Theoretical Framework of Thai and Scots Contract Law: Comparative Perspectives*

*Korrasut Khopuangklang***

บทคัดย่อ

บทความฉบับนี้นำเสนอว่าหลักการพื้นฐานของกฎหมายหนี้และกฎหมายสัญญาของไทยและสกอตแลนด์มีความคล้ายคลึงกัน แม้ว่าสกอตแลนด์จะเป็นระบบกฎหมายผสมซึ่งได้รับอิทธิพลบางส่วนจากกฎหมายอังกฤษ แต่อิทธิพลหลักของกฎหมายสัญญาสกอตคืออิทธิพลจากระบบกฎหมายซิวิลลอว์ ซึ่งพิจารณาได้จากการลักษณะพื้นฐานของกฎหมายสัญญาหลายประการ อาทิ สัญญาเป็นข้อตกลงระหว่างบุคคล ไม่มีการนำหลักค่าตอบแทน (consideration) ของกฎหมายอังกฤษมาใช้ ทฤษฎีความศักดิ์สิทธิ์ของเจตนามีความสำคัญอย่างยิ่งในกฎหมายสัญญา และการบังคับชำระหนี้โดยเฉพาะเจาะจงเป็นสิทธิหลักของเจ้าหนี้ ซึ่งลักษณะเหล่านี้ตรงกันข้ามกับแนวคิดพื้นฐานของกฎหมายสัญญาอังกฤษ ในทำนองเดียวกัน ระบบกฎหมายไทยได้รับอิทธิพลจากทั้งระบบกฎหมายซิวิลลอว์และคอมมอนลอว์ แต่อิทธิพลของกฎหมายซีวิลลอว์มีมากกว่าอิทธิพลของกฎหมายอังกฤษ นักกฎหมายไทยอธิบายว่าสัญญาเป็นการแสดงเจตนาตกลงเข้าทำสัญญากันของบุคคลตั้งแต่สองคนขึ้นไป แนวคิดว่าสัญญาคือการแลกเปลี่ยนของคำมั่นสองคำมั่นและหลักค่าตอบแทน ไม่ปรากฏในกฎหมายไทย หลักความศักดิ์สิทธิ์ของเจตนาเป็นหลักที่มีความสำคัญใน

---

*This article is based on the author's research on "Theoretical Framework of Thai and Scots Contract Law: Comparative Perspectives", submitted to the Research Promotion Committee, Faculty of Law, Thammasat University, 2017.

**LLB (Second Class Honours) (Thammasat), LLM (Thammasat), LLM (Edinburgh), PhD (Edinburgh), Lecturer, Faculty of Law, Thammasat University.

กฎหมายสัญญา และการบังคับชำระหนี้โดยเฉพาะเจาะจงถือเป็นการเยียวยาหลักกรณีผิดสัญญา ซึ่งลักษณะเหล่านี้แสดงให้เห็นว่าทฤษฎีกฎหมายสัญญาไทยมีความสอดคล้องกับระบบกฎหมายซิวิลลอว์

จากการศึกษาพบว่า ประเด็นปัญหาความชัดเจนในกฎหมายสัญญาไทยในหลาย ๆ กรณีสามารถแก้ไขให้เกิดความชัดเจนได้โดยการเรียนรู้จากกฎหมายสกอต ในประการแรก โดยการศึกษาเปรียบเทียบกับกฎหมายสกอตทำให้สรุปได้ว่าคำเสนอไม่เป็นนิติกรรมเนื่องจากคำเสนอไม่ได้ก่อให้เกิดความผูกพันในตัวเอง นอกจากนั้น จากการศึกษาเปรียบเทียบเชิงประวัติศาสตร์กับกฎหมายเยอรมันพบว่าการที่คำเสนอไม่อาจถูกบอกถอนได้นั้นเกิดขึ้นโดยผลของกฎหมาย มิใช่โดยเจตนาของผู้ทำคำเสนอ ประการที่สอง อาจสรุปจากการเปรียบเทียบกับกฎหมายสกอตได้ว่ากรณีสัญญาประโยชน์ของบุคคลภายนอกนั้น บุคคลภายนอกไม่จำเป็นต้องมีสภาพบุคคลในขณะคู่สัญญาได้ตกลงทำสัญญาก็ได้ ประการที่สาม แนวคิดที่ถือว่าการบังคับชำระหนี้โดยเฉพาะเจาะจงเป็นสิทธิหลักของเจ้าหนี้กรณีผิดสัญญามีความสอดคล้องและส่งเสริมหลักความศักดิ์สิทธิ์ของเจตนา และประการสุดท้าย นักกฎหมายไทยอาจเรียนรู้เกี่ยวกับกระบวนการในการเกิดสัญญากรณีอื่น ๆ นอกเหนือจากการเกิดสัญญาโดยวิธีคำเสนอคำสนองได้จากนักกฎหมายสกอต โดยทั่วไปกฎหมายสัญญาสกอตค่อนข้างมีความชัดเจน ดังนั้น ประเด็นปัญหาความไม่ชัดเจนในกฎหมายสัญญาสกอตซึ่งอาจเรียนรู้ได้จากกฎหมายไทยจึงมีไม่มากนัก กระนั้นก็ดี มีกรณีหนึ่งซึ่งจากการศึกษาพบว่ากฎหมายไทยมีความชัดเจนกว่ากฎหมายสกอต กล่าวคือ ข้อความคิดทั่วไปว่าด้วยนิติกรรม ซึ่งข้อความคิดดังกล่าวอาจช่วยพัฒนากฎหมายสกอตได้ ทั้งนี้ ความเข้าใจเกี่ยวกับข้อความคิดพื้นฐานว่าด้วยนิติกรรมในกฎหมายสกอตค่อนข้างคล้ายคลึงกับกฎหมายไทย หากแต่ในปัจจุบันในสกอตแลนด์ไม่ค่อยมีการศึกษาเพื่อพัฒนาข้อความคิดดังกล่าว ดังนี้ ข้อความคิดทั่วไปว่าด้วยนิติกรรมอาจช่วยพัฒนาแนวคิดต่าง ๆ ในกฎหมายสกอตได้ เช่น การแบ่งแยกประเภทของหนี้ต่าง ๆ และการแสดงเจตนาซึ่งก่อให้เกิดผลตามกฎหมาย

Abstract

This article argues that the underlying basis of the law of obligations and contract law in Thai and Scots law shows many similarities to each other. Even though Scots law is a mixed legal system which has been subject to influence from both the Civil and the Common Law, the predominant influence on Scots contract theory is the Civilian traditions. In Scots law, contracts are based upon an agreement between two parties; there is no requirement of consideration; and the will theory plays a large part. These characteristics place Scots contract law in parallel with Civilian traditions and mark a stark contrast with English contract law. Similarly, the Thai legal system has been influenced by both Civil and Common Law traditions, but the Civilian influence is stronger than the English influence. Contract is viewed by Thai lawyers as being based upon an agreement between two parties; neither the English legal doctrine of consideration nor the approach of defining contract as an exchange of two promises was adopted in Thai law; and the will theory plays a substantive role in Thai contract law. All these characteristics show that Thai contract theory is fundamentally based upon Civilian traditions.

It is argued in this article that some uncertainties in the Thai law of contract can be resolved from a comparative analysis with Scots law. Firstly, compared to the binding nature of an offer in Scots law, an offer in Thai law is not a juristic act because it is not binding per se. Moreover, based on the historical treatment of German law, an offer cannot be withdrawn because of the prohibition of the law, rather than the actual intention of the offeror. Secondly, Thai law can benefit from Scots law in identifying a third party beneficiary as a person whose personality has not yet begun. Thirdly, the fact that specific performance is the primary remedy in Thai law helps to provide an alternative explanation of the importance of the will-based theory in Thai law. Scots law generally has a clear approach in dealing with aspects of contract law. Therefore, it is inevitable that fewer uncertain aspects of Scots law can benefit from Thai law than vice versa. Nonetheless, there is an aspect to which Thai law has a more precise approach than Scots law, namely, the notion of a juristic act and the fact that Thai law has a clearer general theory of juristic acts may be helpful for Scots law. The understanding of a juristic act in Scots law is

rather similar to that of Thai law, despite the lack of development of this concept in modern Scots law. Such a general theory of juristic acts may be helpful, for example, for the classification of voluntary obligations and any act that has a legal effect based on the intention of the party.

The author has argued elsewhere[1] that Scots and Thai law share common theories and doctrines related to the law of promise, which enhances the understanding of Thai promissory law. The doctrine of promise in Thai law contains some uncertainties, most of which can be resolved by adopting the Scottish approach. It is not difficult to adopt the Scottish model to Thai law because, inter alia, the fundamental basis of their law of promise is similar. Although Scots law and Thai law are influenced by both the Civil Law and the Common Law, their promissory law is fundamentally different from English law, in which, as a general rule, promise is not legally binding. It would be interesting to consider if the theoretical framework of Scots contract law share the same commonalities with Thai law, in which contract law is mainly derived from Civilian sources, to the same degree as in the case of promissory law. The aim of this article is to present a new comparative analysis of these two systems by focusing on the law of contract. In view of the fact that Thai contract law contains a number of uncertainties, some aspects of Scots contract law may be helpful to Thai law if the fundamental basis of their contract law is similar.

This article is divided into three parts, the first of which contains an introduction to the theoretical framework of Thai contract law. Theoretical uncertainties in Thai contract law is pointed out in each of the sub-heading discussed (unless there appears to be no important uncertainty in that particular area). Similar aspects of the framework of Scots law will be further discussed in the second part. Some doctrinal problems in Scots contract law is highlighted (although there are fewer uncertainties in Scots law than in Thai law). Finally, it compares and analyse the substantive features of Thai and Scots contract law. In addition, the article concludes by determining which uncertain aspects of Thai contract law can be resolved using the Scots approach (and vice versa).

1. Theoretical Framework of Thai Contract Law

Although the Civil and Commercial Code does not categorise sources of obligation, Thai academics explain that there are four main types of obligation in

[1]Korrasut Khopuangklang. ***A Critical Analysis of Promise in Scots Law and Thai Law***. PhD Thesis, The University of Edinburgh, 2016.

