conditions, also known as terms of service (TOS). The users who need to use services must accept them with no choice to negotiate with ISPs by clicking “I agree” or “I accept.”¹⁵ The terms of service agreements are commonly referred to clickwrap agreements,¹⁶ and such agreements are typically upheld by the courts.¹⁷

⁸ Samantha D. Haworth, *Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act*, 68 U. Miami L. Rev. 535, 537 (2014).

⁹ ULC, also known as the National Conference of Commissioners on Uniform State Laws

¹⁰ See Section 2 Definition of Digital Asset of Revised Uniform Fiduciary Access to Digital Assets Act (2015) (published March 8, 2016).

¹¹ See Section 2 Definition of Account of Revised Uniform Fiduciary Access to Digital Assets Act (2015) (published March 8, 2016).

¹² See Samantha D. Haworth, *supra* note 25, at 538.

¹³ *Id.*

¹⁴ *Id.* at 539 to 41.

¹⁵ Alp Toygar, et al., *A New Asset Type: Digital Assets*, 22 Journal of International Technology and Information Management 113, 115 (2013).

¹⁶ Robert Lee Dickens, *Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases*, 11 Marquette Intellectual Property Law Review 379, 401 (2007).

¹⁷ Gerry W. Beyer, “Cyber Estate Planning and Administration,” Lecture, San Antonio, Estate Planners Council, San Antonio Country Club, Texas, May 19, 2015: p.5, available at

The terms of service contain all clauses to police the user's rights and obligations. Some clauses have a major impact on the distribution of digital assets, leading to the difficulties of digital asset inheritance. One of the examples is a clause stating that an account is not transferable, or a clause indicating that your password cannot be shared with others, otherwise, you are in breach of the terms of service. Finally, regarding the explicit death clause, it has rarely been found in TOS. At least two worldwide services, i.e. iCloud and Yahoo! have "No Right of Survivorship" clause in their TOS.¹⁸ Consequently, both services explicitly disclaim any right of survivorship. Therefore, such digital assets in the online accounts cannot be transferred to the heirs and they may be permanently deleted.

3. Legislation on the Disposition of Digital Assets on Death in the United States and Thailand

3.1 The United States (US)

3.1.1 Legal Aspects of Digital Asset and No Right of Survivorship Clause in Terms of Service (TOS)

In US property law system, property is broadly defined as legally enforceable rights among people that relate to things of value. In general, property is categorized into two types, i.e. real property and personal property, which consists of tangible and intangible property.¹⁹ The digital assets do not completely fit into any type of property. Regarding the closest form of digital assets, it should be considered intangible property as long as it continues its digital form online or on a computer.²⁰ Thus, the digital assets are considered intangible property which the users have the ownership right over, and they can be transferred by the users. Furthermore, most of them are qualified as copyright works, because the users have created the digital assets by themselves with their originality. When the users die, such digital assets viewed as intangible property, a part of the deceased's estate, should be passed on to the heirs in the similar way of distribution of tangible property by the will or the intestate succession.

In general, US copyright law provides a term of protection lasting for the life of the author plus seventy years.²¹ Whether it is registered does

<http://www.sanantonioepc.org/assets/Councils/SanAntonioTX/library/Cyber%20Estate%20Planning%20and%20Administration%20-%2005.19.15.pdf> (last visited July 18, 2016).

¹⁸ Ashley F. Watkins, *Digital Properties And Death: What Will Your Heirs Have Access To After You Die?*, 62 Buff. L. Rev. 193, 217-18 (2014).

¹⁹ John G. Sprankling, et al., *Global Issues in Property Law* 1 (Thomson/West. 2006).

²⁰ Nathan J. Dosch & Joseph W. Boucher, *E-Legacy: Who Inherits Your Digital Assets?*, State Bar of Wisconsin (2010), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=83&Issue=12&ArticleID=1907> (last visited July 24, 2016).

²¹ See 17 U.S.C. § 302(a)

not affect the condition of copyright protection. Thus, when the user creates a work, the copyright subsists in that work at the moment of creation. For example, emails, “[p]oems, essays, photographs, videos, commentary, and even status updates are all potentially eligible for copyright protection.”²² Furthermore, the copyright is automatically inheritable.²³ Therefore, the heirs shall continue to have copyrights over the digital assets for a period of seventy years after the death of online users.

Even though the users have the ownership rights and copyrights over the digital assets as well as have the legal right to bequeath these assets to their heirs, the heirs have the difficulties in accessing to the deceased’s accounts due to terms of service agreement (TOS), especially the term of No Right of Survivorship.

According to the doctrine of unconscionability,²⁴ it becomes a general principle of contract law in the common law system.²⁵ This doctrine does not only govern the sale of goods contracts, but also extends to other contracts.²⁶ The doctrine is a key choice against unfair terms in terms of service agreements, known as clickwrap agreements in order to protect a weaker party in bargaining power. This doctrine is one of various defenses for contract law in order to invalidate the enforceable contracts due to unfair clauses. In most jurisdictions, a party must prove procedural and substantive unconscionability to invalidate such unconscionable clauses.²⁷

Even though the terms of service agreements are generally valid and enforceable because the agreements have been formed according to the elements of formation of contract, “No Right of Survivorship” clause may be invalid and unable to bind the parties because of its unfairness. The heirs may argue that such “No Right of Survivorship” term is unconscionable or unfair.

3.1.2 Legislation on Management of Deceased User’s Digital Asset

Since 2005, certain states in the United States have passed legislation to govern the access and management of digital assets after the death of online users. Such state statutes allow the executor or administrator of an estate to access and manage digital assets initially in e-mail contents,

²² Ashley F. Watkins, *Digital Properties And Death: What Will Your Heirs Have Access To After You Die?*, 62 Buff. L. Rev. 193, 215-216 (2014).

²³ *Id.* at 216; See 17 U.S.C. § 201(d)(1).

²⁴ Unconscionability Doctrine is codified in the Uniform Commercial Code (the U.C.C.) § 2-302(1).

²⁵ Gamarello, Thomas, *The Evolving Doctrine of Unconscionability in Modern Electronic Contracting* 6 (2015). Law School Student Scholarship. Paper 647. http://scholarship.shu.edu/student_scholarship/647 (last visit May 10, 2016).

²⁶ พินัย นนกร, “กฎหมายว่าด้วยข้อสัญญาที่ไม่เป็นธรรม : แนววิเคราะห์ใหม่เชิงเปรียบเทียบ,” *วารสารนิติศาสตร์*, ปีที่ 30, ฉบับที่ 4, น. 546, 564 (2543). (Pinai Nanakorn, “Unfair Contract Terms Law: Comparative Analysis,” *Thammasat Law Journal*, Vol.30, Iss.4, p. 546, 564 (2000).)

²⁷ See Gamarello, Thomas, *supra* note 25, at 7-8.

social networking sites, electronically stored documents, and then extended to digital assets and accounts in 2014.²⁸ However, this legislation leads to the problem on the privacy of account users and persons whom users have electronically communicated with.

Later, in 2015 Revised Uniform Fiduciary Access to Digital Assets Act (2015), known as Revised UFADAA, resolves all relevant privacy issues, and help compromise between acquiring the economic and sentimental value and protecting users' privacy interest. Therefore, at least eighteen certain states in The United States, i.e. Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Maryland, Michigan, Minnesota, Nebraska, North Carolina, Oregon, South Carolina, Tennessee, Washington, Wisconsin, and Wyoming,²⁹ have passed the legislation by following the Revised UFADAA as the guideline. The Uniform Act is to facilitate any fiduciary access to digital account to manage digital asset, and facilitate any ISP disclosure online account, together with respecting privacy and intent of online users.³⁰

Section 4 of this Act is the most important section. It addresses a three-tier priority system³¹ which provides ways for users to direct the disposition or deletion of their digital assets after their death, and establishes a priority system in case of conflicting instructions in order to respect the user's intent. Such user's intent could be found in an online tool provided by ISPs in their services, e.g. Legacy Contact (Facebook's online tool), and Inactive Account Manager (Google's online tool), or a traditional estate plan, e.g. a will, other written record. However, if there is no any direction as previously mentioned, TOS will be applied. If such TOS does not address fiduciary access to digital assets, the default rules of Revised UFADAA will be applied. One of the default rules is to make the differences between the term of catalogue of electronic communications, and the term of content of electronic communications, i.e. the body of an electronic message that is not readily accessible to the public. Thus, the

²⁸ See Kristina Sherry, *What Happens to Our Facebook Accounts When We Die?: Probate versus Policy and the Fate of Social-Media Assets Postmortem*, 40 Pepp. L. Rev. 185, 216-20 (2012); Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 Fordham L. Rev. 799, 830 (2014); Rachael E. Ferrante, *Relationship between Digital Assets and Their Transference at Death: It's Complicated*, 15 Loy. J. Pub. Int. L. 37, 51-54 (2013); Ashley F. Watkins, *Digital Properties and Death: What Will Your Heirs Have Access to after You Die?*, 62 Buff. L. Rev. 193, 220-23 (2014); Samantha D. Haworth, *Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act*, 68 U. Miami L. Rev. 535, 541-42 (2013-2014).

²⁹ Uniform Law Commission, Legislative Tracking, available at [http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited July 21, 2016).

³⁰ See Prefatory Note of Revised UFADAA.

³¹ See Revised Uniform Fiduciary Access to Digital Assets Act (2015) (published March 8, 2016).

fiduciary may never access the content of electronic communications without the user's consent.³²

The legislation on the access and management of deceased users' digital assets not only has been passed in the United States, but in European Union (EU) there was also Annual Conference and General Assembly in Vienna, September 2015, which focused on the transfer of property and information at death or incapacity in a digital age³³ held by the European Law Institute (ELI). The ELI and the U.S. Uniform Law Commission (ULC) collaborate on the study of whether this Revised UFADAA can be adapted to European Law.

It can be seen that US, EU, Asia, or even global harmonization is of significance for reducing the gap between law and technology since the Internet becomes a part of human life.³⁴

3.2 Thailand

3.2.1 Legal Aspects of Digital Asset and No Right of Survivorship Clause in Terms of Service (TOS)

According to section 138 of Thai Civil and Commercial Code (CCC), "Property" includes tangible property as well as intangible property, susceptible of having the value and of being appropriated as required conditions. Intangible property includes rights to business having economic value such as intellectual property rights (IP rights), and right to computer data.³⁵

Firstly, the value of property means "Value" not "Price" under section 453 of CCC, the Contract of Sale. The "Value" means the value of itself, "Price" means the market price that both parties need to purchase and sell in the market.³⁶ By way of illustration, something cannot be traded in the market, but it has its own value. For example, something may have the sentimental value for a person and such person gives the importance to that thing as the high value thing, while another person thinks that thing has no

³² *Id.* at 6-7 (Comment of Revised UFADAA; See A Summary of UFADAA at 2 (March 2016), available at <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Revised%202015/Revised%20UFADAA%20-%20Summary%20-%20March%202016.pdf> (last visited July 23, 2016).

³³ European Law Institute (ELI), "Panel on the Revised Uniform Fiduciary Access to Digital Assets Act (2015)," Annual Conference and General Assembly, Vienna, September 2-4, 2015, available at <http://www.europeanlawinstitute.eu/about-eli/structure/general-assembly/ga-2015/panel-iv-fiduciary-access-to-digital-assets-feasibility-study-with-ulc/> (last visited July 22, 2016).

³⁴ *Id.*

³⁵ พันิช ฌ นกร, คำอธิบายกฎหมายลักษณะมรดก, พิมพ์ครั้งที่ 4 (กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน, 2558), น. 41. (Pinai Nanakorn, Commentaries on Succession Law, 4th ed. (Bangkok: Winyuchon Press, 2015), p.41.)

