



**PROBLEMS ON LIABILITY OF INTENTIONAL
INTERFERENCE WITH PROSPECTIVE
ECONOMIC RELATIONS**

BY

MISS PAWITA BOONLIANG

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS**

IN BUSINESS LAWS (ENGLISH PROGRAM)

FACULTY OF LAW

THAMMASAT UNIVERSITY

ACADEMIC YEAR 2015

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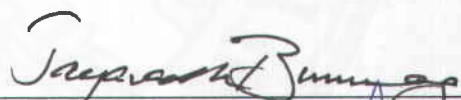
ENTITLED

PROBLEMS ON LIABILITY OF INTENTIONAL INTERFERENCE WITH
PROSPECTIVE ECONOMIC RELATIONS

was approved as partial fulfillment of the requirements for
the degree of Master of Laws in Business Laws (English Program)

on August 10, 2016

Chairman



(Professor Jayavadh Bunnag)

Member and Advisor



(Professor Amnat Wongbandit, D.Jur.)

Member



(Judge Nopporn Bhotirungsiyakorn)

Member



(Assistant Professor Munin Pongsapan, Ph.D.)

Dean



(Professor Udom Rathamarit, Docteur en droit)

Thesis Title	PROBLEMS ON LIABILITY OF INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS
Author	Miss Pawita Boonliang
Degree	Master of Laws in Business Laws (English Program)
Department/Faculty/University	Faculty of Law Thammasat University
Thesis Advisor	Professor Amnat Wongbandit, D.Jur.
Academic Years	2015

ABSTRACT

It is true that each time people pursue their own interests; they interfere with the prospective economic advantage of others. Nevertheless, if they only gently outbid or offer the attractive interests to induce the others' potential customers or would-be contracting party not to enter into the future relationship, with such party and enter into contract with them instead, the inducers' acts are totally lawful. However, if the interferer's conduct engaged in improper means or abuse of right, there should have any measures to eliminate the culpable conduct and any compensation to award the injured person.

Multiple jurisdictions have, both expressly and impliedly, recognized the liability of unlawful interference with economic relations allowing a person who suffered as a result of the unlawful interference with his business expectancy to sue for damages notwithstanding the absence of the existing contract. Thai law does not have specific provision regarding this liability. Lack of specific requirement may create the flexibility on a case-by-case basis but it may also generate an inconsistency in the jurisprudence.

The right of "prospective economic relations" may be regarded as the right to compete or the right to pursue reasonable interests without undue interference. Under Thai tort law, the interpretation of "other right" under 420 can cover this kind of right. Even if there is no express provision regarding this kind of liability, section 420 (general provision), section 423 (civil defamation), section 421 (abuse of right) and section 5 (good faith principle) is sufficient to copes with this area of law. Hence, it may be better to leave the court using the discretion based on a case-by-case basis than to stipulate the specific provisions relating to this area of law.

Keywords: Intentional Interference with Prospective Economic Relations or Business Expectancy, Tortious Interference, Interference with Future Contract

ACKNOWLEDGEMENTS

This thesis could not have been achieved without the invaluable support from multiple people. First of all, my utmost thanks and deepest gratitude go to my thesis advisor, Professor Dr. Amnat Wongbandit, for his generous support, precious advice and patience throughout my thesis process. His dedication and kindness inspires me to be a better person.

Then, I would like to express my sincere gratitude to Professor Jayavadh Bunnag, Judge Nopporn Bhotirungsiyakorn and Assistant Professor Dr. Munin Pongsapan for the devotion of their valuable times as the Thesis Committee and their immeasurably helpful instruction and guidance which enabled me to accomplish my thesis. I also would like to extend my profound appreciation to my professors, at Faculty of Law, Thammasat University, for teaching me during the LL.M. coursework as well as the officers at LL.M. office who provided me the great support.

Next, I would like to extend my respectful gratitude to Venerable Ajahn Sa-ard Thitopaso (Luangpor Sa-ard) of Wat Pah Don Hai Soke for his immense kindness and for teaching me know the power of mindfulness as well as other respected Buddhist monks and Ganesh God, the symbol of my previous university, as my spiritual anchor.

Further, I am deeply indebted to my family, my parents Assistant Professor Sthaphon Boonliang and Mrs. Duanjai Boonliang for their unconditional love, incalculable encouragement and endless support. Without them, I would not have accomplished this study and I could not have been who I am today. I also would like to thank my sister and my brother-in-law, Ms. Duangporn Boonliang and Mr. Nopparin Subinrat, to guide me to study here and special thanks to Mr. Naruephon Thangsuwan for his encouragement, motivation, useful advices and thank you for always bringing out the best in me.

In addition, I would like to thank all my LL.M. friends for sharing the precious moments with me and help me to complete my study, especially for Ms. Narinthip Songchitsomboon, Ms. Pathama Siamhan, Ms. Chatanut Khiewcham, Ms. Ratchanikarn Suwadist, Mr. Panuwat Foongwanich and Mr. Noppon Thiamwanchai. Also, my warm thanks direct to my friends and professors at Faculty of Arts, Silpakorn University for their continuous encouragement and support.

Also, I would like to express my sincere thank to my current and previous workplace, my colleagues and my bosses at Orbis, SSI and Haier, to provide me the opportunity and time to carry out my study, especially for Ms. Siraprapa Pongsida. Likewise, I would like to express my sincere gratitude to the authors of all the books, articles or any other writings cited in my thesis. Lastly, thank myself to decide to study here; this has become one of the greatest experiences which will remain for the rest of my life.

Miss Pawita Boonliang
Thammasat University
Year 2015

TABLE OF CONTENTS

	Page
ABSTACT	(1)
ACKNOWLEDGEMENTS	(2)
CHAPTER 1 INTRODUCTION	1
1.1 Background and Problems	1
1.2 Hypothesis	4
1.3 Objectives of Study	4
1.4 Scope of Study	5
1.5 Methodology	5
1.6 Expected Results	5
CHAPTER 2 INTRODUCTION TO LIABILITY OF UNLAWFUL INTERFERENCE	6
2.1 General Context	6
2.2 Definitions	6
2.3 Background and History	7
2.4 Economic Tort	9
2.4.1 Inducement Tort and Unlawful Interference	10
2.4.2 Unified Theory	11
2.4.3 Privity of Contract	12
2.4.4 Scope and Definition of Economic Relations	12
2.5 Rationale and Advantage of this Tort in Practice	13
2.6 Notion of Free Market and Fair Competition	14
2.7 Elements of Cause of Action for Liability of Interference with Prospective Economic Advantage	14
2.7.1 The Existence of a Business Relation, Business Expectancy or Trade or Business Interest	14

2.7.2 Knowledge of the Business Relation	15
2.7.3 An Intention of the Defendant	15
2.7.4 Improper Mean or Wrongful Conduct	15
2.7.5 Interference	16
2.7.6 Damage	16
2.7.7 Justification	16
2.8 Sample Case of Conduct Involving Interference with Prospective Economic Advantage	17
CHAPTER 3 LIABILITY OF UNLAWFUL INTERFERENCE IN FOREIGN COUNTRIES	20
3.1 Overview of Legal Approaches as to Intentional Interference with Prospective Economic Relations in Foreign Countries	20
3.1.1 Canada	20
3.1.2 France	21
3.1.3 Germany	21
3.1.4 The United Kingdom	21
3.1.5 The United State	22
3.2 Canada	22
3.2.1 Background and History	22
3.2.2 Canadian Common Law Tort	22
3.2.3 Cause of Action	24
3.2.3.1 An Intention to Injure and Cause Loss to the Plaintiff	24
3.2.3.2 Interference with the Plaintiff's Business or Livelihood by Illegal or Unlawful Means	26
3.2.3.3 Use of Unlawful Means	26
3.2.3.4 Damage Injured by the Plaintiff	37
3.2.4 Sample Case	39
3.2.5 Summary	39
3.3 France	40
3.3.1 Background and History	40

3.3.2 Loss of Chance Theory	40
3.3.3 French Civil Code	42
3.3.4 Cause of Action	43
3.3.4.1 Fault	44
3.3.4.2 Existence of Damage	44
3.3.4.3 Causal Link between the Tortious Conduct and Damage	44
3.3.4.4 The Chance or Opportunity	45
3.3.4.5 Relief and Amount of Compensation	45
3.3.5 Abuse of Right	46
3.3.6 Summary	47
3.4 Germany	48
3.4.1 Background and History	48
3.4.2 German Civil Code	48
3.4.2.1 Section 823(1)	49
3.4.2.2 Right to an Established and Operating Business	51
3.4.2.3 Section 823(2) (Statutory Liability)	52
3.4.2.4 Section 826 (Immoral Conduct)	53
3.4.3 Liability of Interference with Prospective Contract	55
3.4.4 Summary	56
3.5 The United Kingdom	56
3.5.1 Background and History	56
3.5.1.1 Initial Period	59
3.5.1.2 A Trilogy of Cases (1892-1901)	61
3.5.1.3 Subsequent Developments	63
3.5.2 Unified Theory	65
3.5.3 Pigeon-Hole Theory	67
3.5.4 English Tort Law	68
3.5.5 Cause of Action	69
3.5.5.1 An Unlawful Act Committed by the Defendants	69
3.5.5.2 The Interference with the Actions of a Third Party in relation to the Claimant	72
3.5.5.3 Intention to Cause Loss to the Claimant	73

3.5.5.4 Damage to the Claimant	75
3.5.6 Summary	75
3.6 The United States	75
3.6.1 Background and History	75
3.6.2 Restatement of Torts	77
3.6.2.1 Seven Factors Evaluating the Improper Conduct An Economic Advantage or Business Expectancy	77
3.6.2.2 The Restatement's List of Permitted Interference	78
3.6.2.3 Damages	80
3.6.2.4 Justification, Defenses and Privileges	82
3.6.3 Interests Protected	84
3.6.3.1 Definition and Scope of Economic Relationship	84
3.6.3.2 Level of the Relationship or Specificity of the Relationship	90
3.6.3.3 Reasonable Probability	90
3.6.4 Interpretation of Improper Means	92
3.6.5 Cause of Action	94
3.6.6 Under California law	94
3.6.6.1 Existence of Economic Relationship	95
3.6.6.2 Knowledge of the Economic Relationship	96
3.6.6.3 Intention	96
3.6.6.4 Interference or Disruption	96
3.6.6.5 Improper Means	97
3.6.6.6 Damages	101
3.6.7 Under Texas Law	102
3.6.7.1 A Reasonable Probability That the Plaintiff Would Have Entered Into a Business Relationship	102
3.6.7.2 The Independent Tortious or Wrongful Conducts of Defendant	103
3.6.7.3 Desire to Prevent the Relationship from Establishing	105
3.6.7.4 Harm or Damage As a Result of Defendant's Interference	106
3.6.8 Under Illinois Law	107

3.6.8.1 Existence of Valid Business Expectancy	107
3.6.8.2 The Defendant's Knowledge of the Expectancy	108
3.6.8.3 The Defendant's Intentional and Unjustified Interference which Prevents the Realization of the Business Expectancy	108
3.6.8.4 Damages	108
3.6.9 Other Jurisdictions and Sample Case	109
3.6.9.1 Under Minnesota Law	109
3.6.9.2 Under New York Law	111
3.6.9.3 Other Cases	113
3.6.10 Summary	117
CHAPTER 4 LIABILITY OF UNLAWFUL INTERFERENCE UNDER THAI LAW AND COMPARATIVE ANALYSIS BETWEEN FOREIGN LAWS AND THAI LAW	118
4.1 Law and Problems Relating to Liability of Unlawful Interference under Thai Law	118
4.1.1 Thailand Civil and Commercial Code	118
4.1.2 General Tort Provision under Section 420	119
4.1.3 Any Other Right	119
4.1.4 Good Faith Principle under Section 5	122
4.1.5 Abuse of Right under Section 421	122
4.1.6 Civil Defamation under Section 423	124
4.1.7 Summary of Tort Law Provision	126
4.1.8 The Competition Act B.E. 2542	126
4.1.9 Sample Case	128
4.2 Comparative Analysis between Foreign Law and Thai Law	130
4.2.1 General Concept of this Liability in Various Jurisdictions	130
4.2.2 Cause of Action	133
4.2.3 Scope of Business Expectancy or Prospective Interests	135
4.2.3.1 Contract	136
4.2.3.2 Trade and Business Expectancy	137

4.2.3.3 Interests Not Protected	138
4.2.4 Existence of Business Expectancy or Prospective Relationship	139
4.2.5 Culpable, Improper or Unlawful Conduct	142
4.2.6 Knowledge and Intention	156
4.2.7 Notion of Freedom of Trade and Trade Stability	159
4.2.8 Restraint of Free Market System	160
4.2.9 Specific Provision or Leaving open to the Discretion of the Court on a Case-by-Case Basis	162
4.2.9.1 Existence of Business Expectancy	163
4.2.9.2 Knowledge and Intention	163
4.2.9.3 Unlawful Conduct	164
4.2.9.4 Damage and Relief	164
4.2.9.5 Justification	165
CHAPTER 5 CONCLUSION AND RECOMMENDATIONS	166
5.1 Conclusions	166
5.1.1 Foreign Law	167
5.1.2 Thai Law	168
5.2 Recommendations	169
REFERENCES	171
BIOGRAPHY	184

CHAPTER 1

INTRODUCTION

1.1 Backgrounds and Problems

As long as an individual interferes with the economic expectancy of others and not with an existing interests or contract, it will be deemed as competitive activity. Nonetheless, if he interferes with the others' existing contract, he can be liable for inducement tort as called in the common law world. For instance, when a defendant induces a famous singer who works for a plaintiff to breach her contract and work for a defendant instead, the singer may be liable for breach of contract and the defendant may be liable for inducement tort. It is clear that the existing contract between people is protected, however; if there is the reasonable business expectancy which is less than contract but more than mere hope, is this interest protected under some respects?

In case the contract is formalized and if any party breached the contract due to the third party's interference, the other party can claim for damages incurred from the breaching party as well as the third party who interferes. How about the case when the parties reach the final stage but the contract has not been finalized yet because of the third party's interference? In such case, how can the injured party claim any damages from the third party? When people prepare to reach the contract with others, they are supposed to pay a large amount of money during the negotiation, i.e. legal professional charge or transportation fee. So, if any person comes to induce the would-be contracting party not to finalize the contract with the plaintiff, it can cost loss to them.

In the common law world, intentional interference with economic relations is variously known as "unlawful interference with economic relations", "interference with a trade or business by unlawful means", "causing loss by unlawful means", "interference with prospective economic relations", "interference with prospective economic advantage", "interference with prospective contract", "interference with

economic opportunities”, “intentional interference with prospective business relations”, “intentional interference with prospective business advantage”, “intentional interference with business expectancy”¹ and other similar terms. These various terms are interchangeably used. For the purpose of this thesis, the term “unlawful interference” will be used in a way that includes all such synonymous term.

Tortious interference arises in two dimensions. One is interference with contracts and the other is unlawful interference with prospective advantage.² Elements of each liability are similar but not identical. The first one relates to interference with the existing contract, in contrast, the other one is relevant to disruption with economic relations with a third party and the existing contract is not required. This thesis will emphasize on the latter claim.

Under US law, the claim for liability of interference with prospective economic relations is recognized and varies widely from state to state. However, most states share the main elements to constitute this claim. Firstly, the claimant had a business relationship with a third party. Also, the defendant knew the existence of such relationship. Next, the defendant deliberately interfered with the relationship. Then, the defendant used unlawful manner or improper means. Finally, there are losses or damages to the business relationship between the plaintiff and the third party as a result of the defendant’s interference.

On the contrary, Thai jurisdiction does not have any specific liability as appears in the common law. Accordingly, when the fact similar to this liability arises under Thai law, the question is how the court deals with this matter. Due to lack of exact explanation as to this liability, the person may commit a wrong conduct while thinking it is just a competition among people without knowing that it is unlawful and the injured person may not realize or know his right to allege against the third party who interferes and causes loss to his business.

¹Larry Watkins, “*Tort Law – Tortious Interference with Business Expectancy – A Trap for the Wary and Unwary Alike*”, 34 **U. Ark. Little Rock L. Rev.** 619 (2012), available at <http://lawrepository.ualr.edu/lawreview/vol34/iss3/6/>.

²*Id.*

Resulting from the absence of the express provision, if the unlawful interference emerges in the Thai jurisdiction, the liability may rely upon the general tort provision under section 420³ of Thailand Civil and Commercial Code and in case the defendant exercises a right which can only have the purpose of causing injury to another person, he may be liable under section 421.⁴ Further, if the conduct committed is against the *bona fide* principle, he may be liable under section 5.⁵

However, the abovementioned sections lay a very wide basis to determine the person's conduct in general; therefore, it may be difficult for the court when examining the unlawful interference case especially for these following questions, what can be considered as prospective economic interests, when such interests are deemed to exist, what type of knowledge and intent is required and what genre of conduct is amount to tortious conduct under this liability.

Law should be explicit and provide sufficient provision to would-be defendants.⁶ As Justice Oliver Wendell Holmes, Jr. stated, “any legal standard must, in theory, be capable of being known” and “if a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.”⁷ As a result, there should have a clear and definite description with respect to this area of liability in order to provide people with sufficient notice and provide courts with explicit explanation and determination. Apart from the illegality under tort law, interference with economic relation can also be deemed as an unlawful conduct under competition law or labor law. In this thesis, Thai tort law will be primarily studied.

³Section 420 “a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation there for.”

⁴Section 421 “The exercise of a right which can only have the purpose of causing injury to another person is unlawful.”

⁵Section 5 “Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith.”

⁶Watkins, *supra* note 1.

⁷*Id.*

The basis for determining the fair competition and unfair trade practices is the act of the defendant. The main focus points to the defendant's conduct whether it is improper or unlawful or not. However, the major problem is what type of conduct should be actionable and what exactly qualifies as "improper means or unlawful conduct".