Thai private law, namely contract, wrongful act (delict), undue enrichment (unjustified enrichment), and management of affairs without mandate *(negotiorum gestio*).[2] This is based on the obligations recognised in the Civil Law systems and Roman law (which Thai law derives its law of obligations from).[3]

1.1 The notion of a juristic act

In Thai law, there is a legal concept called a "juristic act". In order to understand the theory of contract law, it is necessary to understand the concept of juristic acts since all acts which have legal effects, including contract, are deemed to be juristic acts.

Definition and classification of a juristic act

Juristic acts are defined by the Civil and Commercial Code as "voluntary lawful acts, the immediate purpose of which is to establish between persons juristic relations, to create, modify, transfer, preserve or extinguish rights".[4] They can be classified by various approaches. For example, a distinction can be made between *inter vivos* juristic acts (e.g. gifts) and *mortis causa* juristic acts (e.g. wills).[5] Moreover, the distinction can be made based on the side of the party making the juristic act. In this approach, there are three main types of juristic acts.[6]

First, "unilateral juristic acts" are juristic acts in which the person who makes the act only declares his or her intention and that declaration has a legal

---

[2]Sophon Rattanakorn. ***Commentary on the Civil and Commercial Code: Obligations.*** 11th edition. Bangkok: Nitibannakarn, 2013, p. 29; Daraporn Thirawat. ***Law of Obligations: General Principles.*** 4th edition. Bangkok: Faculty of Law, Thammasat University. 2015, p. 18.

[3]Some legal scholars suggest that there is another source of obligation, namely "obligation as imposed by law" . Sophon Rattanakorn. *Ibid,* at p. 27.

[4]Civil and Commercial Code, Section 149. Unless stated otherwise, all the Sections that are mentioned in this article are the provisions from the Civil and Commercial Code.

[5]Sanankorn Sotthibandhu. ***Commentary on Juristic Acts and Contracts.*** 20th edition. Bangkok: Winyuchon, 2016, p. 26.

[6]*Ibid,* at pp. 25-26; Akkharathorn Chularat. ***Commentary on Civil and Commercial Code: Juristic acts and Contracts.*** Bangkok: Faculty of Law, Thammasat University, 1988, p. 17; Some writers only make a distinction between "unilateral juristic acts" and "multilateral juristic acts" (which already cover bilateral juristic acts) e.g. Sak Sanongchart. ***Commentary on the Civil and Commercial Code: Juristic Acts and Contracts.*** 11th edition. Bangkok: Nitibannakarn, 2014, pp. 4-5; Kittisak Prokati. ***Handout: Juristic Acts and Contracts (LA 101).*** Faculty of Law, Thammasat University, p. 18.

effect regardless of whether the other party receives or accepts the intention or not,[7] e.g. the declaration of termination of contract (Section 386)[8], to avoid a voidable juristic act (Sections 175 and 176)[9], and to make a promise of reward (Sections 362, 365).[10] Second, "bilateral juristic acts" are acts which have legal effects when two persons make their declarations of intention e.g. a contract.[11] Lastly, "multilateral juristic acts" are acts which create legal effects where more than two persons make their declarations of intentions e.g. the declaration to establish a company.[12]

Theoretical problems of contract law in relation to the notion of a juristic act: Is an offer a juristic act?

Under Thai law, it is controversial whether an offer is a juristic act or not. Firstly, some writers consider an offer to be a juristic act on the grounds that an offeror is bound by and cannot withdraw his or her offer once the offer is made. For instance, Sak Sanonchart explains that a unilateral juristic act is an act that can be created by the will of one person. The intention to make a juristic act exists immediately when someone expresses his/her intention to do so. He suggests that an offer and an acceptance are examples of unilateral juristic acts.[13] Meanwhile, Jeed Sethabutr[14] classifies unilateral juristic acts into two types, namely "absolute unilateral juristic act" and "general unilateral juristic acts". The former is a genuine unilateral juristic act because it can be created the will of one person and it is binding whether there is a recipient or not (e.g. wills and promises of reward). The latter is called a general unilateral juristic act because it requires a recipient. Thus,

---

[7]Sak Sanongchart. *Supra note 6*, pp. 4-5; Akkharathorn Chularat. *Supra note 6*, p. 17; Kittisak Prokati. *Supra note 6,* p. 18.

[8]Sak Sanongchart. *Ibid*, pp. 4-5; Akkharathorn Chularat. *Ibid*, p. 17; Kittisak Prokati. *Ibid,* p. 18.

[9]Sak Sanongchart. *Ibid*, pp. 4-5; Kittisak Prokati. *Ibid,* p. 18.

[10]Sak Sanongchart. *Supra note 6,* pp. 4-5; Jeed Sethabutr. ***The Principles of Civil Law: Juristic Acts and Contracts.*** 7th edition (by Daraporn Thirawat), Faculty of Law, Thammasat University, 2013, p. 128;

[11]Sanankorn Sotthibandhu. *Supra note 5,* p. 26; Akkharathorn Chularat. *Supra note 6*, p. 17. It should be noted that a contract that is made by more than two parties is regarded as a multilateral juristic act.

[12]Sanankorn Sotthibandhu. *Supra note 5,* p. 26; Sak Sanongchart. *Supra note 6*, p. 5; Kittisak Prokati. *Supra note 6,* p. 18.

[13]Sak Sanongchart. *Supra note 6*, pp. 4-5.

[14]Jeed Sethabutr. *Supra note 10*, p. 203.

an offer that specifies a period of acceptance is an absolute juristic act because the offeror cannot withdraw the offer within such a specified period, whereas an offer that does not contain a time limit for its acceptance is a general juristic act because it requires a recipient. According to Chitti Tingsabhat, the law provides for a declaration of intention to be unilaterally created to establish a legal relationship without acceptance of the recipient. In his view, an offer which cannot be withdraw is therefore regarded as a juristic act.[15] Meanwhile, Seni Pramoj considers that an offer is a juristic act by referring to the distinction between an offer and an invitation to treat. Since an offer is a proposal to make a contract, it can sufficiently be regarded as a juristic act, whereas an invitation to treat cannot because it does not signify the intention to create a legal relationship.[16] Serm Vinijchayakul also supports the view that an offer is a juristic act. He describes that a contract is a bilateral juristic act which requires the blend of two juristic acts, namely offer and acceptance.[17] Sanankorn Sotthibhudu distinguishes an "obligation" from a "binding effect" by explaining that, although an offer does not create an obligation, it binds the offeror. This can be called the "binding effect of an offer". Therefore, an offer can be regarded as a juristic act.[18]

Conversely, some scholars argue that offers or acceptances are not a juristic act. There must be both an offer and an acceptance to create a juristic act. For instance, Phraya Thep Widun argues that an offer is not juristic act. He states that a contract is a bilateral or multilateral juristic act because it requires the mutual consent of two or more parties. Individuals cannot make a contract with themselves. In contrast, the declaration to make a will, to avoid a voidable juristic act are regarded as a unilateral juristic act because it does not require the consent of the other party.[19] Punno Sukthassani agrees that a mere offer is not a juristic act

---

[15]Chitti Tingsabadh. ***Commentary on the Civil and Commercial Code: Book 2 Sections 354-394.*** 5th edition. by Sanankorn Sotthibandhu. Bangkok: Duantula Publishing, 2009, p. 4.

[16]Seni Pramoj. ***Commentary on the Civil and Commercial Code: Juristic acts and Obligations Book 1 (Parts 1-2).*** 3rd edition. By Munin Pongsapan. Bangkok: 2016, pp. 312-313.

[17]Serm Vinijchaikul. ***Commentary on the Civil and Commercial Code: Juristic acts and Obligations.*** Bangkok: The Excise Department Publishing, 1971, p. 8.

[18]Sanankorn Sotthibandhu. *Supra note 5,* pp. 320-321.

[19]*Phraya Thep Widun* (Boonchuay Vanikkul). ***Commentary on the Civil and Commercial Code: Juristic Act, Period of Time, and Prescription.*** 2nd edition. by Kumchai Jongjakapun. Bangkok: Duantula Publishing, 2013, p. 3.

because some juristic acts ,such as a contract, comprise of more than one declaration of intention, namely an offer and an acceptance. A unilateral juristic act becomes a juristic act when a declarant expresses his or her intention. In contrast, the law deems that there must be a recipient of the declaration of intention in order to have a legal effect in some cases; in other words, there must be such as an offer and acceptance.[20] Akkharathorn Chularat also supports this view by arguing that an offer is merely an act before a juristic act (namely, a contract).[21] Finally, Kittisak Prokati explains that a contract is a juristic act in which two or more parties express their intention to create a legal relationship. It is one juristic act that can be created when there are two or more wills. It is therefore different from a unilateral juristic act that can be created by a single will.[22] Moreover, an offer cannot be a juristic act because it does not create, modify, transfer, preserve or extinguish any right to the offeree.[23]

As can be seen, there is a no consensus amongst Thai writers as to whether an offer is a juristic act or not. It is worth noting that in Thai law an offer is irrevocable once it is effective regardless of whether it is an offer specifying a period of acceptance or not. The rule regarding irrevocability of offer is borrowed from German law.[24] The analysis as to whether an offer is a juristic act will be revisited in Section C, with a comparative treatment with Scots law.

1.2 Fundamentals of contract

Thai commentators suggest that there are four essential components of contract, namely, parties, object, will and formality.[25] First, a contract must be made by two or more "parties", the so-called "contracting parties".[26] This is

---

[20]Punno Sukthassanee. ***Civil and Commercial Code: Juristic acts and Contracts.*** Bangkok: Thammasat Printing House, 1971, pp. 15 and 25.

[21]Akkharathorn Chularat. *Supra note 6*, p. 117.

[22]Kittisak Prokati. ***"Legal Effects of Offers and Acceptances in a Comparative Perspective".*** Thammasat Law Journal, 21(1), (1994), pp. 69-86 at p. 70.

[23]*Ibid* at footnote 3.

[24]See section 3. Theoretical Framework of Thai and Scots Contract Law: A Comparative Analysis, sub-heading entitled "The relevance between juristic acts and contracts: is an offer a juristic act?" for further discussion.

[25]Seni Pramoj. *Supra note 16,* pp. 299-305.