³⁶ เสนีย์ ปราโมช, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ กฎหมายลักษณะทรัพย์ (กรุงเทพมหานคร: โรงพิมพ์ อักษรสาส์น, 2521), น.13. (Saneey Pramoch, Commentaries on Property Law (Bangkok: Aksornsansan Press, 1978), p.13.)

value at all such as ancestors' bones, a lover's letter. Thus, even though that thing costs the low price, or has no price, it is valuable enough to be property if any person needs it as desirable thing. Importantly, the value under section 138 includes, therefore, either the value of itself (worth value), or the economic value.³⁷

Secondly, the ability of "being appropriated" means capability of possessing of the object or claiming for the ownership over that objects. Notably, it does not merely restrict to the level of ownership because there could be various meanings of assertions such as rights of holding the stocks, and rental rights.³⁸

In the writer's point of view, according to the definition of property as mentioned, the digital asset should be categorized as the intangible property. It has the value either sentimental value (worth value) depending on subjective view of each individual or economic value. Also, it is able to be appropriated because it is similar to holding the rights over IP rights, or stocks. The examples of digital assets are the family photos uploaded onto websites, the blogs written onto websites, the documents saved on the cloud storage services, and the how-to videos uploaded onto websites.

Thus, the rights to these intangible properties are also the estate of the deceased users, which is able to pass on to the heirs under section 1599 and 1600 of the CCC. In addition, if the digital assets are qualified as copyright works under Thai Copyright Act B.E. 2537, the heirs shall continue to have copyrights over such digital assets for a period of fifty years after the death of online users under section 18 and 19. In this regards, the copyright is automatically inheritable under section 17.

However, the heirs could not access to the deceased' accounts to acquire the digital assets because of terms of service agreement (TOS), especially "No Right of Survivorship" clause which inevitably prohibits the users' right to bequeath the digital assets to their heirs, resulting in the deletion of all digital assets after death.

Pursuant to this problem, "No Right of Survivorship" clause must be taken into account whether it is contrary to public order under section 150 of the CCC or it is unfair to the users under Thai Unfair Contract Terms Act B.E. 2540.

The writer views that the said clause is not contrary to public order as the following reasons:

(1) Subject to the principle of succession law in the light of testate succession, the estate will be distributed as his bequest in a will. For

³⁷ สมจิตร ทองศรี, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วยทรัพย์ (กรุงเทพมหานคร: สำนักอบรมศึกษากฎหมาย แห่งเนติบัณฑิตยสภา, 2557), น.2. (Somjit Thongsri, Commentaries on Thai Civil and Commercial Code: Property Law (Bangkok: Institute of Legal Education of the Thai Bar under the Royal Patronage, 2014), p.2.)

³⁸ ศรีราชา เจริญพานิช, คำอธิบายกฎหมายว่าด้วยทรัพย์สิน, พิมพ์ครั้งที่ 5 (กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน, 2557), น.24-25. (Sriracha Charoenpanich, Commentaries on Property Law, 5th ed. (Bangkok: Winyuchon Press, 2014), p.24-25.)

example, the individual can exclude some statutory heirs from their estate, can give his whole estate to others, or even can donate all estate for charity by making the will. It can be seen that the testator has the legal right to disinherit the statutory heirs; the testator's intent is legally recognized by law even to restrict the right of disposition of the estate on death;

(2) As the matter of public order, it must affect the public interest. In the case of each online user bound by "No Right of Survivorship" clause, it is considered as private interest of the user and his heirs who are disinherited by this contractual term; and

(3) If this clause becomes void (unenforceable by law) as the matter of public order, the writer is of the view that this legal effect seems to take more advantage of ISPs particularly in usage of free services. Possibly, in the sooner future, this may indeed lead to the difficulties of signing up the accounts for Thai users in utilizing online services because the ISPs will be aware of providing services through TOS to Thai users.

Nevertheless, the writer opines that this clause is considered as unfair term to the users who have the right of disposition of property on death under the law of intestacy, because the users have invested time and effort, and also their originality and creativity in creating such digital assets, constituting copyright works. It can be clearly seen that this clause prohibits the users' right to bequeath the estate to their heirs, together with restricts the heirs' right to acquire the estate. Therefore, this causes the online users to be obliged to comply or bear more burden than that which could have been anticipated by a reasonable person in normal circumstances under section 4 and section 10 of Thai Unfair Contract Terms Act B.E. 2540. Whereas, even ISPs offer the base-level free services, they also gain a lot of benefits as remuneration under section 3 of this Act from the paid-for upgraded services for which the online users pay fees, e.g. iCloud storage upgrades.³⁹ Moreover, the ISPs gain advertising revenue from the advertising companies like e-commerce companies such as advertising fees in the event of the free service. Upon comparison of gaining advantages between the ISPs and the online users under section 4 and section 10, "No Right of Survivorship" term is considered the unfair term. However, this Act does not provide the complete protection to the online users because the interpretation of the unfair contract terms is still debatable since the word 'fair and reasonable' depends on the courts' discretions.

3.2.2 Legislation on Management of Deceased User's Digital Asset

Compared to the legislation governing the disposition of deceased user's digital asset in the United States, there has been no the legislation concerning this issue in Thailand. Also, the Thai existing laws are insufficient, because the laws could not facilitate the heirs to access the

³⁹ See iCloud Terms and Conditions, available at <http://www.apple.com/legal/internet-services/icloud/en/terms.html> (last visited June 27, 2016).

deceased's online accounts for managing the digital assets. It is time for Thailand to raise the public awareness of digital asset disposition, and also to develop our Thai legislation to catch up with the technologic development in the Internet age.

4. Conclusions and Recommendations

The digital asset is considered property under the CCC and is qualified as copyright work under Thai Copyright Act B.E. 2537. It shall be passed on to the heirs under the law of succession. Indeed, the users have the ownership right and copyright over this estate and the heirs have the right to receive this legacy. However, there are the difficulties in the disposition of digital assets after death, which barred by TOS explicitly No Right of Survivorship clause, as set out by ISP. These TOS generally restrict the right of survivorship and transferability of the digital assets in order to protect the online users' data privacy and to reduce their administrative cost. As a result, the heirs of deceased users are unable to access to the online accounts to obtain these estate. Such terms shall be considered as unfair terms under Thai Unfair Contract Terms Act B.E. 2540.

The writer would suggest that passing a particular law governing digital assets after death would be the appropriate legal approach so as to better align with the increasing percentage of Thai online users who are conducting transaction online. The proposed law aims to facilitate digital executor access and ISP disclosure, together with respecting both privacy and intent of the online user, also respecting privacy of other persons whom the deceased user digitally responded to. This proposed law would adhere to the traditional approach of succession law with respect to the intent of online user and promotion of the digital executor's ability to administer the online user's property. As lesson learnt from US legislation, the writer would suggest that the Revised UFADAA is the most suitable guidance; therefore, the fundamental concept of this Act should be adopted into the legislation in Thailand.

Firstly, the three-tier priority system should be established because this system resolves the conflict of instructions which could be found in an online tool or a traditional estate plan as the way of respecting the user's intent to direct the disposition or deletion of digital assets after death.

However, if there is no any instruction as previously mentioned and TOS does not address the executor or administrator of an estate access to digital assets, this proposed law should require the appointment of digital executor by statutory heirs after the death of online user. This digital executor should be a technology specialist⁴⁰ and liable person. The digital

⁴⁰ Jill Choate Beier and Susan Porter, *The Digital Asset Dilemma*, NYSBA Trusts and Estates Law Section Newsletter Vol. 46 No. 2, 7 (2013), available at http://www.mcglawyer.com/pdf_files/TrustsandEstatesSummer2013.pdf (last visited July 24, 2016).

executor may access and manage the deceased user's digital assets but may never access the content of electronic communications without the user's consent.⁴¹

Secondly, the proposed law should require the internet service provider to grant the digital executor of the deceased person access, take control of, conduct, continue, or terminate any online account, and manage the digital asset.

Thirdly, the proposed law should grant the immunity from liability for ISP' acts or omissions done in good faith when the ISP discloses online account to the digital executor.

Lastly, the proposed law should have the criminal sanction provision for misconduct made by the digital executor. If the digital executor discloses the deceased's confidential information to the public, which are likely to cause the damage to the deceased's family or others, the digital executor shall be liable therefor.

⁴¹ See A Summary of UFADAA

INCOME TAXATION ON NONPROFIT ORGANIZATIONS STUDY ON ASSOCIATIONS AND FOUNDATIONS¹

Viriya Ponhem²

Abstract

Foundations and associations (“FFAs”), as nonprofit organizations, are incorporated for the purpose of public charitable works. FAAs should be supported by the government sector and make them as government representative to help communities in need such as public works, accidents, fires or disasters. The government should encourage citizens to participate in charitable activities by volunteering or donating money. FAAs work as a center for citizens to operate charitable activities and to benefit the countries and reduce economic inequality.

From the study, however, there are some disadvantages found in the Thai Revenue Code and the relevant provisions that provide inadequate income tax measures for FAAs, for example, income tax computation is based on gross income tax charge before deduction expenses, and very limit tax deductible contributions and carryover computation tax rule.

These findings suggest that Thai Revenue Code of income tax on FAAs and the Notification of the Ministry of Finance on Income Tax and Value Added Tax (No.531) which exempt income tax on public charitable FAAs should be amended to encourage a better performance of charitable works of FAAs.

Keyword: Income taxation on nonprofit organizations, foundations, associations, charitable contributions.

บทคัดย่อ

มูลนิธิและสมาคมในฐานะที่เป็นองค์กรที่ไม่แสวงหากำไรจัดตั้งขึ้นเพื่อดำเนินการเพื่อประโยชน์ต่อการกุศลสาธารณะ พวกเขาจึงควรได้รับการสนับสนุนโดยภาครัฐและเป็นส่วนหนึ่งในการเป็นตัวแทนของภาครัฐเพื่อที่จะช่วยเหลือชุมชนในทางจำเป็น เช่น งานสาธารณะ อุบัติเหตุ อัคคีภัย หรือ ภัยพิบัติ รัฐบาลควรจะสนับสนุนพลเมืองเพื่อเข้าไปมีส่วนร่วมในกิจกรรมการกุศลโดยในสมัคร หรือการบริจาคเงิน มูลนิธิหรือสมาคมจึงเป็นศูนย์กลางของพลเมืองเพื่อที่จะดำเนินกิจกรรมการกุศลและสร้างผลดีต่อประเทศและลดความเหลื่อมล้ำทางเศรษฐกิจ

อย่างไรก็ตามจากการศึกษา ยังมีข้อเสียบางประการในประมวลรัษฎากรและบทบัญญัติที่เกี่ยวข้องซึ่งเกี่ยวข้องกับมาตรการทางภาษีเงินได้ต่อมูลนิธิและสมาคม ตัวอย่างเช่น การคำนวณภาษีบนฐานรายได้ก่อนหัก

¹ This article is summarized and rearranged from the thesis “Income Taxation on Nonprofit Organizations Study on Associations and Foundations” the requirements for the degree of Master of Laws in business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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รายจ่ายและข้อจำกัดด้านการหักลดหย่อนเงินบริจาคและการนำเงินบริจาคส่วนเกินในปีปัจจุบันไปลดหย่อนในปีถัดไป (carryover)

จากผลการศึกษาที่กล่าวมาข้างต้นจึงขอเสนอแนะว่าบทบัญญัติบางประการในประมวลรัษฎากร การจัดเก็บภาษีเงินได้ ของมูลนิธิและสมาคมและประกาศกระทรวงการคลังว่าด้วยภาษีเงินได้และภาษีมูลค่าเพิ่ม (ฉบับที่ 531) ควรได้รับการแก้ไขเพื่อที่จะสนับสนุนการดำเนินงานการกุศลสาธารณะของมูลนิธิและสมาคม

Introduction

Currently, there is a major increase in population and an increase in the citizens who are facing the social issues such as poverty, homelessness, disabilities, unemployed etc. As a result, there is an increase in social problems and violence such as criminal problems, drug addiction problems, family problems, deterioration in morality. The government alone cannot provide enough social welfare coverage for all these social problems. One of the ways to reduce the social problems and improve society is to work together both public sector and private sector and support nonprofit organizations which become very powerful and resourceful because the nonprofit organizations are composed of knowledge, skill, selflessness, and a precisely charitable goal; they also have a lot of resources and equipment to carry out the tasks. Therefore, nonprofit organizations have a lot of essential roles in helping the people in need, protecting people, resolving social issues which are increasing and getting worse in the different areas.³

Foundations and associations (“FAAs”) are regarded as “nonprofit organizations” established by the virtue of the Thai Civil and Commercial Code under section 110 (foundations) and section 78 (associations). When they are registered, they will have the status of legal entities. FAAs are established for charitable, religious, art, science, literature, education, or for other public purposes.⁴

In supervising a foundation, section 128 of the Thai Civil and Commercial Code gives the power to the registrar to examine a foundation to ensure that it is operating in accordance with section 135, which allows ordinary citizens to examine documents regarding the foundation that is kept by the registrar. In addition, section 131 allows the registrar to revoke the license of foundation if the aim of it is against public order or if it has stopped operating for more than two years above, because there is a fear that an anonymous person may use the name of the nonprofit organization in a negative way.