In brief, liability of unlawful interference has been developed in common-law tort for centuries; however, this liability is not specifically defined in Thai law. Thus, it is important to study which Thai law can be deemed to handle with this matter and whether it is effective enough for protecting the interests of person as well as promoting the fair competition among people.

1.2 Hypothesis

When a person interferes with prospective economic advantage of other people, his action may be justified on the grounds of competition or the right to pursue his own interests. Nevertheless, if the interferer's act goes beyond the fair competition or beyond the right permitted by law or is committed with the purpose of injuring others, he should be liable and the suffered individual should be entitled to recover damages. In the United States, the liability of unlawful interference is explicitly recognized and its basis was expressly stipulated. In contrast, Thai law does not have specific provisions like that, it therefore may have loopholes to hold person liable under Thai law. Consequently, studying the principle of this liability in foreign countries may be a good model to apply such basis to the similar fact of subsequent case occurred under Thai jurisdictions.

1.3 Objectives of Study

- (1) To study the background and principle of liability of unlawful interference;
- (2) To study and analyze such principle in other countries such as Canada, France, Germany, the United Kingdom and the United States;
- (3) To study and analyze the problems on liability of unlawful interference in Thailand;

(4) To seek effective and suitable solutions for such problems by comparing other foreign laws to Thai law including considering the possibility to adopt such approach in Thailand.

1.4 Scope of Study

This thesis mainly focuses on principle of liability of unlawful interference in Thailand in comparison with the law of foreign countries, such as Canada, France, Germany, the United Kingdom and the United States for the purpose of exploring, analyzing and extracting the necessary provision or principle existing in foreign laws but not appeared in Thai law in order to approach and achieve the effective enforcement.

1.5 Methodology

The method used in this thesis is based on documentary research which includes documents, textbooks, articles, journals, newspapers, information on the internet, domestic and international laws, government publications, courts' decisions and other relevant sources.

1.6 Expected Results

(1) To deeply and thoroughly comprehend the background and principle of liability of intentional interference with economic relations and business expectancy;

(2) To deeply and thoroughly comprehend such principle in other countries such as Canada, France, Germany, the United Kingdom and the United States;

(3) To deeply and thoroughly comprehend the problems on liability of interference economic relations and business expectancy in Thailand;

(4) To offer an appropriate solution for such problems in order to adopt such solution in Thailand as well as enhancing the enforcement of the law relating to this kind of liability.

CHAPTER 2

INTRODUCTION TO LIABILITY OF UNLAWFUL INTERFERENCE

2.1 General context

Normally, when the contract has been executed, the contracting parties are supposed to be protected from any undue interference with their contracts. If anyone induces the breach of contract, the suffered party may sue for damages. This liability has been recognized in many jurisdictions. However, the major limitation of this tort is only interests under existing contract can be protected. Therefore, the arising problem is how the interfered party can recover damages from unlawful interference despite the absence of contract.

Later, in accordance with the UK and Canadian courts and followed by the US courts, the scope of interference extends to the prospective economic relations. Hence, when the actual contract does not exist between the parties but only existing prospective economic relation, the interfered person may be entitled to recover damages. Eventually, person is therefore ensured that their prospective economic relations will not be disrupted by any undue intervention.

2.2 Definition

Unlawful interference occurs when a defendant commits an unlawful conduct which interferes with the plaintiff's trade or business interest⁸ Likewise, it also incurs in case that the defendant causes the plaintiff not to enter into a business relationship with a third party that would probably have occurred as well as any acts of the defendant which hinders the plaintiff from establishing or maintaining relationships with the third party.⁹ Usually, the false claims, which are the defendant's classic acts,

⁸Duhaime's Law Dictionary,
<http://www.duhaime.org/LegalDictionary/U/UnlawfulInterferencewithEconomicInterests.asp>

⁹Restatement (Second) of Torts, §766B

are made against a business's reputation of the plaintiff for the purpose of driving their customers away.¹⁰

Subject to common law, tort of unlawful interference is designed to protect potential benefits of the people. Unlike tort of inducing breach of contract, in spite of lack of contract, this tort allows a plaintiff who suffered economical loss from the defendant's unlawful interference to recover damages. In the US, aside from the intentional interference, the liability may be based upon negligence. For instance, the fisherman may seek compensation for damages or lost income in consequence of the defendant's oil spill. Nonetheless, this thesis does not cover the negligence interference.

2.3 Background and History

The origin of the tort of interference reaches back to the Roman law concepts of the *manus and patria potestas*¹¹ which concerns the protection of interference in familial relation. It allowed a master to bring a suit against violence done to his household's members.¹² The common law also recognized such liability in fourteenth century and expanded to cover the act of driving away a business's customers or a church's donors.¹³ Yet, a cause of action under common law was strictly limited and only applies to a case which improper mean or actual violence was employed. For centuries, the common law had permitted civil suit for interference with one's customers or other prospective economic relations; however, the actor's conduct must be, in character, tortious or engaged in violence, fraud, or defamation as summarized in Restatement (Second) of Torts¹⁴ under the US law.

¹⁰Lyn L. Stevens, "Interference with Economic Relations: Some Aspects of the Turmoil in the Intentional Torts", 12 **Osgoode Hall Law Journal**. 595 (1974), available at <http://digitalcommons.osgoode.yorku.ca/ohlj/vol12/iss3/5>

¹¹Peter H. Eulau, "Inducing Breach of Contract: A Comparison of the Laws of the United States, France, the Federal Republic of Germany and Switzerland", 2 **B.C. Int'l & Comp. L. Rev.** 41 (1978), available at <http://lawdigitalcommons.bc.edu/iclr/vol2/iss1/3>

¹²George C. Christie et al., **Advanced Torts, Cases and Materials** (2004).

¹³*Id.*

¹⁴*Id.*

Furthermore, it involves with the employer's protection against inducement of his servant or laborer.¹⁵ The threshold of tort of interference appeared in English case *Lumley v. Gye* (1853).¹⁶ In this case, the defendant persuaded an opera singer, who had contract with the claimant to sing at the claimant's theatre, to break her contract and sing at his theater instead. Even if the plaintiff had a direct claim against the singer and can sue her for breach of contract, the defendant became liable for inducing a breach of contract.¹⁷

Prior to 1853, it was difficult to apply *Lumley v. Gye* principle to the liability of inducing a breach of contract because the action against the contracting party who breached the contract was laid, but there was no any action against the person procuring a breach of contract.¹⁸ Only a contracting party could be sued for breach of contract but no liability was imposed upon the inducer. As a consequence, the court said that the solution was to permit the inducer to be sued in tort for such action.¹⁹ Pursuant to this famous case, it is laid that one who procures breach of contract may be held liable as accessory to the contracting party's liability.²⁰ This is to say, the liability of inducement of breach of contract depends on the contracting party's breach of contract. A main limitation of inducement tort is that if there is no existing contract, person is not entitled to recover from such tort.

History of tort of unlawful interference differs from tort of inducing of breach of contract. It originates in the case of *Garret v. Taylor* in 1620.²¹ In such case, the defendant drove the plaintiff's potential customers away by threatening them with

¹⁵Eulau, *supra* note 11, at 44.

¹⁶*Lumley v. Gye* 118 ER 749 (KB 1853) (cited in Steven F. Rosenhek & Brad Freelan, "The Torts of Good Faith Bargaining, Inducing Breach of Contract and Intentional Interference with Economic Interests", FASKEN (Apr. 2006), <http://www.fasken.com/en/torts-of-duty-of-good-faith-bargaining/>)

¹⁷Rosenhek & Freelan, *supra* note 16.

¹⁸*OBG Ltd v Allan* [2007] UKHL 21, at 3.

¹⁹*Id.*

²⁰*Id.*

²¹*Garret v Taylor* (1620) Cro Jac 567, 79 ER 485 (KB) (cited in *OBG Ltd v Allan* [2007] UKHL 21)

violence and vexatious action. Besides, in the case of *Tarleton v. M'Gawley*²² in 1790, the defendant was held liable on the grounds of deterring the plaintiff from trading with natives (plaintiff's prospective customers). The defendant anchored its ship off the coast of West Africa and he deprived the plaintiff (his rival trading ship) of their potential business by shooting its cannon to drive away the canoe of the natives in order to prevent the natives to trade with the plaintiff. The defendant's liability did not depend upon any other wrong conduct (no existing contract is breached). Instead, it was primary liability for injuring the plaintiff's interest by interfering with the liberty of the others.²³ Even if loss of the plaintiff was the decision of the potential customers not to trade with the plaintiff, the potential customers did not trade because of the defendant's disruption.

The use of threats to intimidate customers was categorized as "intimidation" and the existence of this named tort appeared in the case of *Rookes v Barnard*.²⁴ However, threat is not an element required for the tort of unlawful interference.²⁵ With respect to *Tarleton v M'Gawley*, if the ship's master hindered the claimant from trading by simply sinking the native's canoes, it is presumed that the Lord would have considered this as not making any difference.²⁶ Tort of intimidation is only one genre of a tort usually called "causing loss by unlawful means"²⁷ recognized in English law.

2.4 Economic tort

When people intend to harm other people's business or interests, they can find themselves liable under "economic tort." Economic torts or business tort are torts under the common law involving liability which arise out of or in connection with business transactions, the economic or business relationship, or loss of interests of

²²*Tarleton v M'Gawley* (1793) 170 ER 153 (KB) (cited in *OBG Ltd v Allan* [2007] UKHL 21)

²³[2007] UKHL 21, at 3.

²⁴*Rookes v Barnard* [1964] AC 1129 (HL) (cited in *OBG Ltd v Allan* [2007] UKHL 21)

²⁵[2007] UKHL 21, at 3.

²⁶*Id.*

²⁷*Id.*

people and are normally involved with pure economic loss.²⁸ This tort can be divided into two types: improper market practices and deceptive market practices.²⁹ The typical categories of economic torts are inducement to breach a contract, conspiracy, intimidation and unlawful interference with economic interests.³⁰ Any action deliberately caused damages to other people's business by using the unacceptable or unlawful means in order to gain advantage over the competition can be count as "unlawful interference with economic interests".

2.4.1 Inducement Tort and Unlawful Interference

Inducement tort and unlawful interference tort have similar elements but different in details. The obvious distinction between these two kinds of tort is the existence of the contract. To be liable under inducement tort requires the existing contract whereas unlawful interference tort does not.³¹ Next, both torts are intentional torts but the intended results are different.³² Inducement tort involves an intention to cause breach of contract between the plaintiff and the third party. On the contrary, a tort of unlawful interference relates to an intention to harm the plaintiff without causing the breach of contract. Then, another distinguishable element is the means used while committing tort. Improper or unlawful means is not required to establish the inducement tort, for example, gentle persuasion which is totally lawful can constitute the inducement tort.³³ In contrast, unlawful means or improper practices are the essential elements to comprise of the unlawful interference tort. Finally, the inducement tort is a tort of "accessory liability" which requires the primary unlawful conduct of the third party to breach the contract. Conversely, unlawful interference is

²⁸Kenneth W. Clarkson, **Business Law: Text and Cases - Legal, Ethical, Global, and Corporate Environment** (12th ed. 2014)

²⁹Craig Ferris & Lisa Peters, "A Framework Emerges – Recent Developments in the Law of Intentional Economic Torts", LAWSON LUNDELL LLP (May 2013), http://www.lawsonlundell.com/media/news/378_EconomicTorts2013.

³⁰Duhaime's Law Dictionary, <http://www.duhaime.org/LegalDictionary/E/EconomicTort.aspx>.

³¹Ferris & Peters, *supra note 29*.

³²*Id.*

³³*Id.*

a tort of “primary liability” which the wrongful conduct of another party is no needed to constitute this tort.³⁴

Tort of interference with contract is rather different and has a greater protection than tort of unlawful interference. It is reasonable to require a defendant who procures a breach of contract to show his privilege for interfering with the contract for which he was not entitled. But, in case two individuals competes for the same interests that no one is entitled, no one can therefore be more privileged to pursue his interests. If the action of each individual is lawful, no one should be accused on the grounds of unfairness.

2.4.2 Unified Theory

There are some cases that treat liability for inducement tort as unlawful interference tort.³⁵ This thought is referred to as “the Unified Theory.”³⁶ While one group tried to separate the two torts, others desired to accept any hybrid tort and the unified theory.³⁷ Lord Hoffmann denied the unified theory by uttering that it is necessary to separate these two forms of economic tort by reason of dissimilar ingredients.³⁸ Inducement tort is a form of accessory liability whereas unlawful interference is based on primary liability. Actually, the right to contract deserves greater protection than prospective contractual relations; thereby, the court should not use the same standard to evaluate interference with contract and interference with prospective contract.³⁹ In the UK, inducement tort and unlawful interference torts were merged for a time while this mixture never incurred in Canada even if, in some cases, unlawful interference was explained as a genus tort.⁴⁰

³⁴Ferris & Peters, *supra* note 29.

³⁵Gregory Mitchell, “*Economic Tort (1)*”, NEW LAW JOURNAL (Jun. 29, 2007), <http://www.newlawjournal.co.uk/nlj/content/economic-tort-1>

³⁶*Id.*

³⁷[2007] UKHL 21

³⁸*Id.*

³⁹Stevens, *supra* note 10.

⁴⁰W. Michael G. Osborne. “*Hello! Case Says Goodbye to Confusion in Economic Torts: House of Lords Clarifies Scope of Economic Torts*”. LITIGATOR (Oct.16,

2.4.3 Privity of Contract

Privity of contract is a common law doctrine,⁴¹ which provides that only contracting party has the right under the contract, or have obligations hereunder. Simply, only contracting party can sue or be sued under the contractual obligations. For instance, a producer of electrical appliances sells its product to a distributor. The distributor then sells the product to a customer. After purchasing, the customer found that the products are defective; contractual relation does not exist between customer and producer. Therefore, the customer cannot recover damages based on the contract because of no privity of contract between them. Nonetheless, liability under the law of tort, such as tort of inducing a breach of contract, tort of negligence, conspiracy by unlawful means (or the economic torts), and statutory liability is not barred by privity of contract if cause of action is established.

2.4.4 Scope of Business Interests or Economic Relations

Trade or business interest is a broad concept which surrounds limited interests e.g. franchisees, agents, retailer or distributors⁴², which are not the owner of business, may sue under this tort. Generally, business interests have wide scope including interests which are equal to economic interests i.e. interests from the formation of contract, employee's employment, ability to sell goods, deliver goods, hire out goods, or provide services to prospective customers and financial support from a financier.⁴³ The future interests can also be protected as well as present interests. Breach of contract is not required to be actionable, mere interference with the prospective business interests is adequate.

2007), <http://www.thelitigator.ca/2007/10/hello-case-says-goodbye-to-confusion-in-economic-torts/>

⁴¹1196303 Inc. v Glen Grove Suites Inc., 2015 ONCA 580, (cited in John Polyzogopoulos, "Court of Appeal Summaries (August 24 – 28, 2015)", BLANEY MCMURTRY LLP (Aug. 28, 2015), <https://blaneyscourtsummaries.com/tag/privity-of-contract/>

⁴²Michael Leahy et al., "Rebirth of Tort of Interference with Prospective Economic Advantage", TELEVISION EDUCATION NETWORK (Mar. 1999), http://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=http://www.tved.net.au/PublicPapers/March_1999,_Lawyers_Education_Channel,_Rebirth_of_a_Tort___Unlawful_Interference_with_Trade_or_Business.html

⁴³*Id.*

Even if the court spelled out that malicious interference with business expectancy is able to constitute a tort, the explicit rule to determine when the interference with prospective contracts or reasonable business expectancy emerges is not stipulated.⁴⁴ The degree of certainty of the business expectancy will be also taken into account. Apparently, the individual who has just begun the business cannot be entitled to legal protected expectancy.⁴⁵

2.5 Rationale and Advantage of This Tort in Practice

Even if this kind of tort should get less protection than tort arising under existing contract, its existence is still vital. In the course of doing the business or negotiation, people desire to be ensured that he can run the business or conduct the dealing without any unlawful interference. This tort can be served as a protection of economic or business interests and warns people to conduct the business or dealing under fair competition. It does not restrain of trade and devalues the competition. Rather, it encourages the competitive activity since if illegitimate conducts of the competitor are ignored, it actually ruins the competition. This tort draws the boundaries between fair and unfair competition.

This notion comes from the basis that an individual is entitled to assume that he can conduct his business or dealing free of undue disruption. It is designed to protect an economic interest as well as balancing the competition. The main element to constitute this tort is the reasonable business expectancy of the plaintiff. The example of expectation is the chance to acquire the new clients or customers or maintain the relationship with the existing customers. This principle fosters the principle of *bona fide* competition for prospective advantage. If the competition is fair, the interference is justified.

⁴⁴Indiana Law Journal, “*Tort Liability of Organizations for Intentionally Impairing Economic Relations*”, 28 **Ind. L. J.** 467, 471-473 (1953), available at <http://www.repository.law.indiana.edu/ilj/vol28/iss4/2>

⁴⁵*Id.*

2.6 Notion of Free Market and Fair Competition

Historically, inducing breach of contract (the “inducement tort”) and unlawful interference (“unlawful interference tort”) was difficult to plead.⁴⁶ There is a struggle to identify when these torts should be actionable because fair competition and improper market practices are difficultly distinguished. While business competition is encouraged and promoted all over the world, the restriction on competition seems to be malicious. As long as the business operator competes within the scope of fair competition, there are no points to discuss about it. Nevertheless, the problem occurs when the competition goes beyond the acceptable competition. The American legal system admits this tort as an essential means to secure trade stability.⁴⁷ Freedom of trade and trade stability plays a vital role to promote the fair competition and these should be balanced.

2.7 Elements of Cause of Action for Liability of Unlawful Interference

Even if the particular elements which are required to establish a claim vary from one jurisdiction to another jurisdiction, the essential elements of interference tort typically include as follows:

2.7.1 The Existence of a Business Relation, Business Expectancy or Business Interest

In order to constitute the liability for unlawful interference, there must be the existence of business relation between the claimant and the third party or any potential business interests. The business interest can be broadly identified. The degree of certainty must be considered. To simplify the degree of certainty, supposing if embryo can be detected, it is certain to become human. But in case of sexual intercourse between the different sexes, it is too far to presume the existence of

⁴⁶Ferris & Peter, *supra* note 29.