[26]Seni Pramoj. *Ibid* at p. 308*;* Sanankorn Sotthibandhu. *Supra note 5*, pp. 299-300.

different from a unilateral juristic act which can be made by one party only. The second fundamental of contract is the "will" of the parties. Thai commentators explain that a contract arises from the wills of two or more parties which coincide in the same terms.[27] It is an agreement, based upon offer and acceptance, between two or more parties. Thirdly, all contracts must contain an "object". Object can be described as a purpose or benefit which would be achieved by making a contract.[28] A contract which contains no object, or purpose, is "uncertain and there is no real intention".[29] Finally, the formality or means of making a contract can be either oral, written or by any other means. As a general rule, Thai law does not require formality in contract. However, there are some exceptions in which formalities are required for certain types of contract to be valid.[30]

There are three main types of formalities of contracts under Thai law. First, some transactions (such as hire purchase is required to be made "in writing".[31] Second, some contracts (e.g. marriage) are required to "be registered" with the relevant official competent. Thirdly, particular kinds of transactions is required to be made "in writing and to be registered" by a competent official. Examples include a sale of immovable properties,[32] and exchange of immovable properties[33], and mortgage.[34]

Theoretical problems of contract law in relation to fundamentals of contract: Is delivery of a given property regarded as a formality of contract?

The law regulates that a gift is only valid when the related property has been delivered.[35] This means that the agreement (offer and acceptance) of the donor and donee is insufficient to constitute a valid contract of a gift. This leads to the question of whether the delivery of a given property is a formality of contract of a gift, and there are two schools of thought on this issue. First, a number of

[27]Kittisak Prokati. *Supra note 6,* p. 6.

[28]Seni Pramoj. *Supra note 16,* p. 308; Sanankorn Sotthibandhu. *Supra note 5,* p. 303.

[29]Seni Pramoj. *Supra note 16,* pp. 136-137.

[30]Civil and Commercial Code, Section 152.

[31]Civil and Commercial Code, Section 572.

[32]Civil and Commercial Code, Section 456 para 1.

[33]Civil and Commercial Code, Section 519.

[34]Civil and Commercial Code, Section 714.

[35]Civil and Commercial Code, Section 523.

scholars suggest that the delivery of related property is formality of contract of a gift based on the fact that the contract of a gift cannot be valid if the donor does not delivery the related property. Thus, it is equivalent to the legal requirement of formality.[36] Secondly, opponents of the foregoing theory argue that the delivery of the related property is not a formal requirement. Rather, it is an essential condition of the contract.[37] This means that, when two persons agree to make a contract of a gift but the related property has not been delivered yet, the contract has no legal effect. However, this does not mean that there is no agreement between the parties or their agreement is void because the contract of a gift can still be valid if the donor delivers the related property to the donee later.

1.3 Nature and classifications of contract

Under Thai contract law, contracts can be classified by a variety of approaches based on their nature. For example, contracts may be classified by referring whether or not they are contracts that appear in the Civil and Commercial Code. They may be classified based on their gratuitous nature. In addition, a distinction can be made between principal and accessary contract.

Bilateral and unilateral contracts[38]

Another possible approach of classifying contracts is between bilateral and unilateral contracts. It is important to note that the terms "bilateral" and "unilateral" in this context do not refer to the number of parties on each side who form a contract.[39] Rather, they refer to the side of contracting parties who are bound to perform the obligation. While in a bilateral contracts both of the parties have duties to perform their obligations, in a unilateral contract, a duty to perform an obligation lies upon one party only. For example, gratuitous loan is deemed to be a unilateral contract because only the lender is bound to grant the borrower the use of the borrowed property. In contrast, a sale is deemed to be a bilateral

[36]E.g. Jeed Sethabutr. *Supra note 10*, pp. 41-42; Sanankorn Sotthibandhu. *Supra note 5*, pp. 96-97.

[37]E.g. Seni Pramoj. *Supra note 16,* p. 118; Kittisak Prokati. *Supra note 6,* pp. 119-120.

[38]It should be noted that most textbooks on Thai contract law do not classify contracts using this approach. It is acknowledged by only a few writers (e.g. Sanankorn Sotthibandhu. ***Commentary on Sale, Exchange and Gift.*** 7th editions, Bangkok: Winyuchon, 2016, pp. 376-377). Nonetheless, this approach is included in this article for the purpose of a comparative study with Scots law.

[39]This is the meaning of "unilateral contract" under English law.

contract on the basis that both the seller and the buyer have duties to deliver the property sold and to pay the price, respectively.

Privity of contract and third party rights

Another distinction can be made between a contract that benefits the contracting parties and a contract that benefits a non-contractual party. The former is known under the doctrine of privity of contract. Under this doctrine, a contract only binds and benefits the contracting parties. The latter is called a third party right contract whereby a third party beneficiary can benefit from it. A third-party right in Thai law is viewed as a contract.

Theoretical problems of contract law in relation to the nature and classification of contracts: Can the parties make a contract in favour of a non-specific third party beneficiary?

The law states that rights of a third party beneficiary only come into existence when he or she declares his or her intention to acquire the right to the debtor.[40] Thus, before such a right comes into existence, the contracting parties can always revoke it.[41] However, it is questionable whether the contracting parties can make a contract in favour of a non-specific third party beneficiary. That is to say, can a third party beneficiary be a non-specific person. Most of the writers who discuss this issue are of the view that a third party must be specific.[42] This means that contracting parties cannot form a contract to pay a sum of money in favour of poor people, for instance, because there is no specific person can benefit from the contract. Nonetheless, Thai scholars suggest a contract can be formed in favour of a person who has been clearly specified, even if a personality has not yet been fully formed. However, whether that personality can be any kind of person or only a foetus is debatable. The first view suggests that a contract in favour of a person whose personality has not yet begun can only apply to a foetus who is to be born later.[43] This is as a result of Section 15 para 2 which states: "A child *en ventre sa*

[40]Thai Code, Section 374 para 2.

[41]Thai Code, Section 375.

[42]E.g. Chitti Tingsabadh. *Supra note 15*, p. 121; Sak Sanongchart. *Supra note 6*, p. 446; Jeed Sethabutr. *Supra note 10,* pp. 321-321; Chaiyot Hemarachata. ***The Law of Contract.*** 3rd edition. Bangkok: Chulalongkorn University Press, 2004, p. 145.

[43]Seni Pramoj. *Supra note 16,* p. 367.

mere is capable of rights provided that it is thereafter born alive."[44] In contrast, others consider that any kind of person whose personality has not yet begun can enjoy third party rights as long as he/she/it was specified when the contract was formed. For instance, the parties may form a contract in favour of a company that has not yet been established.[45]

1.4 Contractual intention

There are two schools of thought as to how a "serious intention" (to enter into a contract) should be measured, namely the subjective and objective schools. The first is the subjective school, which determines whether a person intends to create a binding contract or not from the actual intention of the parties. The second is the objective school, which determines such seriousness "by reference to external acts and manifestations, not by evidence of subjective, internal intention."[46] In short, while the subjective theory "stresses the priorty which should be given to the actual state of a declarant's mind"[47], in the objective theory, a "contract formation depends on what is communicated, not on what is merely thought."[48]

The subjective theory of contract plays an important role in Thai private law. The law states that "In the interpretation of a declaration of intention, the true intention is to be sought rather than the literal meaning of the words or expressions."[49] However, this does not mean that the objective theory of contract has no role to play in Thai contract law. In fact, the objective theory will prevail when a bona fide other contracting party or a bona fide third party is involved. To put it differently, if a person had no intention of entering into a binding contract, but the other party was led to believe that he or she had, the former cannot deny

---

[44]Thai Civil and Commercial Code, Section 15 para 2.

[45]E.g. Chitti Tingsabadh. *Supra note 15*, p. 121; Jeed Sethabutr. *Supra note 10,* pp. 321-321.

[46]Wayne Barnes, ***"The Objective Theory of Contracts".*** University of Cincinnati Law Review.76 (1119) 2008, pp. 1119-1158, at p. 1120.

[47]Thomas Broun Smith. ***A Short Commentary on the Law of Scotland***. Edinburgh: W Green, 1962. (henceforth: Smith, *Short Commentary),* p. 757; See also Martin Hogg, Martin Hogg, ***Obligations.*** 2nd edition. Edinburgh: Avizandum, 2006 (henceforth: Martin Hogg, *Obligations*), p. 22.

[48]Wayne Barnes. *Supra note 46.*

[49]Thai Civil and Commercial Code, Section 171.

his or her liability. A person is held liable for his or her expression if the recipient did not know that he or she had no serious intention to create a legal relationship.[50]

Theoretical problems of contract law in relation to contractual intention: How to distinguish an offer from other expressions which are not obligatory?

It is worth noting how Thai law distinguishes an offer from other types of expressions which cannot amount to a contract. Such distinction can be made by using the notion of hierarchy of intention. Conceptually, a person who makes an offer has a stronger intention to bind himself or herself in comparison with a person who makes an overture and an invitation to treat. A person who makes an overture and an invitation to treat does not wish to be legally bound by his or her action at all. Consider the following situations[51]:

(i) A wishes to sell his horse. When A meets B, he asks whether B would like to have a horse or not. A's expression is deemed as an "overture" because he merely makes preliminary enquiries as to B's interest in order to know the possibility of having a contract with B.

(ii) B responds that he does not want a horse, A then states that he has a good horse and wishes to sell it for a cheap price, and if B is interested, he can let A know a preferred price. A's expression of willingness is still not regarded as an offer, since it does not contain certain terms which shall become binding (as a contract) if B accepts. It is only an invitation to treat made by A to invite B to make an offer to buy a horse.

(iii) B still does not make an offer to buy A's horse, then A proposes that he wishes to sell a horse to B for the price of 1,000 Bath (£20 approximately). A's declaration of intention is regarded as an offer on the basis that a contract of sale can be concluded if B accepts A's proposal.

From the above examples, it can be seen that these types of expression are categorised into three different levels, according to the extent of their binding nature. The extent to which an offeror wishes to bind himself or herself is the greatest in comparison with a person who makes an invitation to treat and a person

[50]Thai Civil and Commercial Code, Section 154.

[51]Seni Pramoj. *Supra note 16,* pp. 312-313.

who makes an overture. As a result, an invitation to treat and an overture cannot be accepted and thus cannot result in a binding contract.