³ Thai Junior Encyclopedia Project, <http://kanchanapisek.or.th/kp6/sub/book/book.php?book=12&chap=3&page=t12-3-infodetail09.html>.

⁴ Amara Pongsapich. **Thailand Nonprofit and Social Development**. Bangkok: Chulalongkorn University. 70 (1997).

For income tax purposes, in the past, FAAs did not have any duty to pay income tax until the year 1982 (2525 B.E.)⁵ when income tax law on FAAs was introduced and to be effective in 1983 (2526 B.E.) This was stem from the views that tax exemption on FAAs could be abused for the aims of tax evasion as a result FAAs' moral images.

Because FAAs operate for public and charitable purposes and do not have any objectives of distributing any profits among members, the provisions related to income tax on FAAs should not only contribute to equity but also support nonprofit organizations. Furthermore, nonprofit organizations like FAAs are legally prohibited to distribute the profits among their members.

Definition of Nonprofit Organization

A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors or trustees. It should be noted that a nonprofit organization is not barred from making profits. It is only the distribution of the profit that is prohibited among members.⁶

Actually, it is very difficult to define exactly the meaning of “nonprofit organization”. There are many scales, scopes and forms. It operates to cover public activities such as education, religions, museums, hospitals etc. Many researchers have provided definitions of nonprofit organizations in relation to various aspects.

Rules on income taxation on nonprofit organizations study on foundations and associations compared to foreign law

Thai law

The historical background of income tax on FAAs did not started from income taxation but it started from the tax deduction from charitable contributions. It means that the Thai Revenue Code allowed taxpayers who donate money to FAAs registered with the Minister of Finance as public charitable FAAs to receive the tax deduction from charitable contributions at the maximum amount of 10 percent of the contributions after the deduction of other tax expenses and allowances. This regulation seemed like a good starting point to implement tax measures in order to foster charitable organizations in form of associations and foundations.

Tax deduction from charitable contributions has restricted to FAAs as prescribed by the Ministry of Finance because the authorities may consider that these kinds of them are examined by law. The law consists of many conditions and they must operate activities for public. Therefore,

⁵ สุเมธ ศิริคุณโชติ. “ภาษีเงินได้กับมูลนิธิและข้อคิดเห็นบางประการ.” *สรรพากรสาส์น*. เล่มที่ 4: 2528, น. 81

(Sumet Sirikunchoat. “Taxable income of foundations and some suggestions.” *Sanpakornsarn*. No. 4: 2528, at 81.)

⁶ James J. Fishman. *Taxation on Nonprofit Organizations Cases and Materials*. Fourth Edition. New York : Foundation Press, 2015, at 3-4.

individuals who donate money to public charitable FAAs can trust that their money would be spent on charitable works. In addition, this policy indirectly fosters FAAs' activities because instead of direct payment from government, they can obtain contributions from individuals and reduce to depend on government. Accordingly, FAAs have to adapt and operate well to make individuals trust them. Currently, the maximum amount of the tax deductible contributions is 10 percent after deduction of expenses and allowances for individuals and the maximum amount of the tax deductible contributions is 2 percent of net profit for companies.

While, for income tax purposes, in the past, FAAs were exempt from income tax (both personal income tax and corporate income tax) because they were not under any tax unit in Thai Revenue Code. Until 1982 (2525 B.E.), FAAs must be taxable on income tax which was effective in the accounting period of 1983 (2526 B.E.) except the FAAs prescribed by Minister of Finance under section 47 (7) (b) of the Revenue Code that is still exempt income tax⁷.

FAAs must be taxable on gross income, the amount of money person earns before other deduction, at the tax rate of 5 percent, while, income derived from trade or business activities taxed at 1 percent. Afterwards, the tax rate has been increased from 5 and 1 percent to 10 and 2 percent respectively.⁸ Incomes from registration fees or maintenance fees from members, cash or assets received as donations, cash or assets received as gifts and income from private school registered on behalf of associations or foundations except tutorial schools are out of scope of income taxation.⁹ FAAs prescribed by Minister of Finance as charitable organization are exempt from income taxation.

From what has been mentioned above, at present, the Thai Revenue Code classifies two types of associations and foundations: (1) General FAAs which they are taxable on gross income and (2) FAAs prescribed by the Minister of Finance in accordance with Section 47 (7) (b) under the Thai Revenue Code which are exempt on income tax.¹⁰

The United States Law

In the United States, nonprofit organizations fall under Internal Revenue Code.¹¹ They are probably tax-exempt organizations if they qualify and apply it. Although nonprofit organizations have tax-exempt status, they may be required to be taxable on unrelated business income

⁷ Sumet Sirikunchoat, *supra* note 5.

⁸ สุเมธ สิริคุนโชติ. *ภาษีอากรตามประมวลรัษฎากร 2558*. กรุงเทพฯ : เรือนแก้วการพิมพ์, 2558. หน้าปก (Sumet Sirikunchoat. **Taxation under Thai Revenue Code 2558**. Bangkok : Ruenkaew Printing, 2558, cover page.)

⁹ The Thai Revenue Code, section 65 Bis (13)

¹⁰ จิระภา สุขีประเสริฐ. "ภาระหน้าที่การเสียภาษีของมูลนิธิหรือสมาคม." *สรรพากรศาสตร์*. เล่มที่ 02 : 47, น.50. (Jirapar Sukipraseard. "*Tax burdens of Foundations and Associations.*" **Sanpakornsarn**. No. 02 : 47, at 50.)

¹¹ The Internal Revenue Code, section 501 (c)

which is not exempt's purposes. Passive investment income such as dividends, interest, rents and royalties are excluded from unrelated business income.¹² Charitable contributions to qualified organizations under section 501 (c)(3) organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes are also tax deductible expenses. The limits of tax deductible contribution are 50 percent maximum of adjust gross income for individuals and 10 percent maximum of taxable income for companies. Moreover, if the deduction from contribution exceeds the limit in the present year, it can be carried over for the next five years.

The Japanese law

Nonprofit organizations can be established in a variety of ways, such as associations and foundations, public interest associations and foundations, special nonprofit organizations, organizations established under special law etc. Also, the main objectives of their activities are to serve public charities. Commonly, nonprofit organizations are exempt from the corporate tax, but any incomes they receive from profit-making activities are taxable on corporate tax which is subjected to the same tax rate as a company. In addition, the accounting for nonprofit organizations is subject to the business accounting practice as fair and appropriate. For tax benefit, Japanese nonprofit organizations consist of various categories. Therefore, income taxation of nonprofit organizations may be complex. The limit of tax deductible donation is 40 percent maximum of individuals and 3.125 percent maximum of companies.¹³

Problems on income taxation on foundations and associations under Thai law

Currently, there are several problems related to income taxation on foundations and associations. The problems can be classified the two major issues: (1) problems related to income tax computation and organizational features and (2) problems related to charitable contributions. They will be explained through the following:

1. Problems related to income tax computation and organizational features

1.1) Tax base and tax rate of income taxation on foundations and associations

At present, income taxation on FAAs shall be taxable on gross income at 10 percent while income derived from business, commerce, agriculture, transmission of real estate and others ways which fall under section 40(8) of the Thai Revenue Code are taxable on gross income at 2 percent.¹⁴ There are some problems of income taxation facing as follows:

¹² The Internal Revenue Code, section 512 (b)(1)-(5)

¹³ Council of foundations. "*Foundation Basics*." <http://www.cof.org/content/japan>.

¹⁴ The Thai Revenue Code, section 39 and income tax rate schedule.

Firstly, income taxation on FAAs is inappropriate for the current situation because income taxation on them has been at this rate since the accounting period of 2529 B.E. even though the tax rate of companies as profitable organizations which are taxable on net profit was decreased from 30 percent to 23 percent in the accounting period of 2555 B.E. and has been further decreased to 20 percent in 2556-2558 B.E. It shows that the tax rate imposed for FAAs has never been decreased even though they have roles in developing the society and community and do not have any profit-making agendas.

Secondly, although income taxation on gross income of FAAs is actually taxable on lower tax rate compared to companies and they are disallowed to deduct any expenses.¹⁵ They, therefore, are not concerned about the items which shall not be allowed as expenses in the calculation of net profits. However, it is the disadvantages when FAAs operate its business and lose money but they still have to pay income tax on gross income, unlike companies that do not need to pay tax if they are going through the loss and, furthermore, it can bring the loss to carry forward in the next five accounting period. For this reason, it seems as if the FAAs bear the tax burden too much or not although their aims do not to make profit to distribute among members. Moreover, keep in mind that tax policy related to them should be imposed to examine FAAs rather than a channel of earning for the government.¹⁶

In United States, nonprofit organizations can apply to obtain tax exempt status under section 501(c) of the Internal Revenue Code. Nonprofit organizations are divided in two types: (1) nonprofit organization that allows people who donated money to deduct as charitable contributions and (2) nonprofit organization that disallows to deduct charitable contributions. Donors can be deductible contributions, if it is charitable organization in accordance with section 501(c) (3) of Internal Revenue Code such as educational, religious organizations etc.

1.2) No measures to examine financial receipts of foundations and associations

Commonly, general FAAs have to submit annual income tax return (PND 55) in each accounting period but they do not need to submit a balance sheet, accounting sheet, or any financial statement. In this case, it leads to an absence in examining of the real financial status of FAAs.¹⁷

On the other hand, public charitable FAAs as tax-exempt status are not required to submit annual income tax return (PND 55) but they need to submit a balance sheet, and accounting sheet to the Revenue Department for examining on whether it is operating in the conditions that the Revenue Department imposed or not.

¹⁵ The Thai Revenue Code, section 65 Ter.

¹⁶ Sumet Sirikunchoat, *supra* note 5, at 85.

¹⁷ Jirapar Sukipraseard, *supra* note 10, at 50.

1.3) Problems of Notification of the Ministry of Finance on Income Tax and Value Added Tax (No. 531)

There are three problems related to Notification of the Ministry of Finance (No. 531) which specifies the qualifications of public charitable organizations, foundations and associations in order to obtain tax-exempt status:

Firstly, FAAs which expect to apply for public charitable organizations established at least than one year is inappropriate because it is difficult to ensure whether or not those are registered for the purpose of public charitable works. Accordingly, to be easier to ensure, the qualified FAAs should be registered more than one year. In the past, FAAs that expected to apply for the public charitable organizations would have to be set up for at least three years which made it ensure to prove that the organizations had the history in helping the societies. Yet, the regulation was changed in 2555 B.E. from three years to one year. The problem is that the period of one year is released in the situation in examining and supervising the donated money for tax deductible contributions which increase the risk for the Revenue Department.¹⁸

Secondly, public charitable FAAs are barred from deriving revenue from a purchase or sale or provision of service in ordinary course. The clause disallows the public charitable FAAs to derive revenue from sales or services in ordinary course except if the sales are related to religion, education, clinic and social work. It is understandable that the government wishes for public charitable FAAs that is truly beneficial, transparent, and does not engage in business activities that produces profits from businesses and commercial purposes. In addition, these FAAs are more likely to receive subsidy from donors because they also receive tax deductible contributions.

