Alessandro Stasi

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Preface

The primary purpose of this book is to illustrate and explain the elementary principles of Thai private law, in a simple and readable style that should appeal to a wide readership of students, academics, and practitioners. The text is organized around the major issues relating to private law and provides a concise and systematic overview of the norms regulating legal relationships between private persons. Although all topics have been previously treated in the Thai language, this book is one of the first and most complete works in the English language about Thai private law. The book covers not only the legal system, starting from the Civil and Commercial Code and emphasizing the substantial changes that have been introduced in the past decades, but also the deep influence of doctrine and case law. It is built up in several layers, starting from the general rule, to gradually examine the more specific ones. As it is common in civil law legal systems, the analysis of the specific cases follows the explanation of the general rule.

The 6 chapters are each designed to present a detailed analysis of a particular area of Thai private law and discuss the principal issues encountered in a legal practice without unnecessary detail. To some extent, each chapter is intended to address a specific topic which can be read independently of the rest of the book. Chapter 1 introduces the main concepts, rules, and institutions of the Thai legal system. It details the history of the codification of the Civil and Commercial Code and provides the reader with valuable information about the main principles which regulate private relations between citizens and business associations. Chapter 2 provides a full and systematic view of the fundamental principles which regulate the law of obligations in Thailand. It analyses the general rules relating to obligations (dealing with contractual agreements separately in so far as this is necessary) as well as the special rules which apply to particular kinds of obligations. It is also concerned with the mechanisms of prevention, compensation, and enforcement in case rights are violated. Chapter 3 is devoted to specific contracts. It provides an understanding of the sources of contract law in Thailand and analyses the normative regulation of nominate contracts under the Civil and Commercial Code. Topics covered include sale, gift, hire of property, hire of services, and hire of work, loan, deposit, suretyship, pledge, and mortgage. Chapter 4 deals mainly

with real rights, though it also incidentally contains rules referring to obligatory relations arising in connexion with the ownership and possession of things. It provides an introduction to the fundamental rules which regulate property law in the Thai legal system and includes a detailed discussion of the concepts of ownership and possession. It also reviews some of the principal characteristics of the main real rights over immovables other than ownership including the right of servitude, superficies, habitation, and usufruct. The most important legal aspects of family law are summarized in Chap. 5. After outlining the Thai rules as to the celebration of marriages and its validity, the effects of marriage are explained in detail. The effects of marriage are treated under two heads: the general effects being distinguished from the effects described under matrimonial regime of the spouses. This chapter also analyses the legal relationships of individuals who are connected to each other as family members, such as children, parents, wives, and husbands. Chapter 6 concluding the book deals with all issues arising from death and transmission of the estate of a person after his death, the statutory rights of inheritance, the succession by will, and the administration and devolution of an estate of deceased persons.

Much of the material presented in this book has been inspired and greatly informed by the studies of Prof. Ernest Joseph Schuster. His fundamental work 'The principles of German civil law' has exercised an immense influence on the drafters of the Thai Civil and Commercial Code and still represent today an essential reference for a large number of researchers and scholars dealing with the Thai legal system. This work has also benefited greatly from the continual assistance of a very large number of friends, colleagues and students. These include, in particular, Alexei Blanc, Parisa Mahakantha, Pariya Patchimnan, Phatcharaporn Chokbunsuwan, Somkit Keskowit, and Suppaluk Jakkrod. The author is especially grateful to Prof. Giuseppe Mario Saccone, Dr. Santichai Srisawet, and Dr. Sumalee Yang who meticulously reviewed the entire manuscript and made many pertinent suggestions. Additional thanks go to Phansa Manokatitham for her valuable assistance with particular topics in the text and Thitiwat Ongsangkoon for his work on the project.

All of these persons and institutions must be exonerated, however, from responsibility for any inaccuracies, errors, or omissions within the work, the author alone assuming full responsibility. To the best of the author's knowledge, the law as stated in this work is current as of May 31, 2016.

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About the Author

Alessandro Stasi is an Italian academic and lawyer. He read law at the University of Naples Federico II, Italy, and took his First State Exam in 2006. He then moved to France and graduated from the University of Nice Sophia-Antipolis where he obtained a master's degree and two doctorates in comparative business law. Alessandro Stasi was MBA Director at the Asian University, Thailand, and also taught law at the Ramkhamhaeng University, Thailand. He is currently a Lecturer in law at the Mahidol University International College, Thailand. In addition to being the author of several books (most recently *Elements of Thai Civil Law* and *Principles of Thai Business Law*), he also writes academic articles in leading international journals and provides advice to private clients, international organizations, and non-governmental organizations.

Chapter 1
General Rules of Thai Private Law

1.1 Introduction

1.1.1 Private Law, Civil Law, and Commercial Law

The term private law as distinguished from public law is not defined by Thai statute law. Justinian's definition *publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem pertinet,*[1] still indicates the line of cleavage. It should be remembered, however, that there are cases where public bodies exercise private rights as property owners or as employers of labour and that such rights, though exercised for the public benefit, are regulated by private law. The Thai Civil and Commercial Code and the other enactments referred to in this treatise deal with private law only, but there are matters on the borderline to which attention will be called in their several proper places.

Private law (*kotmaai aykgachon*) traditionally includes relations between private individuals. It is divided into two main branches: civil law and commercial law. Civil law (*kotmaai paeng*) regulates property relations and personal relations between private persons , while commercial law (*kotmaai panit*) includes those rules governing business and commercial transactions between merchants during the course of their business as well as the instruments they have at their disposal.

Many civil law nations separate civil law from commercial law. France, Germany, and Japan, for example, still have separate Commercial Codes. Pointing to the unity of the legal system, Thailand has preferred to draft and promulgate a Code that deals with both civil and commercial transactions. Thus, the scope of the Code has been extended so as to make it a Civil and Commercial Code whose sections are applicable to both civil and commercial matters.

[1]Dig. I.1.1§ 2, Ulpian: public law is the law that concerns the position of the Roman state; private law is the law that concerns the interest of the individual citizens.

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The Civil and Commercial Code does not comprise the whole of the law on the subjects with which it purports to deal. Thus, for instance, the law of companies contained in the Code is supplemented by the Public Limited Companies Act B.E. 2535 (1992) and the Securities and Exchange Act B.E. 2535 (1992); the law as to unlawful acts by the Liability for Damages Arising from Unsafe Products Act B.E. 2551 (2008); the law as to intellectual property by the Copyright Act B.E. 2537 (1994), Patent Act B.E. 2522 (1979), Trademark Act B.E. 2534 (1991), Protection of Layout-designs of Integrated Circuits Act B.E. 2543 (2000), Trade Secret Act B.E. 2545 (2002), and Protection of Geographical Indication Act B.E. 2546 (2003). With a view to more effective protection of the consumer, the Consumer Protection Act B.E. 2522 (1979) and Unfair Contract Terms Act B.E. 2540 (1997) have been enacted. Moreover, the whole of the legislation relating to foreign investment in Thailand is regulated by separate acts including the Foreign Business Act B.E. 2542 (1999), Alien Employment Act B.E. 2521 (1978), and Investment Promotion Act B.E. 2520 (1977).

1.1.2 History and Function of Thai Private Law

The framework of the Thai legal system has its roots in the continental legal tradition with its dependence on statutory law. The codification of Thai private law began in the nineteenth century under the reign of King Chulalongkorn (Rama V). Under his guidance, public administration aimed to improve and develop the country in many significant areas. Several reforms introduced important changes in the legislation, revenue administration, trade, and taxation. On 8 May 1874, the Council of State was established on the model of the French Council of State with the responsibility to advise the king on matters concerning state administration, national development, and legislative drafting.

During the reign of King Rama V, European nations tried to expand their colonial empires into Southeast Asia, and Thailand began to face jurisdictional problems. Westerners, mainly British and French, complained that there were no standards in the Thai legal system, and the sanctions administered by the Thai court, such as trial by ordeal, were barbaric and cruel. Such disputes with Europeans over legal matters led to bilateral treaties providing for special courts and exempting European subjects from the jurisdiction of the Thai courts under the Law of Three Seals. A number of bilateral treaties between Thailand and the Western countries provided that foreign citizens were only subject to their own court established in the kingdom. These courts, which were known under the term 'Counsel Court' (s*an kongsul*), progressively led to problems of extraterritoriality of the judicial system.[2]

[2]See in this sense Engel and Engel (2010), pp. 38–39.

King Rama V realized that modernization was necessary if the country was to remain independent of foreign domination. Thus, the king urgently planned a development process, going all over the kingdom to personally examine and understand his subjects' conditions.[3] In that period, it was a common assumption that Thai law and English law were exactly the same. As a consequence, English common law began to be taught in the country's law school and adopted in the royal court, thereby relegating existing Thai law and the long accumulating experience in its practice to oblivion.[4] However, difficulties confronting Thai jurists and judges, unable as they were to apply English common law principles to Thai subjects, led Rama V, in 1908, to appoint a commission to draft, *inter alia*, a Civil and Commercial Code, in line with the country's need. It so happened that the French government offered to help out with the contemplated Civil and Commercial Code. With the intricacies of goodwill diplomacy militating, as they did, against declining the apparently disinterested proposition, the overture was graciously taken up without further reflexion and French legal advisers were employed in large number to help draft the Civil and Commercial Code following the Code Napoleon of 1804.[5] These included Padoux, Moncharville, Guyon, Rivière, Segnitz, Laforcade, L'Evêques, and others.

The work of preparing the draft of a Civil and Commercial Code embodying the main parts of Thai private law proceed very slowly because of misunderstanding and lack of cooperation between the different members of the draft committee.[6] The difficulties confronting the committee are made clear in a letter that Rama V wrote to Jens Westengard in which he states that 'there is only one thing that will

[3]On this point, see Stasi (2015), pp. 14–15.

[4]The king's son, Prince Raphi Pattanasak of Rajburi, was sent to study law in England, and in 1896, he was appointed Minister of Justice. Thanks to his reforms, Prince Raphi is today considered as the father of Thailand's modern legal system. Prince Raphi established the first law school in the country in 1897, using the Ministry of Justice building, designed the syllabus, and selected the students himself. In his fourteen years in office, he laid down the foundations of the Thai legal system. Another key figure during the reign of King Rama V was his Adviser-General, Belgian jurist Rolin-Jacquemyns, who played a very important role in establishing Thailand's modern legal system. He coedited the legal Code in 1897, recommended the creation of a law school to King Rama V, and coexamined the bar exams for the law school. On this point, see McCargo (2015), p. 30. See also Preechasilapakul (2003), pp. 17–20.

[5]See, among others, Prachoom (2015), p. 66.

[6]On this point, see Loos (2006), p. 62, who states that 'The problem appears to have been in part their lack of proficiency in English. Despite the entirely French and Siamese membership of the drafting commission, the Civil Code was initially drafted in English by the French members, three of whom were sent to improve their English in London in 1908 before coming to Siam. They drafted the Codes without input by bilingual Siamese, not because of imperial tendencies on the part of the French legal advisers or inabilities of Siamese officials, but because of the limited availability of and great demand for Siamese officials with bilingual fluency in English and Thai. When Padoux returned to Paris in 1912 for reasons of ill health, he also was disappointed in his work. By 1913, poor health or not, Padoux resigned his post in Siam and signed on to work as an adviser in China'.

give trouble and that is M. Padoux's draft of the Code. The minister of Justice, Judge Skinner-Turnerand and Masao think that it will not do at all. Not only will it have to be altered but it will be necessary to re-draft it altogether because Padoux and his five assistants are quite incapable of making a Civil Code'.[7]

In view of the criticism, a second commission was appointed under the reign of King Rama VI with instructions to revise the first draft following the German Civil Code (*Bürgerliches Gesetzbuch*, or BGB) and the Japanese Civil Code.[8] The new drafting committee was composed of several practitioners and academics who enjoyed great prestige at that time, including René Guyon who was the last foreign legal adviser to help draft parts of the Civil and Commercial Code. They led the legal reform process, which they executed through the medium of English. Despite the legal requirement of stamping Thai versions as original, the Civil and Commercial Code was first drafted in English and only later translated into Thai.[9]

The second draft was finished in 1924, and after the introduction of numerous modifications on the Books 1 (General Principles), Book 2 (Obligations), and Book 3 (Specific Contracts) of the Civil and Commercial Code, the final product became law in 1925.

This fragmentary approach to codification witnessed the promulgation of Book 4 (Property) in 1932, and before the Book 5 (Family) and Book 6 (Succession) were officially enacted in 1935, a new system of government was put in place. In June 1932, some young intellectuals educated abroad and inspired by concepts of Western democracies led a revolution to change the system of government from an absolute monarchy to a constitutional monarchy. To avoid bloodshed, King Rama VII graciously agreed and signed the country's first constitution on 10 December 1932.

Thailand's current king, Rama IX, has reigned since 1946 and is the longest reigning monarch in Thai history. Under his reign, Thailand has had numerous charters or constitutions, and many adopted following military coups and riots. Under the current interim constitution approved in July 2014, the king plays an important role as head of the nation. The king exercises his power through the three branches of government: the executive power, the legislative power, and the judicial power.[10]

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[7]Letter of King Rama V to Jens Westengard, 24 February 1910.

[8]The Japanese Civil Code was chosen mainly because it represented a successful approach of transforming private law from an oriental-style country to a Western-style country, and thus, Thailand could avoid significant risks and uncertainties if she followed the Japanese model. Therefore, the development of Thai private law is principally an amalgamation of different legal paradigms of different countries, including Germany, France, and Japan. Only in the domain of family law, has an autonomous model been used.

[9]On this, see in particular Powel (2009), who observes correctly that 'the Thai legal register has been tainted by English grammatical construction. While Thai does not employ a passive voice equivalent to the English passive, there are many instances in the Civil and Commercial Code where the syntax of the Thai closely mimics the English, producing sentences which are not how Thais would say things at all and yet which have become familiar to and are routinely copied by legal drafters'.

[10]See Stasi (2015), p. 16.

1.1.3 Arrangement of the Civil and Commercial Code

The arrangement of the Civil and Commercial Code is, to a great extent, based on the arrangement of the German BGB which in turn has its roots in Roman law. The Thai Civil and Commercial Code is made up of six parts, known as 'books' dealing with the general provisions of the Code (Book 1), the law of obligations (Book 2), specific contracts (Book 3), property law (Book 4), family law (Book 5), and the law of succession (Book 6).[11] Business contracts are primarily governed by Book 3 which also lays down detailed provisions in relation to partnerships and companies.[12] This arrangement is not, strictly speaking, logical, inasmuch as the second and third books deal with a special class of rights, while the fourth deals with rights referring to a special class of property, and the fifth and sixth with the results of a special class of events and the rights created under special classes of relationships. It would have been more consistent to make either the nature of the property or the nature of the rights the main basis of division. In England, the most familiar division is the separation of the rules relating to real property from those relating to personal property, and the distinction between the two methods of classification serves to illustrate a vital difference between English law on the one side and Roman law on the other hand. The rights relating to land were, under English law, treated as rights *sui generis*; feudal tenure, entails, recoveries, leases and releases, and other similar institutions have no reason of existence except in relation to land. Alienation, marriage, birth, and death affect land in a manner entirely different from the manner in which they affect other property. Under Roman law, on the other hand, no such distinction existed. The word *res* comprised all movable and immovable objects; property in land was not in its nature different from property in slaves or in pieces of furniture. The distinction between several classes of rights and several classes of events affecting rights was, therefore, a more natural basis of the scheme of classification than the distinction between land and other property. The Civil and Commercial Code, as mentioned before, has retained the classifications introduced by the books on Roman law, but owing to the fact that it has to a large extent allowed English institutions to modify the Roman system on which it is mainly constructed, the distinction between immovables and movables has assumed a much larger importance than it had in the old textbooks.

The general part of the Civil and Commercial Code deals mainly with the persons, natural or juristic, in whom rights may vest; with the nature and

[11]A Thai version of the Civil and Commercial Code can be found in the Legal Execution Department's Website at http://www.led.go.th/datacenter/pdf/1_5.pdf. There is no official English version. A recommended English translation can be found in Sandhikshetrin (2008).

[12]The BGB is divided into five books, of which the first contains general rules, while the second, third, fourth, and fifth books, respectively, deal with the 'law of obligations', 'the law of things', 'family law', and 'the law of inheritance'. The structure of the BGB is in line with the structure of the *Pandektenlehrbucher*, i.e. the systematic books on modernized Roman law which was the 'Common Law' of Germany before the introduction of the Civil Code.

classification of the particular objects called things (the rights relating to which are, as mentioned above, discussed in the second book); with juristic acts (being the principal factors by which rights are created, transferred, and extinguished); with the influence of time as creating and extinguishing rights (prescription), and some other matters of minor importance.

The book relating to obligations abandons the old division between contractual obligations and obligations *ex delicto*. It contains general rules relating to obligations (dealing with contractual agreements separately in so far as this is necessary) as well as special rules as to particular kinds of obligations which are enumerated promiscuously without any systematic order. It is also concerned with the mechanisms of prevention, compensation, and enforcement in case rights are violated.

The third book is devoted to specific contracts. The normative regulation of nominate contracts under the Civil and Commercial Code covers nearly thirty categories of contracts. Nominate contracts are regulated specifically because they concern particular relations between persons which occur frequently and are always constituted in the same form. Although the Civil and Commercial Code provides the framework for several standardized contractual relationships, in pursuing their interests, individuals are free to perform types of contracts not previously listed in the Civil and Commercial Code.[13] Thai private law recognizes such a category as innominate contracts under the principle of freedom of contract and treats such contractual schemes as enforceable if they embody interests deserving of protection by the legal system.

The book relating to property brings out the development which, as mentioned above, has led to a more marked distinction between the law as to land and the law as to movables; a separate division deals with rights relating to immovables; the rules as to the acquisition and loss of property are given separately in respect of immovables and in respect of movables.

The book on family law regulates the legal relationships of individuals who are connected to each other as family members, such as children, parents, wives, and husbands. This includes marriage contracts, divorce, and legal separation together with custody issues. As for the book on the law of inheritance, the rules thereof govern all issues arising from death and transmission of the estate of a person after his death, the statutory rights of inheritance, the succession by will, and the administration and devolution of an estate of deceased persons.

1.1.4 General Characteristics of the Civil and Commercial Code

The law of the Civil and Commercial Code is built up on foundations borrowed from German law with additions contributed from French and Swiss sources, but

[13]For a detailed discussion on this point, see Nipitikul (2001), pp. 32–38.

some of the provisions are of an entirely original character. The rules relating to family law and law of inheritance are only a few examples of numerous and important innovations. The Law of Three Seals (*Kotmai Tra Sam Duang*), the corpus of traditional laws of Thailand compiled in 1805 by the order of King Rama I, was deliberately and decisively abandoned by the authors of the Civil and Commercial Code. Their aim was to introduce detailed rules only for specific purposes and to be generally content with the establishment of broad principles, leaving it to legal science and to the decisions of the courts to fill in the details gradually. Provisions like the following—'Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith' (Section 5, Civil and Commercial Code). 'Any person who, through an act of performance made by another person or in any other manner, obtains something to the prejudice of such other person without legal ground, must return it to the latter' (Section 406, Civil and Commercial Code). 'The letter is bound to deliver the property hired in a good state of repair' (Section 546, Civil and Commercial Code). 'In any case, the property found must be kept with reasonable care until delivery' (Section 1323, Civil and Commercial Code). 'Any clause in the prenuptial agreement contrary to public order or good morals, or provided that the relations between them as regards such properties are to be governed by foreign law shall be void' (Section 1465, Civil and Commercial Code). 'A person exercising parental power has the right to punish the child in a reasonable manner for disciplinary purposes' (Section 1567, Civil and Commercial Code)—leave considerable freedom to those who have to administer the law and give it an amount of elasticity, which ordinary statute law does not give.[14]

Some of the sections merely contain definitions (e.g. Sections 83, 137–144, 453, 1335, 1356, and 1367 of the Civil and Commercial Code), and sometimes, a section merely sums up the contents of immediately following sections (e.g. Section 1324 of the Civil and Commercial Code). In other cases, a right is defined and the expression by which this right is afterwards called is added in brackets (e.g. Sections 291 and 298 of the Civil and Commercial Code).

Words and forms of speech are frequently used in a technical meaning not defined by the Code, but so obvious from their mode of application that such technical meaning must be deemed to be implied by the Code itself. Thus, the words 'cannot' and 'may not', respectively, have distinct technical meanings. When the Civil and Commercial Code says that an act cannot be done, this means that an act attempted to be done, notwithstanding the prohibition, is void, but when the Civil and Commercial Code declares that an act may not be done, an act violating the prohibition is not on that ground void, but gives a right to damages to any person in whose favour the prohibition was made (compare, e.g., Section 193/11 of the Code, which declares that the periods for prescription fixed by law cannot be extended or reduced, with Section 566 which provides that if no period is agreed

[14]See in regard to more comprehensive discussion Saengyouthai (2011), p. 49.

upon or presumed, either party may terminate the contract of hire of property at the end of each period for the payment of rent, provided that notice of at least one rent period is given, and means that any notice given before the end of each period for the payment of rent, notwithstanding the prohibition, is effective, but entitles the party injured by the determination of the contract to damages).[15]

The word 'shall' implies that the omission to do the prescribed act gives an aggrieved party a claim for damages (see, e.g., Section 493 of the Civil and Commercial Code which provides that the parties to a sale agreement may agree that the buyer shall not dispose of the property sold; if he disposes of it contrary to his agreement, he shall be liable to the seller for any injury resulting thereby), while the word 'must' implies that the omission renders the whole transaction ineffective (see, for instance, Section 714 of the Code which states that a contract of mortgage must be made in writing and registered by the competent official and means that a contract made in derogation of these requirements is deemed void).

The authors of the Civil and Commercial Code have taken great pains to show, when establishing any rule, how the burden of proof respecting compliance with the rule is to be apportioned between the parties, and they have adopted peculiar modes of expression intended to give a guidance as to their meaning. The rules are too complicated and subtle to be reproduced in this place, and they are not always carried out with complete consistency.

1.1.5 Methods of Interpretation

The judicial application of legal rules is based on the generalization of a case into a legal principle and, then, the formulation of rules that encompass a variety of cases. As a consequence, a set of complex elements must be considered in the choice-of-law process: first, the legal principle—its substance, strength, and scope and in other words, the question of law in relation to the case; second, the question of fact which must be demonstrated in a trial by reference to facts and evidence. Facts can be pleaded and proved by evidence, legal reasoning, general knowledge, assumption, legal standards, methods of interpretation, and legal presumptions; and third, the technique of choice between conflicting legal rules for the same facts. Conflicts which may arise in the application of the law may be generic, or temporal. To avoid such contradictions, the law provides principles and procedures for the resolution of conflicts. In solving the generic collisions between coexistent laws, the court should take into account the nature of the law. Laws are categorized as general or special, incidental or consequential, and subsidiary or absolute. In cases of temporal conflict of legal standards, one solution can be found in the following maxim *lex posterior derogat legi priori* meaning that later laws repeal

[15]On this theme, see especially Auaychai et al. (1982), p. 19.

earlier laws.[16] In this regard, Section 3 of the Civil and Commercial Code provides that from the day of operation of the Code, all other laws, bye-laws, and regulations, in so far as they deal with matters governed by the Code or are inconsistent with its provisions, have to be considered as repealed.

This choice-of-law process is preceded by the judicial interpretation of the law. Courts have available to them several methods of interpretation which need to be noted. Interpretation is considered to be authentic when the legislator's intention or purpose is used as a decisive criterion. Thus, an authentic interpretation is an official interpretation of the law. If the interpretation is derived from unwritten practice, it is defined as usual interpretation. Both usual and authentic interpretation constitute what is generally called legal interpretation.

For cases which do not fall within the authentic interpretation, the Civil and Commercial Code provides several rules of interpretation of the law to be applied. Specifically, Section 4 of the Code states that the law must be applied in all cases which come within the letter and spirit of any of its provisions. This is to say that the interpretation must be based on the ordinary meaning of the language of the law (literal interpretation). Literal interpretation is based exclusively on the actual language of the provision contributing to the shaping of legal status. If it is not possible to adopt a literal interpretation because the legislative acts are unclear or imprecise, then the explanation of the legal text must be done according to comparison with other norms of the legal system (systematic interpretation).[18]

Where no provision is applicable, Section 4, paragraph 2, of the Civil and Commercial Code provides that the case must be decided by analogy to the provision most nearly applicable (interpretation by analogy). Where a gap has been left by any statutory rule, it is filled up, according to this method, by reference to another rule contained in the same statute, in connexion with which a point corresponding to the point left open in the first-mentioned rule is expressly provided for, and the *ratio iuris* of the last-mentioned expression is taken to be a general rule of law applicable to all cases. This method which assumes that the omission in the first case was accidental, while it may have been deliberate, and also that a judge may fill in a gap left by the legislator's want of care is not in accordance with English methods of interpretation.

Another kind of assistance in respect of the interpretation of the Civil and Commercial Code is provided by the historical evidence accompanying the adoption of the Code including the committee reports, debates, and testimony offered during its consideration by the legislature.[19] These materials cannot be used as direct evidence for the meaning of any part of the Code, inasmuch as in Thailand as well as in England, the rule is paramount that the legislator's expressions and not his intentions are conclusive, but this rule does not detract from the cogency of

[16]Kasemsap (1981), p. 54.

[18]See Stasi (2016), pp. 16–17.

[19]See in regard to more comprehensive discussion Kasemsap (1981), p. 42.

another rule of equally universal application, according to which the history of any legal provision is an indispensable guide to the *ratio legis*, and the committee reports offer the most valuable guidance to the history of the enactments embodied in the Code. Where any rule is taken from the common law, or from any local system of customary law, the application formerly given is of necessity, an almost conclusive guide as to its present application, and it is only in respect of new or modified law that important new questions can arise. For the purpose of finding whether, and to what extent, any provision of the Code is derived from old sources, the committee reports are undoubtedly the most convenient and most authoritative work of reference.

The authority of textbook writers both as regards the old and the new law is of great importance in Thailand. Certain works are by common consent picked out as the most worthy of attention, and such works are quoted in the written pleadings and in the judgments of the courts in the same way as some of the older works are quoted in English courts.

Lastly, there is the guide to interpretation which in practice is the most important of all, viz. the rules established by the practice of the courts. Theoretically, the rule of English law, according to which the judgment of any court establishing any rule of law is conclusive for all co-ordinate and subordinate courts, is not accepted in Thailand, and any young judge fresh from his final examination may overrule the judgment of the Supreme Court of Justice, but in practice, the ruling of any superior court is of the greatest weight and authority, and the Supreme Court of Justice publish regular official reports of their more important judgments. In fact, while they are not absolutely binding, it would not occur to any serious judge to overrule a principle laid down in any superior court, without giving very substantial reasons for his dissent.

The methods of expression and interpretation to which attention has been called admit of a constant adaptation of the law to the successive variations of the surrounding conditions. No doubt the wide margin left to judicial discretion has gradually disappeared. After a time, certain rules consistently adopted by the courts have been treated as rules of customary law. These rules, however, are not applied literally, but only as indicating the principles which ought to be followed, and are not therefore in any event less elastic than the rules established by case law in England. It is not proposed to discuss the advantage of codified over uncodified law, but it is necessary to insist on the fact which cannot be disputed by anyone familiar with the working of civil law codes that the persons who in discussing the merits or demerits of codification oppose codified law to case law, entirely miss the point at issue. A Code like the Civil and Commercial Code does not replace or hinder the development of case law. It replaces a number of heterogeneous statutes, and the new laws take the shape of amended sections instead of appearing as separate enactments. Moreover, its methods of expression favour recognition of general principles in the place of the casuistic irregularity which is fostered by the absence of any authoritative systematization of law.

1.2 Persons

1.2.1 General Rules

The expression 'person' is in Thai Law applied to any individual entity capable of rights, that is to say, capable of being the owner of, or exercising rights over property, and of having and enforcing claims against others. Legal persons are defined as the owners or holders of their legal interests. Legal systems prescribe rules which identify what characteristics persons must have to enjoy capacity. This can be described as legal personality (in Thai: *bukkon dtaam kot maai*) and is synonymous with capacity for rights. The term capacity for rights must be sharply distinguished from capacity for acts, which indicates the ability or power of a person to cause legal consequences through juristic acts or unlawful acts. The Thai legal system recognizes several types of capacity for rights, as well as capacity for acts.[20]

Entities capable of rights are divided into two classes, which are, respectively, called natural and juristic persons. The distinction between natural persons (in Thai: *bukkon tammadaa*) and juristic persons (in Thai: *niti bukkon*) is derived from Roman law. Natural persons are individuals in possession of legal rights and legal duties as provided by the law. Juristic persons are entities with separate legal existence, such as different types of companies, organizations, and institutions.

Under Thai private law, every human being is capable of rights, but there is no characteristic sign, the possession of which marks any combination of human beings or any other artificial entity as a 'person' in the legal sense. Corporate rights must always be expressly conferred, either by virtue of a general enactment, making their attainment dependent on compliance with certain prescribed conditions, or by a special act of the competent authorities of the state within which the right of personality is to be enjoyed.

1.2.2 Legal Position of Natural Persons

As human beings, all individuals are entitled to have rights and assume obligations in their name. Every human being possesses juristic personality. Section 15, paragraph 1, of the Civil and Commercial Code specifies the beginning and the end of personality. It provides that: 'The legal personality of an individual commences with the full completion of birth as a living child and terminates at death'. This means that the existence of a natural person begins at birth and terminates upon death.

The question at what moment a human being begins to be capable of rights is of great importance, as the following example will show. If an only child is born

[20]See in this sense Stasi (2016), p. 25.

after the death of his father and dies after having been capable of rights for one moment only, any property to which such child was entitled under his father's will or intestacy becomes vested in him during that moment and under the Thai law of intestacy passes to his mother as his next-of-kin; if, on the other hand, the child never became capable of rights, the person who, under the father's will or intestacy, would have taken the property in the event of the child not having been born becomes entitled to it. Complete severance from the mother is not required; the completion of the act of birth in the medical sense, coupled with the survival of the child for one moment at least after such completion, is all that is necessary. The entry in the register of births (which must state the exact hour as well as the date of the birth) is *prima facie* evidence of the time of a birth. Stillborn children are registered in the register of deaths only, and the non-registration of the birth of a child whose death is registered is *prima facie* evidence of the fact that the child's birth was not completed.

Under Roman law, legal personality could begin even before birth if the *nasciturus* (i.e. unborn children, already conceived) was to be legally invested with rights. In particular, the testator's children born after his death would be heirs even before their birth, provided that they would have been in the position of *sui et necessary heredes* if born during his lifetime.[21] In Thai law, a *nasciturus* is not capable of rights in the strict sense of the word, but may have inchoate rights which the Civil and Commercial Code protects. More precisely, Section 15, paragraph 2, of the Civil and Commercial Code provides that a *nasciturus* (in Thai: *tarok naikan manda*) is capable of rights provided that it is born alive. This means that *nasciturus'* rights are perfected only once they have been born and are thus dependent on the event of their birth. Thus, a *nasciturus* is entitled to be heir provided that it is born alive within three hundred and ten days after the *de cujus*'s death (Section 1604, paragraph 2, Civil and Commercial Code). Similarly, a *nasciturus* has the right to be recognized as a legitimate child. Section 1536, paragraph 1, of the Civil and Commercial Code stipulates, in this regard, that 'in case of termination of the marriage, a man is presumed to be the natural father of a child only if the child is born within three hundred and ten days after the termination of the marriage'.

In the context of delictual liability, damages inflicted upon an unborn child during pregnancy may constitute an unlawful act according to Sections 420 and following of the Civil and Commercial Code.[22] For example, if a child is born alive and afterwards develops a serious condition or abnormality by reason of an unlawful act done to it during the pregnancy, the person who committed that act may be liable. By the same token, an unborn child who, at the time of the accident, was *en*

[21]On this aspect, see for all, Prachoom (2015), p. 63.

[22]It is relevant to point out that under English law, the delicate situation of the unborn child has somewhat been clarified by the Congenital Disabilities (Civil Liability) Act of 1976 which provides that a child who is born alive but disabled as a result of an occurrence before its birth may bring an action in tort for recovery of damages.

ventre sa mère (i.e. in the mother's womb) may subsequently claim compensation for lack of legal support under Section 443, paragraph 3, of the Civil and Commercial Code.[23]

The capacity of an individual to have civil legal rights terminates when he dies a natural death or is declared to be dead. Some of the rights acquired and some of the duties undertaken by a person during his lifetime are transferred to the person or persons who are said to represent his estate, but a right to which the deceased was not entitled at his death does not pass into his estate under any circumstances. It is therefore frequently important to ascertain whether a person to whom a right would have been accorded if he had been living at a particular moment did actually live at that moment, and for such a purpose, it is necessary to know at what precise moment his life came to an end.

In English law, the 'moment of death' is defined by the medical conception of 'brain death' characterized, as it is, by a complete absence of electrical activity in the brain.[24] In theory, brain death denotes permanent functional death of the centres in the brainstem that control breathing, heart rate, and other vital reflexes. In actual practice, however, legal ascertainment of brain death is complicated: two independent medical opinions are legally required in England before it is agreed and organs can thus be removed.[25] The Thai law on this matter follows the English rule of cessation of breathing or stoppage of the functioning of the brainstem (in Thai: *kan samong tai*). In order to determine the actual moment of the death, it is necessary to refer to the consensus of professional opinions among medical and legal practitioners, though the underpinning legislation remains to be formally enacted.[26]

In the case of a person dying within the kingdom of Thailand, the entry in the registration of deaths, which according to the prescribed rules must contain particulars as to the exact hour at which death took place, is *prima facie* evidence as to the time of death. In the case of a person dying within any state outside the kingdom of Thailand, the entry on the register kept according to the law of such state is generally accepted as *prima facie* evidence on the point in question. In the case of a death in a country in which no register is kept, other evidence must be produced.

A difficulty arises, however, in the case of persons who have left their homes and have not been heard of for some time. Such persons, who in the technical language of the Thai law are called *poo mai yoo* (and who in the course of this treatise will be referred to as 'absent persons'), may be made the subjects of a judicial 'declaration of disappearance' (*kamsang sadaeng kwaam saap soon*).

Under the rules of Roman law, an untraceable person was not deemed to be dead before the lapse of a specified period from the time of his birth, which the

[23]On this theme, see especially Stasi (2015), p. 32.

[24]In this sense, Harris (2005), p. 108.

[25]On this point, see Prachoom (2015), p. 63.

[26]Ibid., p. 65.

glossators fixed at one hundred years. The presumption of death was not properly established before a declaration of the competent court as to the absence of new was obtained. Under the English law, the question whether the court may authorize a presumption of death does not depend upon the age of the party concerned, but upon the length of the period during which no news has been received. Following the English model, Thai private law provides that a person may be declared to be dead if no news has been received for five years reckoned from the end of the calendar year during which the last news was received. Specifically, Section 61, paragraph 1, of the Civil and Commercial Code empowers the court, upon the application of any interested person or of the public prosecutor, to declare a person legally dead after having been missing for a period of five years.

Pursuant to Section 61, paragraph 2, of the Civil and Commercial Code, shorter periods are sufficient in the case of any member of the armed forces engaged in war found to be missing during such war, of any person who was on board a vessel lost or presumed to be lost at sea and of any person known to have been exposed to any mortal danger (e.g. a fire causing loss of life in such manner that the bodies of the persons burnt to death cannot be identified). The adjudication of disappearance and its revocation must be published in the Government Gazette to give notice of such legal fact to the public.

After a person has been declared legally dead, he is presumed to have died from the judicial declaration of disappearance. The declaration of disappearance gives rise to the same consequences as a natural death. Therefore, the estate of the disappeared person will be transferred to the heir according to Section 1599 of the Civil and Commercial Code. Moreover, the declaration of disappearance is a cause of dissolution of marriage under Section 1501 of the Civil and Commercial Code. The declaration of death is a species of legal presumption. It is still possible that the person declared dead is, in fact, still alive. Therefore, any interested person (such as parents, children, and and relatives of the missing person) or the public prosecutor as well as the disappeared person himself may prove that the missing person is alive or died at a different time in order to revoke the adjudication of disappearance. In such a case, however, the rescission does not affect the validity of any act which was performed in good faith after the adjudication of disappearance but before the revocation (Section 63, paragraph 1, Civil and Commercial Code).[27]

The Roman law had certain rules as to the order in which several persons becoming victims to the same fatal accident were presumed to have died (e.g. if a father died in the same shipwreck with his infant child, the father was presumed to have survived such child, whereas, on the other hand, an adult child dying with his father in a similar way was presumed to have survived the father). Section 17 of the Civil and Commercial Code, on the other hand, establishes a presumption to the effect that persons who have succumbed to a common danger have died at the same moment. Thus, when several persons have died in the same fatal event, and it is not possible to determine which of them perished first, they are presumed to

[27]In this sense, Stasi (2015), p. 34.

have died simultaneously. The effect of this is that neither person can become entitled to any right in the estate of the other as his survivor.

The presumption established by the declaration of death operates in two directions: it does not merely mean that in the absence of proof to the contrary the death has the effect which it would have had if it had actually taken place at the time in question; it also means that the person declared to be dead is deemed to have lived up to the moment in which he is presumed to have died. The presumption as to the time of death contained in the declaration of death is therefore, at the same time, a presumption as to the duration of the life of the person concerned. If in the case of an untraceable person no declaration of death has been obtained, he is presumed to have lived up to the time to which he would have been presumed to have lived if a declaration of death had been obtained.

1.2.3 Composition of Personality

In the older Roman law, the modes of acquiring and exercising rights were largely dependent on the nationality and social rank of the person concerned. A Roman citizen was governed by a law differing from the law applicable to persons not having the privilege of citizenship, and great differences existed also between the rights of freedmen and those of free citizens, while slaves were incapable of rights. Distinctions of this kind, which were considerably reduced in the later development of Roman law, asserted themselves in a very marked manner in the Thai legal systems where some of the distinctions due to class privileges have continued to exist till quite recent times.

Although social status, profession, and occupation have ceased to have any effect on the application of law, nationality and domicile still affect the legal positions of the persons concerned. In fact, the question as to what law is to be applied for the determination of any particular issue frequently depends upon the so-called personal statute of one of the parties, by which is meant the system of law to which he is personally subject, as distinguished from the system of law to which the particular transaction may be otherwise subject (e.g. *lex situs, lex contractus, lex loci solutionis*). The 'personal statute' according to English law is determined by the domicile of the person concerned without regard to his nationality. According to Thai law, the nationality as a general rule determines the personal statute, but domicile cannot be entirely disregarded (as, for instance, when the law of the nationality is not uniform but varies from place to place). Domicile is also of importance, in many cases, for the purpose of establishing the jurisdiction of the particular court before which an action is brought. It is therefore necessary to inquire into the Thai conception of nationality as well as that of domicile.

Nationality is used as one of the elements necessary to identify the applicable law regarding a natural person. Every citizen of Thailand is deemed to be of Thai nationality, and the expression 'Thai', as used in Thai codes and statutes, means 'Thai citizen'. Thai nationality law has different requirements for a person

to obtain Thai nationality based on principles of both *jus sanguinis* (i.e. 'right of blood') and *jus soli* (i.e. 'right of the soil'). Strictly defined, *jus sanguinis* grants nationality by descent according to the nationality of one, or both, of the parents, while *jus soli* confers nationality to all persons born in the national territory.

According to Thailand's Nationality Act B.E. 2508 (1965) as amended by Acts No. 2 and No.3, B.E. 2535 (1992), and Act No. 4, B.E. 2551 (2008), the status of Thai citizen may be acquired by a variety of means. Among the most common means are by descent and by naturalization. Acquisition of nationality by descent is regulated under Section 7, paragraph 1, of the Nationality Act which provides that a person acquires automatically Thai nationality by birth if at least one of the parents is Thai, irrespective of place of birth. Another mode of acquisition of nationality includes naturalization. The Nationality Act specifies the conditions that a foreign national must meet to obtain nationality. In particular, naturalization requires the consent of the individual, good behaviour, regular occupation, and prolonged domicile in the kingdom for a consecutive period of not less than five years and knowledge of the language (Sections 10). Should the applicant for naturalization as a Thai have children who are minors and who have a domicile in Thailand, he may concurrently apply for such naturalization for his children.

The act also contains detailed rules dealing with the loss of nationality by consent (Sections 13–15), revocation of nationality (Sections 15–22), recovery of nationality (Sections 23 and following), and the Committee on Nationality Consideration (Sections 25 and following). It is interesting to note that the Nationality Act confers on the competent authority's broad discretionary power concerning not only the granting and recovery of nationality but also its revocation in various circumstances. For example, with respect to a person of an alien parent who is born in Thailand and acquires Thai nationality, his Thai nationality may be revoked if there is evidence to show that such a person makes use of another foreign nationality. According to Section 17 of the Act, the revocation of Thai nationality depends on the discretion of the Minister of Interior.

Domicile differs from nationality in that it is not the legal relationship between a person and a state but the status of being a lawful permanent resident in a particular jurisdiction. It is the principal character of the establishment set up by a person in a country. According to the Thai Civil and Commercial Code, a person of full age and capacity has his domicile 'in the place in which he has his principal residence' (Section 37).[28] Thus, the domicile can be defined as the place of the main and permanent establishment for the life and the activity of a person. For example, domicile can be the place where a person keeps his family and has his office. However, if a person has several residences where he lives alternately, or various centres of habitual occupation, either one shall be considered his domicile.[29]

[28]Domicile and residence are sometimes used interchangeably, but they are not the same. Residence has a more restricted meaning than domicile. It indicates the place where someone lives and is used as a legal concept to fulfil one of the requirements of domicile.

[29]On this point, see Stasi (2015), p. 43–46.

Special rules apply to certain categories of natural persons. Specifically, the Civil and Commercial Code provides that a person under incapacity or of restricted capacity cannot establish or remove his domicile, without the consent of his legal representative. By the same token, Section 44 of the Code establishes that the domicile of a minor is that of his legal representative who is the person exercising parental power or the guardian. In the case where the minor is under parental power of his parents and the parents have separate domiciles, the minor will have domicile of his father or mother with whom he lives. The domicile of husband and wife is the place where husband and wife cohabit as a couple unless either husband or wife expresses his/her intention to have a separate domicile (Section 43, Civil and Commercial Code). The domicile of a public official is the place where he exercises his function, provided that such function is not temporary, periodical, or mere commission (Section 46, Civil and Commercial Code). The domicile of a convict by a final judgment of the court or by a lawful order is the prison or correctional institution where he is imprisoned until his release (Section 47, Civil and Commercial Code).

1.2.4 Legal Capacity

Every natural person is in all modern systems of law deemed capable of rights, but this capacity is not always unrestricted. Certain classes of persons are, according to some systems of law, deprived of the enjoyment of certain classes of rights. Thus, under Roman law, a slave was a thing and not a person. Like any other thing, he could be owned by several masters, or one man might have a life estate (i.e. usufruct) in the slave. Being a thing, the slave had no sort of right; he could be killed or tortured at his master's discretion; he could own no sort of property, nor could he be regarded as capable of being legally bound by obligation.[30]

Specific restrictions as to the capacity for rights of natural persons also exist under the present Thai law. Thus, according to Section 1622 of the Civil and Commercial Code, a Buddhist monk cannot claim inheritance as a statutory heir unless he leaves the monkhood, though he is capable of retaining the property owned by him before entering the Buddhist order (Section 1624, Civil and Commercial Code). This means that property belonging to a person before he enters the Buddhist monkhood does not become property of the monastery and may be disposed of in the manner provided by law. By the same token, a foreigner is incapable of being the owner of immovable property. In this regard, Section 86 of the Land Code provides that foreigners may acquire land only by virtue of the provisions of a bilateral treaty and there is currently no treaty in force allowing foreigners to own land in Thailand.

[30]For a detailed analysis on this point, see Leage (1906), p. 47.

Capacity for rights must be distinguished from disposing capacity, by which is meant the power of disposing of property and of incurring obligations by juristic acts. Under the law of all countries, deficiency of age and mental disorder have the effect of removing or restricting the capacity to dispose of rights, and in all countries, there are various degrees of incapacity. Thus, for instance, the contracts of infants may, under English law, be voidable or valid, according to the circumstances of each case, and the same rule applies as to the contracts of lunatics. According to Thai law, a distinction is drawn between the total absence of capacity for juristic acts and restricted capacity. A person fully capable is called *bukkon tee mee kwaam saa-maat*; a person wholly incapable is called *bukkon rai kwaam saamaat*; and a person of restricted disposing capacity is called *bukkon sa-meuan rai kwaam saamaat*.[31] Incapacity or restricted capacity either exists naturally (as in the case of minors or persons of unsound mind not officially placed under guardianship) or it is declared by a court of law (as in the case of physically handicapped persons and mentally disordered or habitually intoxicated persons, placed under guardianship by judicial order). The expression 'capacity' will, in the further course of this treatise, be applied to indicate capacity for juristic acts, and a corresponding use will be made of the expressions 'incapacity' and 'restricted capacity'.

The lack of capacity to perform juristic acts refers to the capacity to enter into a particular transaction with regard to the mental state of the actor at the time the transaction needs to be made. The Civil and Commercial Code provides three main categories of persons lacking the legal capacity, namely minors, incompetents, and quasi-incompetents.[32] In this regard, Thai private law takes over the Roman regulatory framework rather than the English informal mechanism, while, at the same time, broadens its scope not only by encompassing spendthrifts left out by English law but also by contemplating those neglected by Roman law to include physically handicapped persons and mentally disordered or habitually intoxicated persons.[33]

The first category of individuals who lack legal capacity are minors. Generally speaking, all persons not having attained the age of twenty years are minors according to Section 19 of the Civil and Commercial Code. Thus, on reaching his twenty years of age, a person ceases to be a minor and becomes *sui iuris.* While full age under English law has, since the Family Law Reform Act 1969, been scaled down from twenty-one to eighteen years, Thai provisions on it has stayed put since 1992, the year of the latest revision of Book 1 of the Civil and Commercial Code bearing on general principles, and it appears, in view of the international downward trend, that reform is long overdue.[34] Minors must obtain

[31]The effect of these distinctions, and the distinction between capacity for juristic acts and capacity in respect of the commission of unlawful acts, will be explained below in Sect. 1.5.2.

[32]Jaisamoot (1971), p. 32.

[33]See in particular Prachoom (2015), p. 81.

[34]Ibid., p. 80.

the consent of their legal representative to perform a valid juristic act. Coming of age can, however, be accelerated with marriage (in Thai: *kan somrot*). Precisely, a minor is deemed to be a person with full capacity upon marriage, provided that the man and woman have completed their 17th years of age, and the marriage is made in accordance with the provisions of Sections 1448 and following of the Civil and Commercial Code. In addition, Section 1436 of the Civil and Commercial Code specifies in its wording that minors have to get the permission from their parents for their marriage. Under these conditions, marriage emancipates a minor from parental control.

The right of parental authority is exercised by the parents jointly or, in certain circumstances, by one of them on their own. A person who is under the legal age and has no parents, or whose parents are deprived of their parental power, may be provided with a guardian during minority according to the provisions of Section 1585 of the Civil and Commercial Code.[35] In some circumstances, however, parental consent is not required by law. More precisely, minors can independently engage in those juristic acts which are strictly personal (e.g. marriage) or suitable to their condition in life and actually required for their reasonable needs, or solely benefit them (e.g. the release of debt, acceptance of legacy, or acceptance of inheritance without charge and condition). By the same token, they are capable of carrying out all acts destined merely for acquisition of any right or release from any duty. It must be added that according to Section 25 of the Civil and Commercial Code, Thai minors are also capable of making a valid will when they are fifteen years old without prior approval from their legal representative. In carrying out all other juristic acts, in the absence of legal provisions to the contrary, a minor under Thai law requires prior consent on the part of his legal representative (in Thai: *poo taen doi chob tam*), without which they would be voidable.[36]

The Civil and Commercial Code also lists a number of juristic acts which require the previous permission of the court to be valid (Section 1574). Such acts include selling, exchanging, letting out property on hire purchase, mortgaging, releasing mortgage to mortgagor, or transferring the right of mortgage on immovable property, extinguishing real rights of the minor on immovable property, creating servitude, and other real rights on immovable property. Thus, in these cases, the parents of a minor cannot dispose of the minor's property without permission of the court.[37]

The second category includes mentally incompetent persons. A person who is unsound of mind (*bukkon wigon jarit*) and incapable of managing his own affairs has no competence to engage in juristic acts. It follows that a lunatic (*bukkon wikonjarit*), like his Roman counterpart, *furiosus*, can be adjudged an incompetent person and be placed under tutelage. If a lunatic is adjudged incompetent by the court on the application of the spouse, ascendants, descendants, public prosecutor,

[35]For more detailed discussion on this topic, see Thingsapati (1984), pp. 28–49.

[36]Prachoom (2015), p. 84.

[37]Jaisamoot (1971), p. 12.

guardian, curator, or any other person taking care of him, such person is deemed as a person with no capacity and his juristic acts can only be allowed to be carried out by his guardian. Consequently, juristic acts performed by a person adjudged incompetent are voidable (Section 29, Civil and Commercial Code). In contrast, an act performed by a person of unsound mind but not adjudged incompetent by the court is voidable only when the act occurred at a time when he was actually of unsound mind, and in addition, it can be shown that the other party was aware of this weakness (Section 30, Civil and Commercial Code). Only under these two conditions, can the juristic act be voidable.[38]

The third category of individuals who lack legal capacity are quasi-incompetent persons. A person who has physical or mental infirmity (which are called in Thai, respectively, *kai pikan* and *jitfanfean mai som prakop*), habitual prodigality (*praprut surui surai seple pen ajin*), or habitual intoxication (*tit sura ya mao*), or other similar causes that make him incapable of managing his own affairs, or whose management is likely to cause detriment to his own property or family, may, like the Roman *prodigi*, be adjudged quasi-incompetent by the court. Persons belonging to this class may be placed under curatorship by court order, and the effect of such an order is to restrict the capacity of the person concerned. Specifically, Section 34, paragraph 1, of the Civil and Commercial Code lists certain transactions which require, as was the case in Roman law *cura*, the consent of the curator to be valid, such as investing in property; hiring or letting property; giving security; making gifts or performing any act whose object is the acquisition of a real right; accepting the return from the invested property, principal, or other capital; contracting a loan or lending money; and borrowing or leasing valuable movable property. Failure to comply with these provisions makes the juristic act voidable.[39]

With respect to delictual obligations, it is important to observe that under Thai law, a person, even though incapacitated, on account of minority or unsoundness of mind, is liable for the consequences of his unlawful act. According to Section 429 of the Civil and Commercial Code, the parents or his guardian is jointly liable with him, unless they can prove that proper care in performing their duty of supervision has been extended.[40]

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[38]There is in England a distinction between persons of unsound mind not so found, and persons adjudicated incompetent by a court, but this distinction has not the same effect as the corresponding distinction in Thai law. A lunatic so found according to English law is not, by reason of that fact alone, incapable for all purposes. On the other hand, a person placed under guardianship by a Thai court on the ground of mental disease is under complete incapacity. Persons of unsound mind not placed under guardianship on the ground of mental disease are under complete incapacity if their soundness of mind is of a nature to prevent the free exercise of their power of volition is not merely of a temporary character.

[39]In certain cases of serious physical handicap or mental disorder, the court may give an order empowering the curator to act on behalf of the quasi-incompetent, thereby mimicking the Roman tutorial device, albeit without its concomitant demerit of lack of mandate (Section 34, paragraph 2, Civil and Commercial Code). On this point, see Prachoom (2015), p. 81. See also Jaisamoot (1971), p. 69.

[40]Stasi (2015), p. 28.

1.2.5 Characteristics of Juristic Persons

As mentioned above, the line of demarcation between corporate bodies in the strict sense and unincorporated associations of persons is not very sharply defined in modern law, and there is no definition of the term 'juristic person' which is universally accepted, or which entirely excludes certain associations of persons, who according to the general opinion are not to be deemed corporate bodies. The expression itself was not, prior to the enactment of the Civil and Commercial Code, used in any statute. Book 1 of the Code has given it official recognition without, however, attempting to define it. The best course for practical purposes is to deal, in the first instance, with juristic persons recognized as such by express provision of law, or by common consent, and to deal separately with the associations of persons not generally considered to partake of the character of juristic persons.

A juristic person recognized as such may be defined as an entity capable of rights, and consequently capable of owning property, and of possessing and enforcing claims against others and subject to corresponding duties. The unique feature of a juristic person is its ability to boast a legal personality separate from those of its components parts (i.e. natural persons). In this regard, Section 1015 of the Civil and Commercial Code states that 'Upon registration having been made according to the provisions of the Title, a partnership or a company shall constitute a juristic person distinct from the several partners or shareholders of whom it is composed'.[41]

The persons by whose contributions the property of the juristic person is originally constituted, or for whose benefit the juristic person is created, are not, in any sense of the word, owners of the property of the juristic person, or entitled to any rights, or subject to any duties, to which the juristic person is entitled or subject. Although they are not human beings, they are still treated by the law as if they were persons. In these cases, the legislator seeks to secure the protection of important social interests which are not involved in the personal interests of individuals. In this respect, Section 65 of the Civil and Commercial Code provides that 'A juristic person can come into existence only by virtue of this Code or other laws'. Legal protection, therefore, is conferred on other categories of persons which are not human beings but artificial entities or a group of persons.[42] The law does not necessarily need to create those interests because the necessities and ideals of the community spontaneously recognize them as a matter of fact. The law merely recognizes, under certain circumstances, the centrality of those interests and invests them with the necessary protection by transforming such interests into legal advantages. These legal entities are called juristic (artificial, moral, or fictitious) persons as opposed to natural persons.[43]

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[41] See in particular Prachoom (2015), p. 96.

[42] Khurusuwan (2012), p. 27.

[43] On this point, see Stasi (2016), p. 29.

1.2.6 Particular Classes of Juristic Persons

Under Thai private law, juristic persons according to their purposes may be divided into four classes:

1. Groups of persons which agree to unite for a common undertaking with a view to sharing profits are considered under Thai private law as juristic persons with the capacity to have rights and obligations. This includes limited partnerships, registered ordinary partnerships, private limited companies, and public limited companies. Both partnerships (*hang hunsuan*) and companies (*borisat*) are defined by the Civil and Commercial Code as contracts whereby two or more persons agree to unite for a common undertaking with a purpose of sharing profits (Section 1012).
2. Associations, which are also recognized as juristic persons under Section 78 of the Civil and Commercial Code, which states that an association created for conducting any activity other than the realization of profits, must have its regulations and must be registered according to the provisions of the Code. It follows that the association becomes a juristic person only after registration.
3. Foundations, which are non-profit juristic persons who utilize complexes of property denoted by juristic persons, natural persons, or other organizations for the accomplishment of specific purposes. Pursuant to the Civil and Commercial Code, foundations are defined as particular legal entities founded by individuals on the basis of voluntary property contributions (Section 110). Their aims may be public charitable, cultural, religious, scientific, historical, educational, or other non-profit-making activity for the public benefit. As with associations, they must be registered under the provisions of the Code in order to become a juristic person. Also, the property of a foundation must be managed for the implementation of its objects and not for the benefit of any person.
4. Monasteries, religious associations, and institutions.[44]

1.2.7 Juristic Persons' Capacity to Act

The very existence of a juristic person implies that it is capable of rights, and the acquisition or loss of rights is in the Thai technical language described as the acquisition or loss of *sitti*, but as juristic persons are the creatures of law, it also follows that the capacity for rights may be restricted either generally or by the statute or charter by which, or under which, any particular legal entity is formed. The restrictions as to the capacity for rights imposed by the charter or statute from which a juristic person derives its existence are of course independent of any general rules. In this regard, Section 66 of the Civil and Commercial Code states that 'A juristic person shall have

[44]For a more comprehensive treatment of the subject, see Stasi (2016), pp. 29–31.

rights and duties conferred on it by provisions of this Code or other laws within the confines of such powers, duties and purposes as have been prescribed or determined by law, regulations or its constitutive charter'. This is to say that limitations on the rights and duties of a juristic person may derive from the law, from its regulations, or from its constitutive act. Under Thai law, for example, juristic persons undertaking finance, securities, and credit foncier businesses are required to obtain a licence from the Minister of Finance before they commence the business operation. Similarly, a company which has as its main objective the business of insurance cannot operate a finance business as this would be beyond the scope of its objectives. By the same token, a state enterprise which is established by a specific law to operate a telecommunications business cannot operate a transportation business.[45]

Certain rights which can be exercised by a natural person cannot, by reason of their particular nature, be exercised by a juristic person. Thus, the rules regulating the relations of husband and wife, or parent or child, cannot of course affect corporate bodies. It is not so obvious, however, that the functions of a guardian or executor cannot be performed by a corporation. Under English law, a corporation may be appointed executor and trustee; under Thai law, a guardian must be a natural person, but a corporation may be appointed executor. Subject to the considerations set out above, it can be said that a juristic person enjoys the same rights and is subject to the same duties as a natural person 'except those which, by reason of their nature, are susceptible of being enjoyed or incurred only by a natural person' (Section 67, Civil and Commercial Code).[46]

A juristic person without capacity for juristic acts is as inconceivable as a juristic person without any capacity for rights, but like the capacity for rights, the disposing capacity may be restricted by the constitution of the juristic person. A natural person may act either in person or through an agent. A juristic person, on the other hand, must of necessity act through one or more persons appointed as its primary agents.[47] These primary agents must always have certain express or implied powers of acting on behalf of the juristic person whom they represent. In English law, such powers are not as a rule defined by any general rules, but vary according to the constitution of the particular juristic person; in Thailand, on the other hand, certain fixed rules are laid down as to the powers of the primary agents of each class of juristic persons regulated by general law. More precisely, Section 70 of the Civil and Commercial Code states that a juristic person must have one or several representatives as prescribed by the law, regulations, or its constitutive act. The will of a juristic person is declared through its representatives. This means that representatives always have extensive powers of acting in the name and on behalf of the juristic person whom they represent.[48]

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[45]Ibid., p. 31.

[46]On this aspect, see the observations by Chanwirat (1992), pp. 29–42.

[47]These primary agents must be distinguished from agents appointed by the primary agents, whose powers may be as varied as the powers of the agents of natural persons.

[48]In this sense, Minakanit (2009), pp. 52–53.

Generally speaking, an act which is performed directly within the scope of the activities of the juristic person is considered to be legally binding. Certain restrictions may be imposed upon the power of representatives in accordance with the provisions of the law and subject to compliance with the regulations and the constitutive act of the juristic person. Such restrictions on the powers of the representatives, however, are not enforceable as against third parties acting in good faith.

A juristic person is liable to make compensation for any damage done to other persons by its representatives or the person empowered to act on behalf of the juristic person in the exercise of their functions, saving its right of recourse against the causers of the damage. The same rule applies to unlawful acts committed by an employee in the course of his employment. In fact, according to Section 425 of the Civil and Commercial Code, an employer is jointly liable with his employee for the consequences of an unlawful act committed in the course of employment.[49]

1.3 Things[50]

1.3.1 Definition

The legal definition of a 'thing' (*sap*) must start from the popular conception and disregard the refinements of metaphysics as well as those of physical science. The senses do not perceive things, but only experience certain sensations associated together, and assumed to be caused by a unit existing independently of the consciousness of the person whose senses are affected, which unit is called a 'thing'. The popular conception as to what deserves this name is consistent enough to be made the basis of legal rules. In English law, a difficulty arises, not so much from a dissociation of legal rules from popular conceptions, as from the fact that the expression 'thing' has received an extended use by a fiction of law, which causes it to include not only the 'things' of popular usage which are called 'chattels', or 'things in possession', but also certain rights called 'things in action'.

The definition contained in Section 137 of the Civil and Commercial Code which declares that only corporal objects are things avoiding the peculiar difficulty of English law, but the term 'corporal objects'—even leaving aside the metaphysical questions to which reference has been made—is in itself ambiguous. Some Thai writers declare that only such things are corporal objects as are tangible and occupy space, while others are of opinion that anything which can be perceived

[49]See again, Stasi (2016), p. 30.

[50]Thai private law, following the tradition of Roman law, splits its legal provisions on things in the Civil and Commercial Code into the law of property (Book 4), the law of succession (Book 6), and the law of obligations (Books 2 and 3), despite the just criticism that the classical division is an illogical breakdown of things into incomparables confounding physical things with rights. On this point, see Prachoom (2015), p. 111.

by its physical effects and can form the object of rights is a corporal object. This would include energy of all sorts, such as water power, electricity, heat, and the like. Having regard to the necessity of taking the popular conceptions as a basis, the first-mentioned view appears more satisfactory.

The next difficulty arises as to the limitation of the unit described as a thing. Embracing the Roman notion of property as things of economic value and mimicking Roman's late classification of things, Sections 141 and 142 of the Civil and Commercial Code proceed, respectively, to define things as divisible and indivisible. Accordingly, divisible things (*sap bang dai*) are those which can be separated into real and distinct portions, each forming a perfect whole. These are distinguished from indivisible things (*sap bang mai dai*) which cannot be separated without alteration to its substance. Here, again the scientific conception of each so-called unit as an agglomeration of other units (atoms, ions, vortices, and the like) must be disregarded, and the popular conception resorted to.[51] Any object which loses its essential qualities by subdivision may be looked upon as an indivisible thing. In the case of animals, whether living or dead, this is clear at first sight. A building is another example.

The question is not so simple, however, when liquids, or gases, or very loosely aggregated solids (such as sand, wheat, and other grain, tea, pounded sugar, and tobacco), are considered. In such cases, the aggregate for the time being enclosed in one receptacle (bottle, barrel, and bag) is considered as an indivisible thing. Aggregates composed of distinct units (such as flocks of sheep, art collections, and the like) are not considered things according to Thai terminology, there being a special technical term, 'aggregate of things', used in their case.[52] Sometimes, it is difficult to say whether a given object is to be looked at as an aggregate or as a unit, and an object may be an aggregate for one purpose and a unit for another. Thus, for instance, a pack of cards loses its essential qualities by subdivision and is therefore a thing as a collective whole, but each individual card can also be looked upon as a thing. In some cases, the delimitation of a unit, considered as a thing in the eye of the law, depends upon purely arbitrary considerations. Therefore, in Thailand, a parcel of land, being a unit for registration purposes, is looked upon as an individual thing, but such a unit may be subdivided in the registry, in which case each part becomes a thing, or it may be added to another unit, in which case the two united parcels form one thing.[53]

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[51]Posataboot (2000), pp. 76–89.

[52]Ibid., p. 92.

[53]As far as such artificial indivisibility as well as divisibility is concerned, perhaps instances of Roman law can shed some light on the applicable criteria. Thus, a *communio* existing among co-owners was, while it lasted, indivisible, but with judicial intervention, it could be dissolved and therefore made divisible, it being made clear that, in Roman thinking, artificial indivisibility was voluntary. Unfortunately, Roman law not only indiscriminately embraced property as well as property objects, the focus of Thai law, but also devoted its attention to judicial, artificial, as well as physical division. On this point, see Prachoom (2015), p. 113.

In Roman law, certain things were described as *res extra commercium* (in Thai: *sap nok panich*), being things which could not be the objects of private rights. In modern law, no such classification exists. There are material substances which cannot be the objects of rights, but they are not things within the meaning which has been explained. The atmospheric air in which we live cannot be the subject of rights, but a bottle of atmospheric air, like a bottle of carbonic acid, or any other gas, can be the object of rights. The fact that the sale or purchase of certain things is prohibited or restricted does not, according to modern notions, place them *extra commercium.* The sale of a temple or a human corpse is, as a general rule, prohibited, but both may be objects of rights and are therefore 'things'. A living human being was considered to be a 'thing' in the past when slavery was a legal institution, but nowadays, human beings have ceased to be the objects of rights and therefore have ceased to be things. A parent or guardian may have the right to the custody of a child, but this does not mean that the child is an object of rights, but rather that the parent or guardian may exercise some of the rights of which the child is the subject.

For purposes of convenient description, things are classified according to several criteria; of these, a list will be given. The mode of describing the component parts of things and the objects derived from things also requires separate statement. It will also be necessary to refer to certain classes of things which derive their principal importance from the fact that their holder as such is entitled to certain rights which they represent (e.g. negotiable instruments).

1.3.2 Classification of Things

Things may be classified in multiple ways, and different types of things may be governed by different legal rules. Under the Thai legal system, one fundamental division is between movable and immovable things. This distinction, owing to the influence of Roman classifications, has assumed much greater importance in the Civil and Commercial Code than it had in Roman law.[54] It corresponds in a certain measure to the English division between real and personal property, but according to English law, certain movable objects are classed with real property, and on the other hand, immovables held for a term of years, however long, are classed with personal property. The term 'chattel real' used in respect of such immovables, like the term 'thing in action', is a metaphorical expression used in English law which has no counterpart in civil law systems.

[54]The distinction between 'movable' and 'immovable' things, categories bequeathed to civil law systems by Roman law, became the principal basis of classification during the high Middle Ages where they conveniently served to distinguish land from anything else that could be owned privately. In English law, it has tended more and more to replace the old classification of things as real and personal. On this point, see Lee (1956), p. 111. See also Howell (2007), p. 538.

A thing is called immovable if it cannot be moved without being divided into several units. In this context, it must be noticed that, if a house is called a thing, the expression house includes the plot of land on which the house stands; therefore, even if the whole house is bodily removed without being taken to pieces, there is a severance between the building and the land. According to Section 139 of the Civil and Commercial Code, immovables (*asangharima sap*) include land, things fixed permanently to land (e.g. trees, buildings, bridges, and other constructions), and things forming a body with the land (e.g. springs, rivers, and watercourses). It must also be noted that certain things which are in some respects treated like immovables are in reality movables; ships of five tons and over, floating houses, and beasts of burden are the most conspicuous instance of this fact. The concept of movable things (*sangharima sap*) can be defined *a contrario* as anything that does not fall into the category of immovable things (Section 140, Civil and Commercial Code).[55]

Things may further be divided into fungible and non-fungible things. The *res fungibiles* of Roman law are in Thai called *sap tee mai nae non* and can be defined as movable things which in ordinary dealings are usually determined by number, measurement, or weight. The fact that a thing usually determined and dealt with by number, measurement, or weight is sometimes determined and dealt with specifically, or that a thing usually dealt with specifically is sometimes dealt with by number, measurement, or weight, does not alter its character. Money is a fungible thing, though a particular coin may be bought, lent, pawned, deposited, or given away. A literary manuscript is not a fungible thing, though a prolific but unsuccessful author may, as a last resource, sell his manuscript by weight.

Another distinction that can be found under the Civil and Commercial Code is between consumable and non-consumable things. 'Consumable things'—*sap tee kin dai* (*res quae usu consumuntur*)—may be defined under Thai private law as movable things intended to be used or enjoyed by means of being consumed or alienated. The most conspicuous instances of things intended to be used or enjoyed by means of being consumed are food, drink, fuel, and the like; the principal instance of things intended to be used by means of being alienated are money, banknotes, dividend warrants, and cheques. The essence of the distinction between consumable and non-consumable things is that the consumption or alienation must be the intention of ordinary usage. Most things are, of course, slowly consumed by

[55]It is noteworthy that the Civil and Commercial Code has adopted not only the Roman distinction between movables and immovables, but also its concomitant ambiguity. As noted earlier, in its simplest sense, *res* in the law of property merely indicates a physical object, sometimes known as property object, but for lawyers, there are also such intangible things (e.g. notes, shares, franchises, patents), a common denominator between these two kinds of thing being that both are assets of economic value. Both *a sangharima sap* and *sangharima sap* envisaged in Sections 139 and 140 of the Civil and Commercial Code, respectively, being essentially *sap* as they are, literally refer to property objects but so generous a construction is put on them that they are made to denote property in the widest possible sense to reflect the convenient equivocation of the Roman *res*. On this point, see Prachoom (2015), p. 112.

use (*consumitur annulus usu*), but things called non-consumable things are intended to be preserved, notwithstanding their use. Movable things forming part of stock-in-trade or other aggregates of things intended to be used by successive alienation of the individual things forming part of it are deemed consumable things.[56]

1.3.3 Things, Components Parts, and Accessories

Thai Civil and Commercial Code adopts the Roman distinction of essential and non-essential component parts. Specifically, Section 144 of the Code states that an essential component part of a thing is that which, according to its nature or local custom, is essential to its existence and cannot be separated without destroying, damaging, or altering its form or nature. It follows that any part of a thing which, on being severed from the other parts, is destroyed or essentially modified or causes the destruction or essential modification of such other parts is called an essential component part (*suan kuap*) of such thing; a component part which can be severed from the thing of which it forms part without producing the consequences which occur on the severance of an essential component part is called a non-essential component part of such thing. The owner of a thing has ownership in all its essential component parts.

The question whether a particular component part is essential or non-essential is not always easy to solve and frequently depends on varying circumstances. Thus, the component parts of a watch produced in a factory, while it remains in such factory, are not essential parts of the watch, inasmuch as each part can be replaced by another corresponding part, and each part can be used for another corresponding watch, but as soon as the watch is in the hands of a buyer, the watch is useless if one small wheel is taken out, and the small wheel is useless when severed from the watch. Under the first-mentioned circumstances, it is a non-essential part of the watch, and under the last-mentioned circumstances, it is an essential part of the watch.

An essential component part of a thing cannot be the object of separate rights. The consequences of this rule are of a twofold nature: the owner of a thing cannot create a separate real right as to an essential component part of such thing and all separate real rights relating to a thing originally independent are lost as soon as such thing becomes an essential component part of another thing. Any component part, whether essential or not, may, however, be made the object of an obligatory right. The owner of a house may let a room belonging to it, but not so as to give the tenant a right available against third parties. The tenant, according to English phraseology, would not acquire an estate in his room, but merely be entitled to damages in the event of his tenancy being interfered with.

[56]For a detailed discussion on this point, see Waayupap (2012), p. 23 ff.

The Civil and Commercial Code supplements the definition given above in the following ways. First, it enumerates a number of objects which are to be deemed essential component parts (e.g. things affixed to the soil), whether otherwise coming within the definition or not. Thus, according to Section 145, paragraph 1, of the Code, trees when planted for an unlimited period of time are deemed to be essential component parts of the land on which they stand. However, under paragraph 2, trees which grow only for a limited period of time and crops which may be harvested one or more times a year are not component parts of the land. Second, the Civil and Commercial Code provides that the rights attached to the ownership of land such as servitudes are deemed component parts of the land though not coming within the definition (Section 1393). This means that the servitude follows the dominant property when the latter is disposed of or made subject to other rights. Third, things attached to land or to a building for a temporary purpose are not deemed component parts of the land though otherwise coming within the definition (Section 146, Civil and Commercial Code). The same rule applies to a building or other structure which, in the exercise of a right over another person's land, has been fixed to the land by the person who has such right.[57]

It must be added that certain things, without being component parts of another thing, are so closely connected therewith that acts affecting the principal thing (*sap bpen bprataan*) also affect them. Things standing in such a relation to the principal thing are known as *kreuang ubpagon* (accessories).[58] A thing does not come within the statutory definition of accessories unless it complies with the requirements mentioned by Section 147 of the Civil and Commercial Code which states that 'accessories are movable things, which are, according to the usual local conception or clear intention of the owner of the principal thing, attached to such thing permanently for its management, use or preservation, and, by connection, adjustment or otherwise, brought by the owner into the relation with the principal thing, in which it must serve the principal thing'. It follows that an accessory must be intended to serve the economic purposes of the principal thing in a permanent manner (*perpetui usus causa*) and must be a thing which, in accordance with common usage, is apt to be looked upon as an accessory. The fact that an accessory is temporarily severed from the principal thing does not alter its quality.

The Civil and Commercial Code, by way of illustration, gives some instances of things intended to serve the economic purposes of the principal thing in a permanent manner, but such instances are not intended to be exhaustive. They are in the case of a building serving industrial purposes, the machinery, and tools used for such purpose and in the case of a farm, the cattle and farm implements, and the agricultural products, in so far as they are necessary for the purpose of carrying on farming operations.

[57]Ibid., p. 87.

[58]See in regard to more comprehensive discussion Suchiwa (2007), p. 17.

1.3.4 Natural and Legal Fruits

The definition of the term 'fruits' (in Thai: *dok pon*) is of importance for the purpose of determining questions between a person entitled to the temporary enjoyment of property and the ultimate owner of such property (e.g. usufructuary and owner; husband and wife in a case in which one spouse is entitled to the income of the other spouse's property; and parent and child during the child's minority).

The fruits of a thing consist of the natural products of such thing and such other benefits as are derived from using it in accordance with the purpose for which it is intended; the fruits of a right consist in the income derived from the proper exercise of the right. Under Thai private law, fruits are separated into two kinds: natural fruits and legal fruits. Natural fruits are produced by the earth or by animals (e.g. the fruits of a fruit tree, the milk of a cow, the wool of a sheep, the eggs of a hen, and the produce of fields and gardens). They are obtained from a thing in the normal possession or in the use of the right holder and are capable of acquisition at the time when they are naturally separated from the principal thing.[59]

In particular circumstances, the owner of the fruits is not the same person as the owner of the principal thing. A classic example of acquisition of fruits by a non-owner is that of a lessee who is entitled to the fruits of a piece of land or a usufructuary who has the right to use and enjoy the fruits of another's property for a specific period of time.[60]

Legal fruit denotes a thing or other interest obtained periodically by the owner from another person for the use of the thing. They arise from the use of the property through juristic acts, e.g. interest on capitals, annuities rent on hire of property, cash dividends from corporate stock, and proceeds of pledges. They are calculated and may be acquired day by day or according to a fixed period of time.[61] The benefits derived from a thing or right by virtue of any contractual or other legal relation to the person entitled to the use of such thing, or to the exercise of such right, are also deemed fruits of such thing.

The most obvious examples of the fruits of a thing are crops derived from land owned by the cultivator of the land; if the crops are derived from land leased to the cultivator, they are the fruits of a right, the lessee, according to Thai law, having a mere obligatory right and no estate in the land. As to minerals obtained by the owner of the land, the question whether they are to be deemed part of the property or fruits of the land depends upon the destination of the land. Therefore, if the land is owned or leased for mining purposes, or as a quarry, the minerals are the fruits of the land or of the right, being obtained in conformity with the purposes of the ownership or of the lease. If, on the other hand, the land is owned or leased for agricultural purposes, the minerals taken away from the land are deemed to

[59]On this point, see Auaychai et al. (1982), p. 73.

[60]On this theme, see especially Suchiwa (2007), p. 42.

[61]Stasi (2016), pp. 38–39.

have been part of the property. In the case of investments in stocks or shares, the dividends or interest received at stated intervals is the fruits of rights. The most obvious instance of benefits derived from a thing by virtue of a contractual relation to a person exercising a right over such thing is the payments of rent received by a landlord from his tenant.

Where fruits consist in periodical money payments, they are, as between persons successively entitled, considered as accruing from day to day. In all other cases, fruits derived from a thing belong to the person entitled to the use of such thing at the time of the severance, whereas income derived from a right belongs to the person exercising such right at the time when it falls due.

A person who is under obligation to surrender the fruits received by him while in temporary possession of a thing (e.g. the buyer of a thing who after being let into possession cancels the sale in consequence of a breach of warranty on the seller's part, or a possessor ejected by the true owner) may recover the expense properly incurred in the production of the fruits, in so far as such expense does not exceed the value of the fruits.[62]

1.3.5 Money and Negotiable Instruments

Certain things are characterized by the fact that they are mainly intended to be used as physical embodiments of rights; a lawful holder of a thing belonging to this class is, as such, entitled to the right which it embodies, and no other person except such lawful holder is entitled to exercise the right.

The most obvious example of a thing embodying a right is a banknote, but cheques and bills of exchange, debentures payable to bearer or passing by endorsement, interest coupons payable to bearer, and all other classes of documents coming under the definition of negotiable instruments belong to the same class.

Most of the documents in question represent obligatory rights, but the right to the possession or ownership of the thing which represents the obligation is a real right and is governed by the law of things. Among the exceptional classes of negotiable instruments which embody real rights, certificates of charge issued to bearer form the most conspicuous instances; the holder of such a certificate is entitled to the rights of an ordinary mortgagee and may at any time be registered as such if he thinks fit.[63]

A thing originally intended for no other purpose than the embodiment of a right may, by a combination of circumstances, cease to represent such right and become

[62]Periodical outgoings are apportioned in the same way as payments received periodically; outgoings not being of a periodical kind must be paid by the person chargeable with the outgoings at the time when they are payable.

[63]On this point, see Minakanit (2009), p. 82.

useful for another purpose. A postage stamp no longer current, though ceasing to represent a right, may yet continue to be the object of legal transactions by reason of its value for collectors. Even the worthless bearer bonds of defaulting states may be used as wallpapers or for other decorative purposes.

Things representing rights must be distinguished from things serving as evidence of the existence of rights, e.g. certificates of indebtedness, not being in the nature of negotiable instruments. The ownership of a thing serving as evidence of a right, like the ownership of a thing representing a right, is vested in the person entitled to the right.[64]

1.4 Rights

1.4.1 Classification

All systems of law distinguish between a right available against the whole world and a right available against a particular person only. Rights of the former class are called *jura in rem* or 'absolute rights'. An absolute right is either a right relating directly to the person entitled thereto (*sitti daet kaat*), e.g. the right to good repute, liberty of the person, and freedom from violence—or a right relating to some outside object—e.g. the right to the exclusive occupation of a plot of land. If the object to which an absolute right relates is a tangible object within the Thai definition of a 'thing', the right is called a 'real right' (*sap sitti*), but no generally recognized term exists with reference to absolute rights relating to intangible objects—e.g. copyright, patent, covenant not to compete, goodwill, and other assets—a class of objects unknown to Roman law, but steadily growing in importance in all modem systems; the expression 'rights relating to immaterial objects' is used by some writers and will in the course of this treatise designate the rights in question.

A right *in personam*, is, according to the terminology of the Civil and Commercial Code, described by the term 'claim' (*sitti riak rong*) (Section 193/9); in legal literature, the expression 'obligatory right' (*sitti tang nee*) is used in respect of all rights *in personam* not having the distinctive character referred to below. The relation between the person entitled to an obligatory right and the person, against whom such right is available, is described as 'obligation' (*nee*).[65]

The rights arising under family law and under the law of inheritance are partly absolute rights and partly rights *in personam*; some of them are ordinary rights, real or obligatory, and distinguished from other rights merely by the events which create them (e.g. birth, legitimation, adoption, marriage, and death) or by

[64]On this aspect, see Posataboot (2000), p. 107.

[65]On this aspect, see also the observation of Kriwichian (2007), p. 131 ff.

the peculiar relation between the parties whom they affect (e.g. parent and child, guardian and ward, husband and wife); other rights belonging to this category have an entirely distinctive character. Thus, a father's right of usufruct over an infant child's property does not differ from any other right of usufruct, nor does the transfer of ownership brought about by death differ in its effect from the transfer of ownership brought about by act *inter vivos*, but on the other hand, the personal rights arising as between husband and wife, and the rights exercisable over a child's or ward's person by virtue of the parental power or the law of guardianship, are rights *sui generis*, which do not exist in other relations.

A distinction, which though familiar to English jurists, is neglected by Thai writers is that between antecedent and remedial rights. A remedial right arises in every case in which a recognized antecedent right is violated; the antecedent right, viz. the right originally existing, may be either an absolute right or a right *in personam*, but the remedial right must necessarily be a right *in personam*, as it is available only against the particular person by whom the antecedent right was infringed. The right of an employee to receive his wages is an antecedent right, and the right to compensation for non-payment of wages is a remedial right; when we speak of a right arising by virtue of a juristic act, we always mean an antecedent right, but when we speak of a right arising in consequence of an unlawful act, we mean a remedial right. A remedial right must be distinguished from the remedy which the law provides for its enforcement. The rules relating to such remedies belong to the branch of law which, according to English terminology, is called 'adjective law', so as to distinguish it from 'substantive law'. In the present treatise, only such remedies will be discussed as are available without the assistance of the courts and are specially dealt with by the Civil and Commercial Code.