1.5 Will theory in Thai contract law

Will theory and freedom of contract

Modern Thai contract law, under the influence of European Civil Law, is significantly based on the will theory of contract. The notion of freedom of contract is the most important basis of Thai contract law.[52] Freedom of contract is related to the will theory, which was dominant in the nineteenth century and still has a strong influence. In the nineteenth century, several philosophers, economists and judges regarded freedom of contract as an "end in itself, finding its philosophical justification in the "will theory" of contract and its economic justification in *laissez faire* liberalism".[53] According to this idea, a contract is not presumed to be valid unless all parties, who were regarded as the best judges of their own interests, voluntarily agree, either tacitly or explicitly, into a contract without coercion.[54]

Theoretical problems of contract law in relation to will theory: Are individuals permitted to make a promise to enter into a contract, which is not specified under the Civil and Commercial Code?

The Thai Civil and Commercial Code recognises two kinds of promises to make a contract, namely promise of sale[55] and promise of a gift.[56] This leads to an uncertainty whether or not individuals are permitted to make a promise to enter into other types of contract. On the one hand, it may be argued that individuals should not be permitted to make a promise to enter into other types of contracts than sale and gift, given that if the Code intends to permit such promise, then the provisions of promise of sale and promise of a gift should not be specified under the Code.[57] On the other hand, it may be argued that individuals should have the

---

[52]Sanankorn Sotthibandhu. *Supra note 5,* p. 297

[53]Joseph Chitty. ***Chitty on Contracts.*** 32nd edition. by Hugh G Beale. London: Sweet & Maxwell, 2015. (henceforth: *Chitty on Contracts*) para 1-028.

[54]*Ibid.*

[55]Thai Civil and Commercial Code, Section 454.

[56]Thai Civil and Commercial Code, Section 526.

[57]No writer explicitly supports this view. However, they acknowledge this argument. Jeed Sethabutr. *Supra note 10,* pp. 224-225; *Sanankorn* Sotthibandhu. ***Commentary on Hire of Property and Hire Purchase.*** 5th edition. Bangkok: Winyuchon, 2011, p. 42.

freedom to make a promise to enter into any kind of contracts that they wish to enter into.[58] This is based on the fact the doctrines of autonomy of will and freedom of contract play an essential role in Thai contract law. The Thai courts support the latter. Since at least 1942, there have been cases in which the court held that a promise of lease, which is not recognised by the Code, was enforceable.[59]

1.6 Remedies for breach

Types of remedies for breach of contract

In Thai law, traditionally, there are two main types of remedies, namely specific performances and damages. Firstly, the Thai Code states: "If a debtor fails to perform his obligation, the creditor may make a demand to the Court for compulsory performance, except where the nature of the obligation does not permit it."[60] As for damages, the Code states: "When the debtor does not perform the obligation in accordance with the true intent and purpose of the same, the creditor may claim compensation for any damages caused thereby."[61] The approach which distinguishes between damages instead of performance and simple damages, as exists in German law, does not appear under the Thai Civil and Commercial Code. As a result, where a breach of contract occurs, an aggrieved contracting party is entitled to choose either "performance supplemented by simple damages, damages instead of performance, and termination for breach supplement by simple damages."[62]

---

[58] Jeed Sethabutr. *Supra note 10,* pp. 224-225*;* *Sanankorn* Sotthibandhu. *Ibid*, at p. 43.

[59] E.g. Supreme Court Decisions 1004/1942 (B.E. 2485), 368/1945 (B.E. 2488), 411/1946 (B.E. 2490), 626/1946 (B.E.2490), 146/1951 (B.E. 2495), 1324/1952 (B.E. 2496), 170/ (B.E. 2497), 1170/1962 (B.E. 2506), 661-662/1968 (B.E. 2511), 1051/1971 (B.E. 2514), 294/1972 (B.E. 2515), 1213/1974 (B.E. 2517), 1925/1974 (B.E. 2517), 3670/1985 (B.E. 2528), 316/1987 (B.E. 2530), 450/1988 (B.E. 2531), 748/1990 (B.E. 2533), 3761-3765/1990 (B.E. 2533), 3263/1992 (B.E. 2535), 876/1994 (B.E. 2537), 6515/1995 (B.E. 2538), 5995-5996/1995 (B.E. 2538), 563/1997 (B.E. 2540), 7386/2005 (B.E. 2548), 3078-3079/2009 (B.E. 2552).

[60] Civil and Commercial Code, Section 213.

[61] Civil and Commercial Code, Section 215.

[62] Munin Pongsapan. ***"Remedies for Breach of Contract in Thai Law".*** in Mindy Chen-Wishart and Burton Ong (editors). ***Studies in the Contract Laws of Asia: Remedies for Breach of Contract.*** Oxford: Oxford University Press, 2016, pp. 370-399, at p. 388.

Theoretical problems of contract law in relation to remedies for breach: What is the primary remedy for breach of contract?

As will be fully discussed, Scots law and English law take a different position as to whether or not specific performance is the primary remedy for breach of contract. It is therefore worth considering this position under Thai law.

At first glance, it is doubtful if specific performance can be regarded as the primary remedy in Thai law. This stems from the fact that Section 215 of the Code contains the phrase "except where the nature of the obligation does not permit it."[63] It is observed that, theoretically, most Thai scholars do not explain specific performance as it is traditionally explained in Germany, namely that "every contractual obligation gives rise to specific performance".[64] Nevertheless, it is found that the Thai courts' decisions seem to suggest that specific performance is the primary remedy in the sense that an aggrieved party is entitled "to choose between specific performance and damages, instead of performance."[65] Also, some scholars suggest that the specific performance is the right of the pursuer.[66] This implies that specific performance is deemed to be the primary remedy in Thai law.

2. Theoretical Framework of Scots Contract Law

Even though Scots law is partly influenced by English law, Scots private law, especially contract law, is still fundamentally distinct from English law.[67] This can be seen from some obvious differences in the field of obligations between the two neighbour jurisdictions. For instance, Scots law recognises five types[68] of obligations,

---

[63]Civil and Commercial Code, Section 215.

[64]Munin Pongsapan. *Supra note 62*, p. 378.

[65]*Ibid* at p. 388.

[66]Sophon Rattanakorn. *Supra note 2,* 246-253; However, some writers do not explicitly state that specific performance is the primary right of the creditor e.g. *Sanankorn* Sotthibandhu. ***Commentary on the Law of Obligations (Legal Effects of Obligations).*** 2nd edition. Bangkok: Winyuchon, 2011, pp. 246-253; Jeed Sethabutr. *Supra note 10,* pp. 379-380, 399, 404.

[67]For full analysis see Martin Hogg. ***"Perspectives on Contract Theory from a Mixed Legal System".*** Oxford Journal of Legal Studies. Year 29 Vol. 3. (2009) (henceforth: Martin Hogg, *Contract Theory*), pp. 643-673.

[68]There are other approaches in categorising types of obligations e.g. (i) unilateral and bilateral/multilateral obligations and (ii) gratuitous and onerous obligations. Martin Hogg, *Obligation*s, pp. 1-8.

namely contract, unilateral promise, delict, unjustified enrichment, and *negotiorum gestio*. By contrast, English law only recognises three types of obligations, namely contract, tort and unjust enrichment (or restitution). Under English law, *negotiorum gestio* is not recognised as an enforceable obligation.[69]

2.1 The notion of a juristic act

It appears that in modern Scots law, the concept of juristic act "is not widely used and a general theory of juridical [juristic] acts is missing."[70] Leading contract law and the law of obligation textbooks do not offer a unified idea or general concept of this concept.[71] This is despite the fact that Scottish legal scholars still use the term "juristic act" in their works. For example, in *Contract Law in Scotland,* it is explained that assignation is different from third party rights because a third party right "is a creation of the original contract whereas assignation requires a further and independent juristic act by one of the contract parties".[72] In *A History of Private Law in Scotland*, it is stated that "it is not settled whether force and fear render juristic acts void or only voidable, whether third parties are protected, and which remedies are available."[73]

Also, the Scottish courts use the term "juristic act" in a number of cases[74] For instance, in *Regus (Maxim) Ltd v Bank of Scotland Plc*[75], when dealing with the juristic nature of promissory obligation the court stated: "a promise in the law of

---

[69]Samuel J Stoljar. ***"Negotiorum Gestio".*** in Ernst von Caemmerer Peter Schlechtriem (editors). ***International Encyclopedia of Comparative Law. vol x (Restitution - Unjust Enrichment and Negotiorum Gestio).*** 1984, p. 4; For the competing view that English law recognises the notion of *negotiorum gestio* see D Sheehan, ***"Negotiorum Gestio: A Civilian Concept in the Common Law?"*** ICLQ (2006) 253.

[70]Phillip Hellwege. ***"Juridical Acts in the Draft Common Frame of Reference - a Model for Scotland?"*** Edinburgh Law Review Vol. 18 No. 3, (2014), pp. 358-882 at p. 381.

[71]E.g. William W McBryde. ***The Law of Contract in Scotland.*** 3rd edition. Edinburgh: Thomson/W. Green, 2007. (henceforth: McBryde, *Contract*).

[72]Hector L MacQueen and Joe M Thomson. ***Contract Law in Scotland.*** 3rd edition. Haywards Heath: Bloomsbury Professional, 2012. (henceforth: MacQueen & Thomson, *Contract)* para 2.84.

[73]Kenneth G C Reid and Reinhard Zimmermann (editors). ***A History of Private Law in Scotland Vol. 2 Obligations.*** Oxford: Oxford University Press, 2000, p. 101.

[74]Examples can be found in *Port of Leith Housing Association v Akram* [2011] CSOH 176 at para 15; *Sheltered Housing Management Ltd v Bon Accord Bonding Co Ltd* [2010] CSIH 42 at para 23; *Halifax Life Ltd v DLA Piper Scotland Ltd* [2009] CSOH 74 at para 8;

[75][2013] CSIH 12.