However, although FAAs will receive the subsidy from donors, it may not enough to administer them and work for the society. The government, therefore, should allow the general FAAs including the public charitable FAAs to operate for profits from income and spend to charitable activities. The government does not have to concern that the public charitable FAAs will behave to obtain more profits because they must be imposed to spend at least 60 percent of expenses for charitable purposes.

Thirdly, the regulation provides the authority to Minister of Finance to deem any FAAs properly qualified as public charitable FAAs even if they disqualify because certain FAAs may reasonably encourage the governmental policy to resolve the problems of society so they should gain more sponsorship directly from the citizens and the citizens are further able to enjoy tax deductible contributions. On the other hand, this seems impartial because it could be seen as abusive authority of the Minister of

¹⁸ Thai Plubica. *“Revenue Department collects information related to donations to Foundations and Associations backward 20 years.”*
<http://thaipublica.org/2013/04/personal-income-tax-structure-18/>

Finance¹⁹ because it possibly equips to a political tool for the founders who have political connections to establish public charitable FAAs to obtain tax-exempt status and spend the money in a negative way. In order that after they registered as a public charitable FAAs, they are incentive to people to donate money and enjoys tax deductible contributions. As a result, if it is not established for public purposes, then it possibly leads to the government losing revenues.

1.4) Profits received from passive investment income should be exempt from income taxation

Passive Investment Income is income that receives without doing anything such as royalties, dividends, interest, and rents. In the United States, these kinds of income are excluded from unrelated business income which would be taxable because they do not cause unfair competitive problem. These kinds of income are recognized as proper source of income of nonprofit organizations.²⁰

Under Thai Tax Law, FAAs must be taxable on gross income which is all categories of income they receive.²¹ Royalties, dividends, interest shall be taxable at 10 percent of all income except dividends under conditions according to section 65 Bis (10) of Thai Revenue Code.

2. Problems related to charitable contributions

2.1) The limit of deductible contributions is too small.

Currently, the limit of deductible contributions is rather small limit. The amount of contributions has been 10 percent maximum of income after deduction of expenses and allowances for individuals²² and 2 percent maximum of net profit for companies.²³

It is true that tax deductible contributions become highly criticized because there are both sides that agree and disagree with tax deductible contribution policy which can lead to the wealthy gaining more benefits because donors are able to donate their own money and enjoy tax deductible contributions. On the other side, donors who voluntarily donate money should not receive benefits return. This policy may cause an “upside-down effect” which wealthier people will receive more benefits than poorer people under the progressive tax rate.²⁴

Nevertheless, the dissents argue that supporting contribution policy lead to help people in the rural areas and reduce the gap between the rich

¹⁹ Sumet Sirikunchoat, *supra* note 5, at 86.

²⁰ Fishman, *supra* note 3, at 370.

²¹ Thai Revenue’s ruling No. 0702/4315

²² The Thai Revenue Code, section 47 (7)(b).

²³ The Thai Revenue Code, section 65 Ter (3)

²⁴ วิริยะ นามศิริพงศ์พันธุ์, “ปฏิรูปภาษี การคลังและงบประมาณ เพื่อลดความเหลื่อมล้ำและสร้างความเป็นธรรมในสังคม.” *วารสารนิติศาสตร์*. เล่มที่ 1: 2555. (Wiriya Narmsiripongpan. “Tax reformation, public finance and budget for a reduction of inequity and contributing fairness to societies.” *Faculty of Law’s Journal*. No.1: 2555).

and the poor in society because the rich is willing to donate the money and enjoys tax deductible contributions. In fact, the benefits donors receive are not much higher than the money they donate depending on the tax rate they reach. Additionally, FAAs can help people faster and more efficient.

2.2) Disallowance to carryover of the excess amount of contributions

Under the Thai Revenue Code, if individuals contribute a large amount of money for donations over 10 percent of their income in the current year, they cannot carry over and deduct in the excess amount of contributions to the next year. Therefore, adding the clause which allows such excess amounts to be carried over can be useful for donors because they will receive a full amount of tax deductible contributions. In the United States, if individuals donate money over a limit to allow deductible by law, they can carry it over to the next five years. This encourages individuals and companies to donate to public interest.

Recommendations for income taxations on foundations and associations

1. Recommendations related to income tax computation and organizational features

1.1) Abolish income taxation on gross receipt on FAAs

Currently in Thailand, FAAs are taxable on gross income. Basing on gross income is not the most favorable measure to encourage FAAs. Therefore, Thai tax law should be amended by abolishing the Income Tax Rates Schedule related to tax on gross income before deduction of any expenses of FAAs which is not income under Section 65 Bis (13) at 10 and 2 percent on gross receipt and add Tax Rates Schedule to tax on net profit of unrelated trade or business income at 20 percent. Also, section 65 Bis (13) should be amended to exempt income tax on FAAs except income from net profit derived from unrelated trade or business income.

1.2) Impose the policy to examine financial statement of FAAs

As general FAAs in Thailand pay tax on gross receipts, they have to submit annual income tax return for FAAs (PND55) but they are not required to submit financial statement (except public charitable organizations prescribed by the Minister of Finance) so the Revenue Department cannot prove income they receive. As a result, to be tax-exempt, they should be required to submit income tax returns with financial statement to the Revenue Department. If they fail to do this, their tax-exempt status will be revoked.

1.3) Amend the Notification of the Ministry of Finance on Income Tax and Value Added Tax (No. 531)

The Notification of the Ministry of Finance on Income Tax and Valued Added Tax (No. 531) should be amended as follows:

Firstly, the period of time established of at least only one year is too short to prove that foundations are charitable organizations. Therefore, this clause should be amended to make foundations be established for at least three years.

Secondly, it should allow the foundations prescribed by the Minister of Finance or public charitable organizations to conduct activities such as purchase or sale or provision of services.

Thirdly, Notification of the Ministry of Finance on Income Tax and Value Added Tax (No. 531) should be used only for FAAs which qualify to receive tax exempt status. It should not provide the power to Ministry of Finance to deem any FAAs properly because the donors can obtain deductible contributions if they donate to foundations which mostly work for charitable purposes.

1.4) Exclude income taxation on passive investment income

Passive investment income such as income from royalties (40 (3)), interest or dividends (40(4)) and income from rent (40(5)) are types of income that have no impact on competition. Therefore, fees for royalties, interests, dividends and rent should be exempt from taxation.

2. Recommendations related to charitable contribution deduction

2.1) Increase the limit of tax deductible contributions

To foster charitable activities, the limit of tax deductible contributions should be increased from 10 percent of individual income and 2 percent of companies' net profits.

2.2) Allow excess donations to be carried over to the next year

Add a provision to allow the excess of donations in the current year to be carried over to the next year so that tax payers are able to fully deduct contributions (within the limit that is set for each year).

Problems of Bank Guarantee under Thai law¹

*Warisa Charoensuk***

Abstract

Bank guarantee or demand guarantee is a basic financial instrument issued by a bank under the commitment to pay maximum amount money arising merely upon making a demand for payment in a stipulated form and presenting documents as prescribed in the demand guarantee within the validity period. It means that even if the parties of the underlying contract cannot specify that there is a default under the underlying contract, the bank still has a duty to pay if proper complying documents are presented.

While the rules of guarantee under the Civil and Commercial Code which are the accessory guarantee or the suretyship, are inconvenient and disadvantageous to a creditor because the guarantor (the surety) can invoke not only his defenses but also the principal debtor's defenses against the creditor. Whereas banks shall not act as accessory guarantors since it is difficult to determine in which situations they should pay. In addition, the bank may involve in a dispute between the parties under the underlying relationship.

There are many ICC rules concerned with the demand guarantees; UCP 600, ISP 98 and URDG 758. Under such rules, the demand guarantees are independent undertaking from the underlying contract, and they are paid on demand (primary undertaking) with no proof of default. However, these rules are extremely different from the rules of guarantee under the Civil and Commercial Code of Thailand.

At the present, Thailand has no direct law or regulation concerning with the demand guarantee. So when the Courts judges decide a case concerning bank guarantee, the Courts have to decide a case by trying to adapt the rules of guarantee under Thai law. Therefore, this thesis focus on the proposed solution to issue bank guarantee comply with ICC regulations by specifying essential conditions of bank guarantee under the doctrine of freedom of contract and autonomy of will, including Section 150 of the Civil and Commercial Code.

Keywords: Bank Guarantee, Demand Guarantee, Independent Guarantee, Bank Guarantee in Thailand

บทคัดย่อ

¹The article is summarized and rearranged from the thesis “Problems of Bank Guarantee under Thai law” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

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หนังสือค้ำประกันหรือ คิมาแนคการันตี เป็นเครื่องมือทางการเงินซึ่งออกโดยธนาคารภายใต้คำมั่นสัญญาว่าชำระเงินไม่เกินจำนวนตามที่ระบุไว้ในหนังสือค้ำประกัน โดยธนาคารจะชำระเงินตามที่ผู้รับประโยชน์เรียกร้อง เพียงแต่ผู้รับประโยชน์แสดงเอกสารที่เกี่ยวข้องภายในระยะเวลาที่กำหนดไว้ ทั้งนี้ ธนาคารมีการผูกพันต้องชำระเงินให้แก่ผู้รับประโยชน์แม้ว่าคู่สัญญาตามสัญญาหลักจะไม่แสดงการผิดนัดผิดสัญญาต่อธนาคารก็ตาม

ในขณะที่กฎหมายเรื่องค้ำประกัน ตามประมวลกฎหมายแพ่งและพาณิชย์ของไทย ซึ่งมีลักษณะเป็นสัญญาอุปกรณ์นั้น ก่อให้เกิดความไม่สะดวกและไม่ส่งผลดีต่อเจ้าหนี้ผู้รับหนังสือค้ำประกันเป็นหลักประกันของสัญญา เนื่องจากผู้ค้ำประกันตามกฎหมายไทยสามารถยกข้อต่อสู้ไม่เพียงแต่ข้อต่อสู้ของตนเองเท่านั้น ผู้ค้ำประกันยังอาจยกข้อต่อสู้ของลูกหนี้ขึ้นต่อสู้เจ้าหนี้ได้ด้วย ในขณะที่ธนาคารก็ไม่ควรจะเป็นผู้ค้ำประกันแบบลูกหนี้ชั้นที่สอง เนื่องจาเป็นการยุ่งยากที่ธนาคารจะต้องพิจารณาถึงการผิดนัดผิดสัญญาของสัญญาระหว่างเจ้าหนี้และลูกหนี้ชั้นต้น อีกทั้งจะทำให้ธนาคารซึ่งอยู่ในฐานะผู้ค้ำประกันต้องเข้าไปเกี่ยวข้องกับสัญญาหลักซึ่งตนเองไม่ได้เป็นคู่สัญญาด้วย

ตามกฎหมายของสภาหอการค้าระหว่างประเทศ (ICC) มีหลายกฎที่เกี่ยวข้องกับคิมาแนคการันตี เช่น UCP 600, ISP 98 และ URDG 758 เป็นต้น ซึ่งภายใต้กฎดังกล่าวข้างต้น หนังสือค้ำประกันจะมีลักษณะเป็นเอกสารสัญญาซึ่งแยกต่างหากออกจากสัญญาหลัก และมีลักษณะเป็นหนังสือชั้นต้น ไม่ใช่หนังสือรองเหมือนการค้ำประกันตามกฎหมายไทย ซึ่งทำให้มีลักษณะที่แตกต่างจากการค้ำประกันตามประมวลกฎหมายแพ่งและพาณิชย์ของไทยเป็นอย่างมาก

ในปัจจุบันประเทศไทยยังไม่มีกฎหมายหรือกฎใดๆที่เกี่ยวข้องกับการบังคับใช้หนังสือค้ำประกันโดยเฉพาะเจาะจง ซึ่งเมื่อศาลต้องตัดสินคดีเกี่ยวกับหนังสือค้ำประกัน ศาลก็จะต้องใช้กฎหมายลักษณะค้ำประกันตามประมวลกฎหมายแพ่งและพาณิชย์มาตัดสิน ดังนั้น วิทยานิพนธ์ฉบับนี้จึงมุ่งเน้นหาแนวทางที่จะทำให้หนังสือค้ำประกันที่ออกในประเทศไทยมีผลบังคับเหมือนกฎของสภาหอการค้าระหว่างประเทศ โดยการระบุเงื่อนไขที่จำเป็นในหนังสือค้ำประกันโดยใช้หลักอิสระในการเข้าทำสัญญา (Freedom of Contract) และไม่ให้ขัดกับความสงบเรียบร้อยและศีลธรรมอันดีของประชาชนตามที่กำหนดไว้ในมาตรา 150 แห่งประมวลกฎหมายแพ่งและพาณิชย์ เพื่อให้สอดคล้องกับหลักสากล

คำสำคัญ: หนังสือค้ำประกัน, คิมาแนคการันตี, การค้ำประกันแบบเอกสารสัญญา, หนังสือค้ำประกันในประเทศไทย

Introduction

In the international trade which parties are in different countries, therefore, security for performing a contract is necessary. Normally, there are several types of securities for performing the obligation of a contract. Bank guarantee is one of an essential security which is widely used all around the world. Because banks are the credible institution, so that the provision of a written undertaking by a bank in favor of a buyer payable on demand is a reliable security for both a buyer and a seller. Such undertakings are variously known as demand guarantee. Additionally, it may be called letter of guarantee (L/G) or bond or standby letter of credit (SBLC).