The following restriction is by Thai law imposed on the exercise of any right to whatever class it may belong: 'The exercise of a right which can only have the purpose of causing injury to another person is unlawful' (Section 421, Civil and Commercial Code). This rule is known as the 'prohibition of chicanery' and has been found to be of considerable practical importance.

The classes of rights dealt with by the special parts of the Civil and Commercial Code will be discussed in the special parts of this treatise; the following sections refer to such classes of rights only as are dealt with in the general part of the Civil and Commercial Code and to some cognate classes of rights which are dealt with by separate statutes.

1.4.2 Right to Name

A name is a symbol that is used to identify a person. It represents the main means by which it is possible to differentiate a natural person from others. Under the Person Name Act B.E. 2505 (1962) as amended by the Person Name Act (No. 3), B.E. 2548 (2005), a person's name includes the first name and a surname and may also include a middle name (Section 5). Names must be entered into the household

registry at birth and are chosen freely, under reserve of the restrictions contained in Sections 6 and 8 of the Act. In particular, names may not be identical or similar to the name of H. M. the King and H. M. the Queen or any title or may consist of any impolite word or meaning. Since Thai surnames are often long, Section 8 (5) of the Name Act also provides that it is not possible to create a surname of more than ten consonants. Titles of nobility are allowed under Thai law: descendants of the nobility usually take the noble name of their ancestor as a surname.

In the case of marriage, spouses may decide to keep their existing last name or to use the last name of the other at the commencement of the marriage as well as in the course of the marriage (Section 12, Name Act). However, in the case of divorce or annulment of the marriage by judicial decision, a spouse who has been using the last name of the other may revert back to a birth or former name (Section 13, Name Act).[66]

Over and above these basic notions, it must be pointed out that Thai law, following the English law right to change one's name, enables a person to change his existing first name, middle name, or family name as long as by doing so he does not deceive any other person, or violate any right to which any other is entitled. Continental law, on the other hand, does not allow a person to describe himself by any name other than the name acquired by birth or in some other lawful manner (e.g. order of a competent authority, adoption, marriage, and divorce).

1.4.3 Right to Trade Symbols

Trade symbol protection in Thailand is provided by the Trademark Act B.E. 2534 (1991) as amended by the Trademark Act (No. 2) B.E. 2543 (2000). Trade symbols have a positive function for both consumers and businesses. This source identification protects the public by giving consumers the opportunity to reliably recognize the products they prefer and purchase those products without being confused.

Under Thai law, the term trade symbol includes any trademark, service mark, certification mark, and collective marks. A trademark (in Thai: *kreuang maai gaan kaa*) is defined under the Trademark Act as a sign that distinguishes the goods of one person (i.e. natural or juristic person) from those of others in the marketplace. The sign may be composed of words, letters, names, manuals, signatures, photographs, drawings, devices, brands, combinations of colours, or any combinations of the above. Three-dimensional signs (e.g. the shape of a good or its packaging) are also protected as trademarks under Section 4 of the Trademark Act, while some unconventional trademark forms (e.g. fragrance, sound, and taste) cannot serve as trademarks under Thai law.

[66]Stasi (2015), p. 45.

Other symbols protected by the Trademark Act include service marks, certification marks, and collective marks. A service mark (in Thai: *kreuang maai borigaan*) serves the same purpose as a trademark, but it is used to identify a service (rather than a product) of one person from those of another. *Thai Airways*, for example, is a service mark for air transportation services provided by Thai Airways International Public Company Limited. A certification mark (in Thai: *kreuang maai rap rong*) is a sign used by a person other than its owner to certify that specific products satisfy prescribed standards. These standards may apply to the origin, materials, methods of production, quality, and other characteristics of goods or services. Certification marks are different from any other kinds of marks for several reasons. Firstly, their function is not related to the identification of the product to which they have been applied. Instead, they certify the nature or origin of the goods or services. Secondly, certification marks are not used by the owner of the product. They apply to goods or services of another business. For example, *Shell-Chuan-Chim* certificate lays down standards of quality for food and food providers. Similarly, *Halal* certification is recognition that the products have been tested and declared permissible under Islamic law. Collective marks (in Thai: *kreuang maai ruam*) are essentially trademarks or service marks used either by companies or enterprises of the same group or by members of an association, cooperative, trade union, confederation, group of persons, or other organizations. Therefore, the owner of collective marks is not the producer of the goods and services itself but the group of which the producer is a member. And herein lies the main purpose of collective marks: they are meant to distinguish the product of the members of a group of people from the product of an individual juristic person. An example of a collective mark is the white elephant in a hexagon of Siam Cement Group Co. Ltd.[67]

In Thailand, both registered and unregistered trademarks receive protection from the law, although registered symbols obtain far more ideal protection.[68] The registration is preceded by an official inquiry as to whether the trade symbols in respect of which the application is made are not one in general use and also as to the possibility of distinguishing it sufficiently from previously registered trade symbols. Words descriptive of the goods (in the same way as under English law) and marks consisting exclusively of letters and figures are not admissible as trade symbols. The use of any public national symbols,[69] or of any indecent or obvi-

[67]Ibid., pp. 222–223.

[68]Owners of unregistered trade symbols do not enjoy the same broad protection as the owners of registered trade symbols. Pursuant to Section 46 of the Trademark Act, the only remedy available for owners of unregistered trade symbols is a passing-off action. Passing-off actions arise out of the use by the defendant of any trade symbol which is identical with or deceptively similar to the plaintiff's trade symbol. This prevents traders from misleading customers and holding out their products as having some association with other traders when this is false.

[69]Under the Trademark Act, national symbols include those which are 'identical to national or royal flags, royal or government emblems or seals, the state name, and names or representations of members of the royal family, as well as symbols of international organizations' (Section 8).

ously deceptive symbol, is also prohibited. The registration of a trade symbol lapses after ten years unless renewed for another period of ten years by payment of a renewal fee, and fresh renewals may be effected from time to time (Section 53, Trademark Act). The infringement of a trade symbol entitles the person aggrieved thereby to an injunction, and if such infringement is due to any wilful or grossly negligent act, damages may also be recovered.[70]

1.4.4 Rights Relating to Intangible Objects

The recognition of copyrights and patents is of comparatively modern origin and has the following characteristics which distinguish it from the recognition of other rights. First, rights as to material objects are recognized in modern law without reference to the nature of the object to which they refer, whereas rights relating to immaterial objects are not recognized unless the objects conform to certain specified conditions (originality, usefulness, etc.). Second, rights as to immaterial objects are always recognized for a limited time only.

The primary rights relating to intangible objects are copyright and patent. Copyright (in Thai: *likasit*) is a form of protection provided by the law for an original and creative work of an individual or a juristic person. Under Section 4 of the Copyright Act, '*likasit*' is defined as 'the exclusive right of the creator of a work'.[71] Author's right in Thailand is dealt with as regards literary, dramatic, artistic, musical, audio-visual, cinematographic, sound recording, and sound and video broadcasting work by the Copyright Act. This listing is only illustrative, not exhaustive, as the Copyright Act extends the protection to any other work in the literary, scientific, or artistic domain whatever may be the mode or form of its expression. The act specifically excludes copyright protection for any idea, procedure, process, system, method of use or operation, concept, principle, discovery, scientific theory, or mathematical theory.

Copyright protection extends for a period of fifty years after the death of the author (Section 19, Copyright Act). This means that fifty years after the author

[70]It must be pointed out that Thailand is not a member of the Madrid System for the International Registration of Marks. It follows that a person must submit a trademark registration application to the Department of Intellectual Property in order to register a trademark in Thailand.

[71]It is interesting to note that many civil law countries prefer to use the term 'author's right' in lieu of 'copyright' (e.g. *droit d'auteur* in France, *Urheberrecht* in Germany, *diritto d'autore* in Italy, and *chosakuken* in Japan). The expression 'author's right' is more expressive than copyright because it includes the author's exclusive right to the publication (which expression includes public reading, recitation, and performance) of an unpublished work (common-law copyright) as well as the exclusive right to the reproduction of a published work (copyright in the ordinary sense of the word). In this text, the usual translation (i.e. copyright) has been preferred to a more natural sounding one (i.e. author's right).

dies, the copyrighted material falls into the public domain and the copyright no longer exists. Works in the public domain are not protected by copyright, and everyone has the right to reproduce, adapt, and communicate them to the public without prior permission of the author.

Because the period of copyright protection is very long and the legislator wants to encourage wide dissemination of creative work throughout society, the Copyright Act includes several limitations. In certain circumstances, a natural or juristic person has limited use of copyrighted material without requiring prior authorization from the author. Section 32, paragraph 2, of the Copyright Act provides the fair use of a copyrighted work for purposes such as personal, family and relatives' use, use for research, educational purposes, teaching and studying, and judicial and administrative proceedings. Fair use also includes comment, criticism, and news reporting with acknowledgement of authorship.

As regards patents, patent protection in Thailand is relatively recent as the first law dates back to 1979. Until that date, Thailand did not provide any legal protection for inventions and product designs. The Patent Act B.E. 2522 (1979) defines patents (in Thai: *sitti bat*) as a temporary monopoly given by the government to the inventor for the exclusive use of an invention or a design. The inventor may be a natural or juristic person. The primary purpose of patents is to preclude others, during the validity of the patent, from making, using, or selling the invention without permission.

An invention within the meaning of the patent law may refer to a new product or to a new process for producing a known product. The Thai law in all cases requires novelty, inventiveness, and the possibility of making an industrial use of the invention.[72] By the patent, the patentee acquires the exclusive right to exploit the patented article, or any article produced by means of the patented process (Section 36, Patent Act). In the case of a product patent, the right of exploitation includes the right to make, use, offer for sale and sell the patented product. The patentee has also the exclusive right to import the product for any of the above-mentioned purposes. The product patent thus grants a legal monopoly. In relation to a process or method patent, the right of exploitation includes the right to produce, use, sell, offer for sale, or import the product produced by the patented process. The Patent Act also entitles the patentee to exclude others from doing any of the above-mentioned acts during the term of the patent. The distinctive role of these provisions is to encourage research and the diffusion of new knowledge and technology in Thailand.[73]

[72]Under Section 9 of the Thai Patent Act B.E. 2522 (1979), an invention of which the application would be *contra bonos mores* is not patentable. The following inventions are also excluded from patent protection: natural micro-organisms and any component of micro-organisms, plants or extracts from animals or plants; scientific and mathematical methods and theories; data systems for an operation of a computer (computer programs); and methods of diagnosis and treatment or cure of human diseases or animal diseases.

[73]See again Stasi (2015), p. 214 ff.

Pursuant to Section 35 of the Patent Act, the duration of the patent right is limited to twenty years from the date of filing the patent application.[74] A patentee whose right has been infringed is entitled to an injunction restraining further infringements and to obtain damages from the infringer.[75]

1.4.5 Adjective Rights

The adjective rights requiring discussion in this place are those which entitle a party to protect or enforce his rights without the assistance of the courts. Thai law recognizes a general right to protect a threatened interest, where judicial proceedings would be unable to prevent the apprehended mischief. The acts which are allowed for such purposes come under the head of 'self-defence' (*sitti bpong gan*), which includes the defence of property, and 'self-help' (*gaan chuay leua dton ayng*).

Self-defence within certain limits is also authorized by English law; self-help is allowed in a number of isolated instances (retaking of goods taken out of the custody of the lawful possessor, abatement of a nuisance, expulsion of a trespasser, and the like), but there is no general rule corresponding to the Thai provisions on the subject. In addition to the rights of self-help and self-defence, Thai law recognizes certain adjective rights which may be conveniently referred to in this place. They are rights which have no independent existence but only serve for the purpose of protecting a substantive right. A person entitled to a substantive right may in certain events compel the person under liability or the possessor of a thing or document to which the right refers to furnish security or to produce the thing or document for inspection. Under English law, rights of such a nature could not be asserted before action brought, but under Thai law, they exist independently of any litigation on the subject matter.

Under the Civil and Commercial Code, there are instances of damage suffered from justifiable acts of self-defence which do not give any right of action to the party who suffers from their effects. In other words, these acts though harmful to others are not unlawful because no legal right is infringed. To take a simple case as an example, if a person damages or destroys a thing in order to protect the rights

[74]Originally, patents lasted only fifteen years from the filing date. In 1992, a new Patent Act (No. 2 B.E. 2535) sought to amend the 1979 Act, and it changed the term of protection to twenty years from the date of filing (Section 35, Patent Act). During this period, no one has the right to produce, use, sell, or import the invention without permission. At the end of the twenty years, however, the product or process enters the public domain. In other words, the patented product is available to the whole world. The Patent Act does not provide any possibility of renewal or extension upon expiration of the patent.

[75]A claim for such damages must be filed before the court after the patent has already been granted to the applicant.

of himself[76] or of a third person against immediate danger threatened by the thing itself, such person is not liable to make compensation, provided the damage done is not out of proportion to the danger (Section 450, paragraph 1, Civil and Commercial Code). Another example can be found under Section 449 of the Civil and Commercial Code which states that a person who, acting in lawful defence or under a lawful command, has caused injury to another person is not liable to make compensation. Acts or omissions of this type do not qualify as delicts. Similarly, a person who injures or destroys a thing belonging to another, with the intention of avoiding any danger threatened to be inflicted by such thing, is not acting unlawfully, if the infliction of such injury or such destruction was required for the purpose of averting the danger and if the damage inflicted by the act of self-defence is not out of proportion to the danger being prevented.[77] This is to say that when an act is committed with a lawful excuse or justification, this precludes legal liability in delict law even though it causes injury to another.[78] However, if the danger averted by the alleged act of self-defence was caused by the default of the person acting in self-defence (e.g. by the insufficient fencing of an enclosure), he is liable for the damage caused by his act (Section 450, paragraph 3, Civil and Commercial Code).

With regard to self-help, Section 451, paragraph 1, of the Civil and Commercial Code disposes that a person who uses force for protecting his right is not liable to make compensation if under the circumstances the help of the court or of the proper authorities is not obtainable in due time and there is danger that, if he does not act immediately, the realization of his right will be frustrated or seriously impeded.[79] A case for self-help arises if the enforcement of a right is in danger of being frustrated of materially hindered by the omission of immediate measures for its protection, and if it is impossible to obtain the assistance of the public authorities with sufficient speed.

The using of force according to Section 451, paragraph 1, of the Civil and Commercial Code, however, must be strictly limited to that which is necessary for adverting the danger. This means that self-help must not go further than is necessary for averting the threatened injury or loss and the necessary steps for obtaining the judicial assistance available under the circumstances of the case must be taken

[76]An attack against the property of the person concerned is for this purpose deemed an attack directed against him.

[77]To take an example, a person who kills a ferocious dog attacking his own dog acts in lawful self-defence; but a person who kills a valuable horse which has strayed from a neighbouring paddock into his garden to the danger of his flower beds is, not acting in lawful self-defence, as the loss inflicted on the horse's owner is quite out of proportion to the loss which would have been incurred by the destruction of the flower beds. See a comprehensive list of examples of self-defence in Minakanit (2009), pp. 177–191.

[78]In this sense, Poonyapun (1978), p. 88.

[79]On this aspect, see for all, Sumawongse (1981), p. 69.

without delay. A person who erroneously assumes that an act of self-help is justified in any case in which it is not justified and acts on such assumption is liable for any damage caused thereby, even if the mistake was not caused by negligence (Section 451, paragraph 3, Civil and Commercial Code).

1.5 Juristic Acts

1.5.1 The Concepts of Legal Facts and Legal Acts

The creation, extinction, or transfer of a right may be effected by a purely physical fact, or by a manifestation of the human will. Any fact that is considered by law as an occurrence with legal meaning and that produces certain legal effects constitutes a legal fact. This means that, according to the legislator, the fact has sufficient importance to make the law regulate it in a specific manner. Legal facts include those natural facts which give rise to legal consequences without any human participation. The birth or death of a human being, the growth of a plant, the retirement or the advancement of the sea, an earthquake, and a fire are conspicuous instances of natural facts by reason of which rights are created, transferred, or extinguished; the lapse of time may also be referred to as a physical fact with similar consequences.

Facts are distinguished from acts insofar as the former are occurrences, while the latter are motions directed by the mind. Legal acts, thus, can be defined as manifestations of human activity that produce correlative rights and duties. A manifestation of the human will may be intended to create, transfer, or extinguish a right (e.g. a gift, a sale, a promise, a disclaimer, a release), or it may create a right without intending to do so (e.g. the utterance of a slanderous statement or the infliction of a bodily injury). A manifestation of the human will intended to create, transfer, or extinguish a right recognized by law is called a *nitikam* by the Civil and Commercial Code and will in the course of this treatise be referred to as a juristic act.

While juristic acts are a fundamental part of the Thai legal system, it is not easy to define the notion of juristic act, which is an abstract concept. According to Section 149 of the Civil and Commercial Code, 'juristic acts are voluntary lawful acts, the immediate purpose of which is to establish between persons' relations to create, modify, transfer, preserve, or extinguish rights'. The juristic act is thus a manifestation of intention intended to have and capable of having legal effects. It represents the functional form in which the subjective intention of the actor develops its activity in establishing rights within the boundaries of the legal system. Such a manifestation may consist in the use of written or spoken words, or in any other outward act (e.g. the delivery of a thing, the occupation of land, and the like); it may also be of an entirely passive nature (silence, deliberate acquiescence), but it must in every case furnish evidence of a clear intention on the part of

the person from whom it proceeds. The active or passive manifestation furnishing such evidence is called 'declaration of intention' (in Thai: *gaan sadaeng jaytdtanaa*).[80]

For a juristic act to be valid, the following elements have to be met: actor's capacity, declaration of intention, object, and form. If only one element is missing, the juristic act is not valid or is void.[81]

1.5.2 Capacity of Juristic Acts

As mentioned above, the term *kwaam saamaat* is used by the Civil and Commercial Code to denote capacity for juristic acts. This term is identical in meaning with the term capacity, which is commonly used in European continental's Codes,[82] and which distinguishes capacity for incurring liability in respect of unlawful acts from capacity for juristic acts. Thai law, under the influence of civil law systems, deals with the disabilities caused by infancy and other causes in a manner which materially differs from the manner in which they are treated by English law. According to Thai law, each class, which is subject to any such disability, comes under certain fixed rules. Every person under incapacity or restricted capacity has a 'legal representative' (*poo taen doi chop tam*), being either one of his parents or his guardian or curator, who, except in certain cases of a special nature, has power to act on his behalf or to sanction or ratify his acts. As a general rule, a person of restricted capacity can do valid acts with the assent of his legal representative, and any act done without such assent is voidable.[83]

It must be added that the Civil and Commercial Code also provides some rules for the protection of third parties dealing with persons of restricted capacity. In particular, a party whose interests are intended to be affected by a unilateral act done by a person of restricted capacity (e.g. by a notice to determine a lease) may decline to be bound by such act, unless the legal representative's written authority

[80]A juristic act constituted by the declaration of intention of one person only (e.g. a notice to determine a lease, a testamentary disposition) is called 'unilateral' (in Thai: *nitikam fai dio*), while a juristic act requiring concurrent declarations of intention on the part of several persons is called 'an agreement' (in Thai: *sanyaa*). The declaration by which a unilateral act is constituted may either be one which is not effective unless communicated to another party (e.g. a notice), or it may be effective without communication (e.g. a will). In the first case, it is called 'a declaration of intention requiring communication'.

[81]As we will see in detail in Sect. 1.5.9, voidable means that the act can be either made void or ratified by the legal representative. A void juristic act has no legal effect from the moment; it was made by operation of law, automatically, without any declaration of the parties required. When a voidable Transaction is avoided, and it is to be regarded as void from its inception date. When a voidable transaction is ratified, it is then perfected and no longer subject to disaffirmance.

[82]See, for instance, Articles 1123 and 1124 of the French Civil Code.

[83]On this point, see above Sect. 1.2.4.

is produced to him, or unless he has received notice from the legal representative that he has authorized the act. As regard bilateral acts, a party to an agreement with a person of restricted capacity, entered upon by the latter without his legal representative's authorization, may require the legal representative to ratify the agreement within a reasonable period of time. If the ratification is not declared within that period, it is deemed to have been refused. Should, however, the restriction to the capacity of the person concerned be removed before the expiration of the period, such ratification might take the place of the legal representative's ratification.[84]

1.5.3 Declaration of Intention

The declaration of intention refers to the action of a person expressing his intentions to others to perform a juristic act in a certain form. For example, if A wants to purchase a car from B, he has to declare his intention to B in order to successfully conclude a contract of sale. If A's intention remains in his heart, this stage of activity does not have legal effects. Thus, it is necessary for not only the interior forming of the will but also the appearance of the internal intention to the outside under a definite form. The question as to what constitutes the communication of a declaration of intention presents no difficulty when the parties are in the presence of each other, but where the declarant is at a distance from the addressee, two doctrines directly opposed to one another are possible; according to one, communication is made as soon as the message containing the declaration is dispatched; according to the other, it remains incomplete until the message is received by the addressee. The former is called the doctrine of utterance, while the latter is called the doctrine of receipt. There is also a third doctrine called the doctrine of perception, according to which the receipt of the message is insufficient unless its contents have actually come to the knowledge of the addressee.[85]

The rules of English law relating to the communication of an offer and an acceptance on the formation of an agreement apply the 'doctrine of perception' in respect of the offer, and the 'doctrine of utterance' in respect of the acceptance. An offer (unless made under seal) produces no effect whatsoever until it becomes known to the offeree; if it is revoked, or if the offeror becomes incapable or dies before that time, it can no longer be accepted.[86] On the other hand, an acceptance

[84]If the restricted capacity of a contracting party was unknown to the other party, or if it was falsely represented to such other party that the required authorization had been given, the party misled by such ignorance or such misrepresentation may, at his option, withdraw from the agreement. On this point, see Kasemsap (1981), p. 108.

[85]Setabutr (2008), p. 134.

[86]See in particular Haemaratchata (1992), pp. 21–22.

forwarded by the acceptor in a manner authorized by the offeror is deemed to be duly communicated to the latter, though it never reaches him.

The present Thai law, on principle, adopts the 'doctrine of receipt'. Under Section 169 of the Civil and Commercial Code, a declaration of intention to a person not in his presence becomes effective at the moment in which it reaches such other person. This implies that an offer does not take effect if a revocation of the original declaration reaches the other party previously or simultaneously. On the other hand, if the declaration of intention is made to a person in his presence, Section 168, paragraph 1 of the Civil and Commercial Code, provides that the declaration takes effect when it becomes known to the other party. This principle also applies to the declaration made through certain communication devices such as the Internet, telephone, or fax machines. The effect of a declaration is not impaired by the fact that the declarant dies and becomes incompetent or quasi-incompetent by an order of the court before its receipt on the part of the addressee (Section 169, paragraph 2, Civil and Commercial Code).

If the declaration of intention, however, is made to a minor or a person adjudged incompetent or quasi-incompetent, it cannot be set up against him unless his legal representative, guardian, or curator, as the case may be, has knowledge of it or has given prior consent to it. Such provision, however, does not apply to the declaration of intention concerning any matter that the minor or the incompetent is required by law to make by himself (Section 170, Civil and Commercial Code).

In accordance with the declared intention of the offeror or to ordinary usage, no notice of acceptance is necessary, and the agreement comes into existence at the time of the occurrence of fact which is considered as a declaration to accept; the length of the period during which the offer in such a case remains binding depends upon the offeror's expressed or implied intention (Section 361, paragraph 2, Civil and Commercial Code).[87]

1.5.4 Discrepancy Between Real and Apparent Intention

Legal doctrine has for a long time been divided between two conflicting positions, the doctrine of 'real intention' and the doctrine of 'declared intention'. The supporters of the former of these maintain that a person cannot be really bound by any expression of intention which does not rightly give effect to the intention which was in his mind, while the adherents of the latter uphold the rule which is universally accepted in English law that where one by his words or conduct causes

[87]In regard to the method of declaration of intention, parties must express their intent objectively. Law is not concerned with what a party may have actually thought or the meaning that he intended to convey. Normally, the declaration of intention corresponds to the subjective intention of the actor. Thus, the intention of a party is analysed as it reasonably appears from his or her words or actions. On this point, see Stasi (2015), p. 60.

another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. The present Thai law starts from the doctrine of real intention, but makes it subject to so many exceptions, and to so many rules for the protection of innocent parties, that in the result the difference between English and Thai law on this subject is not of much practical importance.[88]

A discrepancy between real and apparent intention occurs when the expression of intention is not seriously meant as well as when the tenor of the declaration does not express what is really intended to be declared. The latter class of cases is generally dealt with under the head of 'error' and will be discussed separately.

The rules as to the former class of cases are necessary under a system starting from the doctrine of 'real intention'. The Civil and Commercial Code deals with hidden intention, declarations not intended to be taken seriously, and simulation. More precisely, Section 154 of the Code provides that a declaration of intention is not void on the ground that the declarant in the recesses of his mind does not intended to be bound by his expressed intention, unless the other party knew of that hidden intention. This means that if there is a difference between the subjective and the objective outcome that the party intends to achieve with the juristic act, the objective expression of intent will be considered. In cases where further interpretation of an expression of intent is necessary in order to identify the precise meaning the actor desires to manifest, different methods of interpretation may need to be applied according to circumstances. This may be a literal interpretation, an interpretation based on the objective to be achieved, or an interpretation based on social customs.[89]

With regard to the declaration of intention which is not intended to be taken seriously and is made in the expectation that the absence of serious intention will be detected is void. If the declaration is one requiring to be communicated to another party, such other party, if not liable of negligence, is entitled to be compensated for any loss suffered by his reliance on the validity of the declaration. If the declaration is not required to be communicated, any person relying on it is entitled to compensation, if not liable of negligence.

As concerns the simulation, it can be defined as a juristic act which does not reflect the true intent of the party. A distinction can be drawn between an absolute and a relative simulation. It is absolute simulation when the juristic act lacks real consent and the parties do not intend to produce any legal effects between them. Parties do not intend to be bound at all. In these cases, the act is not merely voidable, but inexistent, i.e. void *ab initio* (Section 155, paragraph 1, Civil and

[88]Panthulap (1979), p. 160.

[89]The Civil and Commercial Code contains express general rules as to the interpretation of juristic acts. More precisely, Section 171 of the Civil and Commercial Code 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'.

Commercial Code). Simulation is relative when parties apparently perform an act, while in reality concealing another. In other words, the apparent act is not really desired or intended to produce legal effects. If parties have intended to perform a juristic act different from the simulated one, the provisions of law relating to the concealed act shall apply (Section 155, paragraph 2, Civil and Commercial Code).[90]

1.5.5 Vices of Consent

A valid juristic act requires not only the intention of the parties, but it also requires that such consent is free. A declaration of intention is said to be free when it is not vitiated by an error, or influenced by a fraud or duress by the other or a third party. Error (or mistake) can be defined as a false representation of the reality. It occurs when one or both parties are under a misconception with regard to the object of the contract. In other words, error consists in a misrepresentation of reality which causes a contracting party to believe that a fact or state of facts is existent, when they are not.

The rules of Thai law as to the effect of error differ from the corresponding English rules, both as regards the extent of the sphere within which error is admitted as a ground of relief and as regards its effect when so admitted. The sphere is much larger under Thai law; on the other hand, the effect does not go as far as it does under English law in the cases in which it is a ground of relief.

There are two classes of cases of so-called error which must be kept strictly apart. In the one class of cases, relief is sought on the ground that the declared intention does not express the real intention of the declarant or declarants; in the other class of cases, the relief is sought on the ground that the declarant when making the declaration was under a mistaken assumption as to certain facts and that he would not have made such declaration had he known the true facts. In the one class of cases, the error refers to the expression of the intention, in the other to the formation of the intention.[91]

More precisely, Section 156 of the Civil and Commercial Code provides that a declaration of intention is void if made under a misapprehension as to an essential element of the juristic act. In order to perform a contract, it is necessary that the parties agree upon its essential terms. If one of these fundamental elements is

[90]An example will help clarify this point. Suppose A declares his intention to donate his land to B, when in reality a sale agreement is being made. In this case, the concealed contract (sale contract) binds both parties as long as it meets all the conditions for its validity. Similarly, if a debt intended to be assigned by way of mortgage as security for a loan is in fact assigned absolutely, the transaction as between the assignor and the assignee is treated as a mortgage. On this point, see Stasi (2015), pp. 61 and 73.

[91]Setabutr (2008), p. 152.

absent, then the contract cannot be considered legally binding. There may be the external signs of agreement but no actual consensus between the parties. The error as to an essential element of the contract is for instance an error as to a character of the contract, an error as to a person to be a partner of the contract, and an error as to a property being an object of the contract. An error of such nature is apt to arise in cases in which a person accepts an offer or signs a document of which he fails to understand or misunderstands the effect, or if he himself uses words which have an import not known to him when uttering them.

In the case that the declaration of intention is made under a misapprehension either as to a quality of the person or as to a quality of the property, it is voidable (Section 157, Civil and Commercial Code). It must be pointed out, however, that according to Section 157, paragraph 2 of the Civil and Commercial Code, it is not every error as to persons or property which amounts to error and lays down the foundation for the rescission of a contract. When the identity of the contracting party is not an essential element, the contract remains valid and enforceable despite the error. This is to say that the error must be related to the quality of the person or the property which is considered as essential in the ordinary course of trade, and without which such contract would have not been made. This rule enables a seller to rescind a sale if he finds that the other party is less solvent that he imagined, and it enables the buyer to rescind if he finds that he had overestimated the productiveness of the purchased object.

As shown by the comparison of the rules, the sphere within which error is a ground of relief is much larger in Thai than in English law; on the other hand, the relief available under Thai law on the ground of error is of a less far-reaching kind than the relief available under English law. According to English law, error, where operative, avoids the transaction in which it occurs. Under Thai law, the party misled by the error has a right of avoidance under the following conditions. First, it cannot be exercised unless the facts of the case warrant the conclusion that the party intending to avoid the act would, if he had known the true facts and given a reasonable consideration to the matter, 'not have made the declaration which he did make' (Section 157, paragraph 2, Civil and Commercial Code).[92] Second, the avoidance must be made without culpable delay as soon as the party claiming relief becomes aware of the error. In any case, the right cannot be exercised after the lapse of ten years from the date of the declaration, and where the party subject to avoidance is absent, the act of avoidance is deemed to be effected by the forwarding of a written notice to his address. Third, if the declaration avoided by the declarant was made to a party to whom it had to be communicated, such other party, if excusably ignorant of the ground of avoidance, is entitled to compensation for the loss suffered by him by reason of his having acted on the faith of the validity of the declaration. In the case of a declaration which does not require to be communicated to another person, any third party suffering loss by acting on the

[92]Sodpipan (2002), pp. 88–94.

faith of the validity of the transaction, and excusably ignorant of the existence of the ground of avoidance, is entitled to the corresponding relief (Section 158, Civil and Commercial Code).[93]

From all that has been stated above, it is clear that a contract which has been concluded under the influence of an error and which would not have been entered into had there been a correct assessment of the facts is void unless it is due to the gross negligence of the mistaken party. This means that an error is grounds for avoiding the contract without regard to the question of whether it is imputable to information given by the other party or not. A contract may be vitiated by error even if the other party to the transaction is not responsible. The annulment, however, cannot be grounded on an error as to a future fact known to be uncertain or an error for which, given the object of the juristic act, the party seeking relief should remain responsible.

Fraud can be defined as a misrepresentation or omission of a material fact made with the intention to deceive and induce another party to take some action detrimental to his own interest. It occurs when a party knowingly establishes a fraudulent set of circumstances in order to obtain an unjust advantage, or to cause a loss or inconvenience to the other party. A juristic act which is performed as a result of fraud is voidable (Section 159, Civil and Commercial Code). Accordingly, the victim of fraud may, at his choice, void the juristic act, ratify the juristic act, raise the fraud as a defence, or sue for damages. In any case, a person who has been induced by fraud to perform a juristic act is entitled to recover the damages he has sustained by reason of the false representations unless he has waived his right to claim damages. If both parties acted fraudulently, neither of them can allege it to void the act or to claim compensation (Section 163, Civil and Commercial Code).[94]

The Civil and Commercial Code distinguishes between two types of fraud: fundamental fraud and incidental fraud. The first category refers to those cases where a party is induced to contract with another by a deliberately false or misleading statement. Consent to any agreement is said to be induced by fraud when it would not have been given had not such cause existed. In this regard, Section 159, paragraph 2 of the Civil and Commercial Code, provides that a declaration of intention is voidable on account of fraud only when without fraud the juristic act would not have been made. The second category applies when a person, though he enters of his own accord into the juristic act, is induced to accept more disadvantageous terms than he would otherwise have done. Deception is insufficient to compel consent. In these cases, fraud is considered to be merely incidental to the juristic act: the victim would still have performed the juristic act, but on better terms, whether as regards quality or price or otherwise. For example, the owner of a second-hand shop might lie about the duration of the phone's battery to get a better price. Here,

[93]Ibid., p. 102.

[94]A comprehensive overview of the issue can be found in Haemaratchata (1992), p. 65.

the buyer would have paid a lower price had he known the actual battery life of the phone. Incidental fraud thus leads a person to contract on more onerous terms than he otherwise would have accepted. The consequences are not the same as if the juristic act was void because of fundamental fraud. Incidental fraud does not annul the juristic act. The juristic act is valid, even though, without the deception, the innocent party would have included different terms.[95]

Another distinction can be made between active fraud and fraud by silence. Fraud is active when it consists of a positive act, such as when A tells B that the necklace is made of silver when actually it is made of platinum. Fraud is by silence when a party does not provide information with respect to a fact or quality of which the other party is ignorant. Such behaviour will represent fraud if, without it, the juristic act would not have been concluded. In this case, the legislator believes that by keeping silence about the important aspects of an act one party may misguide the other party (Section 162, Civil and Commercial Code). For instance, if the insurer keeps silence about some important aspects of a contract of insurance, this behaviour may misguide the assured.

When the deception is practised by a third party, the juristic act can be annulled only if the other contracting party knew about the fraud or should have known about it (Section 159, paragraph 3, Civil and Commercial Code). This means that third-party fraud does not entitle the victim to avoid the act induced by it, except in a case where the declaration of intention constituting such act is required to be communicated to another. In such a case, the act is voidable altogether if the party to whom the declaration has to be communicated is aware, or by the application of proper care would have become aware, of the fraud otherwise it is only voidable as against any person deriving a right under the act with knowledge, or imputed knowledge, of the fraud. An example will help illustrate the point: A, who is falsely told by D that B has a valid patent for an invention, makes an agreement with B for the purchase of this patent (B not assuming any responsibility for its validity) and for the employment of C as manager of a business to work the patent. If B is aware, or by the application of proper care would have become aware, of the invalidity of the patent, the agreement is voidable altogether; if B excusably believes that the patent is valid, but C is aware of the invalidity, the right derived by B under the agreement is not forfeited on that ground, but the agreement may be avoided in so far as C derives any right thereunder, B's right may, however, be defeasible on the ground of mistake.

A juristic act induced by duress is voidable at the option of the party induced by such threats, whether proceeding from a party to the act or from a third party. Duress can be defined as an unlawful threat of injury or violence to influence a party to perform a juristic act. The expression unlawful threat includes any threat prohibited by law (e.g. a threat of criminal proceedings). Pursuant to Section 164, paragraph 1 of the Civil and Commercial Code, a declaration of intention is voidable if made under duress.

[95]The contracting party in bad faith, however, is liable for damages resulting from the fraud (Section 161, Civil and Commercial Code). On this point, see Stasi (2016), p. 76.

It is not every type of duress that is considered as a vice of consent by the legal system, but only a genuine and reasonable fear, due regard being had to the sex, age, position, health, and temperament of the parties, and all other circumstances which may relate to that juristic act. In this respect, Section 164, paragraph 2 of the Civil and Commercial Code, provides that duress, in order to make a juristic act voidable, must be imminent and so severe that it overcomes the will of the victim and without it the act would not have been made. In other words, it must be capable of overwhelming a reasonable person.

Duress must give rise to a fear of unlawful violence. Accordingly, the threat of the normal exercise of a right is not considered as unlawful. This is the case, for example, of a creditor who demands security for a debt under threat of suit if such security is not given as required, or of a judge who exerts duress on a debtor to sell his property and satisfy his debts. Lawful duress has no legal effect. By the same token, mere threats cannot constitute duress unless they are of a serious nature and the victim has been coerced by that pressure. Therefore, reverential fear is not cause for annulment of a juristic act (Section 165, Civil and Commercial Code).

Generally speaking, duress involves the use of improper threats or acts by one party to coerce the other party into making a juristic act he would not otherwise have made. It is possible, however, that one is induced by duress exercised by a third person to confer a benefit upon another. In this respect, Section 166 of the Civil and Commercial Code provides that duress is grounds for annulment of the juristic act, even when it is exercised by a third person.[96]

It is noteworthy to observe that an act done under the influence of actual violence would, under Thai law, not be looked upon as a manifestation of the will of the party compelled thereby and would on that ground alone be inoperative. This means that a juristic act concluded under physical violence would not be considered as a declaration of intention at all. In the absence of an essential element of the juristic act (i.e. the consent), the juristic act would be void, not voidable.[97]

1.5.6 Object of Juristic Acts

Another essential requirement of a juristic act is the legality of the object. In civil law legal systems, the fundamental grounds of invalidity do not differ significantly. Yet, the notion of invalidity evolves over time according to the evolution of society and depending on the degree to which a practice becomes socially accepted. Unlawful juristic acts have no legal effect and are not binding. It is not possible to bring a legal action upon them. However, if a juristic act includes a series of several agreements, some of which are legal and others illegal, then the court will enforce only those legal agreements which can be separated from the

[96]Ibid., (2016), p. 78.

[97]On this theme, see especially Setabutr (2008), p. 173.

unlawful ones. Yet, it is not always easy to draw a specific line in dividing legal juristic acts from illegal when it comes to business and commerce. Some juristic acts may be related to unlawful activities without being in themselves unlawful.

The Civil and Commercial Code contemplates several circumstances under which the object of the juristic act is unlawful. Specifically, Section 150 of the Code states that an object is unlawful if it is expressly prohibited by law or is impossible, or is contrary to public order or good morals. Each circumstance will receive full discussion below.

The object of the juristic act is lawful when it does not infringe the law. Juristic act violating a legal provision is deemed null and void. An agreement is forbidden by law when it violates a norm prohibiting that activity or when it is punishable under any other legal provision. Thus, any juristic act expressly prohibited or penalized by law is void on the ground of illegality, unless the enactment containing the prohibition provides otherwise. It is immaterial whether the prohibition arises under primary or subordinate legislation.

Among prohibited acts which do not come within the range of criminal law, the following may be mentioned: any agreement for compound interest which does not belong to one of the excepted classes, any gaming transaction, any agreement protecting a person against liability for his own wilful default, and any agreement not belonging to one of the excepted classes, dealing with a right expected to arise on the death of a living person.[98]

The object of the juristic act is impossible if it purports to bind a party to do that which is absolutely impossible in itself. For example, 'I will give you 1,000 baht if you touch the sky with your finger'. In this case, the juristic act is unlawful because it contains an obligation which is impossible to carry out. The same applies to juristic acts intended to create a legal relationship which is considered to be legally impossible. For example, a person agrees to establish a right of servitude over his own land in favour of himself without complying with the provisions of the Civil and Commercial Code.

The expression 'public order' is not defined by the Civil and Commercial Code. It is a rather vague and wide expression reflecting the needs and values of society at a particular time. What constitutes public order is not a static notion, but one which changes as society changes. Generally speaking, it can be said that a juristic act is void when it tends to injure the fundamental principles on which the legal order relies. A juristic act which is against the public interest or which is likely to deprive a person of some right or interest or the legitimate expectation of a benefit is void.[99]

[98]Haemaratchata (1992), p. 43.

[99]This includes juristic acts which tend to interfere with good government, juristic acts in conflict with the proper discharge of official duties and responsibilities, and, more generally, juristic acts against the public interest of the state in its internal relationships. The constitutional law, the criminal law, and the administrative and fiscal law are founded on principles of public policy, their aim being the protection of the collective interest of individuals. Two private parties cannot infringe or alter the imperative norms of the country. On this point, see Stasi (2016), p. 66 ff.

Juristic acts *contra bonos mores* (in Thai: *seen-la-tam an dee*) represent a specific class of acts which are generally considered as void under Section 150 of the Civil and Commercial Code. Usually, it is not a matter of difficulty to state that a juristic act is expressly forbidden by law or is a crime, but it may be problematic to determine in which case a juristic act is *contra bonos mores*. In deciding whether a juristic act is *contra bonos mores*, the judge has to assess moral values with reference to criteria of evaluation accepted by the community. The expression *contra bonos mores* is not correctly rendered by 'immoral'. Grossly immoral acts would no doubt fall under the description, but many acts infringing the strict laws of morality are upheld by the courts, while on the other hand, many acts, which under the particular circumstances of the case may not be immoral at all, are repudiated as violating *bonos mores.* The expression, like the English expression 'acts against public policy', is applied to such classes of acts as could not be enforced by the courts without giving offence to public feeling.

In deciding whether a juristic act is against good morals, the judge has to assess moral values by reference to criteria of evaluation accepted by the community. Some examples of juristic acts that have been held by the Supreme Court to be contrary to good morals are acts by which a permanent restraint is imposed on marriage, any act permanently restricting the disposing capacity of the person concerned (e.g. a voluntary settlement by which the settlor deprives himself of the control of his whole fortune). Other examples include acts aiming at the promotion of sexual immorality by direct or indirect means (e.g. the letting of a house for immoral purposes), acts by which the earning capacity of a person is unduly hampered, and acts by which a right of custody or control or cohabitation arising under family law is waived (e.g. an agreement for perpetual separation between husband and wife, an agreement by which a father binds himself to allow his child to be educated by another person).[100]

1.5.7 Form Juristic Acts

The actor's intent can be expressed in several forms. As a general rule, the Thai legal system provides for a principle of freedom of forms with respect to juristic acts. This means that a juristic act is not required to be done in any particular form, unless it belongs to a special class of transactions for which a particular form is required by rule of law, or by agreement between the parties. Where no such special form is prescribed, a declaration constituting or forming part of a juristic act may be made by spoken or written words, or by means of any other act from which the declarant's intention may be inferred, subject of course to the above-mentioned rules as to communication. A juristic act can be made by a verbal or written expression (e.g. explicit form), or tacitly by conduct (e.g. implicit

[100]See a comprehensive list of examples in Sodpipan (2002), p. 111.

form). Verbal expression is the most recurrent: the intention to create a juristic act is evident from words. Written expression is where the actor has memorialized his will into a documentary form. Persons may also manifest their intent to create a juristic act simply by conduct, such as when one places an item in a supermarket trolley. Thus, a juristic act exists if a person has acted in a manner that manifests the intention to establish legal relations. Even if the intention is not manifested verbally or in writing, it can be deduced from the behaviour.[101]

Where, however, a rule of law or a contractual stipulation requires a special form to be observed, an act not complying with such requirement is void, unless (in the case of any contractual requirement) the contrary has been agreed upon. In this regard, Section 152 of the Civil and Commercial Code stipulates that an act which is not in the form prescribed by law is void. Hence, the juristic act will produce legal effects only if the form of the act corresponds with the form prescribed by the law. If the required form is not adhered to, the juristic act is void because an essential element is absent (Section 152, Civil and Commercial Code).

The law may require a special form and in particular (1) written form; (2) registration with the competent authority; (3) written form and registration with the competent authority; and (4) written notice of the competent authority. The more stringent form is required in the case of transactions creating real rights or affecting family relations or rights of inheritance, and the less stringent form is required for certain kinds of transactions by which obligatory rights are created or transferred. It will be understood that any classes of juristic act referred to in the further course of this treatise can be done informally, unless the formal requirements are expressly mentioned.[102] Specifically, the formation of a will is a trite example of the first category. To be valid, a will must be made in writing, dated at the time of making and signed by the testator before at least two witnesses present at the same time who must then and there sign their names certifying the signature of the testator (Section 1656, Civil and Commercial Code). An example of the second category would likely be the creation of an association. Under Section 78, Civil and Commercial Code, an association must be registered to be valid. A sale of immovable property falls into the third category. More precisely, Section 456, Civil and Commercial Code, provides that a sale of immovable property is void unless it is made in writing and registered by the competent official. An example of the fourth category would be the renunciation of an inheritance or refusal of a legacy. As a matter of fact, such acts must be made by an express declaration of intention in writing deposited with the competent official (Section 1612, Civil and Commercial Code).[103]

[101]For instance, Section 570 of the Civil and Commercial Code states that if the lessee continues to use the property after the expiry of the agreed period and the letter is aware of this fact and makes no objection, the parties are deemed to have renewed the contract for an indefinite period.

[102]Panthulap (1979), p. 195.

[103]See in particular Stasi (2015), p. 67.

1.5.8 Incidental Elements of Juristic Acts

The effect of a juristic act may be made subject to the happening of an uncertain future event, which is called a condition (in Thai: *ngeuan kai*). The event must be objectively uncertain. Mere subjective uncertainty is insufficient. An example will help illustrate the point: A receives a letter from a distant cousin to the effect that he has a grandchild, without any indication as to its sex. He executes a settlement to be operative in the event of the grandchild being a male; this is not a 'condition' within the meaning of the Civil and Commercial Code as A's uncertainty as to the sex of the child is purely subjective.

If an act is to be inoperative, unless a specified event happens, the condition is called a condition precedent (*ngeuan kai bang-kap gon*); if, on the other hand, the operativeness of an act is to come to an end on the happening of a specified event, the condition is called a condition subsequent (*ngeuan kai bang-kap lang*). In the case of a condition precedent, a new state of things is created by the fulfilment of the condition; in the case of a condition subsequent, its fulfilment restores the former state of things. For example, A promise to pay 1,000 baht to B, if he shall at any time be called to the Bar, is a promise subject to a condition precedent; a promise to pay a yearly sum to B, which yearly sum shall cease to be payable in the event of his being called to the Bar, is a promise subject to a condition subsequent.

Certain kinds of conditions are called unreal conditions, because they are conditions in appearance only, and do not correspond to the definition given above. This is the case whenever it is either absolutely certain that the specified event must happen or absolutely certain that it cannot happen. The effect of an unreal condition of the first-mentioned kind is the same as if there had been a real condition and as if the event had happened; the effect of an unreal condition of the kind secondly mentioned is the same as if there had been a real condition and the event had not happened. In this regard, Section 189 of the Civil and Commercial Code provides that a juristic act upon a condition precedent which is impossible is void.

A condition the performance of which is dependent on the choice of the person on whom a right is conferred conditionally is called a potestative condition. Potestative conditions must be distinguished from burdens imposed upon gifts *inter vivos* or testamentary gifts. In the case of a potestative condition precedent, the whole transaction remains in suspense until the performance of the condition; in the case of a gift subject to a burden, the gift is operative subject to the right of the donor or of his heirs to enforce the obligation imposed by the burden or (in certain events) to demand restitution.

The expression 'period of suspense' is used to indicate the period of time during which it is uncertain whether a condition will be fulfilled or not. The rights and duties of the intended parties during such period of suspense are regulated under Book 1, title 4, chapter 4 of the Civil and Commercial Code. Specifically, Section 183, paragraph 1, states that a juristic act subject to a condition precedent takes effect when the condition is fulfilled. This means, for example, that a person

entitled to the ownership of an estate, on condition of his attaining the age of twenty-one, is not entitled to the rents or profits received or chargeable with the outgoings paid during the period of suspense. Similarly, a person who forfeits an estate in the event of his remarriage may retain the rents and profits and is chargeable with the outgoings during the period of suspense.

If the condition was imposed with a stipulation providing that on its fulfilment the effects of such fulfilment shall operate as from a prior date the intended parties must, as far as possible, place each other in the position which they would have mutually occupied if the condition had been fulfilled at such prior date. In this respect, Section 189, paragraph 3, of the Civil and Commercial Code provides that 'if the parties to the act have declared an intention that the effect of the fulfilment of a condition shall relate back to a time before it is fulfilled, such intention is to govern'. For instance, a person entitled to the ownership of an estate, on condition of his attaining the age of twenty-one, under a testamentary disposition providing that, in the event of his attaining that age, he is to be entitled to such ownership as from the date of the testator's death, is entitled to claim the fruits and profits obtained during the period of suspense by the person, who under the will or under the statutory rules was in possession during such period; on the other hand, such person is entitled to the reimbursement of his outlay for outgoings.

The Civil and Commercial Code also provides that a person is entitled to any right on the fulfilment of a condition precedent, or whose right is restored by the fulfilment of a condition subsequent, is in the event of the fulfilment of the condition entitled to claim compensation from the party whose right is terminated by the fulfilment of the condition, if such party by his wilful or negligent default during the period of suspense has caused the frustration or restriction of the right. Suppose, for example, that an object sold subject to a condition precedent during the period of suspense is sold and delivered to another buyer who acquires a good title. In this case, the first buyer is, on the fulfilment of the condition, entitled to compensation from the person by whom the second sale was effected.[104]

Furthermore, a party who, in violation of the requirements of good faith, promotes or frustrates the fulfilment of a condition, is not allowed to benefit by the effect of such unlawful interference.[105] More precisely, if the fulfilment of a condition is prevented not in good faith by the party to whose disadvantage it would operate, the condition is deemed to have been fulfilled; if the fulfilment of a condition is brought about in bad faith by the party to whose advantage it would operate, the condition is deemed not to have been fulfilled (Section 186, Civil and Commercial Code).

In the case of a 'potestative condition', the promotion or hindrance of its fulfilment is not of course against good faith, if proceeding from the party on whose volition the fulfilment of the condition is made dependent, but it may be an act of bad faith if proceeding from the other party. This means that a party who is to

[104]On this point, see Setabutr (2008), pp. 183–191.

[105]Haemaratchata (1992), p. 119.

receive a certain payment, on condition of completing a certain work by a certain time, may of course work as hard as he likes for the purpose of completing the work within the stipulated time, but if the completion of the work is prevented by the interference of the party who has undertaken the payment, the above-mentioned rule takes effect, and the condition is deemed to have been fulfilled.

It may be stipulated by a juristic act that its effects are to begin or to come to an end after the expiration of a certain period of time. If it is uncertain whether the end of such period will ever be reached (*dies incertus an, certus quando; dies incertus an, incertus quando*), the stipulation as to time is really in the nature of a condition.

A stipulation as to time (*ngeuan way-laa bang-kap*), in the technical sense of the word, only exists in cases in which it is certain that the act will become operative, or cease to be operative, at the end of the stipulated period of time; on the other hand, the length of the period of time may either be ascertainable beforehand or otherwise. Whether A promises to pay B or his estate, a yearly sum for a period of five years from the date of the promise (*diescertus an, certus quando*), or whether the death of C be stipulated for as the end of the period of payment (*dies certus an, incertus quando*), the stipulation as to time comes within the definition.

1.5.9 Ineffective Juristic Acts and Their Consequences

From the above considerations, it follows that a valid juristic act must meet all the essential conditions laid down by law. If an act does not meet all the conditions, or is defective in one of its elements, it is not able to produce the effects envisaged by the parties. More specifically, the ineffective juristic act can be classified into three major types: void, voidable, and unenforceable, depending on the circumstances.

The expression 'nullity', as used in civil law codes and textbooks, is somewhat misleading. In German law, a transaction called 'void' is inoperative for all purposes *ab initio*, while in French law, there are only very few instances of nullity in which the transaction is absolutely inoperative from the beginning. In most cases, the nullity must be established by the order of a court made in an action brought specially in that behalf (*action en nullité*) and unless such action is brought within the time limited for the particular purpose the transaction is looked upon as valid (see, for instance, Code Civil Art. 1304, as to void agreements).

The Thai expression here rendered by 'void' (in Thai: *moh-ka*) has in Thai law the same meaning as the corresponding German expression. This is to say that a void act cannot be subsequently confirmed by the parties, and its nullity may be alleged at any time by any interested person (Section 172, Civil and Commercial Code).[106] If any part of an act is void, the whole act is void, 'unless it may be

[106]Sodpipan (2002), p. 61 ff.

assumed under the circumstances of the case that the parties intended the valid part of the contract to be severable from the invalid part' (Section 173, Civil and Commercial Code).

In the case that the transaction intended by a juristic act is void, but the requirements for the validity of another transaction which has the same effect are complied with, such other transaction will be allowed to take the place of the intended transaction if it can be assumed that the substituted transaction would have been intended by the parties, had they known of the nullity of the intended transaction (Section 173, Civil and Commercial Code).[107] For instance, a contractual promise made by an infant as to the disposal of his estate after his death, made without the concurrence of his legal representative, is void as a promise, but if the infant has attained the age of sixteen, and the promise is made in the form prescribed for a testamentary disposition, the transaction would be upheld on the infant's death as a testamentary disposition;

A juristic act, on the other hand, is voidable (in Thai: *moh-kee-ya*) if it is contrary to a private interest of one party that is protected by law. In this sense, voidability is a kind of invalidity of a lesser degree than nullity.[108] A voidable act is impugned by an act of avoidance, which must be effected by a declaration addressed to the party entitled to notice of the act of avoidance. The right to avoid a voidable juristic act is accorded to specified classes of persons and available within specified periods of time, in accordance with rules laid down separately as to each case of voidability (see, for instance, the effect of error in the following sections).

If a voidable act is successfully impugned, it is deemed to have been void *ab initio* and the parties shall be restored to the condition in which they were previously. If it is not possible to so restore them, they must be indemnified with an equivalent (Section 176, Civil and Commercial Code). The confirmation of a voidable act by a party entitled to avoid puts an end to the voidability, and such act is deemed to have been valid from the beginning; a third party acquiring a right created by a voidable act is, in many cases, protected by special rules, but these rules are applied in so far only as the party concerned is excusably ignorant of the voidability of such act (Section 177, Civil and Commercial Code).[109]

A juristic act that is neither void nor voidable may, nonetheless, be unenforceable. In other words, there are cases where an act that is not in the form prescribed by law is valid but unenforceable. An unenforceable juristic act (in Thai: *mai saamaat bang-kap daai*) is one for the breach of which the law provides no remedy. The Civil and Commercial Code requires certain kinds of contracts to be evidenced by a written form to be enforceable. For example, a hire of immovable

[107] See again, Panthulap (1979), p. 191.

[108] Setabutr (2008), p. 189 ff.

[109] Under Section 181 of the Civil and Commercial Code, a voidable act cannot be avoided later than one year from the time when ratification could have been made or later than ten years since the act was done.

property is not enforceable by action unless there is some written evidence signed by the party liable (Section 538, Civil and Commercial Code). Written form in these cases is required for the enforcement of the contract and does not affect the validity of the juristic act or modify its effects. According to Section 653 of the Civil and Commercial Code, a loan of money for a sum exceeding 2000 baht is not enforceable by action unless there is some written evidence of the loan signed by the borrower. Similarly, a contract of suretyship may be unenforceable because of a failure to satisfy the writing and signature of the surety requirements as provided by Section 680, paragraph 2, Civil and Commercial Code. Hence, these contracts are referred to as unenforceable, rather than void or voidable.

1.6 Agency

1.6.1 Definition of the Term

An act of agency (*dtua taen*), within the meaning of the Thai term, is a manifestation of the agent's volition intended to operate, as if it were a manifestation of the principal's volition. A mere act of transmission is not an act of agency within the meaning of the Thai law; a person transmitting a declaration of intention is called a messenger (*poo jaeng kaao*) and is not within the definition of an agent.[110] An agent must also be distinguished from a person acting in his own name, though employed on behalf of another person. Thus, a 'commission merchant' employed to buy goods, but dealing with the seller of the goods in his own name, is not an agent within the meaning of the Thai definition.[111]

Under the Civil and Commercial Code, both natural and juristic persons may enter into legal transactions by means of an agent. According to Section 797 of the Code, agency is a legal relationship whereby a person, called the agent, has authority to act for another person, called the principal, and agrees thereby to act in transactions with third parties. An act of agency is 'active' where the agent makes a declaration of intention on his principal's behalf; it is 'passive' where he receives a declaration of intention addressed to the principal through his agency. As, according to the definition, the act of agency must be a manifestation of the agent's own volition, active or passive acts of agency on the part of a person under incapacity are inoperative, but by virtue of an express enactment contained in Section 799 of the Civil and Commercial Code, the effectiveness of an active or

[110]On this theme, see especially Auaychai et al. (1982), p. 245.

[111]In the usual English terminology, the expression 'agent' is frequently applied to designate any person employed by another, whether as a messenger, as an independent contractor, or as an agent within the meaning defined above, but in the course of this treatise, it will be used in the narrower sense only.

passive act of agency is not impaired by the fact that the agent is of restricted capacity. It follows that the principal who employs an incapable person as an agent is bound by the act of that agent.[112]

The mutual rights and obligations of the principal and the agent are partly determined by the particular nature of the relation which creates the power of agency (e.g. agreement for services, mandate, and partnership), but there exist general rules which apply to all cases without exception. Specifically, an agent is liable in damages for any wilful default on his part and also for omission to apply the degree of care incumbent upon him under the particular circumstances. This rule applies in a case where a restriction, which is ineffective as against third parties, has been disregarded by the agent.

It must also be pointed out that an agent may not, unless otherwise permitted, enter into a legal transaction in the name of the principal with himself in his own name or as an agent of a third party, unless the legal transaction consists solely in the performance of an obligation. In other words, a transaction to which a person is a party, as agent for a principal, is void if the same person without the principal's permission is also a party as principal or as agent for another principal.

Obligations arising out of the agency relationship must be literally complied with. The agent is bound to obey the lawful directions of the principal and must act according to the express or implied directions of the principal. If the agent has general authority, he may undertake all acts of management on behalf of his principal except the transactions listed under Section 801 of the Civil and Commercial Code, such as selling or mortgaging immovable property, letting immovable property for more than three years, making gifts, making a compromise, entering an action in court, and submitting a dispute to arbitration. Conversely, when the agent has a special authority, he may do on behalf of his principal whatever is necessary for the due execution of the matters entrusted to him provided that they are within the scope of his appointment.[113]

1.6.2 Modes of Establishing Agency

An agency relationship may be created by operation of the law or, in some cases, by contract within the scope of the principal authorization. Powers of agency are frequently conferred by legal rules on persons standing in certain relations to others. The powers of the legal representative who acts on behalf of any person under incapacity, or in concurrence with any person of restricted capacity, and of the 'primary agents' who act on behalf of the juristic persons, as well as those exercisable by a managing partner on behalf of the general partnership, are all powers conferred by legal rules.

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[112]For a more detailed discussion on the distinction between active or passive acts of agency, see Nipitikul (2001), pp. 101–103.

[113]On this point, see Stasi (2016), p. 32.

In each of these cases, the law either defines the powers conclusively or establishes a presumption in favour of certain defined powers.[114]

The authority of an agent to act on behalf of his principal, where not given by legal rules, may be created by an act of the principal. The agent's power derived under such an act is termed *amnaat tam gaan-taen* in Thai law and is here translated by the term 'authority to act'. The English term 'power of attorney'—by which an ordinary translator renders *nang-seu mop am-naat*—is inappropriate, as it suggests the idea of a formal document, whereas the Thai power of agency can be conferred informally and even by implication. The rule of English law, according to which an authority to execute a contract under seal must be given by deed under seal, has its counterpart in Section 798 of the Thai Civil and Commercial Code which states that if a transaction is by law required to be made in writing, the appointment of an agent for such transaction must also be made in writing. Similarly, if the transaction is required to be evidenced by writing, the appointment of an agent for such transaction must also be evidenced by writing.[115]

The declaration of intention conferring the power of agency must be communicated to the agent who receives authority to act on behalf of the principal, or to the party with whom the agent is authorized to transact business on the principal's behalf; it is in the nature of a unilateral act, and the rules as to the communication of unilateral acts required to be communicated to other parties are applicable to it.

1.6.3 Effect of Absence of Authority

Under Thai private law, the rules as to unauthorized agency refer to cases in which a person, without authority to do so, purports to act on behalf of a named principal.[116] The agent's liability with regard to the juristic acts performed on behalf of his principal with third parties will depend on whether such acts are concluded within the authority conferred or *ultra vires.* The agent is, therefore, usually not bound to third persons by the acts which he has performed within the scope of his authority on behalf of the principal. In this regard, Section 820 of the Civil and Commercial Code states that the principal is liable for juristic acts which the agent has concluded within the authority granted to him by virtue of his agency. In contrast, if the agent performs an act without authority or beyond the scope of his

[114]Where a mere presumption is established, the effect of restrictions on third parties is made subject to certain conditions as to publicity.

[115]A comprehensive overview of the issue can be found in Khurusuwan (2012), p. 77 ff.

[116]No question as to agency can arise under Thai law in the case of acts done on behalf of unnamed or undisclosed principals. A person, who does not professedly act on behalf of a named principal, cannot be treated as an agent, and a person, who was not named as principal by the agent acting on his behalf, cannot be treated as principal by the other party. If the intention to act on behalf of another is not made manifest, the absence of the intention of a person to act on his own behalf cannot be taken into consideration.

authority, it is said to be *ultra vires* and such act does not bind the principal unless he ratifies it. Should the principal not expressly or impliedly ratify the juristic act, the agent would be personally liable to third persons, unless he proves that such third persons knew he was acting without authority or beyond the scope of the authority.[117]

An agreement to which an unauthorized agent is a party may be made operative by the ratification of the alleged principal which may be communicated to the agent or to the other party. The right of the alleged principal to ratify the agreement is forfeited if, after being called upon by the other party to declare his intention, he fails to do so within a reasonable period of time.[118] If the other contracting party knew of the absence of authority, he is bound until the time for ratification has elapsed; if he was ignorant of the absence of authority, he may repudiate the contract at any time before the ratification has been communicated. This means that until the ratification of the contract, the other party is entitled to revoke it, unless he knew of the lack of power of agency when he entered into the contract. The repudiation may be addressed to the alleged principal or to the agent and is subject to the ordinary rules as to the communication of declarations of intention.

In the case of unilateral acts, the rules are somewhat different. The party, to whom the declaration of intention (e.g. a declaration containing a notice to determine a lease) is made on behalf of an alleged principal, may, unless the principal has informed him of the agent's authority, demand the production of a written power and in the case of the non-production of this power may repudiate the transaction at once. If he fails to avail himself of this right and raises no question as to the alleged power of agency, or if knowing of its absence he acquiesces in that fact, the position of both parties is the same as in the case of an agreement.[119]

With regard to the liabilities of unauthorized agents, it must be pointed out that under English law, a person who in good faith acts as agent for another, without authority to do so, is liable in damages by reason of his implied warranty of authority; on the other hand, a person who in bad faith, and with knowledge of the absence of authority, acts as agent for another renders himself liable to an action of deceit. No liability is of course incurred if the absence of authority was known to the other party. The rules of Thai law are similar in effect but of a more elaborate nature. More precisely, the unauthorized agent does not incur any liability if the other party was or, by the application of proper care, would have become aware of the absence of authority. Also, if the unauthorized agent was a person of restricted capacity, and his legal representative did not give the required assent, then no liability is incurred by the unauthorized agent.

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[117]In this sense, see Stasi (2016), p. 33.

[118]It must be pointed out that in the case that such a request is made, the ratification is inoperative unless communicated to the party making it.

[119]If a unilateral declaration of intention is communicated to a person who consents to receive it on behalf of another, but has no authority to do so (e.g., if a notice to determine a lease is addressed to the lessor's solicitor without the lessor's authority), ratification may take place in the same way as in the case of an active act of agency.

Subject to these exceptions, a person alleging powers of agency, which he does not in fact possess, is liable to another party with whom he enters into an agreement on behalf of a principal. Specifically, if the alleged agent knew that he had no authority, the other party may at his option either proceed with the agreement, substituting the agent as a party in the place of the alleged principal, or repudiate it and claim full damages. If the absence of authority was unknown to the alleged agent (e.g. if the withdrawal of the principal's authority had been declared in the manner authorized in the case of an absent addressee, and had not reached him, or if he excusably misunderstood the principal's intentions), the other party can only claim damages for his 'negative interest' in the agreement.

1.6.4 Operation of Powers of Agency

A declaration of intention, made by an agent on behalf of his principal and within the scope of his authority, is immediately operative for or against the principal. It is immaterial for this purpose, whether the fact that the agent is acting for a specified principal is stated expressly or is apparent from the surrounding circumstances.

In a corresponding manner, a declaration of intention communicated to an agent who receives it on behalf of his principal, and has authority to do so, is binding on the principal.

The identity of the principal must be made known to the party dealing with the agent, but it is not necessary that his name should be expressly mentioned (e.g. a salesman in a shop does not expressly state that he is selling the goods on behalf of his employer, yet his intention to do so appears clearly from the circumstances).

The operation of the powers of agency is consequently dependent on the presence of two factors, viz. the principal's authority (either existing at the time of the act or supplied by subsequent ratification) and the communication of the fact that the act is done on the principal's behalf.

An act done on the principal's behalf, though binding on the principal, is the agent's act, and the rules as to the knowledge of facts, as to discrepancies between real and apparent intention, and as to the influence of fraud, or unlawful threats, are therefore applied with reference to the agent's, and not with reference to the principal's knowledge or mental condition.[120]

It is, however, clear that such a rule, though in harmony with the technical character of agency, would, if it stood alone, give a wide opportunity for fraud. It would manifestly be unfair if a principal, with knowledge of a defect in the title to any property, could instruct his agent who was ignorant of it to purchase such property and thus obtain the protection afforded to a buyer without notice, by taking advantage of the agent's ignorance. Therefore, a principal, who has given definite

[120]This rule substantially agrees with the corresponding rule of English law.

instructions to an agent appointed by his own act, cannot take advantage of the fact that such agent was ignorant of circumstances of which the principal was aware or of which he would have become aware, if he had applied proper diligence.

Where the powers of agency are conferred by rules of law, or where the agent is not acting in pursuance of definite instructions, the difficulty is met by the rules as to fraudulent misrepresentation made by third parties, it being remembered that intentional non-disclosure of material facts is frequently deemed fraudulent misrepresentation. If therefore a managing partner of a general partnership, acting under the statutory power of agency in good faith, buys goods known by the other partners to be stolen goods, the other partners cannot take advantage of the managing partner's ignorance, though the managing partner is not an agent appointed by their act, and though the managing partner was not acting under special instructions.

It must also be pointed out that when an agent acts within his authority, the other party acquires no contractual rights against him personally, but if the agent is guilty of fraudulent misrepresentation, the other party, in addition to his remedies against the principal, has a right, of indemnity available against the agent under the general rules as to unlawful acts.

1.6.5 Termination of Agency

As a general rule, the agency is terminated when the legal relationship on which it is based comes to an end. This means that a power of agency remains in force as long as the relation for the purposes of which it was created remains in existence (e.g. the duration of the contract for services, or of the partnership term, determines the duration of the employee's or partner's power of agency; the duration of the incapacity of a person under incapacity determines the duration of his legal representative's power of agency). According to Section 827, paragraph 1, of the Civil and Commercial Code, however, the principal is entitled to revoke the authority and the agent is entitled to renounce the agency at any time.[121] An express agreement by which a power of agency is made irrevocable is valid under Thai private law, unless under the special circumstances of the case such a stipulation would be deemed *contra bonos mores* (e.g. if the principal gave the agent an irrevocable general power to manage all his affairs).

Under Roman law, a power of agency was deemed to be revoked by the principal's or agent's death or supervening incapacity. By the same token, Section 826, paragraph 2, of the Civil and Commercial Code states that agency is extinguished when either party dies or becomes incapacitated or bankrupt, unless the contrary

[121]It is noteworthy to observe that under Section 827, paragraph 2, of the Civil and Commercial Code, 'the party who revokes or renounces the agency at a time which is inconvenient to the other party is liable to such party for any injury resulting therefrom'.

appears from the terms of the agreement or the nature of the business.[122] Thus, many of the relations in connexion with which powers of agency are conferred automatically cease on the death or supervening incapacity of the agent but may continue in case of death or supervening incapacity of the principal depending on the nature of the business. In addition, a power of agency given for the agent's own security (e.g. a power to sell goods or to collect debts conferred by way of security for money advanced by the agent to the principal) may continue even in case of death or supervening incapacity of the principal while the security is required. It follows that a power of agency conferred for the agent's own security is after his death or supervening incapacity, exercisable by his heirs or his legal representative (as the case may be).

As between principal and agent, the power of agency is deemed to be revoked by the act or event which puts an end to the relation under which the power was conferred. Therefore, if such relation comes to an end by any event other than notice (e.g. death, lapse of time, and completion of the business in which the agent was employed), such event also terminates the power of agency; if it comes to an end by notice, no further notice is required to terminate the agency. Section 830 of the Civil and Commercial Code provides, however, that the causes for the extinction of agency, whether arising from the principal or agent, cannot be set up against the other party, until they have been notified to the other party or the latter has knowledge of them.

In the case of the termination of a mandate or partnership in consequence of any act or event other than express notice, a mandatory or partner who is excusably ignorant of such termination is, as between himself and his principal or partner, entitled to continue the exercise of his power of agency until he becomes aware of the termination or would have become aware of it had he applied proper care.

It must be added that the extinction of agency cannot be set up against a third person acting in good faith, unless the third person is ignorant of the fact through his own negligence (Section 831, Civil and Commercial Code).

1.6.6 Assent of Third Parties

The expression 'assent' (*kwam yin yom*) is used under Thai private law in a general sense, which includes both the authorization of a juristic act (*gaan anuyaat*) and

[122]In this regard, Section 828 of the Civil and Commercial Code provides that when the agency is extinguished by the death of the principal or by the principal becoming incapacitated or bankrupt, the agent must take all reasonable steps to protect the interest entrusted to him until the heirs or representatives of the principal can protect such interest. Similarly, when the agency is extinguished by the death of the agent or the agent becoming incapacitated or bankrupt, the heir or the person having lawful charge of the agent's estate must notify the principal and take steps to protect the interest of the principal as may be reasonable under the circumstances until the principal can protect such interest (Section 829, Civil and Commercial Code).

its ratification (*sat-dta-yaa-ban*). Among the cases in which a party to an act requires the assent of another, four are of special importance. First, as mentioned above, the legal representative's assent is, as a general rule, required to any act done by a person of restricted capacity. For example, a minor must obtain the consent of his legal representative. All acts done by him without such consent are voidable unless otherwise provided (Section 21, Civil and Commercial Code). Second, in many cases, an act done by a husband or wife requires the assent of the other spouse. For instance, the management of the common property must be carried out jointly by both spouses. According to Section 1476 of the Civil and Commercial Code, a joint decision by both spouses is required before entering into a number of contracts including sale, exchange, rent, mortgage, and gift, among others. If either spouse enters into any these contracts independently or without the consent of the other, the latter may apply to a court to have the contract revoked. Third, in any case in which a right relating to an immovable is charged with an encumbrance, the release of the right subject to such encumbrance requires the assent of the encumbrancer. Fourth and last, any disposition[123] relating to an object, made by a person without power to make such disposition, is operative if it is made with the assent of the person entitled to dispose of the object.

The assent is not, as a general rule, required to be declared in any particular form, and the declaration of assent may be addressed to the party who requires the assent, or to the other party to the transaction to which the assent is given. A party intended to be affected by a unilateral act requiring the assent of a third party may repudiate such act, unless a written assent is produced to him, or unless the assent has been communicated to him by the assenting party.[124]

1.7 Prescription

1.7.1 The Historical Development of Prescription

It is obviously desirable in the public interest that a claim left dormant for a considerable time should cease to be enforceable and, conversely, that the title to property over which the rights of ownership have been exercised for a considerable period should no longer be questioned. Roman law gave effect to these principles by introducing a special defence (*longi temporis praescriptio*) available in cases of

[123]The expression 'disposition' occurs very frequently and includes every transaction by which a right is transferred to another, or charged or pledged in favour of another.

[124]It must be pointed out that under Thai private law, the authorization of a juristic act may be revoked at any time before it has been acted upon, except in a case in which, owing to the special relation between the parties, the assent was irrevocable. On this point, see Kasemsap (1981), p. 95 ff.

belated assertion of rights and by conferring the ownership of a thing on a person who in good faith had exercised the rights of ownership for a specified period (*usucapio*). Both effects of the lapse of time were described by mediaeval writers under the head of *praescriptio*, a distinction being made between a *praescriptio extinctiva* and *praescriptio acquisitiva*. Under English law, the lapse of the prescribed period as regards land not only bars the action, but also confers rights of ownership on the person in whose favour the time has run; as regards *chattels*, on the other hand, the effluxion of the period bars the action, but creates no change of ownership.

The Thai Civil and Commercial Code maintains the distinction between *praescriptio extinctiva* (which it calls *aayu kwaam*) and *praescriptio acquisitiva* (which it calls *gaan kropkrong bporabpak* and which will be discussed below in Chap. 4). The term prescription in this treatise is used as the equivalent for *praescriptio extinctiva*.

1.7.2 Effects of Prescription

Prescription can be defined as a release of a debt effected by the expiration of a certain period of time. Section 193/9 of the Civil and Commercial Code states that a claim is barred by prescription if it has not been enforced within the period of time fixed by law. Where the principal claim is barred by prescription, all accessory claims (e.g. claims for interest, costs, fruits, expenses, and contractual penalties) are equally barred and the debtor is entitled to refuse performance (Section 193/26, Civil and Commercial Code).

Prescription is a means of defence or exception to an action, and not a ground of action. It does not extinguish the obligation by operation of law. It follows that a party who has paid any sum of money or delivered any object by way of performance of an obligation barred by prescription, or who has made any acknowledgment, or given any security in respect of any such obligation, cannot subsequently recover such sum of money or object or revoke such acknowledgment or security on the ground that the obligation was barred by lapse of time, whether he was acquainted with this fact or not. In this regard, Section 193/28 of the Civil and Commercial Code states that 'If any act of performance is done in satisfaction of a claim barred by prescription, the value of such performance may not be demanded back, even if the performance has been effected in ignorance of the prescription'.

Where the duty to do an act is barred by prescription, the party originally bound by such duty may refuse to do the act (Section 193/10, Civil and Commercial Code). The fact that an obligation is barred by prescription, however, does not prevent a creditor from exercising his rights over any object, charged, delivered, or transferred to him by way of security for the performance of such obligation.[125]

[125]It is important to note that such security is not available in respect of any claim for arrears of interest or of any other payments or deliveries due at periodical intervals, in so far as such claim is barred by prescription.

The Civil and Commercial Code also states that the period of prescription may not be extended or reduced by agreement between the parties (Section 193/11). Accordingly, any agreement for lengthening such period, or excluding or restricting the application of the rules as to prescription, is void.

1.7.3 Rules as to Period of Prescription

The periods of prescription of actions fixed by the Civil and Commercial Code vary greatly depending on the specific claim.[126] According to Section 193/30 of the Code, the period of prescription for which no other period is provided by law is ten years. In many cases, however, the terms are much shorter. Therefore, to select a few cases from the Civil and Commercial Code, claims related to arrears of interest, rent or hire of property, salaries, annuities, pensions, allowances for maintenance, and all other periodical payments are prescribed in five years (Section 193/33), claims arising from the acknowledgment of liabilities by the debtor in writing in two years (Section 193/35), and claims for damages arising from unlawful act in one year (Section 448).[127]

Prescription begins and run from the moment when the claim can be enforced. Precisely, in the case of an obligation to do any act, the period runs from the time fixed for performance; in the case of an obligation to abstain from doing any acts of a specified description, the period runs from the first act of infringement (Section 193/12, Civil and Commercial Code). If, however, the performance cannot be claimed before notice given, the period runs from the time of the expiration of the notice (Section 193/13, Civil and Commercial Code).

Special provisions regulate the periods of prescription which apply to certain claims. With regard to claims which are established to recover a thing from a person deriving title from a former possessor, the period runs from the time at which such former possessor acquired the possession of such thing. In the case of a claim which depends upon the avoidance of a voidable act, the period runs from the first moment at which the right of avoidance arises.[128]

It is important to note that the length of the period is extended when the creditor is a person under disability (minors, person of unsound mind whether adjudged incompetent or not) and the claim would have expired while the said person did not have full capacity. In these cases, prescription is not completed until the

[126]In the case of a claim which is established by judgment or has the force of such a claim, the period is ten years, without regard to its original nature; where, however, a claim for periodical future performance is established in this manner, the ordinary rule is applied.

[127]On this point, see Stasi (2015), p. 81.

[128]Thus, for instance, the right of a statutory heir to avoid a testamentary disposition which excludes him only arises at the moment at which he becomes aware of the ground of avoidance. The period of prescription in such a case runs from the latter date only.

expiration of one year after he has acquired full capacity (Section 193/20, Civil and Commercial Code).[129] By the same token, if a claim is filed on behalf of or against the estate of a deceased person, an additional period is allowed, which comes to an end six months after the acceptance of the inheritance on the part of the heirs, or of the executor's office on the part of the executor, or after the institution of bankruptcy proceedings against the estate, or after the appointment of a curator or administrator of the estate.

1.7.4 Interruption and Suspension of Prescription

The Civil and Commercial Code distinguishes between the interruption (*aayu kwaam sadut yut long*) and the suspension (*gaan sadut yut*) of the prescription. Where the prescription is interrupted, the time which has run prior to the date of interruption is not counted if the same claim becomes again subject to prescription. Where the prescription is suspended, the time which has run before the date of such suspension is added to the time running after its cessation.

Prescription is interrupted, that is to say the running of the prescriptive period stops, in the following cases: (1) if the debtor has acknowledged the claim towards the creditor by written acknowledgement, by part payment, payment of interest, giving security, or by any unequivocal act which implies the acknowledgment of the claim; (2) the creditor enters an action for the establishment of the claim or for requiring performance; (3) the creditor applies for receiving a debt to arbitration; (4) the creditor submits the dispute to arbitration; and (5) the creditor does any act which brings an effect equivalent to entering an action (Section 193/14, Civil and Commercial Code). Interruption of the prescription against the principal debtor is also effective against the secondary debtor. This is the case, for example, of a guarantor who guarantees the performance of the principal debtor. When a debt bears interest and it is prescribed, interest on the debt is prescribed with it.

In case (1), a new period begins to run from the date of the last act of acknowledgment; in cases (2), (3), (4), and (5), the interruption continues until the proceedings are terminated, but if the claim is withdrawn, or dismissed by an order not affecting its validity (e.g. on the ground of the incompetence of the court), the interruption is ineffective, unless fresh proceedings are instituted within six months. In the case that the proceedings are discontinued by consent, or simply allowed to drop, the interruption comes to an end at the moment when the last step is taken in the proceedings. For instance, if fees become payable to a medical practitioner in 2012, the period of prescription comes to an end on 31December 2014. If an action is begun on that day, the plea of prescription is not available; if

[129]A person under incapacity cannot under any circumstances be sued, while he has no legal representative, but a person of restricted capacity can sue or be sued without his legal representative in respect of any transaction into which he can enter without the assent of his legal representative.

the action is dismissed by reason of its not being brought in the proper court, and a new action is begun on 30 June 2015, the result is the same, but if the new action is begun on July 1, the claim is barred. In the case that the action is brought in the proper court, and pleadings are delivered but nothing further is done, then the two years begin again to run from the date at which the last pleading was delivered.

With regard to suspension of the period of prescription, it applies to those cases when a specific event or condition provided by the law occurs which prevents the right holder from exercising his right. Prescription is suspended on three main grounds. First, prescription is suspended during any additional time expressly allowed by the creditor for the satisfaction of a claim which has fallen due, or during a period of time within which the debtor, by reason of some temporary circumstance, is entitled to refuse satisfaction.[131] Second, suspension occurs during the last six months of the period of prescription, if during such time the claimant is prevented from taking proceedings by reason of *force majeure* (deprivation of liberty, interruption of means of communication, severe illness, and the like). The third and last ground of suspension applies with regard to any claim between a parent and a child during the child's minority, guardian, and ward during the continuance of the guardian's office or between spouses during the continuance of the marriage.[132]

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[131]This rule, however, is not applied in any case in which the debtor's temporary right to refuse satisfaction is based on one of the following grounds: on the *exceptio non adimpleti contractus*; on one of the special grounds of defence open to a surety; or on one of the dilatory pleas open to an heir of the original debtor.