Scotland is a unilateral juristic act."[76] In *Port of Leith Housing Association v Mohammed Akram and another*[77], it is stated that "the contract provided that one party is to perform a juristic act in relation to the other, one party's agent could not perform that act in relation to the other party's agent."[78]

Definition and classification of a juristic act

Although Scottish modern literature tends not to discuss the general concept of juristic acts, a useful explanation of this concept was offered by TB Smith, who published his commentary entitled *A Short Commentary on the Law of Scotland* in 1961. TB Smith began the explanation on this concept by stating: "The expression "juristic act" (*acte juridique, negozio giuridico, Rechtsgeschäft*) is somewhat cumbrous, but is now generally accepted by those systems which Scots law was associated during its formative period". [79] He further wrote: "A comprehensive term is necessary to cover the many situations in which a declaration or manifestation of the will creates, modifies, transfers or extinguishes a right."[80] Moreover, a definition of a juristic act is given by the Scottish Law Commission: "manifestation of will or intention by a person acting in the realm of private law which has, or is intended to have, a legal effect as such."[81]

Juristic acts can be classified by various approaches. First, a distinction can be made between between *inter vivos* (e.g. contracts) and *mortis causa* juristic acts (e.g. testamentary dispositions).[82] Second, a gratuitous juristic act (e.g. a donation) is distinguished from an onerous one (e.g. a sale).[83] Thirdly, the distinction between unilateral and bilateral juristic acts exists. A unilateral juristic act is "where effect is given to a single will". Thus, renunciation of rights, wills and unilateral promises are

---

[76]*Ibid* at para 33 per Lord President Lord Bonomy.

[77][2011] CSOH 176.

[78]*Ibid* at para 15.

[79]Smith, *Short Commentary* 284.

[80]Smith, *Short Commentary* 284.

[81]The term used by the Scottish Law Commission is "juridical act", rather than "juristic act". However, they refer to the same concept. The Commission explains that the term "juristic act" may be confused with the act of a jurist. Therefore, it is more appropriate to use the term "juridical act". Discussion Paper, *Interpretation in Private Law* (Scot Law Com No 101, 1996), 3 at note 18.

[82]Smith, *Short Commentary* 284.

[83]*Ibid.*

all regarded in this category. An example of bilateral juristic acts is contract because it "involve(s) the concurrence of a plurality of wills."[84] The last classification of juristic acts are between juristic acts which are effective to transfer real rights (e.g. conveyance or *traditio*) and juristic acts creating personal rights (e.g. hire of property).

2.2 Fundamentals of contract

Since a contract is an agreement between two parties, a person cannot enter into a contract with himself or herself, otherwise there would be a concurrence of the debtor and the creditor.[85] As explained by Stair, "None can be creditor or debtor to himself".[86] In addition, contracting parties must have capacity to contract.[87] Agreement or *consensus in idem* is the basis of contract.[88] The idea that contract arises from the agreement of the parties has been recognised by Scottish courts.[89] It has been held that "agreement is concluded when the parties reach *consensus in idem".*[90] In *Walker v Alexander Hall & Co Ltd*[91], Lord Blackburn stated that "there was no *consensus in idem* between the parties". In *Avintair Ltd v Ryder Airline Service Ltd*[92] it was observed that "there is no doubt that parties must

---

[84] *Ibid.*

[85] McBryde, *Contract* para 3-05.

[86] James Dalrymple Viscount Stair. ***The Institutions of The Law of Scotland, Deduced From its Originals, and Collated with the Civil, and Feudal-Laws, and with the Customs of Neighbouring Nations. In Four Books, the Third Edition, Corrected and Enlarged, with Notes.*** Eighteenth Century Collections Online Print Editions, 2010 (henceforth: Stair, *Inst*) 1.18.9.

[87] As a general rule, age of legal capacity to contract in Scotland is the age of 16. McBryde, *Contract* paras 3-12-13.;

[88] Martin Hogg and Gerhard Lubbe. ***"Formation of Contract".*** in Reinhard Zimmermann et al (editors). ***Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa***. Oxford: Oxford University Press, 2004, pp. 34-65 at p. 39. It should also be noted that the term used in Scots law is *"consensus in idem"*, while in other jurisdictions the term "*consensus ad idem*" may be used.

[89] Martin Hogg, *Contract Theory* 661.

[90] E.g. Seed Shipping Co v Kelvin Shipping Co (1924) 17 LlL Rep 170; Pickard v Ritchie 1986 SLT 466; Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd 1996 SLT 604; "contract is an agreement": Percy v Board of National Mission of the Church of Scotland [2005] UKHL 73, 2006 SC (HL) 1, [109]; Advice Centre for Mortgages Ltd v McNicoll 2006 SLT 591.

[91] (1919) 1 LlL Rep 661.

[92] 1994 SC 270, 273.

achieve *consensus in idem* upon all the essential matters before there can be said to be a contract between them". The form required for voluntary obligations (contracts and promises) is regulated by the Requirements of Writing (Scotland) Act 1995. The general rule is that contracts do not require writing.[93] However, a written document subscribed by the granter(s) is required for the constitution of a contract for "the creation, transfer, variation or extinction of an interest in land".[94]

2.3 Nature and classifications of contract

Scots law recognises the term nominate and innominate contracts. Such references on this subject are made to Roman law. Moreover, since the doctrine of consideration is not adopted in Scots law,[95] in Scots law there is no theoretical objection for a contract being gratuitous.[96]

Bilateral and unilateral contracts

TB Smith explains that a contract can be either synallagmatic or unilateral. Before considering their distinction, it is helpful to explain that a unilateral contract is, of course, distinct from a unilateral promise. This is because the former is a bilateral juristic act whereas the latter is a unilateral juristic act. Thus, their essential difference is that "no obligation is created in the former case [unilateral contract] until the offer has been met by acceptance, and performance must thereafter be accepted."[97]

Accordingly, TB Smith distinguished between bilateral contracts on the one hand and unilateral contracts on the other. A Synallagmatic or bilateral contract involves "reciprocal duties of performances".[98] A unilateral contract is "where one

---

[93]Requirements of Writing (Scotland) Act 1995, s 1(1).

[94]Requirements of Writing (Scotland) Act 1995, ss 1(2)(a)(i), 2(1).

[95]*Chitty on Contracts* ch 3; ***Treitel The Law of Contract.*** 14th edition. London: Sweet & Maxwell, 2015 (henceforth: *Treitel The Law of Contract*) ch 3.

[96]Stair, *Inst* 1.10.12. In English law, as a general rule, contracts cannot be gratuitous. See *Chitty on Contracts* para 1-128; *Treitel The Law of Contract* para 3-170, 3-171; For case law see *Hall v Palmer* (1844) 3 Hare 532; *Macedo v Stroud* [1922] 2 AC 330; *HSBC Trust Co (UK) Ltd v Quinn* [2007] EWHC 1543 (Ch).

[96]Smith, *Short Commentary*, p. 284

[97]Smith, *Short Commentary*, p. 284

[98]*Ibid.*

party alone is bound to performance".[99] In this sense, the term "unilateral contract" used by TB Smith is similar to the Civilian idea of "unilateral contract". In French law, for example, gift (or donation) and gratuitous loan are deemed to be unilateral contracts[100] on the grounds that in these instances only the donor/lender is obliged to perform their obligations. In contrast, the donee/borrower is not obliged to do anything, i.e. they are not bound to accept the gift or to pay the price. Nonetheless, Smith's approach of classifying contract into synallagmatic/bilateral and unilateral contracts are not followed by modern writers. The criticism has been made that "[n]ot all of [TB Smith's] conceptual discussion is helpful".[101] As argued by Hogg in relation to the recognition of "unilateral contract" as a type of contractual obligation proposed by TB Smith[102], the term "unilateral" is not an appropriate one to use with contract within the context of Scots private law. Hogg's argument is based on the fact that in Scots law only promise can be unilateral, whereas contract must always be bilateral.[103] Rather, the term "unilateral contract"[104] is normally referred to the English legal concept, which, in many circumstances, equates to the notion of promise in Scots law.[105] Thus, in contrast to French law, in Scots law a donation is not regarded as a unilateral contract. In fact, in Scots law a donation is not seen as even vaguely an agreement, or a contract, between the donor and the donee, as discussed below.

Privity of contract and jus quaesitum tertio (third party rights)

Unlike in England, the doctrine of privity of contract is not adopted in Scotland. The notion of third party rights on contract has been functional in Scotland at least since the seventeenth century. In addition, Scots law has a unique approach in analysing third party right by linking this concept with promissory

---

[99] *Ibid.*

[100] French Civil Code, Arts 1102-1103; Barry Nicholas. *Supra note 116*, p. 38; George A Bermann and Etienne Picard (editors). *Introduction to French Law.* Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2008, p. 208.

[101] Martin Hogg, *Contract Theory*, p. 659.

[102] *Ibid*.

[103] *Ibid*.

[104] *Ibid*.

[105] E.g. Memorandum, *Constitution and Proof of Voluntary Obligations: Unilateral Promises* (Scot Law Com No 35, 1977) 10-11; Hogg, *Obligations*, p. 5.

obligation. As explained by Stair explained, that promises to create rights in favour of persons who are not yet born or who are absent can be enforceable.[106] The fact that a promise is binding without acceptance helps to explain why *jus quaesitum tertio* in Scots law is enforceable regardless of the beneficiary's acceptance. This is different from third party rights in other systems, in which the rights of beneficiaries come into existence when they express their intention to take the benefit, i.e. to accept the offer of a contract.[107] The main difference between unilateral promise and *jus quaesitum tertio* is the number of parties involved in the constitution of the obligation. Only one party, namely the promisor, creates the obligation in favour of the promisee in an ordinary promise, whereas two parties, namely the promisor and the stipulator, create the obligation in favour of a third party beneficiary in a *jus quaesitum tertio*. Thus, a unilateral undertaking made by one person cannot amount to a *jus quaesitum tertio*.[108]

Theoretical problems of contract law in relation to the nature and classifications of contract

(1) What is the legal characteristic of a donation?

In the early stages of Scots law, donation was usually discussed in the context of the law of obligation. However, this changed during the seventeenth and eighteenth centuries when the subject appeared in the area of law (so called today) of unjustified enrichment and benevolent intervention. In other words, it was not placed in the context of contract law.