Demand guarantee is a financial instrument issued by a bank under a commitment to pay maximum amount money arising merely upon making a demand for payment in stipulated form and presenting documents as

prescribed in the demand guarantee within the validity period.² It means that even if the parties of the underlying contract cannot specify default under the underlying contract, the bank still has an obligation to pay if proper complying documents are presented.

While traditional means of security such as an accessory guarantee or suretyship, is inconvenient and disadvantageous to a creditor because an accessory guarantor can invoke the principal debtor's defenses against the creditor. While banks shall not act as accessory guarantors since it is difficult to determine in which situations they should pay and they may become involved in a dispute between the parties under the underlying relationship.³

The beginning development of the law in this new area occurred in the early 1970s.⁴ The device of guarantees payable on demand originated from the former practice of exporters and contractors having to place a cash deposit which could immediately be seized by the importer and employer in the event of default. This technique was found inconvenient. It necessitated exporters and contractors raising funds which remained tied up for a considerable period and this adversely affected their liquidity position.⁵ Then the idea of first demand guarantee was created to substitute for cash deposits.

Characteristics of demand guarantee

The characteristics of demand guarantee are as follows;

- Independent undertaking

The demand guarantee is separated from the underlying contract. The rights and obligations created by the demand guarantee are independent of those arising from the underlying contract. Also, the guarantor has a duty to pay when the creditor presents related document. When the guarantor received the presentation, the guarantor has to pay on first demand and must not prove any default of the underlying contract.

- Documentary in character

The demand guarantee is a documentary in nature. The guarantor will pay to the conditions specified in the demand guarantee, the presentation of a demand and other related documents. The guarantor has no obligation to authenticate such presentation documents that the beneficiary submits to him.

- No proof of breach

Due to the guarantor complies merely with the terms and conditions specified in the demand guarantee, hence the guarantor did not

² Michelle Kelly-Louw. **Selective Legal Aspects of Bank Demand Guarantee**, University of South Africa (2008)

³ Roeland Bertrams. **Bank Guarantees in International Trade**. Kluwer Law International (2004) at 2

⁴ *Id* at 3

⁵ *Id* at 53

know conditions under the underlying contract. When the beneficiary presents documents for claiming, the guarantor has to pay without proving a default of the applicant.

The suretyship

The suretyship or the accessory guarantee is the contract which one person (the surety) agrees to answer for some existing or future liability of another (the principal debtor) to a third person (the creditor).⁶ The essential feature of a contract of guarantee is that the liability of the surety is always secondary while the principal debtor remains a primary liability to the creditor. There is no liability on the surety unless and until the principal debtor has failed to perform his obligations. Consequently, the nature of the secondary obligation is that the surety is merely liable to the same extent that the principal debtor is liable to the creditor and the surety is not liable if the underlying obligation is void or unenforceable. This liability is known as the principle of co-extensiveness.

Different characteristics between the demand guarantee and the suretyship

Although the demand guarantee and the suretyship share a significant characteristic in that they both provide security to the creditor in respect of non-performance of the debtor under the underlying contract between the debtor and the creditor, they have different characteristics. The guarantor under the demand guarantee has a primary obligation, and the guarantee is independent of the underlying contract, whereas, the suretyship is a secondary obligation and the surety's liability depends on default of the primary obligation. Accordingly, they have several different characteristics as follows:

(1) Since the demand guarantee is the independent guarantee, therefore, the payment obligation of the guarantor depends on the terms and conditions specified in the demand guarantee and the presentation documents from the creditor, whereas the payment obligation of the surety depends on the principal's default of the underlying contract.

(2) Liability of the guarantor is immediate when the creditor calls for payment and proof of default is not a condition of payment. The liability of the surety incurs when the creditor can prove that the principal debtor has defaulted and the surety may invoke defenses against the creditor, in addition, the guarantor may set-off his own debt before paying to the creditor.

(3) According to the surety's obligation to pay under the non-performance of the principal debtor under the underlying contract, so that the surety is entitled to invoke the principal debtor's defenses against the creditor. On the contrary, under according to the principle of independence

⁶ Geraldine Mary Andrews and Richard Mille, **Law of Guarantees**. (5th ed). Sweet & Maxwell Limited, 2008 at 1

of the demand guarantee, the guarantor cannot invoke the principal debtor's defense derived from the underlying contract against the creditor. Additionally, the guarantor's payment obligation is solely determined by the terms and conditions of the demand guarantee.

The parties involved in demand guarantee

In general, demand guarantee will have at least three parties involved. Nevertheless, it possibly increases up to four parties, which are defined as follows:

- Principle (also called “Applicant”/ “Account Party”)

The principle or the account party or the applicant, is the party who has a duty to perform an obligation which imposes in the underlying contract, e.g., a contractor, a supplier, or an exporter. The applicant has to perform work covered by the underlying contract and be required security for performing his obligation by the demand guarantee.⁷

- Beneficiary

The beneficiary is another party of the underlying contract, for example, a buyer, an employer, or an importer, who favors the issued demand guarantee. The beneficiary is the only one party that has a right to claim under the demand guarantee.⁸

- Guarantor

The guarantor is the party who issues the demand guarantee requested from the applicant. Almost guarantors of the demand guarantee are banks because banks are financial institutions. Thus, they are credible.

- Instructing Party

In general, the instructing party will involve in the demand guarantee when the applicant and the beneficiary are in different countries. From the beneficiary's point of view, the locally-issued guarantee should be avoided if possible, because it is hard to control unjustified claim payable overseas.⁹ The beneficiary requires demand guarantee issued by his satisfied bank, which normally locates in his country (beneficiary's bank), and the applicant does not use banking service with such bank. The applicant will request his bank (applicant's bank) to communicate with the beneficiary's bank (counter-guarantor), which usually locates in the beneficiary's country, to issue the demand guarantee to the beneficiary. Therefore, the instructions are given by the applicant's bank (instructing party) to the beneficiary's bank (counter-guarantor)¹⁰ to issue the demand

⁷Pierce, A., **Demand guarantees in international trade**, London : Sweet & Maxwell, 1993 at 8

⁸*Id*

⁹Pierce A., *supra* note 6, at 27

¹⁰ See article 2 of the ICC Uniform Rules for Demand Guarantees, ICC Publication No. 758

guarantee against a counter-guarantee by the instructing party who is entitled to an indemnity with the applicant.¹¹

Structures of demand guarantee

The relationship of the parties under the demand guarantee has two structures as follows; direct demand guarantee and indirect demand guarantee. Normally, a contract structure has two parties; a creditor and a debtor, but the demand guarantee is not merely a two-party relationship. The demand guarantee is a promise of the guarantor that if the third party (the applicant) has failed to perform his obligation, the guarantor will pay instead. Therefore, under the demand guarantee, there are three contracts combined in this structure; (1) a contract between the beneficiary and the applicant (the underlying contract) (2) a contract between the guarantor and the applicant (the application) and (3) a contract between the beneficiary and the guarantor (the demand guarantee). Hence, the demand guarantee is a multi-party relationship which is linked with each contract together. Also, the demand guarantee has three parties and four parties involved. The relationship of the parties under the demand guarantee has two structures as follows;

(1) Direct Demand Guarantee

As aforementioned, three parties guarantee is called “direct demand guarantee” because the applicant’s bank directly issues the guarantee.¹²

For example, Mr.A is in Thailand has negotiated a sale of goods contract with Mr.B, who lives in another country. A condition of the contract between Mr.A and Mr.B specifies that Mr.A has to provide a bank demand guarantee for securing performance obligations to Mr.B. Therefore, Mr.A (the applicant) requests G Bank (the guarantor), which is Thai Bank, to issue the guarantee in favor of Mr.B (the beneficiary). G Bank is not obliged to carry out this instruction unless it has agreed to do so, and it will require to set aside funds or to have other provisions to cover its prospective liability under the guarantee.

When Mr.B believes that Mr.A has breached the underlying contract, Mr.B will present a demand to G Bank, with other documents specified in the guarantee (if any). G Bank must pay to Mr.B and then reimburses from Mr.A under their contract (the application).

According to the direct demand guarantee structure, it shall be separated into three contracts as follows:

1. The underlying contract between the beneficiary and the applicant;
2. The application (counter-indemnity or reimbursement contract), independent undertaking between the applicant and the guarantor; and

¹¹ Michelle Kelly-Louw , *supra* note 1, at 21

¹² Roeland Bertrams, *supra* note 2, at 16

3. The demand guarantee (or guarantee) issued by the guarantor in favor of the beneficiary.

(2) Indirect Demand Guarantee (counter-guarantee)

In the case of the beneficiary requires the guarantee issued by a bank in his country, the applicant who is not a customer of the beneficiary's bank has to ask his bank to communicate with the local bank in the beneficiary's country to issue the guarantee. Instructions are then given by the applicant's bank (instructing party) to the beneficiary's local bank to issue the guarantee against a counter-guarantee by the instructing party who in turn is entitled to indemnify from the applicant. In this situation, the beneficiary's bank (counter-guarantor) is the issuer of the demand guarantee and the guarantor of the demand guarantee.

Thus, the applicant arranges for its bank, the instructing party, to request the other bank, based in the country of the beneficiary, to issue the guarantee to the beneficiary against a counter-guarantee from the instructing party. This four-party guarantee is termed an indirect demand guarantee. Therefore, indirect demand guarantee, there is an additional contract that is the contract between the instructing party and the guarantor who is the bank in the beneficiary's country (the counter-guarantee).

International regulations related to demand guarantee

There are many international rules concerned with the demand guarantees. For instance, the regulations of International Chamber of Commerce ("ICC") such as the Uniform Rules for Demand Guarantee ("URDG"), the Uniform Customs and Practice for Documentary Credits ("UCP") or the International Standby Practices ("ISP"). Under such rules, the demand guarantees are independent undertaking from the underlying contract, and they are paid on demand (first undertaking) with no proof of default. However, these rules are different from the rules of guarantee under the Civil and Commercial Code of Thailand. The rule of guarantee under the Civil and Commercial Code is a suretyship which the obligation of the surety depends on the default of the principal debtor, and the obligation of the surety does not arise until the principal debtor has failed to perform his primary obligation under the underlying contract.

Problems of bank guarantee under Thai law

At the present, Thailand does not have a direct rule related to the demand guarantee results in that Thai courts have to decide a case by trying to adapt rules of guarantee under the Civil and Commercial Code of Thailand. While the demand guarantees under URDG are independent undertaking, the guarantee under the Civil and Commercial and Code of Thailand is different. This conflict consequently causes many problems of bank guarantee issued under Thai law. For instance, one of the nature of demand guarantee is the guarantor has to pay on first demand so that the bank has to pay when receives documents from a creditor. Nevertheless, under the Civil and Commercial Code, a guarantor has to invoke a primary

debtor's defenses against a creditor because a bank may lose the right to recourse from the debtor if a bank ignores to invoke defenses.