[132]In regard to the suspension of the period of prescription, see Nipitikul (2001), p. 149.

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Chapter 2
The Law of Obligations

2.1 The General Statement of Obligations

2.1.1 The Concept and Meaning of Obligations

The term 'obligation' comes from the Latin *obligare*, the root of which (*ligare*) means 'to bind'. It denotes a relation between two persons which entitles one of them to claim from the other some act or omission recognized as capable of producing a legal effect.[1] Any giving, doing, or forbearing may be the subject of an obligation, provided only that it be something possible and not contrary to law. A person who is entitled to the performance of an obligation, whatever its nature may be, is, according to Thai legal terminology, called the 'creditor' (*jao nee*), and the person who is under the obligation is called the 'debtor' (*look nee*). For the sake of brevity, the terms 'creditor' and 'debtor' will be used in this sense, though in ordinary English language they have a somewhat narrower meaning.[2]

An obligatory right is invariably directed against a determinate person (the debtor). Ownership may be asserted against the entire world, but an obligation can only be asserted against, say, the vendor, if it arises from a sale, the lessor, if it arises from a contract of letting and hiring, and so forth. Obligatory rights are rights that only operate relatively, viz., as against the person of the debtor. The main point to be observed is that an obligatory right consists, as such, in the fact

[1]Justinian defines an obligation as follows: '*Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendae rei, secundum nostrae civitatis jura'* (J. iii. 13. *pr.*), i.e. as the legal tie between two persons which binds one of them to do or forbear from doing something for the benefit of the other. The Thai Civil and Commercial Code describes such an act or omission by the general term *gaan chamra nee* which in the course of this treatise will be translated by 'performance'.

[2]On this point, see Stasi (2015). See also Setabutr (2006, p. 2).

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that a particular other person (the debtor) is bound to do something.[3] In other words, an obligatory right is simply and solely a right to require a particular other person (the debtor) to act in a specific way.[4]

Some obligatory relations have a limited legal effect, notwithstanding the fact that they do not create any rights enforceable by action. Thus, for instance, the transactions characterized by Sections 853–855 of the Civil and Commercial Code as gambling or betting transactions do not impose any liability enforceable by action on the losing party, but a party who has paid the amount of his loss cannot recover it on the ground that he was under no legal liability to make the payment (Section 853, Civil and Commercial Code).[5]

A person who has freely done an act as if in performance of an obligation, knowing that he was not bound to effect the performance, is not entitled to restitution (Section 407, Civil and Commercial Code). In other words, no return or reduction can be claimed in respect of any performance, made in satisfaction of any liability incapable of legal enforcement. Pursuant to Section 408 of the Civil and Commercial Code, the following persons are not entitled to restitution: (1) a person who performs an obligation subject to a time clause before the time has arrived; (2) a person who performs an obligation which has been barred by prescription; and (3) a person who performs an obligation in compliance with a moral duty or with the requirements of social propriety. In all these cases, there is no claim in the technical sense of the word, but, on the other hand, the performance is not deemed an *indebitum*. The term 'imperfect obligation' is used by some textbook writers to denote the obligations belonging to the class now referred to, while others apply the term 'natural obligation'.

2.1.2 Classification of Obligations

The Civil and Commercial Code deals with the general rules which apply to all obligations without regard to whether they are derived from contracts or any other form of liability, before it defines the different types of contracts. Although this classification is based on logical considerations, it is inconvenient in practice. As a matter of fact, some specific modalities of obligations, such as conditions and time limitations, are directly related to contract law. Other modalities of obligations, such as joint and several liability, would be better analysed under the general

[3]It should be added, however, that some of the rights against definite persons which arise under family law (e.g. the right to the custody of an infant, or the personal rights of one spouse against another) are not usually included among obligatory rights, though strictly speaking they would come under the definition.

[4]See Sohm (1907, p. 379).

[5]As mentioned above in Sect. 1.7.2, the payment of a debt barred by prescription cannot be recovered, even if it was made in ignorance of the fact that the debt had become barred by prescription (Section 193/28, Civil and Commercial Code).

heading of contracts even if they may arise in the absence of agreement. For now, we will limit our attention to the main classifications of obligations and discuss them in detail in subsequent sections.

Obligations may be pure and simple, may be subject to a term or condition, may be currently existing, or may arise in the future. A pure and simple obligation is an absolute engagement which is not encumbered with any conditions or time limitations: the debtor binds himself unconditionally and without reserve. It produces its effects immediately and may be enforced without delay. However, these types of obligations may always be modified by mutual agreement of the contracting parties or, in some circumstances, by the law. Accordingly, in such a case the obligation will produce different effects from what might be expected from a pure and simple obligation.[6]

Obligations are generally legal, valid, and immediately binding. This means that the creditor has the right to enforce performance by its debtor without delay and the debtor has no available defence against that enforcement. But the obligation may also be subject to a condition and, consequently, receive all its effects at the moment a future and uncertain event happens. If time is given for the performance of the obligation, the performance is made to depend on the occurrence of a certain and future event that constitutes the term. This is to say that the obligation becomes immediately binding, but rights and duties under the obligation are suspended until the happening of the stated event.[7]

Generally speaking, the object of obligations may be either a specific thing, in the proper and confined signification of the term, which the debtor obliges himself to give, or a specific act which the debtor obliges himself to do or not to do. In some cases, however, the object may be composed of two or more acts. In such cases, there are different possibilities. The obligation may contain several parts or objects that are connected together. Here the debtor must perform all the acts so that he can obtain a discharge. In this case, each act is regarded as the object of a separate obligation and the obligation is said to be conjunctive.[8] Alternatively, the obligation may require the debtor to perform only one act in order to obtain a discharge and extinguish the obligation. In this case, two or more things are promised disjunctively and the obligation is considered to be alternative. Where the debtor is under an obligation to perform one out of several specified acts, then, in the absence of any contrary agreement between the parties, the election rests with the debtor.[9] After the election has been made and communicated to the other party, the selected performance is deemed to be the only performance stipulated for *ab initio*. If the debtor does not exercise his right of election, and the creditor's claim has to be enforced by judicial proceedings, judgment is given in an alternative form. Such

[6]See above Sect. 1.5.8. On this point, see also Maneesawat (1993, p. 27).

[7]See in particular Stasi (2016, p. 44 ff).

[8]On this theme, see especially Pramod (1965, p. 138).

[9]It must be pointed out that when the creditor has the right to elect, and he delays his election, the debtor may request him to notify his election within a specified reasonable period of time. If after the lapse of the period the request remains unsatisfied, the right of election passes to the debtor.

a judgment entitles the creditor to enforce such of the alternative obligations as he may think fit, but the debtor may, prior to the completion of such enforcement, satisfy his obligation by doing one of the alternative acts stipulated for by him.[10]

If one of the promised alternative acts is, or becomes, impossible, the obligation is deemed to refer to the other alternative act or acts. In case, however, the impossibility was caused by the act or default of the non-electing party, the electing party may elect the impossible act. The result of such an election is that if the electing party is the debtor, he may consider his obligation satisfied; if the electing party is the creditor, he may claim damages for non-performance.[11]

Obligations can further be divided into divisible and indivisible. An obligation is divisible when it is capable of partial performance. This means that the object of the performance is susceptible to division. On the other hand, an obligation is indivisible when the object of the performance, because of its nature, because of the law, or because of the intent of the parties, does not admit any division.[12]

An obligation may also be several or joint if there are several debtors or several creditors. In these cases, it may be that the obligation is split between each person: each debtor is bound to bear a specific share of the total obligation and each creditor is entitled to a specific share of the total obligation. This is said to be a joint obligation. It may also be that the obligation is a several and joint one. This occurs when each of the debtors is liable in respect of the same liability and owes an obligation for the whole, or each of the creditors has the right to demand performance of the whole debt. In the first case, the debtors are considered to be several and joint debtors, and in the second case the creditors are considered to be several and joint creditors.[13]

2.1.3 Formation of Obligations

As a general rule, an obligation cannot be created by any juristic act except a contract (*sanyaa*) between the parties.[14] A juristic act, constituted by concurrent

[10]An example will clarify the point. Suppose that A agrees to sell to B either his red motorcycle or his green motorcycle for the sum of 50,000 baht but fails to perform his agreement. B obtains judgment directing A 'to deliver to B the said red motorcycle or the said green motorcycle against payment of the sum of 50,000 baht'. B obtains an order enabling the official process server to obtain possession of the red motorcycle, but before this order has been carried out B delivers the green motorcycle. The claim is satisfied.

[11]In the example above, if the green motorcycle is destroyed owing to A's negligence, B may at his option accept the delivery of the red motorcycle in satisfaction of A' promise, or claim damages for non-performance of the promise to deliver the green motorcycle.

[12]For a detailed analysis on this point, see Stasi (2016, p. 45).

[13]On this point, see below Sects. 2.2.5 and 2.2.6.

[14]There are, however, certain unilateral acts which create obligations, the effect of which is expressly recognized. Thai law recognizes the public offer of a reward and the execution of an 'obligation to bearer' as unilateral acts creating a binding obligation without the necessity of acceptance on the part of another party. On this point, see Setabutr (2006, pp. 31–32).

declarations of at least two parties, is called a contract (or obligatory agreement). A contract can thus be defined as agreement between two or more parties which creates a legal obligation between them and is normally constituted by an offer and an acceptance. If a contract does not produce these effects, then it is not considered a contract at all. It is said to be void and no person is bound by it.[15]

A contract may result in a unilateral obligation (e.g. the obligation to repay a loan) or in a bilateral obligatory relation. The creation of a bilateral obligatory relation may be intended by the parties, but even where the primary intention of the parties was the creation of a unilateral obligation only, an obligation may be created on the other side as an incidental result. Thus, in the case of a mandate, the primary intention is to impose on the mandatary the duty to act according to his instructions, but the principal may incidentally come under an obligation to reimburse the mandatary for his expenses. In such cases, the Roman law gave to the party entitled to the performance of the primary obligation the *actio directa*, while the party entitled to the performance of the incidental obligation became entitled to the *actio contraria.*

Contracts intending to create obligations on both sides are called reciprocal contracts (*sanyaa dtaang dtop taen*). Contracts primarily intended to create an obligation on one side only, but incidentally resulting in the creation of an obligation on the other side, are called imperfectly reciprocal contracts.

With regard to contracts in favour of third parties, Roman law did not allow a person who was not a party to a contract to assert any rights created thereby. English law, according to the finally established doctrine on this subject, follows the rule of Roman law, but the effect of a contract giving rights to a third party may be attained by the creation of a trust. The Thai Civil and Commercial Code expressly recognizes the principle that a performance may by agreement be stipulated for in favour of a third party, with the effect of giving a direct right to such third party to claim such performance. In fact, according to Section 374 of the Code, 'if a party by a contract agrees to make a performance to a third person, the latter has a right to claim such performance directly from the debtor'. In this case, the right of the third person comes into existence at the time when he declares to the debtor his intention to take the benefit of the contract.

The question whether a third party for whose benefit a contract is entered into is to have an enforceable right, whether such right is to vest forthwith, or whether it is intended to be subject to any condition or stipulation as to time, and, finally, whether such a contract may be revoked or modified by the parties thereto without the concurrence of the third party, must, in default of any express declaration of intention on the subject, be ascertained from the circumstances, and more particularly from the object of the contract (Section 375, Civil and Commercial Code).

[15]Under English law, an agreement is inoperative unless supported by valuable consideration, but no similar rule exists in Thai private law. An agreement is formed by offer and acceptance in the manner shown in Sect. 1.5.3, subject to such rules as to form and other matters affecting the validity of juristic acts as have also been mentioned above.

It must be added that under Thai private law there are some presumptions and rules of interpretation which operate in so far as no contrary intention is shown by the contract. Precisely, a promise to the effect that the promisor will pay a debt owing by the promise to a third party does not give such third party a right to claim payment of the debt from the promisor. If any benefit is conferred on the promisor exclusively in consideration of a promise in favour of a third party, however, such third party has a right to claim performance of such promise. The Civil and Commercial Code also states that 'all defences available as between the promisor and the promisee are also available as between the promisor and the third party' (Section 376).

Furthermore, in case the date of the promisee's death is to be the date of performance (e.g. if A insures his life for the benefit of B), the third party, for whose benefit the promise is made, does not acquire a vested interest until the date of such death. Such a contract may, therefore, during the life of the promisee be rescinded without the third party's concurrence, and if the third party dies before the promisee, his representatives are not in any event entitled to claim performance on the death of the latter.[16]

2.1.4 Obligations Created Otherwise Than by Juristic Act

It was customary in the older continental codes to classify all obligations as being *ex contractu, quasi ex contractu, ex delicto, quasi ex delicto*, but this mode of classification has been rejected by the Civil and Commercial Code. Under Thai law, there is a broad line of demarcation between obligatory rights created by juristic act and other obligatory rights. The latter may be subdivided under two principal heads, namely: remedial obligatory rights and obligatory rights conferred by outside circumstances. A remedial obligatory right may arise on the breach of an antecedent right, or on the commission of an unlawful act by which an absolute right is violated. In both cases, the remedial right is of an obligatory nature, and in both cases, it is a right to receive compensation in accordance with the definition of that term given below.

Among the obligations imposed by outside circumstances, those created by the rendering of voluntary services (*jat gaan ngaan nok sang)* and those created by the receipt of unjustified benefits (*laap mee quan daai*) require special attention.[17] Mutual obligations also arise between parties who are joint owners of property, or subject to joint liabilities by reason of some act or event not brought about by their

[16]If the third party is not as yet born on the promisee's death, the period of vesting is postponed to the time of his birth. The agreement cannot in such a case be rescinded between the date of the promisee's death and the date of the third party's birth.

[17]For a detailed analysis on this point, see Poonyapun (1978, p. 74).

own agreement, e.g. co-heirs of a deceased person. There are finally the obligations which in this treatise are described as liabilities created 'by estoppel', and the obligations imposed on finders of lost objects.[18]

2.2 Circumstances Affecting Liability

2.2.1 Absolute Liability and Liability for Default

A debtor may under a special legal rule applicable under the circumstances, or under the terms of his promise, be bound by his obligation, even if its performance becomes impossible without any default on his part. As a general rule, however, he is not liable for non-performance or incomplete performance if the performance or the complete performance was rendered impossible by any circumstance not brought about by his own default.

The default may be wilful or negligent. The expression 'wilful default' is used as an equivalent of *la-loie*, which term denotes any default made by the debtor with the consciousness of the consequences of his conduct, though not necessarily with the intention to violate his obligation.[19] Negligence is called *kwaam bpra-maat lern ler* and means the omission of the degree of diligence in which under the special circumstances of the case the debtor was bound to give. In the absence of any contrary legal rule applicable under the special circumstances, or of any express or implied stipulation, the diligence usual 'in ordinary intercourse' must be applied. In certain specified cases, it is sufficient to give the degree of care which the person concerned usually gives to his own affairs (*diligentia quam suis*) but a person whose liability is reduced in this manner is in any event liable for damage caused by gross negligence in the performance of his obligation. Gross negligence (*kwaam bpra-maat lern ler yaang raai raeng*) is not defined by the Civil and Commercial Code, but the definition of Roman law still holds good: *Lata culpa est nimia negligentia*, *id est non intelligere quod omnes intelligunt*. To disregard a risk which is obvious to everybody constitutes gross negligence.[20]

In all cases where liability is based on the grounds of fault, a debtor is released therefrom if it can be proved the existence of circumstances excluding liability. More precisely, a person is not responsible for damage caused by any act done in a state of unconsciousness or disturbance of the mental faculties, excluding the free action of the power of volition, unless such unconsciousness or mental disturbance was brought about by culpable indulgence in stimulants or narcotics.[21]

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[18]On this point, see below Sect. 2.7.4.

[19]It must be noted that when an aggravated liability is attached to intentional default the Civil and Commercial Code uses the word *pit-nat*.

[20]The cases in which a debtor's responsibility is restricted to damage caused by his wilful default and gross negligence are exceptional.

[21]If the act was done under the influence of culpable indulgence in stimulants or narcotics, the person by whom it was done is responsible as if he had been guilty of negligence.

Where the damage was caused by an unlawful act for which compensation cannot be obtained from a third party, the person by whom the act was done, though released from direct responsibility by the effect of the rules stated above, has to compensate the injured party in so far as this appears equitable under the circumstances, regard being had to the pecuniary position of the parties, and in so far as the payment of such compensation does not deprive the party by whom the damaging act was done of the means for his own maintenance and for the performance of his statutory duties as to the maintenance of others.

Under English law, a promisor must, as a general rule, carry out his promise and is liable for its non-performance, even if he is not guilty of wilful default or negligence. At first sight, this rule seems to be diametrically opposed to the Thai rule, but as English law recognizes that under special circumstances, the non-performance of an agreement is excused unless caused by the promisor's wilful or negligent default, the difference between the two systems is not so great as it appears. The distinction between various degrees of diligence, though sometimes mentioned in English judgments, is not so consistently carried out as in Thai law.

It is noteworthy to observe that the degree of diligence which a person is bound to give under the circumstances of any particular case may be modified by agreement between the parties concerned. However, the responsibility for the debtor's own wilful default cannot be excluded beforehand by mutual agreement. In this regard, Section 373 of the Civil and Commercial Code provides that 'an agreement made in advance exonerating a debtor from his own wilful default is void'. The creditor may, of course, after the occurrence of the default, waive any rights to which he becomes entitled by reason of the default.[22]

In certain cases where the debtor is liable without reference to any default on his part, the performance is excused if it was prevented by *force majeure* (*hayt sut wisai*). *Force majeure* corresponds to the 'act of God' of English law and is assumed to exist in any case in which the non-performance or the incompleteness of the performance of an obligation could not have been avoided, even if the highest degree of diligence had been applied. Section 8 of the Civil and Commercial Code defines *force majeure* as 'any event the happening or pernicious result of which could not be prevented even though a person against whom it happened or threatened to happen were to take such appropriate care as might be expected from him in his situation and in such condition'.[23]

2.2.2 Contributory Default of Plaintiff

Under English law, the plaintiff's contributory default affects the defendant's liability in the case of claims for damage done by unlawful acts. Under the rules of

[22]See in particular Sodpipan (2002, pp. 114–115).

[23]Ibid., p. 123.

the present Thai private law, the liability created by an agreement or other juristic act is affected in the same way by the contributory default of the other party as the liability for an unlawful act. Under Thai as well as under English law, the proof of the plaintiff's own default is relevant only for the purpose of showing that the defendant's default was not the 'decisive' or 'preponderant' cause of the damaging event, but while under English law the fact that the defendant's default was not the decisive cause deprives the plaintiff of his entire claim to compensation, Thai law leaves it to judicial discretion to determine whether the defendant's liability to make compensation is entirely destroyed or merely reduced by contributory default on the part of the plaintiff. In this respect, Section 223, paragraph 1, of the Civil and Commercial Code states that 'in case any fault of the injured party has contributed in causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused chiefly by the one or the other party'.

Contributory default also applies when the fault of the injured party consisted only in an omission to call attention of the debtor to the risk of an unusually serious loss which the debtor neither knew not ought to have known, or in an omission to avert or mitigate the injury (Section 223, paragraph 2, of the Civil and Commercial Code).

The contributory default of a person for whose default the plaintiff is liable under the rules mentioned below has the same effect as the plaintiff's own default.

2.2.3 Liability for the Default of Others

The regime of liability for default of others is based on two main categories depending on whether the liability arises under a juristic act or under an unlawful act of another person. With regard to the performance of obligations arising under a juristic act, the Civil and Commercial Code states that in the case of any act done by a person's legal representative on his behalf, the principal is liable for the agent's default in the same way as he would be liable for his own default if his capacity was unrestricted. More precisely, Section 220 of the Civil and Commercial Code provides that 'a debtor is responsible for the fault of his legal representative, and of person whom he employs in performing his obligation, to the same extent as for his own fault'.

In the case of an act done by any other agent on behalf of a principal, a distinction must be drawn between acts specially delegated to independent persons and acts done in the ordinary course by assistants. As regards independent persons, the general rule is that the performance of an obligation undertaken by A may not, in the absence of express permission, be delegated by him to B. If such delegation takes place A is liable for all consequences due to the unauthorized delegation of his duty. If the debtor has authority from his creditor to delegate the performance of his obligation to another, the question as to the liability of the original

debtor for the default of the substitute employed by him depends upon the agreement between the parties or the specific legal rules applicable under the particular circumstances.

With respect to the employment of assistants, it is of course clear that many kinds of obligations cannot be carried out in detail by the promisor in person, but that the performance must be effected by employees working under his superintendence. In such cases, there is an implied authority to employ assistants, and where such implied authority exists (and also where the employment of assistants is expressly authorized) the debtor, in the absence of a special stipulation to the contrary, is answerable for any default on the part of his assistants as though it had been his own. Thus, if the principal is himself only liable for gross negligence, he is only liable for gross negligence on the part of his assistants; if the principal is answerable for *diligentia quam suis,* the assistants must show the degree of care which such principal exercises in his own affairs.[24]

If the employment of assistants is unauthorized (e.g. if the promisor has agreed to perform the promise in person, or if the work is of a nature which according to ordinary custom is not handed over to assistants), the promisor commits a wilful default by such unauthorized employment of assistants and is therefore liable for the consequences, whether attributable to the assistants' default or otherwise.

As to unlawful acts, the question as to the liability of a person for the unlawful acts of employees, agents, or others who are under his control is one which in all countries has given rise to considerable controversy. French law imposes a general responsibility on parents, schoolmasters, and employers for the acts of any infant children, pupils, apprentices, and servants who are under their custody or control. The responsibility, however, for a particular act is excluded by proof that such act could not have been prevented by the person exercising the control (Art. 1384, Code Civil). The Swiss Code of Obligations imposes a similar liability and recognizes a similar ground of exemption, with the modification that the responsibility is excused if it is proved that due diligence has been used for the purpose of preventing the damaging act. Under English law, although there is no responsibility for the acts of children, pupils, or apprentices, there is a general rule that an employer or principal is responsible for damage caused by any wilful or negligent act of an employee or agent acting within the scope of his employment. The proof that the damaging act could not have been prevented by the employer or principal is not of any avail, and to that extent the liability for the default of others goes further than in French or Swiss law.

In Thailand, the Civil and Commercial Code lays down a special regime of liability which applies to persons who are under a legal duty to supervise others due to their minority or their mental or physical condition (Section 429). This is to say that parents of minors, as well as guardians of incapacitated persons or persons of unsound mind, are jointly liable with them for all damage unlawfully inflicted upon any third party. For example, if a father forgets a loaded shotgun on the table and the son uses it, the father may be held liable with his son for the harm inflicted to a third party.

[24]On this point, see Setabutr (1980, p. 126).

The supervisor's liability for the unlawful acts committed by the person requiring supervision is not strict. To rebut this presumption, the supervisor has to show that he has exercised proper care as to the duty of supervision. Proper care is a standard of conduct which is imposed upon all individuals in the same circumstances. The purpose is to apply the standard objectively, instead of attempting to assess the degree of fault according to the individual capabilities of the parties involved. If a supervisor is held liable for failing to act according to the conduct determined by the duty of care standard, then he will be answerable for the damage caused under his supervision.

The same regime of liability applies to teachers, employers, and other persons who undertake the supervision of an incapacitated person, either permanently or temporarily (Section 430, Civil and Commercial Code). Thus, the supervisor is jointly liable with the person requiring supervision for any unlawful act committed by the latter while under his supervision, provided that it can be proved that he has not exercised proper care. If it cannot be proved that the supervisor did not comply with his supervisory duty, then he will be relieved of any liability. Classic examples include liability of classroom teachers, school administrators, and coaches for damages suffered by students engaging in sports activities, damages arising in schools when children play in a schoolyard during the break time, or injuries caused by a failure to adequately supervise a pool during hours that swimming is allowed.

The general rule that a person is liable for damage only if such damage is caused by his wilful or negligent default is varied in the direction of greater severity in the case of persons engaged in certain kinds of activities. More precisely, the Civil and Commercial Code imposes a regime of strict liability upon employers, juristic persons, innkeepers, and carriers. Pursuant to Section 425 of the Civil and Commercial Code, an employer is jointly liable with his employee for the consequences of an unlawful act committed by such an employee in the course of his employment.[25] These rules apply whether the employer is a natural person or a juristic person.[26] Conversely, an employer is not liable for damage done by an independent contractor to a third person in the course of the work unless the employer was at fault in regard to the work ordered or to his instructions or to the selection of the contractor (Section 428, Civil and Commercial Code).[27] The employer who makes compensation to a third person for an unlawful act committed by his employee is entitled to indemnity—full reimbursement—from said employee (Section 426, Civil and Commercial Code).[28]

[25]The law on the subject is complicated by the fact that there are specific modifications of the general rules in the case of particular employments and trades.

[26]The course of employment is a legal consideration of all acts committed by the employee while he is performing the usual duties of his employment. On this point, see Poonyapun (1978, p. 89).

[27]Ratification by the employer of acts committed by the contractor is equivalent to a prior command and retroactive to the date of the act done.

[28]This means, of course, that such compensation on the part of an employer has not been paid in vain, and this mimics the Roman quasi-delicts *deiectum vel effusum.* On the other hand, the law does not cover cases where the burden of vicarious liability falls on the employee himself. See Prachoom (2015, p. 403).

The liability of a juristic person for the unlawful acts of its representatives is similar to the strict liability of an employer for an employee. Specifically, a juristic person may be held liable for any damage done to other persons by its representatives or the person empowered to act on behalf of the juristic person in the exercise of their functions (Section 76, Civil and Commercial Code). In other words, the juristic person is liable for the *intra vires* wrong of its organs by a fiction of the law. The representatives or the person empowered to act on behalf of the juristic person, however, may exercise the right of recourse against any or several or all of the causers of the damage.[29]

With respect to the innkeeper's liability, the Civil and Commercial Code provides that the proprietor of an inn, hotel or other such place is liable for any loss or damage to the property which the traveller or guest lodging with him may have brought (Section 674). Specifically, an innkeeper, who in the regular course of trade gives sleeping accommodation to guests, is liable for the loss or deterioration of anything brought into his inn by a guest accommodated in the course of such trade unless the loss or deterioration was caused by the guest, by the condition of the thing itself, or by *force majeure*. The innkeeper is liable for loss or damage to the property of the guest, even caused by strangers going to and from the inn. In the case of money, negotiable instruments, or valuables not deposited for safe custody with special notice of their nature, however, the liability is limited to certain ceiling amounts under Section 675 of the Civil and Commercial Code. A notice posted in the inn repudiating the innkeeper's liability is ineffective, but an express agreement between innkeeper and guest excluding such liability is binding on the latter (Section 677, Civil and Commercial Code). As to the necessity of immediate notice of any loss suffered by the guest, Section 676 of the Civil and Commercial Code states that 'on discovery of the loss or damage to the property not expressly deposited, the guest must communicate the fact to the proprietor of the inn'. Thus, the claim to which the guest is entitled under this title lapses if the guest fails to notify the innkeeper without undue delay of the loss or damage.

As regards the liability of carriers, Section 616 of the Civil and Commercial Code states that the carrier is liable for any loss, damage, or delay in delivery of the goods entrusted to him, unless he proves that the loss, damage, or delay is caused by *force majeure* or by the fault of the sender or consignee.[30] The carrier is also liable for loss, damage, or delay caused by the fault of the other carries or persons to whom he entrusted the goods.[31]

[29]For a detailed analysis on this point, see Stasi (2016, pp. 126–127).

[30]If the goods were transported by several carriers, they are jointly liable for loss, damage, or delay.

[31]The rules as to the liability of the owner of animals or buildings for damage caused by such animals, or by the fall of such buildings, will be discussed below in Sect. 2.6.6.

2.2.4 Types of Delay (Mora)

Under Thai private law, an obligation must be fulfilled on time and properly. A debtor is in delay (*mora solvendi*)[32] if the promised act remains unperformed at the time fixed for its performance and after a demand on the creditor's part. The creditor's demand is not required if the time of performance is either originally, or by notice after default, fixed with reference to the calendar year (*dies interpellat pro homine*). In this regard, Section 204, paragraph 2, of the Civil and Commercial Code states that the debtor is in default without warning if a time by calendar is fixed for the performance and he does not perform at the fixed time. The same rule applies if a notice is required to precede the performance, and the time is fixed in such manner that it may be reckoned by the calendar from the time of notice.[33]

The creditor's demand is also dispensed with if judicial proceedings for the enforcement of the claim have been initiated against the debtor. The institution of judicial proceedings[34] places the debtor in *mora* and subjects him to the increased liability mentioned above. In such cases, interest runs from the date at which a claim is brought forward, but if the action is brought before the claim is due, interest runs from the date on which the claim becomes due.[35]

A debtor who is in *mora* subjects himself to an increased liability. Specifically, he must apply the highest degree of diligence, whatever degree of diligence was originally required and is liable even for accidental damage to the subject matter of the obligation. In this sense, Section 217 of the Civil and Commercial Code provides that 'a debtor is responsible for all negligence during his default. He is also responsible for impossibility of performance arising accidentally during the default unless he can prove that such damage could not have been avoided by the punctual performance of his obligation'.

A debtor who is in *mora* is liable for all damage caused by the delay. In the case of a claim for money other than a claim for interest, interest runs from the time at which the delay begins, the rate being seven and half per cent per annum (Section 224, Civil and Commercial Code). If the debtor is bound to pay compensation for the value of an object which has perished during the default, or which cannot be delivered for a reason which has arisen during the default, the creditor may also claim interest on the amount of such compensation, from the date which serves as the basis for the assessment of such compensation (Section 225, Civil

[32]This term will be used as an equivalent of the Thai *look nee pit naat*, as no convenient English expression can be found.

[33]The debtor, however, is not deemed to be in *mora* if the punctual performance of his obligation has been prevented by any circumstance for which he is not responsible (Section 205, Civil and Commercial Code).

[34]The effects of the judicial proceedings begin at the date of the service of the process by which the proceedings are instituted, or in the case of a supplemental claim brought forward at any hearing of the action, at the date of such hearing.

[35]Where a right to a periodical payment is in question, a declaration as to the right to future payments may be claimed in an action.

and Commercial Code). The same rule applies if the debtor is bound to make compensation for the diminution in value of an object which has deteriorated during the default. According to Section 216 of the Civil and Commercial Code, if by a reason of default, the performance becomes useless to the creditor, he may refuse to accept it and claim compensation for non-performance.

As opposed to the delay of the debtor, the delay of the creditor (*mora accipiendi*)[36] occurs whenever the creditor refuses to accept, without legal ground, the performance tendered by the debtor (Section 207, Civil and Commercial Code). If the performance is tendered before it is due in any case in which the debtor is not entitled to anticipate the performance, the creditor is not deemed to be in *mora.*[37]

The performance must be effected in the manner in which the creditor is entitled to claim it. A verbal tender, however, is sufficient if the creditor declares that he will not accept the performance or if the completion of the performance depends on an act of the creditor (e.g. if it is the creditor's duty to carry away the thing which he is entitled to claim). In the latter case, a request on the debtor's part asking the creditor to do the required act is deemed equivalent to a verbal tender of the performance. The request is unnecessary where the creditor's act has to be done at a time, or at the expiration of a notice, fixed by reference to the calendar (Sections 208 and 209, Civil and Commercial Code).

The creditor is not in *mora*, if at the time of the tender, or at the time fixed for the creditor's act of acceptance, the debtor in fact is unable to perform the obligation (Section 211, Civil and Commercial Code).[38] In the case of reciprocal obligations, the creditor is in *mora* if he is willing to accept the other party's performance, but fails to tender performance on his part (Section 210, Civil and Commercial Code).

As regards the effects of the *mora accipiendi,* it must be noted that whatever degree of diligence the debtor may have been bound to apply up to the time when the delay began, he ceases as from such time to be responsible for any damage not caused by his wilful default or gross negligence. In case the obligation was to deliver a generically defined thing, the risk of the performance passes to the creditor[39] from the moment of the tender of a specific thing offered in satisfaction of the obligation. The debtor is entitled to claim reimbursement of any expense incurred by the unsuccessful tender, or by the storage of the subject matter of the obligation during the continuance of *mora*.[40]

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[36]The term *mora accipiendi* is used in this treatise as the equivalent of the Thai expression *jao nee pit naat*.

[37]Where no time of performance is fixed, or where the debtor is entitled to anticipate the time of performance, a creditor who is temporarily unable to accept a tendered performance is not thereby placed into *mora* unless the debtor has given him reasonable previous notice of his intended performance.

[38]See Panthulap (1979, p. 133).

[39]Before such tender the debtor bears the risk: he has to deliver a thing answering the description, whatever may happen to the thing which may have been appropriated by him for such delivery.

[40]Following the same logic, interest on a debt bearing interest ceases as soon as *mora accipiendi* begins.

2.2.5 Joint Liabilities

The much discussed and somewhat obscure distinction existing in Roman law between debtors who are under a 'correal' obligation and debtors who are under a 'solidary' obligation, corresponds in a certain manner to the English distinction between 'joint debtors' and debtors who are liable 'jointly and severally'. Although in the later stages of both systems the distinction has lost in importance, according to English law, there is still the important difference, that—except in the case of a partnership liability—the liability of one of several joint debtors on his death becomes discharged *ipso facto*, while the obligation of one of several persons liable jointly and severally is binding on his estate. Under Roman law, there was also a distinction between 'correality' and 'solidarity' on the creditors' side, which, however, does not correspond with the English distinction between rights held 'jointly' and rights held by several persons as 'tenants in common'.

Thai law has not retained the distinction between correality and solidarity, either on the passive or on the active side. There is only one class of joint liabilities, while joint rights, as shown below, are divided into two classes, but the present classification has nothing in common with the classification of Roman law. The Thai Civil and Commercial Code defines joint debtors (*look nee ruam*) as persons whose liability to perform an obligation is such that each of them is bound to perform the whole obligation, while the creditor is not entitled to claim more than one performance of the obligation (Section 291). In a corresponding way, joint creditors (*jao nee ruam*) are defined as persons whose right to claim the performance of an obligation is such, that each of them is entitled to claim the whole performance, while the debtor cannot be called upon to perform his obligation more than once (Section 298, Civil and Commercial Code).

Where several persons are liable for the performance of one obligation, they may be liable jointly[41] in accordance with the definition given above, or each may be liable in respect of part of the obligation only. The question which of the two kinds of liabilities is intended is determined by Section 290 of the Civil and Commercial Code, which states that each co-debtor is only liable for an equal share unless it appears otherwise from the source of the obligation or from the law. In other words, the law establishes a general presumption of limited liability, which applies in the absence of an agreement between the parties, or of a special rule of law providing otherwise.

If several co-debtors, however, owe performance in such a way that each is obliged to effect the entire performance, but the creditor is only entitled to demand the performance once, the creditor may at his discretion demand full or part performance from each of the co-debtors (i.e. joint and several liability). This means that where the liability is a joint liability, the creditor may claim performance from

[41]The expression 'joint liability' will in the further course of this treatise be used as the equivalent of the liability arising under a *nee ruam*, which, according to the usual English terminology, would be described as a 'joint and several liability'.

each of the joint debtors wholly or in part. Until the complete performance of the obligation, all the joint debtors remain liable (Section 291, Civil and Commercial Code).

Once the performance is complete by a joint and several debtor, it is also effective for the other co-debtors. Thus, the performance by one of the joint debtors of the obligation, either according to its original tenor, or in some other manner accepted by the creditor, or by set-off, or by deposit with a public authority, operates in favour of the other joint debtors.

It must also be noted that a release of the debt, agreed upon between the creditor and one of the joint debtors, releases the other joint debtors only in so far as it can be shown that this was the intention of the parties to the agreement. The creditor's *mora accipiendi* upon the tender of the performance by one of the joint debtors operates in favour of the other joint debtors.

Other facts exonerating one of the debtors, or affecting his liability, do not exonerate the other joint debtors, or affect their liability. It follows that impossibility of performance, prescription, or its interruption, or suspension, or the fact that one of the joint debtors acquires the creditor's rights, whatever its effect on the obligation of the debtor whom it concerns, does not alter the obligations of the other joint debtors. For example, if A takes an assignment of a debt for the payment of which A and B are jointly liable, B cannot allege that the debt has become extinguished by merger. To take another example, suppose that the creditor takes proceedings against A for the enforcement of a debt for the payment of which A and B are jointly liable. Subsequently, the creditor takes proceedings against B, after the period of prescription has run. In this case, the creditor cannot allege that the prescription in favour of B was interrupted by the proceedings against A.

After the death of one of the joint debtors, the question whether his estate remains liable is determined by the same rules as if the liability had been exclusively his own.[42] For instance, if two artists enter into a joint agreement to produce a painting or a work of sculpture, the liability is a joint one. In the event of the death of one of the artists before the time fixed for performance, however, his estate is not liable in damages for the breach of the obligation.

Joint debtors as between themselves, in the absence of a contrary agreement, are liable in equal shares (Section 296, Civil and Commercial Code).[43] If the contribution of one of the joint debtors remains unsatisfied, the deficiency must be borne by the others. In so far as a joint debtor, being entitled to contribution from the other joint debtors, satisfies the creditor, the creditor's right is *ipso facto* transferred to him, but the right so acquired must not be exercised to the detriment of

[42]As a general rule an obligation is not discharged by the debtor's death, but when the obligation is of a strictly personal nature its performance, on the debtor's death, is rendered impossible by an event for which he is not responsible; his estate is therefore discharged from liability.

[43]This rule also applies as between several wrongdoer. Under English law, one out of several wrongdoers has no right of contribution against the others, if his participation in the unlawful act was wilful. On this point, see Panthulap (1979, p. 141).

the original creditor. This means, for instance, that the subrogated creditor, who has satisfied part of the debt, cannot, as regards the remaining part of the debt, claim any rights of priority to the prejudice of the original creditor.

2.2.6 Joint Rights

Where several persons are entitled to the benefit of a right, they are not deemed joint creditors (*jao nee ruam*) unless otherwise provided by law or agreed by the parties (Section 290, Civil and Commercial Code). Section 298, Civil and Commercial Code, however, states that if more than one person is entitled to demand performance in such a way that each may demand the entire performance but the debtor is only obliged to effect the performance once (i.e. joint and several creditors), the debtor may at his discretion effect performance to each of the creditors.[44]

Where the creditors are joint creditors, the debtor, as mentioned above, can discharge his obligation by a performance for the exclusive benefit of one of them. *Mora accipiendi* on the part of one out of several joint creditors operates against all, and if the debtor acquires the right of one of the joint creditors, the debt is extinguished by merger. In all other respects, the rules relating to joint liabilities are applied, *mutatis mutandis.*

Joint creditors, as between themselves, are, in the absence of any special provision to the contrary, entitled in equal shares (Section 300, Civil and Commercial Code). Therefore, if one of them obtains satisfaction, each of the others is entitled to claim from him such part of the value of the benefit of the performance as corresponds to his share.[45]

2.3 Performance of Obligations

2.3.1 Mode of Performance

Performance of an obligation means the fulfilment of its contents. It occurs when the debtor faithfully and appropriately does something or abstains from doing something. Generally speaking, the debtor is bound to do or forbear from doing some particular act with the prudence and care of a reasonable person.[46] Thus, the subject of the performance of the obligation is the exact execution of the prestation

[44]It must be noted that persons who as joint owners of property are entitled to assert claims arising by virtue of their common ownership, are not in the position of joint creditors.

[45]For a detailed analysis on this point, see Setabutr (2006, p. 71).

[46]See Maneesawat (1993, p. 87).

stipulated in the contract or by law with regard to the proper place, the proper time, the proper kind, the proper quality, and the proper value.

As a general rule, the debtor is under an obligation to effect the promised performance in such manner as good faith between the parties requires, due regard being had to ordinary usage. The mode of performance depends on the nature of the particular obligation. If the obligation arises under a juristic act, the mode of performance is in the first instance regulated by the intention of the parties as shown by their declarations of intention; if the obligation arises under a rule of law, applicable under the particular circumstances of the case, the mode of performance depends in the first instance on such rule of law.[47]

The rules governing performance of obligations are provided for by the Civil and Commercial Code under Sections 194–202 and 314–339. The provisions in these sections deal with, among other things, place, time, and mode of performance.[48] The special rules concerning the place and time of performance apply in the absence of any contractual stipulation or of any special circumstances (such as the nature of the obligatory relation between the parties or any specific rule of law applicable thereto) from which the place and time of performance can be inferred. In the case of an agreement by which several obligations are undertaken, each obligation may, of course, have a separate place and time of performance.

The ascertainment of the place of performance is frequently of importance for the purpose of determining the choice of law, the interpretation of a particular expression, or the jurisdiction of a particular court. Under Thai private law, performance must be made at the place in which the debtor is domiciled unless another place of performance arises from the nature of the obligation or is designated by the parties. However, if a specific thing is to be delivered, the debtor is generally not compelled to bring it to the domicile of the creditor. Pursuant to Section 324 of the Civil and Commercial Code, if a specific thing is to be delivered which at the time of making the contract was located elsewhere, the delivery is to be made at the place where the thing was at the time when the obligation arose. This means that the debtor is not as a rule bound to find the creditor. On the contrary, the onus is on the creditor to find the debtor for performance of the obligation.[49]

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[47]As stated in the section dealing with the interpretation of juristic acts, the general rules there mentioned are supplemented by the special rules stated below as to the manner in which obligatory duties must be carried out, in the absence of any express or implied agreement to the contrary. These rules, as far as the nature of the case admits in each particular instance, are applied to obligations imposed by law (e.g., under the rules of family law), as well as to those created by act of the parties concerned.

[48]On this point, see Stasi (2016, p. 48).

[49]The place of performance must be distinguished from the place of destination. Thus, if a seller undertakes to deliver goods by forwarding them from one place to another, the place from which they are to be forwarded is, as a general rule, the place of performance for the seller's obligation, whereas the place to which they are forwarded is the place of destination. The circumstance that the debtor has undertaken or is under a legal duty to pay the carriage does not in itself justify the conclusion that the place of destination is the place of performance but such an intention may be gathered from other circumstances. In the case of a sale of goods, the place of destination is, as a

With regard to time, the basic rule in Thai private law is that the time may be agreed by the parties. When no time for performance is expressly agreed or where it is not implied from the circumstances, the performance of the obligation may be offered or claimed as soon as the obligation is incurred. If the debtor does not fulfil the performance immediately upon the creditor's demand, he is in default. Specifically, Section 203, paragraph 1, of the Civil and Commercial Code states that if a time for performance is neither fixed nor to be inferred from the circumstances, the creditor is entitled to demand the performance immediately, and the debtor has to perform his part immediately. However, the debtor should be granted a reasonable period of time to carry out the performance of his obligation.

If performance is to be rendered at a fixed time or upon the happening of an uncertain event, the creditor cannot claim performance before that time or the event happens, but the debtor may offer performance before the stipulated time (Section 203, paragraph 2, of the Civil and Commercial Code).[50] It follows that when parties prescribe a specific day by which performance is due, the debtor is not in default until the day for performance pursuant to the underlying obligation has expired. If a time by calendar is fixed for the performance, the debtor is in default when he does not fulfil his obligation within the specified time limit. In this case, the creditor does not need to put the debtor in default by sending a formal notice.[51]

Where the mode of performance is to be determined by one of the contracting parties or by a third party, such determination must, in the absence of an express stipulation allowing unfettered discretion, be made in an equitable manner. In particular, if the mode of performance is made by one of the parties it must be communicated to the other party; if the mode of performance is made by a third party, it must be communicated to one of the parties.[52] Where an equitable determination is not made within a reasonable time the aggrieved party may refer the matter to the determination of the competent court. However, in cases where it is expressly

Footnote 49 (continued)

general rule, the place of performance for the buyer's obligation to receive the goods, while the place of performance for the seller's duty to deliver under the general rule is the seller's place of business; in the case of a money debt, the creditor's place of business is presumed to be the place of destination if the debt arose in the course of his business, and the place of his domicile is the place of destination in any other case. A debtor who owes a money debt is presumed to have undertaken the cost and risk of transmission, unless such cost and risk are increased by the fact that the creditor after the date of the creation of the obligation has removed his domicile or his place of business, in which event the increase of the cost and the whole risk has to be borne by the creditor.

[50]Where a time is fixed if the debt does not bear interest, a debtor who repays it before the stipulated time is not entitled to claim any abatement. In the case of interest-bearing debts, there is, as a general rule, an expressed or implied agreement not to repay before a stipulated time; in the absence of such an agreement interest is payable up to the date of payment only.

[51]It is noteworthy that under Section 206 of the Civil and Commercial Code, in obligations arising from an unlawful act, the debtor is in default from the time when he committed it. On this point, see Stasi (2016, p. 52).

[52]The determination made by a third party may be impugned by one of the parties to the agreement on the ground of mistake, fraudulent misrepresentation, or unlawful threats.

stipulated that a third party is to determine the mode of performance in his unfettered discretion, and where such third party is unable or unwilling to determine the matter, or unduly delays such determination, the agreement becomes inoperative.

With regard to an obligation where the quality of the things which must be delivered is not specifically defined and it cannot be determined by the nature of the juristic act or the intention of the parties, the debtor must deliver a thing of medium quality (Section 195, Civil and Commercial Code). As soon as the debtor has done everything required on his part for performing his obligation in this manner, his obligation is deemed to refer to the thing appropriated to the agreement. The appropriation of the thing to the performance of the obligation converts the generic into a specific obligation.

The Civil and Commercial Code also states that 'where the payment is stipulated for in a foreign currency, the payment may be made in Thai currency' (Section 196, Civil and Commercial Code). The commutation is made according to the rate of exchange current at the time and place of payment.[53] With respect to the legal rate of interest, Section 224, paragraph 1, of the Code stipulates that a money debt bears interest during default seven and half per cent per annum. If the creditor can demand higher interest on any other lawful ground, this shall continue to be paid. This means that if parties agree on the payment of interest in excess of seven and half per cent per annum, such higher interest may be claimed for the period of the default. In the absence of an express agreement between the parties, interest cannot be applied except by the operation of the law as damage. Where interest is agreed to be paid but no rate is fixed, the current rate of interest is applied. In this regard, Section 7 of the Civil and Commercial Code states that 'Whenever interest is to be paid, and the rate is not fixed by a juristic act or by an express provision in the law, it shall be seven and a half per cent per year'.[54]

The duty to compensate for outlay in money or in kind, whether arising by virtue of a juristic act or under any rules of law, includes a duty to pay interest on the money spent, or on the value of the material used, as from the date of the outlay. If a person entitled to the reimbursement of outlay had the enjoyment of the fruits or profits of the thing for which such outlay was incurred, the duty to pay interest only arises in so far as consideration was given for such fruits or profits. In the case that the duty to compensate for outlay is limited to the amount by which the value of the thing for which the outlay was incurred has been increased, interest on outlay is payable only in so far as the aggregate amount of principal and interest does not exceed that amount.[55]

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[53]Section 197 of the Civil and Commercial Code adds that 'If a money debt is payable in a specific kind of money which is no longer current at the time of payment, the payment shall be as if the kind of money were not specified'.

[54]On this point, see Stasi (2016, p. 51). See also Pramod (1965, p. 178).

[55]If a person, entitled to claim compensation for outlay made for a specific purpose, has incurred an obligation in order to effect such purpose, he is entitled to be released from the obligation or, in the case of an obligation the performance of which is not yet due, to receive security.

2.3.2 Acceptance of Performance

The acceptance of a performance made in discharge of the debtor's obligation has the effect of shifting the burden of proof. If the creditor after such acceptance alleges that the debtor's performance was not the performance promised by him, or that it was incomplete, it is for him to prove these allegations (Section 320, Civil and Commercial Code). In some cases, the acceptance may preclude all further questions as to the completeness of the discharge, but this fact must under the general rules be proved by the debtor. Special rules, however, are applicable in the case of any bilateral sale. In the case of sale, the buyer must, so far as practicable, examine the goods immediately on delivery. Defects noticeable on such examination must be communicated to the seller forthwith, defects not so noticeable, immediately on discovery. Failure to comply with these requirements, in the absence of intentional concealment on the seller's part, deprives the buyer of all claims on the ground of defective performance unless the goods are so obviously different from the purchased goods, that the buyer cannot be deemed to have accepted them in performance of the agreement.

As a general rule, the Civil and Commercial Code states that by virtue of an obligation the creditor is entitled to claim performance from the debtor (Section 194). Full performance of an obligation extinguishes it. It may be rendered directly by the debtor or by his agent generally or specially authorized for that purpose. Indeed, performance may be rendered by a third person, even against the knowledge of the debtor, with the result that the obligation will be extinguished, unless the performance is of such a personal nature that the debtor has an interest in performance only by the debtor in person. Therefore, performance on the part of a third party must be accepted, unless the promised act is by its nature required to be done by the debtor in person or the parties concerned have declared a contrary intention (Section 314, Civil and Commercial Code). A creditor, who refuses the performance offered by a third party in a case where no such objection has been raised by the debtor, renders himself liable to the consequences of *mora accipiendi*.

The Civil and Commercial Code further provides that an obligation is not deemed to be discharged unless the performance is made for the creditor's benefit. However, if it is made for the benefit of a third party, with the creditor's assent, the debtor is discharged (Section 315). In other words, performance may be made to the creditor, to his representative, or to other persons who are entitled to receive payment. A person is presumed to be authorized to receive an object if he produces a receipt for such object signed by the person who is entitled to receive it. Correspondingly, a third party entitled to any right over an object threatened with seizure by a judgment creditor of the debtor may avert such seizure by satisfying the judgment debt on the debtor's behalf, or by giving security, or by means of

set-off. In so far as the creditor in such a case receives satisfaction for his claim, the third party is entitled to be subrogated to his rights as against the debtor.[56]

It is necessary to distinguish between the performances of obligations which must be executed in instalments from the performance of obligations which must be executed at one time. In fact, the creditor has the right to refuse to accept partial performance by the debtor if full performance is due.[57] In this regard, Section 320 of the Civil and Commercial Code provides that the creditor cannot be compelled to receive part performance or any other performance than that which is due to him. However, if the creditor accepts, part performance extinguishes the corresponding proportion of the debt.[58]

Questions in regard to the appropriation of payments arise when a debtor owes several distinct debts to the same creditor and makes payment which is not sufficient to cover the whole amount. The rules relating to the appropriation of payment are stated under Section 328 of the Civil and Commercial Code and can be briefly summarized.[59] Specifically, when several obligations of the same kind are outstanding, and where a performance on the debtor's part does not satisfy all such outstanding obligations, the debtor may determine in what order the obligations are to be deemed satisfied. In the absence of any such determination, priority must be given to claims which are due over those which are not due. Among claims which are due, the following elements determine the priority in the order in which they are mentioned: (1) the security given for the performance of the obligation (a less well-secured obligation is satisfied before a better secured obligation); (2) the nature of the obligation (a more onerous obligation is satisfied before a less onerous obligation); (3) the date of the creation of the obligation (an obligation of older date is satisfied before an obligation of more recent date). Where none of the indicated elements make a distinction possible, the outstanding obligations are deemed to be satisfied *pro rata* of their respective values.

An important matter to consider in relation to payment is the subject of interest if payment is not made by the due date. Section 329 of the Civil and Commercial Code states that if the debtor, besides the principal performance, has to pay interest and costs, the value of an act of performance sufficient to discharge the whole debt is applied first to the claim for costs, then to the claim for interest, and lastly to the principal claim. If the debtor desires another mode of appropriation, the creditor may decline the performance.

The person making performance is entitled to a receipt from the person who receives performance, and if the performance is wholly performed, he is entitled to have the document embodying the obligation surrendered to him or cancelled (Section 326, Civil and Commercial Code). If such document is declared to be lost, he is entitled to have the extinction of the obligation mentioned in the receipt

[56]Under English law, a third party, who makes a payment on behalf of a debtor without his authority, does not acquire any rights against the debtor, nor does the creditor incur any liability by refusing the tender of a performance on the part of a person other than the original debtor.

[57]Maneesawat (1993, p. 29).

[58]English law has the same general rule on the subject as Thai law.

[59]On this point, see Stasi (2016, p. 50).

or in a separate document.[60] In case the obligation is partly performed or the document gives the creditor any other right, the debtor is only entitled to a receipt and to have the performance noted in the document.

2.3.3 Impossibility of Performance

Under English law, an agreement is void if its performance is physically or legally impossible under any conceivable circumstances. If the impossibility of the performance is due to any special circumstances affecting the particular case, the agreement is not void on the ground of impossibility of performance. Under Thai private law, impossibility of performance may either exist *ab initio* or be caused by an event occurring subsequently to the formation of the agreement. When impossibility of performance exists *ab initio*, the agreement is void, but a party who was ignorant of the impossibility is within certain limits entitled to compensation from the other party, if such other party knew, or ought to have known, of the impossibility. According to Section 150 of the Civil and Commercial Code, in fact, when an agreement contains an obligation to perform an impossible act, it is void from its inception.[61]

In the case, however, that the agreement is made with the implied or expressed condition that it shall become operative on the removal of the impossibility, then it is considered to be binding if the impossibility can be removed. By the same token, an agreement made subject to a condition precedent, or to a stipulation postponing its operation to a future date, is valid, if the impossibility is removed before the fulfilment of the condition or before the date fixed by the stipulation.

Impossibility caused by an event subsequent to the creation of the obligation requires more detailed discussion, being of much greater practical importance than impossibility existing *ab initio*. As mentioned above, a debtor as a general rule becomes released from his obligation in so far as its performance becomes impossible by reason of any circumstance or event for which he is not responsible. In the absence of a contractual stipulation, or a special rule of law providing otherwise for the particular case, he is only responsible for circumstances or events due to his wilful default or negligence. In case of dispute, it is the debtor's duty to prove that the circumstance or event, by which the performance of the obligation has been rendered impossible, was one for which he was not responsible.[62]

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[60] If the creditor is unable to return any such document the debtor is entitled to a publicly certified acknowledgement of the discharge of his obligation.

[61] See Panthulap (1979, p. 208).

[62] It must be pointed out that where the debtor has undertaken to deliver a generically defined thing, his inability to deliver such thing, though not due to any default on his part, is not a ground of excuse, so long as the delivery of a thing belonging to the genus is possible. The most obvious example of the application of this rule occurs where a debtor undertakes to pay money or to deliver fungibles, and is unable to do so because he does not possess the necessary funds. The fact that the debtor has appropriated a specific thing to the performance of the obligation, and that such thing was subsequently destroyed without any default on his part, is not of any consequence, unless it can be shown that the creditor had agreed to accept such appropriations.

In so far as the performance of an obligation becomes impossible by reason of a circumstance for which the debtor is responsible, the creditor is entitled to compensation for the damage suffered through the non-performance of the obligation. In particular, the Civil and Commercial Code states that when the performance becomes impossible in consequence of a circumstance for which the debtor is responsible, the creditor has the right to rescind the contract (Section 389) and the debtor shall compensate the creditor for any damage arising from the non-performance (Section 218, paragraph 1).[63]

If, owing to any circumstance or event for which the debtor is responsible, the performance of his obligation becomes partially impossible, the creditor may decline to accept partial performance, and claim compensation for the non-performance of the whole agreement wherever partial performance is useless to him.[64] When the creditor cannot prove that partial performance is useless to him, he must accept it, but has a right of compensation in respect of the incompleteness of the performance. In this regard, Section 218, paragraph 2, of the Civil and Commercial Code states that 'in case of partial impossibility the creditor may, by declining the still possible part of the performance, demand compensation for non-performance of the entire obligation, if the still possible part of performance is useless to him'. An example will clarify this point. Suppose A agrees to buy from B a pair of horses. One of the horses is killed by an event for which A is responsible. If B can prove that he valued the two horses only as a pair, and that the remaining horse is of no use to him singly, he can refuse to take it back and claim damages for the loss of the pair. If this cannot be proved, he must take the remaining horse and has a claim for damages in respect of the loss of the horse killed by A's default.

Also, it must be noted that if the circumstance or event by which the debtor's performance has been rendered impossible is one entitling him to partial or total indemnity from another (e.g. from an insurance company, which has taken the risk of such circumstance or event, or from a wrongdoer who is liable for the damage caused thereby), the creditor is entitled, in satisfaction *pro tanto* of his claim for compensation, to an assignment of the claim for indemnity, or to the delivery or payment of any object or sum of money received by the debtor in respect of such claim. In this respect, Section 228 of the Civil and Commercial Code provides that in case the creditor has a claim for compensation on account of non-performance, 'the compensation to be made to him is diminished by the value of the substitute received or of the claim for compensation'.

2.3.4 Performance of Reciprocal Agreements

In the case of a reciprocal agreement, there are three main possibilities. It may be intended that each party shall be bound independently of the question whether the

[63]Ibid., p. 215.

[64]The creditor's and debtor's mutual rights and duties are in such a case governed by the same rules as apply in the case of the rescission of an agreement.

other party performs his promise or otherwise; or that one party shall perform his part of the agreement before he has any claim for performance by the other; or that both parties shall be contemporaneously willing and ready to perform their promises.[65]

Where, in the case of a reciprocal agreement, there is no express or implied stipulation to the contrary, each party is entitled to refuse performance, unless the other party is ready and willing to perform the whole of his promise at the same time. Specifically, Section 210 of the Civil and Commercial Code states that 'if the debtor is bound to perform his part only upon counter-performance by the creditor, the creditor is in default if, though prepared to accept the performance tendered, he does not offer the required counter-performance'. This right of refusal is not affected by the counter-promise being made up of several distinct promises by different persons. Let us consider an example to illustrate the concept. Suppose A makes a contract with B and C for the purchase of a quantity of fungibles, it being agreed that B and C shall each be liable to deliver one half of the purchased quantity, and that each is to receive half of the purchase price. B then tenders his half. In this case, A is not required to pay B's share of the purchase price, until C is ready and willing to deliver the remaining half.

A deviation from the general rule is authorized where the counter-promise has been partly performed, and where—owing to the fact that the outstanding part of the performance is of trifling importance, or to some other special circumstances—the refusal of the counter-performance would be a breach of good faith. Following the same logic, the Civil and Commercial Code provides that in the case that performance on the part of A must precede the performance on the part of B, A may nevertheless claim contemporaneous performance, if B's financial position has become seriously weakened after the formation of the agreement, and if the performance of his promise has thereby been rendered insecure.[66]

Where, in the case of a reciprocal agreement between A and B, the impossibility of the performance of A's promise is caused by an event subsequent to the formation of the agreement,[67] such an event may be (1) an event for which neither A nor B is responsible; or (2) an event for which B is responsible; or (3) an event for which A is responsible. To illustrate the first case, suppose that A makes a contract for the sale of jewellery to B. If the jewellery, before the completion of the sale and without any default on A's part, is accidentally destroyed, the performance becomes impossible. As an example of the second case, assume that A undertakes

[65]Under English law, the last-mentioned intention is presumed in the case of an agreement for the sale of land or of goods. In the case of other kinds of agreements, no legal presumption exists, and the intention of the parties must be ascertained in accordance with the ordinary rules of liability.

[66]This provision may cause great hardship, as it enables unscrupulous persons to repudiate disadvantageous transactions; no doubt the repudiating party must prove his case, but the other party will frequently shrink from the public investigation of his financial position.

[67]Where the performance of the promise of one of the parties is impossible *ab initio* the agreement is void from its inception.

to make a dress for B, for delivery on a given date (time being of the essence of the agreement), the terms being that B is to furnish the material, while A is to find the accessories and charge a lump sum for the whole. If B does not furnish the material at the proper time, the completion of the dress on the agreed date becomes impossible. As a simple illustration of the third case, suppose that A makes a contract for the sale of jewellery to B and the jewellery, before the completion of the sale is accidentally destroyed due to A's negligence.

The consequences as to A's rights under the agreement depend on the type of impossibility. In the first case, A has no right to the counter-performance if the performance is totally impossible; if the performance is partly impossible, the counter-performance is reduced *pro tanto* (Section 370, paragraph 1, Civil and Commercial Code). If B avails himself of the rule mentioned above and obtains the assignment of A's right of indemnity against a third party, A has a claim to the counter-performance, but subject to reduction in so far as such counter-performance would be of greater value than the right of indemnity (Section 370, paragraph 2, Civil and Commercial Code). Thus, if in the case referred above under the first example, A has insured the jewellery, and the insurance money exceeds the purchase price, B is entitled to the whole of the insurance money and must pay the whole purchase price; if the insurance money is less than the purchase price, then the purchase money is reduced proportionately. In the case that B has performed his counter-promise to a larger extent than he is required to do under the rules stated above, he is entitled to recover the excess value of his performance under the rules as to unjustified benefits.

In second case, A has a right to the counter-performance, but such counter-performance is reduced in so far as A in consequence of the non-performance of his promise saves any outlay, or uses the time which he would have applied to the performance of his promise, in some other profitable occupation[68] (Section 372, paragraph 1, Civil and Commercial Code). Therefore, in the case referred above under the second example, A is entitled to the agreed lump sum, but he must allow a deduction in respect of any saving of outlay for accessories which he would have incurred if he had made the dress, and for any remuneration which he receives, or by the application of proper diligence would have received, if he had employed the time intended for the making of the dress in some other work.

B is deemed responsible for the circumstance preventing the performance of A's promise, whatever his original liability may have been, if he is in *mora accipiendi* (Section 372, paragraph 2, Civil and Commercial Code). Suppose, for instance, A has agreed to warehouse B's furniture at a specified rent and for a specified period, and takes responsibility for the risk of fire; B refuses to take possession after the expiration of the period, and the furniture is subsequently destroyed by fire; B must pay the rent and has no right to compensation from A.

In the third case, B may, at his option, exercise one of the following alternative rights: he may claim compensation for non-performance, he may rescind the

[68]Any income which he intentionally neglects to earn is, for this purpose, treated like income earned by him.

agreement, or he may exercise the rights which he would be able to exercise under the first case. If the performance is partially impossible, B, if able to prove that partial performance will be useless to him, has the same rights as in the case of total impossibility; if he is unable to prove the uselessness of partial performance, he must accept the partial performance, his own liability for counter-performance being rendered proportionately less.[69]

In addition, Thai private law establishes special rules which are to be applied to the *mora solvendi* in the case of reciprocal agreements depending on whether time is of the essence of the agreement or not. Where time is not of the essence of a reciprocal agreement and one of the parties is in *mora solvendi*, the other party's only remedy, as a general rule, is to claim performance and damages in respect of the delay, unless he can prove that the belated performance would be useless to him, in which event he may either claim compensation for non-performance or rescission.

Time may be made of the essence of the agreement by a notice addressed to the party[70] who is in *mora solvendi* requiring him to perform within a specified reasonable period, and stating that after the lapse of the period the performance will no longer be accepted. In the event that such notice is not complied with, the party by whom it was given may claim compensation for non-performance, or rescission, but his right to claim performance can no longer be exercised. If, in any such case, the agreement is partly performed before the lapse of the period, the party by whom the notice was given has the same remedies as he would have had in the case of partial impossibility of performance brought about by the default of the other party (Section 388, Civil and Commercial Code).

Apart from the cases in which time is made of the essence by notice in the manner stated above, time, in the absence of any indication to the contrary, is deemed to be of the essence of a reciprocal agreement if it is stipulated that the promise of one of the parties is to be performed at a specific time, or within a strictly defined period (Section 388, Civil and Commercial Code). The mere mention of a time or period, at which, or within which, the promise must be performed, is not sufficient for this purpose; the stipulation in question must be so essentially an integral part of the transaction, that the performance or breach of the agreement on that point causes the transaction to stand or fall, and that, therefore, a performance after the agreed point of time is not to be deemed a performance of the agreement.

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[69]A party to a reciprocal agreement who has obtained judgment directing the other party to perform his promise may send a notice to such other party requiring him to perform within a specified period, and declaring that after the lapse of the period performance will no longer be accepted. If the notice is not complied with the party by whom it was given has the remedies open to B in the event mentioned in the text (Section 371, Civil and Commercial Code).

[70]In such a case, two notices are required as a general rule, and in particular the notice by which the debtor is placed in *mora solvendi*, and the notice declining performance after the lapse of a specified period. The second notice is not required in a case in which the debtor has expressly refused to perform his promise.

If one of the parties to such a contract does not perform his obligation punctually, the other party may rescind the agreement.

2.4 Termination of Obligations

2.4.1 Performance in Lieu of Promised Performance

Under Section 321, Section 1, of the Civil and Commercial Code, an obligation is duly discharged if a creditor in lieu of the promised performance accepts a different performance (e.g. if a lessor entitled to the return of the leased object in a state of good repair agrees to accept it in its actual state with compensation in money for the damage).

The performance accepted in lieu of the promised performance may consist in the substitution of a new obligation for the obligation which has to be discharged (i.e. novation), but the mere fact that a debtor undertakes a new obligation is not accepted as proof of an intention on the part of the parties to consider the old obligation as discharged. In this regard, Section 321, Section 2, of the Civil and Commercial Code states that 'if the debtor assumes a new obligation to the creditor for the purpose of satisfying the latter, it is not to be assumed, in case of doubt, that he is assuming the obligation in lieu of performance of contract'. For example, suppose a promissory note is given by way of payment for a claim for sold goods, the claim for the sold goods, in the absence of an express agreement to the contrary, is not extinguished by the receipt of the promissory note.

Where the undertaking of a new obligation by the debtor does not operate as a discharge of the former obligation, such new obligation is said to be undertaken on account of performance, but where the creditor accepts the substituted obligation in lieu of the promised act, the substituted obligation is said to be accepted *gratam taen chamra nee* (in lieu of performance).

Pursuant to Section 322 of the Civil and Commercial Code, if a thing, a claim against a third party, or another right is given in lieu of performance of a contract, the debtor must provide warranty for defects or eviction in the same manner as a seller. This means that where the creditor accepts any right or thing in lieu of the promised performance, the debtor is under the same duty as to warranty of title and quality as a seller.

2.4.2 Release

Under English law, the release (or waiver) by a creditor of his right to the performance of a contract is invalid, unless it is made for valuable consideration or in a special form. Thai law, on the other hand, allows an obligation to be discharged by

an informal and gratuitous agreement between the creditor and debtor.[71] Unless there is a specific agreement to the contrary, a release is presumed to be an act of liberality by the creditor who, without receiving any price or equivalent, renounces his claim.

It is unnecessary to state the reason which induces the creditor to waive his claim. However, the Civil and Commercial Code provides that if the obligation has been evidenced by writing, the release must also be in writing or the document embodying the obligation be surrendered to the debtor or cancelled (Section 340, paragraph 2). This means that if an instrument of debt is returned to the debtor, the debt is presumed to be discharged.[72] In addition, if it can be shown that the agreement was made without any legal ground (*causa*), or that the object of the transaction was not attained, the party who has waived his right may claim restitution on the ground of 'unjustified benefits'. The fact that the motive of the transaction was an intention on the creditor's part to make a gift to the debtor is sufficient to exclude the operation of the rule as to unjustified benefits, but it subjects the transaction to the rules as to gifts.

A mutual release made with the object of putting an end to a dispute, or to a state of uncertainty, is called a compromise (*bpranee bpranom yom kwaam*). Such a compromise is inoperative if it was made under a mistaken assumption as to the facts and if, but for such mistaken assumption, there would have been no dispute or uncertainty.

2.4.3 Deposit

Under English law, a debtor can under certain specified circumstances discharge his obligation by deposit in court but there is no general rule on the subject, and a person who is liable to perform an obligation for the benefit of a person under disability or of uncertain address is sometimes placed at great disadvantage. The Thai Civil and Commercial Code deals with this difficulty in a very comprehensive manner by establishing general principles. According to Section 331 of the Civil and Commercial Code, if the creditor refuses or is unable to accept performance, the person performing may be discharged from the obligation by depositing for the creditor's benefit the thing forming the subject of the obligation at the expense of the creditor. More precisely, a person who is under an obligation to pay or deliver any money, negotiable instrument, valuable, or other similar object may deposit such object with the deposit office. However, if there are no special provisions by law or regulations as to the deposit offices, the debtor has the right, with the approval of the court, to designate a deposit office and appoint a custodian of the thing deposited (Section 333, paragraph 2, Civil and Commercial Code). The deposit is not effective

[71] An agreement by which the creditor acknowledges that there is no obligatory relation between him and his debtor has the same effect.

[72] On this point, see Pramod (1965, p. 220).

unless the object intended to be deposited actually comes into the possession of the public authority to whom it is intended to be delivered, but, in the case of transmission by post, the deposit, if it becomes effective, operates as from the time of dispatch. Such deposit, validly made, is equivalent to payment and the thing deposited remains at the risk of the creditor.[73]

According to Section 331 of the Civil and Commercial Code, if the creditor refuses or is unable to accept performance, the person performing may be discharged from the obligation by depositing for the creditor's benefit the thing forming the subject of the obligation. In other words, deposit may be effected if the creditor is in *mora accipiendi* or if the debtor, by reason of any personal disability of the creditor, is unable to perform his obligation (e.g. if the creditor is a minor and has at the time no legal representative). The same rule applies if the debtor is unable to perform his obligation with entire safety because through no fault of his own he is uncertain as to the creditor's identity (e.g. if the original creditor is dead, and the debtor, notwithstanding the application of proper diligence, has been unable to ascertain what persons represent his estate).

In the case that debtor is under an obligation to deliver a movable thing, not included among the objects which may be deposited with a public authority, he may, if the creditor is in *mora accipiendi*, sell such movable thing in the manner prescribed for that purpose, and deposit the proceeds of sale with the competent public authority. If the debtor cannot safely perform his obligation on account of any personal disability of the creditor, or of any doubt as to his identity, this right of sale may be exercised only in so far as the thing, which the debtor has to deliver, is of a perishable nature, or in so far as the expense of keeping it would be unreasonably great. In this regard, Section 336 of the Civil and Commercial Code states that 'if the thing forming the subject of performance is not suitable for deposit, or if in regard to the thing there is an apprehension that it may perish or be destroyed or damaged, the person performing may, with the permission of the court, sell it at auction and deposit the proceeds'. The same applies, if the keeping of the thing would be unreasonably expensive.

If the debtor is bound to perform only after the counter-performance has been effected by the creditor, he may make the right of the creditor to receive the thing deposited dependent upon counter-performance by the creditor (Section 332, Civil and Commercial Code). This is to say that where the debtor is not required to perform his obligation except after performance of some act on the creditor's part, the debtor may, on effecting the deposit, stipulate, that the creditor is not to be entitled to receive the deposited object, unless he can produce evidence of the performance of his own obligation.

As regards the effect of deposit, the Civil and Commercial Code states that 'the deposited object may be withdrawn by the debtor at any time before the deposit

[73]The fact that the rule as to the place of deposit or as to notice is disregarded does not deprive the deposit of its legal effect, but the debtor is liable for any damage which the creditor may suffer as a result of such disregard.

has become final' (Section 334, Civil and Commercial Code).[74] The deposit becomes final if the debtor waives his right of withdrawal, the creditor accepts the deposit in full discharge of his claim, or a final judgment in an action between the creditor and the debtor declares the deposit to be in order.[75] While the right of withdrawal subsists, the claim is undischarged, but the debtor can meet any demand on the creditor's part by reference to the deposit.[76] If the debtor exercises the right of withdrawal the deposit is without effect, and the costs of the deposit (which would otherwise have to be borne by the creditor) must be discharged by the debtor. As soon as the deposit has become final, the debtor is discharged to the same extent as if he had delivered the deposited object to the creditor at the time when the deposit was made (Sections 334 and 338, Civil and Commercial Code).[77]

The creditor's right to the payment of the deposited amount, or to the delivery of the deposited object, is barred after the lapse of ten years from the date at which notice of the deposit was received by him, unless payment or delivery is demanded before the lapse of the period. After the right of the creditor is extinguished, the debtor is entitled to withdraw the object notwithstanding a previous release of his right of withdrawal. In other words, as soon as the creditor's right is barred the debtor may withdraw the deposited object, even if he has waived the right of withdrawal (Section 339, Civil and Commercial Code).

2.4.4 Set-off

Under English law, the right of set-off (or compensation) only arises in the course of an action: before action brought a debt is not extinguished *pro tanto* by reason of the fact that the debtor acquires a claim against the creditor. Thai law, on the other hand, recognizes an independent right of set-off (*hak glop lop nee*).

Set-off operates as a means of extinguishing obligations and takes place when both parties are creditors and debtors to each other. A claim may be set-off against another of the same nature (e.g. a money claim may be set-off against a money claim, a claim for delivery of stocks or debentures of a certain class, may be set-off against a claim for stocks or debentures of the same class). In this regard,

[74]The right of withdrawal cannot be exercised during the debtor's bankruptcy, nor can the object be seized by a judgment creditor of the debtor (Section 335, Civil and Commercial Code). On this point, see Pramod (1965, p. 229).

[75]The release or acceptance must be communicated, or the judgment produced to the public authority with whom the deposited object is lodged.

[76]The creditor must bear the risk of the safety of the deposited object and has no claim for interest or loss of profits.

[77]Where, according to the regulations of the public authority, the deposited object cannot be withdrawn without the debtor's authorization, the creditor may require the debtor to give such authorization, in the events in which he would have been entitled to claim the performance of the obligation if the deposit had not taken place.

Section 341 of the Civil and Commercial Code provides that if two persons are bound to each other by obligations whose subject is of the same kind and both of which are due, either debtor may be discharged from his obligation by set-off to the extent to which the amounts of the obligations correspond, unless the nature of one of the obligations does not admit of it. It follows that set-off is only allowed between countering claims of the same nature which are both liquid (i.e. immediately and unconditionally due) and collectible (i.e. not subject to term or condition). Therefore, the object of both obligations must be a mutual fungible debt which is fully due and enforceable by action. For example, money may be set-off against money or rice of a certain quality against rice of the same quality, but not rice of one quality against rice of another.[78]

A debtor may set-off a claim to which he is entitled against an obligation to which he is subject, if, at the time, he has both the right to demand satisfaction of the claim and to perform his obligation. The right of set-off is exercised by notice to the other party which specifies the obligation against which compensation is exercised and operates retroactively. This means that the declaration of intention by one party to another relates back in its effect to the time when both obligations began to exist. Set-off does not operate, however, if the parties have declared a contrary intention or compensation is made subject to any term or condition intention (Section 342, Civil and Commercial Code).

The fact that the place of performance or destination is not the same for two claims does not prevent their being set-off against one another, but a party against whom the right of set-off is exercised under such circumstances may claim compensation for any loss suffered by him owing to the fact that he is unable to perform his obligation, or to receive the other party's performance at the proper place If it was specially agreed that one of the claims should be satisfied at a fixed time and place such claim cannot, in the absence of an indication to the contrary, be set-off against an obligation which has to be performed in another place (Section 343, Civil and Commercial Code).

In the event the debt is due and the creditor brings a legal action against the debtor in a civil court to collect the debt, the debtor may plead the affirmative defence of extinguishment of the obligation by set-off. In this case, set-off is not effected by contract but by order of the court. Thus, the creditor's obligation is considered to be extinguished from the time the counter-claim was filed. A claim barred by prescription does not exclude set-off if it was not barred at the time when it could have been set-off against the other claim (Section 344, Civil and Commercial Code).[79]

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[78]To illustrate, suppose that A owes 10,000 baht to B, who in turn owes A 15,000 baht. If the requirements for set-off are fulfilled, A may declare to B that he sets-off his own obligation. Thus, the first loan agreement terminates by set-off, and B remains indebted to A in the sum of 5000 baht, corresponding to the part of the obligation not paid through set-off.

[79]Under English law, a plea of set-off is not available, if the claim to be set-off is barred by prescription.

A debt can be extinguished through compensation except where the law provides otherwise. In some cases, set-off is forbidden on grounds of public policy following the provisions stipulated under the Civil and Commercial Code. Specifically, claims arising from an unlawful act committed wilfully (Section 345, Civil and Commercial Code) and claims exempted from judicial attachment (Section 346, Civil and Commercial Code) cannot be set-off against another. The right of set-off is likewise excluded in case of a claim against a bankrupt acquired after the commencement of the bankruptcy, or with the knowledge of the bankrupt's insolvency. Therefore, these claims cannot be set-off against a debt owing to the bankrupt (Section 344, Civil and Commercial Code).

The two claims set-off against one another become extinguished to the extent of the smaller claim as from the date at which they began to coexist. Accordingly, a declaration of compensation exempts the parties from liability in the case of accidental destruction of the property, discharges a penalty agreed to be paid in the event of non-performance, and arrests the accrual of interest.[80] A person exercising the right of set-off may determine which out of several contemporaneous claims is to be set-off against his debt. In the absence of any declaration of intention on the subject, the rules as to the order of discharge of several coexisting obligations apply.

2.4.5 Merger

An obligation may become extinguished by merger. Merger refers to the extinction of an obligation due to the confusion of rights and duties of the same person. It takes place when rights and liabilities in an obligation become vested in the same person. In other words, one person becomes both debtor and creditor with regard to the same performance.[81] This may occur, for example, when a guarantor becomes principal debtor, or when the debtor succeeds as heir to the creditor with regard to the same debt. It must be pointed out, however, that if the obligation becomes the subject of the right of a third person, which would be disadvantageously affected by a merger, then there will be no merger (Section 353, Civil and Commercial Code).[82]

2.4.6 Novation

Novation is another mean of termination of an obligation. It occurs when the parties concerned have concluded a contract changing the essential elements of the

[80]On this point, see Stasi (2016, pp. 57–58).

[81]On this point, see Ratthanakorn (2007, p. 497).

[82]Ibid., p. 499.

obligation (Section 349, paragraph 1, Civil and Commercial Code). For instance, if a conditional obligation is made unconditional, or a condition is added to an unconditional obligation, or if a condition is changed, it is regarded as a change of an essential element of such obligation.

A novation may also occur by means of a party modification whereby the original obligation must be performed by the debtor for the benefit of a new person different from the original creditor (i.e. assignment of rights). Roman law, like the older English law, did not on principle allow rights to be assigned, but under all systems numerous exceptions became gradually engrafted on the general rule, more particularly with reference to rights embodied in negotiable instruments, and even apart from such special cases the tendency to modify or depart from the general rule became more marked as time went on.

Thai private law, on the other hand, recognizes the right to assign obligatory and other rights to the fullest extent. The Civil and Commercial Code lays down the rules that are applicable to assignments of obligatory rights.[83] In so far as the nature of the case admits, and no express rule of law excludes their applicability, these rules also apply to assignments of other rights, and to transfers of rights (Section 303, paragraph 1, Civil and Commercial Code). All rights, present or future, may be validly assigned except those which are exempt from attachment by a judgment creditor (e.g. a claim for wages, a claim for maintenance, or public fund created under the laws as to compulsory insurance). The Civil and Commercial Code also states that it is not possible to assign a right which by agreement between the debtor and creditor is declared to be incapable of assignment, and an obligatory right which would alter in character if it was exercisable by any person other than the original creditor (Section 303, paragraph 2).

With respect to the form of assignment, Section 306 of the Code provides that the assignment of an obligation performable to a specific creditor is not valid unless it is made in writing. It can be set up against the debtor or third person only if a notice has been given to the debtor, or if the debtor has consented to the assignor.[84] Such notice or consent must be in writing. Thus, in case of a conflict between several assignees the priorities depend on the first assignment which has been notified, or agreed to (Section 307, Civil and Commercial Code).

All securities for a debt, and all rights of priority to which the assignor is entitled, pass to the assignee by virtue of the assignment of the debt, unless expressly excluded from the assignment. The assignor is bound to furnish to the assignee all information required for the enforcement of the right assigned to the latter, and to deliver to him any documents in his possession which help to establish the claim.