⁴⁷Jeanette Anderson, “*Interference with Contractual Relations*”, GOTHENBURG UNIVERSITY PUBLICATIONS ELECTRONIC ARCHIVE, <https://gupea.ub.gu.se/bitstream/2077/2206/1/1998102.pdf>. (last visited, Feb.13, 2016)

human-being. Moreover, it seems that the amount of protection granted to expectancy is consistent to the degree of certainty that the prospective advantage will come into being.

2.7.2 Knowledge of the Business Relation

The second vital element is the requirement that the defendant is aware of the business relation's existence between the plaintiff and the third party.

2.7.3 An Intention of the Defendant

The plaintiff has to satisfy the court that the defendant commit an act with the intention to cause loss to the plaintiff.

2.7.4 Improper Mean or Wrongful Conduct

This element has been muddled for long period of time in many countries. While some jurisdictions have already clarified the basis for this element, it has still been murky in other jurisdictions. The improper conduct can be interpreted broadly or narrowly. As to broad interpretation, some opinion was given that conduct will be improper in case of breaches of statute whether civil or criminal, whether against the third party or the plaintiff⁴⁸ and some decisions agreed with the conduct which the defendant is not at liberty to commit.⁴⁹ With regard to narrow approach, some courts considered that only conduct directed at the third party and gave rise to a civil cause of action by the third party can be actionable under claim for unlawful interference.⁵⁰ Furthermore, another deems that any conducts which violate industrial regulation or business practices is sufficient to constitute torts. Also, some jurisdictions preferred

⁴⁸David A. Crerar & Colin T. Davidson, “*Canadian Tort Law Update – 2011*”, BORDEN LADNER GERVAIS LLP (2011), http://www.blg.com/en/newsandpublications/documents/publication_1829.pdf

⁴⁹*Reach MD Inc v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30, (C.A.)

⁵⁰*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177

conduct which is independently unlawful; it means the act of interference is not *per se* actionable but the conduct must be against law or statute.⁵¹

2.7.5 Interference

It is necessary to prove an interference with the contract. Even if an actual breach of contract is not needed but it must be proved that the interference results in frustration of the interests.

2.7.6 Damage

The final element that must be proved for the tort of unlawful interference is damage. The plaintiff can recover the damages against the third party interfering with his business or contract if he can prove a causal link between the defendant's interference and the plaintiff's damages.

Damages in interference cases are compensatory damages for compensating a plaintiff for lost profits and consequential damages resulting from the interference. In this regard, the claimant must prove what it lost as a result of the interference rather than trying to prove what the defendant's gained as the result of its interference.⁵²

2.7.7 Justification

Any privilege to interfere with existing contractual relation also justifies interference with prospective economic advantage. However, unlike inducement tort justification, the scope of justification for unlawful interference is wider. The privilege to disrupt is the competition, to pursue his business interests, not done with the purpose of eliminating the competitors and not done with pure malice motive.

⁵¹Della Penna v. Toyota Motor Sales, U.S.A., Inc, 11 Cal.4th 376 (1995).

⁵²Jeffrey J. Zuber, "*Interference Torts: When Business Competition Is Actionable*", 16 **A.B.A. Section Litig.** 4 (2009), available at http://www.zuberlaw.com/attorneys/articles/200906_JJZ_Article_Interference_Torts.pdf.

Competition should be free and the competitor should not be convicted any wrong unless it is unfair.⁵³

Yet, it is said that justification should be adopted only in the event of inducement tort because in the course of competition, when person competes for the same interests that no one is entitled, then no one can be considered to be more justified.⁵⁴

2.8 Sample Case or Conduct Unlawful Interference

In the course of competition, the competitors may seek a way to gain benefit, they may cut the prices, offer rebate, negotiate with the plaintiff's customers or refuse to deal with the third party unless the third party agrees not to deal with the plaintiff. Such conducts are totally lawful. However, in high competitive business, an individual may seek to gain profit by unlawfully interfering with another business.

In case the defendant coerces the third party to cease dealing with the plaintiff otherwise the third party will be attacked, and the third party eventually decides to stop negotiating with the plaintiff on account of such threat, the third party's decision to stop dealing with the plaintiff may result in the plaintiff's economic loss. Even if loss of the plaintiff is the decision of the third party not to deal with the plaintiff, the third party does not deal because of the defendant's disruption.

Nonetheless, in the above case, the plaintiff has no cause of action against the defendant because the intimidation to assault and battery is done towards the third party not the plaintiff; therefore, the problem arises whether in which claim the plaintiff can recover from such damages. The defendant's conduct is directly toward the third party and is actionable by the third party but such case is not actionable by the plaintiff. This kind of acts occurs in several dimensions, see below examples.

The first case, suppose you are the manufacturer of the pharmaceutical products, which satisfy the requirement of law and statute. You get the sustainable

⁵³Zuber, *supra* note 52.

⁵⁴Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711 (Tex. 2001).

profit from this business, but your business is threatened by the rival competitor who launches the new products which has a lower price than yours by reason of using the ingredients which does not meet the standard required by law.⁵⁵ In such case, you can report the unlawful act to the authorities in order that the rival business operation will be ceased. Nonetheless, how can you recover your loss and damages suffered from the unlawful act which drive you out of the business?

Next, you run the retail liquor business in a local shopping center, to operate lawfully; you have to obtain the consent from the local authorities. After that, your competitor operates the retail liquor shop near your shop and expands its area beyond that allowed by the local authorities. The competitor's unlawful shop is better situated than yours and you lose the profit and eventually go out of business.⁵⁶ Again, in such case, you can report the unlawful act to the authorities in order that the authorities will issue the injunction. But how can you be indemnified for your trade and business loss?

Then, the defendant spread a rumor to ruin your reputation. As a consequence, the customers do not go to your shop and go to the rival shop instead. You can sue on the grounds of defamation tort. Apart from such claim, can you also file the suit based on unlawful interference? Besides⁵⁷, you are the franchisee who operates the business in an exclusive territory. Nevertheless, you lose profit due to the fact that a fellow franchisee from an adjacent territory encroaches into your territory and negatively affect your franchised business.

Likewise, you lure ducks at a public pond, which you will kill to sell. The defendant deliberately fires a gun into the air in order to scare the ducks out of your range. The defendant is your business rival in the sale of ducks.⁵⁸ In addition, the defendant threatens a third party not to go to work for you while there is no existing employment contract, the goal of the defendant is to get the third party to go to work

⁵⁵Leahy et al., *supra* note 42.

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸William P. Statsky, **Essentials of Torts** (2007).

for the defendant.⁵⁹ Furthermore, the defendant pours some dirt on his property, which is next door to you in order to scare the potential customers away. The defendant wants you to leave the area so that the defendant can rent the premises now occupied by you.⁶⁰

Lastly, in a business attacked by a trade union, a trade union may embargo outside your warehouse, in and out blocking from your warehouse. You are unable to distribute your products and your business suffers as a consequence of the embargo. Apart from any remedies available pursuant to criminal or industrial legislation, can the remedy based on unlawful interference be provided?

Resulting from the abovementioned examples, the liability of unlawful interference in the foreign laws and principles will be explored in order to comprehend and figure out how various jurisdictions cope with those problems and how they entitle the injured party to recover economic loss and it can therefore be a good guideline to adopt in Thai jurisdiction.

⁵⁹*Statsky, supra* note 58.

⁶⁰*Id.*

CHAPTER 3

LIABILITY OF UNLAWFUL INTERFERENCE IN FOREIGN COUNTRIES

3.1 Overview of Legal Approaches as to Unlawful Interference in Foreign Countries

Unlawful interference occurs in the field of economic torts and has become the issue of increasing legal comment in many countries. However, each country offers different approaches and various solutions to this problem. It may be useful to glance at the foreign legal systems to see the development of the interference tort and to see how foreign laws deal with this matter.

For example, according to the United State legal system, the American solutions have something in common with those of France, although these two countries are under different legal systems. American and French laws demonstrate the similar protective attitude towards trade stability and realize that trade freedom is not an absolute freedom but this is a freedom to trade without undue interference from a third party.⁶¹

3.1.1 Canada

In spite of the long history of unlawful interference tort in Canada, the law relating to unlawful interference has still been complex and unsettled.⁶²The Canadian courts have recognized this tort but the principle as well as the elements to constitute this kind of tort was not clarified until in 2014. On January 31st, 2014 the Supreme Court of Canada delineated the scope and clarified the main basis of this tort

⁶¹Anderson, *supra* note 47.

⁶²Brandon Kain & Anthony Alexander. “*The Unlawful Means Element of the Economic Torts: Does a Coherent Approach Lie Beyond Reach?*”, MCCARTHY, available at https://www.mccarthy.ca/pubs/The_Unlawful_Mean_Element_of_the_Economic_Torts_Does_a_Coherent_Approach_Beyond_Reach.pdf (last visited Jan. 17, 2016)

and it therefore could be the guideline for the court to determine the unlawful interference claim.

3.1.2 France

Under French law, any benefit or interests are not specifically set forth. It does not define which interests are more worth being protected than others. French legal concept tends to provide full protection to all kinds of interests with the exception of illegal interests.⁶³ The basis for this liability legal system acknowledges the extension of interference tort into the prospective contractual relation which is called “loss of chance”. It is obvious the French law accepts the loss of chance doctrine in a broad manner.⁶⁴ Moreover, Article 1382, a general tort provision can be deemed to deal with this situation and its matter reflects the generous view when applying to this kind of liability.

3.1.3 Germany

Germany, another civil law country has an interesting provision as appeared in section 826 BGB which imposes liability on someone who willfully injures another in a manner *contra bonos mores*. This can be seen as legal-ethical provision which prevent unacceptable behavior from occurring in the society. Even if the general provision in section 823 BGB only protects the absolute right, 826 BGB enable recovery of pure economic loss.

3.1.4 The United Kingdom

Liability on unlawful interference has its root in the United Kingdom for long period of time; nonetheless, the principle and guideline of this kind of liability has been uncertain and muddled until the release of *OBG Ltd.* decision in 2007. Its decision clarified the conduct which is actionable under the unlawful means tort. The House of Lords decision in *OBG Ltd.* in general and Lord Hoffmann’s interpretation

⁶³Anderson, *supra* note 47.

⁶⁴Rui Cardona Ferreira, “*The Loss of Chance in Civilian Law Countries: A Comparative and Critical Analysis*”, 20 *MJ*. 56 (2013), available at <http://www.maastrichtjournal.eu>.

of unlawful means in particular have been adopted in the courts elsewhere in the common law world.⁶⁵

3.1.5 The United States

The legal development relating to inducement to breach a contract in the UK substantially influence for the legal evolution in the United State as well as in the other common law countries.⁶⁶ The rule of *Lumley v. Gye*, a leading case, was ordinarily accepted in the American courts.⁶⁷ Further, the American law accepts the tort of pre-contractual interference to function in US jurisdiction as appeared in Restatement (Second) of Torts as well as state case law.

3.2 Canada

3.2.1 Background and History

Tort of unlawful interference has a long history in Canada; however, its basis remained unclear and made confusion to the court and would-be defendant. The unlawful interference tort enables a plaintiff to file the suit against a defendant for economic infliction as a result of the defendant's unlawful conduct notwithstanding the absence of the existing contract. Recently, in 2014, the decision of the case *A.I. Enterprises Ltd. V. Bram Enterprises Ltd.* was released by the Supreme Court of Canada which narrowed and clarified scope of unlawful interference.⁶⁸

3.2.2 Canadian Tort Law

Canadian courts have recognized this type of tort in various names, also known as the “unlawful means” tort. It has also been called “unlawful interference with economic relations”, “interference with a trade or business by unlawful means”, “intentional interference with economic relations” and “causing loss by unlawful

⁶⁵*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177

⁶⁶Eulau, *supra* note 11.

⁶⁷*Id.*

⁶⁸David S. Morritt et al., “Canada: Supreme Court clarifies “Unlawful Means” Requirement in Tort of Unlawful Interference with Economic Relations”, OSLER (2014), <https://www.osler.com/en/resources/regulations/2014/supreme-court-clarifies-unlawful-means%E2%80%9D-requireme>.

means”.⁶⁹ Like other common law countries, judge-made law is the source of Canadian law which is based on the decision of the judge.⁷⁰ When a judge decides the case, such decision becomes a precedent and it will guide judges to make a decision in subsequent case whose matter is similar to the precedent case.⁷¹

Apart from Canadian common law, civil law of Québec has different approach. Québec has adopted an “abuse of rights” doctrine whose origin is in the Civil Code of Québec, as stipulated in Article 6 that “every person is bound to exercise his civil rights in good faith” and in Article 7 that “no right may be exercised with the intent of injuring another”.⁷² Subject to Québec’s civil law, it goes beyond the Anglo-Canadian in relation to unlawful interference. With respect to civil law, the defendant may be liable for lawful act if such act is committed with an intention to injure the plaintiff or acts contrary to the social ends of that right.⁷³

Originally, the Supreme Court of Canada seemed to consider the existence of the unlawful interference tort but did not explicitly endorse it.⁷⁴ The Supreme Court of Canada recognized the tort of unlawful interference with economic interests where there was no breach of contract and the clearest instance of this occurring was in *I.B.T., Local 213 v. Therien*, [1960] S.C.R. 265.⁷⁵ The court considered that the unlawful means element of the unlawful interference tort could be satisfied by either violations of common law or statutory duties.⁷⁶

⁶⁹E. Bruce Mellett et al., “*Interference with Economic Relations by Unlawful Means, The SCC Clarifies Unsettled Tort and Gives a Warning to Fiduciaries*”, BENNETTJONES (2014),

http://www.bennettjones.com/Publications/Updates/Interference_with_Economic_Relations_by_Unlawful_Means/

⁷⁰Organization of American States, “*Sources of Canadian Law*” (2007), https://www.oas.org/juridico/mla/en/can/en_can_mla_sources.html.

⁷¹*Id.*

⁷²*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177

⁷³*Id.*

⁷⁴Kain & Alexander, *supra* note 62.

⁷⁵*Id.*

⁷⁶*Id.*

3.2.3 Cause of Action

To constitute the liability of unlawful interference, the following elements must be established. The tort of unlawful interference requires:

- “1) An intention to injure and cause loss to the plaintiff;
- 2) Interference with the plaintiff’s business or livelihood by illegal or unlawful means;
- 3) Unlawful means were directed at a third party who has an actionable claim or an actionable claim but for the absence of having suffered a loss; and
- 4) Economic loss as a result of the unlawful means”⁷⁷

3.2.3.1 An Intention to Injure and Cause Loss to the Plaintiff

Previously, it is arguable that malicious motive to cause loss to the plaintiff was required or not. But, it is apparent that only foreseeability of economic harm was unable to meet the intention requirement. It must be proved that the defendant intended to cause economic loss to the plaintiff. Moreover, it is not adequate that the damage to the plaintiff is an incidental consequence of the defendant’s conduct. Mere foreseeability of such harm does not meet the requirement for intention in the unlawful means tort.⁷⁸

In the course of interference with the plaintiff’s business, the deliberate act to interfere with economic relations has to be proved. The defendant’s intention to harm the plaintiff is sufficient and it is not required that such intention must be the defendant’s predominant purpose. Liability may impose despite the fact that his intention was to pursue his own interests and his predominant purpose was unrelated to injure the claimant.

⁷⁷*Resolute Forest Products Inc. et al. v. 2471256 Canada Inc.*, 2014 ONSC 3996 (CanLII), <http://canlii.ca/t/g84zg> (cited in Ren Bucholz, “*Speak No Evil: Defamation and Unlawful Interference with Economic Relations*”, LENCZNER SLAGHT (11 September 2014), <http://www.litigate.com/speak-no-evil-defamation-and-unlawful-interference-with-economic-relations>

⁷⁸*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para 97.

In *Barber* and *Alleslev- Krofchak*, these two cases are consistent on the intention to injure element. In *Barber*, the defendant's intention to injure expressed based on two wrongs.⁷⁹ Firstly, regarding breach of contract, Molson sold water rights to sale to other person and thereby breached the contract with Vrozos while knowing that it would resulted in Wahta's profits decrease.⁸⁰ Moreover, it ignored for any damages that may incurred on Wahta's economic interests as a result of his conduct. The second wrong involved imposing obligation onto Wahta, Molson imposed its duty to provide free water onto Wahta.⁸¹ Although Molson intended to ensure the performance of concert, Molson was "willing to impose hardship on Wahta".⁸² It does not require Wahta to prove that the intention to injure Wahta is Molson's predominant purpose. Instead, it was enough to prove that Molson's illicit conduct was directed towards Wahta.⁸³ This also was harmony with the intent element in *Reach MD Inc.*.

Like *Barber*, the Court in *Alleslev- Krofchak* also held that Poulin and Valcom willingly to injure Temagami, they intended the "natural consequences that they knew would arise from their deliberate actions"⁸⁴ and thus, could be liable to Temagami.

In *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, the court found that the knowledge of business relationship between the plaintiff and the third party was not a substantial element of the unlawful means tort. Instead, the vital element is to determine whether the unlawful conduct intentionally interfere or harm the plaintiff's economic interests.⁸⁵ Nevertheless, the following question is how the defendant

⁷⁹Adam D.H. Chisholm, "*Shine a Light: New Perspectives on Intentional Interference with Economic Relations*", MCMILLAN (2010), <http://www.mcmillan.ca/102040>.

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.*

⁸⁵Bradley Phillips, "*Claims Against Competitors for Business Interference Must Meet Strict New Supreme Court Test to Succeed*", BLANEY MCMURTRY (2014), <http://www.blaney.com/articles/claims-against-competitors-business-interference-must-meet-strict-new-supreme-court-test>

deliberately injures the plaintiff's economic advantage without knowing the business relationship between them.