Furthermore, ICC regulations mentioned that the demand guarantee has to specify an expiry date because the demand guarantee is a document which the guarantor concerns only with terms and conditions specified in the guarantee, especially the amount and duration of the duty to pay. The rules under URDG 758 and UCP 600 mentioned that a party who makes a demand for payment has to present a claim before an expiry date of a bank guarantee. It means that a bank guarantee under URDG 758 and UCP 600 must have a claim period. Moreover, the demand guarantee under URDG 758 will terminate after three years from the issuing date. On the contrary, the Civil and Commercial Code does not specify a claim period as same as URDG. Additionally, when the Supreme Court judges decide cases about a bank guarantee which includes a condition related to a claim period, they usually have two different views as follows:

- First, the court decides that if the bank guarantee imposes a claim period, it means that the guarantor tries to reduce the period of prescription due to the prohibition of Section 193/11 of the Civil and Commercial Code subject to the Supreme Court's Decision No. 16947/2557 and No. 2208/2558.
- Second, there are other court's decisions decides that the bank who is the guarantor has the right to specify a claim period because it did not reduce the period of prescription subject to The Supreme Court's Decision No. 6622/2546 and No. 3739/2551.

Additionally, the Regulations of the Office of the Prime Minister on Procurement B.E.2535 (1992) has stipulated bank guarantee templates which private companies who are requested the bank guarantee to secure their obligation of the procurement contract with the government agencies, have to use the template attached with these regulations. Whereas there are many differences between the bank guarantee issued to the private sector and the public sector such as the bank guarantees from the principal debtor are the security to perform an obligation under the underlying contract, and they are a penalty which the court may reduce it if it is disproportionately high. Additionally, if there are disputes between the private sector and the public sector concerning an administrative contract, the parties have to file a case to the Administrative Court. Also, the administrative claims have to be filed within five years as from the day the cause of action known or should have been known subject to the Establishment of Administrative Courts and Administrative Court Procedure Act B.E.2542.

Research findings

According to ICC regulations, several rules have benefits to all parties such as the following;

- (1) Due to the demand guarantee is independent undertaking, the beneficiary is entitled to be paid when the beneficiary presents a demand complying with the terms of the guarantee, regardless of whether or not any

breach has actually occurred in the underlying contract and regardless of the amount of the final resulting loss (no proof of actual payment of the demand guarantee is required). By contrast, in a suretyship, the creditor has to prove the debtor's breach and may be paid after setting-off or the surety may invoke the debtor's defenses arising from the underlying contract against the creditor.

(2) The demand guarantee is paid on (first) demand which is primary obligation so that the beneficiary would receive payment immediately when he calls for demand without the need of having to establish a case first and regardless of the applicant's objections. A further advantage to the beneficiary under the function of first demand guarantee is that the applicant will be put pressure to complete the contract because if the guarantor is called for payment from the beneficiary, the guarantor has to pay immediately.

(3) The demand guarantee is irrevocability so that the guarantee will be secured until an expiry date and the guarantor cannot terminate.

(4) The demand guarantee has to specify an expiry date or expiry event so that there is a limit of liability period which releases the bank from its liability if no call has been made on or before the expiry date. Therefore, the bank will know the period of its risk and can manage reserved money.

(5) The beneficiary is entitled to be paid when presents a demand that complies with the terms of the guarantee, besides, the bank has to determine the presentation within a given period. Thus, when the bank received the presentation, the bank has to pay immediately and the beneficiary will receive payment immediately.

Conclusions and Recommendations

From the research, if the issuing bank guarantees in Thailand complies with ICC regulations; UCP 600 or ISP 98 or URDG 758, it will be the proposed solutions that brings about an efficient bank guarantee which advantage to all parties. If the guarantee is found to be an independent guarantee, the beneficiary will be paid immediately and without proving of the applicant's default under the underlying contract. An advantage to the applicant is that if the bank issues the bank guarantee, it shows that the applicant has a financial standing and ability to perform a contract. Furthermore, when the guarantor has received a claim from the beneficiary, the duty of the guarantor is only examination the terms and conditions of the demand guarantee. The guarantor has not the obligation to invoke any applicant's defense against the beneficiary, and then the guarantor can pay without examining a defense of the applicant.

Therefore the proposed solution for issuing bank guarantee in Thailand is designation the conditions complying with ICC regulations. Under the existing Thai law, the Civil and Commercial Code and the doctrine of freedom of contract and autonomy of will, including Section 150 of the Civil and Commercial Code, the parties of the bank guarantee should comply with the conditions as follows:

(1) For complying with the independent undertaking characteristic, all parties should agree with the concept that the bank guarantee is separated from the underlying contract. Therefore, there are three (direct demand guarantee) or four (indirect demand guarantee) separate contracts; the underlying contract, the bank guarantee (and the counter-guarantee) and the application.

(2) The bank should specify the expiry date and the claim period for limiting the period of the obligations of the bank (the guarantor) and the applicant (the principal debtor). Therefore the bank will reserve fund for a proper period, and the applicant will not pay for guarantee fee for ten years. In addition, this specification probably forces the beneficiary to claim within the period and to receive the payment in a proper duration. If the beneficiary takes a long time for calling to claim, the documents which must be used to prove the default of the applicant may disappear.

(3) For complying with pay on demand characteristic, the bank guarantee should be specified a condition that the bank agrees to be a joint debtor with the applicant, so the bank has no right to require that the applicant is first called to perform the obligation and other executions as specified in Section 688, 689 and 690 of the Civil and Commercial Code.

(4) In practice, the bank and its customer, who requests to issue the bank guarantee, always signs the application form which is the independent contract. In addition, conditions of the application between the bank and the applicant and the bank guarantee must not be unfair condition to the applicant.

LEGAL PROBLEMS ON DEMURRAGE IN VOYAGE CHARTERS^{*}

Weena Akarachotikavanith^{**}

Abstract

Demurrage is a term concerned with delay during the terminal operations, and delays during the voyage, before the ship reaches her destination. The current view is that demurrage is liquidated damages for a failure to complete loading and discharging in the allowed laytime which constituted a breach of charter. Maritime transport has the importance to Thailand, however there is no specific Thai law concerning demurrage. Therefore, when an issue concerning demurrage arising from maritime transportation is submitted to Thai court, there are problems in Thai legal system concerning the application of charter contract, status of demurrage, difference of each legal status, burden of proof. In particular, the crucial problems are whether the Thai court is entitled to reduce demurrage agreed by the parties and why, whether Thai court is entitled to grant the interest, lastly, if the parties do not agree on demurrage, whether the shipowner is entitled to ask for demurrage and why. Moreover, in this article, we will look at demurrage in an Unfair contract perspective according to Unfair Contract Act B.E. 2540. On the question of whether the agreement of the parties to pay demurrage is deemed as an unfair contract. This new image of perspective will reduce the burden of the consumer and the charterer who may have the liability to pay for demurrage.

Keywords: Demurrage, Voyage charter, Voyage, laytime

บทคัดย่อ

ดีเมอร์เรจเป็นคำที่เกี่ยวข้องกับค่าชดเชยในกระบวนการของท่าเรือปลายทาง และในระหว่างเข้าเรือ ก่อนที่เรือจะไปถึงจุดหมายปลายทาง มุมมองในปัจจุบันนั้น ดีเมอร์เรจ คือ ค่าเสียหายที่กำหนดไว้ล่วงหน้าหากไม่สามารถบรรทุกของขึ้นเรือและลงจากเรือได้ภายในระยะเวลาที่กำหนด ซึ่งเป็นการผิดสัญญาเช่าเรือ แม้การขนส่งทางทะเลมีความสำคัญสำหรับประเทศไทย แต่ก็ยังไม่มีกฎหมายไทยที่บัญญัติเกี่ยวกับเรื่องดีเมอร์เรจไว้โดยเฉพาะ ดังนั้นเมื่อมีข้อพิพาทเกี่ยวกับดีเมอร์เรจขึ้นมาสู่ศาลไทย ระบบกฎหมายไทยจึงประสบปัญหาเกี่ยวกับการบังคับใช้สัญญาเช่าเรือ สถานะทางกฎหมายของดีเมอร์เรจ และความแตกต่างกันของแต่ละสถานะนั้น รวมถึงภาระการพิสูจน์ โดยเฉพาะอย่างยิ่ง ปัญหาที่ต้องพิจารณาคือ ศาลไทยมีอำนาจปรับลดดีเมอร์เรจที่คู่สัญญาตกลงกันหรือไม่ เพราะเหตุ

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The article is summarized and rearranged from the thesis “Legal Problems on Demurrage of Voyage Charter” Master of Laws Program in Business Laws, Faculty of law, Thammasat University, Thailand, 2015

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ใด ศาลไทยมีอำนาจให้ดอกเบี้ยหรือไม่ และหากคู่สัญญาไม่ได้ตกลงค่าดีเมอร์เรจกันไว้ ผู้ให้เช่ามีสิทธิเรียกร้องค่าดีเมอร์เรจหรือไม่ เพราะเหตุใด ยิ่งไปกว่านั้นบทความฉบับนี้จะศึกษาเกี่ยวกับดีเมอร์เรจในมุมมองของพระราชบัญญัติว่าด้วยข้อสัญญาอันไม่เป็นธรรม พ.ศ. ๒๕๔๐ ว่าข้อตกลงที่จะชำระค่าดีเมอร์เรจระหว่างคู่สัญญาจะถือว่าเป็นข้อสัญญาที่ไม่เป็นธรรมหรือไม่ ซึ่งเรื่องนี้ถือเป็นเรื่องใหม่ที่จะลดภาระของผู้บริโภคและผู้เช่าเรือซึ่งมีหน้าที่ต้องชำระค่าดีเมอร์เรจ

Introduction

Demurrage is a technical term in maritime transportation which means a sum agreed by the charterer to pay as liquidated damages for delay beyond a stipulated or reasonable period of time for loading or unloading.

The Demurrage concept is one of the aspects of the Maritime Transportation, particularly, the law relating to *voyage charters*. In foreign laws especially English law, demurrage is becoming more important to maritime transportation all over the world. For these reasons, lawyers or those involved in Maritime transportation should pay more attention to demurrage both in practical and legal aspects.

The development of this branch of the law has been closely allied to the historical and social changes that took place as sail gave way to steam, and more recently as improved methods of communication have given greater central control to those controlling the commercial adventure, which voyage charter still represent. It is perhaps one of the few remaining areas of English common law in which there has been little intervention.

The establishment of standard forms of charter, the meaning of almost each word of which has been the subject of judicial interpretation, might have resulted in a statistic law, but fortunately that has not been so and the law continues to develop to meet present and future needs. The increasing use of additional clauses to charterparties, some of which are not always accidentally ambiguous, will also no doubt to be continued to provide much material for future litigation.¹

Whilst most of the cases relating to demurrage arise in the context of the charterparties, it must always be remembered that the law relating to these matters also plays an important role in contracts, such as sale contracts.

Demurrage on English American law is always a contractual creation, while in other systems it may be provided by law.²

To understand the background of demurrage, we need to understand the principle of the Charter contract. Basically, there are two parties to the contract which are a freighter and a carrier. The carrier has a duty to carry goods from one place to another. The freighter's main obligation is to pay the freight. Anyhow, the freighter need not be the goods owner or the shipper who delivers the goods nor the consignee to whom the

¹ John Schofield. **Laytime And Demurrage**. 1 (5th ed. London Singapore. 2005)

² Hugo Tiberg. 530 **The Law of Demurrage**, (3rd ed. London Stevens & Sons, 1979)

goods are consigned at the port of discharge, or even the receiver who has to pay for the freight. He may be the third party who charters the ship for carrying goods belonging to other persons.³

Under *Voyage charter*, a vessel is operated for a single voyage. The person who charters the ship is known as voyage charterer; the payment is called freight and the contract a voyage charter-party.