Specifically, Stair perceived a donation to be a kind of involuntary obligation.[109] This means that, from his perspective, a donation did not arise from the will or consent of humans, but rather from the will of God. It belonged to the same category as other involuntary obligations, such as delict and unjustified enrichment. However, Erskine, who later published his Institutions in 1773, dealt

[106]Stair, *Inst* 1.10.4

[107]For example, Art 1121 of the French Civil Code states: "One may likewise stipulate for the benefit of a third party, where it is the condition of a stipulation which one makes for oneself or of a gift which one makes to another. He who made that stipulation may no longer revoke it, where the third party declares that he wishes to take advantage of it."

[108]*Smith v Stuart* [2010] CSIH 29 at para 15 per Lord Justice-Clerk (Gill).

[109]Stair, *Inst* 1.8.2.

with this subject as a matter of contract, which is a voluntary obligation.[110] Erskine offered a clear distinction between an obligation to donate on the one hand and the transfer of donated property don the other.[111] A donation is therefore a contract which is obligatory in its own right.[112] Erskine's account of donation is said to have been helpful for Scots private law because "a clear distinction is drawn between an obligation to give and a conveyance in implement of that obligation."[113] Unfortunately, his treatment of the subject was not adopted by contemporary writers. In modern Scots legal literature, promises are usually discussed along with contracts in contract law textbooks, since they are both voluntary obligations. However, there is no reference to donations in contract law books. It is observed that the subject of donation is normally only found in articles under a heading in legal encyclopaedias without any connection to the law of promise or contract.[114]

(2) Is delivery of the related property a formality of a donation?

In terms of the requirement of formality of a donation, it was established that a donation "in the sense of the actual transfer of property by deliver" could be proved to be parole by the late nineteenth century. This meant that the law did not require a donation to have any particular formality. Thus, the courts could merely determine if there was a donation between the parties or not from the evidence of a witness. The courts needed to consider two important factors, namely, (i) the intention to donate, and (ii) the delivery of the related property. Only the second factor is discussed in this article for the sake of a comparative analysis with Thai law due to space constraints. It is said that delivery of the subject-matter of the gift is regarded as a requirement for a donation. This suggests that "more than a state of mind is required to complete a donation."[115] Thus, in

[110]Erskine, *Inst* 3.1.16

[111]Hector MacQueen and Martin Hogg. ***"Donation in Scots Law".*** Juridical Review (2012), pp. 1-24, at p. 3.

[112]*Ibid.*

[113]***The Laws of Scotland: Stair Memorial Encyclopaedia*** vol 8 para 605, as cited in *Ibid* at pp. 3-4.

[114]Hector MacQueen and Martin Hogg. *Ibid*.

[115]Hector MacQueen and Martin Hogg. *Ibid* at p. 20.

situations where the donor "had not disposed himself of anything"[116], there was no donation.[117]

2.4 Contractual intention

Scots law adopts the objective approach in determining if a party has a serious intention to create legal relationships.[118] The Scots approach is said to be in accordance with English law. It has been recognised that, for all practicable purposes, it is the objective manifestation of the will of the parties upon which courts rely in determining contractual formation and content.

Theoretical problems of contract law in relation to contractual intention: How to distinguish an offer from other expressions which are not obligatory?

As noted, an offer is differentiated from other expressions in Thai law by using the notion of hierarchy of intention to be bound, which does not seem to appear in Scots law. Instead, expressions that are obligatory and those that are not can be differentiated by referring to Stair's approach regarding three acts of will.

Stair distinguished three acts of human will, namely desire, resolution and engagement. First, desire was explained as "a tendency or inclination of the will towards its object".[119] Second, resolution was "a determinate purpose to do that which is desired", which does not result in any legal effect.[120] Only the third act of will, i.e. engagement, can create a right on the basis that "the will confers a power of exaction in another, and thereby becomes engaged to that other to perform".[121] He further wrote: "Neither is resolution efficacious, because, whatever is resolved or purposed, may be without fault altered, unless by accident the matter be necessary, or that the resolution be holden forth to assure others".[122]The Scottish courts benefited from Stair's account. For instance, in *MacDonald v Cowie's*

---

[116]*Ibid* at p. 23.

[117]*Milne v Grant's Executors* (1884) 11 R 887.

[118]McBryde, *Contracts*, para 5-05; Martin Hogg, *Obligations*, pp. 22-23.

[119]Stair, *Inst* 1.10.2.

[120]*Ibid.* He cited *Kincaid contra Dickson* February 27, 1673.

[121]Stair, *Inst* 1.10.2.

[122]*Ibid.*

Executrix Nominate[123], the court, benefited from Stair's approach of three acts of will when considering whether an expression amounted to a promissory obligation. Lord Tyre stated: "[a]dopting Stair's categorisation, I do not consider that the deceased's act of will passed beyond resolution to engagement."[124]

2.5 Will theory in Scots contract law

Will theory is promoted in Scots law. Stair's analysis draws on natural law, but is also consistent with will theory. As he stated, "there is nothing more natural, than to stand to the faith of our pactions"[125] and "contract is an exercise of the will".[126] Stair's idea shows that will theory is used as a dictate of reason, and contract as an expression of the rational will.[127]

Hogg also proposes that the will-based theory plays an important role in Scots contract law by arguing that the defence of will theory in Scotland is rather easier than it is in England. This can be seen from the facts that, for example, one may argue that the will-based theory has been destroyed by the doctrine of consideration on the grounds that "the law is actually about putting things in the correct form rather than enforcing the wills of the parties".[128] This argument, however, cannot be made in Scots law since the doctrine of consideration is absent.[129]

2.6 Remedies for breach

There are three kinds of remedies for breach of contract in Scots law, namely damages, specific implement, interdict.[130] However, for the purpose of a comparative treatment with Thai law, only two kinds of remedies, namely damages and specific implement will be discussed.

---

[123][2015] CSOH 101.
[124]*Ibid* at para 20.
[125]Stair, *Inst* 1.1.21.
[126]Stair, *Inst* 1.1.10.
[127]Martin Hogg, *Contract Theory*, p. 648.
[128]*Ibid*, p. 657
[129]*Ibid.*
[130]McBryde, *Contracts*, Chs 20, 22, 23; Hogg, *Obligations*, pp. 187-194.

Theoretical problems of contract law in relation to remedies for breach: What is the primary remedy?

In Scots law, the primary remedy for breach of contract is specific implement, rather than damages.[131] Specific implement is described as the primary right for breach of obligation in the sense that the creditor is entitled to choose either enforcing the obligation or claiming damages. As stated by Lord Penrose in *Highland and Universal Properties Ltd v Safeway Properties Ltd*[132]: "[i]n Scotland there is no doubt that—unlike the position in England—a party to a contractual obligation is, in general, entitled to enforce that obligation by decree for specific implement as a matter of right..."[133] The Scots approach towards remedies for breach of contract is fundamentally different from English law where damages are the primary remedies for breach of a contract.[134] It is therefore worth referring to English law on this point for the purpose of a comparative analysis.

In England, an aggrieved contractual party is generally not entitled to enforce specific performance where breach of contract occurs. Rather, he or she is granted damages where breach of a contract occurs.[135] This concept of enforcement remedies is relevant not only at a theoretical but also at a practical level. An example can be found in the different approaches of the Scottish and English courts when dealing with "keep-open" clauses in leases. A keep open clause refers to a lease where there is a term that a tenant is required "continuously to occupy and trade from its premises throughout the duration of the lease." In other words, it is a continuous trading obligations. A keep-open clause commonly appears in leases of retail property, rather than offices or industrial units.[136] What happens when there is such clause but the tenant wants to

---

[131]Smith, *Short Commentary* 854; Martin Hogg, *Promises* 352; Hector L MacQueen and Laura Macgregor. *Supra note 163*, p. 239.

[132]2000 SC 297.

[133]*Ibid* at 309; Lord Rodger stated: "even where the obligation of the debtor is to do something, the basic rule is that the creditor has a choice of remedies: he may either seek specific implement of the obligation or damages." *Ibid* at 299.

[134]See *Chitty on Contracts* ch 26; *Treitel The Law of Contract* ch 20.

[135]*Ibid.*

[136]Jennifer Guy. ***Keep open clauses in commercial leases - The Scottish position.*** Morton Fraser Lawyers, available at *http://www.morton-fraser.com/knowledge-hub/keep-open-clauses-commercial-leases-scottish-position#sthash.scWBkZBY.dpuf.*

close down his or her business in the property rented? In England, the English courts do not generally allow the landlord to enforce a keep-open clause.[137] Rather, remedies for breach of a keep open clause is damages. On the other hand, the Scottish courts generally enforce this obligation by ways of specific implement.[138] There have been a number of cases where the Scottish courts granted specific implement for breach of keep-open clause obligations.

3. Theoretical Framework of Thai and Scots Contract Law: A Comparative Analysis

3.1 The notion of a juristic act

Definition and classification

Both systems recognise the notion of a juristic act, although in Scotland the general theory of the concept has not been developed since the publication of TB Smith's work in mid the twentieth century. Nonetheless, scholars and courts still use the term in the similar sense that is used by TB Smith. The term used in Scots law has a similar meaning to the definition of a juristic in Thai law: it refers to acts that are created by the intention of individuals to create, modify and extinguish rights. No doubt, this is a legacy of the Civil Law tradition. Thai law adopted the concept from Civil Law systems. As for Scots law, recall that TB Smith stated that the concept of juristic act is accepted by systems "which Scots law was associated during its formative period"[139], namely the Civil Law systems.

The classification of juristic acts proposed by TB Smith is, in essence, similar to the classification under Thai law. In both systems, the distinction of juristic acts can be made between *inter vivos* and *mortis causa* juristic acts; gratuitous and onerous juristic acts; juristic acts which are effective to transfer real rights and to create personal rights; and unilateral and bilateral juristic acts.

---

[137] E.g. *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

[138] *E.g.* Retail Park Investments v The Royal Bank of Scotland *1996 SC 227;* Highland & Universal Properties Ltd v Safeway Properties Ltd (No 2) *2000 SC 297; 2000 SLT 414;* Oak Mall Greenock Ltd v McDonald's Restaurants Ltd *2003 GWD 17-540. The first Scottish case in which the court awarded damages instead of enforcing the keep-open clause was* Douglas Shelf Seven Ltd v Co-operative Wholesale Society Limited and Kwik Save Group plc*, 2007 CSOH 53.*

[139] Smith, *Short Commentary,* p. 284.

The relevance between juristic acts and contracts: Is an offer a juristic act?