3.2.3.2 Interference with the Plaintiff's Business or Livelihood by Illegal or Unlawful Means

Unlawful interference tort can be divided into two types of situations. One is a situation that a defendant deliberately interferes with the existing contract between the plaintiff and a third party without procuring a breach of contract⁸⁶. Conversely, if the defendant's interference leads to a breach of contract, this tort does not apply but the inducement tort will govern. Other kind of unlawful interference tort is an event that the defendant deliberately interferes with the plaintiff's interest, business, or trade while the specific contract does not exist.⁸⁷

3.2.3.3 Use of Unlawful Means

It is the most difficult matter to determine what can be count as unlawful means. This element remains unclear for many years. Previously, this element was opined into two approaches. The first one is based on narrow interpretation which limits the definition of "unlawful means" to "an act that interferes with the third party's freedom to deal with the plaintiff which would be actionable by the third party against the defendant"⁸⁸, like in the English case *Tarleton v. M'Gawley*, when the defendant prevented the plaintiff from trading with the natives (potential customers of the plaintiff) by firing the canon to the natives' canoe, the natives had a direct claim against the defendant. The second approach based on wide interpretation which deemed that "any conduct that is unlawful, whether civilly or criminally, whether directed at the third party or the plaintiff can be regarded as unlawful means"⁸⁹ as well as any conduct the defendant "is not at liberty to commit." Currently, the scope of unlawful means has been clarified.

⁸⁶Ferris & Peter, *supra* note 29.

⁸⁷*Id.*

⁸⁸Crerar & Davidson, *supra* note 48.

⁸⁹*Id.*

Navigating the turmoil of the unlawful interference cases as to the scope of unlawful act element may enhance the good understanding of the development of this kind of tort in Canada.

(1) The Past and Unsettled Definition

In *1175777 Ontario Ltd. v. Magna International Inc.*, the Ontario Court of Appeal reiterated that for an action to be maintained, the interference with economic interests had to be accomplished through unlawful means.⁹⁰ However, Simmons, J.A. refrained from offering guidance as to what constitutes unlawful means and refused to decide whether unlawful conduct may encompass conduct such as breach of contract, breach of a statute, breach of fiduciary or other duty.⁹¹

Historically, Canadian courts recognized a broad scope of act which is able to satisfy the unlawful means requirement i.e. criminal conduct including bribery, tortious acts which include misrepresentation, defamation, fraud, breach of fiduciary duty, breach of statute like competition and health act and breach of court order.⁹²

In this period, to determine the unlawful means, two approaches which are broad interpretation and narrow interpretation are proposed.

(1.1) As to the narrow interpretation, “unlawful means” element requires the defendant’s conduct must be directed towards the third party. The cases involving the decision based on the narrow interpretation are as follows:

In *Alleslev-Krofchak v Valcom Limited* (2010) ONCA 557, 322 D.L.R. (4th) 193, the narrow view of “unlawful means” was adopted by the Ontario Court of Appeal, to satisfy “by unlawful means” requirement, the defendant’s action

“(a) cannot be actionable directly by the plaintiff; and

⁹⁰Rosenhek & Freelan, *supra* note 16.

⁹¹*Id.*

⁹²Leahy et al., *supra* note 42.

(b) must be directed towards a third party (which then is the instrument through which the harm is caused to the plaintiff.)”⁹³

Alleslev-Krofchak v. Valcom Limited (2010)⁹⁴

Facts: Valcom Limited had an attempt to obtain consulting services from Ms. Alleslev-Krofchak for the preparation of its bid with military authorities. All the services she provided were done through Temagami, a company which she was a shareholder. Due to Valcom’s lack of experience with performance-based contract in the industry of aerospace, AK arranged the appointment between Valcom and ARINC, a big US company that worked with US military for this kind of contracts for many years. After that, Valcom and ARINC entered into an agreement with the condition that Valcom served as the main contractor for this project while ARINC performed as Valcom’s subcontractor.

Valcom proposed AK’s name in the contract as the project manager in its bid. However, her services were provided for ARINC rather than for Valcom. This came from ARINC’s advice that it desired to establish business in Canada and, in the future, would give AK an opportunity to help it advance its ability in the area of aerospace in Canada. As a result, after Valcom’s won the bid, ARINC subcontracted with Temagami for obtaining AK’s services. Owing to her involvement, ARINC provided the project more resource than were considered by its own subcontract with Valcom. Since she did not work as Valcom resource but as ARINC resource, Valcom and his employee Poulin were dissatisfied.

This case was pleaded on the grounds that Poulin instructed ARINC to withdraw AK out of the project by adducing the evidence of her incapability. Then, Poulin suspended the subcontract between Valcom and ARINC and removed AK from the project. Valcom’s actions were regarded as unprofessional by ARINC. Eventually, ARINC terminated the subcontract with Valcom and

⁹³James Farley, “*Does the Left Hand Know what the Right Hand is Doing?*”, MCCARTHY TÉTRAULT LLP (20 May 2011), http://www.mccarthy.ca/article_detail.aspx?id=5354.

⁹⁴*Alleslev-Krofchak v Valcom Limited*, 2010 ONCA 557, 322 D.L.R. (4th) 193

cancelled its plan to expand its business in Canada which resulted in AK's loss of opportunity to help ARINC to conduct its business in Canada.

AK alleged that Valcom and its employees caused loss to her by removing her from the project and interfered with her economic relations with ARINC. She claimed that she lost the opportunity to establish potential relationship with ARINC. At trial, the court stated that Valcom and Poulin knew the existence of contract between ARINC and AK through Temagami. Also, they aimed to cause economic harm to Temagami. AK also stated that the defendant interfered with her economic relations by defamation and they did the same to Temagami's business by defaming its principal, AK. The trial judge found that unlawful means element was met by conspiracy. Valcom and Poulin conspire to defame her and they also did the same to Temagami. Finally, Valcom and its employees were decided to interfere with AK's economic relations by unlawful means and Poulin and Valcom were also decided to willfully interfere with economic relations of Temagami.⁹⁵

Held: The Court of Appeal of Ontario held that the claim for unlawful interference could be actionable only the case where the other gist of actions were not available for the plaintiff. The court interpreted unlawful means based on the narrow scope. To fulfill the unlawful means element, the defendant's act must be directed at a third party who then becomes the vehicle through which loss is caused to the plaintiff but such conduct cannot be actionable directly by the plaintiff.⁹⁶

In this case, the conspiracy and defamation to harm AK did not fulfill the requirement for unlawful means on the grounds that such actions were not directly against the third party. Instead, they were directly actionable by AK pursuant to her own right.⁹⁷ Nevertheless, the defendants' conduct to defame her injured her employer because defamation of AK would negatively affect ARINC's engagement and then preclude ARINC from being a competitor in the aerospace market in

⁹⁵Chisholm, *supra* note 79.

⁹⁶*Id.*

⁹⁷*Id.*

Canada. AK can use this conspiracy against ARINC as unlawful means element required to constitute the tort of unlawful interference.

Obviously, the conspiracy directed at ARINC could be actionable by ARINC, but not by AK. However, it resulted in termination of its relationship with Valcom and shortened its project in Canada. AK had an economic interest in ARINC's expansion so this action injured her. Thus, the conspiracy against ARINC can be count as the unlawful means needed to constitute the tort of unlawful interference against Valcom and Poulin. Whereas the conspiracy against AK cannot satisfy the unlawful means allowing AK to recover under the unlawful interference claim, the plan to injure ARINC and then negatively affected AK is enough to establish separate claim.

Therefore, the appeal court dismissed the argument that AK cannot use conspiracy against ARINC as unlawful means which therefore enabled AK to recover under the claim of intentional interference with her economic relations.⁹⁸ Even if AK cannot use defamation against her as unlawful means, AK can use conspiracy against ARINC as the unlawful means to satisfy the grounds of unlawful interference.⁹⁹

However, any lucidity given by this decision remained for short period because ten days later, the decision on *Barber* was released and the Ontario Court of Appeal said that the scope of activities are conducts that "a defendant is not at liberty to commit", which contributed to broad interpretation of the unlawful means element.

(1.2) Relating to wide interpretation, it permits "unlawful means" covering "any action that is unlawful, whether civilly or criminally, whether directed at the third party or the plaintiff"¹⁰⁰ as suggested by Lord Nicholls. In *Barber*, "unlawful means", in a simple description, are the conducts that the defendant is "not

⁹⁸Chisholm, *supra* note 79.

⁹⁹*Id.*

¹⁰⁰*Id.*

at liberty to commit,”¹⁰¹ as appeared in *Reach M.D. Inc.* The requirement that the act directed against a third party was not mentioned; however, based on the facts of this case, stricter requirement would have been satisfied and the law remained unpredictable.¹⁰² The following cases are relevant to the decision based on the broad approach.

Reach MD Inc v. Pharmaceutical Manufacturers Association of Canada¹⁰³

Facts: The trade association of pharmaceutical manufacturers notified its members to avoid advertising in the calendar produced by the claimant. By doing so, the trade association interfered with the claimant’s potential advantage by thwarting the capability of the third parties to negotiate with the claimant.

Held: The court adopted Lord Denning’s opinion in *Torquay Hotel*. In this case, the unlawful conduct resulted from the issuance of the trade association’s announcement because it had no authorization to commit pursuant to the internal policies which governed the trade association. Regarding the intention, the Ontario Court of Appeal decided that the defendant’s intention to harm the plaintiff was sufficient; there was no need to prove that the defendants’ intention was the defendant’s predominant purpose. The liability may be imposed despite the fact that his intention was to pursue his own interests.

Barber v. Molson Sport & Entertainment¹⁰⁴

Facts: This case arose when Molson gave the rights to sell water on the exclusive basis for the concert to Jonathan Vrozoz. After that, Vrozoz sold those rights to Stephen Barber and after that Barber assigned those rights to Wahta Natural Spring Water. Eventually, at the concert, Molson allowed other people to sell water despite the fact that Wahta has the exclusive right to sell water. This resulted in

¹⁰¹Crerar & Davidson, *supra* note 48.

¹⁰²*Id.*

¹⁰³*Reach MD Inc v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30, (C.A.)

¹⁰⁴*Barber v. Molson Sport & Entertainment Inc.*, 2010 ONCA 570 (CanLII), <http://canlii.ca/t/2cfv7>.

Wahta's loss to exclusively sell water to potential customers. Further, to meet requirements of government authorities, Wahta has to provide free water for supporters and Wahta therefore lost the profits from such price. In the court proceeding, one of the judges found out that tort of unlawful interference was committed by Molson against Wahta.

Held: The court laid out the three criteria to establish aforementioned tort.

First of all, an intent to cause loss, Molson breached its contract with Vrozos can serve as the first wrong (Molson sold sale of water rights to another parties) and such breach affected Wahta's economic interests on the grounds that it reduced Wahta's profits. Secondly, Molson imposed its obligation on Wahta to supply free water. These were conducts that Molson was "not at liberty to commit".

Then, the next elements was interference with economic interest by unlawful means, the court applied the broad approach and held that an act would be the unlawful means when a person was not at liberty to do. In this case, Molson sold the right of selling water to another party other than Vrozos and then resulted in breach the contract with Vrozos. This was a conduct that Molson was not at liberty to commit.

Lastly, economic loss suffered by the plaintiffs was the last element to constitute this tort. The amount of damages was the revenue that Wahta would have made if the tort was not committed. The court measured the compensation and suggested on award Wahta its lost profits.

(2) The Current and Clarified Description

In the recent case, the Supreme Court of Canada has clarified the unsettled scope and provided the guideline for defining what type of conduct can constitute "unlawful means" in *A.I. Enterprises Ltd.* The court held that "unlawful

means must be narrowly interpreted and should apply only to conduct which give rise to a civil cause of action by third party”.¹⁰⁵

This narrow interpretation limits the scope of conduct. Thus, with reference to unlawful interference tort, criminal offences and violation of statute may not be actionable itself. The availability of this tort may be found if the defendant’s act give rise to a civil action by a third party and it therefore interferes with the plaintiff’s economic interests.¹⁰⁶

While adopting this narrower interpretation, the court refused controversial opinion aiming to leave open a broader interpretation of unlawful means and permitting the court to seek for “principled exception” in certain circumstances. In this regard, the Supreme Court denied recognizing the principled exception given by the Court of Appeal.

(2.1) Case Clarifying the Scope of Unlawful Means

A.I. Enterprises Ltd. v. Bram Enterprises Ltd (2014)¹⁰⁷

Facts: Four brothers, through their companies, possessed an apartment building. Three of the brothers desired to sell the building but one of them did not. The dissenting brother attempted to deter the sale. When the building was for sale, multiple potential buyers aimed to acquire the property and offered the money for the amount of 2.58 million and another for 2.5 million. The plaintiff alleged that the dissenting brother thwarted the sales by taking a series of actions including hindering the prospective purchaser to enter into the building. Ultimately, the dissenting brother’s company purchased the property for 2.2 million which is the appraised value. The price was less than other potential purchasers had offered and less than it should be. The majority brought the case against the dissenting brother to recover damages incurred for unlawful interference.

¹⁰⁵Phillips, *supra* note 85.

¹⁰⁶Mellett et al, *supra* note 69.

¹⁰⁷*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177

Held: At the trial, the court concluded that the defendant and his company were liable on the grounds of the tort of unlawful interference because his series of actions had impact of “complicating, delaying, impeding and ultimately and for all intents and purposes completely obstructing and preventing the property from being sold to the prospective third-party purchasers”¹⁰⁸. Because of lack of any justification or legal basis; such conducts satisfied the unlawful means test.¹⁰⁹

On appeal, the trial judge’s decision was upheld but the Court of Appeal concluded that the defendant’s conducts were not actionable as a civil claim. The Court contemplated the judgment in *OBG Ltd.* of the House of Lords to evaluate the appropriate range of economic torts in general and of the unlawful means tort in particular. In *OBG Ltd.*, based upon the majority opinion, Lord Hoffman advocated the narrow interpretation of unlawful means. The unlawful act can be actionable by the party whom it was aimed at and then give rise to a claim under the unlawful interference. In this case, it is prospective third-party purchaser.

Lord Hoffman’s interpretation of unlawful means was favored by the Court of Appeal. Whereas the Court realized that the appellants’ act was not directed against the prospective third-party buyers and it hence was not actionable by them, the Court adopted the “principled exception” to alleviate the impact of rigid rule.¹¹⁰ By permitting the principled exception, the Court concluded that the appellants were liable under unlawful interference.¹¹¹

Finally, the scope of unlawful interference was clarified by the Supreme Court of Canada (SCC) by concluding that unlawful means were the act directed at a third party who has an actionable claim or an actionable claim but for the absence of having suffered a loss. The court summarized that the dissenting brother’s conducts towards third parties were not be count as a civil claim and the principled

¹⁰⁸Morritt et al, *supra* note 68.

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹*Id.*

exception could not be permissible and the requirement of “unlawful means” were not satisfied.¹¹²

This decision rejected the approach appeared in the case *Alleslev-Krofchak*, which the court held that the claim for unlawful interference could be alleged only in the event of unavailability of other cause of action for the plaintiff. Instead, the Supreme Court held that concurrent liability and overlapping cause of action were accepted by the general principles of tort liability in regard to the same incident.¹¹³

This case reflected the principle of economic torts under common law that has traditionally given more protection to physical integrity and property rights than to pure economic interests and traditionally, common law has resisted improving rules about fair competition.¹¹⁴

In summary, the court concluded that the unlawful means may include any acts giving rise to a cause of action by the third party, a breach of the competition act giving a statutory right to claim for loss to the third party, a violation of a foreign anti-trust law giving rise to an action for damages by the third party in another jurisdiction and tort of conspiracy in case it would be actionable by the third party.¹¹⁵

2.2) Rational Supporting the Narrow Approach

The court denied the broader interpretation of unlawful means and specified multiple reasons in favor of interpreting unlawful means in a narrow manner.¹¹⁶ In light of the restriction of unlawful means to actionable civil wrongs, predictability and certainty has been furnished in this area of law because the categories of act for which a defendant may be held liable are not expanded but only

¹¹²Morritt et al, *supra* note 68.

¹¹³Phillips, *supra* note 85.

¹¹⁴Mellett et al, *supra* note 69.

¹¹⁵Ellen Vandergrift, “*Business (Torts) As Usual, for the Most Part*”, CANLII CONNECTS (2014), <http://canliiconnects.org/en/commentaries/36804>

¹¹⁶Mellett et al, *supra* note 69.

another plaintiff who may recover in case of intentional injury resulting from that conduct are added.¹¹⁷

There are several reasons supporting this narrow application. First of all, if allowing the broad concept, it would be inconsistent with the common law notion which provides more protection to physical integrity and property rights than to pure economic interests. Next, the commercial competition could be undermined and imposition of liability for wrongful act alone would not support legal or commercial certainty.¹¹⁸ Legal certainty for commercial affairs is ordinarily promoted under the common law in the Anglo-Canadian tradition. The rationale of the court for adopting this narrow approach was that under common law, limited role for the economic torts is preferable in the modern marketplace.¹¹⁹ Then, the common law has traditionally resisted improving rules about fair competition.¹²⁰ Ultimately, the risk inherent in the economic torts normally that they will undermine legislated schemes favoring collective action in, for example, labor relations and interfere with fundamental rights of association and expression.¹²¹

Additionally, the court aims to avoid “tortifying” acts proscribed by law for reasons remote from civil liability. Hence, thanks to this decision, legal predictability and certainty in commercial affairs are promoted and the boundary of this tort is pleasantly clarified.

As to principled exception, the court similarly found that permitting this principle to unlawful means requirement could result in the uncertainty and danger of overwhelming *ad hoc* decisions made by judges which the court tries to avoid.¹²²

¹¹⁷Mellett et al, *supra* note 69.

¹¹⁸*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para 29.

¹¹⁹*Id.*

¹²⁰*Id.*

¹²¹*Id.* at para 34.

¹²²*Id.* at para 85.