This form of charter is running within tramp traffic (free traffic). The charterer may be the person owning the cargo but may also charter the vessel for someone else's account. The "owner" of the vessel from whom the actual voyage charterer charters the ship may himself be a time charterer or even a voyage charterer who sub-charters (sub-lets) the ship. In case the owner is not the registered owner of the ship, he is normally described as "time chartered owner" or "disponent owner". Thus there may be a chain of charter parties which must all be regarded as separate and distinct.⁴

For a voyage charter, the owner retains the operational control of the vessel and is responsible for the operating expenses such as port charges, bunkers, extra insurance, taxes, etc. The charter's costs are usually cost and charge relating to the cargo.

From a practical point of view, a voyage charter means that the owner promises to carry on board a specific ship a particular cargo from one port to another. The vessel shall arrive at the first loading port and be ready to receive the cargo on a certain day or within period of time.

Where the charterer carries out the loading and/or discharging, the parties generally agree that he will have a certain period of time at his disposal for the loading and discharge of the vessel, the so called *Laytime*. The laytime is a reflection of the basic idea of voyage charter, that the owner, who is operating the ship, will be liable for delay in connection with the transit, whereas the charterer may be liable (or partly liable) for delay in connection with the loading and discharging. If the charterer fails to load and/or discharge the vessel within the laytime specified, he has to pay compensation for the surplus time used, this so-called *Demurrage*. On the other hand, if the charterer saves time for the ship by carrying out of his undertakings more quickly than agreed, he may be entitled to claim compensation, which is called *Despatch Money*.⁵

Demurrage, in its strict meaning, is a sum agreed by the charterer to pay and be paid as liquidated damages for delay beyond a stipulated or reasonable period of time for loading or unloading. Where the sum is only to be paid for a fixed number of days, and a further delay takes place, the ship owner's remedy is to unliquidated "damages for detention" for the

³ *Id* at 4.

⁴ Lars Gorton, Rolf Ihre, Arne Sandeværn. 82 **Shipbroking And Chartering Practice** (2nd edition, Lloyd's Of London Press Ltd., 1984)

⁵ Lars Gorton, Rolf Ihre, Arne Sandeværn. **Shipbroking And Chartering Practice**, 81-84 (2nd edition, Lloyd's Of London Press Ltd., 1984)

period of delay. The phrase “demurrage” is sometimes loosely used to cover both this meaning.⁶

The practical functions of demurrage are for the shipowner's immediate benefit and for the charterer's benefit. The whole purposes of demurrages are⁷ (1) a reparative function for the carrier when his ship has suffered delay, (2) a retentive function (that of the preventing the premature abandonment of voyages) and (3) a punitive and incentive function for the charterer to pursue duties diligently.

In Thailand, there are not any laws or regulations stating or governing demurrage. However, any person involving maritime transportation has to abide by the clauses of the charter contract, bill of lading, or intention of the charter parties, for which demurrage is normally mentioned. Also Thai Supreme Court has rendered the verdict relating demurrage for years.

In light of the above, the objectives of this article consist of the following;

Firstly, to explain demurrage in various contents which are (1) charter parties, (2) laytime, and (3) late layday, including legal status, legal enforcement, procedure and effect of demurrage in foreign laws, focusing on USA , UK , and Europe in comparison to Thai legal system.

Secondly, to analyze and criticize legal principles and procedures relating to demurrage in Thai court, including legal status of demurrage in Thai legal system on the question of whether it is penalty, or damages. Also, the study will include the legal consequences of earnest, penalty, or damages comparing to foreign laws.

Lastly, to find a solution and legal procedure in order to apply demurrage in Thai court.

Definitions and nature of laytime and demurrage

When the shipowner, either directly or through an agent, undertakes to carry goods by sea, or to provide a vessel for that purpose, the arrangement is known as a contract of the affreightment. Such contracts may take a variety of forms, although the traditional division is between those embodied in the charterparties and those evidenced by the bills of lading. Where the shipowner agrees to make available the entire carrying capacity of his vessel for either a particular voyage or a specified period of time, the arrangement normally takes the form of the charterparty. On the other hand, if he employs his vessel in the liner trade, offering a carrying service to anyone who wishes to ship the cargo, then the resulting contract of carriage will usually be evidenced by the bill of lading.

⁶ Stewart C. Boyd, Andrew S. Burrows, Davidp- Foxton. **Scrutton on Charterparties and Bill of ladings**, 298 (20th edition London: Sweet and Maxwell 1996)

⁷ Hugo Tiberger. **The Law of Demurrage**, 40-41, 95 (3rd ed. London Stevens & Sons, 1979)

1. Definitions and Objectives of Demurrage

Demurrage is a term concerned with delay during the terminal operations, and delays during the voyage, before the ship reaches her destination.⁸

In origin, however, demurrage did not mean a sum payable for breach of contract, but ‘a sum payable under and by reason of the contract for detaining a ship at the port of loading or discharge beyond the allowed time.’⁹ In *Lockhart v. Falk*, Cleasby B¹⁰ said:

“The word demurrage no doubt properly signifies the agreed additional payment for an allowed detention beyond a period with specified in or to be collected from the instrument: but it has also the popular or more general meaning of compensation for undue detention; and form the whole of each charterparty concerning the clause in question we must collect what is the proper meaning to be assigned to it.”

On the other hand, in *Harris v. Jacobs*¹¹, having said in the course of argument that demurrage is an elastic term, Brett MR said in his judgement:

“Demurrage is the agreed amount of damage which is to be paid for the delay of the ship caused by a default of the charterers at either the commencement or the end of the voyage.”

Ten years later, in *Lilly v. Stevenson*¹², Lord Trayner took the view:

“Days stipulated for by the merchant on demurrage are just lay days, but lay days that have to be paid for. If the charterparty provides that charterer shall have ten days to load cargo, and ten days further on demurrage at a certain rate per day, the shipper has twenty days to load, although he pays something extra for the last ten, loading within twenty days is fulfilment of the obligation to load...”

The Court of Appeal in *Steel, Yoing & Co v. Grand Canary Coaling Co*¹³ took a similar view, Collins MR said:

“...it was also contended that the charterparty was broken by the vessel being allowed to go on demurrage; but this is not so, for the payment of demurrage is merely a payment for the use of the ship, and not damages for a breach of charterparty”

And in the same case, Mathew LJ said:¹⁴

“There is no ground for suggesting that the obligation to pay demurrage is by way of damages for a breach of charterparty. It is merely a payment for use of the ship.”

In *Inverkip Steamship Co v. Bunge & Co, Scrutton LJ*¹⁵ suggested that both views were tenable, saying:

⁸ *Id* at 529.

⁹ John Schofield. **Laytime And Demurrage**. 1 (5th ed. London Singapore. 2005)

¹⁰ *Lockhart v. Falk* (1875) LR 10 Ex 132, at 135.

¹¹ *Harris v. Jacobs* (1885) 15 QBD 247, at 251.

¹² *Lilly v. Stevenson* (1895) 22 Rett 278, at 286.

¹³ *Steel, Yoing & Co v. Grand Canary Coaling Co* (1902) 7 AC 213, at p. 217.

¹⁴ *Id*.

“The sum agreed for freight in charter covers the use of the ship for an agreed time for loading or discharging, known as ‘the lay days’, and for the voyage. But there is almost invariably a term in the agreement providing for an additional payment known as demurrage for detention beyond the agreed lay days. This is sometimes treated as agreed damages for detaining the ship, sometimes as an agreed payment for extra lay days.”

Many of the terms used have been the subject of consideration by committees comprising representatives of Bimco, CMI, FONSARBA, GCBS and INTERCARGO and this has resulted in the production of two documents, Charterparty Laytime Definitions 1980, as amended, and Voyage Charterparty Laytime Interpretation Rules 1993.¹⁶

The Voylayrules 1993 define demurrage in rule 24 saying:

“Demurrage” shall mean an agreed amount payable to the owner in respect of delay to the vessel beyond the laytime, for which the owner is not responsible. Demurrage shall not be subject to laytime exceptions.

In Gencon Charter (Uniform General Charter 1976 provides the possibility of a limited period on demurrage as did in many early charters, and if the vessel is further delay beyond that, then the shipowner’s claim is one for detention.¹⁷ However in 1994, Gencon Charter has been revised and this resulted that the fixed time limit on demurrage was ejected.

Later on, in *Union of India v. Compania Naviera Aeolus SA (The Spalmatori)*¹⁸, Lord Guest said:

“Lay days are the days which parties have stipulated for the loading or discharge of the cargo, and if they are exceeded, the charterers are in breach; demurrage is the agreed damages to be paid for delay if the ship is delayed in loading or discharging beyond the agreed period.”

In *Dias Compania Naviera SA v. Louis Dreyfus Corporation*¹⁹, Lord Diplock said:

“If laytime ends before the charterer has completed the discharging operation he breaks his contract. The breach is a continuing one; it goes on until discharge is completed and the ship is once more available to the shipowner to use for other voyages.”

In the oriental Envoy, Parker J said of demurrage:²⁰

“In my view, however, while demurrage can no doubt be regarded as being in the nature of damages, for detention, it is not be equated with

¹⁵ *Inverkip Steamship Co v. Bunge & Co* (1917) 22 AC 200, at 204.

¹⁶ Julian Cooke, Timothy Young, Andrew Taylor, John Kimball, David Martowski, Leroy Lambert. **Voyage Charters**, 351 (3rd edition Lloyd’s Of London Press Ltd.)

¹⁷ John Schofield. **Laytime And Demurrage**. 344 (5th ed. London Singapore. 2005)

¹⁸ *Union of India v. Compania Naviera Aeolus SA (The Spalmatori)* (1964) AC 868, at p.899.

¹⁹ *Dias Compania Naviera SA v. Louis Dreyfus Corporation* (1978) 1 **WLR** 261, at p. 263.

²⁰ *Transamerican Steamship Corporation v. Tradax Export S.A. (The oriental Envoy)* (1982) 2 **Lloyd’s Rep** 266, at 271.

such damages. It is very different. It is a simple contractual obligation by the charterer to pay a certain sum if he fails to complete discharge within the stipulated laytime, the commencement and the calculation of which is itself a matter of agreement.”

However, that view of demurrage as a debt, is clearly incompatible with what was said five years later by Lord Brandon in the House of Lords in *The Lips*,²¹ who put it this way:

“I deal first with what demurrage is not. It is not the money payable by a charterer as the consideration for the exercise by him of a right to detain a chartered ship beyond the stipulated lay days. If demurrage were that, it would be a liability sounding in debt. I deal next with what demurrage is. It is a liability in damages to which a charterer becomes subject because, by detaining the chartered ship beyond the stipulated lay days, he is in breach of his contract. Most, if not all, voyage charters contain a demurrage clause, which prescribes a daily rate at which the damages for such detention are to be quantified. The effect of such a claim is to liquidate the damages payable: it does not alter the nature of the charter’s liability, which is and remains a liability for damages, albeit liquidated damages. In the absence of any provision to the contrary in the charter the charterer’s liability for demurrage accrues *de die in diem* from the moment when, after lay days have expired, the detention of the ship by him begins.”

The current view is that demurrage is liquidated damages for a failure to complete loading and discharging in the allowed laytime which constituted a breach of charter.

John F Wilson, emeritus professor of law at the institute of Maritime Law, University of Southampton, has written in the book called “*Carriage of Goods by Sea*” sixth edition published in 2008 saying:²²

“If the charterer detains the vessel beyond the agreed lay days, then he is in breach of the contract. The majority of charterparties include the clause providing that they may retain the vessel for additional days in order to complete the loading or discharging operation on payment of a fixed daily amount, known as demurrage.”