Furthermore, Section 308 of the Civil and Commercial Code states that 'if a debtor has given the consent to the assignment of an obligation without reservation, he cannot set up against the assignee a defence which he might have made

[83]The technical expression used by the Civil and Commercial Code for the assignment of a right is *ohn sitti riak rong*.

[84]Similarly, under English law an assignment is not fully effective until notice is given to the debtor.

against the assignor'. If, however, in order to extinguish the obligation, the debtor has made any payment to the assignor, he may recover it, or if for such purpose he has assumed an obligation to the assignor, he may treat it as if it did not exist.

In cases where the debtor has only received a notice of the transfer, he may set up against the assignee any defence which he had against the assignor before he received such notice (Section 308, paragraph 1, Civil and Commercial Code). In other words, the debtor is entitled to avail himself of all defences and all rights of set-off against the assignee, which he could have used against the assignor at the time of the assignment. Section 308, paragraph 2, of the Civil and Commercial Code adds that 'if the debtor had against the assignor a claim not yet due at the time of the notice, he can set-off such claim provided that the same would become due not later than the claim transferred'. This rule applies to the claims against the assignor acquired by the debtor after the receipt of the notice of the assignment, or falling due after the receipt of the notice of assignment, and after the maturity of the assigned debt.

The assignment of negotiable instruments is governed by special rules. Specifically, the transferee of a negotiable instrument is in a much better position than an ordinary assignee of a claim. While the latter must submit to all the defences and rights of set-off available against the assignor, the transferee of a negotiable instrument, if in the position of a lawful holder, can only be defeated by specific defences, such as defences arising from the invalidity of the debtor's declaration expressed on the face of the instrument (e.g. want of authority of the person who signed the debtor's name on the instrument, incapacity, and the like), defences arising from the tenor of the instrument (e.g. formal defects), and defences available as between the transferee and the debtor (e.g. a right of set-off operating between such transferee and the debtor).

The endorsee of an instrument to order, in the absence of fraud or gross negligence, is a lawful holder if there is a continuous chain of endorsements down to the one under which he holds (even if any endorsement constituting a link in the chain is forged). Accordingly, the possessor of an instrument to bearer is, as between himself and the debtor, deemed to be the lawful holder, but if his possession is unlawful, the person entitled to possession can recover the instrument.[85]

The following classes of instruments pass by endorsement: bills of exchange and promissory notes;[86] any written order or promise by which a mercantile trader is requested or undertakes to pay or deliver to the order of another a sum of money

[85]One important distinction between Thai and English law is to be found in the fact that, according to English law, the holder does not acquire the full rights of a lawful holder unless he is a holder for value. In Thai law, this requirement does not exist. A person who in good faith acquires a negotiable instrument by way of gift has the same rights thereunder as a buyer for value. The rule of English law under which the negotiability of a cheque may be restricted by the holder for the time being does not exist in Thai law.

[86]The instruments of the second class include cheques (which, according to Thai law, are not deemed bills of exchange), and delivery orders for goods of a fungible kind. The law as to cheques in Thai is still regulated by the Cheque Act B.E. 2534.

or a negotiable instrument or a fungible thing, provided that such payment or delivery is not made dependent on some counter-performance on the part of the holder; bills of lading, carriers' receipts, warehousing receipts issued by any undertaking licensed for that purpose, policies against risks of carriage by land or sea if issued to order; and share certificates registered in the holder's name.[87]

The endorsement of a negotiable instrument, if accompanied by its delivery to the endorsee, has the effect of transferring all rights conferred by the instrument from the endorser to the endorsee, and the debtor is not bound to perform his obligation unless the instrument, duly receipted by the last endorsee, is handed to him. The rules of bill of exchange law as to the form of endorsement, the holder's title, and other similar matters apply to all negotiable instruments which pass by endorsement.

Another type of novation can apply when a third party spontaneously assumes the debt to the creditor. Under Thai law, as under Roman law, the assumption of the burden of an obligation by a new debtor in the place of the original debtor is looked upon as the creation of an entirely new obligation. According to this view, the creditor, whose assent must of course be given, agrees to accept the benefit of a newly created claim in satisfaction of the old claim, and thereby joins in a transaction having the character of a 'novation'. In this case, the third party (i.e. novator) becomes responsible jointly with the original debtor (i.e. novatee) to the novation creditor. In this regard, Section 350 of the Civil and Commercial Code states that 'A novation by a change of the debtor may be effected by a contract between the creditor and the new debtor, but this cannot be done against the will of the original debtor'.[88]

It follows that when the agreement is made between the new debtor and the creditor it becomes immediately operative. If the agreement is made between the original debtor and the new debtor, it must be ratified by the creditor in accordance with the ordinary rules as to ratification. The ratification is inoperative if made before notice of the agreement is actually received either from the original or the new debtor, and if such notice specifies a period of time within which the ratification must be made, it is deemed to be refused unless communicated to the new or to the original debtor within the specified period.[89] The parties may at any time before the ratification or repudiation of the agreement on the creditor's part, modify or rescind it. Subject to this provision and to any stipulation to the contrary, the new debtor is as between himself and the original debtor, bound to satisfy the obligation while the ratification is being awaited, and also after its refusal.

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[87]The law requires that the title to such certificates must pass by endorsement of bill.

[88]On this theme, see especially Maneesawat (1993, p. 104).

[89]Where the buyer of mortgaged property agrees with the seller to assume the personal liability for the mortgage debt, the rule is modified in the following manner: the notice must be given by the seller and cannot be effectively given before the buyer is registered as owner of the property. The mortgagee is deemed to have accepted the substitution of the buyer's for the seller's liability, unless he notifies his refusal within a period of six months from the receipt of the notice. The buyer may compel the seller to give the required notice, and the seller is bound to inform the buyer of the result of the notice as soon as such result is ascertained. Under English law, the seller remains liable, unless expressly released by the mortgagee; in such a case, the buyer usually indemnifies the seller against his liability.

After the assumption of the obligation by the new debtor, he may avail himself of the same defences as the original debtor, but he is not entitled to avail himself of any right of set-off to which the original debtor would have been entitled.

According to Section 352 of the Civil and Commercial Code, the parties to a novation may, to the extent of the subject of the original obligation, transfer a right of pledge or mortgage given as security for it to the new obligation, but if such security was given by a third person, his consent is necessary. Thus, a creditor who authorizes the transfer of the liability for a debt can no longer avail himself of the previously existing securities for such debt, unless the person who gave the security (e.g. a surety or a person who has charged or pledged any object as security) authorizes the assumption of the obligation by the new debtor.

It must be added that where a person by agreement takes over the whole of another person's property, he becomes liable jointly with the transferor of the property for the whole of the debts of the latter, but only to the extent of the value of the property and of the rights conferred upon him by such agreement. The liability of the assignee cannot in such a case be excluded by agreement between him and the assignor.

2.4.7 Rescission

A party may, in certain events, instead of claiming the performance of a contract, claim rescission either alternatively to the right to claim compensation for non-performance, or without such alternative right. The right of rescission in certain events may also be stipulated for between the parties. Where a contract provides that a debtor, in the event of the non-performance of his promise is to forfeit his contractual rights, the creditor on the happening of such event is entitled to rescission. According to the provisions of Section 386 of the Civil and Commercial Code, if by contract or by the provisions of law one party has the right of rescission, such rescission is made by a declaration of intention to the other party. The declaration of intention cannot be revoked.[90]

Where no time is fixed for the exercise of the right, the other party may, by notice, require the party entitled to the right to exercise it within a specified reasonable period. If the notice is not complied with before the lapse of the period the right is forfeited.[91]

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[90]Section 390 of the Civil and Commercial Code provides that if in a contract there are several persons on the one or the other side, the right of rescission may be exercised only by all and against all. In the case that the right of rescission is extinguished in respect of one of those persons entitled, it is also extinguished in respect of the others.

[91]If the exercise of a contractual right of rescission is dependent on the payment of forfeit money, the right is forfeited unless such payment is made simultaneously with the communication of the notice of rescission, or immediately after the repudiation of the notice by the other party on the ground of such non-payment.

As regards the effect of rescission, Section 391 of the Civil and Commercial Code regulates all cases where a party exercises a right of rescission to which he is entitled under any legal rule or contractual stipulation. Specifically, it states that if one party has exercised his right of rescission, 'each party is bound to restore the other to his former condition; but the rights of third persons cannot be impaired'. A party who has to return a thing is under the same liability for the loss or deterioration of such thing and has to account for fruits and profits in the same way as a person who is in possession of a thing while an action for its recovery by the true owner is pending. In so far as any services have been rendered or the use of a thing has been allowed, the money value of such services or of such use must be paid.

The right of rescission is forfeited by the party entitled thereto (hereinafter called the rescinding party) if the rescinding party, after becoming subject to the effects of *mora solvendi* as to the return of the objects to be returned by him or of an essential part thereof, fails to comply with a notice requiring him to return such objects or such part thereof, within a reasonable time specified in such notice. Under Section 394, paragraph 1, of the Civil and Commercial Code, the right of rescission is also forfeited if any object which ought to be returned is destroyed, materially altered or deteriorated owing to the wilful default or negligence of the rescinding party, or of any party deriving title under him, or of any party for whose default he is responsible. Section 394, paragraph 2, of the Civil and Commercial Code, however, adds that 'if without the act or fault of the person who has the right of rescission the thing which is the subject of the contract of the contract has been lost or damaged, the right of rescission is not extinguished'.

In the case of a contractual right of rescission, the right of rescission is forfeited if the other party is in a position to discharge his obligation by set-off and immediately on receiving the notice of rescission avails himself of his right of set-off.

2.5 Remedial Obligatory Rights

2.5.1 Right to Performance of Restitution in Kind

It is often stated that the remedies of 'specific performance' and 'injunction' introduced by the English equity courts by means of their power over the person of the defendant have no equivalent in civil law systems, and that, under civil law systems, as under English common law, the only remedial right is a right to pecuniary damages. This assertion is incorrect as regards the continental law and is equally incorrect as regards the Thai law.

The primary remedial right under Thai law is a right to performance[92] where the obligation results either from a juristic act, or from surrounding circumstances,

[92]Where the obligation is of a negative character, the right to performance resolves itself into a right to prohibit any course of conduct by which such obligation is violated.

and a right to compensation (*kaa sin mai tot taen*) where the obligation results from an unlawful act. The right to compensation is not primarily a right to pecuniary damages. Section 176, Civil and Commercial Code, in fact, states that 'A person liable to make compensation is bound to restore the state of things which would have existed, if the event creating the liability had not happened'. This means that the right to receive compensation for damage suffered by reason of an unlawful act is therefore primarily a right to restitution in kind.[93]

The general rule that every obligation gives rise to a claim for specific performance or restitution in kind is subject to some exceptions. Firstly, on the grounds of public policy, claims for personal services as well as claims for the performance of a promise of marriage, and for the restitution of conjugal rights cannot be specifically enforced. Secondly, the Civil and Commercial Code provides that in certain events a person entitled to the performance of a contract may claim rescission in lieu of performance (Section 386).[94]

In the case of a claim for performance of the promise of one of the parties to a reciprocal agreement, the remedial right may be exercised contemporaneously or successively. Precisely, if under the reciprocal agreement the performance of the mutual promises is to be contemporaneous, the plaintiff may claim an order directing the defendant to perform contemporaneously with the plaintiff's performance. In contrast, if the performance of the plaintiff's promise is under the agreement to precede the defendant's performance, and the defendant is in *mora accipiendi*, the plaintiff may claim an order directing the performance of the defendant's promise; if the *mora accipiendi* continues, the plaintiff may enforce the performance of the defendant's promise without being first compelled to perform his own promise (Section 369, Civil and Commercial Code).

2.5.2 Right to Pecuniary Damages

Under certain specified circumstances, the claim for performance or restitution in kind is transformed, *ipso facto*, into a claim for pecuniary damages. Under other specified circumstances, the creditor may at his option claim either performance, restitution, or pecuniary damages. And there are finally circumstances under which the debtor may substitute pecuniary compensation for restitution in kind.

According to Section 213 of the Civil and Commercial Code, the claim is transformed, *ipso facto*, if performance or restitution in kind is impossible,[95] or possible only in such a way as not to afford sufficient compensation to the creditor. In the case that performance of a contract is partially impossible and partial performance

[93]An order restraining a person guilty of unlawful conduct from a continuance of such conduct comes under the same head.

[94]See Ratthanakorn (2007, pp. 175–176).

[95]In the case of impossibility of performance of an agreement, a claim to compensation only arises in so far as the impossibility is caused by a circumstance for which the debtor is responsible.

is useless, the creditor may at his option claim pecuniary damages in place of performance or restitution in kind. Similarly, where damages are payable for injury to a person or damage to a thing, the debtor may demand the required monetary amount in lieu of restoration.

The Civil and Commercial Code also provides, in certain instances, that money may be demanded in compensation for damage that is not pecuniary loss. In particular, Section 446 of the Code states that in the case of injury to the body or health of another, or in the case of deprivation of liberty, the injured person may also claim compensation for the damage which is not pecuniary loss. The claim is not transferable and does not pass to the heirs, unless it has been acknowledged by contract, or on action on it has been commenced.

Where pecuniary damages are payable, they are assessed according to the general principles laid down in the Civil and Commercial Code. As a general rule, compensation must be paid for loss of profit as well as for other loss. Under Section 222 of the Code, the creditor may demand compensation 'even for such damage as has arisen from special circumstances, if the party concerned foresaw or ought to have foreseen such circumstances'.[96]

In certain cases, a party injured by the fact that a contract is invalid has a claim to be indemnified for the actual loss suffered by him in consequence of his belief in its validity. The interest in the agreement for which he is entitled to compensation is called the 'negative' interest in contradistinction to the 'positive interest' or 'interest in the performance' which a party is entitled in the case of a valid agreement.[97]

Special rules are laid down as to the measure of damages on the breach of certain classes of agreements. More precisely, where, on a sale agreement, there is a breach of warranty of essential qualities, the compensation (if compensation is claimed) takes the shape of a reduction of the purchase price. Damages payable by a carrier, in respect of the deterioration or loss of the goods, are also assessed according to special rules. In particular, full damages including loss of expected profit are payable if the loss or deterioration is caused by the wilful default or gross negligence of the carrier, or of any person for whose default he is responsible. Where, however, the carrier is liable for loss or deterioration not caused by wilful default or gross negligence, his liability does not extend beyond the payment of the value of the lost goods, or of the loss in value caused by the deterioration of the goods.

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[96]It must be noted, however, that such profit as, according to the ordinary course of events, and in view of the preparations and precautions of the parties, might reasonably have been expected is deemed to have been lost.

[97]If a party has not altered his position on the faith of the agreement, the value of the negative interest cannot exceed the expenses incurred by him in connexion with the formation of the agreement; if he has done any act in reliance on the validity of the agreement (e.g., if in the case of an invalid sale he has resold the article bought by him), he is entitled to claim the amount of the loss suffered in consequence of such act. Whatever the value of the negative interest no greater amount can be claimed in respect thereof than could have been claimed if the agreement had been valid and had been broken.

With regard to unlawful acts, the Civil and Commercial Code states that a person who injures the life, body, health, liberty, property, or any right of another person must compensate the injured person for all injurious effects on his earning power and success in life, caused by such unlawful act (Section 420). Damage may include, in a case coming within the exceptional rules mentioned above, compensation for physical pain or mental suffering. Section 439 of the Civil and Commercial Code adds that a person who is liable to return a thing taken away from another by means of an unlawful act must compensate such other for all loss arising from the deterioration or loss of such thing, though not due to his default, 'unless destruction or the impossibility of returning it or the deterioration would have happened even if the unlawful act had not been committed'. If compensation is to be paid for the value of a thing of which a person has been deprived, or if compensation is to be paid for the decrease in value of a thing as a result of damage, then the injured person may demand interest on the amount to be paid in compensation from the date on which the determination of the value is based (Section 440, Civil and Commercial Code).

2.5.3 Right of Subrogation

A person who compensates another for the loss of a thing or a right is entitled to the assignment of the claims which the person receiving compensation has against any third party, in respect of the thing or right for which compensation has been given. In this respect, Section 227 of the Civil and Commercial Code states that when a creditor has received as compensation for damage the full value of the thing or right which is the subject of the obligation, the debtor is, by operation of law, subrogated into the position of the creditor with regard to such thing or right. For example, a bailee, who compensates the owner of the bailed goods wrongfully taken out of the bailee's custody, may ask for an assignment of the owner's right to recover the goods from their unlawful possessor.

Pursuant to Section 229 of the Civil and Commercial Code, subrogation takes place by operation of law and ensues to the benefit of the following persons: (a) the person who, being himself a creditor, pays another creditor who has priority to him owing to such other creditor having a preferential right, pledge, or mortgage; (b) the person who, when acquires an immovable property, uses the purchase price in paying off the persons who have mortgages thereon; (c) the person who, being bound with others or for others to pay a debt and was interested in paying the same, has paid it.[98]

[98]It must be added that a person, who has compensated another for the loss of a right which through his negligence has been barred by prescription, may claim the assignment of such right, as it would be of value to him in the event of the debtor declining to avail himself of the defence of prescription.

If, in consequence of the circumstance which makes the performance impossible, the debtor acquires a substitute or a claim for compensation for the object owed, the creditor may demand delivery of the substitute received or may claim for compensation by himself. In cases where the creditor has a claim for compensation on account of non-performance, the compensation to be made to him is diminished by the value of the substitute received or of the claim for compensation.[99]

2.5.4 Penalties

Under the English rules of equity, a penalty, which a party to a contract promises to pay in the event of the non-performance of his obligation, can only be recovered in so far as the penalty is deemed to have been intended as a contractual assessment of the damages recoverable on breach of the agreement (liquidated damages). Where such a construction is impossible under the circumstances, a penalty exceeding the value of the damage cannot be awarded. The rules of Thai law on this subject are entirely different. On principle the parties may agree to the payment of a penalty (in Thai: *bia bprap*) in addition to full damages, and it is only in a case in which the amount of the penalty seems out of proportion to the importance of the matter, that the court may reduce the amount of the penalty to a reasonable amount, making, however, full allowance for all damage actually suffered whether pecuniary or otherwise. In this regard, Section 383 of the Civil and Commercial Code states that if the amount of the penalty seems disproportionately high compared with the actual loss or the severity of the breach, it is within the competence of the court to reduce it to a reasonable amount. In judging the reasonableness, every legitimate interest of the creditor, not merely his financial interests, must be taken into account.[100]

The Thai rules as to penalties distinguish two principal cases, namely the case of a penalty payable in lieu of damages or on account of damages and the case of a penalty payable irrespectively of the other rights to which the creditor is entitled. The first case applies where the debtor promises to pay the penalty in the event of his failing to perform his obligation. In contrast, where the debtor promises to pay the penalty in the event of failing to perform his obligation in the agreed manner, or at the agreed time, the agreement is deemed to have the effect mentioned under the second case.

In the first case, the agreement is similar to an English agreement as to liquidated damages, but the position of the Thai creditor is more favourable. He may at his option claim the performance of the agreement or the penalty, and, where he is entitled to compensation by reason of the breach, he may claim damages in excess of the amount of the penalty; the penalty only represents the minimum amount of the damages.

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[99] A comprehensive overview of the issue can be found in Ratthanakorn (2007, p. 242 ff).

[100] For a detailed analysis on this point, see Setabutr (2006, p. 119).

In the second case, the creditor may claim performance as well as the penalty, but if he accepts performance without reserving his right to the penalty, he forfeits his right to the penalty. If he is entitled to damages for defective performance, he may claim such damages in lieu of the penalty (Sects. 380 and 381, Civil and Commercial Code). When the penalty is to be satisfied otherwise than by the payment of money, damages cannot be claimed in addition to the penalty (Section 382, Civil and Commercial Code).

The penalty falls due when the debtor fails to comply with the terms of the obligation. More precisely, pursuant to Section 379 of the Civil and Commercial Code, if the debtor promises the creditor the payment of a sum of money as penalty if he does not perform his obligation or does not perform it in the proper manner, the penalty is payable if he is in *mora solvendi*. However, if the performance due consists in a forbearance from specific acts, the penalty is due as soon as any act in contravention of the obligation is committed.

As to the burden of proof, if the debtor contests the forfeiture of the penalty on the ground of having performed his obligation, he must prove performance, unless the performance due consisted in forbearance.[101]

It must also be pointed out that if the promise of an act of performance is invalid, then the agreement of a penalty made for the event of failure to fulfil the promise is likewise ineffective, even if the parties knew of the ineffectiveness of the promise (Section 384, Civil and Commercial Code). In other words, no penalty is payable in respect of the breach of an obligation which is inoperative under any rule of law.

2.5.5 Earnest Money

If, on entering into a contract, something is given as 'earnest money' (in Thai: *mat jaam*), this serves as evidence of the formation of the agreement with reference to which it is made and as security for the performance of the agreement (Section 377, Civil and Commercial Code). For instance, a contract to sell or to buy immovable property is not enforceable by action unless there is some written evidence signed by the party liable or unless earnest money deposit is given (Section 456, paragraph 2, Civil and Commercial Code).

In the absence of a contrary agreement by the contractual parties, the earnest money is governed by the following principles: (1) if the contract is performed, the earnest money shall be returned or treated as part payment upon performance; (2) if the party giving it fails to perform, the earnest money shall be forfeited; (3) if the party receiving it fails to perform, the earnest money shall be returned (Section 378, Civil and Commercial Code). It follows that if the performance of the obligation of the giver of the earnest money becomes impossible by reason of a

[101] Ibid., p. 125 ff.

circumstance for which he is responsible, or if the agreement is rescinded by reason of any default on his part, he forfeits the earnest money. In the absence of a contrary agreement, the earnest money cannot be retained, if the agreement is duly performed, or if damages for its breach are recovered. It must be accepted as either part performance of the agreement, or part payment of the damages, or it must be returned. If the agreement is rescinded without any default on the part of the giver, it must be returned.[102]

2.5.6 Right of Retention

The expression *burim sitti*, in the sense given to it by the Thai Civil and Commercial Code, has a somewhat wider meaning than the term 'right of retention' by which it is here translated. The Thai right, though called a right of retention, enables the person entitled to it not only to retain a thing belonging to the debtor, but also to refuse the performance of any act which the debtor is entitled to claim until the debtor performs his own obligation (Section 241, Civil and Commercial Code). With reference to reciprocal agreements requiring contemporaneous performance, this right is specially regulated and has already been discussed above, but the Civil and Commercial Code confers the same right in a number of cases, where no reciprocal agreement, in the technical sense of the word, is in existence between the parties—e.g. where mutual obligations arise in the case of voluntary services, or unjustified benefits.

The right of retention is available: (1) in all cases in which the debtor has a matured counterclaim arising out of the same legal relation as his own obligation; (2) in all cases in which a person, who is under a duty to deliver an object not obtained by him by means of an unlawful act, has at the same time a matured claim in respect of any outlay incurred or damage suffered in respect of such object.

In case of insolvency of the debtor, the creditor has the right of retention even if his claim is not yet due. Section 243 of the Civil and Commercial Code adds that 'if the insolvency has occurred or become known to the creditor after the delivery of the property, he can exercise the right of retention even if an obligation previously assumed by him or the instruction given by the debtor, opposes it.'[103]

On the contrary, the right of retention does not exist if it is incompatible with the obligation assumed by the creditor, or with the instructions given by the debtor at the time of delivery of the property, or if it is against public order (Section 242, Civil and Commercial Code).

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[102]The object of the earnest money may consist in money as well as other things of value which one party delivers to the other contractual party when entering into a contract. The expression 'earnest money' has been used for the sake of brevity, but the rules given above are applicable, whether money or any other object be given in earnest to bind the bargain. Immovable property cannot represent the object of the earnest money deposit since it cannot be delivered.

[103]See Panthulap (1979, p. 327 ff).

Pursuant to Section 249 of the Civil and Commercial Code, the debtor may claim the extinction of the right of retention on giving proper security.[104] Also, a right of retention is extinguished by the loss of possession of the property. However, this does not apply to the case where the property retained is let or pledged with the consent of the debtor.

2.6 Obligations Arising from Unlawful Acts

2.6.1 Introductory Statement

Under Roman law, there was no general rule by virtue of which a person injured by an unlawful act was entitled to claim compensation from the wrongdoer. A liability was imposed in respect of certain specified injuries to the person or property, but the satisfaction to the injured person was more in the nature of a penalty than of compensation for the damage suffered by him, and this penal character of the liability for torts was demonstrated by various results, as for instance by the rule according to which, in the case of some kinds of torts, each of several wrongdoers had to pay the full penalty ('*nam ex lege Aquilia quod alius praestitit, alium non relevat, quum sit poena*' Dig. 9, 2, 11, § 2), and above all by the rule as to the extinction of the claim on the death of the wrongdoers or of the injured person, which to a certain extent is still preserved in English law.[105]

Civil law in continental Europe gradually substituted the principle of compensation for the principle of punishment, and consistently with that principle made the heirs of the wrongdoer liable for the compensation to the extent of the value of the wrongdoer's estate. The claims of the injured person did not, however, pass to his heirs, unless an action for their enforcement was commenced in his lifetime. The Code Napoleon for the first time established a general liability for unlawful acts by stating that 'Everyone is liable for the damage he causes not only by his intentional act but also by his negligent conduct or by his imprudence' (Article 1383). By the same token, Section 823 of the German Civil Code states that 'A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom'. Similarly, Thai Civil and Commercial Code has a general

[104]The creditor may prevent the exercise of the right of retention by giving security, but personal security may be refused.

[105]It was a peculiarity of Roman law that its law of delicts was largely penal in character in that delictal actions were classified as penal by contrast to all other actions, whether *in rem* or *in personam,* which were reipersecutory. As a consequence, no part of the Roman compensation went to the state as it would in a purely criminal process; the payment of damages went directly to the victim. These particular features of Roman law are, of course, totally alien to the Thai legal architecture. In the Thai law of delicts, not only is the compensation for unlawful acts essentially restorative in nature but the eligible damage cannot be 'remote'. See Prachoom (2015, p. 397).

clause imposing liability for damage done by unlawful acts and a number of subsidiary clauses dealing with particular instances. Certain special kinds of damage done by unlawful acts are further provided for by separate statutes.

The rules determining liability for the unlawful acts of others and the rules as to the nature of the compensation to which the injured person is entitled have been discussed above. The rules as to contributory default will be discussed under the following sections.

2.6.2 General Rules as to Unlawful Acts

The definition of unlawful act, as expressed under the Civil and Commercial Code, is identical to its German counterpart. Section 420 of the Code states: 'A person who, wilfully 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 therefrom' (Section 420, Civil and Commercial Code). It follows that every culpable act that causes damage to another either by commission or by omission obliges the person who did it to compensate for it. In this way, the legislator wishes to prevent harm as a result of unsafe behaviour.[106] Hence, if a person knowingly causes damage to another, he must compensate the injured party.[107]

Any unlawful act done wilfully or negligently by means of which a right belonging to certain specified classes of absolute rights is infringed gives rise to a claim for damages under the general rules. The absolute rights referred to under Section 420, Civil and Commercial Code, are the right to freedom from violence, the right to health, the right to liberty, the right of ownership, and other rights similar to the right of ownership.[108] An obligatory right is not within the rights mentioned under the provisions of Section 420 of the Code. Therefore, the fact that C induces A to break a contract entered upon between A and B does not in itself entitle B to claim damages from C. An act violating one of these specified rights is unlawful, if it is not done in exercise of any right to which the person doing the act is entitled (e.g. the right of self-defence, or self-help), or by virtue of any authority conferred by public law (e.g. the authority of public officers to restrain the liberty

[106]See Setabutr (1980, p. 78).

[107]It must be noted that under English law, actions in respect of torts are frequently brought for the sole purpose of asserting a right (as in actions for trespass) or merely for vindicating the plaintiff's character (as in actions for libel and slander). Under Thai law, damages are not awarded unless a claim for substantial compensation can be proved; a judgment for nominal damages in an action founded on an unlawful act is therefore impossible, but the relief granted in such an action may, as shown above, consist in restitution in kind.

[108]The expression *siti yang neung yang dai ko dee* is somewhat freely translated by 'right similar to the right of ownership', but the translation is warranted by the interpretation put on the original words by the authoritative legal tribunals and textbook writers.

of individuals or to remove property in certain events), or with the consent of the injured person.[109]

Besides this first category of liability, one can distinguish a second category of delictual liability which may give rise to a claim for damages. It includes any unlawful act done wilfully or negligently that is contrary to an express provision of law and causes damage to another person. It follows that any unlawful act done wilfully or negligently by means of which an express provision of law intended for the protection of others is infringed gives rise to a claim for damages under Section 422 of the Civil and Commercial Code. The acts coming under this category are acts infringing absolute rights protected by statutory provisions, but not included in the specified rights mentioned above (e.g. acts wilfully or negligently disturbing possessory rights or the enjoyment of servitudes, both rights being protected by express provisions of law).

In the light of these considerations, it ought to be clear that actions for personal injuries, false imprisonment, and trespass relate to the class of acts described above under the first category, as also do actions for the infringement of rights relating to firm names, trademarks, and similar rights, in so far as they are not protected by special statutes. Actions for deceit, misappropriation, wrongful conversion, and defamation relate to the class of acts described under the second category, in so far as the damaging act is dealt with by criminal law.[110]

2.6.3 Capacity to Commit Unlawful Acts

As mentioned above, the capacity for committing unlawful acts is regulated by rules entirely distinct from the rules governing the capacity for juristic acts. Under Section 429 of the Civil and Commercial Code, a person, even though incapacitated, on account of minority or unsoundness of mind, is liable for the consequences of his unlawful act. The parents or his guardian is jointly liable with him, unless they can prove that proper care in performing their duty of supervision has been extended. It follows that if the person responsible for supervision can demonstrate the use of proper care, no damages are payable.[111]

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[109]As a general rule, the incidence of liability is constrained by the defence of consent as enshrined in the maxim *violenti non fin iniuria* (i.e. an unlawful act is not committed against a consenting person). The consent of the injured person is, however, inoperative if, having regard to the nature of the act, the giving of such consent is *contra bonos mores*.

[110]On this theme, see especially Maneesawat (1993, p. 144).

[111]In English law, parents are not liable, as was the case in ancient Rome, for their children's unlawful acts, though they may be liable for their own negligence in failing to supervise or train their young children, where the absence of supervision or training has led them to cause damage to others. However, in the case of older children, a parent can be vicariously liable for the unlawful acts of children employed as servants or agents on ordinary principles of vicarious liability. On this point, see Prachoom (2015, p. 72).

Thai rules as to the capacity for unlawful acts appear to be very similar to English law. Under English law, neither infancy nor any other ground of incapacity affects the liability for torts, but as an unlawful act must be committed either wilfully or negligently, a person, who, without any default on his part, is in a mental condition—whether permanent or temporary—which prevents him from foreseeing the probable consequences of any particular act, is not under any circumstances liable for the consequences of such act. It follows that a party, whatever his age or general mental condition may be, is not released from his liability for damaging acts, unless he can prove that the mental condition under which the particular act was done made him incapable of foreseeing its probable consequences.

2.6.4 Parties Entitled to Claim Compensation

An unlawful act frequently injures persons other than the immediate victim. The immediate victim is always entitled to compensation but Thai law also recognizes the rights of specific classes of persons. Firstly, Section 443, paragraph 1, of the Civil and Commercial Code states that in the case that the death does not ensue immediately, compensation must include all the expenses for medical treatment incurred by a victim who later dies. This is to say that the person whose duty is to pay the funeral expenses of a person killed by an unlawful act is entitled to the reimbursement of such expenses.

Secondly, under Section 443, paragraph 3, of the Civil and Commercial Code, any person entitled to be maintained by a person killed by an unlawful act, or who would have been so entitled if the death had not taken place (including any *nasciturus* in existence, but unborn at the time of such death) has a claim to be compensated for the loss of maintenance during the time during which the right to maintenance would have continued to be operative, having regard to the probable duration of the life of the person killed by such unlawful act.[112]

Thirdly, any person entitled by law to the services of a person killed or injured by an unlawful act is entitled to compensation in respect of the loss of such services. According to Section 445 of the Civil and Commercial Code, any party entitled to the services of the victim of the unlawful act may claim compensation with regard to the loss of such services.[113] Thus, if the injured person was bound by law to perform a service in favour of a third person in his household or industry, the person bound to make compensation must compensate the third person for the loss of such service. The rights to which the classes of persons severally mentioned above are entitled in the event of the death of the direct victim of an unlawful act are of course entirely distinct from any rights which his heirs may have as representatives

[112]The compensation is payable by means of periodical payments.

[113]Minakanit (2012, p. 103).

of his estate. Thus, a right to compensation for the medical expenses, and loss of income during the period preceding the death, may be asserted by the heirs concurrently with the claims of persons injured by loss of maintenance or loss of services.

The fact that the injury to the indirect victims of the unlawful act is treated as an independent tort, giving rise to a separate claim for compensation, would logically lead to the conclusion that the contributory default of the direct victim does not bar or reduce the claims of such indirect victims. It is, however, expressly provided that such contributory default has the same effect on the claims of the indirect victims, as on those of the direct victim, or of his heirs (Section 442, Civil and Commercial Code).[114]

It must be noted that the right to compensation for pecuniary loss does not become extinguished either by the death of the wrongdoer or by the death of the injured person but the right to damages for physical or mental suffering, which is recognized in certain classes of cases, does not pass to the heirs of the injured person unless it has been acknowledged by contract or an action on it has been commenced before the death (Section 446, Civil and Commercial Code).[115]

2.6.5 Defamation

An important rule of delictual liability is laid down for the protection of a person's reputation and the integrity of his name. The overall category for these delicts is defamation. Defamation in Roman law was subsumed under the general delict of *iniuria* which rendered actionable contumelious behaviour towards others. It was irrelevant whether the defamation was written or spoken. In Thai law, defamation is defined under Section 423, paragraph 1, of the Civil and Commercial Code which states that 'A person who untruthfully asserts or circulates a fact that is qualified to endanger the reputation or the name of another or his earnings or prosperity in any other manner, is bound to make compensation for any damage which is occasioned by such acts'.

Wilful defamation is an offence against the criminal law (Section 326, Criminal Code), and therefore also an unlawful act entitling the injured party to compensation. This, where no pecuniary damage is inflicted, means restitution. Where pecuniary damage is inflicted, the injured party may either claim a judicial penalty not exceeding 200,000 baht (Section 328, Criminal Code), or damages. Negligent defamation is not, as a general rule, deemed an unlawful act, but a person, who makes or publishes an untrue statement which is likely to injure the credit of another or to curtail his earning powers, is liable to compensate such other. Ignorance of the untruth of the statement is no ground of excuse if such untruth would have been discovered

[114]See in particular Thingsapati (1984, p. 177).

[115]On this point, see Pramod (1965, p. 259).

by the exercise of proper care.[116] The compensation must not exceed the pecuniary loss and ought not to include a solatium for wounded feelings or annoyance.[117]

In the case that a statement is defamatory, it is *prima facie* actionable without proof of special damage. The main defences to an action for defamation other than consent of the party defamed include privilege, fair comment, and justification. It is generally held by the courts that privilege constitutes an absolute defence against defamation. Thus, statements in parliament, documents published under the authority of the parliament or any committee, as well as the publication of a document issued for the information of the public by or on behalf of the government are covered by absolute privilege. Another defence to avoid liability is fair comment. Fair comment entitles a person to express an opinion or otherwise comment on matters of public interest. The meaning of the expression 'matter of public interest' varies depending on the circumstances and has been interpreted widely by the courts as applying to works of art, books, songs, poems, paintings, and movies. Here, the defendant's communication must be a comment or a statement of opinion to be deemed fair and in good faith. Justification is another important defence to an action for defamation. If the person making, or the person receiving, the libellous statement is justifiably interested in the information conveyed thereby, no compensation can be claimed if the person making the allegation was ignorant of its untruth. In this regard, Section 423, paragraph 2, of the Civil and Commercial Code states that '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'.

Under English law, there are two types of defamation: oral defamation is slander; written defamation is libel. Libel is an unlawful act which subjects the defamer to tort liability without proof of special damages. Slander, on the other hand, does not subject the defamer to liability unless there is proof of special damages.[118] The principal characteristics differentiating Thai from English law, as to claims for compensation arising in cases of defamation may be summarized as follows: (1) there is no distinction in Thai law between slander and libel;[119] (2) no action lies

[116]It is no defence to an action for defamation to declare that the communication was not in fact understood in a defamatory sense or that the defendant did not know that the communication was false. The essential element is assertion, publication, distribution, or circulation of defamatory matter regarding the plaintiff without any justification or excuse.

[117]The basis of the Roman liability was different from that of Thai law: it rested not on the pecuniary loss but on outrage to the feelings of the aggrieved party such that it was not necessary to liability that it should have been published to a third party. Thus, an insulting letter to a person would seem to be an *iniuria* even though no one else saw it. See Prachoom (2015, p. 407).

[118]See Prachoom (2015, p. 402).

[119]The distinction has a practical advantage in that proof of libel is more straightforward than that of slander, and, had Thai law embraced it, it would have alleviated the plaintiff's burden of proof in many cases. In Roman law whether or not defamation was in writing appears to have been indifferent as far as liability was concerned, though it might make a difference when it came to assessing damages. Of course, this cold Roman attitude may have had an influence on the nature of Thai law on defamation. See Prachoom (2015, pp. 406–407).

under Thai law for negligent defamation, unless the plaintiff has suffered pecuniary loss, and no damages can be awarded except in respect of such pecuniary loss; (3) the distinction between absolute and qualified privilege does not exist in Thai law: wilful defamation is not privileged under any circumstances while negligent defamation is excused in every case in which the utterer or the recipient of the defamatory statement had a legitimate interest in its contents.

2.6.6 Rules as to Specific Classes of Unlawful Acts

There is no general rule of Thai law corresponding to the rule of English law, under which a person who brings a dangerous object on to his land is liable in damages, if he fails to use proper precautions for preventing the danger. Specific rules of the Civil and Commercial Code, however, apply as to certain specific sources of danger and regulate the liability of legal persons in respect of danger arising from animals and buildings.

With respect to the liability for damage done by animals, Section 433 of the Civil and Commercial Code states that if damage is caused by an animal, the owner, or the person who undertakes to keep the animal on behalf of the owner is bound to compensate the injured party for any damage 'unless he can prove that he has exercised proper care in keeping it according to its species and nature or other circumstances, or that the damage would have been occasioned notwithstanding the exercise of such care'. It follows that when an animal causes injury to the life or health of a human being, or damage to a thing, any person who would have been entitled to compensation if the damage had been caused by an unlawful act is entitled to claim compensation for such injury from the person keeping the animal, whether there was any default on his part or not. A person so entitled may also claim compensation from any person who was placed in charge of the animal by the person keeping it, unless he can prove that he applied the degree of diligence usual under the circumstances, or that the damaging event could not have been avoided by the application of such diligence.[120]

As regards the liability for damage done by the collapse of a building, Section 434 of the Civil and Commercial Code states that 'If by the collapse of a building or other erection, or by the severance of any part thereof from the main part, the life or health of a human being is injured, any person who would have been entitled to compensation if the damage had been caused by an unlawful act may claim compensation for such injury from any person who is liable in respect thereof'. Thus, the proprietary possessor of the parcel of land on which the building or erection is situate is liable if the damaging event was caused by defective construction, or insufficient repairs, unless he can prove that he applied the diligence usual under the circumstances for averting the danger. If any person other

[120]As to the apportionment of the liability between the several persons liable to compensate the injured party see Sect. 2.6.7.

than the possessor of the land is in possession of the building, or erection, by virtue of any right in respect thereof—e.g. by virtue of a heritable building right—he is liable in the place of the possessor of the land.[121]

The special rules stated above do not exclude the general liability for damage to life or health, caused by dangerous animals or defective buildings. Thus, a person injured by reason of the bad condition of a staircase leading to a court of law in which such person had to attend is entitled to damages from the government of the state to which the court belongs if the danger could have been avoided by the application of proper diligence.

Under the general rules, the plaintiff must always prove that the defendant was in default, but under the special rules the liability sometimes arises apart from any question of default on the part of the defendant, and in all cases where the application of the proper degree of diligence affords a ground of excuse, the defendant must prove that such diligence was applied by him.

2.6.7 Apportionment of Liability Between Several Persons

Where several persons have together committed an unlawful act[122] or are liable under any specific rule of law for damage caused by an unlawful act, they are liable as joint debtors (Section 432, paragraph 1, Civil and Commercial Code). The rules as to contributions between such joint wrongdoers are provided under Section 432, paragraph 3, of the Civil and Commercial Code. More precisely, the Code states that 'as between themselves the persons jointly bound to make compensation are liable in equal shares unless, under the circumstances, the court otherwise decides'.[123]

Where in the case of damage done by animals, or the collapse of buildings, any person other than the person liable under the special rules mentioned above is responsible for the damage (e.g. a builder through whose negligence the building has collapsed); such third party, as between himself and the person liable under the special rules, must bear the whole of the compensation.

It is noteworthy to observe that the rules as to the apportionment of the compensation may in some cases be modified by agreement between the parties.

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[121]It must be added that any person, who by agreement with the possessor undertakes to keep the building or erection in repair or has to keep it in repair by virtue of any right of user vested in him, is liable in the same way as the possessor.

[122]A person by whom the act was incited or assisted is for the purposes of the rule deemed a person acting together with the person doing the act (Section 432, paragraph 2, Civil and Commercial Code).

[123]As can be seen, in Thai law, as is the case generally in English law, the primary aim of compensation is to give the aggrieved party compensation for damage unlawfully inflicted on him. By contrast, a Roman delict was imbued with the idea of vengeance and the action was primarily for a penalty. Thus, if a delict was jointly committed by two or more persons, each was separately liable for the full amount; and even if there was only one wrongdoer, the 'fine' imposed might and frequently did exceed greatly an estimate of the damage sustained. See Prachoom (2015), p. 397.

It follows that a party who undertakes the care of an animal or of a building may agree with the person keeping the animal, or the possessor of the buildings, to undertake the whole of the liability.

2.6.8 Prescription

A claim to compensation for damage caused by an unlawful act is barred after the lapse of one year, reckoned from the time at which the party entitled to compensation becomes aware of the damage, and of the identity of the party liable in respect thereof. In particular, Section 448 of the Civil and Commercial Code states that actions arising out of unlawful act are prescribed 'by the lapse of one year from the day when the unlawful act and the person bound to make compensation became known to the victim, or ten years from the day when the unlawful act was committed'. However, if the damages are claimed on account of an act punishable under the criminal law for which a longer prescription is provided, the longer prescription will apply.

A party liable to give compensation must, even after the lapse of the period of prescription, restore any benefit acquired by the commission of the unlawful act, in accordance with the rules as to unjustified benefits. If a person by means of an unlawful act acquires a personal claim against another (e.g. if he extorts a promise by fraud), the latter may refuse satisfaction of the claim, even after the date at which the right to rescind the transaction has become barred by prescription.

2.7 Obligations Imposed by Surrounding Circumstances

2.7.1 Introductory Considerations

In all systems of law certain classes of obligations are recognized which neither result from a juristic act nor from an unlawful act done by the debtor, but which are imposed upon him where, owing to some accident, mistake, or other circumstance, he becomes entitled to a benefit at the expense of another. Under Roman law, the obligations arising by reason of *negotiorum gestio* and those enforceable by the various kinds of *condictiones* are instances of such classes of obligations. Under English law, they are not so common, but the actions 'for money had and received' and 'for money received to the use of another' may be referred to as instances of their recognition.

The rules as to 'unjustified benefits' and 'voluntary services' forming part of the Thai law give a general recognition to the principle that a person benefited by accident or mistake at the expense of another is bound to restore such benefit or to compensate the other for his sacrifice. The rules as to obligations arising by community of interests and by estoppel illustrate the same principle in a less direct way.

2.7.2 Management of Affairs Without Mandate

The claims of persons rendering voluntary services are recognized by the rules as to the 'management of affairs without mandate' (*jat gaan ngaan nok sang*), which correspond to the rules of Roman law as to *negotiorum gestio*.[124] A person who volunteers his services has, in certain events, a claim for reimbursement of outlay, but under the specific rules of the Civil and Commercial Code a reasonable reward may be claimed, as well as the reimbursement of outlay. English law, in contrast, maintains the maxim that no one can make himself the creditor of another against his will, and therefore does not generally give a claim for the reimbursement of outlay voluntarily incurred, though such outlay may have been beneficial to another.

A person, who conducts business on behalf of another without his request, and without being otherwise entitled to act on his behalf, is described by the Thai expression *poo jat gaan*, the person for whom he acts being described as the *dtua gaan*, which expressions in the further course of this treatise will, respectively, be reproduced by the 'English terms' 'voluntary agent', and 'involuntary principal'.

According to Section 395 of the Civil and Commercial Code, a person who takes charge of an affair for another without having received mandate from him or being otherwise entitled to do so in respect of him, has the obligation to conduct the involuntary principal's business in accordance with his interest, and pay regard to his actual or presumable wishes. This applies to all those situations where a person has conducted someone else's affairs without authority to do so, or rendered him some other service without a precedent mandate. If the act was not intended to be an act of kindness or benevolence but is an act apt to establish a legal relationship, the voluntary agent is entitled to the reimbursement of his outlay unless it can be shown that at the time of his intervention he did not intend to claim reimbursement.[125] This is to say that the voluntary agent is entitled to reimbursement of outlay in every case in which the intervention was in the principal's interest, and in accordance with his expressed or presumable wishes, or was ratified by him. In every other case, the voluntary agent has no claim in respect of his intervention, except in so far as the involuntary principal is liable under the rules as to

[124]Under Roman law, *negotiorum gestio* was where one person managed the affairs of another without the authority of the latter, e.g. the *negotiorum gestor* repaired his friend's house during the absence of the latter from Rome to prevent the property from falling down. The relationship is akin to *mandatum*, but differs in that the *mandatarius* had previous authority. In a proper case of *negotiorum gestio,* however, the person who benefited by the act done was liable, although he had neither authorized nor ratified the act and could be sued by the *actio negotiorum gestorum contraria* for the expenses or other liabilities which the *negotiorum gestor* had incurred in doing the work. On this point, see Leage (1906, p. 310).

[125]If a person who believes that he is acting on his own behalf is in fact acting on behalf of another, he is not entitled to the rights, or subject to the duties of an involuntary agent. Similarly, when a person transacts any business as his own knowing it to be the business of another, the person on whose behalf he is acting may at his option assume or decline the position of an involuntary principal.

unjustified benefits. Correspondingly, the voluntary agent is liable for wilful default or negligence in the same way as if he were acting under a contract involving the transaction of business for another.[126]

It is clear that, as far as the obligations of the manager of affairs without mandate are concerned, the relevant provisions relating to the contract of agency in the Civil and Commercial Code are *mutatis mutandis* applicable, especially after the principal's ratification of the manager's action.[127] Thus, the voluntary agent must, as soon as practicable, give notice of his intervention to the involuntary principal, and must, unless there is danger in delay, await the reply to such notice before proceeding any further. However, if the voluntary agent's intervention had for its object the prevention of an urgent danger threatening the involuntary principal, the voluntary agent is not liable for any default extending beyond wilful default and gross negligence (Section 398, Civil and Commercial Code).[128]

Furthermore, the voluntary agent has the obligation to conduct the principal's business in accordance with his actual or presumed will. If the voluntary agent's intervention was in opposition to the actual or presumable wishes of the involuntary principal, he is answerable for accidental damage (Section 396, Civil and Commercial Code).[129] Nevertheless, the fact that the voluntary agent's intervention is opposed to the involuntary principal's wishes is disregarded in any case in which failure to intervene would have prevented the performance at the proper time of a duty imposed on the principal in the public interest, or incumbent upon him with reference to the maintenance of any relative.

The fact that the voluntary agent is under a mistake as to the identity of the involuntary principal does not affect the mutual position of the parties. The person on whose behalf the intervention is made is entitled to the rights and subject to the duties of an involuntary principal, even if the voluntary agent intended to act for another person.

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[126]If the voluntary agent is under incapacity or restricted capacity he is not liable for any default on his part, except in so far as any liability arises under the rules as to unlawful acts or as to unjustified benefits.

[127]On this point see Prachoom which observes that the provisions of the Thai civil and Commercial Code about the management of affairs without mandate faithfully follow 'the practice of Roman law in intimately linking *negotiorum gestio* with the contract of *mandatum* especially after *gestio* had been ratified. Thus, by ratifying the *gestor*'s act, the *dominus* put himself in relation to the gestor in the same position as if he had given an antecedent mandate so as to give the *gestor action mandate contraria* and, after such ratification, the *dominus* was debarred from subsequently calling into question the usefulness of *gestio*'. Prachoom (2015, p. 370).

[128]As far as the standard of care is concerned, the voluntary agent has to exercise due care expected from a reasonable person and is therefore accountable for negligence. This duly reflects the Roman *exacta diligentia,* the care that a *bonus paterfamilias* habitually exhibited in his own affairs, the Roman *bonus paterfamilias* being the counterpart to the modern 'reasonable person'. However, since this is an emergency, he is in an exceptional situation: he is, as was the case with the Roman *gestor*, liable only for wilful default and gross negligence which could be subsumed under the broad heading of the Roman *dolus.* For a detailed analysis on this point, see Prachoom (2015, p. 372).

[129]On this point, see Sodpipan (2002, p. 76).

2.7.3 Unjustified Benefits

An 'unjustified benefit' (*laap mee quan daai*) is a benefit received without a sufficient legal ground (Section 406, Civil and Commercial Code). The expression 'legal ground' is the equivalent of the Roman *causa*, which has a more extensive meaning than the English term 'consideration' in its usual narrower sense. Thus, the *animus donandi* is a good legal ground, though it is not a 'valuable consideration'. Any person who receives a benefit at the expense of another without a sufficient legal ground must restore such benefit to the person at whose expense it was received.

Where the benefit was received on a sufficient legal ground, which has subsequently ceased to operate, or by virtue of a juristic act the purpose of which has not been accomplished, the person at whose expense such benefit was received has a right to the restoration of the *status quo ante* in the same way as if no sufficient legal ground had ever been in existence. If it was, however, known to him *ab initio* that the accomplishment of the purpose of the transaction was impossible, or if such accomplishment was prevented by any unfair conduct on his part, he forfeits his claim to restoration. To illustrate, suppose A makes a gift of a house to his son B. B is guilty of conduct entitling A to revoke the gift. Upon the exercise of such right A is entitled to claim the retransfer of the ownership by reason of the fact that the legal ground, on which such ownership was transferred to B, has ceased to operate. To take another example, suppose A pays B for the use of a window on a date on which the wedding procession is to pass it. The procession does not pass, owing to the groom's illness. A may recover the amount paid by him because the purpose of the hiring agreement under which it was paid was not accomplished. If A knew that the procession on the day in question could not possibly take place, he has no right to recover the amount paid by him.

The general rule as to unjustified benefits stated above is supplemented by some special rules which apply to the recovery of objects delivered in discharge of a non-existent obligation. Specifically, a person who pays money or delivers an object under the mistaken impression that he is discharging an obligation may, under the general rule stated above, recover such money or such object on finding that the assumed obligation was non-existent (Section 413, Civil and Commercial Code). He has the same right if, at the time of making the payment or delivery, he was in a position to resist a claim for the performance of the obligation intended to be discharged by means of any defence or set-off other than the plea of prescription.[130]

The mere fact that the performance of the obligation was not due at the time when the payment or delivery was made does not entitle the party making it to recover the money or object paid or delivered prematurely, or to demand interest for the intermediate period. The right to recover any money or object paid or

[130]This rule corresponds to the English rule as to the recovery of money paid under a mistake of fact, but under the Thai law other objects may be recovered as well as money, and no distinction is drawn between a mistake of fact and a mistake of law.

delivered for the purpose of discharging an obligation which in fact was non-existent or unenforceable is excluded if the payment or delivery was made with the knowledge of the invalidity of the obligation or of the existence of a valid defence, or in compliance with a moral duty.

Moreover, if a person makes a disposition of a thing or right which is binding upon the true owner, though unauthorized by him, such true owner is entitled to claim from the person making such unauthorized disposition any benefit received in consideration thereof or in connexion therewith.[131] However, in the case that the person by whom the unauthorized disposition was made did not himself receive any benefit in return therefor or in connexion therewith, any other person by whom a direct benefit was derived in consequence of such disposition is liable in his place. If any payment or delivery was made to a person who was not entitled thereto, but with the result that the person making such payment or delivery was duly discharged thereby the person who was entitled to such payment or delivery may claim from the person by whom it was received the surrender of all benefits derived therefrom.[132]

With regard to the claims for the return of payments and deliveries made in consideration of prohibited acts, Section 411 of the Civil and Commercial Code states that a person who has made an act of performance, the purpose of which is contrary to legal prohibition or good morals, cannot claim restitution. Thus, if the purpose of the transfer or delivery of any object to another is of such a nature as to constitute a prohibited act, or an act *contra bonos mores*, the party making the transfer or delivery has no right to recover such object. If any obligation is incurred for any purpose of the nature described, the party incurring such obligation may claim to be released therefrom, even if both parties were *in pari delicto*. An example will clarify this point. Suppose A receives 10,000 baht from B for the disclosure of a secret chemical process. The disclosure was a gross breach of confidence, and therefore *contra bonos mores*. In this case, B has no claim for a return of his payment. If instead of paying the 10,000 baht, he had promised to pay them at a future date, he might have refused such payment and claimed to be released therefrom in any event.

In the light of these considerations, it ought to be clear that the rules as to 'unjustified benefits' are intended to prevent the person concerned from reaping an unmerited advantage at the expense of another, but it is not their object to indemnify the claimant. For this reason, the person having to return the benefit is not *ab initio* bound to exercise any diligence as to the preservation of any object which he may be liable to return. If such object is destroyed before he becomes aware of

[131]If the disposition was in the nature of an unlawful act, the true owner is of course entitled to full compensation under the rules as to unlawful acts, but if the act was done in good faith and without negligence, nothing more can be claimed than the restitution of any benefit received by the transaction. For instance, if a public officer without any default on his part sells goods not belonging to the judgment debtor to a buyer, who in good faith acquires the ownership, the true owner has a claim against him only in so far as the proceeds of sale are in his hands.

[132]For a detailed analysis on this point, see Setabutr (2006, p. 192 ff).

his duty to return it, the loss falls on the claimant. The recipient has to return the object received by him, and all profits received therefrom, as well as any object received in its place or by way of compensation for its loss or destruction. In the case that the return of any object is impossible, its value must be paid to the claimant, in so far as the benefit of such value is still retained by the claimant.[133]

The restriction as to the recipient's liability ceases to operate after action brought. From that time the stricter liability brought about under the general rules as to the effect of *lis pendens* is imposed upon the recipient. In a number of circumstances, such stricter liability begins to operate at an earlier date. In particular, when the recipient, on the receipt of the benefit, is aware of the absence of a legal ground the stricter liability begins as from the receipt of the benefit. If he becomes aware of the absence of a legal ground at some later date, the stricter liability begins as from such later date. Similarly, where the acceptance of the benefit infringes a legal prohibition or is *contra bonos mores*, the stricter liability begins as from the time of such acceptance. In the case that the legal ground originally existing ceases to operate, or where the purpose of the act by which the benefit was conferred is not attained, the recipient comes under the more stringent liability as from such time.[134] In all these cases, interest cannot be claimed from a period anterior to the time at which the right to recover the benefit is established. The return of profits can be demanded in so far only as the recipient is still benefited thereby at such time.

If the recipient of a benefit transfers such benefit gratuitously to another, the transferee becomes liable in the place of the original recipient, in so far as the liability of the latter is excluded by reason of the transfer.[135]

The claim to recover any unjustified benefit, or to be released from an obligation incurred without a sufficient legal ground, is subject to the ordinary rules as to prescription, but the performance of an obligation incurred without a sufficient legal ground may be refused, notwithstanding the fact that the claim to be released from such obligation is barred by prescription.

2.7.4 Obligations Created by Estoppel

The principle of 'estoppel', which plays a very important part in English law, is not known as such in Thailand, but certain classes of obligations recognized by

[133]If the recipient has consumed the value, he is deemed to have retained its benefit.

[134]This rule applies only if at the time of the receipt of the benefit the recipient was aware of the possibility of the termination of the legal ground, or of the uncertainty of the attainment of the purpose.

[135]If at the time of the transfer the original recipient was under the stricter liability, the remedy is available against him only; but as long as the stricter liability does not operate, the recipient ceases to be liable as soon as he transfers the object to another, except in so far as he receives any benefit by reason of the transfer or retains the benefit derived from the use of the object.

Thai law are based on principles similar to those of English law of estoppel, and may conveniently be classed together under that head. According to the English law, a person who induces another to act on the assumption that a certain state of facts is in existence must, in the cases to which the rules as to estoppel are applicable, allow the relations between him and such other person to be regulated by the 'conventional state of facts' thus created, and cannot, as between himself and such other person, derive any advantage from the circumstance that the real state of facts was different.

The Thai law in the cases in which the same principle is applied does not go quite so far, but it gives a right to the party who relies on the existence of a state of things, which does not in fact exist, to receive compensation from the party whose representation caused his mistaken assumption. Specifically, where a declaration of intention is void on the ground of not having been intended seriously, or is avoided on the ground of mistake, the party to whom the declaration was communicated is entitled to compensation for the damage suffered by him, owing to his reliance on the effectiveness of the declaration. If the declaration was one not required to be communicated to another party, any person suffering damage by relying on its effectiveness is entitled to compensation. By the same token, where a contract is void on the ground that it was is impossible *ab initio*, or on the ground of immorality or illegality, the party who at the time of the apparent formation of the agreement was aware of its nullity must compensate the other party for any damage suffered by his reliance on the validity of the agreement unless the nullity was, or ought to have been, known to such other party.

The damages recoverable in either case are damages for the 'negative interest' in the effectiveness of the declaration or the validity of the agreement.

2.7.5 Obligations and Rights of Finders of Lost Objects

A person who finds an object lost by another and takes it into his possession is subject to the duties and entitled to the rights provided under the Civil and Commercial Code. In particular, the finder of an object must give immediate notice to the loser, or to any person entitled to receive the lost object. Where this cannot be done, notice must be given to the competent police authority (Section 1323 Civil and Commercial Code). In any case, the property found must be kept with reasonable care until delivery.[136] If, after the lapse of a year from the communication of the notice to the police authority, no claim has been lodged with such police authority, the identity of the loser or owner remaining unknown to the

[136]The finder must keep the object in his custody unless he prefers to deliver it to the competent police authority, or unless the police authority requires him to deliver it. The finder, however, is not liable for any damage to the found object caused otherwise than by his wilful default or gross negligence.

finder, the finder acquires the ownership of the found object or of its proceeds of sale, unless he waives his claim thereto.

In the case that the original owner subsequently claims the property, the finder is entitled to a reward. In this respect, Section 1324 of the Civil and Commercial Code states that 'a finder of lost property may claim from the person entitled to receive it a reward of ten per cent of the value of the property up to thirty thousand baht, and five per cent on the additional value'. However, if he delivers the property to the police or other competent official, two and a half per cent of the value of the property must be paid as a fee to the government in addition to the reward.[137]

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[137]On this point, see Pramod (1965, p. 298).

Chapter 3
Specific Contracts

3.1 Sale

3.1.1 The General Concept of the Contract of Sale

Contract of sale (in Thai: *sanyaa seu kaai*) is the most practically important of all contracts. Under Section 453 of the Civil and Commercial Code, a contract of sale is defined as an agreement whereby a person, called the seller, transfers to another person, called the buyer, the ownership of property, and the buyer agrees to pay the seller a price for it. Under English law, a sale of goods has the effect of transferring the property in the goods to the buyer. Under Thai law, every sale relating to an existing and specified object of which the seller at the time of the sale is the owner has the same effect. According to Section 458 of the Civil and Commercial Code, the ownership of the property sold is transferred to the buyer from the moment when the contract of sale is entered into. In both countries, a 'sale' must therefore be distinguished from an 'agreement to sell'.

A sale may refer to movable or immovable things, or to rights. It is not a necessary condition that the seller should, at the time of the sale, be the owner of the purchased object, or that the purchased object should at that time be already in existence.[1] In case of sale of unascertained property, however, the ownership is not transferred until the property has been numbered, counted, weighed, measured, or selected, or its identity has been otherwise rendered certain (Section 460, Civil and Commercial Code). Similarly, if a contract of sale is subject to a condition or to a

[1] An agreement by which a contractor undertakes to manufacture or otherwise produce a specified object from material supplied by him is hire of work contract, but comes under all the rules relating to sales. On this point, see below Sect. 3.5.

A. Stasi, *General Principles of Thai Private Law*,
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time clause, the ownership of the property is not transferred until the condition is fulfilled, or the time has arrived.[2]

The price is another essential element of the sale contract. It must be specified in monetary terms and must be complete, certain, or readily ascertainable.[3] In this respect, Section 487 of the Civil and Commercial Code disposes that the price of the property sold may be fixed by the contract, or may be left to be fixed in a manner thereby agreed, or may be determined by the course of dealing between the parties. When the price is not fixed as aforementioned, there is a presumption that the parties intended to contract for a reasonable price.

In the event of the purchase price not being paid at the stipulated time, interest at the rate payable in an ordinary case of *mora solvendi* runs from the date at which the right to the profits of the purchased thing passes to the buyer. If the purchase price is, by agreement between the parties, payable at a later date, interest runs from that date.[4]

For a sale contract to be valid, a special form is necessary only if the object of the contract is immovable property. Specifically, Section 456, paragraph 1, of the Civil and Commercial Code provides that a sale of immovable property and the real rights to immovable property are void unless the sale is made in writing and registered by the competent official. According to Section 1 of the Land Code, land includes mountains, hills, streams, ponds, canals, swamps, marshes, waterways, lakes, islands, and seacoast. It follows that the sale of houses, buildings, land, or roads and the real rights attached to them must be made in writing and registered at the Land Office in the province in which the property is situated. Under Section 456 of the Civil and Commercial Code, 'ships or vessels of six tons and over, steam launches, motorboats of five tons and over, floating houses, and beasts of burden' are treated as immovables, and thus follow the rules on the sale of immovables.

The sale of movable property is neither subject to particular formalities nor to any specific publicity requirements. A sale contract of movable property for a price of 20,000 baht or more, however, is not enforceable by action unless there is some written evidence signed by the party liable, partial payment is made, or partial performance has taken place.

3.1.2 The Rights and Duties of Parties to a Contract of Sale

Pursuant to Section 461 of the Civil and Commercial Code, the buyer is bound to pay the purchase money, and, if the purchased object is a thing, to accept the delivery of such thing in accordance with the terms and conditions of the contract.

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[2]See on this topic Poonyapun and Sathaman (1981), p. 66 f.

[3]If the price is expressed in different forms (e.g. services or goods), then it will not be a sale contract, but some other type of contract (e.g. hire of services or exchange).

[4]For more detailed discussion on this topic, see Hutasingha (1977), p. 112.

However, the buyer is entitled to suspend the payment if he is threatened with an action of mortgage or by any other claim on the property sold until the seller has ended the threat (Section 489, Civil and Commercial Code). There is an exception to this rule when the seller has decided to give proper security to the buyer.

With regard to the obligations of the seller, Section 461 of the Civil and Commercial Code states that the seller of a movable or immovable thing is bound to deliver such movable or immovable thing to the buyer. Delivery may be made by doing anything which has the effect of putting the property at the disposal of the buyer. On the contrary, if the object of the sale contract is a right, the seller is bound to cause such right to be vested in the buyer, and, where the right, involves the possession of a thing, to deliver such thing to the buyer.[5]

The seller must give full information to the buyer as to the legal facts relating to the purchased object, including in the case of the sale of land, full information as to the boundaries, privileges, charges, and burdens. He must also deliver all documents of title relating to the purchased object which are in his possession and relate solely to such object. In so far as they relate to other matters, a publicly certified extract of the part relating to the purchased object must be delivered.

The seller is bound to make full disclosure of defects of title,[6] and of defects in respect of essential qualities. It must be pointed out in this context that specific agreement between parties may exclude or limit such warranty in case of defects and eviction (483, Civil and Commercial Code). However, under Section 485 of the Code, non-liability clauses cannot exempt the seller from the consequences of his own acts or of facts which he knew and concealed. In other words, an agreement excluding or restricting the warranty of title or of essential qualities, which is otherwise implied by law, is inoperative if the seller, with intent to deceive, conceals a defect as to these (Section 485, Civil and Commercial Code). This means that a non-liability clause cannot exempt the seller from the consequences of his own acts or of facts which he knew and concealed.

The buyer has no claim for breach of warranty in respect of defects which were known to him on the formation of the agreement,[7] but the fact that he was aware of the existence of any encumbrance does not take away his right to claim its removal.

In the same way as under English law, persons placed in a fiduciary relation to the parties for whose benefit a sale is effected (auctioneers, mortgagees, pledgees, and the like), are not allowed to purchase except with the assent of the beneficial owner. Where in such a case a purchase has been effected without the required authority, the rules as to ratification are the same as in the case of the act of an unauthorized agent. Where the assent is not obtained, the sale is inoperative, and, in the event of a second sale being effected, the unauthorized buyer is liable for

[5]For example, the seller of a claim secured by pledge is bound to deliver the pledged object.

[6]The buyer is not bound to inquire as to defects of title; but questions on such defects do not arise in the same way in Thailand as they do in England, owing to the system of land registration.

[7]Defects of quality of which the buyer would have become aware, but for his gross negligence, are treated as defects which were known to him, unless they were fraudulently concealed by the seller.

the costs of the abortive sale. If the amount of the proceeds of sale obtained in the effective sale is less than the amount which would have been obtained if the abortive sale had been effective, he is liable for the deficiency. He may also be liable for further damages under Section 422 of the Civil and Commercial Code.

It must also be pointed out that the rules as to the duties of sellers and buyers, and as to warranty of title and quality, are, *mutatis mutandis*, also applicable to exchanges and other agreements for the alienation or hypothecation of property for valuable consideration (e.g. agreements for transfer of property by way of compromise, or in consideration of services, agreements to pledge or charge).

3.1.3 The Liabilities of the Seller

A seller, as shown above, is bound not only to deliver the sold object, but also to cause its ownership to be transferred to the buyer. In order to protect the buyer against any eviction, Section 475 of the Civil and Commercial Code aims at assuring a peaceful possession of the sold good to the buyer. It provides that the seller is liable for the consequences of any disturbance caused to the peaceful possession of the buyer by any person having a right over the property sold which existed at the time of sale or by the fault of the seller. Thus, the buyer is entitled to acquire the sold object free from all encumbrances other than those in the nature of public charges.[8]

In the case of the sale of an obligatory right, the seller guarantees the existence of the right. In case the right is embodied in a negotiable instrument, he also guarantees that no application for an order declaring such negotiable instrument to be inoperative is pending.[9]

The warranty against eviction includes a warranty of title and warranty against encumbrances. Thus, the seller is liable if, by reason of eviction, the buyer is deprived of the whole or part of the property sold, or if the property is subject to a right, the existence of which impairs its value, fitness, use, or benefit, and of which the buyer had no knowledge at the time of sale. In other words, in the case of eviction or threatened eviction, the buyer is entitled to the return of the purchase price as well as compensation for judicial expenses and damages.[10] According to

[8]Where the object of the sale is an immovable, a ship or vessel of six tons and over, a steam launch or motor boat of five tons and over, a floating house or a beast of burden, the seller must at his own expense procure the cancellation of all encumbrances which have remained on the register though they have ceased to be effective. A hire agreement is not considered an encumbrance according to Thai law. On this point, see Chumwisoot (1992), p. 76.

[9]In the absence of an express stipulation, the seller does not guarantee the solvency of the debtor; where such a stipulation exists, it is presumed to apply to the debtor's solvency at the date of the assignment.

[10]Under English law, the seller's duty to deliver or transfer the purchased object, free from any defect of title or encumbrance, is more in the nature of a condition than of a warranty. More precisely, under English law, an agreement for the sale of goods contains an implied condition as to the seller's title, and an implied warranty of quiet possession and freedom of encumbrances.

Section 476 of the Civil and Commercial Code, however, the seller is not liable for a disturbance caused by a person whose rights were known to the buyer at the time of sale. This is to say that the buyer cannot claim damages or refund of the price paid if he has knowingly and dishonestly purchased property belonging to another.[11]

In the absence of a contrary agreement, the seller of a thing is bound to warrant that, at the time when the risk passes to the buyer, the purchased thing is free from defects impairing either its value or its fitness for its ordinary purposes, or for the purposes appearing from the agreement of sale, and that it has the qualities promised by such agreement.[12] In this respect, Section 472 of the Civil and Commercial Code disposes that in the case of any defect in the property sold which impairs either its value or its fitness for ordinary purpose, or for the purpose of the contract, the seller is liable. This applies whether the seller knew of the existence of the defect or not. By the same token, in the case of a sale of goods by sample, the qualities of the sample are deemed to be qualities promised by the agreement. In the case of defect, the buyer may bring an action in order to rescind the sale contract and recover the price he paid as well as the interest from the date of payment. The buyer is also entitled to recover any expense which he necessarily incurred in obtaining the property, such as customs, tolls, and the like. The action for liability for defect, however, is limited by a short period of prescription. According to Section 474 of the Civil and Commercial Code, an action for liability for defect cannot be entered into later than one year after the discovery of the defect.[13]

It must be pointed out, however, that the warranty against defects does not apply if the buyer knew of the defects of the property at the time of its purchase or should have known if he had exercised such care as might be expected from a reasonable person. Also, the seller is not liable if the defect was apparent at the time of the delivery, and the buyer accepts the property without reservation, and if the property was sold by public auction. Furthermore, Section 483 of the Civil and Commercial Code states that 'the parties to a contract of sale may agree that the seller shall not incur any liability for defects or eviction'. It follows that the parties to a contract of sale may exclude liability for defects or eviction, including liability arising by operation of the law; but such clause has no effect if the seller has, in bad faith, omitted to mention such defects to the buyer. This is to say that a non-liability clause cannot exempt the seller from the consequences of his own acts or of facts which he knew and concealed.

[11]On this point, see Stasi (2016), p. 87.

[12]In the case of the sale by public auction of a thing pledged to or charged in favour of the seller, no warranty of essential qualities is implied, if the fact that the seller is selling as pledgee or mortgagee is expressly mentioned.

[13]On this point, see Stasi (2016), p. 89 ff.

3.1.4 Buyer's Remedies in the Case of Breach of Seller's Duties

The seller, as shown above, is bound to deliver the purchased object and transfer the ownership to the buyer free from encumbrances. If the delivery of the purchased object becomes impossible, or if the seller as regards such delivery is in *mora solvendi*, the buyer, as a party to a reciprocal agreement, is entitled to the remedies available in the particular event under the general rules mentioned above.

If, after the delivery or transfer of the purchased object, a defect of title is discovered, the buyer is in the position of a party to a reciprocal agreement which has been partly performed. Therefore, he may exercise the rights available in these events under the general rules if the seller is unable to remove the defect or if he is in *mora solvendi* as to such removal.[14]

As regards the effect of breach of warranty of essential qualities, the ordinary rules applicable in the case of impossibility of performance of a reciprocal agreement apply. The Civil and Commercial Code also provides that in the case of the sale of a generically defined thing the buyer may claim the delivery of a thing free from defects in the place of the thing which has been delivered by the seller. If the thing delivered by the seller was, at the time of the passing of the risk to the buyer, deficient in any specially guaranteed quality, or if the seller, with intent to deceive, has concealed any defect, the buyer may at his option claim damages for the non-performance of the agreement instead of availing himself of any of his other remedies. Where a specific thing at the time of its sale was deficient in any of the specially guaranteed qualities, or where the seller, with intent to deceive, concealed any defect, the buyer may, at his option, either require the seller to consent to a cancellation of the sale or claim damages for the non-performance of the agreement.

In any case in which the thing delivered by the seller is defective, the buyer may, at his option, require the seller to consent to a cancellation of the sale[15] or to a reduction of the purchase price[16] in accordance with the rules mentioned below.[17] As soon as the seller has expressed his consent to the exercise of one of

[14]Owing to the provisions for the protection of buyers in good faith, a question as to defect of title can only arise in the case of stolen or lost movables.

[15]Where several things are sold together, the right of cancellation can be exercised as to such of them only as are defective. If, however, the things so sold together were sold expressly as belonging together, the buyer may cancel the whole sale, and the seller may require him to do so, if he does not avail himself of this right. The cancellation of the sale of the principal thing involves the cancellation of the sale of any accessory, but if any accessory is defective the right of cancellation is confined to such accessory.

[16]The alternative right to cancellation or reduction of the purchase price on the ground of defects of a quality is derived from Roman law.

[17]The right to the cancellation of the sale of a parcel of land on the ground of deficient quantity cannot be exercised, unless the deficiency is so great that the maintenance of the sale would be useless to the buyer.

the alternative rights, the other alternative right is barred. If the buyer informs the seller of the existence of the defect without mentioning the remedy selected by him, the seller may require him to declare within a specified reasonable period, whether he intends to make use of his right of cancellation, and if he fails to comply with this requirement his right to cancellation is forfeited.

Furthermore, the Civil and Commercial Code provides that if the buyer accepts a defective thing with knowledge of the defect, he cannot exercise any right otherwise available, unless on such acceptance he expressly reserves his rights (Section 479). Thus, the buyer is deemed to have accepted the goods, unless he examines them immediately on delivery and forthwith informs the seller of any defect discovered on such examination, or unless the defect was not discovered on such examination. Where a defect has thus escaped discovery the goods are deemed to be accepted unless the buyer informs the seller thereof immediately after its discovery but the buyer's rights are preserved if the notice of the defect is forwarded at the proper time. It must be pointed out, however, that a seller who, with intent to deceive, has concealed any defect is not entitled to plead the buyer's acceptance of the goods.

Where the buyer makes use of his right to a reduction of the purchase price, the reduced price must bear the same proportion to the original price as the value of the purchased thing in its actual condition bears to the value which it would have had at the time of the sale, if it had been free from defects.[18]

In the case that the purchase price of one of several things purchased together has to be reduced, the aggregate value of all the purchased things serves as the basis of the calculation. If under the sale contract the buyer has to do any act (not consisting in the delivery of fungibles) in addition to the payment of an agreed sum of money, then the value of such act must be considered in estimating the purchase price.

It is noteworthy that under the Civil and Commercial Code, Section 474, no action for liability for defect can be entered later than one year after the discovery of the defect. The periods may be extended by agreement between the parties; in other respects, the ordinary rules as to prescription are applicable, subject to small modifications.[19]

[18]See on this topic Poonyapun and Sathaman (1981), pp. 145–146.

[19]A buyer who is entitled to avail himself of any of the remedies mentioned in the text, and who has not as yet paid the purchase money, may even after the lapse of the period of prescription withhold such payment in so far as he would otherwise be entitled to do so, if prior to the lapse of the period he has done one of the following things: (a) if he has forwarded a notice of the defect to the seller; (b) if he has made an application to the court for the perpetuation of testimony as to such defect; and (c) if in the course of an action between him and a subsequent buyer relating to the defect he has served a third party notice on the seller. The purchase money may be withheld to the extent mentioned, without any such act done by the buyer, if the defect has been concealed by the seller with intent to deceive. See Chumwisoot (1992), p. 122.

3.1.5 Seller's Remedies in Case of Breach of Buyer's Duties

It will be remembered that the buyer's obligations make it incumbent on him to take delivery of the purchased thing when tendered to him, and to pay the purchase money upon such delivery (unless payment at another time has been agreed upon). If he is in *mora accipiendi* as regards the delivery, or in *mora solvendi* as regards the payment, of the purchase money, the seller may under the general rules avail himself of one of the following remedies: (1) he may claim performance of the agreement and compensation for the delay, including interest; and (2) he may rescind the agreement if he can show that the belated performance of the agreement is useless to him, or if time is of the essence under the original agreement or has been made so by notice in the prescribed manner. Where the purchased object has been delivered on the understanding that time should be allowed for the payment of the purchase money, the sale cannot be rescinded on non-payment of the purchase money at the agreed time, unless, in the case of the sale of a movable thing, it was stipulated that the ownership should not pass before payment of the purchase price (*pactum reservati dominii*).

The *pactum reservati dominii* is permissible under English as under Thai law. On the sale of immovables, an English seller's rights go further in theory than a Thai seller's rights, but the difference is not of much practical importance, as an English seller does not as a rule rely on his equitable lien for unpaid purchase money, but secures himself by specific mortgage or charge if the purchase money is not paid contemporaneously with the conveyance of the land.

3.1.6 Some Particular Kinds of Sales

There are some particular kinds of sale contracts with their own specific regulations. The Civil and Commercial Code provides the following types of sale contract: hire purchase, sale on approval, sale by sample, sale by description, sale with right of redemption, and sale by auction.

An agreement which in English phraseology is termed a 'hire-purchase' agreement, and in Thai is called *chao seu*, may either take the form of a hiring agreement which, after the payment of a certain number of instalments of rent, is converted into a sale, or it may, as is commonly the case in Thai practice, take the form of a sale subject to the *pactum reservati dominii* until payment of the last instalment of the purchase price. According to Section 572 of the Civil and Commercial Code, hire purchase is a contract 'whereby an owner of a property lets it out on hire and promises to sell it to, or that it shall become the property of, the lessee, conditionally on his making a certain number of payments'.

The lessee may at any time terminate the contract by redelivering the property at his own expense to the owner. The owner, on the other hand, may terminate the contract in case of default of two successive payments or breach of any material

part of the contract (Section 574, Civil and Commercial code). In this case, all previous payments are forfeited to the owner who is entitled to resume possession of the property.

With respect to sale on approval (*kaai peua chop*), the Civil and Commercial Code provides that 'a sale on approval is an agreement whereby the buyer is allowed to take the property on a trial basis for a given length of time' (Section 505). A sale on approval either begins to be operative on the approval of the goods by the buyer (condition precedent) or ceases to be operative on the rejection of the goods (condition subsequent). The following rules apply to such a sale: (1) where no contrary intention is shown, the approval is deemed to be a 'condition precedent'; (2) the seller must allow the buyer to inspect the thing purchased on approval; (3) the approval, in the absence of any stipulation in the agreement specifying the period, must be declared within such reasonable period as the seller may determine; (4) a buyer to whom the purchased thing is handed for inspection, and who does not express his disapproval within the proper period, is deemed to have signified his approval.[20]

A sale on approval must be distinguished from a sale according to sample (*kaai dtaam dtua yaang*), which is an ordinary sale with a warranty of the qualities shown in the sample. More precisely, in the sale by sample agreement, the buyer purchases goods under an implied condition that the property sold must correspond with the sample in quality (Section 503, paragraph 1, Civil and Commercial Code). Therefore, the buyer has the right to examine the property before acceptance and compare the property with the sample (Section 505, Civil and Commercial Code).[21]

In some circumstances, however, customers do not have the possibility to inspect a sample model before purchasing the product. These sale agreements may be performed by description. Sale by description (*kaai dtaam kam*) is a contract of sale of goods containing words identifying its subject matter. Therefore, for the buyer, to purchase a new motorcycle after seeing a catalogue is a sale by description. In this case, the buyer has the right to inspect the property only after its delivery, and the seller has the obligation to deliver property corresponding to the description (Section 503, paragraph 2, Civil and Commercial Code).

A sale with a right of redemption (*kaai faak)* is a sale under a resolutory condition by which the buyer has the right to redeem the property upon the payment of the price (Section 491, Civil and Commercial Code). Although the ownership of the property sold is transferred to the buyer at the moment of the conclusion of the contract, the seller has the right to refund the price of the purchase during a fixed period of time and receive back the property.

According to Section 509 of the Civil and Commercial Code, sale by auction (*kaai tot dtalaat*) is a public sale which is complete when the offer is accepted on

[20]Where the approval is a condition precedent and the goods are delivered before approval, the ownership does not pass until approval.