The Court also reiterated that this tort is not an ultimate resort. Based on the Court of Appeal's view, this tort "should only be available where the defendant's conduct does not provide the plaintiff with any other cause of action against the defendant."¹²³ This opinion was adopted by the Court of Appeal for Ontario and other Canadian courts.¹²⁴

Such view was declined by the Supreme Court, announcing that such restriction is wrong in principle: "The gist of the tort is the targeting of the plaintiff by the defendant through the instrumentality of unlawful acts against a third party."¹²⁵ The Court stated that "such conduct gives rise to liability quite apart from conduct that may otherwise be actionable by the plaintiff,"¹²⁶ and also described that "general principles of tort liability accept concurrent liability and overlapping causes of action for distinct wrongs suffered by the plaintiff in respect of the same incident."¹²⁷

3.2.3.4 Damage Injured by the Plaintiff

Damage is the significant element to constitute the unlawful interference tort. The plaintiff has a burden to prove that loss incurred due to the unlawful interference. Additionally, a causal link between the unlawful interference and the damage suffered by the plaintiff must be illustrated.

In *Volkswagen Canada Ltd. v. Spicer*, a case involves an automobile dealership who suffered operating losses. In an attempt to protect itself, the franchisor had its officials instruct the franchisee's bank that cheque over 1,000 dollars had to bear the signature of one of the officials of the franchisor. The instructions given by the franchisor's officials, who were also directors of the franchisee, were against the franchisee's by-laws. The court found that the element of intent to injure was satisfied

¹²³ *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para 77.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at para 78.

because the conduct was intended to harm the principal shareholders of the franchisee.¹²⁸

The second element of interference with economic interests by unlawful means was also satisfied on the basis that the franchisor's officials were acting contrary to the franchisee's by-laws due to a lack of a directors' resolution to alter signing authority. In terms of damages, despite the fact that the Court did not find there to be pecuniary loss, the Court found that the franchisee's principal shareholders were entitled to general damage of 5,000.¹²⁹

In *Barber*, at trial, \$232,000 was awarded for "reliance damages", and characterized it as both a "loss of profits" and a "net loss".¹³⁰ However, the Court of Appeal said that the trial judge erred in deciding the case because the criteria of damages in tort is based upon *restitutio in integrum* basis, requiring the court to put the claimant to the place where the plaintiff would have been in the absence of the tort.¹³¹ The Court of Appeal further declared that the accurate amount of damages is the revenue that Wahta would have made which it held to be \$420,000.¹³²

Both trial judge and the Court of Appeal had similar ideas when measuring damages in term of "reliance damages", as they both describe on awarding Wahta its lost profits.¹³³ Finally, the amount that Wahta had spent in reliance and a specific amount that another party profited are not awarded by the Court of Appeal.¹³⁴

In *Alleslev-Krofchak*, it was arguable that damages could be awarded for two torts or not, e.g. defamation and unlawful interference.¹³⁵ The Court declared that it was not an error in awarding two general damages for the two distinct torts.¹³⁶

¹²⁸Rosenhek & Freelan, *supra* note 16.

¹²⁹*Id.*

¹³⁰Chisholm, *supra* note 79.

¹³¹*Id.*

¹³²*Id.*

¹³³*Id.*

¹³⁴*Id.*

¹³⁵*Id.*

3.2.4 Sample Case

In *Resolute Forest Products Inc. et al. v. 2471256 Canada Inc.*¹³⁷, the Court followed the evolution of this kind of claim suggested by the Supreme Court.¹³⁸

Facts: The claimant who was a paper manufacturer sued the defendant who operated his business as Greenpeace that the defendant interfered with his business by targeting its customers and defaming them.¹³⁹ The defamation included the act of circulation of a report criticizing its business practices, only defamation was unlawful means stated in the statement of claim.¹⁴⁰ The defendant's act was not actionable by the third party and thus could not meet the requirement of unlawful interference.¹⁴¹ The Ontario Court of Appeal concluded that the defamation against the plaintiff was unable to establish unlawful means. However, before the Divisional Court Hearing, the claimant amended its pleadings that the defendant harassed, intimidated and exerted pressure on the claimant's investors and customers by means of injuring the claimant and added the cause of action for tort of intimidation.¹⁴²

Held: The Court regarded that the amended pleading depicted the act that would be actionable by the third party and hence, it may be able to meet the unlawful interference requirement.¹⁴³

3.2.5 Summary

The liability of unlawful interference is broad in scope that it does not require the existence of formal dealings or a contract between the plaintiff and the third party with which the plaintiff has an economic interest, which can even include contingent economic interests. However, the elements which must be satisfied to establish this tort are strict and narrow.

¹³⁶Chisholm, *supra* note 79.

¹³⁷*Resolute Forest Products Inc. et al. v. 2471256 Canada Inc.*, 2014 ONSC 3996 (CanLII), <http://canlii.ca/t/g84zg>

¹³⁸Bucholz, *supra* note 77.

¹³⁹*Id.*

¹⁴⁰*Id.*

¹⁴¹*Id.*

¹⁴²*Id.*

¹⁴³*Id.*

This area of law stayed in the ambiguity and uncertainty for long period of time in Canada. Nonetheless, owing to the judgment in *A.I. Enterprises Ltd*, the court unanimously narrowed the scope of liability; this decision may immensely bring about the significant predictability and certainty to this muddled area of law.

3.3 France

3.3.1 Background and History

French law tends to protect all rights and interests with the exception of illegal interests. For the purpose of discouraging any wrongful or hazardous conduct, liability is imposed. Every injury incurred from improper conduct can be recovered provided that certain requirements have to be met.

In French tort law, all rights and interests are protected under Article 1382 of *Code Civil*. Generally, in case of interruption of negotiation, damage is limited only for expenses incurred in course of negotiation.¹⁴⁴ However, loss of chance theory permits loss of profit resulting from non-conclusion of contract. If negotiation only has the point in detail, chance to conclude the contract is deemed obvious and indemnification shall be envisaged.¹⁴⁵ Any damage suffered can be recovered provided that the real opportunity is expected and not only hypothetical.

3.3.2 Loss of Chance Theory

Based on the *la perte d'une chance* theory, it may be deemed to extend the scope of protection for economic interests. This imposes the liability on a third person as to breaking off negotiations¹⁴⁶. When a person who has already known of the existing relations between the parties engaged in negotiation thereof and this

¹⁴⁴Bertrand De Coninck, **Le Droit Commun de la Rupture des Négociations Précontractuelles** (2002).

¹⁴⁵Patrick Wéry, **Droit des Obligations - Volume 1: Théorie Générale des Contrats** (2010).

¹⁴⁶María Paz García Rubio et al, “*Perte de Chance’ (Expectation Interest) and Liability of a Third Person in Case of Breaking Off Negotiations*”, 13 **E.R.P.L.**443 (2005), available at <https://www.kluwerlawonline.com/abstract.php?id=ERPL2005027>

conduct leads to the failure of execution of the contract, it may not be deemed as a fault unless it is done by an intention to cause loss or is accompanied by fraudulent misrepresentation.¹⁴⁷

Interference with prospective economic relations may be regarded as recognized in French legal system under the concept of “loss of chance” (*perte d’une chance*). The theory of the loss of chance originates in the *Cour de Cassation* dating 17th July 1889,¹⁴⁸ according to which there were paid damages in relation to a lawsuit which the victim lost as a result of a ministerial servant’s interfering in the natural course of the legal procedure.¹⁴⁹

French tort law has the longest history relating to adopt this theory.¹⁵⁰ It is usually applied in the *Cour de Cassation* considered the damage constituted by the loss of chance to be direct and certain, even though the realization of a chance can never be certain.¹⁵¹ The main requirement is the real loss of chance and the clear causal connection between the defendant’s conduct and the loss of chance.¹⁵²

The application of the loss of a chance theory is accepted in French law in a broad manner; it is ground both in the field of tortious liability and contractual liability.¹⁵³ The concept encompasses the loss of the possibility of acquiring a favorable advantage or event.¹⁵⁴ Moreover, the principle and the application of the loss of chance are not limited in any reserved area.¹⁵⁵ The compensation for loss of chance may be awarded in several cases such as gambling, sport competitions, development of scientific or commercial activity or access to certain professions.¹⁵⁶

¹⁴⁷Raymond Youngs, **English, French and German Comparative Law** (1998)

¹⁴⁸Ferreira, *supra note 64*.

¹⁴⁹*Id.*

¹⁵⁰Cees van Dam, **European Tort Law** (2013).

¹⁵¹*Id.*

¹⁵²*Id.*

¹⁵³Ferreira, *supra note 64*.

¹⁵⁴*Id.*

¹⁵⁵*Id.*

¹⁵⁶*Id.*

This approach may be deemed to protect person from any undue interference with their prospective interests. This may be used when the suffered person lost the opportunity to obtain the advantage as a consequence of the other person's conduct. Ordinarily, to recover damages, it requires damage which is direct and certain. To meet such requirement of direct and certain damage, the chance must be real and serious and not mere hypothetical. The plaintiff must lose favorable event (*une éventualité favorable*) and French law will permit the compensation when loss is actual and certain.¹⁵⁷

In spite of its broad manner of application, the plaintiff must demonstrate the certain requirements as follows:¹⁵⁸

- 1) The existence of damage
- 2) A causal link between the tortious conduct and the damage
- 3) The chance is real and serious

It is not adequate to only show the previous existence of opportunity to obtain a favorable advantage but it must be proved that such possibility was ruined by a defendant's harmful act.¹⁵⁹ The expectancy must be reasonable to materialize, rather than a mere hypothetical character.¹⁶⁰

3.3.3 French Civil Code

When a person engaged a party who had already engaged in negotiations with a third party, it does generally not present a blameworthy conduct unless the negotiations are conducted with the intention to harm the other party or the involvement is committed with a full knowledge of an exclusivity stipulation. In this

¹⁵⁷Olivier Moréteau, "France: French Tort Law in the Light of European Harmonization", 6 *JCLS*. (2013), available at <http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1119&context=jcls>

¹⁵⁸Ferreira, *supra* note 64.

¹⁵⁹*Id.*

¹⁶⁰*Id.*

context, the term “*tortious interference*” that is well known in American law is often used.¹⁶¹

It is important to realize, however, that the blameworthy conduct may be committed without the parties’ agreement to essential elements of the future contract because such agreement is a fundamental condition for the conclusion of a contract but not for a blameworthy conduct that could be punished.¹⁶²

Prospective economic relations are protected under the general clause of Article 1382 of Civil Code stipulating that “Any act of a person which causes injury to another obligates him by whose fault it occurred to make reparation.”¹⁶³ Fault and harm are required to establish the liability. The basis of this provision is rather broad and is extended by Article 1383 which prescribed that “Everyone is responsible not only for the harm which he has caused by his conduct but also by his negligence or imprudence.”¹⁶⁴

3.3.4 Cause of Action

In France, restitution for pure economic loss depends on whether there is an adequate causal link and the loss is sufficiently direct.¹⁶⁵ French law permits the indemnification for loss of chance (*perte d’une chance*) and pure economic loss under Article 1382 of Civil Code. Despite the broad manner of the application, the several requirements have to be satisfied. Pursuant to Article 1382, the plaintiff has a burden to prove that the defendant committed a “fault” (*faute*), which causes injury to the plaintiff.

¹⁶¹Alain Couret & Bruno Dondero, “*The Breakdown of Negotiations in M&A Operations Comparative Approach*”. University College Cork, www.ucc.ie/law/ISCL2011/DublinTexteEnglishVersion2003.doc

¹⁶²Couret & Dondero, *supra* note 162.

¹⁶³Art. 1382 C. civ. « Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer ».

¹⁶⁴Youngs, *supra* note 147.

¹⁶⁵Mauro Bussani & Vernon Valentine Palmer, **Pure Economic Loss in Europe** (2003).

The plaintiff must establish fault, causation and compensable damages. The general requirements to constitute the liability are as follows:

3.3.4.1 Fault

The right to sue in relation to fault is based on constitutional value which the *Conseil constitutionnel* enunciated that “no general provision of law may exonerate a person from all personal responsibility, whatever the nature or gravity of the fault which is imputed to him.”¹⁶⁶ It includes violation of a customary rule or even “ordinary reason or any failure to behave like a prudent man (*un homme avisé*).¹⁶⁷

Any breach of the law constitutes a fault under this section. Moreover, the court may also consider the unreasonable behavior to constitute a fault.¹⁶⁸ Under French law, the criminal conducts are automatically civil wrong and all breach of a criminal statutory provision is a fault in civil and thus violate Article 1382 of the Code Civil.¹⁶⁹ This also applies to other violation of statutory duties under *lois* and *règlements* despite the fact that the sanction is not criminal.¹⁷⁰

3.3.4.2 Existence of Damage

Proof that the damage will occur with reasonable certainty in the future is one essential requirement. Certainty of damage must be met. Law only concerns that damage must actually exist and be certain.¹⁷¹

3.3.4.3 Causal Link between the Tortious Conduct and the Damage

¹⁶⁶Youngs, *supra* note 147.

¹⁶⁷*Id.*

¹⁶⁸Study on the Conditions of Claims for Damages in case of Infringement of EC Competition Rule, French part written by Chantal Momège & Nicolas Bessot, http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/france_en.pdf.

¹⁶⁹Youngs, *supra* note 147.

¹⁷⁰*Id.*

¹⁷¹British Institute of International and Comparative Law, “*Introduction to French tort law*”, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, http://www.biicl.org/files/730_introduction_to_french_tort_law.pdf (last visited Dec.13, 2015)

The plaintiff must satisfy the court that the possibility or opportunity to conclude the contract was destroyed as a result of tortious conduct.

3.3.4.4 The Chance or Opportunity

This tort is based on the possibility of obtaining a favorable interest or outcome. It is important to demonstrate that the chance is likely to occur, not rather than a mere hypothetical.

3.3.4.5 Relief and Amount of Compensation

As a general rule, damages will be awarded only if the harm sustained is direct, personal, certain and foreseeable pursuant to Articles 1149 to 1151 of the French Civil Code.¹⁷² Consequential damages are available if certain and foreseeable, French courts will therefore award damages for loss of chance and loss of earnings if appropriate. Compensation for loss of chance will be calculated by reference to the probability of the missed opportunity occurring and so will never be full of loss.¹⁷³ The Court may request the assistance of an expert to assess the amount of damages to be awarded to the parties if necessary. It is also open to the parties to submit their own expert reports.

Regarding the amount of compensation in case of loss of chance, the plaintiff is entitled to partial compensation. The compensation is equivalent to an amount that was lost resulting from loss of chance.¹⁷⁴ When the judge has to determine what amount should be awarded, the seriousness of the chance and the materialization of the final damage must be taken into consideration.

¹⁷²Alex Dowding & Thomas Oster, *Global Guide to Competition Litigation-France 2012*, BAKERMCKENZIE, <http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Antitrust%20&%20Competition/Guide%20to%20Competition%20Litigation/France>. (last visited Dec.13, 2015)

¹⁷³*Id.*

¹⁷⁴Ferreira, *supra* note 64.

3.3.5 Abuse of Right

Liability may be imposed in the event of conduct which amounts to an abuse of right pursuant to Article 1382.¹⁷⁵ In this regard, despite the lawful conduct, the defendant's act can amount to abuse of right if his motive is only to injure the plaintiff.¹⁷⁶

In French law, abuse of right (*abus de droit*) can be explained as 'the exercise by a person of his or her rights in an excessive manner which causes harm to another'.¹⁷⁷ The abuse of right has been held by the courts to be a "fault" under Article 1382 Civil Code that entitles the plaintiff to recover damages.¹⁷⁸ The example of abuse of right is growing ferns in others' garden.¹⁷⁹ In 1817, the Supreme Court decided that a person is not liable for exercising the right unless the exercise of right is to injure people without gaining any interests for his own, for example, constructing the large building with the spike on the top in order to prevent the owner of the adjacent area from flying the plane over his building is deemed as abuse.¹⁸⁰

Previously, French law only accepts the case that people exercising the right with an intention to cause loss to establish the abuse claim. Then, in 1902, the concept is developed to include the case where people exercising the right without obtaining any advantage. The Supreme Court held that the land's owner who drilled

¹⁷⁵Ferreira, *supra* note 64.

¹⁷⁶*Id.*

¹⁷⁷P. Schammo, "Arbitrage and Abuse of Rights in the EC Legal System" (May 2008) 14(3) *European Law Journal* 351. (cited in Euroblawg, "The EU Law Doctrine of Abuse of Rights: Should it be a general principle of EU Law; and is it?", EUROBLAWG (May 29, 2013), <http://www.euroblawg.com/eu-law-2/the-eu-law-doctrine-of-abuse-of-rights-should-it-be-a-general-principle-of-eu-law-and-is-it/#note-44178-18>

¹⁷⁸David Anderson QC, *Abuse of Rights*, 11 JR 348 (2006), available at www.adminlaw.org.uk/docs/David%20Anderson%20QC%20-%20July%202006.

¹⁷⁹*Id.*

¹⁸⁰Chaiwat Wongwattanasan, "Abuse of Right", 16 Nitisat Journal 100 (1986).

(ชัยวัฒน์ วงศ์วัฒนศาสตร์, การใช้สิทธิโดยไม่ชอบ, 16 วารสารนิติศาสตร์ 100 (2529).

his land without gaining any advantage and then causing the underground water flowing through the adjoining land shall be liable.¹⁸¹

All rights conferred by law are relative; the rights are conferred upon individuals based on specific social objectives and the right holder should respect such objectives.¹⁸² Accordingly, the exercise of rights must be compatible with such social functions.¹⁸³ If the rights are exercised for any purpose other than from their lawful functions, such rights is no longer be protected.¹⁸⁴

The concept of abuse of right may occur when the right is exercised with a predominant motive to injure people, exercising a right in the manner against good moral or good faith, there are no interests or gains considered to reasonably arise from the exercise of right and exercising a right for any objectives other than for which it was originally given.¹⁸⁵ Moreover, it will be regarded as an abuse when an individual does not commit an act as an ordinary reasonable and prudent person would perform in the same circumstances¹⁸⁶ provided that certain criterion has to be met when examining the abuse of right, e.g. intention to injure, proportionality and the right-function.¹⁸⁷

3.3.6 Summary

The general provision of French tort law has generous view to protect all rights and interests except illegal interests. Besides, the concept of abuse of right is well-established in France to support the good faith principle in the course of exercising the right. When a person who has already known of the existing relations between the parties engaged in negotiation thereof and this conduct leads to the

¹⁸¹Wongwattanasan, *supra* note 180.