There is no question about the juristic nature of a contract: it is widely accepted in both systems that it is a bilateral juristic act. However, the uncertainty concerns the juristic nature of an offer, which constitutes a contract when it is accepted, whether it is a juristic act or not. As already noted, in Thai law an offer is regarded as a juristic act by some writers, while some argue the contrary.

As for Scots law, since Stair did not explain the notion of a juristic act, it is not entirely clear if his explanation of "engagement" is equivalent to a juristic act. These two concepts appear to be similar in that both create a right to another person, and once that right is created, the party that stands to benefit can demand that the person who made the engagement fulfils his or her obligation. Although Stair's explanation of engagement does not cover "modifies, transfers or extinguishes rights", it may be inferred that the term "creates a right" is sufficiently wide to include "modifies, transfers or extinguishes rights". Also, Stair did not explain if an offer is classified as an engagement. He wrote: "we must distinguish betwixt promise, polliciation or offer, pactions and contract".[140] At first glance, Stair seemed to suggest that an offer is regarded as an engagement. However, he further wrote that

> "when an offer on tender is made, there is implied a condition, that before it becomes obligatory, the party to whom it is made must accept; and therefore an offer by a son, to pay a debt due by his mother, if it were made known to be accepted at such a time, and in such a place, was found not obligatory after the mother's death, unless it had been so accepted."[141]

This statement implies that an offer is not regarded as an engagement because it is not binding, i.e. does not confer a right on the offeree until the offer has been accepted.

---

[140]Stair, *Inst*, 1.10.4; It should be noted that there is a debate regarding the meaning of pollicitation. For relevant literatures see Cross, Bare Promise; T B Smith, "Pollicitatio - Promise and offer: Stair v Grotius" (1958) Acta Juridica 141: Smith, *Short Commentary* Ch 32; MacCormack, *Pollicitatio* 121-126.

[141]Stair, *Inst*, 1.10.4

In the case of TB Smith, it may be inferred that he did not regard an offer as a juristic act. This is based on the fact that the example of "offer" is not included when he classified various types of juristic acts.

(1) The binding nature of an offer

Scots law

In order to understand the issue under discussion, it is helpful to consider the binding nature of offers in both systems. In Scots law, as a general rule, an offer can be revoked any time before it is accepted.[142] The justification for this is that there is no contractual obligation between the parties yet, thus the offeor is entitled to withdraw his/her offer before the contract is formed. However, where an offer contains a time limit for acceptance, it has been suggested that an offoror cannot withdraw his/her offer until the specified period has elapsed. Scots commentators and the Scottish courts explain the reason for this rule by referring to the binding nature of a promise.[143] Where an offeror specifies a period of acceptance for his/her offer, it means that the offeror is making a "promise" to keep the offer open for the specified period. Since in Scots law promise is binding in its own right, i.e. it is an independent obligation, the offeror is bound to keep the offer open for the specified period. It can be concluded that, in Scots law, an offer does not bind the offeror per se. When someone makes an offer, he/she does not grant any right to the offeree; hence, an offer cannot be regarded as a juristic act.

Thai law

The legal effect of offer in Thai law is different from that of Scots law. In Thai law, an offer cannot be withdrawn once it is made. This rule applies to all offers made to an absent person whether they contain a period of acceptance or not. Specifically, an offer containing a period for acceptance cannot be withdrawn within that period[144] and an offer without a specified period of acceptance cannot be withdrawn within a time in which a notice of acceptance may reasonably be

---

[142]E.g. *Countess of Dunmore v Alexander* (1830) 9 S 190; *Thomson v James* (1855) 18 D 1; *Campbell v Glasgow Police Comrs* (1895) 22 R 621; *J M Smith Ltd v Colquhoun's Tr* (1901) 3 F 981; *Effold Properties Ltd v Sprot* 1979 SLT (Notes) 84. *Smith v Aberdeen City Council* 2001 Hous LR 93 at para 10-28.

[143]E.g. *Paterson v Highland Railway Co*. 1927 SC (HL) 32.

[144]Thai Civil and Commercial Code, Section 354.

expected.[145] However, it is unclear whether an offer made to a present person that does not specify a period of acceptance can be withdrawn or not. This is because the law merely states that this kind of offer can only be accepted there and then.[146] Thus, there is a theoretical problem as to whether the offeror (who makes this kind of offers) can withdraw the offer once it has been made, but the offeree has not accepted it yet (i.e. during the period when the offeror is waiting for an answer). Some writers suggest that the rule that an offer cannot be withdrawn within a reasonable period should also apply to this kind of offer.[147]

Although the recognition of juristic act, as well as the rule of offers specifying a period of acceptance, are similar in both systems the Scots analysis of the relevance between an offer and a juristic act may not directly answer the question of whether an offer is a juristic act under Thai law. This is because an offer is not binding in itself in Scots law; rather, it is binding because of the binding nature of a promise.

German law

Since the rules regarding the irrevocability of offers in Thai law are borrowed from German law,[148] it is worth analysing them from a historical perspective. Like the case Thai law, according to German law, an offer cannot be withdrawn once it has been made.[149] The binding nature of an offer is not obviously stated. However, it cannot be contractually binding on the grounds that there is no such binding between the parties yet.[150] Hogg suggests that this kind of binding is promissory in nature. The evidence[151] shows that Kübel proposed that a promise, in the sense of a genuine unilateral obligation, should be recognised as a standalone obligation during the drafting period of the BGB. Although his proposal was not adopted, it was not entirely rejected. The BGB eventually gives rises to particular kinds of unilateral obligations such as promise of reward, promise of a

[145]Thai Civil and Commercial Code, Section 355.

[146]Thai Civil and Commercial Code, Section 356.

[147]Kittisak Prokati. *Supra note 6,* pp. 59-60.

[148]*Index of Civil Code,* p. 160.

[149]BGB, Sections 145 and 148.

[150]Martin Hogg. ***"Promise: The Neglected Obligation in European Private Law".*** International and Comparative Law Quarterly Vol. 59 No. 02, (2010), pp. 461-479 at p. 463.

[151]*Ibid.*

gift, including irremovable offers, despite the fact that they promissory language was not used in the provision regarding offers. This can be found from Kübel's submission to the drafters of the BGB. He wrote: "The unilateral promise as grounding the obligation to keep one's word (contractual offer)"[152] Hogg therefore suggests that the actual binding effect of irrevocable offers in German law is promissory obligation.[153]

Nonetheless, Hogg's suggestion can only be applied to offers that specify a period of acceptance. It is reasonable to interpret that the offeror has promised that he/she will keep the offer open for a specified period. However, the same justification cannot apply to offers that do not contain time limit for acceptance because there is no justification for the offeror being bound to keep the offer open for a reasonable period. The answer to this issue may be that the drafters of the BGB took it upon themselves to develop the idea that an offer binds the offeor. While an offer that contains time limit for acceptance cannot be withdrawn because the offeror has promised to keep it open, German lawyers simply applied that the offeror should not withdraw the offer within a reasonable period of time, even if it did not specify a period of acceptance. As a result, it can be argued that, in German law, which is the origin of the Thai provisions regarding offers, an offeror is bound to keep the offer open (either for a specified period or a reasonable period) as a result of the law, rather than based on his/her intention.

(2) Analysis

The main feature of a juristic act is that the person intends his/her expression to have a legal effect and the law permits it to do so as a result of the doctrine of private autonomy. Therefore, it can be argued that an offer in German law and Thai law is not a juristic act because the offeror is not bound to keep the offer open by his/her intention, but rather by the effect of the law.

Moreover, another essential feature of a juristic act in Thai law is that the person who makes it has the "immediate purpose"[154] to create, modify, transfer,

---

[152] Translation by Martin Hogg of von Kübel's original German text. *Ibid* at p. 465.

[153] *Ibid.*

[154] "Juristic act are voluntary lawful acts, the immediate purpose of which is to establish between persons relations, to create, modify, transfer, preserve or extinguish rights." Thai Civil and Commercial Code, Section 149.

preserve or extinguish rights. It can be argued that an offeor does not have an immediate purpose to create a legal relationship; rather, he or she intends his or her expression to be binding when it is accepted, i.e. when a contract is formed.[155] This is obvious when considering the extent to which an offeror intends to bind him/herself compared to that of a promisor. It is commonly accepted amongst Thai writers that the extent to which an offoror intends his/her expression to be binding is weaker than that of a promisor.[156] Thus, Thai scholars agree a promise is a juristic act.[157] The theory regarding the extent to which a person intends his/her expression to be binding can be helpful in supporting the stance that an offer is not a juristic act. The fact that a promisor has a stronger intention to bind him/herself means that he/she has an immediate purpose to create a legal relationship; in contrast, the fact that an offeror has a stronger intention to bind him/herself means that he/she does not have an immediate purpose to bind him/herself, but rather intends to be bound when the offer is accepted.

(3) Concluding remarks

In short, although an offer is intended to have a legal effect, it is not a juristic act because the offeror has no immediate purpose to bind him/herself. Moreover, the fact that an offer cannot be withdrawn within a specified or reasonable period is a result of the law, rather than by the intention of the offeror. Therefore, it is argued in this article that an offer is not a juristic act. Accordingly, the answer to the question of whether or not an offer made to a person in the present can be withdrawn should be “yes, it can”, because the law does not prohibit the offeror from withdrawing the offer and the offer cannot bind the offeror per se.

---

[155]This argument has been proposed by Akkharathorn Chularat. *Supra note 6*, pp. 14-15.

[156]E.g. Seni Pramoj. *Supra note 16,* pp. 312-313; Sanankorn Sotthibandhu. *Supra note 5,* p. 331; Paijit Punyapan. ***Promises and an Open Letter to an Anonymous Professor.*** Bangkok: Nititham, 2004, p. 83.

[157]E.g. Seni Pramoj. *Supra note 16,* p. 331; Jeed Sethabutr. *Supra note 10,* p. 128; Sanankorn Sotthibandhu. *Supra note 5,* p. 330; Sak Sanongchart. *Supra note 6*, pp. 366.

3.2 Nature and classifications of contract

Similarities and differences in terms of classifications of contract

Classifications of contract in both systems are in essence similar. The main difference in terms of the classification of contracts in Thai and Scots law concerns gift.