[21]A comprehensive overview of the issue can be found in Poonyapun and Sathaman (1981), p. 191.

the fall of the auctioneer's hammer or in other customary manner. For instance, the auctioneer may announce its final price by shouting 'going, going, gone' or by saying 'one, two and three'. Until such announcement is made, the prospective buyer can withdraw his offer anytime. The date and place of the auction, as well as the terms and conditions of the sale, must be predetermined so that the prospective buyer has the opportunity to inspect the property and make an offer to buy.[22]

3.2 Gift

3.2.1 Definition

While under English law it is not necessary that the gift should be the subject of an agreement between the donor and the donee, gift is defined in Thai private law as a contract. A transfer of property by means of which the donor out of his own property confers a benefit on the donee is a gift (*hai*) if it is agreed between donor and donee that the transfer of the property is to be gratuitous. Under the Civil and Commercial Code, a gift is an agreement whereby one party, the donor, transfers gratuitously a property of his own to another party, the donee, and the donee accepts such property (Section 521). A gift may also be made by granting to the donee the release of an obligation or by performing an obligation due from the donee. Only a transfer of property under the donor's direct control comes within the definition. The non-exercise of a right to acquire property, or the release of a right vested in interest, but not as yet vested in possession or the renunciation of a legacy or inheritance though intended to benefit another does not constitute a gift.

A contract of gift, unlike a contract of sale, is valid only on delivery of the property given (Section 523, Civil and Commercial Code). It follows that the contract takes effect only when the object of the gift is transferred to the other party. Prior to acceptance by the donee, the contract is not formed and the donor may still decide to cancel the gift. Upon delivery of the property, however, the gift becomes property of the donee and it cannot be revoked merely on the will of the donor unless expressly permitted by law.[23] The transfer is not required to be made to the donee himself. A gratuitous payment made by the donor to a creditor of the donee, in payment of the donee's debt, is a gift from the donor to the donee. Where a transfer of property is effected without the donee's concurrence, however, the donor may require the donee to declare his acceptance within a specified period, and if the donee does not decline the gift within that period, he is deemed to have accepted

[22]On this point, see Stasi (2015), p. 140.

[23]A contract of gift being non-onerous with a single obligation, there is no implied guarantee against hidden defects or against eviction. Only in the case that the gift is encumbered with a charge is the donor liable for defect or eviction in the same manner as the seller but only to the extent of the charge (Section 530, Civil and Commercial Code). If a definite and specific property does not belong to the donor, the contract of gift is void. On this point, see Stasi (2016), p. 92.

it.[24] Under English law, on the other hand, it is possible to effect a gift without the consent or knowledge of the donee (e.g. by the execution of a conveyance in his favour). More precisely, a gift may be effected by the transfer or delivery of the object to the donee, or to another in trust for the donee, or by a declaration of trust on the donor's part without delivery or transfer. A voluntary transfer of property from a person to another, however, does not in itself constitute a gift: it is always necessary to ascertain the intention of the parties. In some cases (e.g. in the case of a conveyance or transfer to a wife or a child or to a person to whom the transferor stands in *loco parentis*), the intention to make a gift is presumed. In some other cases (e.g. in the case of a conveyance of land or a transfer of stock paid for by one person and conveyed or transferred to another, not being the wife or child of the buyer or not being a person to whom he stands in *loco parentis*), it is presumed that the grantee or transferee only takes as trustee for the buyer.[25]

In principle, the creation of a gift does not require any special form to be binding. In the case of a gift of immovable property, however, a contract of gift is subject to particular formal requirements (i.e. the contract must be made in writing and registered by the competent official). If a gift or a promise for a gift has been made in writing and registered by the competent official, the transfer of ownership is valid without delivery of the property. Should the donor refuse to deliver to the donee the property given, the donee has an action against the donor to enforce his right. More precisely, the donee is entitled to claim the delivery of the property given or its value.

3.2.2 Promise of Future Gifts

A person who promises a future gift is under a less stringent liability than an ordinary debtor. In fact, the donor may refuse the performance of his promise, in so far as such performance would, having regard to his other obligations, endanger his capability to maintain himself in accordance with his station in life, and to comply with his legal duties as to the maintenance of others.[26] Where a donor who pleads this privilege has promised several gifts, the priorities are determined by the respective dates of the several promises.[27]

If the performance of the promise becomes wholly or partly impossible by reason of any circumstance or event not due to the promisor's wilful default or gross negligence, then the promisor is under no liability.[28]

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[24]For more detailed discussion on this topic, see Hutasingha (1977), p. 131 ff.

[25]Ibid., p. 132.

[26]This is the only remnant of the *beneficium competentiae* of Roman law.

[27]See Minakanit (2012), p. 152.

[28]The ordinary rule under which a promisor has to pay interest from the time at which he is in *mora solvendi* is not applied in the case of a promise of a gift.

A donor who promises to give any specific thing which is in his possession at the date of the promise is not responsible for defects of title or quality except in so far as he has intentionally concealed such defects.[29] The donee may also demand damages for non-performance for a legal defect if the defect was known to the donor upon acquisition of the thing or remained unknown as a result of gross negligence.

In cases where the donor promises periodically recurrent payments, such payments, in the absence of a stipulation to the contrary, come to an end on the donor's death. This means that if the donor promises maintenance consisting of recurrent performance, the obligation expires with his death unless the promise leads to a different conclusion.[30]

3.2.3 Gifts Subject to Burdens

A gift subject to a burden (*paara dtit pan*) must be primarily intended to benefit the donee and must therefore be distinguished from a transfer of property in exchange for a promise made by the transferee. The burden may be imposed for the benefit of the donor or of a third party, or for some public object, or for the donee's own benefit.[31] As soon as the gift has been completed, the obligation imposed by the burden can be enforced by the donor. If the fulfilment of the condition is in the public interest, then the competent public authority may also demand fulfilment after the death of the donor. A third party for whose benefit a burden is imposed is entitled to enforce the performance of the donee's obligation, in the same way as a third party for whose benefit an agreement has been made.

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[29]Where the donor has promised a specific object, which was not in his possession at the date of the promise, the donee may claim compensation for non-performance in the event of such object being affected with a defect of title, which at the time when it was acquired by the donor was known, or, but for his gross negligence, would have been known to him. Where the donor has promised a generically defined object, which was to be acquired by him subsequently to the date of the gift, the donee may in the event of the object given in performance of the promise being affected with any defect, which was known to the donor at the date of acquisition or would, but for his gross negligence, have been known to him, claim the delivery of an object without such defect in the place of the object given by the donor. Where the donor with intent to deceive conceals any defects, he is liable in damages.

[30]A particular type of gift—or we should say a gift made in particular circumstances—is the *donatio mortis causa*, which is the gift of personal property made in contemplation of the death of the donor, to be valid only in that event. It operates in part as a contract and in part as a will. A *donatio mortis causa* resembles a contract in that it is based on an agreement between two parties whereby one party, without being under any legal obligation to do so, gives or grants something irrevocably to another, who accepts it. On this point, see in particular Chumwisoot (1992), p. 234.

[31]Illustrations: (1) A gives his farm to B subject to the burden of allowing A to receive the produce of certain fields during A's life; (2) A gives his park to B subject to the burden of allowing access to the public once a week; (3) A gives a sum of money to B subject to the burden of investing it in a prescribed manner and not changing the form of investment without the donor's permission.

According to Section 528 of the Civil and Commercial Code, if the gift is encumbered with a charge and the donee fails to perform the duty imposed upon him, the donor may revoke the gift in the manner and with the consequences prescribed in the case of the rescission of a reciprocal agreement. In so far as, the value of the gift is not at least equal to the value of the outlay imposed upon the donee, the latter has to perform only to the extent of the value of the property (Section 529, Civil and Commercial Code).

3.2.4 Revocation of Gifts

As a general rule, gifts cannot be revoked and the property already handed over by the donor cannot be recovered. This rigid principle only admits three exceptions that are contained in Section 531 of the Civil and Commercial Code and relates to acts of ingratitude of the donee. First, the donor can claim revocation of a gift if the done commits a serious criminal offence against the donor or against one of the donor's close relatives (e.g. physical maltreatment, insulting behaviour, wilful infliction of heavy financial loss, unlawful attempt to place the donor under guardianship, and other crimes punishable under the Penal Code).[32] Second, the donor can revoke any donation if the donee has grievously defamed or insulted the donor. The third and last case where revocation can be requested regards those situations where the donee refuses to help the donor who is in need of the basic necessities for existence although he was able to supply them. It must be added, however, that these grounds of revocation do not extend to gifts encumbered with a charge, remuneratory gifts, gifts made in compliance with a moral duty or to gifts made in consideration of marriage (Section 535, Civil and Commercial Code).[33]

3.3 Hire of Property

3.3.1 General Remarks

Under English law, hire of property agreements relating to chattels is of a purely contractual nature, while leases of land, besides establishing a contractual relation between the parties, confer a real right on the lessee. Under Thai law, as under Roman law, the hire of property or contract of lease (in Thai: *sanyaa chao sap*) is a consensual contract which confers a contractual right on the lessee. It is generally defined in Section 537 of the Civil and Commercial Code as a contract where

[32]The donor's heirs may recover a gift or revoke a promise made by the donor if the donee has wilfully and unlawfully caused the donor's death, or if he has prevented him from exercising his right of revocation.

[33]On this point, see Stasi (2016), p. 92.

the owner of a piece of property, called the lessor, agrees to let another person, called the lessee, have the use or benefit of said property for a limited period of time in exchange for the payment of a rent. Therefore, there are two parties to the contract of hire of property, namely the lessor or owner of the property and the lessee. When the hire of property contract terminates, the lessee has to relinquish his possession and return the property to its owner.[34]

In the hire of property contract, the lessor allows the lessee to retain the property during all the time agreed upon. Both the lessor and the lessee must be in complete agreement about the subject matter of the hire of property contract. It may be immovable or movable property as far as it is not consumable such as a car, a notebook, a CD, or a pen. It follows that the hire of a large block of houses for thirty years is an agreement, identical in its legal character with the letting of a car or of a bicycle for an hour. There are of course a number of rules which have no meaning except in the case of a lease of land, but the general rules are applicable to both classes of agreements.

For the sake of brevity, the expressions 'hire' and 'lease' will, in the course of this treatise, include hiring agreements relating to chattels, and the expressions lessor and lessee will be applied in a corresponding manner. The terms 'hire of land' and 'lease of land' will in the course of this treatise include hire of buildings and tenements, and also of parts of buildings used as separate dwelling places, or used separately for other purposes.

3.3.2 Duration

The maximum duration of a hire of immovable property is thirty years, or the life of the lessor or of the lessee. If it is made for a longer period or permanently, it is automatically reduced to the duration of thirty years (Section 540, Civil and Commercial Code). Where no period is agreed upon or presumed, either party may terminate the contract of hire at the end of each period for the payment of rent, provided that notice of at least one rent period is given.[35]

If the use of the hired object is continued after the expiration of the term, Section 570 of the Civil and Commercial Code provides that 'the parties are deemed to have renewed the contract for an indefinite period unless notice of a contrary intention is given by either party within the prescribed time'. This means that if, at the end of the agreed period, the lessee remains in possession of the property and the lessor does not object, the parties are deemed to have renewed the agreement for an indefinite period of time.

[34]For more detailed discussion on this topic, see Ekchariyakorn (2005), p. 146 ff.

[35]Section 565 of the Civil and Commercial Code points out that 'a hire of garden land is presumed to be made for one year. A hire of paddy land is presumed to be made for the agricultural year'.

A hire of property for a definite time comes to an end when the time is ended, but may be determined by notice before that time under specific circumstances and, in particular: (a) in the event of any breach of agreement by the lessor or lessee entitling the other party to determine the hire by notice given by such other party; (b) if the lessor refuses his consent to an assignment without any serious ground of objection against the person of the proposed assignee or underlessee; and (c) in the event of the lessee's death—by notice given by the heirs of the lessee.

A contract of hire of movable property is also extinguished by the transfer of ownership of the property hired. It is interesting to note that this rule applies exclusively to the hire of movable property. With regard to immovable property, Section 569 of the Civil and Commercial Code states that a contract of hire of immovable property is not extinguished by the transfer of ownership of the property hired. Therefore, the transferee is entitled to the rights and is subjected to the duties of the transferor towards the lessee. This means that the buyer of a parcel of land is bound by the hire agreement of such parcel granted by his predecessor in title.[36]

3.3.3 Form

Hire of property contract is a bilateral contract which does not require a special form for its validity. Section 538 of the Civil and Commercial Code, however, provides special requirements for the hire of immovable property. More precisely, an agreement to hire an immovable is not enforceable by action unless there be some written evidence signed by the party liable. If the hire is for more than three years or for the life of the lessor or lessee, it is enforceable only for three years unless it is made in writing and registered by the competent official. Therefore, parties must go to the provincial or local land office with a written contract and a confirmed right of possession or ownership title certificate. Other hire of property agreements is not subject to any formal requirement.

3.3.4 The Rights and Duties of the Parties

The rights and the obligations of the lessor and the lessee derive from the contract. The contract rules contained in the Civil and Commercial Code are generally default provisions that apply where the disputing parties have not agreed otherwise. With regard to the duty of the lessor, Section 546 of the Civil and Commercial Code provides that the lessor is bound to hand over the hired object

[36]For more detailed discussion on this topic, see Hutasingha (1977), p. 140 ff.

to the lessee in a state which makes it fit for the agreed use, and to preserve it in that state during the agreed time.[37]

After delivery of the property and in the absence of any stipulation to the contrary, the lessor is bound to allow to the lessee the use of the hired thing during the agreed term. The letter is restrained from interfering with the lessee occupation and use, and must protect him against interference by third parties. This is to say that the letter has to guarantee that the hired property is free from such defects which may prevent its being used for the purpose of the contract. A stipulation by which the lessor's liability in respect of defects of quality or title impairing the agreed use is excluded or restricted is void if any such defect has been concealed by the lessor with intent to deceive. The implied warranty against defects and eviction is governed by the provisions of the Civil and Commercial Code concerning the contract of sale, *mutatis mutandis*. In this regard, Section 550 of the Civil and Commercial Code specifies that the letter is liable for any defects which arise during the continuance of the contract and he must make all the repairs which may become necessary, except those which are by law or custom to be done by the lessee.

The lessee is also entitled to reimbursement for reasonable expenses incurred for the preservation of the property (Section 547, Civil and Commercial Code). It follows that the lessor is bound to reimburse the lessee for any necessary and reasonable expenses incurred by him for the preservation of the property hired, except expenses for ordinary maintenance and minor repairs. When a lessor refuses to execute those reasonable repairs which the law requires him to do, the lessee may effect such repairs himself and deduct the necessary cost from the rent. The reimbursement of any other outlay is governed by the rule as to voluntary services, and the lessee is entitled to the *jus tollendi.*

As regards the duties of the lessee, the payment of the rent is one of the most important elements of the hire of property contract: the lessee must pay the rent at such time, or by such instalments, as may be agreed upon. In the absence of any stipulation as to the time of payment, the rent is payable 'at the end of each period for which it is payable'. That is to say, if a property is hired at so much per year, the rent is payable at the end of each year, and if a property is hired at so much per month, the rent is payable at the end of each month. If the lessee fails to pay the rent on the dates agreed upon, the lessor is entitled sue him to collect the rent due and to terminate the contract. Nonetheless, if the property hired is payable at monthly or longer intervals, the letter must first notify the lessee that payment is required within a period of at least fifteen days.[38]

The fact that the lessee, owing to a circumstance affecting him personally, is unable to use the object let to him, does not release him from his obligation to pay the agreed rent,[39] but he may deduct the value of any advantage derived by the

[37]On this theme, see especially Ekchariyakorn (2005), p. 176.

[38]On this point, see Stasi (2016), p. 94 ff.

[39]But for this special provision a lessor might refuse the payment of the rent if the event preventing him from using the hired object (e.g. his illness) was not due to his default.

lessor from his failure to use the object let to him. Suppose hires a car from B to be used on a tour from August 1 to September 1, B supplying all necessary fuel and the chauffeur's wages. A breaks his leg on August 1 and consequently has to abandon his tour. In this case, A must pay the agreed rent, but may deduct the estimated cost of the fuel and the chauffeur's wages in so far as B is not compelled to pay them. If B lets out the car during any time in August, he must also deduct the net earnings resulting from such letting.[40]

The lessee has also the obligation to use the property according to the purpose provided in the contract. This means that the lessee must not use the hired object for any other than the agreed purpose. According to Section 552 of the Civil and Commercial Code, if the contract does not specify the way the property is to be used, then the lessee must use it for the ordinary and usual purpose. The duty to use the property as required by the contract entails the obligation for the lessee to take care of the property as a reasonable person and to perform all ordinary maintenance and petty repairs on the hired premises (Section 553, Civil and Commercial Code). Thus, the lessee is responsible for any loss or deterioration caused by his wilful default or negligence, or by the wilful default or negligence of a third party whom he has permitted to use the hired object.[41] He is not, however, responsible for any alteration or deterioration resulting from the agreed use of the hired object (reasonable wear and tear).

The lessee is also liable if he does not take appropriate steps to prevent avoidable danger, notify the letter when the property is in need of repairs or third persons claim a right over the property. In this regard, Section 557 of the Civil and Commercial Code states that if during the continuance of the term any defect of the hired object becomes apparent, or any preventive measure is required for the purpose of averting a danger which was unforeseen at the date of the hiring agreement, or if any third party claims a right over the hired object, the lessee must forthwith inform the lessor of the occurrence.

By the same logic, Section 545 of the Civil and Commercial Code states that the lessee cannot sublet or transfer the property to third parties unless it is allowed or stated in the contract. This is to say that the lessee must not, without the lessor's consent, do any act by virtue of which a third party becomes entitled to the use of the hired object. Where the consent is unreasonably refused, however, the lessee may give notice to determine the hire agreement.[42]

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[40]See a comprehensive list of examples in Ekchariyakorn (2005), p. 181.

[41]The lessee's liability for loss caused by his own default results from the general principles of the law of obligations. Liability is not avoided by the fact that the use of the hired object was accorded to another with the lessor's assent.

[42]The provision of Section 421 of the Civil and Commercial Code, according to which the exercise of a right with no other object than the infliction of damage on another is not permitted, may possibly enable the lessee to compel the lessor to withdraw his resistance, where such resistance is clearly unreasonable. Under English law, the unreasonable refusal of the lessor's consent to an assignment or sublease may be disregarded in a case in which he is bound not to refuse his consent except on reasonable grounds.

On the termination of the agreement, the hired object must be delivered to the lessor, who is also entitled to proceed against any third party to whom the use of the hired object was permitted by the lessee. According to Section 558 of the Civil and Commercial Code, 'the lessee may not make alterations in, or addition to, the property hired without the permission of the letter'. If he does so without such permission, he must, on request of the lessor, restore the property to its former condition, and he is liable to the letter for any loss or damage that may result from such alteration or addition. Thus, for example, the lessee of a piece of land let for farming purposes has to deliver up the hired object in the state in which it would be, had it been dealt with during the term in accordance with the proper rules of husbandry.

3.3.5 Effects of Breach of Contract

The general rules as to the effect of impossibility of performance or of delay in performance of a promise forming part of a reciprocal agreement are somewhat modified in the case of hire agreements. It will be remembered that a party to such a reciprocal agreement may in certain events, instead of claiming performance by the other party, claim compensation for non-performance, or rescission. In the case of a hire agreement, the rights which in similar events may be substituted for the right to performance are as regards the lessee: the right to a temporary suspension of the obligation to pay rent or to a reduction of the rent, and the right to pecuniary damages and the termination of the agreement.

As concerns the right to temporary suspension or reduction of rent, Section 568 of the Civil and Commercial Code states that if 'part of the hired object is lost without the fault of the lessee, the latter may claim that the rent be reduced in portion to the part lost'. In the case that the hired object, on delivery of possession to the lessee, is affected with any defect destroying or impairing its fitness for the agreed use, or if it is deficient in one of the agreed qualities, the lessee is entitled to a remission or reduction of the rent, while the defect continues to operate.[43] The right is not available, however, if the defect was known[44] to the lessee on the formation of the agreement, or if, in the event of a defect appearing during the term, the lessor through delay in its notification was prevented from remedying it. The total or partial withdrawal of the use of the hired object brought about by a third party having a paramount right has the same effect as a defect.

Moreover, if the defect is in existence on delivery of possession, or if it arises subsequently in consequence of any event for which the lessor is responsible, or if

[43]The reduction of the rent is calculated on the same principles as the reduction of the purchase price in the case of a sale.

[44]In certain cases, ignorance resulting from gross carelessness is considered as equivalent to knowledge.

the lessor is in *mora solvendi* in respect of his obligation to remedy the defect, the lessee, instead of claiming reduction of rent, may claim pecuniary damages for breach of agreement.[45]

In the following events, the lessee may terminate the lease without giving the lessor a previous opportunity to remedy his breach of agreement: (a) if 'time' is of the essence in respect of the lessor's obligations[46]; (b) if in consequence of the breach in question the continuance of the lease is of no advantage to the lessee[47]; and (c) if the leased premises, being intended as a place of habitation or occupation for human beings, are in a condition seriously endangering the health of such human beings. Where a lease is terminated on one of the grounds mentioned above, any rent which has been paid in advance must be repaid by the lessor with interest from the date of payment, unless the circumstance justifying the rescission was one for which the lessor was not responsible, in which event the repayment can only be claimed under the rule as to unjustified benefits.

As regards the lessor's remedies for breach of agreement, the lessor has the right to pecuniary damages and the right to terminate the lease. The right to claim compensation for damage arises where the damage is caused by an unauthorized use of the leased object, or by the lessee's wilful default or negligence. It is barred by the lapse of six months from the date of the return of the leased object and is lost if the lessor's right to the return of the leased object has lapsed by prescription under the general rules.

It must also be noted that where the lessee fails to deliver up the leased object on the termination of the lease, the lessor is entitled, by way of damages, to claim the rent accruing during the time while the lessee's breach of duty continues. The claim for rent by way of damages does not exclude a claim for further damages.

In respect to the right of termination, the Civil and Commercial Code states that the lessor may terminate the lease in the event of the lessee being in *mora solvendi* and failing to comply with a notice requiring immediate payment.[48] Specifically, Section 560 of the Code states that 'in case of non-payment of rent, the lessor may terminate the contract, but, in cases where the rent is payable monthly or for longer periods, the lessor must notify the lessee before terminating the contract'. The lessor may likewise terminate the lease in the event of the lessee failing to apply the proper degree of diligence and thereby materially endangering the safety of the leased object (Section 554, Civil and Commercial Code). Similarly, the lessor may terminate the lease in the event of an unauthorized use of the leased object

[45]Where the lessor is in *mora solvendi*, the lessee may himself remedy the defect and claim repayment of his outlay.

[46]This may be the case where the letting agreement refers to a movable object (e.g. where a car is hired for a particular occasion), or where an immovable is let for a particular day (e.g. for the purpose of viewing a procession).

[47]The lessee cannot allege this circumstance if owing to his failure to give immediate notice the lessor was prevented from remedying the breach of agreement.

[48]If the lessee immediately on receipt of the notice declares that he is entitled to a right of setoff and succeeds in establishing such right, the notice is inoperative.

by the lessee, or by any other person, being continued after the receipt of a notice requiring the discontinuance of such unauthorized use. In this case, however, the lessor must repay any rent paid in advance with interest from the date of payment.

It is open to the parties to provide that the breach of any covenant contained in the lease is to cause the forfeiture of the lease, and it may even be stipulated that in such an event the lessor may terminate the lease without giving the lessee an opportunity to remedy the breach.

3.3.6 Effects of Sales of Immovables on Lessee's Rights and Duties

As mentioned above, the rule of Roman law under which the lessee of an immovable was liable to be ejected by a buyer has not been adopted by Thai law which provides that, where the lessee or any person claiming under him is in possession of the demised premises at the time of the sale, the rights of the lessee are binding on the buyer. On any further sale, the new buyer is bound in the same way as the original buyer, whose liability thereupon ceases, while the liability of the original lessor continues under the rules and subject to the restrictions mentioned below. Section 538 of the Civil and Commercial Code, however, provides special rules for the hire of immovable property by stating that 'when the contract of hire of property is concluded for less than three years, it is not enforceable by action unless there is some written evidence signed by the party liable. If the contract is concluded for more than three years or for the life of one of the parties, it is enforceable only for three years unless it is made in writing and registered by the competent official'.

If the lessor incumbers the leased object (e.g. a right of usufruct), the encumbrancer is in a position corresponding to that of a buyer. Where the encumbrancer's right only partially conflicts with the lessee's rights, the encumbrancer must refrain from any exercise of his right which would prevent the lessee from using the leased object in the agreed manner.[49]

The buyer, as between himself and the lessee for the time being, is entitled to the rights, and is subject to the liabilities, to which he would be entitled or liable if he were the lessor. He is entitled to the benefit of any security given by the lessee to the lessor, but he is not bound by the lessor's obligation to return to the lessee any objects given by way of security, unless such objects were handed over to him by the lessor, or unless in his agreement with the lessor, he expressly undertook to return them to the lessee.

[49]For the sake of brevity, the statement of the following rules will be made with exclusive reference to the effects of a sale, it being understood that they are also applicable, *mutatis mutandis,* to the effects of the creation of an encumbrance.

The lessor continues to be liable for the performance of the obligations to which the buyer becomes subject under the rules stated above, in the same way as if he had originally undertaken such liability as surety for the buyer and renounced the *beneficium excussionis*. Where notice of the sale is given to the lessee, the lessor is released from his liability unless the lessee gives notice to terminate the lease on the earliest possible date after the receipt of the notice of the sale.

It must be added that an assignment of the claim for rent payable in respect of the current quarter, or the next following quarter, is operative as between the original lessor and the buyer, but any assignment of the claim for rent to accrue at any subsequent date is inoperative as against a buyer without notice.[50]

3.4 Hire of Services

3.4.1 The Nature of the Contract

A contract of hire of services (in Thai: *sanyaa jaang raeng ngaan*) is an agreement whereby an employee agrees personally to render services to the employer under the employer's direction and supervision in return for remuneration or other compensation. It follows that an employer is a person who agrees to accept an employee for work by paying a wage and includes both natural and juristic persons; an employee is a person who, regardless of the name used, agrees to work for an employer in return for remuneration, in the form of salaries, wages, commissions, stock options, incentives, production bonuses, and other incentives.

Hire of services should be distinguished from other types of contracts. Any agreement by which one party promises services for a remuneration to be paid by the other party is a contract of hire of services. On the other hand, an agreement by which the accomplishment of a definite result is promised for a reward to be paid

[50]A similar rule is applied to an arrangement between the original lessor and the lessee under which future rent is paid in advance. In such a case, the arrangement does not remain operative beyond the quarter following the one in which the lessee receives notice of the passing of the property. If the lessee, when entering on the arrangement, is aware of the fact that the property has passed to the buyer, the arrangement is wholly inoperative. In so far as the arrangement is operative, the lessee is entitled—subject to certain specified restrictions—instead of paying any instalment to which it refers, to setoff against such instalment any claim against the original lessor whether arising under the hire agreement or otherwise.

To illustrate, suppose that on March 31, a lessee prepays the instalments of rent due on June 30, September 30, and December 31. Subsequently, the house is sold and the property passes on June 1, but the fact does not become known to the lessee before July 1. In this case, the lessee is not required to pay any rent to the buyer in respect of the quarters paid for in advance. To take another example, suppose a lessee, paying rent quarterly on the same days as in the previous case, sells goods to his lessor for an amount exceeding three instalments of rent and delivers them on April 15. The facts as to the sale of the house, the passing of the property, and the notice to the lessee are the same as in the illustration. In this case, the lessee can setoff the price of the goods against the instalments of rent payable on June 30, September 30, and December 31.

by the other party is a hire of work contract. His activities are carried out independently, and the instruments which are necessary for the execution of the work are to be supplied by the contractor himself unless otherwise provided by the contracting parties.[51] The distinction is analogous to the Roman distinction between *locatio operarum* and *locatio operis*. A brokerage contract is something between a hire of services and a hire of work contract.

A contract of hire of services may be of a more or less permanent nature, or may relate to a single service to be rendered to or for the benefit of the person paying the reward. It may relate to services of any kind, for the old distinction between *operae illiberales* and *operae liberales* has ceased to exist. Nor is the mode of payment material; the person giving his services may be paid by wages or salary, by commission, or by sums dependent upon the extent and character of his work or otherwise. The main characteristic of the contract of hire of services consists in the fact that services are promised on one side and reward on the other (Section 575, Civil and Commercial Code). In so far as no contrary intention appears, a contract of hire of services is of a strictly personal nature: neither the claim for the services nor the duty to perform the service can be transferred to another. In this regard, Section 577 of the Civil and Commercial Code states that the employer may transfer his right to a third person only with the consent of the employee and the employee may have a third party rendering the services in his place only with the consent of the employer. Consequently, as a general rule, the employee must perform the work by himself and may not arrange to be replaced by a third person except with the consent of the employer. Such consent may be given expressly or implicitly, verbally or in writing. If the employee allows another person to perform his services, whether temporarily or permanently, without the consent of the employer, the employer is entitled to terminate the contract.

Hire of services agreements of a public or a quasi-public nature (e.g. agreements for the services of government officials or the services of advocates, notaries, etc.) is regulated by separate enactments which do not come within the scope of this treatise. The rules of the Civil and Commercial Code relating to private hire of services agreements are supplemented, and to a certain extent modified, as to particular kinds of employment by other enactments.[52] Some of the special provisions relating to particular employments are referred to in the following statement of the law as to hire of services agreements, but it is, of course, impossible, within

[51]More precisely, a hire of services differs from a hire of work contract in that the work itself, and not the result of work, is the subject matter of the contract. Unlike the contractor, the employee is obliged to perform the work under the control of the employer. For more on this difference, see Wichianchom (2000), p. 54.

[52]Employees who work in certain specific occupations—agricultural work, marine fishing, the loading or unloading of goods on and from maritime vessels, work to be performed at home, transportation and other work prescribed by Royal Decree—are subject to different forms of employment protection (Section 22, Labour Protection Act).

the space which can be allotted to the subject, to discuss the rules existing outside the Civil and Commercial Codes with any degree of completeness.[53]

The expressions der *naai jaang* and *look jaang* used by the Civil and Commercial Code to designate 'the person entitled to the services' and 'the person bound to give the services', respectively, will, in the course of this treatise, be translated by the words 'employer' and 'employee'.[54]

3.4.2 Employer's Duties

The main objective of labour law is to reduce the disparities in bargaining power between employee and employer and protect employees from employment discrimination and from unfair treatment. Because of this reason, the Civil and Commercial Code mainly sets obligations for employers. The employer's obligation to pay the remuneration is a fundamental counterpart to the employee's obligation to work. Where a remuneration has been expressly agreed upon, the employer is bound to pay it, in accordance with the agreement. In the absence of remuneration, the contract does not come into existence. The promise to pay a remuneration is implied where the particular services cannot under the special circumstances of the case be expected to be given gratuitously.

[53]The legal framework in which employers and employee negotiate the terms and conditions of employment is governed by Labour Protection Act B.E. 2541 (1998) which sets minimum working conditions for the protection of the workforce and provides regulations on workplace safety. Second, the Social Security Act B.E. 2533 (1990) requires that all employers withhold social security tax from the monthly wages of their employee and forward these amounts on a regular schedule to the Social Security Office (in Thai: *Samnaknggan Prakan Sangkhom*). Moreover, a provident fund may be set up voluntarily between the employer and the employees. Both employer and employees contribute to the fund, and, upon termination of the employment relation, the employee is entitled to receive a lump sum payment as the result of such contributions. Third, the Workmen's Compensation Act B.E. 2537 (1994) in response to the high number of work accidents and occupational disease statistics has mandated that employers provide compensation benefits for employees who are injured, sick, disabled, or die in the ordinary course of employment at the rates prescribed by law. Fourth, Labour Relations Act B.E. 2518 (1975) lays out a general framework of regulation in the area of labour dispute resolution in order to reduce employment litigation. The objective is to promote successful reconciliation between employees and employers. The Act also provides for the registration of trade unions with the objective of acquiring and protecting interests relating to conditions of employment and promoting better relationships between employers and employees. Finally, the Labour Court and Labour Procedure Act B.E. 2522 (1979) defines the labour court procedures and jurisdiction with respect to labour claims. In particular, labour courts hear disputes involving employment contracts and unlawful acts between employers and employees in connection with a labour dispute or in connection with the performance of work under an employment agreement. On this point, see Stasi (2015), p. 270 ff.

[54]An apprenticeship agreement is an agreement for reciprocal services, the master's services constituting wholly or partly the remuneration for the apprentice's services and vice versa; where the master receives a premium and where the apprentice receives wages, this constitutes an additional remuneration. It will be understood that notwithstanding this reciprocity of services, the term employer in the case of an apprenticeship agreement is used for the master, and the term employee for the apprentice.

Where the rate of payment is fixed with reference to a specified period of time, the remuneration must be paid at the end of each such period. In all other cases, the remuneration must be paid after the performance of the agreed services. In the absence of a special agreement or of a tariff or general custom, the employer has to determine the amount of the remuneration, but the employee is not bound by this determination if it appears inequitable.

Where the employer is in *mora accipiendi,* the general rules stated above are modified by the provision that the remuneration must be paid for the services remaining unperformed by reason of such *mora accipiendi*, the employer not being entitled to claim any subsequent performance of such unperformed services, but having the right to deduct from the remuneration the value of any outlay saved by the employee in consequence of his non-performance or of any income which he has actually earned or might, but for his intentional neglect, have earned, by some other employment of his services. To illustrate, suppose A engages a gardener to work in his garden, in accordance with directions to be given by him, on a certain date. If the work in the garden cannot be performed on the promised date by reason of the fact that A has failed to give the promised directions, the gardener may claim his wages. Should other suitable work have been offered to him on the day in question, he must allow the deduction of the wages which he has or could have received for such work. Under the general rules as to reciprocal agreements, the gardener would have had to request A to give him the directions within a specified time and would, if the request had been complied with, have had no claim in respect of the day wholly or partially lost, unless time had originally been made of the essence of the agreement.

The Civil and Commercial Code provides certain further obligations for the employer, such as the obligation to issue a certificate of employment describing the employee's duties at the end of the hire of services contract (Section 585) and the obligation to pay for returning costs (Section 586). With regard to this second point, the Code states that if the employee has been brought from elsewhere at the expense of the employer, the employer is bound, when the hire of service comes to an end to pay the cost of the return journey unless otherwise provided in the contract. The payment of the returning cost, however, is subject to the fulfilment of two conditions, namely the contract must not been terminated or extinguished by reason of the act or fault of the employee, and the employee must return to the workplace within a reasonable time.[55]

3.4.3 Employee's Duties

During the course of employment, the employee is under legal subordination to the employer, which means that he must give the services stipulated for by the agreement and must carry out the instruction given to him by the employer. Thus,

[55]Wichianchom (2000), p. 101.

the employee must keep the employer informed as to the execution of his orders and render an account after the completion of such execution. Also, the employee must surrender to the employer all benefits received by him in connexion with a transaction carried out on the employer's behalf.[56]

Where the employee either expressly or by implication warrants special aptitude on his part for the promised services, he must have such special qualification (Section 578, Civil and Commercial Code). The absence of such aptitude constitutes a breach of the agreement and entitles the employer to terminate the contract.

The services must be rendered by the employee in person except in so far as a contrary intention is shown. Where the employment of substitutes or assistants is permitted by the agreement, the liability for the default of such assistants or substitutes is determined by the general rules on the subject.

The Civil and Commercial Code provides the obligation to obey the reasonable and lawful instruction of an employer with regard to the workplace, pace of working, working time, and amount of work. The employee, however, has the right to refuse to perform those tasks which are unlawful or not covered under the hire of services contract. The legal relationship of subordination also implies a duty of confidentiality which extends to information about the employer's business and trade secrets obtained in the course of the employment. Disclosure of such information would be considered as a serious breach of hire of services contract entitling the employer not only to terminate the contract but also to claim damages.

3.4.4 Termination

As regards termination, the Civil and Commercial Code lists five main methods of terminating an employment contract, namely termination upon notice, agreement to discharge contractual obligations, breach of contract, death, and expiration of the contractual term.

Termination upon notice is defined under Section 582 of the Civil and Commercial Code which states that 'if the agreement is entered upon for an indefinite time, and the time of its termination cannot be gathered from the nature or object of the services, either party may give notice to terminate the agreement'. This means that either party can terminate an open-ended contract by giving notice to the other party at or before any time of payment. The length of the notice generally depends upon the mode in which the payment of the remuneration is fixed and cannot exceed three months, but special rules are laid down as to some kinds of employments. If the remuneration is not payable with reference to a fixed period of time, the agreement may—except in so far as the special rules provide otherwise—be terminated at any time by either party.

[56]If any money for which the employee has to account to the employer is used by the employee for his own purposes, he must pay interest at the legal rate from the date of such use.

In the case that an employment is with the employer's knowledge continued by the employee beyond the time fixed for its duration by the agreement, such agreement is deemed to have been renewed for an indefinite time, unless the employer immediately objects to the continuation of the employment. The new contract will be based on the same terms and conditions as the original.[57]

As parties have the right to create an employment relationship based on their mutual agreement, the law grants them the corresponding right to terminate the employment contract by mutual consent at any moment regardless of whether the contract is of a fixed duration or not. The right to terminate the contract by mutual agreement follows from the general principle of freedom of contract according to which, as a rule, parties are free to deal with each other, decide on the content of their contractual obligations, and bring an end to the agreement at any time without incurring in any liability. Termination should be confirmed in a written document stating that contracting parties mutually decide to end the employment relationship and settling all outstanding issues.

Breach of agreement is also considered to be a ground for termination of a hire of services contract. Contracting parties may, at any time, request a competent court to terminate the employment agreement for the reasons specifically and expressly provided for by the law. Thus, a contract of hire of services may be terminated without notice, and prior to the date of its natural termination, when the employee wilfully disobeys or habitually neglects the lawful commands of his employer, absents himself for services, is guilty of gross misconduct, or otherwise acts in a manner incompatible with the due and faithful discharge of his duty (Section 583, Civil and Commercial Code).[58]

In the absence of a special stipulation to the contrary, the employee's death terminates the agreement. As already discussed above, in the event that the employee dies, the employment contract is terminated by force of law. Thus, the death of employees automatically puts an end to the legal relationship. On the other hand, the employer's claim to the employee's services (though not, as a general rule, transmissible by assignment) passes on the employer's death to his heirs like any other obligatory right vested in him unless the personality of the employer forms an essential element of the contract. According to Section 584 of the Civil and Commercial Code, the employer's death terminates the agreement only if the employer is a natural person (not a juristic person) and the personality of such employer forms an essential part of the employment contract.

The expiration of the contractual term represents another important ground for termination. More precisely, when the contract of hire of services is entered upon for a specified period not exceeding two years, the agreement expires at the end of

[57]Wichianchom (2000), p. 122. On this point, also see Sukatadsani (1992), pp. 61–66.

[58]According to Section 579 of the Civil and Commercial Code, however, the absence of the employee from service for a reasonable cause and during a reasonably short term does not allow the employer to terminate the contract.

such period. It is not necessary to give prior notification of termination, and the employee is not allowed to claim for statutory redundancy payment, reinstatement, severance payment, or compensation for unfair dismissal.[59]

3.5 Hire of Work

3.5.1 General Concept of the Hire of Work Contracts

A hire of work contract (*jang tam khong*) is distinguished from a contract of hire of services by the fact that the result of work, and not the work as such, is contracted for by the parties. Every agreement by which the person promising the work (*poo rap jaang*)—who in the course of this treatise will be called 'the contractor'—undertakes to produce a certain result, and by which the person ordering the work (*poo wa jaang*)—who in the course of this treatise will be called 'the employer'—undertakes to pay the agreed remuneration, comes within the definition. The work contracted for by such an agreement may consist in the production or alteration of a thing, or in bringing about of any other result (Section 587, Civil and Commercial Code).

A hire of work contract must be distinguished from a sale: the former, unlike the latter, is concluded for the manufacture or processing of a thing by the contractor by his work. The object of a contract of sale, on the other hand, usually consists in property which already exists at the time the contract is entered into.[60] Under English law, any agreement ultimately resulting in the delivery of a chattel is deemed an agreement to sell, but under Thai law an agreement resulting in the delivery of a chattel to be produced by the contractor is a hire of work contract, though many of the rules relating to sales are, as shown below, applied to such an agreement. A hire of work contract, within the Thai meaning of the word, is in many cases hardly distinguishable from a sale. Take, for example, the case of a person who writes to a clock maker, ordering a clock of a certain description, does not know or care whether the clock is in stock or has to be specially made, the clockmaker when accepting the order remaining discreetly silent on the subject. Under English law, the agreement would in any event be a contract for the sale of goods. Under Thai law, it is uncertain whether the agreement is a sale or a hire of work contract.

[59]If a contract of hire of services comes to an end by reason of the fact that the performance or acceptance of the promised services has become impossible, or if it is rescinded on the ground of either party being in *mora solvendi* or *mora accipiendi*, the ordinary rules, applicable in the case of the termination of a reciprocal agreement by reason of such fact, come into operation. On this point, see Stasi (2016), p. 100 ff.

[60]It must be added that while the object of contracts of sale may be either fungible or infungible things, the object of hire of work contracts is always represented by infungible things.

In the same way, the distinction between a contract of hire of services and a contract of hire of work is frequently difficult to ascertain. Suppose, for instance, that A undertakes to clean B's house for a fixed remuneration, but fails to complete the work owing to insuperable difficulties. B contends that there was a hire of work contract and that no remuneration is payable, as the agreed result was not attained. A, on the other hand, contends that there was a contract of hire of services, and that he had performed these services with proper diligence and with the promised skill, and was therefore entitled to the promised remuneration.[61]

A contract of hire of services is on several grounds more to the advantage of the person undertaking any work than a hire of work contract, and it is generally assumed that in any case of doubt the inclination of the courts will be in favour of a contract of hire of services.

A hire of work contract, if involving the undertaking of business transactions on behalf of the employer (e.g. an agreement with an agent who undertakes the sale of his principal's goods for payment of a commission on each sale effected by him), is subject to special rules.

3.5.2 Rules as to Hire of Work Contracts Where Contractor Supplies Material

Where the contractor supplies the tools and instruments, he is bound to deliver the thing produced by him to the employer and to cause the ownership thereof to be vested in him. Apart from the obligation to supply material, the contractor is bound to complete the work on time. If the work is delivered after the time fixed in the contract, or if no time was fixed, after a reasonable time, the employer is entitled to claim the reduction of the remuneration. When time is of the essence of the contract, the employer is also entitled to rescission.

Where the thing to be supplied is a fungible (e.g. in a case in which any metals sold by weight are ordered from the foundry or smelting works), the agreement is in all respects governed by the rules as to sales (Section 595, Civil and Commercial Code). On the contrary, if the thing to be supplied is not a fungible, the following matters are determined by the rules as to hire of work contracts: the mode of payment, the passing of the risk, and the remedies for breach of warranty of quality. In respect of all other matters, the rules as to sales apply.

It must be added that if the contractor only supplies accessories (e.g. where a dressmaker makes a dress out of material supplied to her, but furnishes the trimmings), the rules as to hire of work contracts are applied exclusively.

[61] See a comprehensive list of examples in Sukatadsani (1992), p. 109.

3.5.3 Rules as to Other Hire of Work Contracts

The Civil and Commercial Code provides special rules governing hire of work contracts not coming under the rules stated above. These rules are subject to any modification agreed upon by the parties. Under Section 607 of the Civil and Commercial Code, the contractor is under an obligation to perform the work in accordance with the agreement but is not ordinarily bound to act personally. In fact, the contractor may appoint subcontractors to work for him in all or in part except in the major part of the contract that requires the ability of the contractor. If the contractor decides to do so, his personal work is regarded as a promised quality.

The contractor is also bound to allow the employer or his agents to inspect the work during its execution (Section 592, Civil and Commercial Code). If the contractor does not begin to work in a proper time or delays in proceeding with it contrary to the terms of the contract, or if, without the fault of the employer, he delays to proceed with it in a such a manner that it can be foreseen that the work will not be finished within the agreed period, the employer is entitled to cancel the contract without waiting for the time agreed upon for delivery.

If the defects appear after the completion of the work, the contractor is only liable for defects appearing within one year of delivery of the work or within five years if the work is construction, unless otherwise provided in the contract. As a general rule, warranty of quality in the case of a hire of work contract corresponds approximately with the warranty of quality on the sale of goods, but the remedies available in the two cases differ from each other considerably.[62]

It will be remembered that, in the case of a sale, the primary remedy, as a general rule, is the right to require the cancellation of the sale or the reduction of the purchase price, but that the buyer of a thing generically defined may, instead of availing himself of either alternative, demand the delivery of a thing free from any defect. In the case of a hire of work contract, the primary remedy is the claim for the removal of the defect. Where the defect materially diminishes the value of the work, however, the employer may require the contractor to consent to the cancellation of the sale, or to the reduction of his remuneration. More precisely, this remedy is available in any of the following events: (a) if the removal of the defect is impossible, or if the contractor refuses to remove it; (b) if, under the circumstances of the case, immediate cancellation or reduction is of special importance to the employer; and (c) if the contractor fails to remedy the defect within a reasonable period of time, specified in a notice requiring him to do so. If the contractor is in *mora solvendi* as to the correction of the defect, the employer may remedy the defect at the contractor's expense.

It must be noted that a claim for compensation, instead of cancellation or reduction of the remuneration, arises where the defect is due to a circumstance for which the contractor is responsible (particularly in the case of negligence on his

[62]For more detailed discussion on this topic, see Hutasingha (1977), p. 176.

part or on the part of any person for whom he is responsible).[63] According to Section 591 of the Civil and Commercial Code, however, the contractor is not liable if the defect of the work originates from the nature of the material supplied by the employer or from instruction given by him. Similarly, the contractor is not liable if the employer has accepted the work without reservation (Section 597, Civil and Commercial Code) unless the defect was such as could not be discovered when the work was accepted, or it had been concealed by the contractor (Section 598, Civil and Commercial Code).[64]

With respect to the employer's obligations, the Civil and Commercial Code states that the employer has to pay the agreed fees for the work carried out by the contractor at the times and in the manner stipulated in the contract. The presumption as to remuneration and the mode of ascertaining the scale of remuneration is the same (*mutatis mutandis*) as in the case of a contract of hire of services.[65] As in the case of an agreement of the latter kind, the remuneration is not necessarily payable in money.[66]

The payment can be made in instalments or in a single payment: where the remuneration is payable in a single payment, interest is payable from the time when payment ought to be made; where the work is to be done by instalments, a proportionate part of the remuneration must be paid or furnished on the delivery or completion of each instalment. Generally, the remuneration is payable on taking delivery of the work. Thus, it must be paid or furnished as soon as the result of the work is delivered to the employer and accepted by him in satisfaction of his claim for performance.[67] Where delivery is excluded by the nature of the work (e.g. where the work consists in the removal of goods or the obtaining of orders), the completion of the work takes the place of delivery.

If the work is not completed at the promised time, the employer may, in any case in which time is of the essence, or in which the contractor is in *mora solvendi*, avail himself of the remedies to which he is entitled in these circumstances under the rules as to reciprocal agreements. He may also, without reference to the question whether time is of the essence, or whether the contractor is in *mora solvendi*, rescind the agreement or claim the reduction of the remuneration in any of the following events: (a) if performance within a reasonable time is refused by the contractor or impossible; (b) if under the circumstances of the case immediate

[63]The right to require the contractor's consent to the cancellation of the agreement has the same effect as the right to the cancellation of a sale.

[64]The rules as to the effect of fraudulent concealment, and of the employer's knowledge of defects at the time of the acceptance of the performance are the same as in the case of a sale.

[65]It must be pointed out that hire of work is a bilateral juristic act which may be gratuitous or non-gratuitous. Most of the time, these contracts are non-gratuitous and remuneration is presumed by law if payment is justified under the circumstances. On this point, see Sukatadsani (1992), p. 136.

[66]Ibid., p. 139.

[67]If the work is to be accepted in parts and the remuneration has been specified for the various parts, however, the remuneration for each part is payable at the time of its acceptance.

rescission or reduction is of special importance to the employer; (c) if, after the lapse of a reasonable time specified in a notice communicated to the contractor, the work remains unperformed.

It must be pointed out that according to Section 603 of the Civil and Commercial Code, the contractor bears the risk of the work contracted for by him and of the material used in connexion therewith, until delivery and acceptance, or completion to the employer's satisfaction. When the employer supplies the material, the contractor must apply due diligence in its preservation, but he is not liable for accidental loss or deterioration (Section 604, paragraph 1, Civil and Commercial Code). If such accidental loss or deterioration is caused by any defect in the material supplied by the employer, or if in consequence of any direction given by the employer and without any default on the contractor's part the work has been destroyed, deteriorated, or rendered impossible, the contractor is entitled to remuneration proportionate to the amount of labour required for making the work and to reimbursement of any outlay not allowed for in such remuneration, without prejudice to any claim for damages against the employer to which he may be entitled under the general rules. The rules as to the risk of the transmission of the product of the work where such product is forwarded by the employer's direction to a destination other than the place of performance are the same as in the case of a sale.

With regard to the effects of *mora accipiendi*, the Civil and Commercial Code states that an employer who is in *mora accipiendi* bears the risk of the work from the time at which such *mora* begins (Section 604, paragraph 2, Civil and Commercial Code). When the completion of the work depends upon any act to be done by him (e.g. sitting for a portrait), and the omission of such act places him in *mora accipiendi*, the contractor is entitled to reasonable compensation for any damage suffered thereby. The contractor may also declare that he will rescind the agreement if the employer fails to do the required act within a specified reasonable period.[68]

In addition to the right to which he is entitled under the general rules, a contractor may also be entitled to a right of pledge or to the registration of a cautionary hypothecary charge in some specific circumstances. In particular, a contractor, who has produced a movable thing from material supplied to him by the employer, or has repaired a movable thing belonging to the employer, and has obtained possession of such thing on its production, or for the purpose of effecting the repairs,[69] is entitled to a right of pledge over such movable thing by way of security for his contractual claims. Similarly, a contractor who has undertaken the construction of a building or of a part of a building is entitled to the registration of a

[68]In the case that the agreement is accordingly rescinded, the contractor is entitled to compensation for his work and outlay.

[69]Where the object has been produced or repaired on the employer's premises, it does not come into the contractor's possession. If in such a case he acquires the possession at a subsequent time, he may exercise his right of retention under the general rules. On this point, see Setabutr (1985), pp. 61–63.

cautionary hypothecary charge on such building, by way of security for his contractual claim. While the work is incomplete, he may claim the registration of such a charge for a proportionate part of his remuneration, and for any outlay not allowed for in the remuneration.

3.5.4 Termination

A contract of hire of work may terminate either by law or by contract. The first category mainly applies to termination upon completion of the contract. This means that a contract for the completion of a certain task or project ends automatically on completion of such work. Personal inability of the contractor is another reason of termination of contract by law. In this regard, Section 606 of the Civil and Commercial Code provides that the contract comes to an end when the personal qualification of the contractor is of the essence of the contract and the contractor dies, or through no fault of his own becomes incapable of carrying on the work.[70]

Termination by contract occurs as a result of breach by the contractor or the employer for the reasons mentioned above. Moreover, according to Section 605 of the Civil and Commercial Code, the employer may at any time before the completion of the work rescind the agreement without alleging any reason. If he avails himself of this right, the contractor is entitled to the whole of the agreed remuneration, but subject to deduction of any saving of outlay, or of any earnings which he has received, or, but for his intentional neglect, might have received during the time saved in consequence of the rescission of the agreement.[71]

On the other hand, a hire of work contract may be rescinded by the employer in any case in which the contractor has made an estimate without guaranteeing its accuracy, and in which the work cannot be completed without largely exceeding such estimate. If the agreement is rescinded on this ground, the contractor is entitled to a remuneration proportionate to the amount of labour required for the work.

3.6 Loan

3.6.1 General Statement

Under Thai law, there are two types of loans, namely gratuitous loan for use and loan for consumption. The gratuitous loan for use of a thing whether movable or immovable is called *sanyaa yeum chai kong roop*. Thus, a person who borrows the use of a house comes under the rules as to *sanyaa yeum chai kong roop*, as well as a person who borrows a book or a car. An agreement for the gratuitous loan for use

[70] See Stasi (2016), p. 102.

[71] On this point, see Sukatadsani (1992), p. 139.

of a thing is not deemed a gift, though it may be of considerable pecuniary advantage to the borrower.[72] On the other hand, the loan of a thing is deemed gratuitous notwithstanding the fact that it is made in exchange for a service rendered to the lender. According to English terminology, a loan of such a description would be a loan for valuable consideration.

A loan for consumption arises when the lender transfers to the borrower the ownership of a certain quantity of property which is consumed by use on condition that the borrower returns a property of the same kind, quality, and quantity. As it emerges from these definitions, the most significant difference between loan for use and loan for consumption lies in their objects: the object of a loan for consumption is consumable property, and the object of a loan for use is inconsumable property.

3.6.2 Gratuitous Loan for Use

An agreement for a gratuitous loan for use is regulated under Book 3, title 9, Chap. 1 of the Civil and Commercial Code. It is defined as an agreement whereby a person, called the lender, lets another person, called the borrower, have gratuitously the use of a property, and the borrower agrees to return it within a certain period. It follows that only non-consumable things may be the object of a loan for use, such as cars, phones, books, or houses, as these can be enjoyed again and again.

Delivery is an essential element of loan for use contracts. According to Section 641 of the Civil and Commercial Code, a loan for use requires delivery of the property lent to be effective and the loan does not exist until the thing lent is delivered. This means that the contract is complete upon voluntary transfer of possession of goods from the lender to the borrower.[73]

An agreement for a gratuitous loan binds the lender to grant the borrower the use of the borrowed thing during the agreed time. As the loan for use is a unilateral gratuitous juristic act, the Civil and Commercial Code mitigates the liabilities and obligations of the lender. Therefore, the lender does not incur any liability for defects or eviction and is entitled to unilaterally terminate the contract without fault in a number of circumstances.

As to the time of return of the property lent, if the duration is fixed in the loan contract, then the contract terminates with the expiry of that period. If no time is fixed, the borrowed article must be returned as soon as the purpose for which it was borrowed has been accomplished, or as soon as a sufficient period of time has passed for allowing such purpose to be accomplished. When neither a time nor a

[72]Gratuitous loan for use is, in some of its features, very similar to a contract of gift. As in a contract of gift, a party receives a considerable pecuniary advantage from the other. Its main difference from the contract of gift is that there is no transfer of ownership of the thing loaned. The title of the property does not pass to the borrower: the borrower only has the right to use the thing borrowed. For more on this topic, see Minakanit (2012), p. 203.

[73]On this point, see Stasi (2016), p. 103 ff.

purpose for the loan is agreed upon, the lender may claim the return of the borrowed thing at any time he may think fit. The lender may also terminate the loan by notice: (a) if by reason of an unforeseen circumstance he requires the borrowed thing for his own use; (b) if the borrower makes an unauthorized use of the borrowed thing (e.g. by granting its use to a third party) or seriously endangers the safety of the borrowed thing by the neglect of his contractual duties; and (c) on the borrower's death (Section 648, Civil and Commercial Code).

The borrower's duties as to the safe preservation of the borrowed thing, as to its proper use in accordance with the agreement, and as to its return at the proper time, are similar to the corresponding duties of a lessee in respect of the leased object. The cost of the preservation of the borrowed thing and the expenses for ordinary maintenance of the property lent must be borne by the borrower (Section 647, Civil and Commercial Code). The right to the reimbursement of any other outlay is determined by the rules as to unjustified benefits.

Under English law, an agreement for the loan of a thing made without consideration moving from the promisee is not enforceable against the lender, nor could the latter in such a case be prevented from recovering the borrowed article at any time he might think fit. The borrower according to English law is of course bound to bestow proper diligence in respect of its custody, and of its return to the lender at the agreed time.

3.6.3 Loan for Consumption

The loan for consumption is the second type of loan regulated under Book 3, title 2, Chap. 9 of the Civil and Commercial Code. As discussed above, a loan for consumption is a contract by which the lender transfers to the borrower the ownership of a certain quantity of property, and the borrower agrees to return a property of the same kind, quality, and quantity.[74] Such type of loan, whether gratuitous or non-gratuitous, is called in Thai *sanyaa yeum chai sin bpleuang*, if according to the intention of the parties, the borrower becomes the owner of the borrowed things, and his obligation to return the same is satisfied by the delivery of the same quantity of things of the same kind and quality.[75] Thus, there is an actual alienation of the property.

[74]This means that the loaned property must be consumable (i.e. property that cannot be used without being consumed, such as money, food, gasoline, and the like) and fungible (i.e. property for which a substitute can be found by quality, measure, or weight such as textile materials, gold, wheat, and the like). On this point, see Setabutr (1985), p. 82.

[75]Cases are conceivable in which fungibles are lent with the intention of being returned in specie, but in any such case the fungibles become 'specific things', *pro hac vice,* and the transaction does not come within the definition of a *sanyaa yeum chai sin bpleuang*. To illustrate, suppose that a moneychanger may for the purpose of decorating his shop window, borrow banknotes, and coins from another subject to a stipulation that the identical notes and pieces are to be returned. This would not affect the rights of third parties without notice of the facts, but an unauthorized use of the borrowed things would, according to Thai law, render him liable.

Loan for consumption is a real contract which requires delivery of the property to be valid. Such property may consist in money, food, or other things that can be measured, counted, or weighed. Upon delivery, the contract is concluded and the borrower is under a unilateral obligation to return the exact equivalent of the same kind and quality. The contract does not impose any reciprocal obligation upon the lender.

Where money or other fungibles are due from one person to another by virtue of any transaction not originally in the nature of a loan, it may be agreed between the parties that their mutual obligatory relations shall be determined by the rules relating to loan transactions. An example will clarify this point. Suppose that the seller of 500 quintals of rice of a certain quality, having received the purchase money, agrees with the buyer that the delivery of the rice shall be postponed, and that he shall owe the 500 quintals of rice to the buyer, as if they had been lent to him. As another example, assume that the rice is delivered, and the parties agree that the payment of the purchase price is to be postponed, and that the buyer shall owe the amount of the purchase price, as if it had been lent to him by the seller.

3.6.4 Loan of Money

Under Thai law, a loan of money is defined as an agreement by which one party delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed. If a loan is made for a sum of money, the Civil and Commercial Code provides special rules with regard to the form of the contract and the interest rate. Specifically, Section 653 of the Code states that a loan of money for a sum exceeding 2000 baht in capital is not enforceable by action unless there be some written evidence of the loan signed by the borrower. If the loan is made for an amount of 2000 baht or less, the contract is valid and enforceable irrespective of whether it is made verbally or in writing.

The loan contract can be gratuitous or non-gratuitous and the payment of interest is not an implied term of an agreement for a loan. Parties determine the nature of the contract by deciding whether the borrower must pay interest or not to the lender. To avoid predatory lending practices, Section 654 of the Civil and Commercial Code fixes a legal limit of 15 % per year to the interest rate that can be charged on a loan. When a higher rate of interest is fixed by the contract, it is automatically reduced to 15 % per year. In contrast, when interest must be paid but no rate has been specified, a legal default interest of 7.5 % per year is applied.[76]

[76]To protect borrowers from improper lending practices, compound interest is not allowed unless by a special agreement in writing.

Where interest is stipulated for, and no time for the payment of interest is fixed, interest is payable at the end of each year during which the loan continues. If the loan was for a shorter period than a year, the interest is payable on the repayment of the loan.[77]

3.7 Deposit

3.7.1 General Remarks

While the *depositum* of Roman law implied the gratuitous assumption of the custody of a thing, the *fak sap* of the Thai law is an agreement for the custody of a movable thing, whether for reward or otherwise. More precisely, a deposit is a contract whereby a person, called the depositor, delivers a property to another person, called the depositary, and the depositary agrees to keep it in his custody and return it (Section 657, Civil and Commercial Code). According to Section 658 of the Civil and Commercial Code, the promise of a reward is implied if under the circumstances of the case the gratuitous assumption of the custody of the thing in question cannot be expected (e.g. if furniture is deposited with a trader whose usual business consists in the keeping of furniture for reward).[78]

The rules as to the duties of the depositor and the depositary bear a certain resemblance to the duties of employers and employees in the case of agreements involving business transactions for the account of another. Under the provisions of Section 659 of the Civil and Commercial Code, an ordinary depositary, if rewarded, must exercise such care and skill as a person of ordinary prudence would exercise in the circumstances. It follows that the depositary may be held liable for wilful default and negligence. In the absence of any reward, it is sufficient for him to apply the diligence usually applied to his own affairs.[79] For example, a warehouseman (i.e. a person who in the usual course of his trade undertakes the storage and custody of goods) is responsible for their loss or deterioration, unless he can prove that such loss or deterioration could not have been avoided by the application of the diligence of a diligent mercantile trader.

A depositary, in the absence of express or implied authority, is not entitled to place a thing deposited with him into the custody of another. In this regard, Section 660 of the Civil and Commercial Code states that if without the permission of the depositor the depositary uses the property deposited or lets a third person have the use or custody of it, he is liable for any loss or damage to the property, even caused by *force majeure*, unless he proves that the loss or damage

[77]With regard to the repayment of the loan, time may be fixed by the contract. Where no time is fixed, either party may at any time give notice of repayment.

[78]A comprehensive overview of the issue can be found in Setabutr (1985), p. 149 ff.

[79]It must be noted, however, that in any case a depositary is liable for the default of his employees to the same extent as for his own default.

would have happened in any case. If authorized to hand over the deposited object to a third party, the depositary is liable for any default in the course of such handing over but not otherwise.

Furthermore, a depositor must indemnify the depositary in respect of any damage arising through any defect in the bailed object, unless he can prove: (a) that he did not in fact know the perilous nature of the defect and would not have discovered it by the application of proper diligence, or (b) that the depositary was informed of the circumstances or otherwise aware of them.

As regards the right of withdrawal of the deposited object, the Civil and Commercial Code provides that a depositor may at any time withdraw the deposited object, subject, however, to the depositary's right of retention in respect of his remuneration or disbursements (Section 663). Correspondingly, a depositary may at any time require the depositor to withdraw the deposited object, unless the object was deposited for a fixed period, in which event the withdrawal before the expiration of such period cannot be claimed except on a cogent ground (e.g. the perilous nature of the goods).[80]

The depositor is bound to reimburse the depositary for any expenses which were necessary for the preservation or maintenance of the property deposited unless such expenses were incumbent upon the depositary under the contract of deposit (Section 668, Civil and Commercial Code). If no time for payment of remuneration is fixed by the contract or by custom, the remuneration is payable when the property deposited is returned. If fixed by periods, the remuneration is payable at the end of each period.

No action for remuneration, reimbursement of expenses, or compensation in connection with a deposit can be entered later than six months after the extinction of the contract.

3.7.2 Deposit in the Nature of a Loan

If fungibles are entrusted to the care of another without any special arrangement, the property in the deposited objects remains in the depositor, and the identical objects must be returned to him. On the other hand, if a special arrangement is made to the effect that the ownership of the deposited objects is to pass to the depositary, and that the duty to return such objects will be sufficiently discharged by the return of similar things of the same quality and quantity, the rules as to loans of fungibles are applicable. Where the arrangement is made while the fungibles are in the depositary's custody, the transaction is treated as a loan as from the time at which the depositary acquires the ownership of the deposited objects. In any case, the time and place of the return are, in the absence of any stipulation to the contrary, determined by the rules as to agreements for the custody of movables.

[80]The depositary is bound to return the property deposited to the depositor, to the person in whose name it was deposited or to the person to whom he has been duly directed to return it.

The authorization enabling the depositary to appropriate the deposited fungibles may, as a general rule, be expressed or implied, but where negotiable instruments are deposited it is inoperative, unless made by express words. In the case that shares or debentures are deposited by any person who does not carry on the business of a banker or money changer, the authorization is invalid unless given by a written document specially referring to the particular transaction.

A transaction occupying an intermediate position between a deposit in the proper sense of the word and a loan of fungibles occurs where a depositor authorizes a warehouseman with whom he stores fungibles to mix his goods with others of the same kind and quality belonging to other depositors. Such an authority has the effect of transferring the ownership to the several depositors by whom, respectively, such an authority was given as tenants in common, in the proportions in which they have contributed to the total quantity of the goods, the warehouseman being authorized to deliver to each depositor a quantity proportionate to his share, without requiring the assent of the other depositors.

3.7.3 Special Rules for the Deposit of Money

Deposit of money (in Thai: *fak ngern*) is regulated under Book 3, title 10, Chap. 10 of the Civil and Commercial Code. A deposit of money is a contract whereby a person, called the depositor, delivers s sum of money to another person, called the depositary, and the depositary agrees to keep it in his custody and return it. According to Section 657 of the Code, it is presumed that the depositary is not to return the same specie, but only the same amount.[81]

The depositary may use the money deposited and is only bound to return an equivalent amount. He is bound to return such amount even though the money deposited has been lost by *force majeure*. The same rules applicable to the contract of deposit apply to the deposit of money. Section 673 of the Civil and Commercial Code, however, specifies that 'When the depositary is bound only to return the same amount of money, the depositor may not demand the return of the money before agreed time, nor may the depositary return it before such time'.

3.7.4 Special Rules for Innkeepers

An innkeeper, who in the regular course of trade gives sleeping accommodation to guests, is liable for the loss or deterioration of anything brought into his inn by a guest accommodated in the course of such trade. Thus, the innkeeper is liable for loss or damage to the property of the traveller or guest, even caused by strangers

[81] On this point, see Setabutr (1985), pp. 163–164.

going to and from the inn, hotel, or other such place. Section 675 of the Civil and Commercial Code states, however, that the innkeeper is not liable for 'loss or damage caused by *force majeure* or by the nature of the property or by the fault of the guest or any of his companions'.

In the case of money, currency notes, bills, bonds, shares, debentures, warrants, jewels, or other valuables not deposited for safe custody with special notice of their nature, the liability is limited to 5000 baht; but if the innkeeper declines to take any such things into safe custody, or if the damage is caused by himself or any of his employees, the liability is unlimited. In this respect, Section 676 of the Civil and Commercial Code provides that on discovery of the loss or damage to the property not expressly deposited, the traveller or guest must immediately communicate the fact to the proprietor of the inn, hotel, or any such place.

It must be pointed out that a notice posted in the inn repudiating the innkeeper's liability is ineffective, but an express agreement between innkeeper and guest excluding such liability is binding on the latter.[82]

3.8 Suretyship

3.8.1 General Statement

An agreement of suretyship or guarantee (in Thai: *kam bpragan*) is defined as an agreement by which the surety (*poo kam bpragan*) binds himself to the creditor of a third party to answer for the performance of the obligation of such third party (Section 680, Civil and Commercial Code). It may refer to a future or contingent obligation as well as to a present unconditional obligation. The existence of a suretyship agreement does not release the main debtor from performing the obligation. The suretyship agreement is a tripartite relationship whereby the principal debtor has the obligation to repay the debt. In the event, the principal debtor is unable or unwilling to do so, then the creditor has an immediate and direct remedy against the surety. Specifically, the Civil and Commercial Code states that the creditor must demand performance of the obligation to the debtor first and must proceed against the property of the debtor before holding the surety responsible for payment (Sections 688 and 689).

A person who requests another to give credit to a third party is liable as surety for such third party to the extent of the credit given in accordance with such request. This form of suretyship is distinguishable in some ways from an ordinary guarantee: an ordinary guarantee is not enforceable by action unless the surety has

[82]For more detailed discussion on this topic, see Hutasingha (1977), p. 219.

bound himself in writing while an instruction to give credit imposes the liability of a surety on the person giving the instruction, though it was not given in writing.[83]

3.8.2 Extent of Surety's Liability

The surety is liable to the same extent as the principal debtor, even in so far as the liability of the latter is increased by reason of his default or *mora*. Suretyship also covers interest and compensation due by the debtor on account of the obligation and all charges accessory to it (Section 683, Civil and Commercial Code). The surety is not, however, liable in respect of such changes in the principal debtor's liability as are brought about by any juristic act done by the principal debtor after the date of the guarantee. For example, if the surety guarantees that the principal debtor will return a picture lent to him, and the picture is destroyed by fire without any default on the part of the principal debtor, the surety is not liable if the principal debtor is not in *mora solvendi* as to the return of the picture. If he is in *mora solvendi*, and consequently liable for accidental loss, the surety is equally liable. If the time for the return of the picture was extended after the date of the guarantee by agreement between the principal debtor and the creditor, and the picture was destroyed during such extended period, the surety is not in any event liable for the loss.

The rules stated above are, of course, applicable in so far only as the surety has not limited his liability to an aliquot part of the guaranteed debt, or to a fixed maximum amount.[84] They are also modified in the event of a continuous guarantee being given to secure a fixed maximum amount of indebtedness.

3.8.3 Defences Open to Surety

The surety may avail himself of any defences and rights of avoidance and of setoff to which the principal debtor is entitled as between himself and the creditor.[85]

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[83]An instruction to give credit in the above-mentioned manner differs in its effects from a mere undertaking to pay for work done for another or for goods supplied to another, because such an undertaking is binding, even if the person for whom the work is done, or to whom the goods are supplied, does not become liable as principal debtor. Undertakings of the latter kind are, under English law, distinguished from guarantees. However, an instruction to give credit to another on the understanding that the person to whom credit is to be given is to be the principal debtor, and the person who gives the instruction is to be liable as surety, would under English law come under the rules relating to guarantees, and would therefore be required to be in writing.

[84]It should be pointed out that in case the scope of the suretyship is not expressly determined by the parties, the suretyship is presumed to be without limitation. On this point, see Chantrathip (2007), p. 68.

[85]He may avail himself of a defence to which the principal debtor was originally entitled but which was waived by him. If the principal debtor is dead, the surety is not entitled to derive any advantage from the fact that his heirs are liable to a limited extent only.

In this regard, Section 694 of the Civil and Commercial Code states that 'in addition to the defences which the surety has against the creditor, he can also set up defences which the debtor has against the creditor'.

In a case not coming under the exceptional rules stated below, a surety may also avail himself of the *beneficium excussionis*, by virtue of which he may require the creditor to prove that he has obtained a judgment against the principal debtor and that his attempt to enforce such judgment was unsuccessful.[86]

The *beneficium excussionis*, a survival from Roman law, which has never penetrated into English law, is excluded if the surety has expressly waived the *beneficium excussionis*, the surety has agreed to be liable as 'principal debtor', or the difficulty of taking judicial proceedings against the principal debtor is materially increased by the fact that he has removed his domicile since the date of the guarantee. The *beneficium excussionis* is also excluded if bankruptcy proceedings have been instituted against the principal debtor, or if it may be assumed from the circumstances that the enforcement of a judgment against him would not result in the discharge of the guaranteed debt, it being at the same time impossible to obtain satisfaction by the sale of any movable thing pledged to the creditor or subject to his right of lien.[87]

3.8.4 Remedies of Surety Against Principal Debtor

A person who becomes a surety at the principal debtor's request, or who has volunteered his suretyship under circumstances which, under the rules as to voluntary services, place him in the position of a mandatary, may require the principal debtor to procure his release from the suretyship if the principal debtor is in *mora solvendi* in respect of the obligation guaranteed by the surety, a material deterioration of the principal debtor's financial position has taken place, or the difficulty of taking judicial proceedings against the principal debtor has been materially increased after the date of the guarantee by a change of his domicile.[88]

With regard to the remedies of the surety against the principal debtor after performance, Section 693 of the Civil and Commercial Code states that the surety who has performed the obligation has a right of recourse against the debtor for the principal and interest, and for the losses or damages which he may suffer by reason of the suretyship. In so far as the surety satisfies the creditor, the claim against the principal debtor, with all securities held by the creditor in respect thereof, becomes vested in the surety, *ipso facto*. The surety is not entitled to use any right so becoming vested in him to the creditor's detriment. An example will

[86]On this point, see Pohtong (1984), p. 42.

[87]Ibid., 48.

[88]It must be added that in cases where the principal debtor's obligation has not yet matured, the principal debtor may, instead of procuring the release, give security.

help illustrate this point. Suppose that the creditor's claim is for 30,000 baht, of which 20,000 baht are guaranteed; he also has a right of pledge on goods belonging to the principal debtor. The surety pays the 20,000 baht, therefore the debt, to the extent of 20,000 baht, becomes vested in him, and he also becomes entitled to a right of pledge over the goods, by way of security for his claim for 20,000 baht. As he must not use his rights to the creditor's detriment, he must allow the creditor to occupy the position which he would have occupied if the principal debtor had paid off the 20,000 baht. As this would not be the case if he claimed to rank *pari passu* with the creditor in respect of his right of pledge, his charge for 20,000 baht is postponed to the creditor's right of pledge for the remaining 10,000 baht.

It is noteworthy that if the surety performs the obligation without informing the debtor and the debtor, in ignorance of the fact, performs the same obligation, then the surety has no right of recourse against the debtor. In such case, the surety may only have an action for undue enrichment against the creditor (Section 696, Civil and Commercial Code).

3.8.5 Remedies of Surety Against Cosureties

It is possible that a debt may be guaranteed by more than one person. In this case, all persons who guarantee the performance of the same obligation are deemed cosureties whether any privity exists between them or not. The cosureties are liable as joint debtors even if they do not enter into the suretyship agreement at the same time (Sections 682, paragraph 2, Civil and Commercial Code). After a cosurety performs the obligation, he has the right to claim contribution from the other cosureties for their share of the debt.

The mutual rights of cosureties are regulated by the general rules relating to the mutual rights of joint debtors. They are less favourable to a cosurety who pays off the guaranteed debt than the corresponding rules of English law.[89]

3.8.6 Termination of Surety

The obligation which results from a suretyship agreement may terminate in different ways. According to the Civil and Commercial Code, the suretyship is

[89]Under Thai law, a cosurety cannot proceed against the other cosureties before he has satisfied the debt; under English law, he can assert his claim for contribution as soon as the creditor has obtained judgment against him. Under Thai law, a creditor cannot in the first instance claim more from any individual cosurety than his share of the contribution, but if he cannot obtain payment in full from any particular cosurety, he can claim a share of the deficiency from each of the other cosureties; under English law, the full amount of the contribution may be claimed from each cosurety, provided that the claimant does not ultimately retain more than the amount due to him.

extinguished if the principal obligation is also extinguished. This is expressly provided in Section 698 of the Code which states that 'The surety is discharged as soon as the obligation of the debtor is extinguished by any cause whatsoever'.

In addition, if the creditor refuses to accept performance when performance is due, the surety is discharged. In this regard, Section 701 of the Civil and Commercial Code provides that 'The surety may tender performance of the obligation to the creditor from the time when performance is due. If the creditor refuses to accept performance, the surety is discharged'.

In the case that the creditor abandons a right of priority, or a charge, or a right of pledge, or a right against a cosurety serving as collateral security for the guaranteed debt, the surety is discharged to the extent of the benefit which he would have derived from the abandoned right, if it had not been abandoned.[90]

It must be added that when the guarantee is given for a definite time, a surety who is entitled to the *beneficium excussionis* becomes discharged unless the creditor, immediately on the termination of the period for which the guarantee is given, takes proceedings against the principal debtor and immediately on the termination of such proceedings informs the surety that he will assert his rights against him. A surety who is not entitled to the *beneficium excussionis* is discharged on the termination of the period for which the guarantee is given unless the creditor, immediately on the expiration, informs him that he will assert his rights against him.[91]

The rule of English law under which a continuing guarantee entered upon for an indefinite time may, as to future transactions, be terminated at any time, unless the contrary is expressly stipulated, though not expressly laid down by any definite rule, would probably be upheld under Thai law, subject to certain safeguards as to the period of notice. In contrast, the surety's death does not, under Thai law, put an end to the guarantee.

3.9 Pledge

3.9.1 General Characteristics

Under Roman law, two kinds of charges were recognized: charges on immovable things remaining in the debtor's possession and charges on movable things handed over to the creditor for his security. A charge of the former kind was called *hypotheca*, while a charge of the latter kind was described as *pignus*. The same distinction is maintained by the present Thai law, which, however, extends the scope of *pignus*, by allowing a right, as well as a movable thing, to be placed under the

[90]Under English law, any change in the relations between the creditor and the principal debtor brought about after the date of the guarantee has the effect of discharging the surety; under Thai law, the surety's liability cannot be increased by reason of any such change, but the change in itself does not discharge the surety.

[91]On this point, see Chantrathip (2007), p. 89.

creditor's control for the purpose of securing the performance of an obligation incurred by the person pledging such right or thing, and which, in the exceptional cases referred to below, also recognizes rights of pledge as to objects outside of the creditor's control. The technical name for this kind of charge is 'right of pledge' (*jam nam*), which, though used by some writers in a general way so as to include also charges on immovables, is, in the text of the Civil and Commercial Code, applied exclusively to charges on movables and rights.

The pledge contract is defined in Section 747 of the Civil and Commercial Code as an agreement in terms of which the creditor has the right to obtain payment by means of a movable property in case the debtor does not perform the obligation at the time fixed.[92] The expression 'pledgor' (*poo jam nam*) denotes the person by whom the pledge was constituted or, his successor in title as owner or possessor of the pledged object, whether he be the personal debtor or otherwise.[93] The right of pledge, relating to a movable thing or right is of a strictly accessory nature. It is a real security over a movable property thing or on a right, created for the purpose of securing the performance of an existing or future, certain or contingent, obligation, entitling the 'pledgee' (*poo rap jam nam)* to obtain satisfaction of such claim out of the pledged object. The right of pledge extends to all products severed from the pledged object. Where the pledged object is a personal claim bearing interest, the right extends to the interest. Where the pledged object is a bond or a share certificate to bearer, or passing by endorsement with dividend or interest coupons attached thereto, the right of pledge extends to such coupons, in so far as they are delivered to the pledgee. The pledgor may, in the absence of an agreement to the contrary, demand the delivery of each coupon as it falls due, but he forfeits this right as soon as the pledgee's right of sale comes into operation.[94]

The pledgee of an undivided share in a movable is entitled to exercise the pledgor's rights as to participation in the management and as to the use of the pledged object, but the right to partition cannot be exercised without the pledgor's assent, unless the pledgee's right of sale has come into operation, in which event such assent is no longer required. On partition, the part which is appropriated to the pledged share becomes subject to the right of pledge.

A right of pledge does not merely secure the principal claim, but extends to all claims for interest, costs, and other accessories. If the pledgor is not the personal debtor, the charge on the pledged object cannot be increased by any agreement between the pledgee and the personal debtor, entered upon after the creation of the right of pledge.

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[92]The rules as to contractual rights of pledge are, in so far as practicable, also applied to statutory rights of pledge, and to the rights of execution creditors in respect of movable objects seized by them.

[93]If the pledged object is sold, the seller remaining liable for the debt, the seller is the personal debtor and the buyer is his successor in title as pledgor; where a person pledges a thing owned by him to secure a debt owing by another, he is the pledgor and such other is the personal debtor.

[94]Where a right of pledge refers to several objects, each object is deemed to be charged with the whole debt.

A pledgor, who is not at the same time the personal debtor, may, as between himself and the pledgee, make use of any defences or rights of setoff to which the personal debtor is entitled (including defences expressly waived by the personal debtor) and also of any defences to which a surety is entitled.[95]

The pledgee has a real right in respect of the pledged object, for the protection of which the same remedies are available *mutatis mutandis* as for the protection of the rights of ownership. The pledgee of a movable thing placed under his control is, of course, also entitled to the possessory remedies.