¹⁸²Amandine Léonard, “*Abuse of Rights’ in Belgian and French Patent Law – A Case Law Analysis*”, JIPITEC, <https://www.jipitec.eu/issues/jipitec-7-1-2016/4398/#N10191>. (last visited May 11, 2016)

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵Elsbeth Reid. “*The Doctrine of Abuse of Rights: Perspective from a Mixed Jurisdiction*”, 8 **Electronic Journal of Comparative Law** 3 (2004), available at www.ejcl.org/83/art83-2.PDF.

¹⁸⁶Léonard, *supra* note 182.

¹⁸⁷*Id.*

failure of execution of the contract, it may not be deemed as a fault based on competition notion unless it is done by an intention to cause loss or is accompanied by unlawful conduct.

3.4 Germany

3.4.1 Background and History

The concept of Thai tort law was derived from the German Civil and Commercial Code (*BürgerlichesGesetzbuch*). Particularly, section 420 which is the key provision of Thai tort law is word by word similar to those of German law. The German law of tort distinguishes from the French Civil Code because, apart from the general provision of liability, there are specific provisions for each matter.¹⁸⁸

3.4.2 German Civil Code provisions

Unlike French tort law, German tort law is not only based on a general clause. To avoid any uncertainty regarding tort law claims, the German tort law specifically stipulated section 823-853 BGB which distinguish the different causes of action.

Alongside several special provisions, the German Civil Code includes there clauses of action, which can be described as “minor” general clauses: section 823(1), 823(2) and 826 BGB.¹⁸⁹ While section 823(1) BGB requires the culpable violation of specific protected interests such as life, body, health, freedom, property, or other right, section 823(2) BGB refers to the culpable violation of a protective law.¹⁹⁰ Section 826 BGB, on the other hand, sanctions willful damage contrary to public policy.¹⁹¹ The most significant difference regarding the legal consequence is

¹⁸⁸Anan Chantaraopakorn, “*The Fundamental Structure of the Law of Tort*”. **Collection Article in the 60th Anniversary of Dr. Preedi Phanomyong.**, (Bangkok : P.K. Printing House, 1988)

¹⁸⁹Gerald Spindler & Oliver Rieckers. **Tort law in Germany** (2011)

¹⁹⁰*Id*

¹⁹¹Spindler & Rieckers, *supra* note 189.

that, contrary to section 823(1) BGB, section 823(2) and 826 BGB allow recovery of pure economic loss.¹⁹²

Normally, to satisfy the requirement for a German tort law claim, there must be the violation of an interest protected pursuant to section 823-853 BGB.¹⁹³ The requirements of each claim varies upon the actions, especially in relation to the degree of culpability i.e., ordinary negligence is adequate for claims under section 823(1) BGB whereas deliberately inflicted damage must be proved for recovering with respect to section 826 BGB.¹⁹⁴ The cause of action greatly varies based on the protected interests.¹⁹⁵

3.4.2.1 Section 823(1)

Under the German Civil Law, this section is a general provision of German tort law providing a right to claim damages but it excludes pure economic loss.

Section 823 states that “a person who, willfully or negligently, unlawfully injures the life, body, health, freedom, property or any other right of another is bound to compensate him for any damage arising there from.”¹⁹⁶

The scope of this seems to be as broad as the general basis of liability under French tort law; however, it is indeed interpreted more narrowly.¹⁹⁷ The plaintiff has to be injured in one of the five specific legal interests listed or one which will be recognized as an “other right” (*sonstiges Recht*).¹⁹⁸

The notion of “other right” does not include wealth, such as economic loss in general but include¹⁹⁹:

“(i) certain interests which are similar to property;

¹⁹²Spindler & Rieckers, *supra* note 189.

¹⁹³*Id.*

¹⁹⁴*Id.*

¹⁹⁵*Id.*

¹⁹⁶Youngs, *supra* note 147.

¹⁹⁷*Id.*

¹⁹⁸*Id.*

¹⁹⁹*Id.*

- (ii) certain family interests;
- (iii) personality rights; and
- (iv) the right to an established and functioning business.”²⁰⁰

Section 823 (1) BGB is the principle rule of German tort law, the claim for compensation is limited to recovery for harm to life, body, health, freedom, property or any “other rights” of another person. In term of “other right” in this section, it refers to absolute right.²⁰¹ Absolute rights, which are comparable to property, signify the rights that can be claimed against everyone or rights against the world.²⁰² The absolute rights include copyrights, patents, trademarks, possession, certain family relationships, and the membership to an association.²⁰³ In contrast, the relative rights are right that can be asserted against specific person e.g. rights under contract.²⁰⁴

In addition, the absolute rights also cover the general right of a person to his personality (*allgemeines Personlichkeitsrecht*) and the protection of an established and operating commercial business (*Recht am eingerichteten und ausgeubten Gewerbebetrieb*).²⁰⁵ Nevertheless, the substantial limit of this section 823(1) BGB is the exclusion of pure economic loss which sometimes causes substantial trouble concerning “other rights” and their scope.²⁰⁶

The personality rights and the right to an established and functioning business are framework rights and need to be balanced with the interests of others.²⁰⁷ Ordinarily, framework rights are not available unless there is no other special protection; they only exist to fill a gap which would exist in legal protection.²⁰⁸

²⁰⁰Youngs, *supra* note 147.

²⁰¹Chung HuiWang, *trans.*, The German Civil Code(1907).

²⁰²Spindler & Rieckers, *supra* note 189.

²⁰³*Id.*

²⁰⁴*Id.*

²⁰⁵*Id.*

²⁰⁶*Id.*

²⁰⁷Youngs, *supra* note 147.

²⁰⁸*Id.*

3.4.2.2 Right to an Established and Operating Commercial Business

The judge-made right to an established and operating commercial business was developed by the Supreme Court of the German Reich (*Reichsgericht*) in the early twentieth century.²⁰⁹ It was created to fill the gaps in the codified law, especially in the area of industrial property protection, which resulted from the limited protection offered by the Civil Code in cases of pure economic loss.²¹⁰

The intention underlying the acknowledgment of the right to an established and operating commercial business was the protection of commercial enterprises against certain kinds of interference with their economic interests, although its specific content still remains vague. Nowadays, this right is accepted as customary law. However, some commentators have shown some effort to limit its scope in order to make the application by the courts more predictable.²¹¹ Substantially, the protection would be given only for the activity and status not the wealth of the business.²¹²

This right protects the regular clientele, business relations, ways of communication, know-how, good will, and the organizational structure of an enterprise.²¹³ However, in order to limit the doctrine's field of application, the Federal Supreme Court requires a "direct interference with the commercial business."²¹⁴ The interference with the right needs to be direct and "business-related" interference (*betriebsbezogener Eingriff*) and only available if there is no other available and applicable provisions.²¹⁵ Hence, it must be in some way directed against the business as such in a manner that is neither socially adequate nor a mere annoyance.²¹⁶

²⁰⁹Youngs, *supra* note 147.

²¹⁰*Id.*

²¹¹Spindler & Rieckers, *supra* note 189.

²¹²Youngs, *supra* note 147.

²¹³Spindler & Rieckers, *supra* note 189.

²¹⁴*Id.*

²¹⁵*Id.*

²¹⁶*Id.*

Infringements of the right to an established and operating commercial business are not *per se* unlawful and every case requires a careful balancing of the legally protected interests involved.²¹⁷ After considering the nature of this right, it is significantly found that this right concerns activity and status not the wealth of the business, the unlawful interference claim therefore falls outside the scope of this right.

3.4.2.3 Section 823(2) (Statutory Liability)

Subject to section 823(2), it provided that “the same obligation (i.e. obligation in tort created in section 823(1)) applies to a person who offends against a statutory provision which has in view the protection of another. If, according to the content of the statutory provision, a violation of it is possible even without fault, the duty to compensate only arises in case of fault.”²¹⁸

The regulations, decrees, by-laws and police orders are covered by this provision²¹⁹ provided that the statutory provision aims to protect the person’s interests and not only interests of members of the public.²²⁰ It is required to determine whether the statutory provision is designed to protect another or not. For instance, according to section 323 of the Criminal Code, providing the failure to help victim of crime when it is reasonable to do and does not take risk of injury, is protective legislation for the purpose of this section whose intention is to protect victims.²²¹ Moreover, for the purpose of this section, protective measures also include consumer protection measures and product liability act as well as an Act requiring dealers to be licensed is a protective norm which enables a customer suffering damage to bring a suit against an unlicensed dealer.²²²

Apart from six rights, if other rights are damaged, section 823 (2) will be taken into account. Right under this paragraph will be right other than the

²¹⁷Spindler & Rieckers, *supra* note 189.

²¹⁸Youngs, *supra* note 147.

²¹⁹*Id.*

²²⁰*Id.*

²²¹*Id.*

²²²*Id.*

right pursuant to the first paragraph. The suffered person may be reimbursed with conditions that the doer breached a statute intended to protect other person.²²³ Interference tort may fall within this section because the conduct causes damage to right of other people's economic interests, such damage can be called "pure economic loss".

Section 823 (2) is designed to fill the gap of first paragraph. It allows injured person to bring a suit against the doer who breached the statute even if such case does not involve the rights protected under first paragraph, for example, deceit which affects the victim's wealth rather than the property, it would not violate section 823(1) but it would violate section 823(2).²²⁴ However, the damages occurred must arise from any harm in which law aims to prevent. If law intends to prevent any damage merely incurred to body or property, pure economic loss cannot be reimbursed under section 823 (2).²²⁵

3.4.2.4 Section 826 (Immoral Conduct)

It is regarded that section 826²²⁶ BGB may apply in addition to section 823(1) and (2) even if it is rather applied in limited way.²²⁷ However, it may be the only ground for an action.²²⁸ The person's wealth is protected based on section 823(2) and by section 826 BGB. Even if the scope of section 826 BGB seems to be at first glance wider than section 823(1) BGB to the extent that its application is not limited to the violation of specific interests and provides for compensation even of

²²³Daruporn Pingsuthiwong. "Tortious Liability Arising from an Infringement of a Statutory Provision Intended for the Protection of Others." Master's thesis, Thammasat University, Laws, 2008.

(ดรุพร ปิงสุทธีวงศ์. "ความรับผิดเพื่อละเมิดอันเกิดจากการฝ่าฝืนบทบังคับแห่งกฎหมายอันมีที่ประสงค์เพื่อจะปกป้องบุคคลอื่น." วิทยานิพนธ์ปริญญาโทบริหารธุรกิจ, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2538).

²²⁴*Id.*

²²⁵*Id.*

²²⁶Section 826 "a person who willfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage"

²²⁷Youngs, *supra* note 147.

²²⁸*Id.*

pure economic loss, it is narrower as it is available only in case of willfully inflicted damage.²²⁹

The intention must cover the infliction of harm as well as the conduct causing it. Conditional intention suffices when the defendant prepared to take the risk of a perceived possible consequence occurring.²³⁰ For example, a ship was hired to deliver steel to Thailand. The purchaser of the steel sold it to the plaintiff. Nevertheless, the steel was seized by the authorities in Thailand on the grounds of the violation of embargo rules, which was intentionally breached by the person who hired the ship and delivered the steel. The *Bundesgerichtshof* decided that he committed a tort under section 826 BGB if he realized of the fact that the plaintiff could suffer loss accordingly.²³¹

Even if this section seems to be broad in nature, the German courts have applied this section in the case similar to English torts, such as intimidation, inducing breach of contract and deceit.²³² The principle of this liability has not been clarified and uncertain to give notice to would-be defendant.

Moreover, regarding the abuse of right, it is apparently appeared in section 226 BGB which set forth “The exercise of a right is not permitted if it can only have the purpose of causing harm to another.” The obvious example is in case an individual build the construction for the sole purpose of blocking out others’ view.²³³ In fact, the abuse of right principle in German tort law is rather weaker than in French.²³⁴ The concept of abuse of right (*Unzulässige Rechtsausübung*) has also been developed from section 242 BGB.²³⁵

²²⁹Spindler & Rieckers, *supra* note 189.

²³⁰Youngs, *supra* note 147.

²³¹*Id.*

²³²*Id.*

²³³*Id.*

²³⁴*Id.*

²³⁵*Id.*

3.4.3 Liability of Interference with Prospective Contract

Contractual obligations only concern the relation between the contracting parties. Due to this relative nature, when interests under the prospective contractual relations of the person are interfered, they are not protected under section 823(1) because this section only protects the absolute rights.

Even if interference with future contract is not tortious pursuant to section 823, if a third person interferes with the existing business expectancy in the manner contrary to public policy, he may be liable under section 826. When considering section 826 (intentional damage against good morals or public policy), the inducement to breach a contract falls into this section, conduct of the inducer is classified as unlawful or as *contra bonos mores*.

Section 826 provides that “a person who willfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage.” As to interference with prospective economic advantage, it may also be deemed to fall into this section if a third person interferes with the others’ existing business expectancy in the manner contrary to moral according to section 826. Still, the concept of good morals is rather difficult to be clarified

In case of bribery, it can be regarded as interference with prospective economic interests if the individual has a reasonable expectation to win the bid but for the bribery.²³⁶ German law does not provide for specific civil sanctions against persons who paid bribes to officials. Nonetheless, when person deliberately harms another in a way that breaches public morals or *contra bonus mores*, damages can be recovered against him based on section 826 of the German Civil Code. It is stated that section 826 allows the plaintiffs to sue for damages when they have been injured by bribery of officials.²³⁷

²³⁶Sharon Eicher. **Corruption in International Business: The Challenge of Cultural and Legal Diversity** (2009).

²³⁷*Id.*

3.4.4 Summary

Unlawful interference may fall within section 826 BGB because this section allows a recovery of pure economic loss and people's wealth. Even if the scope of section 826 BGB seems to be at first glance wider than section 823(1) BGB to the extent that its application is not limited to the violation of specific interests and provides for compensation even of pure economic loss, it is narrower as it is available only in case of willfully inflicted damage.

3.5 The United Kingdom

3.5.1 Background and History

Given decision in the case *Allen v. Flood*²³⁸, the court held in favor of fair competition. As long as unlawful means are not used, the defendant would not be found liable. Later, after *Allen v. Flood* was decided more than a century, the House of Lords laid a guideline for the inducement tort and unlawful interference tort in *OBG limited v. Allan*.²³⁹

Previously, it was generally accepted that there is a "genus" tort of unlawful interference with trade or business by unlawful means²⁴⁰ and the majority of the longer established economic torts were regarded as species of the genus, unlawful means conspiracy, directly procuring breach of contract by unlawful means and two party intimidations.²⁴¹ Both the genus and the species were the torts of intention. However, in 2007, the Law Lords drew the line between inducing breach of contract and unlawful interference tort in *OBG*.

The origin of the tort of interference appears in the famous English case *Lumley v. Gye* (1853).²⁴² In this case, a defendant persuaded an opera singer, who had contract with a plaintiff to sing at the plaintiff's theatre, to break her contract and sing

²³⁸*Allen v. Flood* [1898] AC 1

²³⁹Ferris & Peter, *supra* note 29.

²⁴⁰W. V. Horton Roger. *Wrongfulness under English Tort Law*, in *Unification of Tort Law: Wrongfulness* 39, 44 (1998).

²⁴¹*Id.*

²⁴²Rosenhek & Freelan, *supra* note 16.

at his theater instead. Even if the plaintiff had a direct claim against the singer and can sue her for breach of contract, the defendant became liable for inducing a breach of contract. A main limitation of inducement tort is that if there is no existing contract, the injured person is not entitled to recover from such tort.

History of liability of unlawful interference differs from tort of inducing of breach of contract. It traces back in the case of *Garret v. Taylor* in 1620.²⁴³ In such case, the defendant drove the plaintiff's potential customer away by intimidating them with violence and vexatious action.

Besides, in the case of *Tarleton v. M'Gawley*²⁴⁴ in 1790, the defendant was held liable on the grounds of deterring the plaintiff from trading with natives (plaintiff's prospective customers). The defendant anchored its ship off the coast of West Africa and he deprived the plaintiff (his rival trading ship) of their potential business by shooting its cannon to drive away the canoe of the natives in order to prevent the natives to trade with the plaintiff. The defendant's liability did not depend upon any other wrong conduct (no existing contract was breached). It was primary liability for injuring the plaintiff's interest by interfering with the liberty of the others. Even if loss of the plaintiff was the decision of the potential customers not to trade with the plaintiff, the potential customers did not trade because of the defendant's disruption.

Using threats to intimidate customers was categorized as "intimidation" and the existence of this named tort appeared in the case of *Rookes v Barnard*.²⁴⁵ Still, thread is not an element required for this tort of unlawful interference. In respect of *Tarleton v M'Gawley*, if the ship's master hindered the claimant from trading by simply sinking the natives' canoes, it is presumed that the Lord would have

²⁴³*Garret v. Taylor* (1620) Cro Jac 567, 79 ER 485 (KB) (cited in *OBG Ltd v Allan* [2007] UKHL 21)

²⁴⁴*Tarleton v. M'Gawley* (1793) 170 ER 153 (KB) (cited in *OBG Ltd v Allan* [2007] UKHL 21)

²⁴⁵*Rookes v Barnard* [1964] AC 1129 (HL) (cited in *OBG Ltd v Allan* [2007] UKHL 21)

considered this as not making any different.²⁴⁶ Intimidation is only one genre of a tort called “causing loss by unlawful means”²⁴⁷ recognized in English common law.