Whilst, strictly speaking demurrage is the money payable for time in excess of the allowed laytime, it is often used to describe the period during which such money is payable. The Laytime Definitions for Charter Parties 2013 also provide that:

“On Demurrage” means that if laytime has expired, the charterer has to pay the amount of money to the shipowner. Such time ceases to count once the berth becomes available. When the vessel reaches a place where she is able to tender Notice of Readiness, laytime or time on

²¹ *President of India v. Lips Maritime Corporation (The Lips)* (1987) 2 **Lloyd’s Rep** 311, at p. 315. See also *Odfiell Seachem A/S v. Continentale Des Petroles et D’ Investissements and Another* (2005) 1 **Lloyd’s Rep** 275, at p. 280.

²² John Schofield. **Laytime And Demurrage**. 74 (5th ed. London Singapore. 2005)

demurrage resumes after such tender and, in respect of laytime, on expiry of any notice time provided in the charterparty.

“Demurrage” means that an agreed amount payable to the owner in respect of the delay to the vessel once the laytime has expired, for which the owner is not responsible. Demurrage shall not be subject to exceptions which apply to laytime unless specifically stated in the charterparty.

2. Legal Problems relating to demurrage

For Thai legal system, there is no specified Thai law concerning demurrage. Therefore, when an issue concerning demurrage arising from maritime transportation is submitted to Thai court, there are problems in Thai legal system concerning the application of charter contract, status of demurrage, difference of each legal status, burden of proof. In particular, the crucial problems are whether the Thai court is entitled to reduce demurrage agreed by the parties and why, whether the Thai court is entitled to grant the interest, lastly, if the parties do not agree on demurrage, whether the shipowner is entitled to ask for demurrage and why. Moreover, in this thesis, we will look at demurrage in an Unfair contract perspective according to Unfair Contract Act B.E. 2540. Whether the agreement of the parties to pay demurrage is deemed as an unfair contract. This new image of perspective will reduce the burden of the consumer and the charterparty who has the liability to pay for demurrage.

The legal status and the applications of demurrage under foreign laws

1. Scandinavia

The Scandinavian Maritime Codes were revised in 1936 – 1939 (Swedish Act 1936, Danish Act 1947, Norwegian Act 1938, Finnish Act 1939), and substantial conformity in the affreightment rules was then achieved. The Codes represent a step towards a somewhat freer treatment of the contract of affreightment. The fixed legal scale of lay time and demurrage has been abandoned in the principle and retained only for smaller ships, for which it is considered to fulfil a useful function. Provisions in the Codes of importance in demurrage connections are found in sections 77 – 97 and 105 – 115.²³

2. Germany

The German Commercial Code was finally adopted in 1863 and was readopted in a modified in 1897. Its provisions of the importance for the demurrage situations are found in section 560 – 606. The Code is similar to the Scandinavian Codes though somewhat less rigid than the Swedish Code of 1864. Thus although the old provision from Hanseatic times remains, that the time on demurrage shall be fourteen days (fifteen days in the Wisby and Lubeck Codes), the laytime is determinable, when no customs or local regulations exist, according to the circumstances of the cases. The fixed demurrage time is less serious because the ship is then always entitled to compensation in the form of demurrage. The demurrage

²³ Hugo Tibergh. **The Law of Demurrage**, 6 (3rd ed. London Stevens & Sons, 1979)

rate is not fixed but is determined in the fairness by the judge. A revision of the Commercial Code has long been on the program, latest in 1940, when, however, its realization was delayed by the war effort.

More rigid instead, is the law of Interior Waterways Transportation (*Binnenschiffahrtsgesetz*), covering transportation on board barges and other craft used on rivers and canals. Provisions relating to demurrage are here found in section 27 - 57 and contain scales both for laytime and for demurrage time and rate. There is apparently a need for more detailed provisions regarding the smaller tonnage for which, it will be remembered, the Scandinavian Codes also have certain exceptions.

Committee reports, edited by J. Luz, are available from deliberations of the 1861 – 1863 Committee of the general Commercial Code. These reports do not have the standing of recognized source of law. They do not voice the definite opinion of the committee as such but consist in a rather verbose account of the various views advanced by its members in the course of the discussions. They are however sometimes used by German writers to furnish a background to the regulations on the Commercial Code and will also be referred to occasionally in the text under the name of *Protokolle*.

3. Italy France and Belgium

While Italy has a new Code of Navigation from 1942 the legal provisions on French and especially Belgian law in the field of demurrage are still very limited. Particular weight is in practice given to writings of legal scholars, while the force of precedents is considerably less than in most system; there is a general lack of consistency in the practice of the courts, and a whole series of cases is usually required to show with reasonable certainty that a particular tendency has become so pronounced that it can be regarded as “law”. Although the Latin law systems have a common origin, important divergencies in the theoretical conception of demurrage often result in varying solutions. But frequently the value of precedents seems to be measured by bulk rather than by quality, and it seems to matter little to some authors whether their sources are domestic or alien. The existence of very comprehensive law reports in particular *Le Droit Maritime Français* (cited in the text as DMF) and before the war *Revue Internationale de Droit Maritime* (RIDM) and *Revue de Droit Maritime* Compare (DMC), and to some extent Italian *II DIRITTO Marittimo* (DM) makes the more important decisions available for study.²⁴

4. Holland

Holland has comparatively modern Maritime Code from 1992. Provisions relating to demurrage are found in sections 517 and 518. The Code is essentially Germanic in type but shows more wariness in dealing

²⁴ Hugo Tiberg, **The Law of Demurrage**, 18 (3rd ed. London Stevens & Sons, 1979)

with contract than both the German and especially the older Scandinavian Codes.²⁵

5. United Kingdom

The English law has been rapidly developed through a vast number of precedents, promptly noted and commented upon in the law reviews, especially, from the latter part of the 19th century onwards. The law of Scotland is practically similar in the demurrage field, and Scottish cases are frequently cited in support of some of the leading principles of the English law of demurrage. Cases from other parts of the Commonwealth also have a strong persuasive force on English courts.

6. United States

In the United States the administration of this area of the law lies almost exclusively with the Federal courts. The development of the law has the whole been rather erratic and unsure and has never received the stimulating comment in law reviews and legal treatises that has been the boon of the English case law development. The publication since 1923 of the American Maritime Cases is valuable for student but does not seem to have contributed much to creation of consistent principles in the field of demurrage.

Commercial arbitration is the normal fate of an American demurrage dispute today, and the bulk of recent demurrage cases reported in the American Maritime Cases are arbitration decisions. Although this tendency certainly has not improved the standard of consistency of the American law of demurrage, it must be recognized that disputes will generally be resolved in this way, and that arbitration decisions, in arbitration cases, at least, are a source of law that must be ignored. Whenever they are cited in the text their character of arbitration decisions will however be noted.

Analysis of Thai law and in unfair contract perception

1. Analysis of Thai Law

It is admitted that the demurrage can be deemed as the penalty under Thai law, not the damages because the charterer agree to pay the shipowner a sum of money if the charterer uses the ship beyond the period of time fixed for the departure. In contrast, the damages cannot be agreed before the parties are actually injured. Moreover, the shipowner does not have the burden to prove the amount of the money he is entitled which is in contrast to the damages.

The reasons that the demurrage can be admitted as the penalty under Thai law are as follows;

1) Because the voyage charter and the demurrage concept have their own characteristics substantially different from general contracts, the judge who is involved in the trial and adjudication of the case needs to

²⁵ *Id.*, at 19

study and understand the background of demurrage, customs, intention of the parties, conditions and terms of voyage charter, especially the demurrage clause in order to proceed with the trial and render the judgement.

2) Due to the fact that most of voyage charterparty contracts are on standard form and, *inter alia*, Gencon, the most popular one. In those standard forms, a governing law clause is normally contained, and mostly, English law to apply. Therefore, there may be a question of law on the element of choice of law or conflict of law, particularly, in the case where the parties to the voyage charterparty in question of conflict of law, are not of the same nationality. In some case, the law agreed by the parties and the question of conflict of law must be observed and cannot be overlooked by the parties to the proceedings and the Court. Unless the parties fail to raise such question of law or to produce evidence to satisfy the Court of the stipulated foreign law, the court shall apply Thai law.

3) Notwithstanding the above, it is to be remembered that Section 5 of the Act on Conflict of Laws, B.E. 2481 of Thailand provides a restriction on the applicability of foreign law. In brief, it can apply so far as it is not against public order or good morals.

4) Having overwhelmed the threshold in the two preceding recommendations, the court needs to consider all circumstances at the time of making the contract as well as the demurrage rate fixed by the contract so that, for example, if the demurrage is reasonably proportionate, the court may grant the agreed amount of demurrage. However, if the demurrage is disproportionately high, the court may reduce the demurrage as he deems appropriate.

5) We also have to consider the provisions of the unfair contract. According to Section 4 of the Unfair contract Terms Act, B.E. 2540 (1997), if the terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances. So the charterer may raise the issue of the unfair contract in the court. If the court hears that such term is an unfair contract term, the court may grant the demurrage as he deems fair and reasonable.

2. Concept of the Unfair Contract Terms Act B.E. 2540 (1997)

Usually in voyage charter, the contract between the shipowner and the charterer is a contract between consumer and the business, trading or professional operator or in a standard form contract.

Sometimes, the party who has less bargaining power has to accept the unreasonable term because another party have more advantage over the other party which causes the party to accept the unfair contract terms, such

terms can be enforceable to the extent that they are fair and reasonable according to the circumstances.

In the case of the demurrage, the agreement is usually written in voyage charter which already made in a standard form contract. The parties of demurrage are between the shipowner and the charterer. The charterer is usually a consumer and the shipowner is usually the business, trading or professional operator. If the charterparties serve the term of demurrage with the unfair conditions which are for example;

- 1.terms excluding or restrictions liability arising from breach of contract;

- 2.terms rendering the other party to be liable or to bear more burden than that prescribed by law;

- 3.terms rendering the contract to be terminated without justifiable ground or granting the right to terminate the contract despite the other party not being in breach of the contract in the essential part;

- 4.terms granting the right not to comply with any clause of the contract or to comply with the contract within a delayed period without reasonable ground;

- 5.terms granting the right to a party to the contract to claim or compel the other party to bear more burden than that existed at the time of making the contract

The terms on voyage charter concerning demurrage can be enforceable to the extent that they are fair and reasonable according to the circumstances.

Conclusion and recommendations

According to the reasons mentioned in this thesis, I hereby propose the following recommendations;

- 1) Because the voyage charter and the demurrage concept have their own characteristics substantially different from general contracts, the judge who is involved in the trial and adjudication of the case needs to study and understand the background of demurrage, customs, intention of the parties, conditions and terms of voyage charter, especially the demurrage clause.

- 2) Due to the fact that most of voyage charterparty contracts are on standard form and, *inter alia*, Gencon, the most popular one. In those standard forms, a governing law clause is normally contained, and mostly, English law to apply. Therefore, there may be a question of law on the element of choice of law or conflict of law, particularly, in the case where the parties to the voyage charterparty in question of conflict of law are not of the same nationality. In some case, the law agreed by the parties (if any) and the question of conflict of law must be observed and cannot be overlooked by the parties to the proceedings and the court. Unless the parties fail to raise such question of law or to produce evidence to satisfy the court of the stipulated foreign law, the court shall apply Thai law.

3) Notwithstanding the above, it is to be remembered that Section 5 of the Act on Conflict of Laws, B.E. 2481 of Thailand provides a restriction on the applicability of foreign law. In brief, it can apply so far as it is not against public order or good morals.

4) Having overwhelmed the threshold in the two preceding recommendations, the court needs to consider all circumstances at the time of making the contract as well as the demurrage rate fixed by the contract so that, for example, if the demurrage is reasonably proportionate, the court may grant the agreed amount of demurrage. However, if the demurrage is disproportionately high, the court may reduce the demurrage as he deems appropriate.

5) We also have to consider the provisions of the unfair contract. According to Section 4 of the Unfair contract Terms Act, B.E. 2540 (1997), if the terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances. Therefore, the charterer may raise the issue of the unfair contract in the court. If the court hears that such term is an unfair contract term, the court may grant the demurrage as he considers fair and reasonable.