A right of pledge affecting a movable thing is created by a real agreement between the parties, accompanied or followed by the delivery of the pledged object. The property can be delivered to the creditor or to a third party (Section 749, Civil and Commercial Code). Where the pledged object is a negotiable instrument passing by endorsement, such instrument on delivery must be endorsed in blank or to the pledgee's order. In the case that the pledged object is in the pledgor's indirect possession, the delivery is replaced by a notice to the person who is in direct possession. The delivery to the pledgee may also be replaced by a delivery which brings the pledged object into the joint possession or under the joint control of the pledgor and the pledgee.[96] Among several rights of pledge, the one which is created at a prior time takes priority, even if it was constituted as a security for a future or for a contingent claim.

Any real or obligatory right, or any right relating to an immaterial object capable of assignment or transfer, is also capable of being pledged.[97] The formalities required for pledging a right are the same as would be required on the transfer or assignment of such right. A real right is therefore pledged by means of a real agreement accompanied or followed by registration. If the transfer of a right is incomplete without the delivery of a movable thing (e.g. of a certificate of charge), the same modes of delivery must be used as in the case of the pledging of a movable thing.[98]

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[95]It must be pointed out that the pledgee's rights against the pledged object are not affected by the fact that the claim secured by the pledge is barred by prescription.

[96]If the pledgor is without a title to the pledged object, or the title is defective, the rules as to the acquisition of the ownership of a movable from a person without title or with a defective title are applied *mutatis mutandis*. Where the pledged object is subject to the right of another (e.g. where the pledgor is not the owner but a pledgee of the pledged object), the pledgee's right takes priority over the right with which the pledged object is charged, unless the pledgee at the time of the creation of his right of pledge was not in good faith. The rules as to what constitutes good faith are the same *mutatis mutandis* as in the case of a transfer of ownership.

[97]A right of usufruct not being capable of assignment cannot be the object of a right of pledge. Similarly, a hypothecary charge cannot be pledged apart from the claim which it is intended to secure.

[98]A personal claim capable of transfer by informal assignment cannot be validly pledged without notice to the debtor.

3.9.2 Rights and Duties of the Parties

The pledgee's main right arising from the provisions of the Code is to hold the pledged property until he has received full performance of the obligation (Section 749, Civil and Commercial Code). The pledgee is not, under any circumstances, bound to incur any expense for the preservation of the pledged object. If he incurs any such expense, his claim to reimbursement is determined by the provisions as to voluntary services.

In so far as he is in direct possession of the pledged object, he has to use the same degree of diligence in respect of its custody as if he had agreed to undertake its custody (Section 759, Civil and Commercial Code). If by any dealings with the pledged object he infringes the pledgor's rights to any material extent, and continues such infringement notwithstanding the pledgor's request to discontinue the same, the pledgor may demand the deposit of the pledged object with a public authority, or its delivery to a receiver appointed by the court, or the redelivery to himself against payment of the debt secured thereby.[99] By the same token, if the pledgee, knowing that a material deterioration of the pledged object is impending, fails to give immediate notice thereof to the pledgor, in so far as such notice is practicable, he is liable in damages for the consequences of such failure to give notice.

In the case that a naturally fruit-bearing movable thing is the pledged object, the pledgee has the right to appropriate the profits of the pledged object 'in payment of any interest that may be due to him, and, if no interest is due, in payment of the principal of the obligation secured' (Section 761, Civil and Commercial Code). Where a pledgee is entitled to appropriate the profits of the pledged object, he is, in the absence of any express agreement to the contrary, subject to specific duties, in addition to the ordinary duties of a pledgee. More precisely, he must exercise proper diligence in obtaining the profit and must apply the net profits towards the satisfaction of the interest or costs (if any) secured by the charge, and subject thereto applies the same towards the satisfaction of the principal claim.[100]

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[99]Where the debt secured by the pledge does not bear interest and has not matured, interest at the legal rate may in the event mentioned in the text be deducted from the date of the payment down to the date of the maturity of the debt.

[100]This special type of pledge is known as 'antichretic pledge'. Antichretic charges are institutions of Roman law not unknown in the older English law. *Antichresis* was the name given to an arrangement between the pledgor and the pledgee by which the latter not only obtained possession together with a right of sale, but also the right to take all the fruits and profits yielded by the thing, such fruits and profits to be accepted by him in lieu of interest. The expression 'mortgage' used in England was originally used in contradistinction to *vif gage*, and this term was applied for a charge enabling the creditor to take possession of the property pledged to him, and to obtain payment of his debt with interest by the collection of the rents and profits. A charge of this nature (*antichresis*) is invalid under Thai private law if it is intended to affect an immovable, but a movable thing or a right may be validly pledged under an agreement entitling the pledgee to appropriate the profits of the pledged object. Where a naturally fruit-bearing movable thing is the pledged object, such an agreement is presumed in the absence of evidence to the contrary. The presumption is not applied where the pledged object is a right. On this point, see Pohtong (1984), p. 95.

The pledgee is bound to redeliver the pledged object on the extinction of his right of pledge.[101]

The rights and duties of the pledgee of a right are (subject to certain modifications and exceptions) regulated by the same rules as the rights and duties of the pledgee of a movable thing. In particular, the pledgee of an obligatory right is in the same position towards the debtor[102] as a transferee of the pledged right would be, but he cannot enforce the pledged right before his right against the pledgee has become enforceable. On the other hand, the pledged right cannot be extinguished or modified so as to prejudice the pledgee's right without the pledgee's assent.

With regard to the pledgor, the Civil and Commercial Code provides that the pledgor has the right to get back the pledged property on payment of the debt (Section 758). This is to say that the pledgor is entitled to satisfy the pledgee's claim and to demand redelivery of the pledged object at any time after the maturity of the claim. If the pledgee uses the pledged property or transfers it to a third person, he is liable for any injury, even arising from circumstances of force majeure, unless he can prove that the injury would have been sustained in any case (Section 760, Civil and Commercial Code).

The satisfaction of the claim may be effected by deposit with a public authority, or by setoff. If the pledgor, who redeems a pledge, is not the personal debtor, the claim against the latter on such redemption becomes vested in the pledgor, in the same way as the claim against the principal debtor becomes vested in the surety on repayment of the guaranteed debt.

It must be added that the right of pledge may also be transferred. On the transfer of any claim secured by a pledge, whether by assignment or under any rule of law (e.g. on death or bankruptcy, or seizure by a judgment creditor), the right of pledge becomes vested in the transferee and the transferee may claim the delivery or assignment of the pledged object. The right of pledge cannot be transferred apart from the claim; if the claim is transferred with the express stipulation that the right of pledge is not to pass to the transferee, the right of pledge is thereby extinguished. The pledgee's duties as to the pledged object pass to the transferee. In the case that the transfer is effected by assignment, the transferor continues liable for their performance as a surety for the transferee and without the *beneficium excussionis*.

The pledge may be redeemed by any third party entitled to any right affecting the pledged object which would be forfeited on its sale by the pledgee (e.g. by a subsequent pledgee). This right of redemption may be exercised as soon as the pledgee's claim has matured. The redeeming party on redemption acquires the claim against the personal debtor.[103]

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[101]It must be noted that the pledgor's claims against the pledgee in respect of any alteration or deterioration of the pledged object are barred by prescription after the lapse of six months from the date of re-delivery; they are also barred by prescription in any case in which the right to redelivery is barred by prescription.

[102]The expression 'debtor' as used in the statement of the rules appearing in the text means the person against whom the pledged right is enforceable.

[103]See the analogous rule as to the redemption of charges on immovables.

3.9.3 Pledgee's Remedies

If at any time the pledgee's security is endangered by the impending deterioration of the pledged object, or by a justifiable apprehension of a serious diminution in its value, the pledgee of a movable thing, or of an instrument to bearer,[104] has the right to sell the pledged object after having first given notice to the pledgor of his intention to do so.[105] The notice is unnecessary if its service is impracticable or, if there would be any danger in delay. The sale must be effected by public auction, unless the pledged object is quoted on the Stock Exchange of Thailand, or has a market value. In either of the last-mentioned events, a private sale by a publicly authorized broker or auctioneer at the current price is allowed. The fact that the sale has taken place must, if practicable, be notified to the pledgor without delay.

After the pledged property has been auctioned or sold, any portion of the value or of the proceeds takes the place of the pledged object. The pledgor may demand their deposit with a public authority.

In case of pledgor's default as to discharge of obligation, the pledgee is entitled to foreclose on the pledged property in accordance with the provisions on court execution proceedings. In particular, the pledgee, who does not obtain satisfaction of a matured liquidated claim secured by the pledge of a movable thing, must first inform in writing the owner of the pledged object of his intention to sell the same, and of the amount of the claim intended to be satisfied by such sale. In case of failure to perform the secured obligation within a reasonable time, the pledgee may obtain a court order for the sale of the property by public auction (Section 764, Civil and Commercial Code).[106]

Where there are several pledgees, the right can be exercised by any one of them, but a prior pledgee is not bound to deliver the pledged object to a subsequent pledgee for the purpose of enabling him to exercise the right of sale. If the prior pledgee is not in possession of the pledged object (e.g. if it is held by a third party for account of both pledgees), he is not entitled to oppose a sale for account of a subsequent pledgee, unless he wishes himself to exercise the right of sale.

In the case that the pledged object is in the joint possession, or under the joint control of the pledgor and the pledgee, the pledgee may, as soon as the right of sale is exercisable, require the pledged object to be taken entirely out of the

[104]No similar rules apply where the pledged object is a right, or a negotiable instrument passing by endorsement.

[105]The pledgee cannot sell the pledged object if the pledgor gives sufficient further security within a reasonable period. On this point, see Chantrathip (2007), p. 198.

[106]Where the claim secured by the pledge is not originally a claim for the payment of money, the right of sale does not arise before the claim has been converted into a money claim. In some cases, such conversion may take place without a judicial order, e.g. where a conventional penalty has to be paid on non-performance of the debtor's obligations, but, as a general rule, a claim for the performance of an act other than the payment of money can only be turned into a money claim by a judicial order converting the claim for performance into a claim for pecuniary damages.

pledgor's control. The pledgor may in such a case require the pledged object to be delivered to a third party, who must undertake to keep it ready for delivery to the buyer.

If several objects are pledged as security for one claim, the pledgee is entitled to sell such of them as he may select unless it is provided otherwise in the contract. The pledgee, however, is not entitled to sell more objects than are required for the satisfaction of his claim.

The time and the place of sale must be publicly announced, and also separately notified to the owner of the pledged object and to any third party interested therein, in so far as such notification is practicable. The sale must be effected by public auction, unless the pledged object is quoted on the Stock Exchange of Thailand or has a market value, in which event a private sale at the current price, through the agency of a publicly authorized broker or auctioneer, is permitted.

In any case in which a sale by the pledgee is lawfully effected, the buyer acquires the same rights as if he had purchased the pledged object from the true owner. This rule is also applied in a case in which the pledgee himself purchases the pledged object. All rights of pledge relating to the pledged object are extinguished by the sale, though known to the buyer.

In so far as the proceeds of sale satisfy the pledgee's claim, such claim is deemed to be discharged by the sale. In the event that the sale proceeds of the pledged property exceed the pledgee's claim, the pledgor is entitled to receive the surplus. Correspondingly, if the proceeds are less than the amount due, the pledgor remains liable for the difference (Section 767, Civil and Commercial Code).

3.9.4 Extinction of Right of Pledge

The right of pledge expires when the pledgee returns the property to the pledgor,[107] the debt for which it has been granted has been paid in full, or the obligation secured is extinguished otherwise than by prescription (e.g. destruction of the pledged object). It follows that the extinction of the right of pledge is not caused by the fact that the claim intended to be secured thereby is barred by prescription, or that the pledgor is entitled to any defence or right of setoff against the pledgee. If the pledgor is entitled to any defence permanently barring the claim, he may demand the redelivery of the pledged object, or, in the case of the pledged object being a right, the release of the right of pledge. The discharge of the claim by merger causes the right of pledge to be extinguished, except where a third party is interested in the right, or where it is to the owner's advantage to keep the right of pledge alive.

[107]Where the pledged object is in the pledgor's or owner's possession, re-delivery by the pledgee is presumed. The same presumption is applied where a third party, after the creation of the right of pledge, has obtained possession from the pledgor or from the owner of the pledged object.

Upon complete and full satisfaction of the debt, the pledgee must return the property to the debtor, who is bound to reimburse the pledgee for any expenses which have been necessary for the preservation or maintenance of the pledged property unless otherwise provided in the contract (Section 762, Civil and Commercial Code).

3.10 Mortgage

Mortgage (in Thai: *jam nong*) is a real security over immovable property which grants the creditor the right to be paid out of the property with priority over the remaining ordinary unsecured creditors regardless of whether or not the ownership of the property has been transferred to a third person. It is defined under the Civil and Commercial Code as a contract whereby a person, called the mortgagor, assigns a property to another person, called the mortgagee, as security for the performance of an obligation, without delivering the property to the mortgagee (Section 702). This implies that a mortgage can be created only if the underlying debt is valid. It is not required, however, that the principal obligation should exist at the time of the creation of the contract. A person whose right of ownership over a property is subject to a condition may mortgage the property subject to such condition.[108]

3.10.1 Property Subject to Right of Mortgage

The contract of mortgage affects the whole or a part of a property for the security of an engagement without divesting the owner of his title. A mortgage can be created on any kind of immovable property. Mortgages can also be created on ships of five tons and over, floating houses, and beasts of burden provided they are registered according to law (Section 703, Civil and Commercial Code). In addition, it can be established on any other movable property which can be registered for this purpose.[109]

It must be pointed out that the same property can be mortgaged in favour of more than one mortgagee for different debts. Suppose, for example, that A is the owner of a house and decides to mortgage it in favour of X Bank securing an obligation of 700,000 baht. Later, A decides to borrow additional funds in the amount of 400,000 baht in order to start a new business. Thus, he uses his house again as mortgaged property to secure the payment of his debt in favour of Y Bank. In this case, the rank of each mortgagee will depend on the respective dates and hours of

[108]For more on this topic, see Stasi (2016), p. 107. See also Minakanit (2012), p. 229.

[109]For instance, Section 5 of the Machinery Registration Act B.E. 2514 (1971) provides for the registration of machinery as movable property and enables it to be mortgaged.

registration: an earlier mortgagee will always be satisfied before a later mortgagee (Section 730, Civil and Commercial Code).

3.10.2 Creation of Rights of Mortgage

Only the lawful owner of an immovable property is entitled to mortgage the property and secure the performance of an obligation owed to another person. The contract is void if it is concluded by a grantor that is not the lawful owner of the property at the time of its creation. The property object of the mortgage, however, may belong to the principal debtor or a third party who may decide to use his property as security for the performance of an obligation by another person.

In order to be valid, the contract of mortgage must meet formal requirements. According to Section 714 of the Civil and Commercial Code, a contract of mortgage must be made in writing and registered by the competent official. If it is not concluded in the correct form, it is void and of no effect in law. The main purpose of this section is to protect third persons who might subsequently be induced to deal with the mortgagor.[110]

3.10.3 Enforcement of the Mortgage

The question of enforcement of the mortgage usually arises in case of a mortgagor's failure to perform the obligation. Under Section 728 of the Civil and Commercial Code, the mortgagee must notify the mortgagor to perform his obligation within a reasonable time. If the debtor fails to comply with such notice, then the mortgagee may initiate a court action for a judgment ordering the property to be sold at public auction for the highest obtainable price. The court action is the most drastic remedy that the mortgagee can use when he does not receive performance of the obligation. Where there is surplus money remaining after payment of the amount due on the mortgage, the debtor of the obligation is entitled to receive it (Section 732, Civil and Commercial Code). On the other hand, if the net proceeds of the auction are less than the amount due, the mortgagor is not liable for the difference (Section 733, Civil and Commercial Code) unless parties provide otherwise in the mortgage contract.[111]

In certain circumstances, the mortgagee may decide to claim foreclosure of the mortgaged property, instead of sale by public auction. Foreclosure is available only if there is no other mortgage or preferential rights on the same property, the debtor has failed to pay interest for five years, and the mortgagee has satisfied the

[110]On this point, see Stasi (2016), p. 107. See also Chantrathip (2007), p. 105.

[111]For more detailed discussion on this topic, see Hutasingha (1977), p. 276 ff.

court that the value of the mortgaged property is less than the amount due (Section 729, Civil and Commercial Code). Thus, foreclosure following an event of default terminates the mortgage contract. Pursuant to Section 744 of the Civil and Commercial Code, a mortgage is also extinguished if the underlying obligation secured by the mortgage contract is extinguished otherwise than by prescription. This is the case when, for example, the debt secured by a mortgage has been paid in full. Other ways to extinguish the mortgage include the release of the mortgage granted in writing, the discharge of the mortgagor through a document called a certificate of discharge, and removal of the mortgage.[112]

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[112]For more on this topic, see Stasi (2015), p. 93 ff.

Chapter 4
Property Law

4.1 The Right of Ownership

4.1.1 Introductory Concepts

The fourth book of the Civil and Commercial Code deals mainly with 'real rights', though it also incidentally contains rules referring to obligatory relations arising in connexion with the ownership or possession of things or similar matters. A real right is a right affecting a thing available against all the world, and not merely against a particular person.[1] The most complete real right is the right of ownership, but a real right may also concern a thing owned by another. A person entitled to a real right over a thing owned by another may, by virtue of such right, be enabled, to exercise some of the privileges of ownership in lieu of the owner, or to restrain the owner from exercising some of the privileges of ownership. While obligatory rights may, within certain limits, be created at the unfettered discretion of the parties concerned, real rights are inoperative unless they conform to certain types defined by law.[2]

[1]As was the case in private Roman law, the Thai law of property governs the creation, transfer, and enjoyment of most economic assets, obligations being excluded. The division of labour between the Thai law of property and that of succession is also modelled upon the Roman template: the former deals with transfer *inter vivos* of ownership and rights (Book 4 of the Civil and Commercial Code), while the latter concentrates on the *post mortem* devolution of an estate which includes heritable obligations (Book 6 of the Civil and Commercial Code). On this point, see Prachoom (2015), p. 111.

[2]The general law as to real rights may, as to certain specified matters (e.g. family settlements, transmission of immovables on owner's death; rights relating to rivers, springs, mines, and minerals; neighbour's rights, servitudes; compulsory purchase and compulsory consolidation and subdivision of land; rights of aliens and corporate bodies to hold land, among others) and within certain specified limits, be derogated or modified by special laws.

A. Stasi, *General Principles of Thai Private Law*,
DOI 10.1007/978-981-10-2191-6_4

Alongside the right of ownership, there are other property interests (i.e. real rights less than ownership) which secure over a thing a direct power and may be enforced against anybody, including the owner of the property. The rights that they guarantee with regard to the property are absolute. This is to say that they are rights which are directly exercised on a thing and must be respected by all. The common element of these property interests, and that which separates them from the right of ownership, is that they confer rights over the property which are limited in their scope and duration. Hence, the distinction between ownership and property interests is that ownership, although it may be subject to many conditions and restrictions contained in the law, it is not restricted by any chronological term, it lasts forever. In contrast, property interests can only exist for a period of time over property belonging to others. Whenever property interests are extinguished (e.g. by destruction of the land which is the object of a servitude or by death of the grantee of a right of habitation), the right of ownership is restored to its original extent. According to the *numerus clausus* principle, real rights can only be created by the virtue of the law (Section 1298). The real rights over immovables other than ownership which are enumerated under the Civil and Commercial Code are relatively few and can be easily summarized. Specifically, they include the right of servitudes, habitation, superficies, and usufruct.[3]

A real right is, as a general rule, created, transferred, or extinguished by an agreement between the parties concerned (i.e. real agreement), by which the person by whom the right is to be created, modified, or transferred declares his intention in that behalf, and by which the person in whose favour such right is to be created, modified, or transferred declares his acceptance. A real agreement must be distinguished from an obligatory agreement concerning a real right. A real agreement is intended to effect the change to which it refers by its own operation, whereas by an obligatory agreement concerning a real right, one of the parties undertakes to effect such change by a subsequent transaction. A real agreement, though intended by its own operation to create, modify, transfer, or extinguish the real right which it concerns, is not operative as a general rule unless accompanied, followed, or preceded by a prescribed outward act (transfer of possession or registration).[4]

As regards immovables and movable property which, for economic reasons, is categorized as immovable by the operation of the law, it must be added that the

[3]On this point, see Stasi (2016), p. 147.

[4]The difference between a ‘real agreement’ and an ‘obligatory agreement concerning a real right is analogous to the difference between a ‘sale of goods’ and an ‘agreement to sell goods’ under English law. In fact, under English law, a sale of movables, as a general rule, operates immediately and completely without the necessity of any transfer of possession or registration.

transfer of ownership or the creation or modification of a right affecting an immovable, or the transfer of ownership, or of any such right, or the creation or modification of any right affecting such a right is effected by the combined operation of two acts, namely an agreement between the parties and registration with the competent authority.[5] The release of a right is likewise effected by the combined operation of two acts, namely a declaration by the releasing party communicated to the party in whose favour the release is intended to operate and the cancellation of the right on the register. Such declaration is not binding unless it is delivered to the other party in the prescribed form authorizing the cancellation. If the right intended to be released is subject to the right of another, such other must declare his assent.[6]

4.1.2 Definition of Ownership

Ownership, as distinct from possession, in English law denotes the exclusive right to use, manage, and enjoy property, including the right to convey it to others. English lawyers take a pragmatic approach rather than a conceptual and systematic approach to the notion of ownership. Possession is considered a *prima facie* presumption of ownership. Unless and until the presumption of ownership as deriving from the fact of possessing the goods is refuted by evidences, the possessor is considered the legitimate owner and consequently entitled to enjoy all the features of the civilian ownership. The common law does not therefore have a theory of ownership like the civil law systems. Common law scholars do not speak of the ownership right as the most comprehensive right that a person may have in respect of property, but they circumscribe ownership as a better and undisputed title to possession. Ownership is a relative title which is subject to the rights of persons having a superior interest and to any restrictions on the owner's rights imposed by agreement with or by an act of third parties, or by operation of law.[7]

Ownership under Thai law, like its counterpart in Roman law, is commonly defined in terms of rights of possession, use, and alienation of the property. It denotes the fullest group of rights that a person may have in relation to an object of rights, ownership being the sum total of the powers of use and disposal

[5]Registration is an important factor by which the acquisition and assertion of a real right may be assisted, but it only affects immovables and registered property under special provisions of the law such as cars, ships or vessels of six tons and over, steam launches or motorboats of five tons and over, floating houses, and beasts of burden.

[6]In the case of the release of a charge on an immovable, the owner's assent is required. The release is not invalidated by the fact that a restraint on the power of disposition of the releasing party is imposed after the filing of the application for registration.

[7]Faber and Lurger (2011), p. 266.

permitted by law. As in Roman law, it generally encompasses rights *in rem*, though when a particular right is transferred to another person, as by loan or lease, the right to recover it is *in personam* against the temporary possessor as well as *in rem* against all third parties. According to Section 1336 of the Civil and Commercial Code, the owner of property has the rights of enjoyment (*chai soi*), disposal (*jam nai*), and acquisition of its fruits (*dai sung dogpon*) together with the right to pursue and recover it from any person not entitled to retain it, and the right to prevent any unlawful interference with it.[8]

4.1.3 Extent of Owner's Rights

Ownership in its complete form, like liberty in its complete form, is existent in human thought but not in reality. The complete dominion which the term ownership implies is restricted by the rights of the community, and also by the private rights of others. In other words, the exercise of the right of ownership has to be consistent not only with the counterpart rights of other owners but also with the 'adverse' exercise of *iura in re aliena* and restrictions imposed in the public interests. This restricted character of ownership finds expression in the definition contained in Section 1336 of the Civil and Commercial Code, which declares that the owner of a thing may, 'in so far as the rides of law and the rights of third parties admit', deal with such thing as he pleases and restrain the interference of others. The provisions of the law restricting proprietary rights in the public interest are expressly maintained by special enactments, and the general rule of the present Thai law, according to which the exercise of a right is prohibited if it can have no object except the infliction of damage on another, also imposes a limit to the exercise of the rights of ownership.

The power of the owner of an immovable to restrain the interference of others enables him to prevent the construction or maintenance on an adjoining immovable of erections,[9] the existence or use of which would with reasonable certainty lead to an interference with his rights of ownership. According to Section 1351 of the Civil and Commercial Code, however, the owner of a piece of land may, after reasonable notice, make use of adjoining land so far as necessary for the purpose

[8]The exercise of ownership under Thai law obviously reflects the Roman division of ownership rights into *ius utendi* (right of use), *ius fruendi* (right to the fruits), and *ius abutendi* (right of abuse), although there is no mention of the *ius abutendi*. In fact, *ius abutendi* would include alienation which is already subsumed under 'disposal' in the provisions of Section 1336 of the Civil and Commercial Code. Prachoom (2015), pp. 129–130.

[9]Trees or bushes are not 'erections' within the meaning of the rule but it may be provided by the law that they must be kept at a certain distance from the boundary.

of erection, or repairing, a fence, wall or building on or near his boundary line, but he may not enter the dwelling house or a neighbour without the latter's consent.[10]

In particular, Section 1343 of the Code states that land may not be excavated or overloaded in such manner as to endanger the stability of the soil of an adjoining piece of land unless adequate measures are provided for preventing an injury. This is to say that a parcel of land must not be excavated so as to take away the support of a neighbouring parcel of land unless some other method of support is provided. Similarly, the owner of a parcel of land may cut off and keep roots of a tree or bush which have penetrated from the adjoining piece of land in so far as they interfere with the enjoyment of such parcel of land (Section 1347, Civil and Commercial Code). He may also cut off and keep overhanging branches interfering with such enjoyment if their owner fails to do so within a reasonable period specified in a notice communicated to him.[11] By the same token, fruits falling naturally from a tree or bush standing on a neighbouring piece of land, not being a piece of land used for public purposes, are presumed to be fruits of the piece of land on which they fall (Section 1348, Civil and Commercial Code).

Furthermore, Section 1345 of the Code states that when a hedge, or ditch which is not used as a drain, belongs to the owners of two adjoining pieces of land in common, each of the owners is entitled to cut down the hedge or fill up the ditch to the boundary line provided he builds a wall or erects a fence along the boundary line. More precisely, either of two adjoining owners may require the other to concur in the erection or restoration of a boundary mark in the manner required by state law or local custom, the expense being shared by both equally, unless another mode of division results from the relations between the parties. If two plots of land are separated by an intervening plot, ditch, wall, hedge, fence, or similar appliance serving for the benefit of both plots, it is presumed that the owners of both plots are entitled to the common use of such intervening plot or appliance, unless it is apparent from outward signs that it belongs exclusively to one of the two owners.[12] The common right of user entitles either of the two owners to such use as will not hinder the use of the other, the costs of maintenance being borne by the two owners in equal shares.

The fruits of a tree or bush standing on the boundary plot belong to both owners in equal shares and either owner may demand the removal of the tree or bush at the joint cost of both owners. If the other owner waives his interest in the tree or bush the owner who removes it has to bear the whole cost, but acquires the exclusive ownership of the severed tree or bush. The claim to the removal of the tree or bush, however, is excluded in a case in which it serves as a boundary mark, and cannot conveniently be replaced by another mark.

[10]If damage is caused, the neighbour may claim compensation under Section 1351, paragraph 2, of the Civil and Commercial Code.

[11]The rules on this subject may be modified by the law. For example, the law provides that trees and bushes must be kept beyond a certain distance from public roads.

[12]A similar presumption exists in English law as to party walls.

In the event of any dispute as to the exact boundary, the mode of possession is the determining factor. If the mode of possession cannot be accurately established, each of the plots separated by the disputed plot is increased by a plot equal in size to one half of the disputed plot, unless such result would contradict ascertained facts. In the last-mentioned event, the division has to be made in such manner as appears equitable under the circumstances.

Special rules apply with regard to overlapping buildings. In particular, if the owner of a parcel of land, without being guilty of wilful default or gross negligence, has constructed a building overlapping his boundary, the owner of the land on which such building overlaps, who has failed to raise an immediate objection, must suffer such overlapping building to remain on his land, but he is entitled to the payment of rent for the use of the space occupied thereby, and the rent so payable is a charge on the building taking priority over all other charges. The party for the time being entitled to such rent may at any time require the person for the time being liable to pay the same to purchase the space occupied by the overlapping building at a reasonable price.[13]

The owner of an immovable is also, in the event of the threatened collapse of a building situated on an adjoining immovable, entitled to compel the person who would be liable for the damage caused by such collapse to take the steps necessary for averting the danger. In this respect, Section 435 of the Civil and Commercial Code provides that 'a person who is threatened with an injury from a building or other structure belonging to another is entitled to require the latter to make necessary measures for averting the danger'. Section 450 of the Code, however, specifies that 'if a person damages or destroys a thing in order to avert an immediate common danger, he is not liable to make compensation, provided the damage done is not out of proportion to the danger'. It follows that the owner of a thing is not entitled to restrain any interference with such thing on the part of another who is compelled to have recourse to it for the purpose of averting an impending common danger of a much more serious nature than the damage caused by his act.

Certain kinds of interference with the rights of ownership must be tolerated, because they belong to the ordinary conditions of life in industrial communities. The owner of a parcel of land of which the enjoyment is interfered with by gases, vapours, smells, smoke, soot, warmth, noises, vibration, or any similar disturbing influence proceeding from another piece of land, is without a remedy, in so far as the interference with the enjoyment of his own land is not of any material importance, or in so far as the disturbing influence is brought about by a use of the land from which it proceeds which under the local circumstances is not contrary to usage.

As under English law, the ownership of land extends upwards *usque ad coelum*, and downwards *usque ad inferos*. This is clearly stated under Section 1335

[13]If the overlapping building interferes with a heritable building right, or a servitude, affecting the land occupied thereby, the person for the time being entitled to the benefit of such building right or servitude has the same privileges—*mutatis mutandis*—as the owner of the parcel of land would have had, had such building right or servitude not been in existence.

of the Civil and Commercial Code that states that 'Subject to the provisions of the law, the ownership of land extends above and below the surface'. Under the rules of Thai private law, however, the owner is not entitled to restrain any interferences with his right which takes place at an altitude so high, or at a depth so low, that no damage is caused thereby. Interferences disturbing the amenities of a piece of land (as, for instance power line wires obstructing the view of the sky) are deemed damaging interference, but aerial navigation at a considerable altitude comes within the statutory qualification.

Another point of similarity with English law is represented by the right of way of necessity which arises when a piece of land is severed from a larger piece, and thereby cut off from communication with the outside world. In such a case, the owner of the 'landlocked' piece of land has a right of way over the piece of land which retains the communication, without being required to pay any compensation to the owner of such piece of land. A right of way, subject to the payment of compensation, arises under Thai law in every case in which a parcel of land is without such communication with a public highway as is required for its proper enjoyment. Under Section 1349 of the Civil and Commercial Code, when 'a piece of land is so surrounded by other people's land that it has no access to the public ways, the owner may pass over the surrounding land to reach a public way'.[14] The place and the manner of the passage must be chosen as to meet the needs of the person entitled to passage and at the same time to cause as little damage as possible to the surrounding land. The person entitled to passage may, if necessary, construct a road for passage. The person entitled to passage must pay compensation for any damage suffered by the landowner on account of the passage being established. Such compensation, except for damages arising from the construction of a road, may be made by annual payments. A right of way of necessity, however, does not arise in case the cutting off from communication of the landlocked piece of land was brought about by its owner's own arbitrary act.[15]

4.1.4 Co-ownership

The co-ownership (*kammasit ruam*) Thai law is analogous to the 'tenancy in common' of English law, and governed by the provisions of Sections 1356 to 1366 of the Civil and Commercial Code. According to Section 1357 of the Code, co-owners are presumed to have equal shares and to have the right to manage the property in common unless otherwise agreed. Matters of ordinary management are decided

[14]The same applies, if passage can only be had over a pond, marsh, or sea, or if there is a steep slope with a considerable difference of level between the land and the public way.

[15]State legislation may extend the rules as to ways of necessity so as to provide for access to a railway line or river.

by the majority of the co-owners. However, each co-owner may do an act of ordinary management unless the majority has decided otherwise. All important matters of management, on the other hand, must be decided by a majority of co-owners who must also represent at least half of the value of the property. A change of object may be decided upon only by the consent of all the co-owners.

Co-owners of an immovable may agree on the terms of the possession, management, partition, and other similar matters by entering into a written agreement. In this case, the arrangement between the co-owners of an immovable is not binding on the successor in title of any co-owner, unless registered as an encumbrance on the land register. Following the same logic, a claim enforceable by one of the co-owners against the others is binding on the successors in title of any co-owner only in so far as it is registered on the land register.[16]

A thing held in co-ownership may also be encumbered in favour of one of the co-owners. Thus, a parcel of land held in co-ownership may be encumbered in favour of the owner for the time being of another parcel of land, notwithstanding the fact that the actual owner of such other parcel is one of the co-owners. Correspondingly, a parcel of land may be encumbered in favour of the owners for the time being of a parcel of land held in co-ownership, notwithstanding the fact that the owner of the parcel subject to such encumbrance is one of the co-owners of the parcel entitled to its benefit.

It must be added that each of the co-owners of a thing may assert the rights of ownership over such thing as against third parties. A claim for the delivery of a thing held in co-ownership cannot, however, be satisfied except by delivery to all the co-owners jointly, or by deposit with a public authority, or delivery to a judicially appointed receiver.

4.2 Acquisition of Ownership

Chapter I of the second title of the fourth book of the Civil and Commercial Code deals with the acquisition and extinction of ownership in corporeal things and with the legal modes of acquisition of ownership, i.e. the processes which, by law, make a thing ‘owned’.

Apart from juristic act and succession, the modes of acquiring and losing ownership of corporeal things are principally the following: adverse possession, accession, separation, and occupation. As opposed to the transfer of title by agreement of the parties, these modes of acquisition of ownership are defined as ‘original’, meaning that the acquisition operates independently and creates an entirely new right of ownership. The modes of acquisition of ownership will be analysed in order.

[16]Such a claim would have to be registered as a hypothecary charge.

4.2.1 Acquisition by Juristic Act[17]

The principles of law applicable to acquisition and loss of ownership differ depending on the nature of the property. With respect to immovable property, Section 1299, paragraph 1, of the Civil and Commercial Code provides that the acquisition by juristic act of immovable property or real right related to it is not complete unless the juristic act is made in writing and the acquisition is registered by the competent official. In the case that the immovable property or the real right related to it is acquired otherwise than by juristic act, Section 1299, paragraph 2, of the Civil and Commercial Code specifies that the acquirer's right cannot be dealt with through the register unless it has been registered, nor can it, without registration, be set against a third person who has, for value and in good faith, acquired it and registered his right.[18]

The production of an authority for registration is not sufficient evidence for the registration of the transfer of ownership. The registrar is required to satisfy himself as to the proper observance of the formalities prescribed by the law. In the absence of any evidence showing a contrary intention, the transfer of the ownership of the principal thing has the effect of transferring the ownership of all accessories belonging to the transferor at the time of the transfer. If, in consequence of the alienation of the principal thing, any accessories not belonging to the transferor or, subject to the rights of any third party, come into the possession of the transferee, the same rules are applied as in the case of an alienation of a movable thing by a person without title or with an imperfect title, the question as to the good faith of the transferee being decided with reference to the state of his knowledge at the time of the transfer of possession.

A party to a real agreement acquires the ownership of the parcel conveyed thereby in conformity with the state of the title appearing from the register, subject

[17]The text deals exclusively with the transfer of ownership by juristic act, but the ownership of an immovable is frequently transferred from one person to another without the necessity of any such act. Thus, on the marriage of spouses who have made an ante-nuptial marriage contract providing for community of goods, all property not having the character of privileged or separate property, which was vested in either spouse at the time of the marriage, is *ipso facto* transferred to both spouses as co-owners; where the community of goods is provided for by a post-nuptial marriage contract, the transfer of ownership takes place on the execution of such contract. The ownership of after-acquired property in either case becomes vested in both spouses on acquisition. In the case that any such property consists of any immovable, or any right relating to an immovable, either of the spouses can compel the other to concur in the application for the registration of the change of ownership. Similarly, the death of a person has the effect of transferring the ownership of his property to his heirs. When a person dies, he can no longer own property or exercise rights over property. Therefore, property of the deceased is subject to succession; that is, it must pass on to his survivors. It must also be noted that in the case of bankruptcy the property of the bankrupt does not, as under English law, become vested in a trustee, but remains vested in the bankrupt, who, however, becomes incapable of alienation.

[18]On this point, see Stasi (2016), p. 38 ff.

to the cautions and objections entered thereon, and subject also to such restrictions or qualifications not appearing on the register as are known to the transferor at the time when he files his application for the registration of the transfer.[19] The registration of a right affecting an immovable creates a presumption of the validity of the right and the title of the person in whose favour it is registered. Correspondingly, the cancellation of any such right on the register creates a presumption of the release or extinction of such right.[20]

These rules apply in the case of a gratuitous agreement as well as in the case of a non-gratuitous agreement, but in the case of a gratuitous agreement the true owner is entitled to compensation from the transferee under the rules as to 'unjustified benefits'. For example, suppose A is erroneously registered as the heir of the deceased owner of Whiteacre, B being the true heir. Subsequently, A sells and conveys Whiteacre to C, who is not acquainted with B's rights. In this case, B cannot claim the rectification of the register or otherwise dispute C's title, or claim any compensation from him. If A had made a voluntary transfer of the ownership to C, B would not be entitled to contest his right of ownership, but he would be entitled to a claim for compensation under the rules as to 'unjustified benefits'. To take another example, A purchases an immovable as to which no charge is registered, an objection having, however, been registered on the application of B, who subsequently shows that he is entitled to a charge. In this case, A must allow the charge to be registered.

As between encumbrances registered in the same division of the register, the priorities are determined by order of registration. With respect to encumbrances registered in different divisions, the priorities are determined by the date of the entry. Finally, encumbrances registered in different divisions as from the same date rank *pari passu*. An example will help clarify this point. Suppose a right of usufruct and two hypothecary charges are registered on the same date. Both hypothecary charges rank *pari passu* with the right of usufruct, but the charge registered in the first place ranks in priority to the charge registered in the second place. The priorities may be altered by subsequent agreement between the parties concerned. In such a case, there must be an agreement between the encumbrancer whose right obtains priority and the encumbrancer whose right is postponed, and the change must be registered. If the right intended to be postponed is a hypothecary charge, land charge, or annuity charge, the owner of the mortgaged property must give his

[19] A restraint on the transferor's powers of alienation, intended for the protection of any particular persons, but not entered on the register or known to the transferee at the time when the application is filed, does not affect his rights.

[20] The original or an authenticated copy of every document filed in support of the application for registration must be retained at the registry; the documents so retained are called *chanote*. The register and all documents referred to in any entry are open to the inspection of any person who can prove a legitimate interest. On this point, see Jumpa (2003), p. 211 ff.

assent. In the case that the right intended to be postponed is itself subject to the right of another, such other must give his assent.[21]

As regards rectification of the registration, it is noteworthy to observe that if any right relating to an immovable or to any charge or other encumbrance on any immovable exists without being registered or, is incorrectly registered or incorrectly cancelled, or if any charge or encumbrance, caution or objection which ought to have been cancelled has not been cancelled, the person affected by the incorrect state of the register may apply for a rectification of the register, and may compel any person whose rights would be affected by such rectification to give his assent thereto, and to procure any registration required for the purpose of making such assent effective. If the production of any certificate of charge is required for the purpose of obtaining the rectification of the register, the possessor of the certificate may be compelled by the person entitled to rectification to produce such certificate.

The rules which govern the transfer of the ownership of movable property by juristic act also require two conditions for the validity of the transfer. Pursuant to Section 1303 of the Civil and Commercial Code, on the transfer of the ownership of movables an agreement between the parties is equally necessary, but a transfer of possession, as a general rule, takes the place of registration.[22] The transfer of possession required under the general rule is dispensed when the transferee at the time of the formation of the agreement is already in possession of the property, e.g. as bailee or Pawnee of the movable of which the ownership is transferred to him (*traditio brevi manu*). The same rule applies if the transferor retains the direct possession while the transferee acquires the indirect possession (e.g. if a seller becomes bailee for the buyer) and if neither the transferor nor the transferee is in possession of the property, but the right to possession is assigned by the transferor to the transferee.

With regard to derivative acquisition of the ownership of movable property from persons without title or with defective title, two classes of movables must be distinguished: things which have been stolen from or lost by the true owner and things which have not been stolen from, or lost by the true owner (e.g. things sold by an unauthorized agent). The transfer of the possession of a thing which have been stolen from or lost by the true owner, if accompanied or preceded by a real agreement for the transfer of its ownership to the transferee, has the effect of

[21]On the creation of any encumbrance the owner of the immovable which it affects may reserve to himself the right to create other encumbrances within specified limits having priority over the first-mentioned encumbrance. This reservation must be registered as a qualification of the encumbrance which it concerns.

[22]It must be noted that whereas an agreement for the transfer of an immovable made subject to any condition or stipulation as to time is inoperative, the transfer of the ownership of a movable thing is not invalid by reason of its being made subject to any condition or stipulation as to time (e.g. the *pactum reservati dominii*).

conferring such ownership upon the transferee free from any encumbrance. This rule applies notwithstanding any defect in the transferor's title, or the existence of any undisclosed charge or right of pledge, provided that at the time of the transfer of possession the transferee is in good faith.

In the events in which the ownership is transferred without any transfer of possession, the following rules are applied: (1) in the case of *traditio brevi manu* the ownership passes at the time of the formation of the real agreement, if at such time the transferee is in good faith, and if the possession was originally acquired by delivery from the transferor; (2) in the case of *constitutum possessorium* the ownership does not pass before the actual delivery of possession, and only if the transferee is in good faith at the time at which such delivery takes place; and (3) in the case of the assignment of the right to possession the ownership passes at the time of such assignment, if at that time the assignor is in indirect possession, and if the transferee at the same time is in good faith. If the assignor is not in indirect possession, the ownership does not pass before the actual delivery of possession, and only in so far as the transferee is in good faith at the time of such delivery.[23]

4.2.2 Adverse Possession

Acquisition of ownership may also be effected by adverse possession. Under Section 1382 of the Civil and Commercial Code, a person acquires ownership of property when he has peacefully and openly possessed without opposition a property belonging to another, with the manifest intention of becoming its legitimate owner for a prescribed period of time. The term of prescription varies depending on the nature of the property and in particular the Code requires possession for an uninterrupted period of time. For example, assume that A takes possession of certain chattels, to which he thinks himself entitled as next of kin of a person whom he believes to have died intestate. A will is subsequently discovered by which the chattels are bequeathed to B. In this case, if B does not prevent A from using the property before the expiration of the five years, A acquires an indefeasible title.

For the adverse possession to be effective, several conditions must be met. First, the acquisition must be peaceful. This means without using intimidation, force, or threat of force against the owner or custodian of the property to gain control of it. Second, the acquisition must be open. In this context, open does not mean that the owner knows that the right of servitude is exercised against him. It

[23]A person is not deemed to be in good faith, if he knows the thing of which the ownership is intended to be transferred does not belong to the transferor or is subject to any encumbrance, or if his ignorance on the subject is due to gross negligence. The fact that a transferee, though aware of the fact that the transferor is not the true owner, has some reason to assume that he is transferring the ownership under the owner's authority does not as a general rule entitle such transferee to claim the privilege of good faith.

means that the acquisition must not be secret and the owner has the means of knowing it. The third element required by the Civil and Commercial Code is the adverse nature of possession. Adverse possession means not only that the enjoyment must be done without the consent of the owner, but also that it is adverse by nature. Obviously, the possession would not be adverse if authorized by the true owner or by a person with legal authority to so do. Fourth, ownership of property belonging to another person is acquired by possession of it for a prescribed period of time ranging from five years in case of movable property to ten years in case of immovable property.[24]

It is interesting to note that under the Civil and Commercial Code just title and good faith are not necessary elements of acquisitive prescription. The only elements which are necessary in order to claim acquisition through prescription are those listed under Section 1382 of the Civil and Commercial Code, namely peaceful, open, and uninterrupted possession for a period of time. Thus, a person who has possessed a piece of land continuously for ten years, and during the same period of time was in continuous proprietary possession, acquires the ownership of such piece of land by virtue of such adverse possession.[25]

The Civil and Commercial Code lays down specific rules for the purpose of ascertaining whether a person was in continuous possession for an uninterrupted period. In particular, Section 1386 of the Civil and Commercial Code specifies that possession at the beginning and at the end of the period creates a presumption in favour of continuous possession during the whole period. In the calculation of the possession period, the time during which property belonging to the estate of a deceased person is in the possession of any person other than the heirs runs in favour of the heirs. By the same token, the time during which a predecessor in title is in possession runs in favour of his successor in title regardless of whether it was in good or bad faith. In fact, Section 1385 of the Civil and Commercial Code states that the transferee has the right to add the period of the transferor's possession to that of his own, in case of transfer of possession. In such case, any defect in the possession of the transferor may be set up against the transferee. Thus, the possession of the precedent possessor in title may be counted provided that it was adverse to the original owner's interest. As a consequence of the prescription, the possessor of the movable or immovable property, as the case may be, becomes the legal owner of the property in question. This means that in the event that he

[24]With regard to immovable property, ten years continuous proprietary possession by a person not registered as owner enables the possessor to obtain a judicial order made after a proceeding by public citation declaring the rights of the former owner to be forfeited. On production of such order, the possessor is entitled to be registered as owner. If, before the promulgation of the order declaring the rights of the former owner to be forfeited, a third party is registered as owner, or has caused any objection to be entered against the state of the register, the order is inoperative as against such third party.

[25]On this point, see Stasi (2016), pp. 139–140.

subsequently loses possession of the said property, he has the right to claim ownership against third parties.[26]

The rules as to the computation of the period, and as to its suspension or interruption, are similar to the rules as to the suspension and interruption of the period of prescription. Interruption may either be civil or natural. Civil interruption occurs whenever the possessor loses possession of an object because legal proceedings have been initiated against him. This interrupts the running of prescription against the party who starts the legal proceedings. Natural interruption refers to the physical interruption of the prescription which may occur when the possessor loses possession of an object voluntarily (e.g. restitution, acknowledgement of title, among others) or involuntarily (e.g. theft, robbery, or *force majeure* such as fire, earthquake, and tsunami). In this regard, Section 1384 of the Civil and Commercial Code states that loss of possession brought about against the possessor's will is not deemed to interrupt the continuity of the period in any case in which the possession is recovered within a year from the date of such loss, or by means of an action brought within such period.[27]

Apart from derivative acquisition, there are other methods of acquiring property by creating a new right as it will be discussed below. In such cases, the right is not transferred but it is created as new.

4.2.3 Accession

'Accession' is defined as the incorporation of one item of property into another; that is to say, accession is an original mode of acquisition of ownership according to which a thing is considered to be property once it becomes physically or intellectually associated with something the person already owns.[28] It does not matter whether the thing was owned or not owned before accession; it could apply to an object that has separate legal status prior to accession such as in the case of a seed planted in a plot of land. After the seed is planted, it begins to germinate and eventually emerges above the soil surface, whereby it is deemed an accession to the land.

Accession includes the following categories of acquisition: alluvion, construction of buildings, incorporation, and specification. The rules as to alluvion, newly formed islands and dried upriver beds, are regulated under the Civil and

[26]On this point, see Suchiwa (2007), p. 131 ff.

[27]However, Section 1383 of the Civil and Commercial Code states that the ownership of property obtained through an offence may be acquired by the offender or a transferee in bad faith by prescription only after the expiration of the period provided for prescription of the offence or of the period fixed by the foregoing section, whichever is longer.

[28]See Suchiwa (2007), p. 100.

Commercial Code. The law on the subject is generally derived from the rules of Roman law as to *insula in flumine nata*, *alveus derelictus*, *alluvio*, and *avulsio*. Alluvion is a form of acquisition of ownership without any act being done by the acquirer. It can be defined as an imperceptibly gradual increment in the area of land due to sediment, which is deposited on a shore or bank of a river, or to the shore of the sea, by the force of the water, as by waves or a current. This changes the size of a piece of land without any specific action on the part of the landowner. In this regard, Section 1308 of the Civil and Commercial Code states that where land is formed by alluvion, it becomes the property of the riparian owner. In this case, the owner of the land increased by alluvion is entitled to the addition. Another case of alluvion is that of an island rising in a public lake and beds of waterways left dry (Section 1309, Civil and Commercial Code). In this second case, the Code provides that the ownership of the island created by alluvion belongs to the state.[29]

Another original mode of acquiring property is regulated under Sections 1311 and 1312 of the Civil and Commercial Code. More precisely, Section 1311 of the Code provides that if a person has, in bad faith, constructed a building upon another person's land, he must return the land after having returned it to its former condition, unless the owner of the land chooses to have it returned in its current condition, in which case the owner of the land must pay according to his own choice the price of the building or a sum representing the increased value of the land. On the other hand, if a person has, in good faith, constructed a building encroaching on another person's land, the constructor is the owner of the building, subject to his paying the owner of the land for the use of such land and having his rights on the encroached land registered as servitude (Section 1312, Civil and Commercial Code).[30]

Furthermore, the Civil and Commercial Code provides that the ownership of a movable thing may be lost if, by becoming attached to or combined with another thing, it ceases to be an independent unit. A movable thing ceases to be an independent unit by incorporation (*commixtio*, *confusio*) and specification. The term 'incorporation' is used whenever two things are so attached together that the identity of one of them or of both is lost. In the case of incorporation by attachment to an immovable or to another movable thing which on such attachment becomes the principal thing, the owner of such immovable, or of such principal movable thing, becomes the owner of the thing attached thereto (Section 1316, paragraph 2, Civil and Commercial Code). This may be the case, for example, when a movable thing is attached to a parcel of land in such manner as to form an essential component part of it or when a movable thing is attached as accessory to another movable thing so as to form an essential component part of the principal thing. In these cases, the owner of a thing attached to another loses his right of ownership.

[29]See in particular Jumpa (2003), p. 114.

[30]On this point, see Stasi (2016), p. 137.

In contrast, when movable things are attached together so as to form essential component parts of the combined thing, the previous owners become co-owners of this thing. In this respect, Section 1316, paragraph 1, of the Civil and Commercial Code states that the different persons become co-owners of the composite thing, each person's share being proportionate to the value of his thing at the time of its being joined with the other things.[31]

In the case of 'specification',[32] the person by whom the transformation is effected, as a general rule, acquires the ownership. In all other cases to which reference has been made the owners of the several things joined together become co-owners of the combined thing, in shares proportionate to the value of the things respectively contributed by them. More precisely, the Civil and Commercial Code assigns the right of ownership to the person who supplies the labour when the value of the work has a higher economic value than the material (Section 1317). Thus, if the value of the work greatly exceeds the value of the materials used, the maker or creator shall become the owner of the thing which is the result of his work, but he must pay the value of the materials. Writing, drawing, painting, printing, engraving, or any other similar work done on the surface of any material is deemed to be work done on such material. In contrast, if the value of the work of transformation is considerably inferior to the value of the materials used, ownership remains with the owner of the materials who must pay the value of the work carried out irrespective of the question of whether the materials can or cannot assume their former condition.[33]

A person who, under the above-mentioned rules, becomes deprived of any right is entitled to claim compensation in money from any person benefiting by his loss in accordance with the rules as to unjustified benefits. He cannot, however, claim the restoration of the original state of things unless he is under the circumstances entitled to the *jus tollendi*, or unless the event by which he was deprived of his right was brought about by an unlawful act.

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[31]Under English law certain 'fixtures' attached to land by lessees or tenants for life for purposes of ornament, trade, or agriculture, remain in the ownership of the person by whom they were attached to the land, and the rule making them part of the land is only applied if they are not removed within the particular period of time allowed in each case. Under Thai law such fixtures follow the general rule, but the rights of lessees or usufructuaries or other persons entitled to the temporary possession of land are safeguarded by the *jus tollendi*, which, as we will see in Sect. 4.3.3, is a better protection to a person attaching tenant's fixtures to the land than the right of ownership reserved to such a person under English law.

[32]Under Thai private law, specification consists of the conversion of materials into a new product not held to be the property of the original owner of the material. In other words, it refers to the making of a new 'species' or substance out of another person's materials. On this point, see Minakanit (2012), p. 231.

[33]The same rule applies under English law. Generally, a manufacturer, or artist, or author uses material purchased by himself. Where the material is supplied by the person ordering the work (as, for instance, in the case of a dressmaker who works up the stuff supplied by her customer), the material is generally more important than the work.

It must be also noted that in so far as the ownership of a thing attached to another or transformed by work is lost by its former owner, all encumbrances affecting such thing are discharged. On the other hand, if the former separate owners become co-owners of the combined thing, the share in the combined thing of every co-owner becomes subject to the encumbrances to which the thing formerly owned by him in severalty was subject; an encumbrance affecting an immovable or a principal movable thing extends to any movable thing becoming part thereof by incorporation.

4.2.4 Separation

As we have seen above the ownership of a thing is lost if it becomes the component part of another thing; in a corresponding manner a fresh right of ownership is created whenever a component part of a thing is severed from such thing. The component part so becoming severed may either be in the nature of a product (e.g. the produce of land or the offspring of cattle), or it may be part of the substance of the thing from which it is severed (e.g. a fixture removed by a person entitled to the *jus tollendi*);

As a general rule, the owner of a thing from which a component part is severed, acquires the ownership of the severed part, unless such severed part by virtue of any real right (e.g. a right of usufruct, or an antichretic right of pledge), becomes vested in any other person. There are, however, two main exceptions to this rule. First, the rights of the owner of a thing from which a component part is severed, in so far as they relate to any fruits, are postponed to the rights of a proprietary possessor of the thing from which such fruits are severed, who at the time of obtaining possession believed himself entitled thereto and to the enjoyment of the fruits, and did not at any subsequent time before severance become aware of any defect in his title. Equivalent to the proprietary possessor is the person who possesses the thing for the purpose of exercising a right of use of it.[34] Second, the rights of the owner of a thing from which a component part is severed are again postponed to the rights of any person who, by permission on the part of the owner, or of any person having real or apparent authority to grant such permission, is entitled to appropriate any component part of the thing to which such permission relates (e.g. a lessee under a lease agreement, a buyer of any growing crops or of any part of a demolished building).

[34]A person ousted from possession but recovering possession within a year from the date of its loss, or by virtue of an action brought within that period, is in respect of his right to the severed parts deemed to have been in continuous possession.

4.2.5 Occupancy

Another very common way of acquiring property is through occupancy which refers to the lawful possession of an object which belongs to nobody with the intention of becoming the owner.[35] More precisely, Section 1318 of the Civil and Commercial Code states that a person may acquire the right of ownership of an ownerless movable through occupancy, that is to say, by taking and retaining possession of the property. A thing is deemed to have no owner if it never had any owner (as in the case of a wild animal in a state of liberty) or, if its owner has abandoned its possession with the intention of abandoning its ownership. In accordance to Section 1319 of the Civil and Commercial Code, a movable becomes ownerless if the owner gives up its possession with the intention of renouncing its ownership.

The ownership of a thing having no owner is acquired by any person who obtains proprietary possession thereof, unless possession was obtained by the infringement of a legal prohibition or of another person's right of appropriation.[36] The loss of a thing by its owner frequently produces results similar to those of the abandonment of its ownership. As mentioned above, the finder of a lost thing acquires the ownership thereof if during a certain specified period no notice of the loss is given to him or to the local police authority of the absence of such a notice during the prescribed time has, therefore, the same effect as the abandonment of the ownership.

Treasure trove is separately treated. Treasure is defined in Civil and Commercial Code as movable of value 'which has been hidden or buried for so long that its owner cannot be found any more' (Section 1328). As a general rule, the treasure becomes the property of the state. The finder of treasure who delivers it to the police or other competent official, however, is entitled to receive a reward of one third of its value.[37]

The grounds of termination of ownership correspond to those of its acquisition; thus, they do not need specific discussion here. In general, the causes which

[35]The possibility of acquiring by occupancy the ownership of pieces of land relinquished by the former owner, which existed in Roman law, is not recognized under the present law.

[36]More precisely, wildlife is considered as common property of all. Subject to special laws and regulations, a person who catches a wild animal on waste lands or in public waters, or, without opposition of the owner, on private lands or in private waters, becomes its owner (Section 1321, Civil and Commercial Code). On the contrary, a person who catches a wild animal that is protected under the Wild Animal Reservation and Protection Act B.E. 2535 does not acquire its ownership. In a similar way, a wild animal kept in any private park and a fish kept in a private pond are not deemed to be in a state of liberty. If a wild animal which was in a state of captivity escapes therefrom, it is deemed to be ownerless unless it is immediately pursued by its owner; if it is pursued it is deemed to be ownerless as soon as the pursuit is abandoned. Subject to these exceptions, the ownership of any wild animal which is in a state of liberty is acquired by any person who acquires its proprietary possession.

[37]Under English law, treasure trove belongs to the Crown or to the grantee of the Crown entitled in the particular locality to the franchise of treasure trove.

terminate the right of ownership include, among others, accession, renunciation of property, loss of possession, abandonment of possession, and expropriation of land from the landowner for a purpose deemed to be in the public interest.

4.3 Owner's Claims Against Persons Interfering with Rights of Ownership

4.3.1 Claim to Recover Possession

The legal remedies for the recovery of possession referred to above are intended to protect a former possessor as such and without reference to the right of ownership. An owner as such is entitled to claim possession by an action similar to the Roman *vindicatio*, which is available in any case in which an immovable or movable thing is withheld from the owner.[38] The plaintiff succeeds in such an action if he can prove his right of ownership, unless the defendant can prove that he (or the indirect possessor from whom he derives his right to possession) has a right to possession available against the owner.

If an indirect possessor has a right to possession as against the owner, but was not authorized to transfer such right of possession to another, the owner is entitled to a judgment ordering the direct possessor to deliver possession to such indirect possessor, and directing delivery to the owner in the event of such indirect possessor being unable or unwilling to take possession.

A person who is in possession of a movable thing, of which the ownership was transferred by means of an assignment of the right to possession may, as against the assignee, avail himself of any defence which he would be entitled to use against the assignor. For example, suppose A lets his house to B and B, not having a right to underlet, underlets to C. In this case, A may bring an action against C, claiming an order directing C to give up possession to B, and directing that in the event of B failing to take possession, possession should be given to A. To take another example, assume that A has let a bicycle to B for a month. During the month A sells the bicycle to C, and transfers the ownership by the assignment of his right to possession. B may refuse delivery to C before the expiration of the month.

4.3.2 Mutual Claims for Compensation

As mentioned above, a person who, in good faith, is in proprietary possession of a thing, or who, in good faith, is in possession of such thing by virtue of a real right

[38] An owner who merely wants to assert his right of ownership may do so without claiming possession by an action asking for a declaration as to his right. The owner of an immovable may assert his right by claiming the rectification of the register.

of user, acquires the ownership of all fruits of such thing severed during the time of his possession. A possessor, who is not in good faith, does not acquire the ownership of any fruits or other component parts of the thing possessed by him, but, after having severed such component parts, he may of course confer a good title on a buyer acquiring any such component part without any notice of the defect in the seller's title.

The mutual rights and liabilities of an owner, who recovers the possession of a thing from another, and of such other, are governed by specific rules. As to compensation for fruits and profits, the person from whom possession is recovered is not liable to compensate the owner in respect of fruits, severed by him while he was in good faith,[39] before the commencement of the owner's action.[40] On the other hand, if he was in bad faith when obtaining possession he has to account for all profits earned by him during the continuance of his possession. In the case that the person from whom possession is recovered ceased to be in good faith at any time after taking possession, he has to account for all profits earned by him after such time. He must also account for the whole of the profits earned by him during the pendency of the action as well as for all profits which, but for his default, would during such time have been earned in the usual course of husbandry or management.

With regard to other claims, it is important to discuss the liabilities of the person against whom the owner's right to possession is established when the thing which is the subject-matter of the action is deteriorated, destroyed, or cannot be delivered to the owner. Precisely, if he was in good faith he is not liable in respect of any damaging event which has happened before the commencement of the action. In contrast, if he was not in good faith when obtaining possession, he is liable in respect of any damaging event due to any default on his part which has happened while he was in possession. In the case that the person against whom the owner's right to possession is established ceased to be in good faith at anytime after taking possession, he is under the same liability as from such time.[41]

It must be added that the person from whom possession is recovered is liable in respect of any loss caused by any damaging events due to any default on his part which has happened during the pendency of the action. If his title to possession was derived from an indirect possessor, he is also liable in respect of any of the damaging events due to any default on his part in so far as he is liable to such indirect possessor. When possession is obtained by means of unlawful interference or of any criminal act, the owner is entitled to full compensation under the rules as to unlawful acts.

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[39]A possessor who in good faith derives his title from an indirect possessor is deemed to be in good faith, notwithstanding the bad faith of such indirect possessor.

[40]It must be pointed out, however, that the person from whom possession is recovered is liable in respect of fruits which would not have been won if the proper course of management had been followed. Similarly, if his title to possession was not obtained for valuable consideration, he is liable in accordance with the rules as to unjustified benefits.

[41]If he is in bad faith and also in *mora solvendi* in respect of his obligation to yield possession to the owner, he becomes subject to the more stringent liability brought about by that circumstance.

4.3.3 Counterclaims of Possessor

The person from whom possession is recovered is entitled to certain claims against the owner and in particular the right to compensation for outlay and the *jus tollendi*. With respect to the first point, the possessor is entitled to claim the necessary outlay incurred by him before the commencement of the action, and while he was in good faith, except in so far as it was incurred for the preservation of any thing of which he enjoyed the profits. Necessary outlay incurred during the pendency of the action, or while he was in bad faith, must be repaid by the owner in so far only as the rules as to voluntary services prescribe such payment. Compensation in respect of unnecessary outlay incurred before the commencement of the action, or before knowledge of the fact that the possession was unauthorized, may be claimed, in so far as the thing, for the preservation or improvement of which such outlay was incurred, has, in consequence thereof, an increased value at the time at which the owner recovers possession.[42]

As regards the second point, the person from whom possession is recovered is entitled to the *jus tollendi*. This rule, however, does not apply to those things which are affixed for the purpose of increasing the profits to which he is entitled as possessor, things of which the removal is useless to him, things for which the owner offers adequate compensation in money. The rules of Thai law are much more favourable to the person from whom possession is recovered, and less favourable to the owner, than the corresponding rules of English law. Under English law, an owner of land is entitled to mesne profits for the whole time while he was entitled to possession, and the claim of the owner of a chattel in an action of detinue is for the delivery of the chattel and damages in respect of the detention. The possessor has not in either case to account for any profits actually received by him, but the amount awarded for mesne profits or damages, as a general rule, exceeds any such profits to a considerable extent.

4.3.4 Claims in Respect of Interference with Rights Other Than Right of Possession

As the owner's action for the recovery of possession corresponds to the Roman *vindicatio*, so the action in respect of interferences with rights, other than the right of possession, corresponds to the Roman *actio negatoria*. The Roman *actio negatoria* was applied principally in cases in which the defendant claimed to be entitled to do the act complained of by virtue of a servitude affecting the owner's land, but the

[42]The right to the reimbursement of outlay may be exercised by a successor in title of the party making the outlay, and against a successor in title of the person who, at the time when the outlay was incurred, was the owner of the thing for which it was incurred.

Civil and Commercial Code confers the right of action on any person whose rights of ownership are disturbed, otherwise than by interference with the right of possession. In any such case, the owner may claim the removal of the disturbing factor. If further interferences are to be apprehended, he may also obtain an injunction restraining such further interferences (Section 1336, Civil and Commercial Code).

The disturbance must be one of a permanent or recurrent nature (e.g. the erection of a building obstructing the owner's light, or the frequent use of a private road). Isolated acts of interference give rise to an action for damages, but do not constitute a ground of action justifying the above-mentioned proceedings. If the act complained of is one which the owner is bound to suffer, he has no right of action. According to Section 1338 of the Civil and Commercial Code, restrictions imposed by law on the rights of an owner of immovable property need not be registered. Such restrictions cannot be removed or modified by a juristic act unless such act is made in writing and registered by the competent official. Similarly, restrictions imposed in the public interest can neither be removed nor modified.

4.3.5 Claim to Remove a Thing from Land in the Possession of Another

A person, out of whose possession a thing has been removed to the land of another, may, subject to certain restrictions, enter upon such land for the purpose of searching for and taking away such thing. In the same way, and subject to the same restrictions, the owner of a thing, situate upon land which is in the possession of another, may enter upon such land for the purpose of searching for and removing such thing.

4.4 Possession[43]

4.4.1 Terminology Explained

From ownership, we must distinguish possession. To possess is to exercise ownership, and, generally speaking, the law intends the owner to be at the same time the possessor. Hence, in ordinary language ownership and possession are often used as convertible terms. Nevertheless, the conceptions of ownership and possession ought to be clearly distinguished. It may happen that someone may be the owner,

[43]The term possession comes from the Latin *possessio*. The latter part of *pos-sessio* derives from the verb *sedere* meaning to sit and therefore corresponds to the English word *seisin* which means literally the mere 'sitting' on a thing. On the other hand, the derivation of the syllable *pos* is uncertain; but, if it is related to *posse* and *potestas*, as in *patria potestas*, the literal meaning of *possession* would be 'sitting in power'. See Prachoom (2015), p. 115. On the point, see also Jumpa (2003), p. 41.

but not the possessor of the property, and, conversely, one may have possession—as in the case of theft, for example—without being owner.

Now it is obvious that there may be a great many different kinds of possession. For example, A may hold a thing in his hands, and may hold it in his own interests (e.g. a book which he has borrowed), but may nevertheless acknowledge B (in this case the lender of the book) to be the real owner of the thing, so that, in taking care of it, or in otherwise dealing with it, it is A's intention to preserve it, not only for himself, but primarily for the other person. In this instance, A has merely the *corpus*, i.e. the external element, of possession. A is without the *animus* of possession, i.e. the will coinciding with the physical relationship. Such a relationship is described as mere detention. A person who has detention (e.g. a borrower, lessee, lessee, depositary, mandatary) possesses the thing in subordination to another person. In possessing, he represents another person. This other person (e.g. the lender, lessor, etc.) possesses through the person who has detention.

To take a second example, a person may hold a thing in his hands and may intend, at the same time, to hold it for himself alone. This may be the case of a pledgee who has the right to retain the pledged property until the obligation is discharged. In such case, the pledgee has not merely the *corpus*, but also the *animus* of possession, i.e. he has the will coinciding with the physical relationship. The pledgee does not only hold the thing in his hands, but intends to hold it for himself alone. It is his intention to exclude everyone else from the thing. As far as the exclusion of others is concerned, he holds the thing in just the same way as if he were the actual owner.[44]

This second kind of possession is technically known as 'juristic possession' (in Thai: *gaan krop krong*). Juristic possession is considered as an independent right over a property and is defined as the control a person intentionally exercises towards a thing.[45] Juristic possession as a right consists exactly in the right to hold a thing with the intention to do so. Under Section 1367 of the Civil and Commercial Code, a person acquires possessory right by holding a property with the intention of holding it for himself. Two elements therefore go to make up juristic possession according to Thai law: physical control over the property (i.e. *corpus*) and the intention to exclude everyone else from the possession of the thing (i.e. *animus*). Physical control means some exercise of power over the property and in particular the state of controlling the property as a matter of fact, whether directly or indirectly. This is to say that possession in the legal sense is not recognized unless the possessor had the intention of dealing with the thing possessed by him as if he were its owner; a depositary or lessee are deemed 'detentor' and not a 'possessor' of the bailed or leased object. To illustrate, if A hands over a thing to B for purposes of mere detention (as in a loan, a lease or a mandate), in order, namely, that B may possess it not only for himself, but also for A, the direct holder

[44]On this, see in particular Sohm (1923), pp. 350–351.

[45]On this point, see Suchiwa (2007), p. 174.

of the property has only detention, whereas the indirect holder has juristic possession. As regards intention, it indicates the attitude in the mind of the actor denying the rights of other to have access to the property. This means that a possessor needs to be aware of the fact that the property is within his power of control and to intentionally exercise this control.[46]

According to Section 1369 of the Civil and Commercial Code, a person who holds a property is presumed to hold it for himself. More precisely, a person who is in possession of a thing intending to deal with it as owner is called 'proprietary possessor'. On the contrary, possession obtained against the former possessor's will, and without the sanction of any rule of law, is called 'faulty possession'. Several persons together may be in possession of a thing in a manner corresponding to the manner in which several persons may be co-owners of a thing. This type of possession will in this treatise be described as 'joint possession'.[47]

4.4.2 Acquisition of Possession

Possession is acquired by the assumption of the actual control over a thing delivered or abandoned or lost by a former possessor, or acquired originally by the new possessor. The transfer of the possession of a movable thing may be effected by the delivery of such thing into the hands of the transferee or into a place or receptacle of which the transferee has control (as when rice is deposited on a truck belonging to the buyer). The transfer of the possession of an immovable is effected by any outward act by which the transferee is enabled to obtain access to such immovable (e.g. by the delivery of the key).[48] In any case in which a 'real agreement' is concluded between the transferor and the transferee as to the transfer of the possession of a movable or immovable thing, such transfer is deemed to have taken place as soon as the transferee obtains control over such thing.[49]

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[46]English common law lacks a satisfactory underpinning theory of possession. In the terminology of the English law, the term 'possession' is used in every case in which actual control exists, without regard to the purpose, for which it is exercised.

[47]It must be added that when any person who has a thing under his control exercises such control for another in his business, or under any other circumstances requiring him to follow the directions of such other with regard to the business, such other is alone deemed to be the possessor of the business.

[48]Symbolical delivery, which played a great part in the past, has ceased to exist in modern Thai law. Thus, the delivery of a key is not in the nature of a symbolical delivery if it enables the transferee to exercise control over the thing of which the possession is to be transferred; if it does not attain that object it has no legal effect whatever.

[49]With regard to the indirect possession of a thing, it may be transferred by the assignment of the claim to its delivery. In the case of goods represented by a negotiable instrument (bill of lading, dock warrant, and warehouse receipt), the transfer of the document of title operates as a transfer of the right to obtain possession and has, therefore, the effect of giving the transferee the indirect possession of the goods.

Possession may also be acquired in case of abandonment or loss. More precisely, a person who assumes possession of a thing of which the control was voluntarily abandoned or involuntarily lost by another acquires the possession of such thing.[50] By the same token, a person may acquire possession with the assumption of control over things not previously possessed by another. Thus, possession of a thing not previously possessed by another is acquired by any person who severs a component part from a thing possessed by him and obtains control over such severed part. Possession is also acquired by any person who appropriates any wild animal or any fish caught by him in the sea.

It is noteworthy that under Thai private law, a person who is in proprietary possession of a movable thing is presumed to be its owner; any person who, as defendant or plaintiff in an action, wishes to dispute such ownership must prove his allegation. This presumption is not, however, available against the former possessor of a movable thing other than money, or an instrument to bearer, from whom such movable thing was stolen, or by whom it was lost. Following the same logic, a former possessor of a movable thing is presumed to have been the owner of such thing while he was in possession thereof. Where the possession is divided between a direct possessor and an indirect possessor the presumption operates in favour of the latter.

A person in possession of a thing—whether movable or immovable—is entitled to the fruits of such thing if he, in good faith, believes himself to be the owner of such thing or entitled to the usufruct thereof, and if his title to possession was acquired for valuable consideration. In the case that he is ejected by the true owner, he is not bound to account for any fruits received up to the time of the commencement of the owner's action. If, on the other hand, the possession was acquired in good faith, but without valuable consideration, the possessor must account for the fruits under the rules as to unjustified benefits.

4.4.3 Termination of Possession

The possession of a thing is terminated by the loss of the control over such thing either by delivery to another or by abandonment or loss. In this respect, Section 1377, paragraph 1, of the Civil and Commercial Code states that possession comes to an end if the possessor abandons the intention to possess or no longer holds the property.

[50]Where control is acquired by means of an unlawful act the possession is faulty and has not the same effects as lawful possession.

Possession, however, does not come to an end if the possessor is prevented from holding the property by some cause which is temporary in its nature (Section 1377, paragraph 2, Civil and Commercial Code). This means that the possession of a thing is not deemed to have been abandoned or lost if the circumstance preventing the exercise of actual control is by its nature of a merely temporary character. For example, possession of a plot of land is not lost if, owing to a flood or a landslip, the access to it is for the time being prevented. To take another example, possession of a bicycle is not lost while it is temporarily parked on the street.

The possession of all things possessed by any person at the time of his death becomes, *ipso facto*, vested in his heirs. The possession thus devolving on the heirs is different in its nature from ordinary possession, though it is not called by another name. Where the heirs, owing to absence or some other cause, are unable to exercise actual control, their possession is of a merely fictitious nature, but it has many of the effects of physical possession.

4.4.4 Possessory Remedies[51]

The act of a person who unlawfully deprives another of his possession, or disturbs him therein, is described as 'unlawful interference' (*chop duay got maai seui*). According to Section 1374 of the Civil and Commercial Code, a person whose possession is disturbed by unlawful interference is entitled to have the disturbance removed and, where further disturbance is impending, may obtain an injunction against the wrongdoer.

Furthermore, a person who by unlawful interference is ousted from the possession of an immovable may, immediately after being ousted, use force for the recovery of possession. The right of self-defence may be exercised by any person who has actual control on the possessor's behalf, and against the heirs of the person guilty of unlawful interferences, as well as against any other person deriving title under him with notice of the faulty nature of the possession. A person who is ousted from possession of a movable thing may claim recovery of possession from any person who, as against him, is in faulty possession. The possessor may also defend his right by force and may use force for the recovery of a movable thing from a person apprehended *in flagranti delicto*. Section 1375 of the Civil and Commercial Code, however, states that where a possessor is unlawfully deprived of possession, he is entitled to have it returned unless the other party has over the property a better right which would entitle him to claim it back from the possessor.

[51] A person wilfully or negligently and unlawfully disturbing the possession of another is liable to compensate such other under the general rules as to unlawful acts. The claim for compensation is in such a case available as well as the possessory remedies, but as compensation primarily means restitution the two remedies may frequently coincide.

This means that such possessory remedy is not available if the aggrieved person was himself in faulty possession as against the wrongdoer or as against his predecessor in title, and if such faulty possession was obtained within a year prior to the ouster or disturbance.[52] An example will help illustrate this point. Suppose A claims the delivery of a bicycle which B unlawfully took out of A's front yard. B proves that six months before the removal of the bicycle A had similarly removed it from his front yard. The claim is dismissed, notwithstanding the fact that B's act was unlawful. If B had taken the bicycle more than a year after it had been taken from him, A's action would have been successful.

In addition to the remedies described above, the Civil and Commercial Code lays down additional provisions which apply to those cases where the person who wishes to establish his right to possession is not ousted or disturbed by any unlawful interference. Specifically, the Civil and Commercial Code states that the former possessor of a movable thing may recover its possession from the actual possessor if the latter when acquiring possession was not acting in good faith (Section 1372). If any movable thing, other than money or a negotiable instrument issued to bearer, was stolen from the former possessor, or lost by him, he may recover its possession from the actual possessor, even if such possessor when acquiring possession was acting in good faith.[53]

4.5 Property Interests[54]

4.5.1 General Concepts

Alongside the right of ownership, there are other property interests (i.e. real rights less than ownership) having the purpose of enjoyment and granting the holder specific rights to enjoy the property of another. These are real rights and are limited as compared to the right of ownership itself. The common element of these property interests, and that which separates them from the right of ownership, is that

[52]This remedy is also forfeited by a final judgment obtained in a separate action declaring the person guilty of the interference entitled to the right of possession or to the commission of the disturbing act.

[53]This rule is not applicable if the actual possessor is also the owner of the thing lost or stolen from a former possessor. However, it must be noted that a former possessor, who, when acquiring possession, was not acting in good faith, or who has voluntarily abandoned the possession of a thing which has since come into the possession of another, is not entitled to recover its possession from such other.

[54]The present section only deals with those rights classed as 'servitude' under Roman and Thai law (which include the 'easements' and *profits a prendre* of English law, as well as a number of other rights). The rights of user existing by virtue of contractual relations (e.g. the rights of lessees) and other similar rights of user over land owned by others have been referred to in connexion with the law of obligations.

they confer rights over the property which are limited in their scope and duration. Hence, the distinction between ownership and property interests is that ownership, although it may be subject to many conditions and restrictions contained in the law, it is not restricted by any chronological term, it lasts forever. In contrast, property interests can only exist for a period of time over property belonging to others. Such property interests can only be exercised over property belonging to others and, once extinguished (e.g. by destruction of the land which is the object of a servitude or by death of the grantee of a right of habitation), the right of ownership is restored to its original extent.

4.5.2 Classification

A limited right to the use of a thing belonging to another, or a right to restrain such other from exercising some of his rights of ownership, is called a 'servitude' under Roman and Thai law. The person who grants a servitude takes away from his own rights of ownership and increases the rights of the grantee—*jus suum deminuit, alterius auxit, hoc est servitude aedibus suis imposuit*—Dig. 39, 1, 5 § 9. Following the Roman law tradition, the Thai Civil and Commercial Code distinguishes two main kinds of servitudes: personal servitudes and real servitudes. Where a right exists for the benefit of the owner for the time being of a specified immovable it is called a 'real servitude' (also called predial or landed servitudes),[55] where it exists for the benefit of a specified person it is called a 'personal servitude'. More precisely, real servitudes refer to those relations where the landlord acquires the right to use the land of another to improve the use of their own land. This means that the servient property serves the dominant property, follows the dominant property in case of transfer of ownership and exists irrespectively of the identity of its owner. On the other hand, personal servitudes are those by which the immovable property of the landowner is burdened in favour of a specific individual. Thus, they confer rights to the use of a property for the benefit and enjoyment of a designated person. The right is not constituted in favour of a piece of land but for the use of a person.[56] According to the *numerus clausus* principle, real rights can only be created by the virtue of the law (Section 1298, Civil and Commercial Code). The real rights over immovables other than ownership which are enumerated under the Civil and Commercial Code are relatively few and can be easily summarized. Specifically, they include the right of servitudes, habitation, superficies, and usufruct.[57]

[55]As heritable rights, mining rights, and other similar rights, are treated as independent immovables, the benefit of a real servitude (e.g. a right of way) may be attached to such a right.

[56]See Waayupap (2012), p. 188.

[57]On this point, see Stasi (2016), p. 147.

The burden of all real servitudes and of all personal servitudes is borne by the owner for the time being of an immovable. This means that the right of servitude may not be charged on a movable thing. The benefit of a real servitude passes from one person to another on each change of ownership. Similarly, personal servitudes can be transferred by act *inter vivos* unless otherwise provided in the act creating the usufruct and does not necessarily come to an end on the grantee's death (Section 1422, Civil and Commercial Code). In the following statement, the immovable upon which the burden of a servitude is imposed will be called 'the servient tenement', while the immovable, for the benefit of which a servitude is created, will be called the 'dominant tenement'.[58]

4.5.3 Real Servitudes

The rule of Roman law *impedit servitutem medium praediumquod non servit* has not been adopted by the Thai law. This means that a real servitude is not inoperative on the ground that the dominant and the servient tenement do not adjoin each other. Under English law, there are a limited number of specifically defined easements and *profits a prendre*. Thai law, on the other hand, gives a general definition as to the nature of real servitudes, which admits of the creation of a number of rights which under English law would not be classed either as easements or as *profits a prendre*, and of which the burden would therefore not 'run with the land'. Thus, under English law, building restrictions or restrictions as to the use of buildings, which do not result from any recognized easements, are not binding on any buyer who has not covenanted to observe them, or is not affected with notice of any existing covenant. Under Thai law, on the other hand, a real servitude restricting the use of land in any way which maybe of advantage to the dominant tenement, and is not prohibited by any legal provision, is binding on every successive owner of the servient tenement. For example, a servitude may be imposed on a parcel of land by which the erection of any shop or factory on such parcel of land or the obstruction of the view enjoyed from the dominant tenement is prevented. Specific provisions may narrow the limits within which real servitudes may be created, and regulate the operation of certain real servitudes, but it cannot extend the limits imposed by the law on the creation of such servitudes.