Historically, interference tort has its origin in the United Kingdom and it appeared that the tort also provided protection against the interference with prospective contracts as appeared in *Temperton v Russel* in the Court of Appeal which extended the scope of tort to protect against persuasion not to contract.²⁴⁸ However, it was rejected by the House of Lords in *Allen v Flood* by stating that there were some differences between inducing breach and only persuading another not to enter into a contract.

J T Stratford & Son Ltd v Lindley²⁴⁹

Facts: The plaintiff ran a barge hire business, when the hiring was terminated, the barges must be returned to the plaintiff and the plaintiff can rehire such barges. However, such barges were not returned due to the union embargo and the plaintiff therefore cannot rehire such barges. In such case, there were two types of barges, under existing contract and not under any contract.

Held: The court released the decision that the ability of the plaintiff to enter into prospective contract was as essential as the business under the existing contract. The plaintiffs had a cause of action not only in respect of breaches of hiring contracts but also in respect of new business they were unable to undertake. Apart from interfering with existing contracts, the defendant’s conduct made the claimant unable to do any new business with the barge hirers. In this case, the issue that business interference is tortious if any unlawful means are employed was not raised.

Temperton v. Russell²⁵⁰

It was held that a combination of two or more persons to induce others not to deal with or to enter into contract with any individual was actionable if done for

²⁴⁶*Rookes v Barnard* [1964] AC 1129 (HL) (cited in *OBG Ltd v Allan* [2007] UKHL 21)

²⁴⁷*OBG Ltd v Allan* [2007] UKHL 21, at 3.

²⁴⁸Hazel Carty, *An Analysis of the Economic Torts* (2010).

²⁴⁹*JT Stratford & Son Ltd v Lindley* [1965] AC 269

²⁵⁰*Temperton v Russell* [1893] 1 QB 715

the purpose of injuring that individual and he was thereby injured. The case of *Temperton v Russel* had a deep impact on the evolution of the tort in the United States which leads to the protection of commercial expectations.²⁵¹ In *Temperton v. Russell*, the court declared that the *Lumley v Gye* principle would apply not only to disruption with contractual relations but also interference with prospective or potential relations.²⁵²

Some comments were given that *Temperton's* treatment of interference was a mistake.²⁵³ To illustrate, when two competitors compete for one thing (business), competitors should have liberty to use any legal manner to gain advantages. Whereas person interfering with the existing contract could be regarded as an interloper and further a tortfeasor²⁵⁴, person interfering only with a “prospective business advantage” may only be a competitor.²⁵⁵ The development of this tort can be divided into three periods as follows:

3.5.1.1 Initial Period

Prior to 1892-1901, the principle of economic torts was developed into four paths as follows:²⁵⁶

(1) Inducing breach of contract, the defendant, by means of inducing a third party to breach the contract with the plaintiff, caused loss to the economic interests of the plaintiff;

(2) Conspiracy, the defendant combined with another party to harm the economic interests of the plaintiff by committing an unlawful conduct, or committing a legitimate conduct by illegal means;

²⁵¹ *Carty, supra* note 248.

²⁵² *Christie et al., supra* note 9.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Gary Myers, “*The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*”, 77 *Minn. L. Rev.* 1097 (1993), available at <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1297&context=facpubs>

²⁵⁶ *Kain & Alexander, supra* note 62.

(3) Unlawful interference with economic interests and intimidation, the defendant caused loss to the economic interests of the plaintiff by threatening unlawful means against a third party and as a result, the third party lawfully quitted from its business relationship with the plaintiff; and

(4) Prima facie tort, the defendant harmed the economic interests of the plaintiff through lawful means, but was motivated to do so by malice.

An early case that involved the case of unlawful interference is *Garret v. Taylor* and *Tarleton v. M'Gawley*. It related unlawful acts or threat directed towards a third party and therefore causing loss to the relationship or prospective relationship of the plaintiff, with the third party.²⁵⁷ However, prior to 1892-1901, the theory of such liability was hugely unexplored.²⁵⁸

Tarleton v. M'Gawley (1793)²⁵⁹

Facts: The plaintiff was the owner of a trading ship called the Tarleton. A ship was anchored off the coast of Africa. The plaintiff had an attempt to establish a trade relationship with the natives. The defendant, a rival trader, fired its cannons at a canoe of the natives that approached to the plaintiff's ship for trading. The defendant intended to scare the natives, to make them unwilling to trade with the plaintiff and to prevent this trading. Consequently, the plaintiff lost its trading relationship with the natives so that the plaintiff sued the defendant for interfering with its trade relationship.

Held: A cause of action is permissible for interference with prospective economic advantage. The plaintiff can recover damages for the economic loss resulting from the defendant's unlawful act directed against the natives, the third parties who were the plaintiff's potential customers, with the intention to interfere with the plaintiff's economic advantage. In this case, the prospective advantage is

²⁵⁷Kain & Alexander, *supra* note 62.

²⁵⁸*Id.*

²⁵⁹*Tarleton v. M'Gawley* (1793) 170 ER 153 (KB) (cited in *OBG Ltd v Allan* [2007] UKHL 21)

protected against interference even if the plaintiff was never able to form a contract with the natives in the first place.

3.5.1.2 A Trilogy of Cases (1892-1901)

Between 1892 and 1901, the well-known trilogy of cases relating to unlawful interference was decided by the House of Lords, namely *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co*, *Allen v. Flood*, leading English case and *Quinn v. Leatham*.²⁶⁰ In this period, a tort of unlawful interference remained in nominate²⁶¹ but it was seen that Lord Watson recognized a tort of unlawful interference with economic interests.²⁶²

*Mogul Steamship Co. v. McGregor, Gow, & Co*²⁶³

Facts: The defendant was a ship merchant who desired to control the tea trade carriage from certain Chinese ports and to drive the plaintiff and other competitors out of the market. For achieving their goals, the defendant undercut the price of tea and offered five percent rebate to all local shippers who agreed to exclusively trade with them. The defendant offered local shippers very low rates and then generating it unprofitable for the plaintiff to send their vessels there. The defendant had no personal ill-will to the plaintiff, nor any wish to cause loss to them except an intention to discourage the plaintiffs from sending rival ships to such ports.

Held: The court held in favor of the defendant because it was competition and unlawful means were not employed. The defendant traded by lawful means. Competition was a sufficient justification. His motive was business gain without malice to the plaintiff. Competition, notwithstanding severe and egotistical, if not committed by means of intimidation, molestation, dishonesty, or any illicit action, gave rise to no cause of action at common law. The Court held in favor of the defendants because their practices did not involve with the use of forbidden means, fraud, misrepresentation, intimidation, obstruction, or molestation and the defendant

²⁶⁰Kain & Alexander, *supra* note 62.

²⁶¹*Id.*

²⁶²*Id.*

²⁶³*Mogul Steamship Co Ltd v McGregor, Gow & Co* [1892] AC 25

had done nothing more against the plaintiff than to pursue the interest of their own trade. (Lord Esher, M.R., for the minority, dissenting that the defendant's act in reducing their freights went beyond an ordinary course of trade and the exercise of right was not based on free right but for interfering with the claimant's right to trade.

Allen v. Flood²⁶⁴

Facts: The claimants were shipwrights who did either iron or wooden work in the employ of the Glengall Iron Company. They were not unionists. They made the same work with the members of a union. The union objected to their being employed and refused to work with them, refused shipwrights to do both kinds of work. When the iron men discovered such fact, they called Allen, a trade union official notified an employer that his members would not work unless the claimants were fired and informed him of their intention to go out on strike unless the claimants were discharged. As a result, the claimants were (lawfully) discharged whose employment was terminable at will. For the loss of work, the claimants brought an action against Allen for inducing their discharge.

Held: One of the Lords asked that "If the cook says to her master, 'Discharge the butler or I leave you', and the master discharges the butler, does the butler have an action against the cook?"²⁶⁵ The defendant had neither caused any breach of contract nor used any unlawful means so that this case did not fall within inducement tort and not fall within the unlawful means tort because on the subject of the rights the claimants were only hired day by day. Hence, the trade union did not threaten a breach of contract since the contracts started afresh every day.

The court decided that there was no cause of action because an action itself lawful cannot be made unlawful on account of bad motives. The House of Lords stated that notwithstanding a malicious motive, it could not turn the lawful act into

²⁶⁴*Allen v. Flood* [1898] AC 1

²⁶⁵Horace LaFayette Wilgus, "The Authority of *Allen v. Flood*", 1 **Mich. L. Rev.** 28 (1902), available at <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1008&context=articles>

illegal conduct because what the claimant pleaded was that he was not rehired and this was totally lawful in itself.

3.5.1.3 Subsequent Developments

In 1901-1950, the tort of unlawful interference remained not yet recognized but only an initial basis of such liability was roughly laid based upon the case of *Allen*.²⁶⁶ Further, the “unlawful” requirement was not yet examined by the House of Lords and it remained widely unexplored. In 1983, in *Merkur Island Shipping*²⁶⁷, it was stated that there was a broader tort of “interfering with the trade or business of another person by unlawful means.”²⁶⁸

A Trilogy of 2007 Decisions

After that, in 1950-2006, the House of Lords released the decision in *OBG Ltd v Allan*, *Douglas v Hello!*, *Mainstream Properties v Young* which were the crucial judgments on economic tort since *Allen v Flood* in 1898 and *Quinn v Leathem* in 1901 which were decided over 100 years ago.²⁶⁹

*OBG Ltd v Allan*²⁷⁰

Facts: The defendants were appointed as administrative receivers to take control of the plaintiff’s asset. The defendants sold property and land, and terminated the contracts. Later, it appeared that the defendants’ appointment was invalid and the defendants were not entitled to take control of the company. The substantial issue was whether the defendant had to be liable for the value of the company’s contractual claims assessed as at the date of their invalid appointment and wrongful interference with contractual relations or not.

²⁶⁶Kain & Alexander, *supra note 62*.

²⁶⁷*Merkur Island Shipping Corporation v Laughton* [1983] 2 AC 570 (cited in Kain & Alexander, *supra note 62*)

²⁶⁸Youngs, *supra note 147*.

²⁶⁹Kain & Alexander, *supra note 62*.

²⁷⁰*OBG Ltd v Allan* [2007] UKHL 21

Held: Taking the opportunity in the collection of cases, the House of Lords discussed the economic tort as a complex and muddled area of law which was required to be put in order. The decision has an impact to narrow the economic torts' application. It was ruled that claim for interference with contractual relations could only be present in one of two forms whose cause of action is separated. Firstly, relating to procuring a breach of contract, this liability depends on the contracting party committed an actionable wrong and the defendant's liability was "accessory liability." On the other hand, as to causing loss by unlawful means, the defendant caused loss to the claimant by illegally interfering with their prospective interest; the defendant's liability was a "primary liability."²⁷¹

The House of Lords found that the defendants mistakenly believed that they had the right to perform their duty. Thus, the defendant did not intend to harm the plaintiff or procure any breach of contract. As they were acting in good faith as if they were validly appointed and realized the company's assets over a period of years in terminating the contracts, and had no intention to injure the plaintiff, they were therefore not liable for causing breach of contract or unlawful interference. The claim failed.

In *OBG Ltd*, the defendants neither breached any of the plaintiff's contracts, nor used any unlawful means or intended to injure the plaintiff. There was no liability imposed on the defendant either for causing breaches of contract or unlawful interference. There was no breach of contracts or non-performance of the contracts which were the subject of the settlement negotiation. As a consequence, the primary liability could not be constituted and thus the defendant's act could not be the accessory liability in the absence of the primary liability. Additionally, in spite of its invalidity, the unlawful means were not used and there was no intention to injure the company in the course of their appointment. Ultimately, a concept of separate, general tort of unlawful interference with contracts was not accepted by the House of Lords.

²⁷¹Mitchell, *supra* note 35.

Douglas v Hello!²⁷²

Facts: The magazine OK! entered into the contract for the exclusive rights to publish photographs of Michael Douglas and Catherine Zeta-Jones's wedding. But, the defendant, Hello! published photos which were taken at the wedding without authorization. The claimant sued the defendant for unlawful interference. The question arose about the claimant had a cause of action in confidence and/or in economic tort against the defendant or not. At the trial, the judge decided this caused £1 million of loss to the claimant.

Held: Since Douglas and the claimant remained at liberty to deal with each other, there was no unlawful interference. Simply, they are still able to perform their obligations under the contract. The claim accordingly failed.

3.5.2 Unified Theory

In the view of their length and the disagreement within the law lords in each case, the cases of *Allen* and *Quinn* are difficult.²⁷³ However, in those two cases, there were opinions which liability for inducement tort was treated as unlawful interference with trade. The law lords referred to as “the unified theory”.²⁷⁴ The state of law recently addressed by the House of Lords, in *OBG Ltd*, the five-member Appellate Committee, was unanimous in separating the two torts and in rejecting any hybrid tort and the unified theory.²⁷⁵

The unified theory was declined by Lord Hoffmann and the Lord stated that the two categories of economic tort must be treated as separate, by reason of dissimilar ingredients. While unlawful interference with trade is a form of primary liability, inducing breach of contract is based on accessory liability.²⁷⁶

²⁷²*Douglas v Hello! Ltd* [2005] EWCA Civ 595

²⁷³*Id.*

²⁷⁴*Id.*

²⁷⁵*Id.*

²⁷⁶*OBG Ltd v Allan* [2007] UKHL 21, at 3.

Two economic torts were separately treated by Lord Hoffmann; those are inducement tort and unlawful interference with trade which he called “causing loss by unlawful means”.²⁷⁷ Liability under inducing breach of contract is accessory to the breach of contract of others while unlawful interference is a primary liability as appeared in *Garret v Taylor* (1620), the defendant drove the plaintiff’s potential customers away by intimidating them with mayhem and vexatious case, and in *Tarleton v McGawley* (1793), the defendant drove the plaintiff’s prospective customers away from the plaintiff’s ship by firing cannon at them.²⁷⁸ In each case, with an intention of injuring the plaintiff’s business, the defendant had committed an unlawful conduct and was held liable for the damage caused. This established the primary liability and did not involve any persuasion another to break a contract.²⁷⁹

These two torts remained unclear in some of the cases as criticized by Lord Hoffmann. For example, in *GWK Ltd v Dunlop Rubber* (1926) 42 TLR 593 with an intention to promote its own tyres, the defendant illegally changed the plaintiff’s tyres with those of its own tyres at the exhibition. The defendant was held liable based on *Quinn v Leathem* for violating contractual rights of the plaintiff. Lord Hoffmann stated that the decision did not rely upon the inducement tort at all but the unlawful interference with trade.²⁸⁰

Also, *Thomson v Deakin*, the leading case was examined by Lord Hoffmann and he advised that since tort of unlawful interference with trade was not appreciated, the unified theory was adopted.²⁸¹ This resulted in a distinction between “direct interference” which refers to a classic inducing breach of contract and “indirect interference” which the defendant prevented performance of others’ contracts by illegal means without causing breach.²⁸² This concept sustains several cases of significant judgment namely, *Torquay Hotel v Cousins*. Moreover, the adoption of the unified theory in *Merkur Island Shipping* by Lord Diplock was

²⁷⁷*OBG Ltd v Allan* [2007] UKHL 21, at 3.

²⁷⁸*Mitchell*, *supra* note 35.

²⁷⁹*Id.*

²⁸⁰*Id.*

²⁸¹*Id.*

²⁸²*Id.*

disapproved by Lord Hoffmann.²⁸³ The Law Lords held that the distinction between direct and indirect inducement should be abandoned and they also denied the expansion of procuring breach of contract to the circumstance that the defendant's act only interfered or prevented the performance of the contracting party and without causing an actual breach as appeared in *Torquay Hotel*.²⁸⁴

Pursuant to *OBG Ltd*'s decision, the House of Lords have unanimously denied the economic tort expansion into a general form of liability for interfering with contractual relations. Currently, the distinction between direct and indirect interference was unaccepted.²⁸⁵ Also, inducing breach of contract was separated from wrongful interference with trade. They also declined some dicta in *Allen v Flood* which supported the unified theory.²⁸⁶ As a consequence, it may result in the fewer cases, such as *OBG Ltd*, where the plaintiff neatly selects the most favorable features of each tort and ignores the limiting features.

3.5.3 Pigeon-Hole Theory

Salmond, an authority in the field of tort law, proposed the pigeonhole theory. It is believed that the specific torts are equivalent to pigeon-holes and person's conduct may be tortious if it falls within one of the pigeonholes.²⁸⁷ This is simply called the pigeon-hole theory. If the defendant's conduct does not fit any pigeon holes, he does not commit any tort.

English law enables pure economic loss to be compensated when its claim fit into the pigeonholes.²⁸⁸ Pigeon-Hole approach is the well-known method for imposing liability of economic interests. English law only recognizes certain valuable interests decided to be deserved protecting. When the defendant intends to cause economic loss, the claim for such damage may fit into one of the pigeonholes. If the

²⁸³Mitchell, *supra* note 35.

²⁸⁴Kain & Alexander, *supra* note 62.

²⁸⁵Mitchell, *supra* note 35.

²⁸⁶*Id.*

²⁸⁷Monica Claes, **The National Courts' Mandate in the European Constitution** (2006).

²⁸⁸Vernon Valentine Palmer & Mauro Bussani, "Pure Economic Loss: The Ways to Recovery", 11 **EJCL**. 1 (2007), <http://www.ejcl.org>

defendant's act does not fit within any existing pigeon-hole of liability, that is to say the facts do not fit within any established categories of tort, the plaintiff cannot recover damages. These can simply say "if the plaintiff cannot show any known tort, he cannot recover."

3.5.4 English Tort Law

The English law of tort was wholly created by case law (the common law), notwithstanding some areas are now governed by statute.²⁸⁹ English tort law has narrow categories of tort. Conduct is only unlawful if it falls within the definition of a recognized tort.²⁹⁰ Interference tort in the United Kingdom has developed in the murky manner. However, it has been appeared that the court tends to decide in favor of competition more than to protect the prospective interests of the competitors.