As noted, a gratuitous contract such as a "gift" is legally binding under Thai law. The Thai position in this context then contrasts with Scots law, where, although one may embody a donation in contractual form, a gift or donation need not be classed in every case as contractual in nature.[158] Instead, it is classed as primarily as a transfer of property, rather than contract.[159]

However, even though Thai law regards a gift as a contract, it has a unique characteristic compare to other kinds of contract. A contract can normally be formed when an offer has been accepted (although some may require a prescribed form such as those related to immovable properties). Nonetheless, a gift contract cannot be formed merely based on an offer and an acceptance, but also the given property there must be delivered.[160] Therefore, some writers suggest that a contract of gift does not create an obligation on the part of any party.[161] This is because the only performance of a gift contract relates to the delivery of the given property, which has to be done at the same time the contract is formed. This suggests that, in fact, the actual nature of a gift is not too different in Scots law and Thai law, despite being regarded as contract in Thai law, but not in Scots law. Even though gift is regarded as a contract in Thai law, where the parties agree to make a gift but the given property has not been delivered, the donee cannot demand any performance from the donor. This advances the idea that, if a gift is not classified as a kind of specific contract under the Thai Code, it is theoretically possible to classify it as a transfer of property, as is the case in Scots law.

---

[158]For a detailed account see Hector MacQueen and Martin Hogg. ***"Donation in Scots Law".*** Juridical Review (2012), pp. 1-24.

[159]*Ibid.*

[160]Thai Civil and Commercial Code, Section 523.

[161]Sanankorn Sotthibandhu. *Supra note 38,* p. 377.

The understanding of "unilateral contract"

According to TB Smith, a "unilateral contract" in Scots law is similar to that in the Civil law in that it refers to an agreement between two parties in which only one party has a duty to perform obligation. This is completely from the understanding of "unilateral contract" under English law, which refers to a contract in which only one party to the contract promises to undertake an obligation.[162] This means that a contract can be made by a single will such as the case of advertisements of reward.[163] As noted, the approach of classifying contracts into unilateral and bilateral is not common amongst Thai writers. Nonetheless, if a distinction between a unilateral and bilateral contract had to be made in the context of Thai law, the result would be similar to TB Smith's classification. The English idea of "unilateral contract" cannot be applied in Thai law because it contradicts the juristic nature of a contract in Thai law that it is a bilateral juristic act. A unilateral juristic act in the Thai context would therefore mean an agreement made by two parties but only one party is bound to fulfil the obligation.

Nonetheless, Smith's explanation of a unilateral contract has not been adopted due to the criticism that the term "unilateral" should only be used for "unilateral obligation" (namely, promise) in Scots law. This is also the case in Thai law. Thai writers do not normally make a distinction between a unilateral and bilateral contract. This perhaps stems from the fact that such a distinction may not be an appropriate classification of contract in Thai law. As observed by Sanankorn Sotthibandhu, unilateral contract in the Civil law is similar to non-reciprocal contract, and the term "non-reciprocal contract" is more appropriate. This is because the term "unilateral contract" may suggest that a contract can be formed by one party, which is not possible in the context of Thai law.[164]

The doctrine of third-party rights

In Scots law, the doctrine of third-party right is similar to unilateral promise. In contrast, under Thai law third-party right is seen as contractual in nature, and it is distinct from unilateral promise. As a result, the moment the rights of a third party

[162]*Chitty on Contracts* para 1-099.

[163]*Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

[164]Sanankorn Sotthibandhu. *Supra note 38,* pp. 376-377

beneficiary come into existence in each system differs. In Scots law, it exists once the promise is made, whereas it only exists when the beneficiary declares his/her intention to the debtor in Thai law. This difference may arise from the fact that in Scots law promise is a free standing legal obligation. Therefore, the scope of promissory obligation in Scots law is wider enough to cover some concepts such as third-party right. However, under Thai law, contract is the main route for creating voluntary obligations. Unilateral promise is only recognised in certain limited circumstances.

It is clear that in Scots law, the rights of a third party can be created in favour of a person whose personality has not yet begun or does not have the full capacity, and this analysis can be useful for Thai law. In Scots law, the rights of a third party beneficiary, which come into existence when the agreement between the stipulator and the debtor has been made, can be bestowed in favour of persons whose personality have not yet begun. Thus, there is no theoretical objection to allowing a similar kind of beneficiary in Thai law, particularly because the rights of the beneficiary will not exist until the debtor has been informed. Therefore, the answer in Thai law should be that contracting parties should be permitted to form a contract in favour of any person, including those whose personalities have not yet begun.

3.3 Intention to create contractual obligations: Subjective or objective?

Initially, it appears that Thai and Scots law take a completely different view of the intention to create a legal relationship since the former takes a subjective approach whereas the latter adopts an objective one. However, in fact, the objective theory also has a role to play in Thai law, particularly when a bona fide other party or third party needs to be protected. For instance, as already noted, a hidden intention is not void unless the other party has knowledge of it.[165] Also although a fictitious declaration of intention is void, its invalidity cannot be established against bona fide third persons who are injured by it.[166] Thus, the Thai and the Scots approaches to the intention to create a contractual obligation are not as different as they initially appear to be.

[165]Thai Civil and Commercial Code, Section 154.

[166]Thai Civil and Commercial Code, Section 155.

3.4 Will theory and contract law

Will theory also has a substantive role to play in both jurisdictions. Scots contractual principles are compatible with the will-based theory of contract law. This can be traced from Stair's idea explaining that contract is an exercise of the will. As for Thai law, the will-based theory of contract law also has an influence, being a fundamental of contract. A contract generally arises when the wills of two or more parties coincide. In addition, the principle of freedom of contract reflects that individuals' wills are protected by law. Individuals have the power to determine whether they want to enter into a contract and to choose the contents of the contract. Moreover, a promise to enter into any kind of contract is enforceable even if such a promise is not recongised under the Civil and Commercial Code as a result of the will-based theory.

3.5 Remedies for breach

The approach of considering a specific implement/performance as the primary remedy has been adopted in both systems, which reflects a stark contrast with the position in English law, where damages are the primary remedy. The fact that a specific implement/performance is regarded as the primary remedy in both systems also supports the essential role played by the will theory in Scots and Thai contract law. As argued by Hogg,[167] the use of the will theory as a defence is easier in Scotland than in England. Therefore, Scots contract law can withstand the criticism that "contracts are really only about making reparation for a breach".[168] To put it differently, it can be argued that in England, where damages are the primary remedy whereas specific performance is not, the law merely reflects compensation. That is to say, the English contract law does not enforce the actual obligation of the contracting parties, hence it is not in accordance with the will-based theory of contract. This analysis can also apply to Thai law in which the specific performance is also the primary remedy for a breach.

[167] *Ibid* at 657.

[168] Hogg, *Contract Theory* 666.

4. Conclusion

4.1 Similarities and differences between Thai and Scots contract law and their relevance to the study of the law of contract

This article has shown that the underlying basis of the law of obligations and contract law in both systems shows many similarities to each other. Although Scotland is a mixed jurisdiction and the law of obligations has been also partly influenced by English law, the fundamentals of obligation are closer to the Civilian tradition. Scots law recognises five types of obligations, namely contract, unilateral promise, delict, unjustified enrichment, and *negotiorum gestio*. Similarly, the Thai legal system is mixed (in that it has been influenced by both Civil and Common Law traditions), but the Civilian influence is stronger than the English influence as a result of the codification. Thai law recognises four main types of obligation, namely contract, delict, unjustified enrichment, and *negotiorum gestio*. Thus, both Scots law and Thai law recognise contract, delict, unjustified enrichment and *negotiorum gestio*, each of which is a standalone obligation. This similarity results from the fact that private law in both systems has Roman roots.

Even though Scots law is a mixed legal system which has been subject to influence from both the Civil and the Common Law, Scots contract theory is not really a mixture of these two legal traditions. This article has shown that the predominant influence on Scots contract theory is Civilian. This can be seen from the fact that in Scots law contracts are based upon an agreement between two parties; there is no requirement of consideration; and the will theory plays a large part. Although contracts are no longer classified as bilateral and unilateral in modern Scots law, the understanding of a "unilateral contract" in its traditional sense is compatible with that of the Civil Law, and differs from that of English law. These characteristics place Scots contract law in parallel with Civilian traditions and mark a stark contrast with English contract law.

As for Thai law, a contract is viewed by Thai lawyers as being based upon an agreement between two parties. Moreover, neither the English legal doctrine of consideration nor the approach of defining contract as an exchange of two promises was adopted in Thai law. Furthermore, the will theory plays a substantive role in Thai contract law. Furthermore, as in the case of Scots law, the theoretical

understanding of "unilateral contract" in Thai law is similar to that of the Civil Law, which marks a stark contrast with the notion of "unilateral contract" in English contract law. All these characteristics show that Thai contract theory is fundamentally based upon Civilian traditions.

4.2 Which uncertain aspects of Thai contract law can benefit from this comparative analysis?

There are a number of uncertain aspects of Thai law that can benefit from Scots law. Firstly, compared to the binding nature of an offer in Scots law, an offer in Thai law is not a juristic act because it is not binding per se. Moreover, based on the historical treatment of German law, an offer cannot be withdrawn because of the prohibition of the law, rather than the actual intention of the offeror. Secondly, Thai law can benefit from Scots law in identifying a third party beneficiary as a person whose personality has not yet begun. Thirdly, the fact that specific performance is the primary remedy in Thai law helps to provide an alternative explanation of the importance of the will-based theory in Thai law

4.3 Which uncertain aspects of Scots contract law can benefit from this comparative analysis?

Scots law generally has a clear approach in dealing with aspects of contract law. Therefore, it is inevitable that fewer uncertain aspects of Scots law can benefit from Thai law than vice versa. Nonetheless, there is an aspect to which Thai law has a more precise approach than Scots law, namely, the notion of a juristic act and the fact that Thai law has a clearer general theory of juristic acts may be helpful for Scots law. The understanding of a juristic act in Scots law is rather similar to that of Thai law, despite the lack of development of this concept in modern Scots law. Such a general theory of juristic acts may be helpful, for example, for the classification of voluntary obligations and any act that has a legal effect based on the intention of the party. If Scots law had a clear structure of juristic acts, gifts/donations may be classified as a kind of juristic act.