Under Section 1387 of the Civil and Commercial Code, an immovable property may be subjected to a servitude (in Thai: *paara jam jom*) by virtue of which the owner of such property is bound, for the benefit of another immovable property, to suffer certain acts affecting his property, or to refrain from exercising certain rights inherent in his ownership. This may include positive actions such as, for example, the right to walk and ride over the land of another, or the right to lead, discharge,

[58]The Civil and Commercial Code calls the servient tenement *paree sap*, but the dominant tenement is called *paree sam sap*.

and draw water out of another's land. This may also include negative actions, such as the right to require a landowner not to raise the height of his buildings or not to obstruct lights by trees.[59]

A real servitude may consist of the right to use the servient tenement for some specified purpose connected with the use of the dominant tenement (e.g. a right of way)[60] or to restrain the doing of certain specified acts on the servient tenement (e.g. a right to restrain the erection of a building obstructing the light of the dominant tenement). A real servitude may also consist of the right to restrain the exercise of some specified right resulting from the ownership of the servient tenement which would otherwise be available against the dominant tenement. A right to restrain the owner of the servient tenement from objecting to an obstruction of his own light is an example of this type of servitude.

The grant of a servitude implies a grant of everything which is necessary for its reasonable exercise. No burden must in any event be imposed upon the servient tenement, which is not of advantage to the dominant tenement. Specifically, Section 1391 of the Civil and Commercial Code states that the owner of the dominant property is entitled, at his own expense, to do all that is necessary to preserve and make use of the servitude. However, it adds that the dominant property 'must, in doing so, cause as little damage as possible to the servient property'. As in Roman law the servitude must be *fundo utilis*, and the right conferred by the servitude must be exercised *civiliter*, and with a proper regard to the interests of the owner of the servient tenement. This means that the dominant property's rights must be exercised in a reasonable way and according to the uses for which it was intended in order not to increase substantially the burden upon the servient land. Further, Section 1388 of the Civil and Commercial Code provides that the owner of the dominant property is not entitled to make any change, either on the servient or on the dominant property, which increases the burden of the servient property. Where the exercise of a right resulting from a servitude exclusively affects a particular part of the servient tenement, and thereby causes great inconvenience to the owner of the servient tenement, the latter may require the owner of the dominant tenement to transfer the exercise of his right to another part of such tenement, provided that such other part is equally convenient for the exercise of the right. This privilege cannot be waived or restricted by agreement.

The rule of Roman law under which a servitude could not be created, *ut aliquid faciat quis*, has penetrated into the Thai law. Thus, a burden may not be imposed upon the servient tenement imposing an active duty on its owner for the time being (e.g. where the duty to keep a road in repair is imposed on the owner of a tenement

[59]On this point, see Suchiwa (2007), p. 305.

[60]A right of way must be distinguished from the right of way of necessity which is granted to the owner of a piece of land when he is so surrounded by other pieces of land pertaining to other persons that it has no adequate access to the public ways. In these cases, Section 1349 of the Civil and Commercial Code provides that the landowner has the right to pass over the neighbouring land to reach a public way. On this point, see Stasi (2016), p. 142 ff.

over which a right of way is granted). Where any structure is required on the servient tenement, for the purpose of enabling the owner of the dominant tenement to exercise a right of support, the duty to keep such structure in repair is not imposed on the owner of the servient tenement unless otherwise provided by the parties at the time the servitude was created.[61]

Where two real servitudes having the same right of priority conflict with one another, the owner of either of the dominant tenements may require the owner of the other to come to an arrangement with him, giving effect to the respective rights of both parties in an equitable manner. On a subdivision of the dominant tenement, the owner of each section may continue the exercise of the right previously enjoyed by the owner of the whole tenement, in so far as he derives any advantage from such exercise but in the absence of an agreement to the contrary, the exercise of the rights of the several owners must be so arranged as not to cause greater inconvenience to the owner of the servient tenement, than was caused by the previous exercise of the right by one owner. On a subdivision of the servient tenement the servitude, in so far as it affects only a particular part of such tenement, remains a burden on such part only. If the servitude affects the whole tenement, its burden is imposed on each separate section. To illustrate, a right of way does not affect the sections through which the path or road does not go. A right of pasturage, on the other hand, continues to be exercised over the whole area.

Regarding the modes of acquiring servitudes, a person may become entitled to a servitude by juristic act or by adverse possession. Thus, a servitude, like any other real right, may be acquired, for example, directly by will, contract, or by means of a stipulation for the benefit of a third party. These juristic acts, however, do not automatically confer the legal title of servitude to the beneficiary unless the juristic act is made in writing and the acquisition is registered by the competent official (Section 1299, Civil and Commercial Code). Take, for example, the case of an agreement granting right of access over the servient property. Although such contract is binding on the contracting parties, it does not automatically vest the title to the servitude in the grantee. The right of the grantee is to request performance of the agreement in all aspects. The delivery of the servitude will be deemed to have occurred after proper registration made at the land office and endorsement against the title deed of the servient land. Similarly, in the case of creation of a right of servitude under a last will, the will does not constitute the right. It only confers upon the grantee the right to require the grantor to create a servitude in his name.[62] By a combined reading of Sections 1382 and 1401 of the Civil and Commercial Code, a servitude may also be created by adverse possession which is open, peaceful, and adverse to the owner for an uninterrupted period of time provided by the law.

[61]In addition, a structure which is not required in connexion with a right of support must be maintained by the owner of the dominant tenement unless the contrary is agreed upon between the parties.

[62]On this point, see Stasi (2016), p. 317.

According to the Civil and Commercial Code, servitudes may be terminated by several modes. The termination of the right of servitude can occur, under general terms of law, by agreement between the owner of the servient land and the owner of the dominant land. In instances where land encumbered by a servitude has ceased to benefit the dominant property, the right of servitude is extinguished (Section 1400, Civil and Commercial Code). The right of servitude may also be extinguished in case of merger when ownership of the servient and the dominant land come into the hands of one person. More precisely, if servient and dominant properties are vested in one and the same owner, said owner may have the registration of servitude cancelled (Section 1398, Civil and Commercial Code). Non-usage for ten years (Section 1399, Civil and Commercial Code) and total destruction of the servient or dominant property (Section 1397, Civil and Commercial Code) are other modes of termination of the right of servitude. For instance, if a structure or appliance, hindering the exercise of a right resulting from a real servitude, is affixed to the servient tenement, the claim to remove such structure or appliance may be barred by lapse of time under the ordinary rules as to prescription, notwithstanding the fact that the servitude is registered as an encumbrance of the servient tenement. Similarly, if the use of a right of way is prevented by a locked gate the owner of the dominant tenement has a claim for the removal of such gate, which claim may become barred under the general rules as to prescription. As soon as the claim is barred, the right of way is lost, though it still appears on the register.[63]

4.5.4 Personal Servitudes

The principal personal servitudes in Thai civil law are habitation, superficies, and usufruct. A right of habitation (in Thai: *aasai*) resembles the right called a 'profit in gross' under English law and entitles the grantee to use building as a dwelling place without paying rent.[64] It is a servitude that affects a servient tenement and its benefit is always vested in a specified person. Section 1402 of the Civil and Commercial Code provides that 'A person who has been granted a right of habitation in a building is entitled to occupy such building as a dwelling place without paying rent'. The right to the sole occupation of a building, or of part of a building, is an example of this type of servitude.

The object of the habitation is to fulfil the personal needs of the grantee. For this reason, it cannot exist beyond the death of the grantee. The Civil and Commercial Code expressly provides that the right of habitation is not transferable

[63]On this point, see Stasi (2016), p. 150. See also Jumpa (2003), p. 301.

[64]It must be pointed out that while 'profit in gross' under English law is alienable and transmissible on death, a right of habitation is incapable of assignment and comes to an end on the grantee's death.

to third parties even by way of inheritance (Section 1404). By the same token, the grantee has the right to live in the property with the members of his family only if the habitation is not expressly limited to be for the benefit of the grantee personally (Section 1405, Civil and Commercial Code). Unless this is expressly forbidden by the grantor, the habitator also has the right to take the natural fruits or products of the land as are necessary for his personal needs.

As regards the duration of the habitation, a right of habitation may be created either for a period of time or for the life of the grantee (Section 1403, paragraph 1, Civil and Commercial Code). If it is granted for a period of time, the period cannot exceed thirty years, renewable by mutual agreement for an additional period of thirty years from the time of renewal. In the event that a longer period is stipulated by the parties, the right of habitation is reduced to the duration of thirty years. It has further been laid down under Section 1403, paragraph 2, of the Civil and Commercial Code that where no time period has been fixed, the grantor may terminate the right of habitation at any time by giving reasonable notice to the grantee.

Another type of institution which involves a real right on another person's property is superficies (in Thai: *citi neua peun din*). Superficies can be defined as a limited real right on land giving its holder the right to erect a building or any other kind of construction upon or under the land owned by another. According to Section 1410 of the Civil and Commercial Code, the owner of a piece of land may create a right of superficies in favour of another person by giving him the right to own buildings, structures, or plantations in, on, or above the land owned by someone else. Unless otherwise provided in the act creating it, the right of superficies encumbers a land in such way that the superficiary has a transferable and inheritable right to own a construction permanently attached to land (Section 1411, Civil and Commercial Code).

The Civil and Commercial Code does not provide a minimum period for this right, but limits its maximum period to thirty years renewable by mutual agreement for an additional period of thirty years from the time of renewal (Section 1412). As may be known from the above-mentioned provision of the Code, a right of superficies may also be created for the life of the owner of the land or the superficiary. If no period of time has been fixed, the right of superficies may be terminated at any time by any partner giving reasonable notice to the other. But when rent is to be paid, either one year's previous notice must be given or rent for one year paid (Section 1413, Civil and Commercial Code).

When the right of superficies is extinguished, the superficiary may take away his buildings, structures, or plantations, provided he restores the land to its former condition. If instead of permitting the removal of the buildings, structures, or plantations, the owner of the land notifies his intention to buy them at a market value, and the superficiary may not refuse the offer except on reasonable grounds (Section 1416, Civil and Commercial Code).[65]

[65]See Stasi (2016), p. 152.

The last real right which is regulated under the book 4 of the Civil and Commercial Code is the right of usufruct. Usufruct confers a personal limited real right to use and enjoy another's property and take its fruits without impairing the substance. The usufruct of Roman and Thai law corresponds in a certain manner to the limited ownership enjoyed under English law by a person who, whether for life or for any other limited period, is entitled to the possession of a specified object of property, and to the appropriation of all profits derived from it in the ordinary course of management. While under English law, however, the person entitled to this limited ownership has a proprietary right in such object, the right under Roman and Thai law is deemed a *jus in re aliena*. The grantee, who is called the 'usufructuary' (*poo song citi gep kin*), entitled to reap and appropriate the profits of the object of which the usufruct (*citi gep kin*) been granted to him, which object in the further course of this treatise will be described as 'the usufructuary object'.

Section 1417 of the Civil and Commercial Code states that an immovable property may be subjected to usufruct by virtue of which the usufructuary is entitled to the possession, use, and enjoyment of the property. As it emerges from this definition, the right of usufruct may be constituted exclusively over immovable property. The usufruct of an aggregate of things, or of an aggregate of things and rights, may also be granted, but in such a case the objects comprised in such aggregate must be specifically referred to.[66] A grant of the usufruct of a person's whole property or of his whole estate,[67] without special reference to the objects comprised in it, is inoperative. The grant of the usufruct of an immovable includes the usufruct of the accessories in the same way as the transfer of the ownership of an immovable transfers the ownership of the accessories.

The grant of the usufruct of an undivided share confers upon the usufructuary the grantor's rights of participation in the management and enjoyment of the property held in co-ownership. The right to demand partition cannot, however, be exercised without the grantor's concurrence. After partition the usufructuary becomes entitled to the usufruct of the property appropriated to the grantor.

A usufruct may be granted to a natural person or to a corporate body for a specified time, or subject to a condition subsequent (e.g. the remarriage of a testator's widow), but it cannot under any circumstances be granted for a period exceeding the life or corporate existence of the usufructuary. According to the Civil and Commercial Code, it may be created either for a period of time or for the life of the usufructuary. If no time period has been fixed, it is presumed that the usufruct is for the life of the usufructuary (Section 1418, Civil and Commercial Code).

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[66]The owner of the usufructuary object, as well as the usufructuary, is entitled at any time to demand an expert report on the state of the usufructuary object. Where it consists of an aggregate of objects, each of them may claim the taking of an inventory.

[67]A testator may by his will give the usufruct of his estate to a legatee; this gives the legatee a right to claim from the testator's heirs a grant of the usufruct of the individual objects comprised in such estate.

If the usufruct is granted in consideration of an annual payment the position of the usufructuary is somewhat analogous to that of a lessee under a lease agreement, but whereas a lessee has only a personal right against the lessor a usufructuary has a real right affecting the usufructuary object, for the protection of which the same remedies are available as for the protection of the right of ownership.

The usufructuary's real rights in respect of the usufructuary object, are supplemented by personal rights available against the owner for the time being of such object,[68] who in his turn is entitled to certain personal rights available against the usufructuary. Specifically, usufruct confers the right to use the immovable property and enjoy its fruits without impairing its form or substance (Section 1417, Civil and Commercial Code).

The usufructuary is of course entitled to the profits of the usufructuary object, but certain classes of profits may be excluded by agreement. The profits to which the usufructuary is entitled do not include any fruits which are won in violation of the proper rules of management or husbandry; the ownership of such fruits vests in the usufructuary, as they are severed from the thing by which they are produced, but the owner is entitled to compensation on the termination of the usufruct. Where the usufructuary object is the right to receive an annual or other periodical payment, each instalment is deemed a profit to which the usufructuary is entitled. The owner's share in any treasure trove found on land subject to a right of usufruct is not deemed a profit to which the usufructuary is entitled.[69]

In addition, the usufructuary has the right to possess the property and to bring an action to recover the usufruct against the owner or third parties. Such action, however, must be entered within one year from the day the usufruct comes to an end (Section 1428, Civil and Commercial Code). Further, the usufructuary has the right to transfer the use and enjoyment of the land to third parties, but only for the term of the usufruct. More precisely, Section 1422 of the Civil and Commercial Code states that the usufructuary may transfer the exercise of his right to the third person unless otherwise provided in the act creating the usufruct. In such a case, the owner of the property has the right to sue the transferee directly.

With respect to the duties of the usufructuary, the Civil and Commercial Code provides that the usufructuary is bound to keep the substance of the property unaltered (Section 1424). The right to win profits must be exercised in a proper course of management, and so as to preserve the fitness of the usufructuary object for the economic purposes, for which it was previously intended, and as to prevent the

[68]As between the owner and the usufructuary, the latter is entitled to assume, in the absence of express notice to the contrary, that the grantor of the usufruct is the owner of the usufructuary object.

[69]The usufructuary's right to profits derived from land is subject to the payment on his part of the ordinary rates and taxes and of the interest on all encumbrances existing at the date of the creation of the usufruct; the insurance against fire or other damaging events must be provided for by the usufructuary in so far as such insurance has to be provided for in accordance with the proper course of management.

loss of any of its essential characteristics. The usufructuary has to bear the cost of the ordinary repairs and renewals, but he is not responsible for any deterioration caused by the proper exercise of his rights. Immediate notice must be given to the owner of the usufructuary object of any actual or impending damaging event, and of any threat of interference on the part of any stranger. In the case of default by the owner, the usufructuary may have the work carried out at the owner's expense. Also, the usufructuary must bear expenses for the management of the property, pay taxes and duties, and be responsible for interests payable on debts charged upon it (Section 1426, Civil and Commercial Code). Generally, the usufructuary must take as much care of the property as a person of ordinary prudence would take of his own property (Section 1421, Civil and Commercial Code).[70]

The rights and obligations of the owner of the bare property rights can be considered as the counterpart of the obligations and rights of the usufructuary. Accordingly, the owner is entitled to exercise all those rights which are inherent to ownership including the right to sell the property (or any part of it) and object to any unlawful or unreasonable use of the property. In the event of any conduct on the part of the usufructuary, justifying the apprehension of a material violation of the owner's rights, a judicial order may be obtained directing the usufructuary to give security. In this regard, Section 1423 of the Civil and Commercial Code provides that if the usufructuary fails to give such security within a reasonable period of time or continues to make use of the property unlawfully or unreasonably in spite of the owner's objection, the owner may ask for the appointment of a judicial receiver to whom the management of the usufructuary object is then handed over.

The Civil and Commercial Code also imposes specific obligations upon the owner of the property. Specifically, the owner of the bare property rights is responsible for unusual maintenance and the payment of extraordinary expenses. Also, the owner is not to prevent, impair, or interfere with the right of the usufructuary to use the property and enjoy its fruits. This means, for instance, that the owner has no right to impose a servitude on the land without the agreement of the usufructuary.

When the usufruct is terminated, it falls back into the property and the right of ownership is restored to its original extent. The right of usufruct may be terminated with the death of the usufructuary unless the parties agreed otherwise. In the case that the usufructuary is a corporate body, the usufruct right comes to an end by the termination of its corporate existence. If the right of usufruct is granted for a definite period of time or subject to a condition subsequent, it is released by the expiration of the period or the fulfilment of the condition. The usufruct can also terminate in certain specific circumstances, including by release, *force majeure*, and when the usufructuary acquires the ownership of the immovable property. In the absence of evidence to the contrary, the release of the usufruct of an immovable by the grantee is deemed to include a release of the usufruct of the accessories.

[70]It must be noted that where the usufructuary incurs any voluntary outlay for the benefit of the usufructuary object, his right to reimbursement is governed by the rules as to voluntary services.

On the termination of the usufruct, the usufructuary must return the usufructuary object to its owner. In the event of the continuance on the part of the usufructuary of any unauthorized use of the usufructuary object, after the receipt of a notice requiring him to discontinue such unauthorized use, a judicial order may be obtained restraining him from continuing such unauthorized use. Also, Section 1419 of the Civil and Commercial Code provides that if the property is destroyed or expropriated without compensation being paid, the owner is not bound to restore it. However, if any compensation is paid, the owner or the usufructuary must restore the property so far as it is possible to do so, having regard to the amount of the compensation received, and the right of usufruct revives accordingly. If restoration is impossible, the usufruct comes to an end and the compensation must be divided between the owner and the usufructuary in proportion to the damages suffered by them, respectively.[71]

In the case that the usufruct of an immovable let on lease[72] comes to an end before the expiration of the lease, the rules as to the rights of lessees on a sale of the leased object are applied, *mutatis mutandis*. However, the rules relating to the owner's right to give notice to terminate the lease are somewhat different from those regulating the lessor's right under the corresponding circumstances.

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[71] On this points, see Stasi (2016), pp. 147-154. See also Suchiwa (2007), p. 350.

[72] As mentioned above, the right of usufruct cannot be assigned to another, but the usufructuary may authorize another to exercise the right; this enables him to grant a lease.

Chapter 5
Family Law

5.1 Regulation of Marriage

5.1.1 The Concept of Marriage in the Civil and Commercial Code

The concept of 'family' in a legal sense is based on the institution of marriage. In Thailand, marriage is defined as the legal union between a man and a woman as spouses according to the provisions of the law. The rules regarding the celebration of marriages apply to all marriages celebrated within the kingdom of Thailand, without regard to the nationality of the spouses.[1]

Pursuant to Section 1452 of the Civil and Commercial Code, a marriage cannot take place 'if the man or woman is already the spouse of another person'. It must be pointed out; however, that polygamy was legal and recognized in the context of inheritance until 1935 and it was common for men from the upper classes to have several wives. There were three categories of wives depending on the type of marriage in which the couple was engaging: the major wife, or *mia klang muang*, whose parents consented to her marriage and who brought property into the marriage; the minor wife, or *mia klang nok*, who did not bring any property to the marriage but accepted the marital request; and the slave wife, or *mia glang thasi*, who was acquired in connection with a debt of bondage.[2] The man had the right to treat his wives as private property, punishing them as he saw fit in accordance with

[1]However, it must be pointed out that according to the Act on Application of Islamic Law in Four Provinces B.E. 2489 (1946) 'Islamic family law and inheritance shall be applied in the court of first instance in Pattani, Narathiwat, Yala, and Satun' (Section 3).

[2]For more detailed discussion on this topic, see Stasi p. 155 ff. See also Akraviboon (1979), pp. 89 and 121.

A. Stasi, *General Principles of Thai Private Law*,
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the Three Seals Law. This law also granted him the power to manage his wives' monies and the land which they had brought into the marriage.[3]

5.1.2 Celebration of Marriage

The Thai rules as to the celebration of marriages are applicable to all marriages celebrated within the kingdom of Thailand, whether the spouses are of Thai nationality or otherwise. The same rules apply to marriages between Thai celebrated outside the kingdom of Thailand by Thai consuls or other officials authorized to celebrate marriages. On the other hand, Thai law considers the marriage of a Thai celebrated outside the kingdom of Thailand as duly celebrated, if it is celebrated in accordance with the law of the place of celebration. In this regard, Section 1459 of the Civil and Commercial Code states that a marriage in a foreign country between Thai people or between a Thai person and a foreigner may be effected according to the form prescribed by Thai law or by the law of the country where it takes place. If the spouses desire to have the marriage registered according to Thai law, the registration must be effected by a Thai diplomatic or consular officer.[4]

Thai private law only recognizes civil marriage (*in Thai: gaan som rot*), though in the majority of cases a religious ceremony follows. The marriage is effected by the declaration of the parties made before the competent registration official,[5] and in the presence of each other expressing their intention to be married to each other. According to Section 1458 of the Civil and Commercial Code, a marriage takes place only if the man and woman agree to take each other as husband and wife, and such agreement is declared publicly before a registration officer. The parties must make these declarations in person, and they must be unconditional and not subject to any stipulation as to time. The public officer may refuse to accept the declaration of intention of the parties for a fixed-term or conditional marriage.

[3]On this point, see Devasahayam (2011), p. 10.

[4]Section 1460 of the Civil and Commercial Code provides that 'in case where there exists special circumstances that make the marriage registration by the registrar unable because either or both of the man and woman were in imminent danger of death or in the state of armed conflict or war, if a declaration of intention to marry has been made by the man and woman before a person of *sui juris* living there, who would have noted down as an evidence such intention, and if the registration of marriage between the man and woman was effected thereafter not later than ninety days as from the date of first possible opportunity to apply for registration of marriage with production of the evidence of the intention in order to have the date and place of declaration of intention to marry and the special circumstances recorded by the registrar in the marriage register, the day on which declaration of intention to marry has been made to the said person shall be deemed as the date of registration of marriage'.

[5]The competent registration official must be a duly appointed registration official. However, a person publicly exercising the functions of such an official, without having been appointed as such, is deemed competent unless the absence of authority is known to both parties.

After the civil marriage has been officiated, any clause or limitation shall be deemed to be null and void and shall be given no force or effect. Two witnesses of full age must be present. The official must ask each of the parties whether he or she will marry the other, and on their answer in the affirmative declare them duly married spouses and make the appropriate entry in the register.[6]

5.1.3 Promise of Marriage

Mutual promises of marriage constitute an agreement between the parties described by the expression *gaan man* which, as regards the conditions of its validity and some of its consequences, is subject to the ordinary rules as to obligatory agreements. Pursuant to Sections 1435 and following of the Civil and Commercial Code, mutual promises of marriage between a man and woman constitute a legal agreement described by the expression 'betrothal' (i.e. agreement to marry). Betrothal is treated by the law as a preliminary to a marriage contract. Although an agreement to marry cannot be specifically enforced, a claim for pecuniary compensation arises, as a general rule, on breach of the agreement by one of the parties. In these circumstances, the pecuniary compensation is limited to an amount indemnifying the aggrieved party for any disbursements made or undertaken in contemplation of the marriage, or for any loss incurred through any steps taken by such party in contemplation of the promised marriage affecting his property or occupation. More precisely, the engaged person who breaks off the agreement of future marriage has the obligation to compensate the other party, his or her parents as well as any other person acting in the place of the parents, for appropriate expenses or debt incurred in good faith. The compensation is payable in so far only as the disbursements or steps in question were reasonable under the circumstances.[7] Damages may be related, for example, to the cost of the honeymoon, wedding gown, or wedding jewellery. Compensation may also be claimed for injury caused to the body or reputation of the betrothed and other damages suffered as a consequence of the breach of the contract.[8]

The claim for compensation does not arise if the breach of promise is due to a cogent ground (e.g. the discovery of a legal impediment to the marriage or of a circumstance which after the marriage would justify a decree of nullity or a divorce). If the ground justifying the breach of promise is a culpable act of the other party the party refusing to perform the promise is entitled to compensation from the party guilty of such culpable act.

In order to be valid, a betrothal must be performed when the man and woman have completed their seventeenth year of age. According to Section 1435, paragraph 2,

[6]For a more detailed discussion on the rules governing the celebration of marriage, see Kampoosiri (1998), p. 178.

[7]See again, Akraviboon (1979), p. 72.

[8]A promise to pay a penalty in the event of a breach of the agreement is void.

of the Civil and Commercial Code, the contract is void if one of the parties to the intended marriage is under the age of seventeen. In the case that the parties to the future marriage are minors, the consent of the parents, guardians, or adopters, as the case may be, is also a necessary requirement of the engagement contract. A betrothal concluded by the minor without the said consent is voidable.

A mutual promise of two persons to marry requires both a declaration of intention to marry and the transfer of property from the man to the woman as evidence that the marriage will take place. Engagement property can be either movable or immovable and includes rings, gold, land, houses, or other gifts which are given as symbols of the engagement.[9] In any case in which the promised marriage from any cause whatsoever does not take place, the man—whether entitled to compensation or damages under any of the rules stated above or otherwise—may claim from the woman a return of all gifts and of all tokens symbolic of the engagement in accordance with the rules as to unjustified benefits, unless the contrary has been agreed upon. Pursuant to Section 1442 of the Civil and Commercial Code 'In case where there is an essential event happening to the betrothed woman that makes the marriage unsuitable, the man is entitled to renounce the betrothal agreement and the woman must return the engagement property to the man'.[10] However, the engagement property does not need to be returned in any case in which the death of one of the parties prevents the marriage (Section 1441, Civil and Commercial Code) or the man becomes insane (Section 1449, Civil and Commercial Code).

All claims for compensation, damages, or return of gifts or tokens, are barred after the lapse of six months from the date of the rescission of the agreement.

5.1.4 Circumstances Affecting the Validity of Marriages

The circumstances which affect the validity of a marriage according to Thai law may be divided into two classes: public severing impediments (i.e. impediments which give rise to proceedings for nullity by the public authorities if they come to their notice) and private severing impediments (i.e. impediments which do not give rise to nullity proceedings unless one of the spouses takes proceedings).

A public severing impediment brings about the nullity of the marriage in the sense in which the word 'nullity' is generally used in Thai and in English law. It must be noted, however, that according to Section 1500 of the Civil and Commercial Code, a void marriage does not prejudice the rights acquired by third person acting in good faith before entering the void of the marriage into the marriage register. Thus a third party who before the pronouncement of the decree of nullity without being aware of the relative nullity of the marriage enters upon any

[9]On this point, see Stasi (2016), p. 158.

[10]A somewhat anomalous rule entitles the parents of the aggrieved party, or any other persons acting in their place, to compensation for any disbursements made or undertaken in connexion with the promised marriage (Section 1440, Civil and Commercial Code).

transaction to which one of the spouses is a party cannot be prejudiced by the effect of the decree. In all other respects, a marriage relatively void is after the pronouncement of the nullity treated as if it had been void *ab initio*.[11]

Section 1495 of the Civil and Commercial Code clearly defines the grounds for nullity of marriage and provides that it is only a judgment of the court that effects the void of the marriage. An annulment action can only be brought by the other spouse, parents, descendants, or, if there are none of the said persons, by any interested person.[12] The court may, by a sentence of nullity, declare the marriage void on any one of four circumstances, namely insanity or mental incompetency of one of the parties at the time of the marriage,[13] prohibited degrees of consanguinity and affinity,[14] the subsistence at the time of the marriage of a previous valid marriage between one of the parties and another person,[15] and the absolute absence of consent of the parties.[16]

In cases where the marriage is adjudged void, the property possessed or acquired by the individual spouses before or after the marriage, as well as its fruits, is considered to be personal property. As for the property jointly earned by the spouses, they must divide it equally unless the court orders otherwise by taking into consideration the obligation in the family and earnings of both parties, as well as their situation in life.

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[11]The characteristic feature of nullity as distinguished from voidability is the fact that proceedings for nullity can be taken by the public prosecutor as vindicator of the public interest, as well as by either spouse and by other interested parties.

[12]See Akraviboon (1979), p. 132.

[13]The marriage is deemed valid *ab initio*, if confirmed after the termination of the incapacity, or mental incompetency, and before the pronouncement of the decree of nullity or of the dissolution of the marriage. If the confirming party is of restricted capacity and confirms without the authorization of the legal representative the marriage ceases to be void and becomes voidable.

[14]Marriages between the following classes of relatives are relatively void: descendant and ascendant; relatives by marriage in the ascending or descending line; brother and sister of the whole or half blood (Section 1450, Civil and Commercial Code). An illegitimate child and his issue are deemed to be descendants of the putative father and of his ancestors for the purpose of this rule.

[15]If such other person has been judicially declared to be dead and one of the parties at least is ignorant of the fact that the person declared dead is actually living, the re-marriage is not rendered void by such fact. The re-marriage in such a case has the effect of dissolving the former marriage. Either of the parties to the second marriage, not having at the time of such marriage been aware of the fact that the person declared dead was living, may within six months from the time of becoming aware of such fact take proceedings for the avoidance of the second marriage. If such proceedings are successful, the other party, if equally innocent, is entitled to alimony in the same way as an innocent divorced person.

[16]The fact that the declarations are not made in the prescribed locality does not constitute grounds for nullity of the marriage. If therefore a registration official declares himself willing to receive the declaration of the parties in any place of entertainment or in the open air, the parties if making the required declaration are validly married. The non-observance of any of the rules as to the celebration of the marriage other than those mentioned above (e.g., the rules as to insanity or mental incompetency of one of the parties at the time of the marriage, as to the prohibited degrees of consanguinity and affinity, as to the subsistence of a previous valid marriage, and as to the absolute absence of consent of the parties) does not constitute grounds for nullity.

A private severing impediment causes a marriage to be voidable by judgment of the court either at the request of any interested party or *ex officio*. Under the Civil and Commercial Code, absence of the required parental authorization is a ground to annul a marriage,[17] as is lack of consent to marriage because of mistake,[18] fraud,[19] duress, or insufficient age[20] (Section 1503). Nevertheless, if the minor spouse turns seventeen or gets pregnant before cancellation of the court, then the marriage is deemed to be valid (Section 1504, paragraph 2, Civil and Commercial Code).

Under the Conflict of Laws Act B.E. 2481, the effect of an impediment is, as to each of the spouses, determined by the law of the state of which such spouse is a national at the time of the marriage (Section 19). In so far as the law of such state refers back to Thai law, Thai law is to be applied. Suppose, for example, a British subject domiciled in Thailand marries his deceased wife's sister, who at the time of the marriage is a Thai subject. Thai law asks in the first instance: How would an English court decide as to the validity of the marriage under the circumstances of the case? The answer would be that an English court would decide according to the law of the domicile, i.e. Thai law. The Thai court would therefore apply Thai law and declare the marriage valid.[21]

5.2 Effects of Marriage

The effects of marriage are treated under two heads: the general effects being distinguished from the effects described under matrimonial regime of the spouses.

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[17]As seen above, parental authorization is required for either party to a marriage who is less than twenty years of age. With respect to minors who have parents, the law requires the written approval of both parents or, in special circumstances, a verbal declaration before at least two witnesses. In cases where both parents are still alive, the consent of both is required, but if only one parent is alive, his or her consent is necessary and sufficient. If both parents are dead or unable to give consent, the guardian of the minor must provide the requisite approval.

[18]The mistake must refer to essential personal qualities of the other party. Only such personal qualities are considered essential as would on a proper consideration of the matter have induced the party concerned to refuse the marriage.

[19]The marriage is voidable when one of the parties was induced to marry the other under the influence of misrepresentation as to essential circumstances (not being circumstances of a pecuniary nature) made by or with the knowledge of the other party. The definition of what is essential is the same as that given above in respect of essential qualities; misrepresentation as to outside circumstances (e.g. as to the consent of the parents of one of the spouses or as to the intention to have a religious marriage) may be essential.

[20]Under the Civil and Commercial Code, a marriage can take place only when the man and woman have reached their seventeenth year of age. Section 1448 of the Civil and Commercial Code, however, provides that 'the court may, in case of having appropriate reason, allow them to marry before attaining such age'.

[21]English law covers a much wider ground than those which have the corresponding effect under Thai law: English law forbids, and Thai law allows, a marriage between a half uncle and his niece or between a half aunt and her nephew.

5.2.1 Personal Relations Between Spouses

Marriage, as a legal cohabitation, is founded on the moral and legal equality of the spouses, in the mutual sentiment of love, respect, and understanding, as the basis of unity in the family. The obligations deriving from marriage are mutual: fidelity, moral and material support, co-operation in the family's interests, and cohabitation.

Within marriage, men and women have the same rights and obligations. This is made plain by the fact that they have a reciprocal duty to contribute towards the needs of the family: 'husband and wife must maintain and support each other according to his or her ability and condition in life' (Section 1461, paragraph 2, Civil and Commercial Code).[22]

Both spouses are bound to live together in conjugal community (*gaan yoo ruam gan*), which includes not only physical cohabitation but also a joint participation in all the affairs of life (*consortium omnis vitae*).[23] An action for the restitution of the conjugal community is therefore the proper remedy in all cases in which one of the spouses fails to perform any general duty owing by one spouse to another. A demand for the restitution of the conjugal community may be resisted so far as under the circumstances it constitutes an abuse of the right, or in so far as the spouse to whom the demand is addressed is entitled to claim a divorce.

Where the physical or mental health or happiness of either spouse is greatly imperilled by continuance of cohabitation, however, the spouse may apply to the court for authorization to live apart while the danger persists; in such case, the court may order a certain amount of maintenance to be furnished by one of the spouses to the other in so far as this can be done having regard to their means and earning powers (Section 1462, Civil and Commercial Code).

It is interesting to stress out that under Section 12 of the Person Name Act B.E. 2548 (2005), either spouse may use the last name of the other according to their agreement. Such agreement may be adopted at the commencement of the marriage or in the course of the marriage. In case, the spouse does not want to change the last name, it can be kept the same.

5.2.2 Property Relations Between Spouses

Chapter 4 of Book 5 of the Civil and Commercial Code governs the property ownership between husband and wife in marriage, the person who holds the rights to manage the property, and how property is split in case of divorce or court order. The expression 'matrimonial regime' is a collective description of the effect of a marriage on the property owned by each of the spouses at the date of the marriage

[22]On this point, see Stasi (2016), p. 159 ff.

[23]An agreement for separation between the spouses is void as being *contra bonos mores*.

or acquired at a subsequent time. These effects, in so far as they are determined by the statutory provisions on the subject, are collectively described as 'statutory regime'; in so far as the statutory effect is displaced by prenuptial agreement the expression 'contractual regime' is used.

Under the statutory regime, personal property that belongs solely to either husband or wife is known as *sin suan tua* (i.e. separate or personal property), while common property—owned jointly by husband and wife—is referred to as *sin somros* (i.e. common or marital property). *Sin suan tua* is property that belongs to only one of the spouses. The owner of such property is entitled to dispose of it without having to give preliminary notification to the other spouse.[24] According to the Civil and Commercial Code, property comprising the personal property of a spouse includes betrothal gifts, property for personal use (e.g. clothes, ornaments, tools necessary for carrying on the profession of the spouse, and the like), property belonging to the spouse before marriage, as well as property acquired by the spouse during marriage through a will or gift (Section 1471). These items are to be held separate from common property and the spouse enjoys total rights to manage these assets. *Sin somros* includes assets acquired during marriage and property acquired by either spouse during marriage through a will or gift made in writing if it is explicitly declared to be common property (Section 1474, Civil and Commercial Code). In this regard, it is interesting to note that a marriage gift is considered to be marital property unless it is expressly designated by the donor as belonging to only one of the spouses. An exception regarding land ownership applies to foreigners who are married to a Thai spouse. In the event that a piece of land is acquired during the marriage, the land will be considered as *sin suan tua* of the Thai spouse.[25]

As a general rule, *sin somros* can be administered by only one of the spouses without the consent of the other. Under Section 1476 of the Civil and Commercial Code, however, a joint decision by both spouses is required before entering into a number of contracts including sale, exchange, rent, mortgage, and gift, among others. If either spouse enters into any of these contracts independently or without the consent of the other, the latter may apply to the court to have the contract set aside. Furthermore, in the case of disagreements regarding common assets of the spouses throughout marriage, the law protects the economic interests of the spouses by allowing either of them to apply to the court and request an order granting the permission to dispose of the property. A spouse may also apply to the court for an authorization to be the sole manager of the common assets or to divide the marital property in the case that the other spouse is causing a loss, does not provide marital support, becomes insolvent, incurs debts to an amount exceeding one half of

[24]For more on the distinction between *sin suan tua* and *sin somros* see Jarujinda (1992), p. 65.

[25]Fruits of *sin suan tua* are also marital property. This may be the case, for instance, of the rent derived from a piece of land under ownership of one of the spouses or the interests accrued from a fixed-term deposit. If personal ownership cannot be proved, the property is presumed to be common to both the spouses.

the common property, or hinders the management of the marital property without reasonable ground.[26]

As regards the manner in which personal debts are treated, the Civil and Commercial Code provides that debts incurred by one of the spouses before the marriage are satisfied using personal property which belongs to the debtor. If the personal property of the debtor spouse is not sufficient to satisfy the credits and obligations to third parties, then the creditor is entitled to recover the residual amount from marital property. In contrast, marital debts which are incurred by one or both spouses during the marriage must be satisfied out of the *sin somros* and *sin suan tua* of both spouses. Under Section 1490 of the Civil and Commercial Code, marital debts are jointly owed by the married couple and include debts incurred in connection with the management of household affairs and providing for the necessities of the family, or maintenance and medical expenses of the household, and for the proper education of the children; debts incurred in connection with the *sin somros*; debts incurred in connection with a business carried on by the spouses in common; and debts incurred by either spouse only for his or her own benefit but ratified by the other.[27]

The rules of the statutory regime apply except in so far as they are modified by prenuptial agreement.[28] If the contract deals with all the matters provided for by the rules of the statutory regime, the latter are not applied; but all matters not dealt with by the prenuptial agreement are governed by the statutory rules, unless the contract—as it may do—expressly stipulates, that the statutory rules are to be excluded. As a general rule, a prenuptial agreement defines the rights each party has to property when future contingencies arise or in the event that the marriage ends. It may protect the premarital assets of the spouses as well as any other property traceable to those assets.[29] For instance, a prenuptial agreement may define the rights each party has to property or economic support in the case that the marriage ends in divorce.

Any third party is, as between himself and either of the spouses, entitled to assume that the statutory rules apply, unless at the time when the particular transaction is entered upon, the modification or exclusion of the statutory regime is registered in the prescribed manner in the marriage property register of the district in which the husband is domiciled at such time, or unless such modification or exclusion of the statutory regime is known to such third party.

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[26]See Kampoosiri (1998), p. 239.

[27]On this point, see Stasi (2016), p. 160.

[28]Under the Civil and Commercial Code, the regime may not be altered by post-nuptial marriage contract. The post-nuptial concept between husband and wife is in principle not recognized or legally binding under Thai law. In this regard, Section 1469 of the Code states that any agreement concluded between husband and wife during marriage may be avoided by either of them at any time during marriage or within one year from the day of dissolution of marriage provided that the right of third persons acting in good faith are not affected thereby.

[29]Minakanit (2012), p. 301 ff.

It must be pointed out that the rights acquired by each of the spouses under the matrimonial regime must be distinguished from the rights acquired under the law of inheritance. The rights of one of the spouses under the matrimonial regime are in many cases without practical effect before the death of the other spouse; at the same time such rights are vested rights *ab initio*, while the rights acquired under the law of inheritance, as a matter of course, do not come into being before the death of the predeceasing spouse.

For example, assume that H (Husband) and W (Wife) by marriage contract become subject to the regime of *sin somros*, H being the owner of movable property worth 100,000 baht and W being the owner of movable property worth 50,000 baht. By virtue of the marriage, the property of H and the property of W form one fund of the aggregate value of 150,000 baht, each of the spouses being entitled to one moiety of the common fund. Should H subsequently die without having made a will, his estate will be distributed among his statutory heirs according to the law of inheritance. Assuming the corpus of the property not to have increased or decreased during the marriage, and assuming all debts to have been paid in H's lifetime, W on H's, death, by virtue of the marriage, becomes entitled in possession to her moiety of the common fund, while the remaining moiety which belongs to her husband's estate will be distributed among H's statutory heirs according to Secton 1620 of the Civil and Commercial Code.[30]

5.3 Divorce[31]

5.3.1 Consensual Divorce

The Civil and Commercial Code of Thailand provides for both divorce by agreement and judicial divorce. If the divorce (*gaan yaa raang*) is jointly requested by the spouses, it does not require court approval. The divorcing couple can register a divorce in any district office in the country. According to the Civil and Commercial Code, consensual divorce must be made in writing and certified by the signatures of at least two witnesses (Section 1514, paragraph 2). The district office will issue a divorce certificate upon registration. In the case of divorce by mutual consent, the spouses must also decide on the exercise of parental responsibilities and child maintenance. In the absence of an agreement, the court is

[30]The distinction is important from the point of view of private international law, inasmuch as the matrimonial regime is determined in accordance with the husband's personal law at the time of the marriage, while the rights arising under the law of inheritance are determined according to the personal law, to which the deceased spouse is subject at the time of his death.

[31]There are three ways in which marriage can be dissolved, namely, death, divorce, and cancellation by the court (Section 1501, Civil and Commercial Code). Under Thai private law, it is not possible to obtain a legal marital separation. This means that a spouse cannot claim judicial separation in lieu of divorce.

empowered to make an order with respect to the parental powers and responsibilities, as well as to the amount and duration of child maintenance upon consideration of all relevant facts and circumstances.[32]

5.3.2 Judicial Divorce

In the case that the divorcing couples cannot agree on divorce, they may file a petition for judicial divorce. Judicial divorce is the legal dissolution of a lawful marriage by judgment of the court. Husband or wife can bring an action for divorce only in certain cases, exhaustively listed by the Code. The grounds on which a divorce or a judicial separation may be granted by a Thai court, and the effects of a divorce decree are determined by the law of the state where the action is instituted (Section 27, Conflict of Laws Act B.E. 2481). An example will help illustrate this point. Suppose that a Thai court tries a petition brought by the wife of an English subject on the ground of a fact which under English law constitutes injure grave, but which is not a matrimonial offence under Thai law. In this case, the petition is dismissed.

Legal grounds for divorce in a judicial divorce include adultery, although the extent of the offense depends on whether the petitioner is the husband or the wife. The husband is permitted to sue for divorce if the spouse has committed adultery. On the contrary, a woman cannot enter a claim for divorce unless she can prove that her husband is financially maintaining and supporting another person as his wife.[33] In the case of divorce by judgment of the court on the grounds of adultery, the divorcing spouse is entitled to claim compensation against the other spouse involved and against any third-party adulterer or adulteress, as the case may be. The Civil and Commercial Code further specifies that the husband is entitled to claim compensation from any person who has wrongfully taken liberties with his wife in an adulterous manner, and the wife is entitled to claim compensation from another woman who has openly shown her adulterous relations with the former's husband. However, the divorcing party is not entitled to claim compensation if he or she has consented to or connived at the act done by other party (Section 1523).

Other admissible grounds for divorce include disappearance, imprisonment for a crime, gross misconduct, cruelty of treatment, wilful desertion for more than twelve months,[34] lack of maintenance or financial support, insanity, breach of a

[32]Under English law both parents retain parental responsibility on divorce. Furthermore, the Adoption and Children Act 2002 includes a series of measures to enable step-parents and civil partners to obtain parental responsibility for their stepchildren either by agreement or by a court order.

[33]Jarujinda (1992), p. 89.

[34]Wilful desertion refers to the intentional disobedience to an order for the restitution of the conjugal community continued for more than a year against the wishes of the other spouse as well as to the intentional absence from the conjugal home against the wishes of the other spouse, continued for more than a year under circumstances under which personal service of any judicial process is impossible.

bond of good behaviour,[35] communicable and dangerous disease, or incompetence (Section 1516, Civil and Commercial Code). Divorce is also allowed when the husband and wife voluntarily live separately because of being unable to cohabit peacefully for more than three years, or live separately for more than three years by the order of the court. Upon termination of the marriage, the *sin somros* is divided equally between man and woman. Also, the divorced spouses are liable for common debts equally.[36]

The right to obtain a divorce on any ground other than the respondent's incompetence is barred by condonation and may also be barred by lapse of time. According to Section 1529 of the Civil and Commercial Code, an action for divorce is extinguished 'after one year when the fact which can be alleged by the claimant has been known or should have been known to him or her'. However, grounds upon which a claim for divorce can no longer be based may still be proved in support of another claim for divorce based upon other grounds. This means that facts which cannot, owing to lapse of time, form the foundation of a claim for divorce may be used for the purpose of corroborating other facts brought forward in support of the petition.

5.3.3 Effects of Divorce

A divorce decree has the effect of dissolving the marriage as from the date on which it ceases to be appealable. From that date the spouses cease to be husband and wife, and the general effects of marriage as well as the effects of the matrimonial regime come to an end, but new duties may spring up between the parties under the rules stated below.

If a marriage is dissolved on any ground other than the respondent's insanity or the respondent's communicable and dangerous disease, the divorce decree must declare the dissolution of the marriage to be due to the respondent's fault. Where in any such a case a cross-petition on the respondent's part is equally successful or where facts are proved, which show that the respondent would have been successful if he had filed a cross-petition, or that condonation or lapse of time would have been the only reason preventing his success, the decree must on the respondent's application also declare the petitioner to be in fault. If only one of the spouses is declared to be the guilty party (i.e. exclusively guilty party), he incurs certain liabilities and becomes subject to certain disabilities. More precisely, Section 1526 of the Civil and Commercial Code states that 'in a case of divorce, if the ground for divorce has derived from the guilt of only one party, and the divorce will make the other become destitute deriving insufficient income out of his or her property or

[35]This includes any facts by which the marital relation (owing to any grave breach of marital duty, or dishonourable or immoral conduct on the respondent's part) is disturbed to such an extent that the petitioner cannot fairly be expected to continue the marriage.

[36]A comprehensive overview of the issue can be found in Stasi (2016), p. 163.

business which used to be carried on during the marriage, the latter is entitled to apply for the living allowances to be paid by the party at fault'. The court may decide whether the living allowances be granted or not by taking the ability of the grantor and the condition in life of the receiver into consideration.[37]

A petitioner, who obtains a divorce on the ground of the respondent's insanity or the respondent's communicable and dangerous disease, is under the same liability in respect of the maintenance of the latter, as if he were the exclusively guilty party in the case of a divorce obtained on any other ground. In this regard, Section 1527 of the Civil and Commercial Code provides that if a divorce is effected on the ground of insanity or on the ground of suffering from a communicable and dangerous disease, the other spouse must furnish living allowances to the spouse who is insane or is suffering from the disease.

The right to receive maintenance is forfeited by re-marriage. It follow that if the party receiving living allowances remarries, the right to receive living allowances is extinguished (Section 1528, Civil and Commercial Code). On the death of the exclusively guilty party, his heirs become liable in his place.

As regards the family name of divorced spouse, Section 13 of the Person Name Act B.E. 2548 (2005) states that 'once the marriage is dissolved by divorce or by judicial decision, either spouse using the last name of the other shall surrender it and use his former last name instead'. However, should the marriage be dissolved by death, the living spouse who still uses the last name of the other is entitled to further use such last name.[38]

In case of divorce by mutual consent, the spouses must make an agreement in writing for the exercise of parental power over each of the children. In the event an agreement cannot be reached, the matter will be decided by the court (Section 1520, Civil and Commercial Code). On the other hand, in case of judicial divorce, the court determines whether the father or mother shall get parental power over the child. If, in such trial, it is deemed proper to deprive the spouse of the parental power, the court may give an order depriving that spouse of the same and appointing a third person as a guardian, by taking into consideration the happiness and interest of the child. No special provision is made as regards cases in which a marriage is dissolved on the ground of the insanity of one of the spouses, as insanity would in any event cause the suspension of any parental power which might otherwise be vested in such spouse.[39]

The duties of the spouses as to the maintenance of their children are not modified by the divorce. Under Section 1522 of the Civil and Commercial Code, in

[37]The right to claim the living allowances is extinguished if it is not raised in the plaint or counter-claim in the action for divorce.

[38]It must be noted that if the living spouse wishes to remarry, he must surrender the existing last name and use his former last name instead.

[39]In fact, Section 1582 of the Civil and Commercial Code provides that when the person exercising parental power is adjudged incompetent or quasi-incompetent, the court may, of its own motion or on the application of a close relative of the child or of the public prosecutor, order the deprivation of the parental power either partly or wholly.

case of divorceby mutual consent, 'an arrangement shall be made and contained in the agreement of divorce as to who, both of the spouses or either spouse, will contribute to the maintenance of the children and how much is the contribution'. In case of divorce by judgment of the court, or in case the agreement of divorce contains no provisions concerning the maintenance of the children, the court shall determine it.

5.4 Parentage, Legitimacy and Legitimation

5.4.1 General Rules

Two persons, of whom one is a descendant of the other, are deemed to be kindred in the direct line. Two persons, not being kindred in the direct line, but having a common ancestor, are kindred in the collateral line. The degree of kinship is determined by the number of the births by which the connexion between the two persons concerned is effected.[40] In the case of husband and wife, the kindred of one are deemed to be relatives by marriage of the other. A person thus related by marriage to one of two spouses, is deemed to be related to him in the line and the degree in which he is related to the spouse to whose kindred he belongs.

Under Thai private law, the relationship between parents and children may be established by virtue of the child's birth (i.e. filiation) or in certain cases by law (i.e. adoption). Generally speaking, filiation refers to the relationship which exists between a child and the child's parents, forming the basic social nucleus of the family. For this reason, it is regulated by the law and cannot be subject to a private agreement between the parties or to a transaction.[41]

5.4.2 Legitimate Filiation

A child qualifies as legitimate child on the ground of the presumptions drawn from the information provided by maternity. In the same way as under English law, a child is presumed to be the legitimate issue of a marriage, if born during the subsistence of such marriage, without regard to the length of the period which has elapsed between the marriage and the birth, and a child born after the dissolution of a marriage is presumed to be the legitimate issue of such marriage, if the date of the birth is not too far removed from the date of the dissolution of the marriage.

[40]Where the kinship is in the collateral line, it is necessary to go back to the common ancestor. Thus brothers are kindred in the second degree, and first cousins are kindred in the fourth degree, nephews in the third degree, etc. The rules on this subject are those of the Roman civil law, which have also been adopted in England and which differ from those of the Canon law.

[41]On this, see in particular Minakanit (2012), p. 303.

Pursuant to Section 1536 of the Civil and Commercial Code, a child born after the termination of the marriage is presumed to be the legitimate offspring of his parents, if it is born within three hundred and ten days of the termination of the marriage. In these cases, there is a relative presumption of paternity and the burden is on someone challenging legitimacy. According to the Civil and Commercial Code, an action to nullify the presumption of paternity must be entered by the supposed father within one year of the birth of the child (Section 1542).[42] This means that the illegitimacy of a child born during wedlock, or within three hundred and ten days after the dissolution of the marriage between its mother and her husband, cannot be alleged for any purpose, unless the husband has within the prescribed period taken proceedings for disputing the legitimacy. The husband forfeits his right to take such proceedings if at any time after the child's birth he acknowledges the child as his child.

5.4.3 Natural Filiation

The law provides for natural filiation where there is no ground to presume legitimate filiation. In case of conception out of wedlock, a child is considered to be the legitimate child of the mother. This means that the presumption is that the identity of the mother is always certain and the child's mother is the woman who gave birth. Paternal filiation at law becomes effective by the subsequent marriage of the parents, by the registration made on application by the father, or by a judgment of the court.[43] Unless and until this is done, such a child is an illegitimate child, and, as mentioned above, is not deemed to belong to its father's kindred. Notwithstanding this fact, the father is under certain liabilities both as regards the child and the child's mother, and for this purpose specific rules are laid down by which the paternity of an illegitimate child is determined. More precisely, the Civil and Commercial Code provides that any person who, during the period of possible conception, has cohabited with the mother of an illegitimate child is deemed to be the father of such child unless this is clearly impossible under the particular circumstances, or unless it can be proved that another person also cohabited with the mother during the same period (Section 1539).[44] In so far as the period of possible conception falls within the time of the subsistence of the marriage, cohabitation

[42]As a point of interest, Thai private law differs from English law in that a child qualifies as legitimate child on the ground of the presumptions drawn from the information provided by maternity while, under English law, there is no fixed presumption as to the length of the period of gestation.

[43]For the effects of legitimation on inheritance see Section 1627 of the Civil and Commercial Code which states that 'an illegitimate child who has been legitimated by his father and an adopted child are deemed to be descendants in the same way as legitimate children within the meaning of this Code'.

[44]A person who by public act, executed after the birth of an illegitimate child, acknowledges himself to be the father of such child can no longer avail himself of such exception.

between the spouses is presumed. Similarly, when the period of possible conception falls within a period of time preceding the marriage, cohabitation is presumed if the husband dies prior to the birth of the child without having taken proceedings to dispute its legitimacy.

According to Section 1547 of the Civil and Commercial Code, a child born of the parents who are not married to each other is legitimate by the subsequent marriage of the parents, or by the registration made on application by the father, or by a judgment of the court.[45] If legitimation is achieved by subsequent marriage of parents (*legitimatio per subsequens matrimonium*), the illegitimate child on the marriage of its father with its mother takes automatically the status of a legitimate child in relation to its parents as well as to their kindred.[46]

As mentioned above, a child born of the parents who are not married to each other may also be legitimate by the registration made on application by the father. It follows that registration is of great significance because it allows the father of an illegitimate child to confer upon said child the status of legitimacy in the absence of marriage. When the father applies for legitimation, however, the child and the mother must give their consent.[47] In a case where the child or the mother raises the objection that the applicant is not the father, or does not give consent, then the registration for legitimation may only be effected by a judgment of the court.[48]

Under certain conditions, the court statement of paternity has the same effects as voluntary recognition. The legitimation by order of the court—which corresponds to the *legitimatio per rescriptum principis* of Roman law—enables the father of an illegitimate child to give such child the status of legitimacy without marrying the mother, and even while married to a wife other than the mother of the legitimated child. These conditions are exhaustively listed under Section 1555 of the Civil and Commercial Code and include cases of rape, abduction, or seduction of the mother during the period when conception could have taken place. Also, an action for legitimation may be entered when there is a statement from the father acknowledging the child as his own,[49] or there has been open cohabitation of the presumptive father and the mother during the period where conception could have taken place. It is left entirely to the discretion of the court to grant or to

[45]Under English law, unlike in the Thai counterpart, an unmarried father will automatically have parental responsibility for any child born after 2003, in respect of whom he is registered as father on the birth certificate; otherwise, an unmarried father can acquire parental responsibility either by agreement with the mother or by applying to court for a parental responsibility order. On this point, see Gooch and Williams (2007), p. 270. See also Prachoom (2015), p. 72.

[46]*Legitimation per subsequens matrimonium* is a mode of legitimation introduced by the Canon law and recognized in most civil law countries.

[47]The mother's authorization is dispensed with in certain events; if the mother refuses her authorization it may be replaced by the leave of the court in any case in which the child would be unduly injured by the failure of the attempted legitimation.

[48]See again, Minakanit (2012), p. 201.

[49]The father in his application must acknowledge the child as his child, but the validity of the legitimation cannot be impugned on the ground that the applicant is not truly the child's father.

refuse the application, but the order cannot in any case be made unless the requirements mentioned below are complied with.

The effects of an order of legitimation are not quite so extensive as the effects of legitimation by subsequent marriage; the order establishes ties of kinship between the father and the child and the child's issue, but it does not establish ties of kinship between the child and the father's kindred or ties of affinity between the child and the father's wife or between the father and the child's spouse.

The question whether and in what manner legitimation can be effected—in the view of Thai law—depends on the law of the father's nationality at the time of the intended legitimation (Section 31, Conflict of Laws Act). Let us look at an example. Suppose a British national marries the Thai mother of his child in Thailand. The question whether legitimation can be effected is governed by English law. In this case, the child is legitimated by the subsequent marriage.

5.4.4 Filiation by Adoption

A child may also become legitimate through adoption. Fortunately, Thai law on adoption (*karnrap but buntam*) had not been anchored to English common law; otherwise, the idea of adoption would not have seen the light of day as early as 1934, the date of promulgation of Book 5 of the Civil and Commercial Code.[50] Thai adoption is thus modelled upon the Roman *adrogatio*, though the Roman role model was destined, for historical reasons, primarily for elderly persons over sixty years of age with no prospect of having children of their own and the age discrepancy had to be at least eighteen years.[51]

Under Thai law, adoption is governed by a double group of rules: the Civil and Commercial Code and Child Adoption Act B.E. 2522 (1979). According to the legal definition, adoption enables the adopter to place the child of another into the same position as if it were his own.[52] A husband and his wife may together adopt a

[50]In the beginnings, English common law knew nothing of the Roman institutions of adoption, and it was not until 1926 that it was introduced by statue into England. However, it created little more than a special kind of guardianship: it was confined to unmarried children under 21 (then 'minors'), conferred no rights of succession and created no relationship that would be, as was the case in ancient Rome, a bar to marriage. In the last two respects English law was brought much nearer to Roman concepts by the Adoption of Children Act 1949. The recent enactment of the Adoption and Children Act 2002 breaks new ground in allowing, for the first time, unmarried couples, whether heterosexual or same sex, to adopt a child together and the Civil Partnership Act 2004 confers analogous rights to those conferred by marriage on same sex couples to register their relationship. On this point, see Prachoom (2015), p. 83.

[51]See Prachoom (2015), p. 85.

[52]There is no official English version of the Child Adoption Act B.E. 2522 (1979) at present. English translations can be found in various sources, where the translations differ. A recommended English translation can be found at: http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/70624/102958/F-1572464182/THA70624.pdf.

child as their joint adopted child. Adoption is effected by a contract between the adopter or the joint adopters of the one part and the adopted child of the other part, which, however, requires the confirmation of the competent court; the confirmation cannot be refused if the statutory requirements are complied with.[53]

Any natural person is eligible to apply for adoption, provided that certain criteria are met with regard to the best interests of the child.[54] Specifically, the Civil and Commercial Code provides that the adoptor must be at least twenty-five years old, and be at least fifteen years older than the adopted child (Section 1598/19). A married adopter as well as a married adopted child requires his spouse's authorization. The person to be adopted can be a minor or an adult. Where a minor is adopted, the authorization of the parents is also required or, if one of his parents died, the authorization of the surviving parent. Adoption of minors can take place only with the consent of both parents. If the adoptee's parents are dead, cannot express their consent, or unreasonably refuse to give such consent, the prospective adoptive parents may apply to the court for an order allowing the adoption in lieu of consent. Any decision in this regard must be made with the health, progress, and welfare of the minor as the paramount consideration.

The declarations of the parties must be made by them, respectively, in person, but if the adopted child has not attained the age of fifteen, its legal representative may, with the leave of the court, make the required declaration on the child's behalf (Section 1598/20, Civil and Commercial Code). If either the adopter or the adopted child is of restricted capacity the leave of the court must be obtained in addition to the assent of the legal representative. The contract must be unconditional and intended to be immediately operative. The contracting parties are bound by the contract, but the child does not acquire the status of an adopted child before the confirmation of the contract by the court. The contract becomes inoperative if the child dies before its confirmation, or if the adopter dies before having filed his application for confirmation.

It is evident, in principle, as in the case of the latest English legislation on adoption and the Roman *adoptio plena*, that the welfare of the adopted child should be uppermost in the minds of all concerned. Thus, if consent to a proposed adoption is so unreasonably withheld as to be prejudicial to the health (*sukapaap*), prospects (*kwam jarern*) or welfare (*sawas dee pap*) of the adopted child, an application can be made to the court for its consent (Sections 1598/21 and 1598/22, Civil and Commercial Code).[55]

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[53]On this theme, see especially Akraviboon (1979), p. 171.

[54]In the case of joint adoption, each adopter has to conform with the requirements which according to the statement in the text have to be conformed with by the adopter.

[55]Such obviously 'informed' consent is not the only safeguard of adopted children's welfare provided under Thai private law. Other measures including the privileges extended to them as compared to natural children, obstacles placed in the way of dissolution of adoption, a special escape route for an adopted child falling victim of maltreatment and steps to contain possible adverse fallout from realized adoption dissolution tend to be at work in the same direction. On this point, see Prachoom (2015), p. 85.

Once a permission of adoption is granted, the adopted child acquires the status of legitimate child of the adopter. A child adopted by a single adopter acquires the adopter's name and the status of a legitimate child of such adopter; a child adopted by a husband and wife jointly acquires one of the spouses' names and the status of a legitimate child of both spouses. Any issue of the adopted child living at the time of the adoption, who are not parties to the contract of adoption, and any after-born issue of such issue are excluded from the effects of the adoption. All other issue of the adopted child acquire the same status, as if the adopted child were a legitimate child of the adopter or adopters. No ties of kinship are created between the adopted child and the adopter's kindred, and no tie of affinity is created between the adopted child and a single adopter's spouse, or between an adopter and the adopted child's spouse. An adopter does not by virtue of the adoption become entitled to any right of inheritance in respect of the child's property (Section 1598/29, Civil and Commercial Code). Therefore, unlike the Roman role model, the adoptive parents do not qualify as statutory heirs for the inheritance of the adopted. The only exception to this rule is in cases where the adoptee dies without a spouse or descendant before the adopter. In these circumstances, the adopter is entitled to claim from the estate of the decedent the properties which were given to him and which still exist in kind after the liquidation of the estate.

Pursuant to Section 1598/28 of the Civil and Commercial Code 'an adopted child acquires the status of a legitimate child of the adoptor, but none of his rights and duties in the family to which he belongs by birth is prejudiced'. This means that by virtue of the adoption, the natural parents of an adopted legitimate child lose their parental power, and the natural mother of an adopted illegitimate child loses the custody and care of the child. The natural kindred of the adopted child are not liable for its maintenance in so far as such maintenance is supplied by the adopter or adopters. In all other respects, however, the rights and duties arising from the kinship between the adopted child and its natural kindred are not modified by the adoption, the natural blood tie of kinship giving rise to the time-hallowed social value of gratitude to one's ascendants being seen as essentially unsevereable.[56]

Dissolution of adoption (in Thai: *karn lerkrap but buntam*) in Thailand is not one-sided affair as was the case with Roman emancipation from the adoptive family. Where the adopted person is *sui juris*, the adoption may at any time during the child's lifetime be revoked by contract between the adopter or adopters[57] of the one part and the adoptee of the other part (Section 1598/31, paragraph 1, Civil and Commercial Code). After the adoptee's death, this may be done by contract between the adopter or adopters of the one part and the other persons affected by the adoption of the other part. If the adoptee is still a minor, the dissolution must

[56]A single adopter has the same rights during the adopted child's infancy as a father entitled to the exercise of the parental power. In case of his marriage the same rules are applicable—*mutatis mutandis*—as on the re-marriage of a person having legitimate issue by a former marriage. Joint adopters are during the child's infancy in the position of parents. See ibid., p. 86.

[57]Where two spouses are the adopters, the right of revocation is exercised by them jointly during their joint lives and by the survivor after the death of one of them.

take place only after the consent of the biological parents has been obtained (Section 1598/31, paragraph 2, Civil and Commercial Code). The revocation is subject to the same rules—*mutatis mutandis*—as to its confirmation by the court and otherwise, as the contract of adoption.

In the cases and under the conditions provided for by law, one of the parties to an adoption may also bring an action to court requesting the dissolution of the adoptive relationship. The most frequent reasons for dissolution include serious insults of one of the parties, acts of violence, lack of maintenance or financial support, desertion for more than one year, imprisonment for a crime for more than three years, or disappearance. Courts may dissolve adoption if one party is guilty of serious misconduct, whether it be a criminal offense or not, 'which causes the other to be very ashamed or hated, or to sustain excessive injury or trouble (Section 1598/33, Civil and Commercial Code)'.[58] Following the provisions of Section 1598/32 of the Civil and Commercial Code, the contract of adoption is also revoked by a marriage between the adopter and the adopted child.

It is important to point out that a decree of dissolution pronounced by the court takes effect from the time when the judgment becomes final and cancels the effects of the adoption. Upon dissolution of adoption, all rights and duties between the adopted child and the adoptive parents cease to exist, and the original familial ties between adoptee and biological parents are restored. Dissolution, however, may not be set up to the prejudice of the rights of third persons acting in good faith unless it has been registered.[59]

The rules as to conflict of laws are the same—*mutatis mutandis*—as those relating to legitimation. According to Section 35 of the Conflict of Laws Act, if the adopter and the adopted are of the same nationality, adoption is governed by their law of nationality. In the case that the adopter and the adopted are of different nationalities, the capacity and conditions for adopting or being adopted are governed by the respective law of nationality of each party. As regards the effects of adoption between the adopter and the adopted, however, the law of nationality of the adopter will apply. As regards the rights and duties between the adopted and the family to which he belongs by birth, the law of nationality of the adopted is to be applied.

5.5 Parental Responsibilities

5.5.1 Right to Maintenance

Under Thai private law, the right to maintenance can be enforced like an obligatory right. Any person able to support himself in accordance with his station in life

[58]The state's recognizant role in Thai adoption and dissolution of adoption is essential in that, to have their full effects, both have to be formally registered pursuant to Sections 1598/27 and 1598/31 of the Civil and Commercial Code. On this point, see Prachoom (2015), p. 87.

[59]On this point, see Jarujinda (1992), p. 151.

is bound to supply maintenance to any of his kindred in the direct line who are unable to support themselves. Parents are liable to maintain their unmarried infant children, even if they have to reduce their standard of life for that purpose, unless some other person liable to supply maintenance is able to maintain such children, or unless such children's maintenance can be supplied out of the income or corpus of their property. In so far as any person otherwise liable to supply maintenance is excused on the ground of the insufficiency of his means, the person who is next in order as to the duty to supply maintenance to the necessitous kindred becomes subject to the liability of the person so excused.[60] If the spouse of the person requiring maintenance[61] is able to supply such maintenance without imperilling his own means of subsistence, having regard to his station in life, his liability ranks before the liability of the kindred; if he would have to reduce his standard of life for the purpose of supplying the maintenance, the kindred are liable in the first instance. Among the kindred, the issue are liable before the ancestors. Among the issue such of them as on the death of the necessitous relative would be entitled to statutory portions are liable to supply the required maintenance collectively, each of them contributing a share corresponding to his statutory portion. Then among the ancestors, those of nearer degree are liable before those of remoter degree and those of the same degree are liable in equal shares. An example will help illustrate this point. Suppose that W, being unable to maintain herself is married to H, who is unable to work, and whose income is only sufficient to allow him to support himself in accordance with his station in life. The issue consist of A, a son, and B and C, sons of a deceased daughter, all being able to supply maintenance to W. Should A's contribution be half of the sum required, then B and C have to contribute the other half in equal shares. Similarly, if W has no issue and no parents living at the time in question, but her paternal grandfather and grandmother, and her maternal grandfather are living, and able, respectively, to supply the maintenance, each has to contribute one third.

5.5.2 Nature of Maintenance to Be Supplied

As mentioned above, the nature of the maintenance depends, as a general rule, upon the station in life of the recipient and must be suitable to such station. It includes the whole cost of living and, in the case of persons requiring education, also the cost of such education, and of the preparation for any profession or calling. The maintenance is, however, reduced to the bare necessaries of life, if the condition of the person concerned was caused by his own misconduct. The same

[60]The person who is next in order is also liable if the party liable in the first place cannot conveniently be sued in a Thai court.

[61]A divorced spouse liable to supply maintenance or a former spouse liable to supply maintenance is for the purpose of the rule in the same position as a spouse.

result happens if the person requiring maintenance has committed certain specified offences affecting the kindred liable to supply maintenance.

As a general rule the maintenance has to be supplied by means of a fixed annuity payable in advance by quarterly instalments, but where the parents of an unmarried child are liable to supply such maintenance they may determine in what manner it is to be provided, unless the court on any special ground directs otherwise. The expenses of past maintenance can only be claimed as from the date at which the person liable to supply it was in *mora solvendi*, or at which proceedings for the assertion of the right to maintenance were instituted.[62]

The right to maintenance becomes extinguished by the death of the person entitled thereto and also by the death of the person liable to supply it, except as regards such claims for past maintenance, or such instalments payable in advance as have fallen due prior to the death.[63]

According to Section 1564 of the Civil and Commercial Code, parents are bound to maintain their children and to provide proper education for them during their minority. Only such persons are, as a general rule, entitled to be supplied with maintenance, as are unable to maintain themselves either by their earnings or from the income or corpus of their property. A person who in his station in life is not expected to earn his own living (e.g. a student) is deemed to be unable to obtain any earnings. When the children are *sui juris*, parents are bound to maintain them only when they are infirm and unable to earn their living. Correspondingly, children, regardless of their age, have the legal responsibility of maintaining and caring their parents (in Thai: *upagara lae liang doo*). This probably reflects a Thai old tradition of demonstrating gratitude to one's parents and ancestors. Indeed, the importance of the time-hallowed social value of gratitude is so preponderant in Thai society that by law a person is legally banned from taking an action, civil or criminal, against his own ascendants (*bupa garee*) without leave of the court.[64] This means that parents may not be sued by their child, unless the case is taken up by the public prosecutor upon application of the child or other close relative.

With regard to the illegitimate child, the father is also bound to supply such child with maintenance in accordance with the mother's station in life (including the cost of education as in the case of a legitimate child) from the date of its birth down to the completion of its twentieth year.[65] The maintenance is to be continued after that time, if the child, by reason of physical or mental defects, is unable to support itself. The father is released from the last-mentioned liability in so far as its discharge would deprive him of his own means of subsistence, having regard to

[62] An agreement waiving the claim to future maintenance is void.

[63] The funeral expenses of a necessitous relative have to be paid by the party liable to supply maintenance in so far as the payment of such expenses cannot be obtained from the heirs of the deceased.

[64] On this, see in particular Prachoom (2015), p. 73.

[65] The maintenance must be supplied by means of an annuity payable in advance by quarterly instalments.

his station in life. The cost of past maintenance may be claimed; a gratuitous renunciation of the claim for future maintenance is void.[66]

The reciprocal duties as to maintenance between the parents and any legitimate child, and between the mother and an illegitimate child, are determined by Thai law if the parent, whose nationality is decisive, is a Thai (Section 36, Conflict of Laws Act). In the case of a legitimate child, the father's nationality is decisive as long as the father is living; if he is dead, the mother's nationality is decisive. In the case of an illegitimate child, the mother's nationality is decisive. Where the parent, whose nationality is decisive, has ceased to be a Thai subject, Thai law is still applied by Thai courts, in so far as the child, whose right or duty as to maintenance is in question, remains a Thai subject. No statutory rule exists as to the choice of law in any case in which the rights or duties as to the maintenance of any remoter kindred are in question.

5.5.3 Parental Power

The parental relation creates a number of miscellaneous rights and duties which have some similarity to the rights and duties which exist between husband and wife as part of the general effects of marriage. These miscellaneous rights and duties are supplemented by certain definite rights exercisable by both parents as to the person and property of children, which rights are collectively described by the term 'parental power' (*amnaat bpok krong*).[67]

The rules of the Thai Civil and Commercial Code as to 'parental power' represent a compromise between the principles governing the *patria potestas* of Roman law and the ideas underlying the English 'right of wardship' over infant children. The Roman *paterfamilias* who had powers over the issue under his *potestas*, whether infants or of full age, had to surrender some of his privileges in the later stages of Roman law, but he always retained the right of usufruct over the property of such issue. As regards infant children, this right is preserved by the Civil and Commercial Code; subject to this exception, the main principle of English law which looked upon the father's privileges not as rights exercisable for his own benefit, but as means for enabling him to protect the children's interests, is also the main principle of the actual Civil and Commercial Code. The term 'parental' power indicates that the exclusive rule of the father has been abandoned and, as a general rule, the power is exercised by both parents.

The parental power is vested in both parents until their death or judicial declaration of death, unless they are suspended or forfeited on any of the grounds mentioned above.[68] Parents may also be deprived of the care of the child's person or of

[66] A renunciation for valuable consideration requires the sanction of the court.

[67] The rules as to the conflict of laws, as regards both the miscellaneous rights and duties and the parental power, are the same as those regulating the conflict of laws as to maintenance.

[68] See paragraph 5.3.3.

the management of the child's property, by order of the court under the circumstances specified in the sections, respectively, dealing with these matters. Their powers do not in any case extend to matters as to which a curator has been appointed or to objects given by any testator or donor with directions excluding the parental power of management.

In addition, Section 1566 of the Civil and Commercial Code provides that 'the parental power is exercised by the father or the mother in any of the following cases: (1) the mother or the father is dead; (2) it is uncertain whether the mother or the father is living or dead; (3) the mother or the father has been adjudged incompetent or quasi-incompetent; (4) the mother or the father is placed in a hospital by reason of mental infirmity; (5) the parental power has been granted to the mother or the father by an order of the court; (6) the mother or the father have come to such agreement as provided by the law that it can be made'. If both parents are unable to exercise the parental power, the court has to make such arrangements as may appear necessary in the child's interest.[69]

The person exercising the parental power is the legal representative of each child subject to the power, and, as such, has authority to act on behalf of any incapable child or to give the required assent to the acts of any child whose capacity is restricted. To protect minors from imprudent and improvident actions, Section 21 of the Civil and Commercial Code provides that minors must obtain the consent of their legal representative in order to perform a juristic act; otherwise, the act is voidable. With respect to the capacity to conduct a business or to enter into an employment contract, Section 27 of the Civil and Commercial Code states that the legal representative may permit a minor to carry on a commercial business or other business or to enter into a hire of services contract as an employee. In case of refusal by the legal representative without reasonable ground, the minor may apply to the court for granting permission.[70]

Apart from the consent of the legal representative, a minor needs the permission of the court before performing some important transactions listed under Section 1574 of the Civil and Commercial Code. Transactions relating to immovables or to the whole property under the parent's management or to the purchase or sale of a business to leases extending over a year, borrowing transactions or to the issue or endorsement of negotiable instruments, etc., are among those for which the leave of the court is required.[71] Similarly, a minor cannot renounce an inheritance, refuse a legacy, and accept an inheritance or legacy encumbered with a

[69] As a general rule, a guardian is appointed under such circumstances.

[70] Pursuant to the Labour Protection Act, the minimum age of employment is fifteen years (Section 44), and no children under the age of eighteen may be employed without informing the labour inspector (Section 45). In these circumstances, the minor has the same capacity as a person *sui juris*. Nevertheless, if the carrying on of a business of service causes serious damages or injuries to the minor, the legal representative may terminate the permission or apply to the court for revocation of the permission granted. The termination of permission makes the minor's capacity of a person *sui juris* cease to exist.

[71] As regards certain kinds of these transactions a general authorization may be given.

charge or condition, except with the consent of the legal representative and the approval of the court (Section 1611, Civil and Commercial Code). Gifts cannot be made on the child's behalf except for the purpose of satisfying a moral obligation. Objects which cannot be sold without the leave of the court cannot be delivered to the child without such leave. By the same token, a new business cannot be started on the child's behalf without the leave of the court.

The Civil and Commercial Code further mentions that the power of acting on behalf of, or concurrently with, any child subject to the parental power cannot be exercised with reference to certain specified matters, as to which a conflict of interest between the child on one side and the legal representative, or certain near relations of his, on the other side is possible. More precisely, Section 1575 of the Civil and Commercial Code provides that for those acts where the interests of a parental power holder conflict with those of the minor, the former has to obtain the permission of the court; otherwise the act is void. The same provision applies in case of conflict of interest between the minor and the spouse or the children of the parental power holder.

Under certain circumstances, a minor can perform specific activities. There are four categories of legal acts that the minor can carry out without the consent of the legal representative. First are the jurist acts that solely benefit the minor. Under the Civil and Commercial Code, a minor can perform all acts merely intended to acquire a right or to be relieved of a duty (Section 22). It must be noted that the mere acquisition of a right means that the juristic act must be without condition or encumbrance, such as in case of acceptance of inheritance or acceptance of legacy without charge and condition. Similarly, the juristic act by which a minor is relieved of a duty must be without condition, such as in case of release of debt under Section 340 of the Civil and Commercial Code. Second are the juristic acts which are strictly personal (Section 23, Civil and Commercial Code). These rights are very highly related to the personality of each individual such as the right to life, the right to physical and psychological integrity, and the right to make decisions about personal and private matters. Third are the juristic acts required for reasonable needs. The law confers the right to minors to carry out all acts which are suitable to their condition in life and required for their reasonable needs without the consent of their legal representative (Section 24, Civil and Commercial Code). Fourth and last of all is the execution of a will. Section 25 of the Civil and Commercial Code states that minors, after completing fifteen years of age, can make a will without obtaining the consent of their legal representatives.[72]

5.5.4 Rights and Duties Arising from Parental Power

Under Thai private law, both parents have the same rights and duties in relation to child. Power of parents comprises the right and duty to educate and control the

[72]On this point, see Stasi (2015), p. 57.

child, the right and duty to determine its place of residence, and the right to demand the restitution of the custody of the child from any person unlawfully detaining it. Both parents have the right to require from their children complete obedience and respect, and, in the case of disobedience, to threaten punishment and inflict it. In this regard, Section 1567 of the Civil and Commercial Code provides that a person exercising parental power has the right to punish the child in a reasonable manner only for disciplinary purposes. Parents also have the right to require the child to do such work as may be reasonable to his ability and condition in life.[73] It follows that a child, while residing in the parental home and educated and maintained by its parents,[74] is bound to render them such services in the household work or business as may reasonably be expected, having regard to the child's ability to render services, and the station in life of the parents concerned.

With respect to the family name, a legitimate child takes the father's family name. If the father is unknown, a child has the right to use the name of the mother (Section 1561, Civil and Commercial Code). An illegitimate child takes the mother's family name unless the mother's name has been changed by her marriage, in which case the child takes the mother's former name.

As to the children's property, parents have the right to manage their property during their minority by using the same degree of care as that of a person of ordinary prudence.[75] The power of management exercised by virtue of the parental power over a child's property is not necessarily exercised over the whole of the child's property, owing to the fact that a testator or donor may, as mentioned above, exclude it as to any objects given by him. A testator or donor may also give special directions as to the management of any objects not so excluded, and these directions must be followed, unless the court gives leave to disregard them, on the ground that the interests of the child would otherwise be endangered.[76] The following statement must be taken to refer exclusively to the management of property in respect of which the parental power has not been excluded or made subject to special directions.

The power of management includes the right to take possession of, and to give a valid discharge for, all sums of money or other property to which the child is entitled well as the right to sell, charge, or otherwise dispose of any property

[73]On this theme, see especially Jarujinda (1992), pp. 132 and 139.

[74]An illegitimate child stands in the same position to the mother as a legitimate child to the parents. For the sake of brevity, the rules in the text are expressed with reference to legitimate children and their relations to their parents, but it will be understood that they also refer to illegitimate children and their relations to their mother, unless the contrary appears from the context.

[75]When the children are *sui juris* but remain in the parental home, the following rules are applied: (a) any outlay for the benefit of the household or of the parents is presumed to be made without the expectation of repayment; (b) if the whole or part of any child's property is handed over to one of the parents for the purpose of being managed by him, he is presumed to have the right to appropriate the net income remaining after the discharge of necessary outgoings.

[76]Where the donor is living his assent to a deviation is sufficient and if he is prevented by permanent incapacity or absence the court may assent in his place.

belonging to the child but subject, as regards certain specified kinds of property, to the leave of the court.[77] If the child has an income, it must in the first place be used for his maintenance and education, and any remaining amount should be returned to the child. Nevertheless, Section 1573 of the Civil and Commercial Code states that if the parents' income is insufficient to care for their needs, parents have the right to receive the income from their children's property.

While both parents are living, the court does not exercise any control over the management of the child's property, except in the events mentioned above. On the death of one of the parents, the surviving parent must make an inventory of the whole of the property belonging to any child then subject to the parental power[78] and must from time to time make and file an inventory of any property subsequently accruing to any child subject to the parental power. Also, if the surviving parent intends to contract another marriage the court must be informed of such intention, and an inventory of the property subject to his management must be filed before the re-marriage.

The parental power of management may be made subject to the control of the court in any case in which the child's property is endangered by a neglect of the duties incumbent on the parent exercising the parental power. In such a case, the court may require an inventory to be filed and an account to be rendered and may direct the deposit with a public authority of bearer securities, instruments endorsed in blank, and valuables, in such manner that they cannot be withdrawn or transferred without the leave of the court or may take certain other precautionary measures of the same nature. If these steps appear insufficient, the parent may be ordered to give adequate security.[79]

According to Section 1582, paragraph 1, of the Civil and Commercial Code, the court may, of its own motion or on the application of a close relative of the child or of the public prosecutor, withdraw the power of management as to the property of any child in any case in which the parent exercising the parental power neglects his duties as to the maintenance of the child in such a manner that his future maintenance appears endangered.[80] If a parent loses his power of management as to a child's property, such parent or his heirs must deliver the property previously managed by him to the legal representative of the child, and at the same time render an account of the management. If the power is terminated by the coming of age of the child to whom the property belongs, the property and the account must be delivered to the child.

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[77]Like their Roman counterparts, English parents are bound to care for their children's property but differ from the former in that they have no right at all to the enjoyment of the said property. See Prachoom (2015), p. 72.

[78]If no such property exists, he must file a declaration to that effect.

[79]The court may from time to time modify any such order or direction.

[80]The powers of management cease *ipso facto* if the parent exercising the parental power is adjudged bankrupt; on the termination of the bankruptcy, they can be restored by an order of the court (Section 1582, paragraph 2, Civil and Commercial Code).

5.6 Guardianship

5.6.1 General Rules

Under Section 1585 of the Civil and Commercial Code, a person who is not *sui juris* and has no parents, or whose parents are deprived of their parental power, may be provided with a guardian (*poo bpok krong*) during minority. In case where the person exercising the parental power has been deprived of a part of the parental power, the Juvenile and Family Court may appoint a guardian to exercise the part of the parental power. Also, the court has the right to appoint the guardian for management of the property in case of the deprivation of the right of management from the parents.

The functions of such a guardian, and more particularly his powers to act on behalf of the ward (*poo yoo nai bpok krong*), are strictly defined and extensive. In this respect, Thai has the advantage over English law under which the powers of the guardian of an infant's estate or person are in some respects vague and in many respects restricted.

The duties and powers of the court as to the control of the exercise of the guardianship are much more extensive than the similar duties and powers with reference to the exercise of the parental power. It is the duty of the court to supervise the exercise of the powers of the guardian, and of the supervising guardian, and to prevent breaches of duty on the part of either of them, and it may impose fines if its directions are disobeyed.

The judge of the court is under the same liability with reference to any breach of this duty, as he is with reference to any breach of duty in respect of his control over the parental power.

Pursuant to Section 1590 of the Civil and Commercial Code, there can be only one guardian at the time. However, in case where there is a testamentary disposition directing that several guardians be appointed or there is an application by the person with proper reasons, several guardians may be appointed as the court considers necessary. In case several guardians are appointed, the court may order the guardians to act either jointly or in accordance with the power specially conferred upon each of them.

The distinction of Roman law between the *tutela* over the younger infants and the *cura* over those of riper age is not maintained in Thai law. The functions of a 'curator' (*poo pi tak*) are intended to meet cases in which a person has physical or mental infirmity, habitual prodigality, habitual intoxication, or other similar causes that make him incapable of managing his own affairs, or whose management is likely to cause detriment to his own property or family. In these cases, such person may be adjudged as quasi-incompetent by the court and a curator may be appointed (Section 32, Civil and Commercial Code). Also, a curator may be appointed for an absent adult whose place of abode is unknown,[81] or who is prevented from returning and from attending to the management of his property.

[81] A *curator absentis* may be appointed, notwithstanding the fact that the absent person has appointed an attorney capable of acting on his behalf, if any circumstances exist which render the revocation of the power of attorney desirable.

5.6.2 Selection and Appointment of Guardian[82]

The court in its selection of a guardian must follow a prescribed order of priority as between the persons who by law are 'called upon' to act. According to Section 1586 of the Civil and Commercial Code, the guardian is appointed by the order of the court on application of a relative of the minor, the public prosecutor or of the person whose name has been specified in the will by the last surviving parent. In case there is a testamentary disposition on the appointment of a guardian, the court shall appoint the guardian accordingly unless the will is not effective or the person specified in the will is prohibited to be guardian.[83]

In the absence of any special ground justifying the appointment of several guardians (for example, the nomination of several guardians in a testamentary disposition), only one is appointed for each ward. Where, for any special reason, several guardians are appointed for one ward, each of such guardians may be appointed for a separate sphere of duties, e.g. one of them may be appointed as guardian of the person and another as guardian of the property. Where several guardians are appointed, without distinction of spheres of action, they must act jointly. In cases of difference of opinion between the guardians the court decides, unless on the appointment of such guardians other directions have been given. The court must follow any directions given by a ward's parent as to the decision on differences of opinion between guardians nominated by such parent, unless such directions appear to endanger the ward's interests.

It must be pointed out that a person may either be incapable of being appointed as a guardian or merely disqualified. If a person incapable of being appointed is appointed, such appointment is void, *ab initio*; disqualified person ought not to be appointed, but if the prohibition has been disregarded the appointment is operative. The court, however, is bound to dismiss the disqualified person as soon as the disqualification is brought to its knowledge.[84]

The appointed person is bound to accept the office of guardian, if not excused on one of the prescribed grounds. A person who culpably declines the office without lawful excuse is liable for any damage suffered by the ward by reason of the consequent delay in the appointment and may be fined for his refusal. It is the duty of the court to effect the appointment of a guardian of its own motion whenever such

[82]The appointment of curator must be made in accordance with the provisions of the Civil and Commercial Code which govern guardianship.

[83]Section 1587 of the Civil and Commercial Code provides that 'Any person *sui juris* may be appointed a guardian, except the following: (1) person adjudged incompetent or quasi-incompetent; (2) person who is bankrupt; (3) person who is unfit to take charge of the person or property of the minor; (4) person having or having had a lawsuit against the minor, ascendants or brothers and sisters of full blood or brothers and sisters of half blood of the minor; (5) person having been excluded by name in writing from guardianship by the deceased parent'.

[84]The revocation of the order of appointment of the guardian does not affect the right of the third person acting in good faith, but the acts done by the guardian do not bind the minor whether the third person acted in good faith or not (Section 1588, Civil and Commercial Code).

appointment is required.[85] The person appointed must declare before the court that he will faithfully and conscientiously discharge the duties of his office. Pursuant to Section 1597 of the Civil and Commercial Code, the court may also order the guardian to give security if such a precaution is required on any special ground.

5.6.3 Rights and Duties of Guardian

The status of guardian commences from the day when the notification of his appointment by the court is known to him.[86] The guardian must without delay make an inventory of the ward's property within three months from the date when the appointment by the court is known to him, but this period of time may be extended on application made by the guardian to the court before the expiration of the three months.[87]

Furthermore, Section 1593 of the Civil and Commercial Code states that 'Within ten days after the completion of the inventory, the guardian shall submit one certified copy thereof to the court, and the court may require him to give supplementary information or to produce documents in order to show that the inventory is correct'. If the court does not give an order otherwise within fifteen days after delivery of the inventory or the day of producing of supplementary information or documents, as the case may be, the inventory is deemed acceptable by the court.[88] If the inventory is deemed insufficient, the court may direct some other person or authority to take an inventory.

A guardian has the same rights and duties as a parent exercising the parental power but is subject to much greater restrictions than a parent. Section 1598/1 of the Civil and commercial Code specifies that the guardian must render account to the court concerning the property once a year as from the day when he becomes guardian.[89] The court has to examine the accounts and to cause them to be amended or supplemented if necessary.[90] The guardian whenever requested to do

[85]Where a guardian has to be appointed for an infant the court may, pending such appointment, make such preliminary orders as may be required in the ward's interest.

[86]The rights and duties of a curator are determined by the purpose for which he is appointed. Within the scope of such purpose, he has the same powers and is subject to the same restrictions as a guardian.

[87]The inventory shall be made in presence of at least two witnesses who must be *sui juris* and be relatives of the ward, but if no relative can be found, other persons may be witnesses.

[88]If the guardian does not comply with the provisions concerning the making of the inventory or the submission of a complete and correct inventory or the court is dissatisfied with such inventory on the grounds of gross negligence, dishonesty, or obvious inefficiency of the guardian, the court may discharge the guardian.

[89]The court may, however, after the account of the first year has been rendered, order that the account be rendered at a longer interval than one year.

[90]Any disputed claim arising between the guardian and ward may be tried at once by action before the competent court.

so must give information to the court as to the conduct of the guardianship and the circumstances of the ward.

A guardian is also liable for all damage caused to the ward by his wilful or negligent default.[91] Where several guardians are in default they are liable jointly and severally, but where the default consists merely in the neglect of the duty of supervision, the guardian, as between himself and the supervising guardian, is liable exclusively. The duties of a guardian must be performed without remuneration, unless the court on any special grounds directs otherwise, e.g. where the extent of the property and the difficulties of its management justify such remuneration.[92]

The rules as to the care of an infant ward's person are the same as those applicable to the care of a child subject to the parental power except that the Juvenile and Family Court may order the removal of the ward into a family, even in the absence of the grounds on which a child under parental power may be removed out of the parental custody.[93] The guardian of an adult has the care of the ward's person only in so far as this is necessitated by the object of the guardianship.

The rules as to the guardian's power of management over the ward's property are similar to the rules as to a parent's power of management over his infant child's property. In the same way as under the last mentioned rules, the property given by a testator or donor must be managed in accordance with his directions (if any) unless the court in the ward's interest and subject to the donor's assent (if living and capable of assenting) authorizes any deviation therefrom.

It must be mentioned, however, that there are several points of difference between a guardian's and a parent's powers of management. As first point, a parent has the right to use the income in a reasonable measure if he has no income sufficient for living to his condition in life; a guardian cannot use any part of the income or of the corpus of the ward's property for his or her own purposes and must invest all income not required for the payment of necessary outgoings. As second point, a parent is free to select any investments from within the range allowed to him; a guardian must invest the income of the ward according to the provisions of Section 1598/4 of the Civil and Commercial Code, namely, in bonds issued (or guaranteed) by the Thai government, in fixed deposit and in any other investment which may specially authorized by the court. As a third point, a parent, exercising parental power, can dispose of or give a valid discharge for any personal claim or negotiable instrument forming part of the child's property; a guardian is, as a general rule, unable to do so without the concurrence or ratification of the supervising guardian or the leave of the court (such leave may, however, be given in respect of a whole class of transactions together). As a fourth point, a parent, exercising parental power, retains the whole of the child's property in his

[91]The rule as to the sufficiency of the amount of diligence which the person concerned gives to his own affairs which applies in the case of a parent is not applied in the case of a guardian.

[92]A guardian who employs any funds belonging to the ward for his own purposes has to pay interest thereon.

[93]Where the ward is in the custody of either parent the rule is the same as where a child is under the parental power.

custody or under his control except under the special circumstances mentioned above; a guardian, on the other hand, is required to lodge with a public authority, or register, bearer securities, and instruments endorsed in blank, and in such manner, that they cannot be withdrawn or transferred without the leave of the Juvenile and Family Court.[94] Fifth and last point, the range of transactions requiring the leave of the Juvenile and Family Court is considerably wider in the case of a guardian acting on behalf of a ward than in the case of a parent acting on behalf of a child.[95] For some kinds of transactions, however, a general leave may be given.[96]

After the ward has reached discretion and his age is not less than fifteen years complete, the guardian must, in all important transactions, consult him first, so far as it is possible to do so (Section 1598/5, Civil and Commercial Code). The fact that the ward has given consent does not exonerate the guardian from liability.

5.6.4 Termination of Guardianship

According to Section 1598/6 of the Civil and Commercial Code, the guardianship ceases *ipso facto* on the ward's death or by the ward becoming *sui juris*.[97] A guardianship ordered on the ground of any disability other than infancy is terminated by the Juvenile and Family Court if the ward ceases to be affected by such disability. A guardianship is likewise terminated by the death of the guardian, resignation, removal from office, incapacity to act, or bankruptcy.[98]

It must be noted that under Section 1598/8 of the Civil and Commercial Code, a guardianship may be terminated by the order of the court when the guardian fails to perform his duties, abuses his functions, or is guilty of gross negligence in performing his duties. Also, the guardian may be discharged by the court if in consequence of his misconduct or of any other circumstance his retention of the office would, in the opinion of the court, endanger the ward's interests.[99]

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[94]Other similar precautionary measures may also be ordered on any special ground. For instance, a guardian may on special grounds be allowed to retain the custody or control of the property requiring deposit or registration under the general rule.

[95]The rules about gifts and about the delivery to the child or ward of objects which cannot be sold or charged without the consent of the supervising guardian, or the leave of the court, are the same in both cases.

[96]The powers of a curator as to the management of any property entrusted to him are the same as those of a guardian.

[97]If a ward, who is untraceable, has not been declared to be dead, the court may terminate the guardianship.

[98]A curatorship comes to an end if the cause for the court adjustment of the quasi-incompetent ceases to exist (Section 36, Civil and Commercial Code). More precisely, in case the reasons for the quasi-incompetence disappear, the court has to revoke the declaration of incompetence at the request of the person himself, the person's spouse, the ascendants, the descendants, the guardian or curator, the person taking care of the person, or the public prosecutor.

[99]A curator's office is terminated on the same grounds as a guardian's office.

On the termination of the guardianship, or on the vacation of his office, a guardian must deliver or transfer the property under his care to the ward if *sui juris* or to his legal representative if he is under parental control or guardianship. Section 1598/11 of the Civil and Commercial Code provides that when the guardian or the functions of the guardian are terminated, the guardian or his heir must without delay hand over to the ward, his heir, or the new guardian the property managed. Then within a period of six months,[100] the guardian must prepare an account of the management of the ward's property which must be submitted to the Juvenile and Family Court for examination. If the account is found to be in order, the court issues a certificate to that effect.

The rights and duties of a guardian (or curator), during the period intervening between the termination or vacation of his office and the receipt of the notice of such termination or vacation or between the ward's death and the time at which the ward's heirs can take charge of the ward's estate, are regulated by the same rules—*mutatis mutandis*—as those applicable under the corresponding circumstances on the termination of the parental power.

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[100]This period of time may be extended by the court on application of the guardian or his heir.

Chapter 6
Law of Inheritance

6.1 Introductory Concepts

6.1.1 Intestate and Testamentary Succession

Inheritance is regulated in the sixth book of the Civil and Commercial Code and is conceived of as a separate institute. It, among other things, regulates the transmission of the estate of a deceased person after his death, the statutory rights of inheritance, the succession by will, and the administration of an estate. The title to the estate of a deceased person may be derived under a statutory rule or under a disposition made by the deceased.[1] This fact is frequently expressed by the statement that the right of the persons taking the estate is acquired under the intestacy or under the will of the deceased, but this form of expression seems to assume that testamentary succession represents the normal, succession *ab intestato*, the exceptional state of things. The authors of the Civil and Commercial Code in its final shape were anxious to repudiate this view, which, though characteristic of the later developments of Roman law, was unhistorical and did not reflect Thai practice. The statutory right of succession was therefore chiefly emphasized, and any right derived under a disposition of the deceased was looked upon as a modification of, or addition to, the statutory right. The rule of Roman law, *nemo pro parte testatus pro parte intestatus decedere potest*, has accordingly ceased to exist. The present rule is that the statutory heir succeeds, except in so far as he is displaced by any disposition of the deceased intended to become operative on his death.[2]

[1]These are the only legal titles of succession which are available under Thai private law and it is not possible to succeed under a different title, such as a contract of inheritance.

[2]It must be pointed out that according to the Act on Application of Islamic Law in Four Provinces B.E. 2489 (1946) 'Islamic family law and inheritance shall be applied in the court of first instance in Pattani, Narathiwat, Yala and Satun' (Section 3).

A. Stasi, *General Principles of Thai Private Law*,
DOI 10.1007/978-981-10-2191-6_6

6.1.2 Heirship

The estate, as a whole, is called the 'inheritance'. The inheritance vests in the heirs immediately on the death of the deceased, subject to being divested as to the whole, or as to the share of any co-heir, by disclaimer within the period allowed by law. By the operation of such disclaimer, the inheritance or the share disclaimed by any co-heir becomes, *ipso facto*, vested in the person next entitled. The person to whom heritage descends by statutory right or by will is called the heir. Heirs who are entitled to succeed to the property by law are called statutory heirs, and the heirs who are entitled to succeed to the property by will are called legatees.[3]

Under Roman law, the heirs were on principle personally liable to an unlimited extent for the discharge of the liabilities of the estate. According to the principle of universal succession adopted by Roman law, the heir took the place of the deceased person in every respect, becoming entitled to his rights and subject to his liabilities. The *beneficium inventarii* introduced by Justinian enabled an heir to have an inventory of the estate taken in a specified manner and within a specified period and thereby to limit his liability for the debts of the deceased to the value of the estate. Unlike the Roman *heredes,* Thai heirs are not liable in excess of the property devolving on them (Section 1601, Civil and Commercial Code). This means that their liability does not exceed the amount which they receive.

No distinction exists between movables and immovables: On the death of the deceased, the whole of the estate vests in the heir or heirs. Under Section 1600 of the Civil and Commercial Code, however, the estate does not comprise those rights and duties which by law or by their nature are purely personal to the person of the deceased, such as the right to compensation for pain and suffering when injuries caused by accidents lead to the death of the victim (Section 446), the obligations arising under a contract of hire of work when the personal qualification of the contractor is of the essence of the contract (Section 606), or the obligations arising under a contract of hire of services when the personal qualification of the employer is of the essence of the contract (Section 584). The deceased's rights and obligations under a contract of loan are likewise excluded from the estate (Section 648, Civil and Commercial Code), as well as the claims for children's allowances.[4]

Where there are several heirs, they stand to each other in the relation of co-heirs. Thus, where several persons take the estate of the deceased as his next of kin, they take it as statutory co-heirs, and similarly several persons appointed as

[3]The statutory, testamentary, or contractual right to a share in the estate of a deceased person may be abandoned by renunciation in the lifetime of such person, or forfeited by the committal of certain offences which render the person committing them 'unworthy to inherit'.

[4]On this point, see Stasi (2016, p. 169).

heirs by will are testamentary co-heirs. If the testamentary heirs do not take the whole estate, the statutory heirs take the remaining part of the estate as co-heirs with the testamentary heirs.[5]

6.1.3 Executors

Executors were unknown to Roman law; they were introduced into Thailand under the influence of the German Civil Code. Following the lead of German law, Thai law has regularized and defined their position in a very complete manner. The powers of executors depend to a large extent on the provisions of the testamentary disposition by which they are appointed. The estate does not in any case become vested in them, but they may be given the amplest powers of disposition and alienation, and their appointment may correspondingly deprive the heir of such powers. The functions of a Thai executor are not necessarily exhausted by the payment of the testator's debts and the distribution of the residuary estate. The powers of managing and alienating the testator's estate for the benefit of the heir, or of managing the portion of one particular co-heir, may be continued during such heir's or co-heir's life, or for a specified period not exceeding ten years. The functions of a Thai executor are in such a case more like those of an English trustee than like those of an English executor.[6]

6.1.4 Legacies and Testamentary Burdens

The expression 'legacy' is here used as the equivalent of the Thai *pi nai gam*, which comprises any gift out of the estate of a deceased person other than a gift of a share in the inheritance. Such a gift may consist of a sum of money, or of a specific thing, movable or immovable. Under the later Roman law, the ownership of anything specifically bequeathed became vested in the legatee as soon as the estate as a whole became vested in the heirs, but under the Thai law, a legatee does not acquire any right of ownership, but merely a personal right to the payment or delivery of the object bequeathed to him. As a general rule, the heirs are bound to

[5]The etymological equivalent of the expression 'heir', as used in civil law systems, has an essentially different meaning from that which the expression has in English law. Under the English law, the term 'heir' is commonly reserved for one who receives real property by action of the laws of intestacy, which operate only in the absence of a valid testamentary disposition. See Garner (2001, p. 400).

[6]In this regard, it must be added that an English executor who accepts the office is, as regards the vesting of the testator's estate, in the same position as a Thai heir. The estate does not become vested in a Thai executor. However, as a Thai executor with full powers of management has complete control of the estate, third parties dealing with him are, as a general rule, as safe as third parties dealing with an English executor.

pay or deliver the bequeathed object, but the duty to satisfy a legacy may also be imposed upon a particular legatee.

A legacy must be distinguished from a burden imposed upon the heir or a legatee for the benefit of any person or object. The person for whose benefit a burden is imposed on an heir or legatee has no right to enforce such benefit, the enforcement being left to the heir or executor, or to some public authority.

As regards the compulsory right of succession, the so-called 'formal' right of inheritance of Roman law, which made it necessary for a testator to appoint everyone of his natural heirs as heir, or to disinherit him on one or more of the recognized grounds of disinheritance, has not been adopted by the Civil and Commercial Code.[7] Similarly, the 'material' right of inheritance, which is the right of every statutory heir who has not either renounced his claim, or been declared 'unworthy to inherit', or deprived of his share on some lawful ground, to a part of his statutory portion, does not apply under Thai law.[8]

6.1.5 Conflict of Laws

The devolution of the estate (*tang tae gaan tok tot haeng sapsin moradok*) of a person may be governed by different laws depending on the nature of the property and on the domicile of the deceased. Pursuant to Section 37 of the Act on Conflict of Laws B.E. 2481 (1938), 'As far as succession concerns immovable property, the law of the place where such property is situated shall govern'. Then, Section 38 adds that 'As far as movable property is concerned, succession by statutory right or by will is governed by the law of domicile of the deceased at the time of his death'.

The capacity of a person to make a will is governed by the law of nationality at the time when the will is made. Any question, therefore, as to the validity of a testamentary disposition affecting the estate is determined by Thai law, if the deceased, at the time of his death, was of Thai nationality, whatever his domicile may have been at such time.

This rule is, however, subject to some qualifications and exceptions. According to Section 40 of the Act on Conflict of Laws, a testamentary disposition, though not executed in the form required by Thai law, is deemed duly executed if executed in the form required according to the law of the place of execution, or in the

[7]Compulsory portions, though originally prescribed by English law, are now unknown in England. The absolute liberty of testamentary disposition prevails at the present time.

[8]Under Roman law, if less than the compulsory portion was left to a statutory heir—who was not declared 'unworthy to inherit'—he could require the testamentary heirs to make up the deficiency; if the compulsory portion or even a larger share was left subject to any restriction (e.g. the appointment of an executor with managing powers), the statutory heir could at his option claim his compulsory portion free from any restriction in lieu of the benefit intended to be given to him, or abide by the provisions of the will.

form required by the law of the state, of which the testator was a national at the date of execution. If the testator was the citizen of a foreign state at the date of execution, and was capable, according to the law of such state, of making a will, the validity of such will is not affected.[9]

It must be added that the revocation of a will or of a clause in a will is governed by the law of domicile of the testator at the time when the revocation is made. The law of domicile of the testator at the time of his death also governs the lapse of a will or of a clause in a will.

6.2 Statutory Right of Inheritance

6.2.1 General Rules

The word 'inheritance' (in Thai: *moradok*) means the estate as a whole, but the rules applicable to the inheritance as a whole are also applicable to the share of any particular co-heir. It will therefore be understood that any rule stated below which refers to the 'heir' and to 'the estate' or to 'the inheritance' is equally applicable to any co-heir and to his share in the estate.

The devolution of the inheritance takes place immediately on the death of the deceased.[10] In principle, only a natural person who has been alive at the time of the deceased's death holds a legitimate right to inheritance; however, a child yet unborn but already conceived at the time of the death may be an heir if he is born alive within three hundred and ten days after the death of the person whose succession is in question (Section 1604, Civil and Commercial Code).

The persons who between them are entitled to the inheritance are called the 'statutory heirs' (*sitti doi tamnai gaan rap moradok*). The testator may by testamentary disposition deprive a statutory heir of his right of inheritance without appointing another heir in his place. The estate is then, subject to the rules of intestacy, administered as if the person so deprived had not been living at the date of the deceased's death. If no natural person entitled to the rights of a statutory heir is living, or deemed to be living at the time of the deceased's death, the treasury authority of the state becomes the statutory heir.[11]

It must be pointed out that many civil law countries apply the rule of equalization of shares between issues. Accordingly, the issue of the deceased must, on the division of the estate, as between themselves, account for certain kinds of gifts received from the deceased during his life in the manner known in English law as 'bringing into hotchpot'. The liability to account for such gifts is called hotchpot

[9]Effects and interpretation of wills, as well as nullity of a will or of a clause in a will, are governed by the law of domicile of the testator at the time of his death.

[10]Accordingly, if the heir disclaims the inheritance, it is deemed to have vested, as from the date of the death of the deceased, in the person accepting it in his place.

[11]Prachoom (2015, p. 421 ff).

liability.[12] Thai private law does not follow the same rules, and heirs do not have to bring in hotchpot the gifts received by them.

A statutory heir may be deprived of his right of inheritance by testamentary disposition; a right of inheritance may also be forfeited by formal renunciation in the lifetime of the deceased, by disclaimer on the part of the person entitled or by a judicial declaration establishing the 'unworthiness' of the party concerned.

6.2.2 Mode of Determining Statutory Heirs

The next of kin and the surviving spouse (if any) in so far as they have not been deprived of their right or forfeited it are the statutory heirs of the deceased and, as such, take the whole estate, or such part thereof as is not disposed of by testamentary disposition. For the purpose of ascertaining who are the next of kin, the kindred are divided into classes following each other in a prescribed order; if any member of a prior class is living or deemed to be living, the members of the subsequent classes do not belong to the next of kin. In the absence of any statutory heir, the surviving spouse takes the whole inheritance.[13]

As in the past men were allowed to have several wives in Thailand, the Civil and Commercial Code regulates the interaction between co-wives in the event of the decease of the husband. According to Section 1636 of the Code, if the deceased person has left several wives who acquired their legal status before the enforcement of the Civil and Commercial Code Book 5, all the wives are jointly entitled to inherit from him. However, each secondary wife can only claim one half of the share to which the principal wife is entitled.[14]

If neither the surviving spouse nor any kindred become entitled as statutory heirs, the treasury authority of the state takes the place of the statutory heir (Section 1699, Civil and Commercial Code).

It is noteworthy to point out that the Civil and Commercial Code also contains special provisions relating to Buddhist monks. Specifically, although he can be a legatee, a Buddhist monk cannot claim inheritance as a statutory heir unless he leaves the monkhood and enforces his claim within one year from the death of the decedent (Section 1622). Furthermore, the Code states that any property acquired

[12]The amounts to be accounted for under the rule stated above are added to the amount representing the net value of the part of the testator's estate divisible among issue. The statutory portions are then calculated as if the value of the estate was equal to the aggregate amount formed by this addition, and the value of the gifts received by each descendant entitled to a share is deducted from the statutory portion of such descendant; if the value of the gifts received by any descendant exceeds the amount of his portion, such descendant is excluded from the division.

[13]On this theme, see especially Jitgaannateegit (1993, p. 89 ff).

[14]For a detailed discussion on this point, see Stasi (2016, p. 175 ff).

by a Buddhist monk during his monkhood becomes, upon his death, property of the monastery which is his domicile, unless he has disposed of it during his life or by will (Section 1623).[15]

6.2.3 Classes and Degrees of Statutory Heirs

The Thai rules determining the order in which the kindred are entitled may be said to be inspired by Justinian's reform of late Roman law which significantly replaced the blood tie of *agnatio* by *cognatio* and placed males and females on an equal footing. The order of succession, however, has been slightly changed along the lines of English law.[16] Pursuant to Section 1629 of the Civil and Commercial Code, the kindred are divided into six classes, each class being called a *lam dap*. As under English law, the first class consists of the descendants of the deceased.[17] If the deceased does not have descendants, then in the second order of succession the parents of the deceased will inherit equally. Should neither the descendants nor the parents inherit, the other degrees of inheritance apply in the following order: brothers and sisters of full-blood; brothers and sisters of half-blood; grandparents; and uncles and aunts.

The surviving spouse is also a statutory heir and shares the estate with the relatives of the deceased. The share of the surviving spouse depends on whether the deceased has any other heirs and varies in relationship to the closeness of the other heirs to the deceased. The closer the relationship of other heirs to the deceased, the smaller is the share of the surviving spouse.[18]

The members of the first class are called *poo seup sandaan* and those of the second class *bidamarat* and so forth. Among the members of each class, those nearest in degree to the deceased take priority over those further removed. This is to say that as long as there is any heir surviving (or represented) in a particular class, the heir of the lower class has no right at all to the estate of the deceased. However, in the particular case where there is a descendant surviving (or represented), and also the parents, or one of them, are still surviving, each parent is entitled to the same share as an heir in the degree of children (Section 1630, Civil and Commercial Code).

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[15]Ibid., p. 176.

[16]See Prachoom (2015, p. 447).

[17]In this respect, Section 1627 of the Civil and Commercial Code provides that illegitimate children who have been legitimated by their father and adopted children are deemed to be descendants in the same way as legitimate children. It can be argued, *a contrario*, that illegitimate children who have not been duly acknowledged have no rights of inheritance.

[18]Stasi (2016, pp. 172–173).

Inheritance by virtue of the representation only applies to the following classes of statutory heirs: descendants, brothers and sisters of full-blood, brothers and sisters of half-blood, and uncles and aunts.[19] It follows that there is no right of representation for the second and fifth classes (*i.e.* parents and grandparents), and the whole share devolves to the other surviving heirs, if any, of the same class.

These rules may be illustrated by examples, it being assumed in all cases that the deceased does not leave any spouse surviving. As regards the first class, suppose that B leaves one child A who has issue and two grandchildren B and C, children of a deceased child. A, B, and C are the next of kin, A takes one half, B one fourth, and C one fourth. The issue of A are excluded.

To illustrate the rules that apply to the second class of statutory heirs, let us take another example. Suppose D dies without issue and leaves a mother M, one brother of the whole blood F, one brother of the half-blood G, who is a son of B by a prior marriage, and another brother of the half-blood H, who is a son of D's deceased father by a prior marriage. M is the next of kin in her own right and takes the whole estate. F, G, and H are excluded. In fact, according to the provisions of Section 1641 of the Civil and Commercial Code, F and H cannot receive the inheritance by virtue of the right of representation of their deceased father; G has no right to the estate of the deceased by virtue of Section 1930 of the Civil and Commercial Code.

Another example may help clarify the rules which apply to the third and fourth classes of statutory heirs. Assume A dies leaving no kindred belonging to the first or second class, but leaving him surviving in the third class, one brother of the whole blood B, one brother of the half-blood C, and X and Y, issue of the deceased whole blood brother D. In this case, B takes one half in his own right, and X and Y each take one-fourth as representatives of their deceased ancestor. C is excluded.

Similarly, to take an example of the fifth class of inheritance, suppose D dies leaving no kindred belonging to the first or second class, but leaving him surviving in the third class, P.A. his paternal grandmother, M.A. his maternal grandmother, and A and C issue of the deceased paternal grandfather, A being an uncle of D, and C a cousin of D (the son of a deceased uncle). The half belonging to the paternal line goes entirely to P.A.; the half belonging to the maternal line goes entirely to M.A. A and C are excluded.

As regards the last class, assume that the deceased dies without leaving any kindred belonging to the first five classes but one great-uncle A, and one second cousin B, being the grandson of another great-uncle. In this case, A and B each take one half of the estate.

[19]Section 1639 of the Civil and Commercial Code specifies that 'If any of his descendants is dead or has been excluded before death of the *de cujus*, the descendants of such descendants shall represent him for the purpose of receiving inheritance and the representation shall take place in this way as regards the share of each person consecutively to the end of the stirpes'.

6.2.4 Renunciation of Statutory Right of Inheritance

Any person may by a publicly certified agreement with another renounce his rights to a statutory portion in the estate of such other.[20] Such an agreement is called renunciation of inheritance. Where the renouncing party is one of the kindred of the party to whose estate the renunciation refers, the renunciation extends to the issue of the renouncing party unless the contrary is shown. Where the renunciation is made in favour of any other person, it is, in the absence of a contrary stipulation, inoperative in the event of such other person being deprived of or forfeiting his own right. In the case that a general renunciation is made by any issue of the person to whose estate the renunciation refers, it is presumed to be made in favour of the other issue and of the spouse of such person. An agreement between the parties, by which the renunciation is revoked, is subject to the same formal requirements as the original agreement.

6.2.5 Forfeiture by Declaration of Unworthiness

A statutory or testamentary heir may, on the application of any person who would benefit by his forfeiture of the inheritance, be declared 'unworthy to inherit' (*poo mai samquaan*) if by any wilful and unlawful act he has caused or attempted to cause the death of the deceased, or has brought him to a condition, by reason of which he became incapable, down to the date of his death, of making or revoking a testamentary disposition (Section 1606, Civil and Commercial Code).[21] Further, a person is deprived of the right to succession by law if, by fraud or unlawful threats, he has prevented the deceased from making or revoking a testamentary disposition, or compelled him to make or revoke a testamentary disposition. Other categories of persons can be divested of their succession right: the person who has forged or destroyed any testamentary instrument made, or purporting to have been made, by the deceased which would, if genuine or existing, be operative at the date of the death of the deceased, or the person who, having knowledge that the decedent was murdered, did not give information necessary to bring the offender to punishment. If it can be shown, however, that the deceased has condoned the offence by a pardon in writing, the declaration cannot be made.

[20]The party to whose estate the renunciation refers must execute the agreement in person, unless he is incapable, in which case his legal representative may act on his behalf; if he is of restricted capacity, the concurrence of the legal representative is dispensed with. If either party is under guardianship, the leave of the court is required; if either party is under parental control, the leave is required unless the parties are spouses or intending spouses.

[21]On this point, see in particular Huthakoon (2006, p. 117).

The right of inheritance of the person declared unworthy becomes vested, as from the date of distribution of the estate, in such person or persons as would have been entitled to such right if the person declared unworthy had predeceased the deceased.

6.3 Testamentary Right of Inheritance

6.3.1 Nature of Testamentary Disposition

Under Roman law, a 'testament' was distinguished from a codicil; it was of the essence of a testament that it should contain the appointment of the testator's heirs, whereas a codicil only gave legacies without appointing heirs. The formalities of execution were much more stringent in the case of a testament than in the case of a codicil. Under English law, there is no legal difference between a will and a codicil, but it is customary, in a case in which a testator executes several successive testamentary instruments intended to be read together, to designate the instrument first made as the will and all subsequent ones as codicils to such will. Thai law has abolished the word 'codicil' from the Civil and Commercial Code. Every instrument containing a testamentary disposition is called a will ('testament'), and no such disposition is valid unless the prescribed formalities as to the execution of a will have been observed.

It is not of the essence of a will that it should appoint heirs or purport to dispose of the whole of the testator's estate or even of any part of it. An instrument containing nothing except the exclusion of particular persons from their statutory right of inheritance is called a will in the same way as an instrument disposing of the whole estate.

As regards the interpretation of wills, it must be pointed out that when interpreting a clause in a will, one must refer to the special rules provided under the Civil and Commercial Code. Thus, according to Section 1684 of the Code, if a clause can be interpreted in several senses, the sense which best assures the observance of the intention of the testator must be preferred. Also, when the tenor of a testamentary disposition admits of several interpretations, one of which would render it inoperative while the other would make it operative, such interpretation as will render the disposition operative is, in the absence of any indication to the contrary, to be preferred.[22]

Several dispositions contained in one testamentary instrument may be so interdependent that the invalidity of one also prevents the operation of one or more of the others. This is deemed to be the case if it can be shown that the testator would not have made a particular disposition, if he had known of the invalidity of another disposition. In the absence of such proof, the invalidity of one of the dispositions does not affect the validity of the others.

[22]See in regard to more comprehensive discussion Prachoom (2015, p. 420 ff).

6.3.2 Circumstances Rendering Testamentary Dispositions Inoperative

A testamentary disposition may be or become inoperative on two main grounds. The first ground applies in the case of defects in the tenor or expression of the disposition. A testamentary disposition which is vitiated by such defects may be either void *ab initio* or only voidable at the option of some person who would benefit by its avoidance.

Under the Civil and Commercial Code, all the dispositions contained in any will are void if the testator was incapable of making a testamentary disposition or if the prescribed formalities have been disregarded.[23]

Besides, a testamentary disposition is void if its tenor is unintelligible or incomplete.[24] Similarly, a testamentary disposition is void if the testator makes its validity depend upon the determination of another, or if he empowers another to appoint an heir or legatee, or to select the object which is to go to a particular legatee; it is, however, permissible to bequeath a legacy to a class, with power to any person nominated by the testator to apportion the bequeathed objects among the class, or to appoint the whole to one or more members of the class,[25] or to give alternative legacies. The appointment of an executor may also be left to the discretion of a nominee.

Pursuant to Sections 1708 and 1709 of the Civil and Commercial Code, a testamentary disposition may be avoided if it is vitiated by a mistake on the testator's part as to its tenor,[26] a mistaken assumption or expectation on the part of the testator as to any fact or event (present or future) or by the influence of unlawful threats.[27] As a general rule, the right of avoidance of a voidable testamentary disposition may be exercised by any person benefited by such avoidance, but where a mistake as to any particular person forms the ground of avoidance, such person alone is entitled to exercise the right. Following the same logic, the Civil and

[23]A testamentary disposition executed with the easier formalities allowed under certain special circumstances becomes inoperative after a specified period reckoned from the date at which the special circumstances cease to exist.

[24]The fact that the testator refers to a future supplemental direction, which he fails to give before his death, does not render the disposition inoperative, unless it can be shown that this was the testator's intention.

[25]The rule in the text shows that Thai law forbids the granting of a 'general power of appointment' but allows the granting of a 'special power of appointment' in respect of property bequeathed by will.

[26]Generally, a declaration of intention is not voidable on the ground of mistake as to the tenor of the declaration, unless it can be shown that the declarant would not have made it had he known the true facts and given reasonable consideration to the matter; in the case of a testamentary disposition, it is sufficient to show that the testator, being the man he was, would not have made the disposition, had he known the true facts.

[27]However, a disposition is not voidable if it can be shown that the testator would have made the same disposition if he had known the true facts.

Commercial Code provides that an heir or legatee on whom any liability is imposed by a voidable disposition may refuse to discharge such liability, notwithstanding the fact that the right of avoidance has been barred by lapse of time.

The second ground relates to those acts or events done by or affecting the testator or a testamentary heir or legatee. In this case, the disposition may be rendered inoperative for all purposes or only as regards a particular person. Where a disposition is altogether inoperative, it is treated as non-existent; where it is inoperative as regards a particular person, it enures to the benefit of the statutory heirs.

According to the Civil and Commercial Code, a testamentary disposition may be rendered wholly or partially inoperative by the testator's revocation, or by any act done or event happening before the testator's death. More precisely, a disposition conferring a benefit on a particular person is inoperative as regards such person if he or she renounces such benefit by agreement with the testator.[28] Also, a disposition in favour of a spouse is inoperative as regards such spouse if the marriage was declared void or dissolved before the testator's death, or if justifiable divorce or separation proceedings were pending on the ground of any matrimonial offence committed by the surviving spouse. In this case, the disposition remains operative if it can be shown that the fact in question would not have induced the testator to revoke the disposition. By the same token, a disposition in favour of any person who predeceases the testator is inoperative.

It must be added that a testamentary disposition may also be rendered wholly or partially inoperative by any act done or event happening after the testator's death. Specifically, if any *nasciturus* deemed to be living at the testator's death is not subsequently born alive, a testamentary disposition in his favour becomes inoperative (Section 1604, Civil and Commercial Code).[29] If no person appointed as testamentary heir is living or deemed to be living at the time of the testator's death, the disposition in his favour is inoperative. A legacy, on the other hand, does not lapse merely by reason of the fact that the legatee is not *in esse* at the time of the testator's death.

The Code further provides that if any heir or legatee is declared unworthy to inherit or disclaims his right of inheritance or a legacy in his favour, the disposition by which such right of inheritance or legacy is given is inoperative as regards such heir or legatee and is deemed to be made in favour of such person or persons as would have been entitled, had the original heir or legatee predeceased the testator (Section 1606).

[28]This may in some cases be more convenient for the testator than the revocation of the whole will. The formal requirements are the same as in the case of the renunciation of a statutory right of inheritance.

[29]For more detailed discussion on this topic, see Minakanit (2012, p. 336 ff).

6.3.3 Testamentary Capacity

A will is a personal act which must be undertaken by the testator himself and cannot be performed by an agent. In order to make a will, the testator must have the capacity of testation at the time when the will is made. In other words, the testator must have the mental capability to understand the nature and extent of the property he owns and have the ability to freely choose his successors. A lack of capacity can be based upon either sanity or age. A person adjudged incompetent is incapable of making a will (Section 1704, Civil and Commercial Code).[30] The Code also states that a will made by a person, who is alleged to be of unsound mind but not adjudged incompetent, may be annulled only if it is proved that at the time of making the will, the testator was actually of unsound mind (Section 1705).

According to Section 25 of the Civil and Commercial Code, a person who has attained the age of fifteen years, and whose capacity is not restricted on any ground other than that of his infancy, can make a valid will.[31]

6.3.4 Forms of Wills

A will must be made according to the forms provided by law. If the will does not comply with the necessary formal requirements, it is considered to be void. The Civil and Commercial Code provides for five types of will. A will must in all cases be executed by the testator in person.[32]

The first and most common type of will in Thailand is the witnessed will (*pinaigam baep tammada*). This type of will does not need to be signed or acknowledged by a notary or other public authority to be valid. Under Section 1656 of the Civil and Commercial Code, a will may be made in writing, dated at the time of making and signed by the testator in the presence of at least two witnesses who sign their names to certify the signature of the testator.[33] Erasures, additions, or other modifications of the will must be made in the same form; otherwise, the will would be void.[34]

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[30]If the person adjudged incompetent survives the date at which the order declaring him under incompetent ceases to be appealable, the incapacity begins retrospectively from the date of the application, but the will of a person who dies before the order ceases to be appealable is not invalid by reason of the order. The will of a person adjudged incompetent made during the pendency of an application for the removal of the guardianship is not invalid by reason of the existence of the guardianship if the application is successful.

[31]This age requirement differs from the legal age at which a person is considered to attain full capacity. A will made by a person who has not attained his fifteenth year of age is void (Section 1703, Civil and Commercial Code).

[32]On this point, see Huthakoon (2006, p. 112).

[33]This type of will has its roots in classical Roman law. The minimum number of witnesses is, however, as is the case in English, law, two—a less stringent requirement than the Roman one of seven. On this point, see Prachoom (2015, p. 440).

[34]For a comprehensive analysis on the subject, see Stasi (2016, p. 174).

The holographic will (*pinaigam baep kian ayng tang chabap*) constitutes the second type of will under the Civil and Commercial Code. A holograph will is a document containing a direction of any kind intended to be operative on the writer's death, written and signed by the testator and indicating its date. It is not necessary that the document should be described as a testamentary instrument, or should be strictly confined to testamentary directions. A testamentary disposition contained in an ordinary letter would be deemed a holograph will. All changes and modifications must be made by the testator's own hand and signed by him to be valid (Section 1657, Civil and Commercial Code). This is a modified version of the Roman *testamentum holographum*, a witnessed will written entirely in the testator's own hand. The Roman requirement of witnesses is intelligible: witnesses provide a practical guarantee of the will's being authentic, since, without witnesses, its making could easily be faked. The case law helps to confirm that, unlike what was true of Roman law, there is no need for witnesses of a holograph will under Thai law.[35]

A holograph will may be lodged with a public authority; if the public authority with whom it is lodged is not the *amphur* (district) office, or if the will at the date of the testator's death is lodged with a private person, such authority or person must, on receiving notice of the death, deliver the will to the local *amphur*.

The third type of will is the publicly declared will (*pinaigam baep aeksan fai meang*). This is a will which is created by a verbal declaration of intention of the testator at the local *amphur* office in the presence of the relevant public officer. Under the provisions of Section 1658 of the Civil and Commercial Code, the declaration of intention is noted down by the public officer and subsequently signed by the testator and two witnesses certifying the genuineness, reliability, and accuracy of the statement. The statement must include the date and place of the proceedings; the names of the testator, of the relevant public officer, and of the additional witnesses; and the declaration made by the testator. Finally, the statement is dated and signed by the public officer at the local *amphur* who certifies by his hand and seal that the will has been made in compliance with the law.[36] The will is placed in a parcel sealed with the official seal and taken into official custody. The endorsement describing the will must be signed by the public officer.[37]

Provisions of Section 1658 of the Civil and Commercial Code reflect a Roman contribution to the making of public wills. Thus, under the Empire, there was the public nuncupative will (*testamentum apud acta conditum*) that was an oral unwitnessed declaration to appropriate officials duly entered on the records of a court and the public written will (*testamentum principi oblatum*) that was a written will submitted to the Emperor for his endorsement. Of course, the Thai refinement in Section 1658 of the Civil and Commercial Code has added to these Roman prototypes the requirement of witnesses that was not present under the Roman law.[38]

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[35]Prachoom (2015, p. 441).

[36]The witnesses must be present during the whole proceedings.

[37]Huthakoon (2006, p. 131).

[38]In fact, in Roman law, the authorities themselves served as witnesses. On this point, see Prachoom (2015, p. 442).

The secret will (*pinaigam baep tam duay lap*) represents the fourth type of will. According to Section 1660 of the Civil and Commercial Code, a will can be made at the *amphur* office by a secret document. In this case, the testator must sign his name on the document and deliver it to the *amphur* in a sealed envelope. Such delivery is duly attested by the public officer in the presence of two witnesses who sign the closed document. If the testator has not written the last will with his own hand, he must state the name and domicile of the writer.[39]

This private, confidential will is similar in substance, if not in form, to the Roman private nuncupative will (*testamentum per nuncupationem*), an oral declaration made before seven witnesses that became quite common under the Empire. However, its Thai counterpart is strictly private, while the Roman private nuncupative will, made orally in the presence of the several witnesses, was not as 'private' as its designation might imply. Indeed, Thai wills are, in principle, private, confidential documents such that according to provisions of Sections 1662 and 1668 of the Civil and Commercial Code, the contents of a secret will in the custody of the authorities are not to be revealed to others during the testator's lifetime, nor is the testator obliged to reveal them to the witnesses.[40]

The emergency will (*pinaigam baep tam duay wa ja*) constitutes the fifth and last type of will. The principle of the Roman *testamentum militare*, which allowed the testamentary formalities to be relaxed in special cases, which is also recognized in England, has been adopted and considerably extended under the Thai law. According to Section 1663 of the Civil and Commercial Code, 'when under exceptional circumstances, a person is prevented from making his will in any other of the prescribed forms, he may be make an oral will'.[41]

Easier formalities are allowed in any of the following cases: where a testator believes his death to be approaching so fast that he would not have time to make a declaration before a judge or notary; where the testator's place of residence is, by reason of an epidemic or of other exceptional circumstances, isolated from the outer world to such an extent that a declaration before a judge or notary is rendered impossible or exceptionally difficult; and where the testator, being a member of the armed forces in time of war or under a state of siege, is impeded by one of certain specified hindrances, from making a will in one of the ordinary forms.

For this purpose, the testator must declare his intention regarding the dispositions of the will before at least two witnesses present at the same time. Such witnesses must without delay appear before the *amphur* and state the dispositions which the testator has declared to them orally, as well as the date, place, and exceptional circumstances under which the will was made.

Any will, executed in one of the easier forms under the rules mentioned above, becomes inoperative one month after the time when the testator has again been placed in a position to make a will in any other of the prescribed forms (Section 1664, Civil and Commercial Code).

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[39]As to declarations by testators unable to speak, see Section 1661 of the Civil and Commercial Code.

[40]Prachoom (2015, p. 443).

[41]On this theme, see especially Minakanit (2012, pp. 339–340).

6.3.5 Revocation of Testamentary Dispositions

The capacity to revoke a testamentary disposition is governed by the same rules as the capacity to make such a disposition, subject, however, to the qualification that a person adjudged incompetent may, notwithstanding such disability, revoke a testamentary disposition made before he was adjudged incompetent.

The revocation may refer to the whole of the contents of a will or to a particular disposition contained therein and may be effected in several ways. When a will is embodied in a document, the revocation may be made by destruction, cancellation, or alteration effected by the testator in person, with the intention of revoking the will so destroyed or the disposition so cancelled or altered. This intention is presumed in the absence of any evidence to the contrary. When the will is embodied in several duplicates, such revocation is not complete unless it is effected in all the duplicates (Section 1695, Civil and Commercial Code).

A will is also revoked by making a new will either expressly revoking the will or disposition intended to be revoked, or containing some provisions inconsistent with the dispositions intended to be revoked.[42] To be valid, however, the latter will must be made in any of the forms prescribed by law and it alters only those provisions which are in conflict with it. Thus, a will declared before a public officer is revoked by its removal out of the official custody, which may at any time be effected by personal delivery to the testator.[43]

Pursuant to Section 1696, paragraph 1, of the Civil and Commercial Code, a testator may also effect revocation by a valid transfer of the property which is the subject of a will. The same rule applies if the testator intentionally destroys the property which is the object of the will.

6.4 Tenor and Effect of Testamentary Dispositions

6.4.1 Ascertainment of Shares

The Thai Civil and Commercial Code lays down specific rules which apply in the case that the testator's directions leave any doubt as to the distribution of the estate. In particular, if only one person is appointed as heir, and not more than an aliquot part of the testator's estate is given to him, the remaining part of the estate goes to the statutory heir. In the case that several persons are appointed as heirs

[42]If a second will, revoking a previous will, is itself revoked, the dispositions of the previous will become operative again, as though they had never been revoked.

[43]A holograph will is not revoked by its removal out of the official custody. The fact that a will remains in the official custody on the testator's death does not prove that such will or the whole of the dispositions contained therein remain unrevoked; the revocation may have been made by a holograph will remaining in private custody, or by a publicly declared will placed in some other official custody. See Minakanit (2012, p. 341).

and the shares given to them do not, in the aggregate, exhaust the whole estate, then the part of the estate which is not disposed of goes to the statutory heirs.[44]

However, if it is clear from the directions contained in the will that the persons appointed are intended to take the whole estate (e.g. if the will says: 'I give the whole of my estate to A, B, and C, in the following proportions: three-tenths to A, two-tenths to B, and four-tenths to C'), the shares are increased rateably (A, in the example given, takes three-ninths, B two-ninths, and C four-ninths).

Should several persons be appointed as heirs, without any indication as to the manner in which the estate is to be divided between them, such persons will take in equal shares. Thus, if the testator says: 'I give my estate to my statutory heirs', each of the persons who would take the estate in the event of the testator's intestacy is entitled to his statutory portion. If the testator says: 'I give my estate to my kindred', or 'to my nearest kindred', each of the persons among the kindred who would take the estate in the event of the testator's intestacy is entitled to his statutory portion. If the testator says: 'I give my estate to my children', the issue of any deceased child takes in substitution of such child, and the division among the children and the issue of deceased children is *per stirpes*.[45]

Similarly, when some persons appointed as heirs are given aliquot shares of the estate, while there is no indication as to the shares to be taken by the others, such others divide the balance in equal shares. If the aliquot shares given by the will exhaust the whole estate, such aliquot shares abate rateably, on the footing that each of the heirs, to whom no definite share has been appointed, takes a share equal to the smallest aliquot share expressly given by the will.[46]

6.4.2 Appointment of Heirs

It is unnecessary to appoint the heirs, as such, by express words. Any person to whom the testator gives the whole, or an aliquot part of his estate, is thereby deemed to be the testator's heir, or one of his heirs. On the other hand, a person to whom any specific object is given, though described as heir, is deemed to be a legatee, and not an heir, unless it is shown by other indications that it was the testator's intention to appoint him as heir in the technical sense.

Under the Thai private law, particular provisions apply with regard to joint ownership of property with right of survivorship. The expression 'survivorship' (*jus accrescendi*) means the right of the surviving or continuing heirs to a share

[44]Following the same logic, if several persons are appointed as heirs and the shares given to them, in the aggregate, exceed the whole estate, the shares abate rateably.

[45]Jitgaannateegit (1993, pp. 142–149).

[46]An example will clarify the point. Assume the testator says: 'I appoint as my heirs my wife and my three children, A, B, and C; and I direct that one half of my estate is to go to my son A, and that each of my children B and C is to take one quarter'. In the result, the widow takes one-fifth, A takes two-fifth, and each of the two other children take one-fifth.

lapsed by the death of another heir, or by some other circumstance causing the testamentary disposition in favour of such heir to become inoperative.

The right of survivorship between co-heirs may appear as survivorship among co-heirs or survivorship as to joint shares. If a testamentary disposition becomes inoperative, as regards any particular heir, specific rules regulate the distribution of the estate in the absence of a contrary indication in the testator's will. Specifically, in cases where the whole estate is given to the heirs appointed by the will and the disposition in favour of one of them becomes inoperative, the others divide his share in the proportions in which they are entitled to the inheritance. If in such a case a share in a 'joint share' becomes vacant, the persons entitled to the remaining part of the joint share become entitled in the first place. When no such persons are available, the other heirs take the whole of the 'joint share'.

Furthermore, in cases where the heirs appointed by the will only take part of the estate (the other part being intended to go to the statutory heirs), a vacant whole share goes to the statutory heirs; but a vacant share in a 'joint share' goes to the persons entitled to the other part of such 'joint share'. If no such person is available, the whole joint share goes to the statutory heirs.[47]

6.4.3 Legacies

A gift, made by will, which confers on the beneficiary any pecuniary advantage and does not comprise the whole of the testator's residuary estate, or an aliquot part thereof, is a legacy within the meaning of Thai law. The right to a legacy given unconditionally, and without any stipulations as to time, becomes effective on the testator's death; the right to a legacy given subject to a condition precedent,[48] or to a stipulation as to time, becomes effective on the fulfilment of the condition, or at the stipulated time.[49]

The legatee (*poo rap pee nai gam*), as such, has no right of ownership over any object bequeathed to him; his right is in the nature of a personal claim against the person charged by the testator with the burden of the legacy. The burden of a legacy may be imposed on the heirs generally or on any particular heir or on a person entitled to another legacy.

The person charged with a legacy may have to deliver a thing, or transfer a right to the legatee, or do some other act for his benefit (e.g. grant him a loan). If the performance of the act directed by the testator is either in its nature impossible, or prohibited

[47]It must be noted that any share in the estate devolving to any heir by virtue of the right of survivorship is, as regards the liability for legacies and testamentary burdens, deemed a separate share.

[48]The right to a legacy given to a person who is not living or deemed to be living at the time of the testator's death, or to a person who is to be ascertained on an event which is to happen after the testator's death, becomes effective on the birth of the legatee or the happening of the event.

[49]If the date precedes the testator's death, the legacy devolves on the legatee on the date of the death.

by law at the time of the deceased's death, or of immoral character, the bequest is inoperative. If it is merely impossible under the special circumstances, the general rule relating to obligatory duties of which the performance is impossible applies.

The benefit of a legacy may be given to any person including one of the heirs; the gift of such a benefit is deemed a legacy, even if the heir to whom it is given is himself charged with the whole or part of its burden.[50] If the testator directs that a particular object forming part of his estate is not to go to his testamentary heirs, the statutory heirs become entitled as legatees. In the case that a legacy is given to several persons, the same rules are applied as to the ascertainment of the shares and as to the right of survivorship, as in the case of the appointment of several persons as heirs.

It must also be noted that the testator may impose burdens or conditions to testamentary dispositions. The burden of the legacies or of any particular legacy may be imposed on the heirs generally, or on any particular heir, or on one or more legatees, in such manner and in such proportions as the testator may direct. In the absence of special directions by the testator to the contrary, the legacies not specifically charged on any particular persons or person must be borne by the heirs generally. Where any legacy has to be borne by the heirs generally, the burden is divided between them *pro rata* of their respective shares in the estate. A legatee, however, is not required to perform any obligation imposed upon him before he is himself entitled to claim the benefit of his legacy.[51]

The rule of Roman law, which exempted an heir from the liability for legacies imposed upon him, in so far as they prevented him from retaining at least one quarter of his share in the testator's estate for his own benefit, has not been adopted by the Civil and Commercial Code. A legatee, however, may refuse to perform the obligation imposed upon him in so far as the cost of such performance exceeds the value of the benefit conferred upon him.

6.4.4 Classification of Legacies

The subdivision of legacies into general, specific, and demonstrative legacies which is familiar to English lawyers is unknown in Thailand, but it fits well into

[50]This modification of the Roman law as to *praelegatum* is of practical importance. Where the burden is imposed on the heirs generally, it gives the heir to whom the legacy is given an advantage over his co-heirs, but even in a case where there is only one heir who is charged with all the legacies, he derives an advantage from having a legacy given to him. If a testator leaves his estate, worth 80,000 baht, to his heir A and gives a legacy of 60,000 baht to A and another legacy of 60,000 baht to B, A and B are each reduced to 40,000 baht. Under Roman law, the legacy to A would have been deemed part of the inheritance, and B would have taken the whole 60,000 baht, being the only legatee.

[51]Where any heir or legatee charged with any legacy cannot or does not in fact accept the benefit conferred upon him, the burden otherwise to be borne by him is charged on the person benefiting in his place.

the Thai rules and offers a convenient framework for the classification of the kinds of legacies allowed by Thai law. The bequest of an object described generically which the legatee is entitled to claim without reference to the question whether it forms part of the testator's estate or not (e.g. 20,000 baht payable in cash, a sewing machine, three dozen bottles of Bordeaux wine) is in the following observations classed as a 'general legacy'. The expression 'specific legacy' is used for the bequest of any object described specifically which, according to the testator's intention, the legatee is not entitled to claim, unless it forms part of his estate (e.g. 'my 100 shares in the Union Bank', 'my sewing machine', 'the three dozen bottles of Bordeaux wine in my wine cellar'). The expression 'demonstrative legacy' is used for the bequest of an object described specifically which the testator wishes the legatee to receive without regard to the fact whether it forms part of his estate or not, it being his intention that such specific object should be procured by the person charged with the legacy in the event of its not forming part of his estate.

Where an object generically described is bequeathed to a legatee, he is entitled to receive an object answering the descriptions of a quality suitable to his position in life. The person charged with the burden of such a legacy is under the same liability as regards title and freedom from defects as the seller of a movable thing. A legatee to whom a defective object is delivered may require its replacement by an object free from defects. If the defects have been fraudulently concealed, he may, instead of claiming delivery of an object free from defects, claim damages from the person charged with the legacy for the non-performance of his obligation.

With respect to specific legacies, any bequest of an object described specifically is presumed to be given with the intention that the legatee should have no claim in the event of the object so described does not form part of the testator's estate. It follows that the legacy of a specific object is ineffective to the extent that the object, at the time of the devolution of the inheritance, does not belong to the inheritance.[52] On the other hand, if the testator has bequeathed a specific object, of which he is in possession at the time of his death, without being its owner, he is presumed to have bequeathed the right to possession, unless such right offers no legal advantage to the legatee.[53]

The bequest of a specific thing is presumed to comprise the accessories of such thing, as well as all claims for compensation in respect of any damage done to

[52]If the testator's heirs have a claim to the delivery of the specifically bequeathed object, the legatee is entitled to the assignment of such claim; on the other hand, the legatee has no claim in respect of an object specifically bequeathed which, though forming part of the testator's estate, has to be delivered to another under an agreement for sale made by the testator and binding on the heirs.

[53]It must be pointed out that if any claim specifically bequeathed by the testator is satisfied before his death, the legatee is presumed to be entitled to the object delivered in satisfaction of the claim. Where the satisfied claim was a claim for the payment of any money, the legatee is entitled to the sum of money received by the testator, whether the estate comprises cash to the like amount or not.

such thing after the date of the bequest. Correspondingly, the bequeathed object is presumed to be given subject to all encumbrances affecting it at the time of the testator's death.[54]

As regards the demonstrative legacies, the person charged with a demonstrative legacy must, if the object bequeathed does not form part of the estate, procure it for the legatee.[55] If the cost of the bequeathed object would be out of proportion to its value, a sum representing such value must be paid to the legatee.

6.4.5 Testamentary Burdens

A person entitled to the benefit of a testamentary burden obtains no enforceable right; but the performance of the obligation imposed on the person charged with the burden may be enforced by the heirs jointly, or by one of the co-heirs, or by any other person who would be benefited if the person charged with the burden had to forfeit his benefit under the testator's will.[56]

Subject to the modification necessitated by the difference in the legal position of the respective beneficiaries and the special rules stated below, the rules as to legacies apply, *mutatis mutandis,* to testamentary burdens. The special rules provide that where the purpose of a testamentary burden is defined by the testator, he may leave the selection of the beneficiaries as well as the selection of the means to be employed for the satisfaction of the purpose to the discretion of the person charged with the burden, or to any third person.

In any case in which the performance of the obligation imposed on a person charged with a testamentary burden is impossible, owing to any circumstances for which such person is responsible, and also in any case in which the person entitled to demand such performance has obtained a judgment, but has been unable to enforce it, the person charged with the burden must surrender the benefit derived from the non-performance of his obligation in accordance with the rules as to unjustified benefits. On the other hand, if the performance of the obligation is impossible, owing to any circumstances for which the person taking a benefit under a will subject to a burden is not responsible, such person is entitled to retain the benefit, unless it appears from the tenor of the will that the testator would not have conferred the benefit except in return for the performance of the obligation.[57]

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[54]If a charge to which the bequeathed object is subject was vested in the testator at the time of his death, it must be decided from the surrounding circumstances, whether the benefit of such charge goes to the legatee or remains vested in the heir.

[55]As regards title and quality, the obligations are the same as in the case of the sale of a generically defined object.

[56]Minakanit (2012, p. 341).

[57]A person who receives a testamentary gift subject to a burden is in a more favourable position than a person who receives a similar gift by act *inter vivos*.

6.5 The Administration of the Estate

6.5.1 Preservation of the Estate

The competent court is entitled, *ex officio*, to take such steps for the preservation of the estate of a deceased person as it may deem advisable in any case in which this seems necessary, or in which the identity of the heirs is not established, or in which it is unknown whether the inheritance has been accepted. The steps may include the appointment of a curator of the estate and an order for the deposit in court of any property belonging to the estate. A curator of the estate must be appointed on the application of any person who wishes to assert a right against the estate by judicial proceedings.

If the heir or one of the co-heirs is a *nasciturus* deemed to be living under the provisions of Section 1604 of the Civil and Commercial Code, the expectant mother is entitled to maintenance out of the share of such *nasciturus* in the estate and may for that purpose obtain the appointment of a curator of the estate.

If no heir can be found within a period appearing reasonable under the circumstances, the court, after having previously complied with the regulations as to the public citation of claimants, must issue a declaration to the effect that there is no heir other than the treasury authority of the state entitled under the circumstances. Such a declaration creates the presumption that the authority mentioned therein is the sole statutory heir of the deceased.

As mentioned above, all publicly declared wills must be placed in official custody, whereas witnessed wills and holograph wills may be kept in private custody. Any person who has in his custody any testamentary disposition is bound immediately on the death of the testator to deliver such document to the local *amphur*. The *amphur*, on receiving notice of the death of a testator or contractor, whose will is in its custody, must fix a date for the opening and publication of such will and must cite the statutory heirs and all beneficiaries, in so far as this is practicable, for such date. The will is then opened[58] and produced to the parties.

Every will originally placed into official custody is retained by the local *amphur*, and any person who can show that he has a legally recognized interest in the contents of a will is entitled to inspect and to obtain an authenticated copy of, or extract from, the same. The authenticated copy of a will, together with the minutes of the proceedings on the opening or publication thereof, is frequently accepted as *prima facie* evidence of the rights of the parties deriving title thereunder; in a case of total or partial intestacy, other evidence is, of course, required. The only evidence which effectually protects a third party acting in reliance thereon is a 'certificate of inheritance' issued by the *amphur* office, specifying the names of the statutory or testamentary heirs of the deceased and the shares in which they are, respectively,

[58] A direction given by the testator or curator prohibiting the opening of his will is invalid.

entitled. Such a certificate may either be issued to all the co-heirs jointly, or to each of them as to his share. If the rights of the heirs are restricted by the appointment of one or more executors,[59] the fact must also be mentioned in the certificate.

The certificate creates a presumption in favour of the rights shown thereby and as to freedom from any restrictions not specified therein. A third party acting on the presumption established by the certificate is fully protected, unless it can be proved that he knew either that the certificate was incorrect, or that the *amphur* had issued an order for the return of the certificate on the ground of its being incorrect.

6.5.2 Acceptance and Disclaimer of Inheritance

The acceptance of a right of inheritance may be express, implied, or tacit.[60] Tacit acceptance is deemed to have taken place if no formal disclaimer is made by a publicly certified declaration[61] before the local *amphur* within the prescribed period. If any heir dies before the lapse of the prescribed period, without having accepted or disclaimed his right of inheritance, each heir of such heir may, while he is entitled to disclaim his share in such deceased heir's estate, disclaim his interest in such deceased heir's right of inheritance.

In the case that the estate goes to more than one heir, the acceptance or disclaimer of each co-heir refers to his own share only, but a partial or conditional acceptance or disclaimer or an acceptance or disclaimer made subject to any stipulation as to time is inoperative.[62] The fact that any right of inheritance was disclaimed must be notified by the local *amphur* to the party or parties becoming entitled to the vacant share.[63]

The acceptance of a right of inheritance is inoperative, if the acceptor was under a mistake as to the ground of inheritance.[64] Apart from this, the declaration of acceptance or disclaimer, and even the omission to disclaim within the prescribed period, may be avoided on the grounds on which any other declaration may be avoided (mistake, fraudulent misrepresentation, unlawful threats).

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[59]An executor may also obtain a certificate as to his appointment. Such a certificate has the same effect and is subject to the same rule as a certificate of inheritance. The right is of importance, where executors are appointed in the place of the original executors.

[60]A legacy is accepted or disclaimed by a declaration communicated to the person charged with the burden of such legacy.

[61]The declaration is preserved by the court and is open to the inspection of any interested party.

[62]Similarly, a partial or conditional acceptance or disclaimer of a legacy, or an acceptance or disclaimer made subject to any stipulation as to time is inoperative.

[63]The treasury authority who is the statutory heir if no other heirs are in existence, or if all disclaim or forfeit their rights, has no power to disclaim.

[64]In such a case, the time for disclaiming runs from the date at which he becomes aware of the true ground of inheritance.

The avoidance is inoperative unless declared by certified act before the competent court within a specified period of time. The avoidance of an acceptance has the effect of a disclaimer, and the avoidance of a disclaimer has the effect of an acceptance.[65]

As regards the position of heirs before acceptance, the estate becomes vested in the heirs on the death of the testator, subject to being divested as to the whole or any share therein by the effect of a disclaimer. The mere fact that an heir transacts any business on behalf of the estate does not deprive him of the right of disclaiming his share. If he subsequently disclaims, he is, as between himself and the persons in whom the estate becomes ultimately vested, in the position of a person performing voluntary services.

6.5.3 Duties and Responsibilities of Executors

A testator may by his will appoint one or more executors, or leave it to the discretion of some other person[66] or of the competent court,[67] to make such an appointment. He may also appoint or provide for the appointment of any substitutional executors, to take the place of executors who are unable or unwilling to accept the office, or who, having accepted the office, vacate it at any subsequent time. An executor may also be empowered by the testator to appoint one or more co-executors and to appoint one or more successors to himself. The powers and duties of an executor may include some which, under English terminology, would be described as powers and duties of a trustee under a will.

Under Section 1718 of the Civil and Commercial Code, persons not *sui juris*, persons of unsound mind or adjudged quasi-incompetent, and persons adjudged bankrupt by the court are disqualified for the office. There are no other grounds of disqualification.[68]

While a guardian's office cannot be refused except on certain specified grounds, an executor can accept or refuse the office as he pleases. The acceptance of the office must be declared before the competent court, which court may fix a period of time for acceptance. If the acceptance is not effected within such period, the person concerned is deemed to have disclaimed the office. The executor's powers come into operation on the acceptance of the office.

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[65]Where a disclaimer is avoided, the party who became entitled by reason of such disclaimer must be informed by the court; the act of avoidance must be open to the inspection of any interested party. On this point, see Jitgaannateegit (1993, p. 168).

[66]A person who under the will has such a power of appointment may be required by any beneficiary to exercise it within a specified period; if he fails to comply with such requisition, he forfeits the power.

[67]The court may decline to make the appointment or may rescind the appointment if the assets are insufficient for the payment of costs.

[68]Prachoom (2015, p. 431 ff).

An executor can be dismissed from the office by the court on the ground of misconduct and can retire from the office at his discretion. If his capacity ceases to be unrestricted, the office is vacated *ipso facto*. An interested person may apply to the court to seek the discharge of an executor (Section 1727, Civil and Commercial Code). The executor can be discharged by the court if he neglects his duties, or for any other reasonable cause. Pursuant to Section 1731 of the Civil and Commercial Code, the executor of an estate can be removed by the court 'if he does not produce an inventory in the prescribed time and form due to gross negligence, dishonesty, or obvious inability to do so'. This may be the case, for example, of an executor who fails to complete the estate administration.

Under English law, an executor or trustee, in the absence of an express direction to the contrary, is not entitled to remuneration. Similarly, a Thai executor, who acts as trustee, is not entitled to receive remuneration out of the estate unless permitted by the will or by the majority of the heirs (Section 1721, Civil and Commercial Code).

An executor's ordinary functions are the discharge of the liabilities of the estate (including legacies and testamentary burdens) as well as the distribution of the residuary estate among the co-heirs.[69] His main task is the submission of a liquidation and distribution account of the property of the estate within one month from the time he was appointed. The inventory of the estate is an essential requirement because it sets out the deceased's assets and liabilities.[70]

In an ordinary case, an executor has power, while these duties require performance, to take possession of the estate, and to give a valid discharge for debts, and dispose of any objects forming part thereof. While these powers of the executor are in operation, the heirs, though entitled to the legal interest in the estate, have no power of disposition over any object forming part thereof. It follows that no action can be brought and no judgment enforced against the heirs in respect of the liabilities of the estate, and all proceedings must be taken against the executor.[71]

An executor is not entitled to make any gratuitous dispositions except for the purpose for which a guardian may make gratuitous dispositions. He may incur obligations binding on the estate, in so far as this is necessary in due course of management, and the heirs are bound at his request to concur in any acts required for that purpose.[72]

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[69]The liabilities of the estate comprise in the first place such of the testator's liabilities as are not extinguished by his death and in the second place all liabilities to which the heirs as such become subject (e.g. funeral expenses, legacies, and testamentary burdens).

[70]See Jitgaannateegit (1993, p. 174).

[71]The rights and liabilities of the heirs, in respect of their management prior to the date of the order, are determined as follows: in respect of the period preceding the acceptance of the inheritance, the rules as to voluntary services apply; in respect of the period from the date of such acceptance down to the date of the order, the rules as to mandate apply; the heirs are entitled to be reimbursed out of the estate for all outlay incurred in the discharge of the liabilities of the estate, in so far as they can prove that under the circumstances, they were entitled to assume the solvency of the estate.

[72]The power to incur liabilities may be extended by the testator so as to make it unnecessary for third parties to inquire whether any particular act is necessary in due course of management.

The testator may restrict any of the ordinary powers of an executor or make them exercisable as to particular objects only. He may, for instance, appoint an executor merely for the purpose of managing the property given to a particular heir or legatee.

Where several executors are appointed, their powers must, in the absence of any contrary directions, be exercised by all of them jointly.[73] In any case of difference of opinion, the court must be appealed to. On the vacation of the office by one of several executors, his powers, in the absence of a contrary direction, become vested in the continuing executors.

In an ordinary case, a Thai executor is *functus officio* after having discharged the liabilities of the estate and distributed the residuary estate among the heirs. His powers of disposition then come to an end, and the heirs, as legal owners of the objects forming the testator's estate, obtain full powers of disposition over the same. The testator may, however, direct the executor's powers to be continued for a prescribed period as to the whole estate, or as to any particular share or object. During the period prescribed by the testator, the executor retains his disposing powers, and the legal owners of the estate or of the share or object to which the direction refers remain under the original restrictions. For all practical purposes, the executor is then in the same position as a trustee of settled property under an English will. The fact that under Thai law the legal interest is vested in the beneficiary, and that under English law it is vested in the trustee, is only of theoretical importance.

With respect to the executor's statutory duties, the Civil and Commercial Code provides that an executor must, immediately on accepting his office, deliver to the heirs a statement setting out, to the best of his knowledge, the particulars of the estate and its liabilities (Section 1729).

An executor must use proper diligence in the management of the estate and follow the testator's directions, except in so far as the competent court gives leave to disregard them. Such leave can only be granted in a case in which obedience to the testator's directions would endanger the safety of any part of the estate; the beneficiaries must, in so far as this is practicable, be heard before leave can be granted.

As between the executor and the heirs, certain of the rules[74] applicable as between principals and mandataries are applied, *mutatis mutandis* (Section 1720, Civil and Commercial Code).[75]

[73]Protective measures may be taken by each executor individually.

[74]The rules prohibiting the delegation of powers and imposing the duty to give information and to surrender any benefits arising from the management of the estate are the most important among those referred to in text.

[75]Jitgaannateegit (1993, p. 199).

6.5.4 Rights of Heirs in Respect of Estate

A person who takes possession of the estate, or of any part thereof, by virtue of an alleged right of inheritance, to which in fact he is not entitled,[76] is bound to deliver to the true heirs[77] the objects of which he has taken possession by virtue of his alleged right, or which he has acquired in exchange for any such object, and all fruits and profits derived from any such object.[78] In so far as delivery is impossible, his obligation to compensate the true heirs is determined by the rules as to unjustified benefits.[79]

As long as the estate remains undivided, there is a community of ownership between the co-heirs of the type known as *kong moradok tee yang mai dai baeng*. The provisions under Sections 1745 and following of the Civil and Commercial Code regulate the preparation of the partition of the estate among the heirs in accordance with the law or the last will of the testator. Until the partition of the estate is completed, there is a community of ownership between the co-heirs. All the assets belonging to the estate are under the joint control of all the co-heirs.[80] This means that each co-heir is presumed to have an equal share in the undivided estate and cannot validly claim title to a specific portion of it unless otherwise provided by law or by express clause in the will.[81]

Until the partition of the estate, a co-heir is not entitled to sell his undivided share in any of the objects forming part of the estate, but he may by public act sell and assign his share in the estate as a whole.[82] The assignee of a share acquires all the rights and becomes subject to all the liabilities of his predecessor in title, and the assignor is released from such liabilities.[83]

The objects comprised in the estate are under the joint management of all the co-heirs, each of whom is bound to concur in, and entitled to take, any steps necessary for the preservation of any object. The rules as to the power of a majority, and as to the contributions in respect of outlay, applicable to community of ownership by undivided shares apply, *mutatis mutandis*. This implies that no valid disposition can be made and no valid discharge given, in respect of any object

[76]Such a person is called 'possessor of the inheritance'.

[77]If the action is brought by any heir as to his share, the possessor must hand over the objects in his possession to all the heirs jointly or lodge them with a public authority for their joint account.

[78]A person purchasing the estate or any share therein from the possessor is in the same position in relation to the heirs as the original possessor.

[79]As from the commencement of judicial proceedings on the part of the true heirs, his liabilities are determined by the same rules as those regulating the liabilities of the possessor of a thing after the commencement of an action for its recovery brought by the true owner.

[80]Huthakoon (2006, p. 169).

[81]See Stasi (2016, p. 180).

[82]The other co-heirs in such a case have a statutory right of pre-emption.

[83]In certain specified events, the assignor remains liable.

comprised in the estate without the concurrence of all the co-heirs.[84] Each of the co-heirs may require any performance due to the estate to be made for the benefit of all the co-heirs jointly, or to be satisfied by deposit with a public authority, or delivery to a judicially appointed receiver, for the joint account of the co-heirs; the debtor cannot discharge his obligation by any other mode of performance.

Joint ownership by the community of co-heirs may be terminated either extra-judicially or by court order. If the heirs cannot agree among themselves how the partition of the estate should be done, an action for partition of an estate may be entered in court. According to Section 1748 of the Civil and Commercial Code, any heir in possession of the undivided estate is entitled to claim partition. The right of a co-heir to claim the partition of the estate, however, is suspended if the birth of an expected co-heir has not as yet taken place, or if any question is pending as to the legitimacy of any co-heir, or if an incorporated foundation, appointed as heir by the testator, has not as yet received the required official confirmation. The right of a co-heir to claim the partition of the estate is likewise suspended if the right to claim partition of the whole estate or of any particular object comprised in it has been excluded by testamentary disposition, either entirely or during a specified period, or been made exercisable after the lapse of a specified period after notice.

When an action for partition of an estate is entered in court, every person claiming to be an heir entitled to such estate may intervene in the action. In principle, partition of the estate is made by the heirs jointly taking possession of the property or by selling the estate and dividing the proceeds of the sale between the co-heirs. The estate cannot be divided among the co-heirs before all its liabilities have been discharged; any money required for the purpose of discharging liabilities may be raised by the realization of a sufficient part of the estate.[85] The residue remaining after the discharge of all the liabilities is divided among the co-heirs *pro rata* of their respective shares, but subject to the rules as to equalization of shares referred to above.[86]

Where an executor has been appointed, the partition of the estate has to be carried out by him, but he is bound to take the opinion of the co-heirs on his scheme of division before carrying the same into effect. The testator may also without appointing an executor leave the mode of division to the discretion of a third party,[87] or give other directions as to the manner in which it is to be carried out.

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[84]A debtor cannot satisfy his debt to the estate by setting off a debt owing to him by one of the co-heirs.

[85]In so far as any particular co-heir is chargeable with any particular liabilities, he must allow such liabilities to be discharged out of the property apportioned to him on the division of the estate.

[86]The directions as to the mode of partition given by the testator may include directions as to particular objects to be taken over by particular heirs in part satisfaction of their respective shares.

[87]The decision of such third party is not binding on the heirs, if it is obviously inequitable; in such a case, the decision is left to the court.

After the partition of the estate, if any heir is by reason of eviction deprived of the whole or a part of the property allotted to him under the partition, the other heirs are bound to compensate him (Section 1751, Civil and Commercial Code).[88] Such obligation ceases if there is an agreement to the contrary, or if the eviction results from the fault of the heir evicted or from a cause arising after the partition.[89]

The heir evicted must be compensated by the other heirs in proportion to their shares, less the quota corresponding to that of the heir evicted, if any of the heirs bound to make compensations insolvent.[90] By the same token, the other heirs are liable for the part of the insolvent heir in the same proportion less the quota corresponding to that of the compensated heir.

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[88] In this respect, Section 1752 of the Civil and Commercial Code specifies that 'No action for liability on account of eviction under Section 1751 can be entered later than three months after the date of eviction'.

[89] These provisions do not apply to a legatee under a particular title.

[90] On this theme, see especially Prachoom (2015, pp. 450–451).

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