The existence of economic torts was recognized by the court for over a century.²⁹¹ Yet, its basis has never been clarified and then generated the widespread confusion. Nonetheless, the decisions including *OBG Ltd*, released in 2007, have given a long-awaited guidance and clarification.²⁹² Currently, it is rather certain that there are three main economic torts: inducing a breach of contract, causing loss by unlawful means and conspiracy. The first two torts were examined in *OBG Ltd*, and the last in *Total Network*.²⁹³

The tort of causing loss by unlawful means is frequently claimed as an alternative to the inducement tort; however, this claim does not depend on any existing contract.²⁹⁴ Referring to Lord Hoffmann in *OBG Ltd*, the purpose of this right of action is to "enforce basic standard of civilized behavior in economic competition."²⁹⁵

²⁸⁹Palmer & Bussani, *supra note* 288.

²⁹⁰Youngs, *supra note* 147.

²⁹¹SJ Berwin LLP. "Claims without Contract: Economic Torts Come of Age", LEGAL 500 (March 2009), <http://www.legal500.com/developments/6629>

²⁹²*Id.*

²⁹³*Id.*

²⁹⁴*Id.*

²⁹⁵*Id.*

3.5.5 Cause of Action

The essential elements of this tort are:

- “1) An unlawful act committed by the defendants;
- 2) The interference with the actions of a third party in relation to the claimant;
- 3) Intention to cause loss to the claimant;
- 4) Damage to the claimants”²⁹⁶

3.5.5.1 An Unlawful Act Committed by the Defendants

Regarding this form of economic tort, the most important difficulty is what counts as unlawful means? Historically, unlawful means element has been source of confusion which concurrently generates both strength and weakness in this area of law, the lack of definition has generated an inconsistency in the jurisprudence but it has also created the flexibility on a case-by-case basis. Lord Hoffmann opined that “acts against a third party count as unlawful means only if they are actionable by that third party, the main qualification being where there is no cause of action only because that third party does not suffer loss.”²⁹⁷

An unlawful act is one that is civilly actionable by the third party, or would have been if the third party had suffered some loss. Civilly actionable wrongs, for instance, include threats to not perform some contractual obligation with the third party or physical violence. Still, criminal acts that are not civilly liable would not be sufficient.²⁹⁸

(1) Period of Muddled Meaning

Prior to 2007, it was uncertain whether unlawful means must engage in conduct directed at the third party or directed at the plaintiff.²⁹⁹ Moreover, it was not clarified whether unlawful means can include some acts which were

²⁹⁶SJ Berwin LLP, *supra* note 291.

²⁹⁷*OBG Ltd v Allan* [2007] UKHL 21, at 3.

²⁹⁸SJ Berwin LLP, *supra* note 291.

²⁹⁹*Kain & Alexander*, *supra* note 62 at 88.

independently actionable at the suit of the plaintiff or not.³⁰⁰ Finally, it was unclear about the role of the wide scope of unlawful means e.g. conduct the defendant was “not at liberty to commit” which appeared in cases like *Dunlop, Lonrho* and *Torquay Hotel*.³⁰¹

(2) Time of Clarified Definition

In 2007 and 2008, two judgments relevant to economic torts, *OBG Ltd* and *Hello!*, were released by the House of Lords. Thanks to these decisions, the scope of the unlawful means element of the unlawful interference tort was clarified and narrowed.³⁰²

In 2008, pursuant to *OBG Ltd*, the unlawful means must engage in acts directed at the third party and then become the vehicle which resulted in the plaintiff’s loss, and not merely against the plaintiff directly (except perhaps in the cases of two-party intimidation).³⁰³ In accordance with *OBG Ltd*, to satisfy the requirements of the unlawful interference tort, the defendant’s acts must directed at a third party and was:

“(i) at least theoretically, independently and civilly actionable by the third party (or would have been had the third party suffered a loss)³⁰⁴; and

(ii) of a kind that interfered with the third party’s liberty to deal with the plaintiff.”³⁰⁵

Thereby, it was clarified that the wide scope of unlawful means was declined by the House of Lords’ restrictive notion to the unlawful interference tort.³⁰⁶ Furthermore, the independently actionable conduct at the suit of the plaintiff,

³⁰⁰Kain & Alexander, *supra* note 62 at 88.

³⁰¹*Id.*

³⁰²*Id.* at 36.

³⁰³*Id.* at 108.

³⁰⁴*Id.* at 88.

³⁰⁵*Id.*

³⁰⁶*Id.*

and unlawful means element of the unlawful interference tort could be both concurrently emerged from the same act by the defendant.³⁰⁷

Unlawful means

A majority of their Lordships (with Lord Nicholls dissenting) concluded that the “means” used by the defendant will only count as “unlawful means” for the purposes of the tort if they involve with an actionable civil wrong to the third party, or would have involved an actionable wrong to the third party if the third party had suffered damage. The significance of this requirement is that behavior which the law classifies solely as criminal, and not as an actionable wrong to the third party, does not count as “unlawful means” in order to constitute the tort.³⁰⁸

The House of Lords concluded three appeals in a single set of grounds which will likely become the leading authority on the emerging torts.³⁰⁹ On Lord Hoffmann’s opinion which relied on multiple leading cases i.e. *Allen, Quinn, Rookes and Lonrho I*, to establish the tort, there must be

“(a) a wrongful interference with the third party’s action in which the claimant has an economic interest and;

(b) an intention to cause loss to the claimant”³¹⁰

Pursuant to these cases, Lord Hoffmann concluded that unlawful means only cover actions committed against a third party and thereby actionable by the third party and such act interfered with the third party’s liberty to deal with the plaintiff.³¹¹ Besides, if the only ground that it is not actionable is the absence of loss by the third party, it will also be unlawful means.³¹²

³⁰⁷Kain & Alexander, *supra* note 62 at 88.

³⁰⁸Roderick Bagshaw, “*Economic Torts Cases*”, MCBRIDESGUIDES (2 September 2013), <https://mcbridesguides.files.wordpress.com/2013/09/economic-torts-cases.pdf>

³⁰⁹Crerar & Davidson, *supra* note 48.

³¹⁰*OBG Ltd v Allan* [2007] UKHL 21, at para 47.

³¹¹*Id.*

³¹²*Id.* at para 51.

However, in the minority, the broader interpretation of “unlawful means” was offered by Lord Nicholls to embrace all actions which the defendant is not allowed to do, or unlawful whether civilly or criminally, whether directed at the third party or the plaintiff.

This may be the two divergences of legal opinions between those who desire to restrict liability by narrowing the scope of unlawful means and those who prefer the broader definition of unlawful means to “any act which the defendant is not at liberty to commit.” Certainly, if we take the broad view of unlawful means we are in danger of ending up with the result that a delivery company which infringes the rules on drivers’ hours or a restaurant which cuts corners on hygiene may not only be prosecuted by the relevant authority but also sued by rivals who lose business because they cannot match the infringers’ prices.³¹³

In conclusion, the settled interpretation of unlawful means consist of any acts which the defendant aimed to cause the claimant economic loss by interrupting with a third party’s freedom to deal with the plaintiff in a manner which is unlawful against and actionable by the third party. However, they do not cover actions which are against the third party but have no negative impact to the third party’s freedom to deal with the plaintiff.³¹⁴

3.5.5.2 The Interference with the Actions of a Third Party in relation to the Claimant

To satisfy this requirement, the unlawful act which has only an impact to the third party is not sufficient. Instead, it must be proved that the freedom of the third party to deal with the claimant was specifically affected.³¹⁵ To illustrate, failure to perform a contractual obligation or a threat of physical violence must affect third party not to deal with the plaintiff.³¹⁶ Unlawful means had to interfere with a third party’s liberty to negotiate with the plaintiff. It would not be sufficient for the

³¹³Roger, *supra* note 240.

³¹⁴*OBG Ltd v Allan* [2007] UKHL 21, at para 47.

³¹⁵*SJ Berwin LLP, supra note 291.*

³¹⁶*Id.*

unlawful means merely to reduce the value to the claimant of the relationship he had with a third party.³¹⁷

RCA Corp v Pollard (1983)

Facts: The plaintiff had the right on the exclusive basis to sell records of Elvis Presley and the defendant sold the bootleg recordings made at concert of Elvis Presley without consent of the plaintiff. Resulting from this, it reduced the value of the plaintiff's exclusive right.

Held: The defendant's act does not interfere with the claimant's freedom to perform its contract. Even if this conduct amounted to unlawful means and the defendant used such means with the intention of injuring the plaintiff. The defendant did not commit the tort of unlawful means to cause loss to the plaintiff because the unlawful means had to interfere with the third party's freedom to deal with the plaintiff. In this case, the third party still had the freedom to perform the conduct.³¹⁸ To establish tort, it is not adequate to reduce the value to the plaintiff of the relationship he had with a third party.

3.5.5.3 Intention to Cause Loss to the Claimant

In relation to intentionality, while the inducement tort's intention highlights on the interference with contractual rights or breach of contract, the tort of causing loss by unlawful means requires an intention to cause damage to the plaintiff.³¹⁹ In order to show that the defendant has committed the tort of unlawful interference; it must be shown that the defendant had an intention to cause loss to that other.

In *Douglas v Hello!*, the trial judge found that the defendant did not intend to cause loss to the claimant based on the evidence that his intention was only to avoid a loss of sales for Hello! and not to reduce sales of OK!. However, Lord Hoffmann stated that loss to OK! was intended by Hello! on the grounds that it

³¹⁷Bagshaw, *supra* note 308.

³¹⁸*Id.*

³¹⁹SJ Berwin LLP, *supra* note 291.

desired to preserve its sales by attracting the purchasers who would otherwise bought OK!'s magazine to buy its magazine instead. Simply, it was the flipside of the preserved sales of Hello!. The significant proportion of the preserved sales of Hello! derived from this way.³²⁰

To determine the defendant's intention, it is needed to distinguish between the desired end or mean of reaching different desired end of the defendant and the result of attaining such end or employing such means. The House of Lords confirmed³²¹ that a consequence will count as part of the defendant's end if it is 'simply the other side of the same coin' and the defendant knows that this is the case.³²²

Nevertheless, Lord Hoffman distinguished such event from the case where the customers suffered loss resulting from the action directly aimed at its supplier. To illustrate, if a defendant precludes airplane from flying by unlawful means with an intent to cause loss to the airline operating company despite the fact that he may foresee that some passengers would suffer loss in consequence of his conduct, he would not be held to have an intention to cause the passengers loss because he could attain his end, that is causing loss to the airline operating company. In such a case, any loss suffered by passengers would not be the flipside of the defendant's end. Yet, the circumstances may be changed in the event that one of the defendant's aims is to cause loss to the passengers for the purpose of stimulating them to put pressure on the airline operating company.³²³

Lord Hoffmann mentioned that for inducement tort, an intention to cause a breach is required whereas an intention to cause loss is needed for unlawful interference tort. In *OBG Ltd* and *Douglas v Hello!*, it demonstrated the similarity of intention concept. As appeared in both cases, the ends, means and consequence must be distinguished. One can be held to cause loss although it is only the means which one attained the end of pursuing his own interest. Conversely, if the loss was only

³²⁰*OBG Ltd v Allan* [2007] UKHL 21, at para 134

³²¹*Id.* at para 134, 167.

³²²Bagshaw, *supra note 307*.

³²³*Id.*

foreseeable consequences of individual's act and was neither desired end nor means of achieving it, such individual is not liable.³²⁴

3.5.5.4 Damage to the Claimants

If the loss incurred to the plaintiff is the defendant's desired end or a means of achieving a different desired end, the defendant will be liable but not including any loss which is only foreseeable result of his actions.³²⁵ This requirement is designed to deprive a defendant who seeks to avoid liability from asserting that his actions were to pursue his own interests and not to cause loss to the plaintiff. The House of Lords, in *OBG Ltd*, referred to the defendant's gain and the plaintiff's loss as "being inseparably linked or simply different sides of the same coin".³²⁶

3.5.6 Summary

The effect of the judgments in *OBG Ltd*. brings about the narrow application of the economic torts. The claim for interference with contractual relations must be fit into one of two cause of actions, separately either inducing a breach of contract or causing loss by unlawful means. Widely, the House of Lords decision in *OBG Ltd* in general and Lord Hoffmann's interpretation of unlawful means in particular have been adopted in the courts elsewhere in the common law world.

3.6 The United States

3.6.1 Background and History

The American jurisprudence have followed the rule appeared in the English case of *Lumley v. Gye* which introduces the tort of inducing breach of contract or interference with contractual relations. But, in the case valid contract does not exist, how American deal with this issue?

Historically, interference tort has its origin in the United Kingdom and it appeared that the tort also provides protection against interference with prospective

³²⁴SJ Berwin LLP, *supra note 291*.

³²⁵*Id.*

³²⁶*Id.*

contracts as appeared in *Temperton v Russel*³²⁷ in the Court of Appeal with the intention to extend the scope of tort to protect the prospective interests against persuasion not to contract.³²⁸ However, it was rejected by the House of Lords in *Allen v Flood* by reasoning that there are some differences between inducing breach and only persuading another not to enter into a contract. Actually, this liability is recognized in the UK under the heading “causing loss by unlawful means” as appeared in *OBG Ltd* but its application is rather limited.

Nonetheless, the case of *Temperton v Russel* had a deep impact on the evolution of the tort in the United States³²⁹ which leads to the protection of commercial expectations.³³⁰ In *Temperton v. Russell*, the court declared that the principle in *Lumley v. Gye* would apply not only to interference with contract, but also interference with potential interests.³³¹

Person can be liable for interference with prospective advantage of others even it is only foreseeable and not formalized. This tort arose from the cases which the third party uses the violence or threat against a competitor’s future relationship.³³² To satisfy the requirement of this tort, the plaintiff shall explain “the probability of future economic benefit”.³³³ It puts the burden of proof on the plaintiff to examine the fact more than obliging the defendant to justify his act. The plaintiff needs to demonstrate the unlawful interference of the defendant. The burden of proof is placed on the plaintiff because if this tort imposes the burden on the defendant to prove his justification, the competition may become *per se* illegal.

³²⁷*Temperton v Russell* [1893] 1 QB 715

³²⁸Carty, *supra* note 248.

³²⁹Christie et al., *supra* note 9.

³³⁰Carty, *supra* note 248.

³³¹Christie et al., *supra* note 9.

³³²Gina M. Grother, “Interference with Contract in the Competitive Marketplace”, 15 *Wm Mitchell L. Rev.*(1989), <http://open.wmitchell.edu/wmlr/vol15/iss2/6>.

³³³*Id.*

3.6.2 Restatement (Second) of Torts

Tort law is state law created by the courts (common law) and by legislatures (statutory law).³³⁴ Generally, judges and states use the Restatement (Second) of Torts as an influential guideline. This Restatement was made by the American Law Institute for the purpose of explaining the general law of the United States.³³⁵

Under Restatement (Second) of Torts, §766B³³⁶, “one who intentionally and improperly interferes with another’s prospective contractual relation is subject to liability to the other for the pecuniary harm resulting from the loss of the benefits of the relation, whether the interference consists of:

- (a) Inducing or otherwise causing a third person not to enter into or continue the prospective relations or
- (b) Preventing the other from acquiring or continuing the prospective relation.”

The existence of contract is not required to constitute the cause of action of this tort. The substantial matter is to prove the pecuniary damages resulting from the unlawful interference.

3.6.2.1 Seven Factors Evaluating the Improper Conduct

In accordance with the Restatement§767B, the tortious interference with prospective contractual relation requires the improper conduct of the defendant.³³⁷ However, the Restatement does not provide the definition of “improper” but set forth seven factors as a guideline for a court to decide whether a defendant’s behavior was improper or not.

The interference with the prospective relations is lawful unless it can be proved that improper means were used. To evaluate whether the conduct is

³³⁴ “*Tort Law: An Overview*”, CORNELL UNIVERSITY LAW SCHOOL, <https://www.law.cornell.edu/wex/tort>.

³³⁵ *Id.*

³³⁶ Restatement (Second) of Torts, §766B

³³⁷ Restatement (Second) of Torts, §767B

improper or not, seven factors³³⁸ must be taken into consideration such as, nature of the actor's act, his motive and the remoteness of the actor's act to the interference. There are some comments arguing that §766B is vague, unpredictable and rather unable to guide person.³³⁹ To avoid these problems, some states have been away from the Restatement approach and create their own standards. The states that do not follow the Restatement's guideline can be divided into two categories.

Firstly, the defendant may be liable for interference if his action is independently tortious or violates some other established standard of the trade or profession. This approach provides more clarity than section §767; however, business customs and trade standards are something difficult to define and quite attach to the subjectivity which may generate to unpredictability.

Relating to the second path, the conduct of defendant must be independently tortious or unlawful to sustain the cause of action for tortious interference. Subject to this standard, only the conduct that is recognized to be illegal under the common law or statute can be actionable. The jurisdictions following this principle are, among other states, Texas in *Wal-Mart Stores, Inc v. Sturges*³⁴⁰ and California in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*³⁴¹

3.6.2.2 The Restatement's List of Permitted Interference

-
- ³³⁸ 1) The actor's conduct;
 2) The actor's motive
 3) The interests of the other with which the actor's conduct interferes;
 4) The interests sought to be advanced by the actor;
 5) The social interests in protecting the freedom of action of the actor and the contractual interests of the other;
 6) The proximity or remoteness of the actor's conduct to the interference; and
 7) The relations between the parties.

³³⁹Ryan M. Connor, "Revisiting the Restatement's Tortious Interference Provisions", AMERICAN BAR ASSOCIATION (Jun. 3, 2014), <http://apps.americanbar.org/litigation/committees/businessstorts/articles/spring2014-0513-revisiting-restatement-of-torts-tortious-interference-provisions.html>.

³⁴⁰*Wal-Mart Stores, Inc. v. Sturges* 52 S.W.3d 711 (2001)

³⁴¹*Della Penna v. Toyota Motor Sales, U.S.A., Inc*, 11 Cal.4th 376 (1995)

The list of interference which is allowed pursuant to the Restatement is as follows:³⁴²

First of all, as long as an individual does not engage in any wrongful conduct or breach of statute, he has liberty to compete for his own prospective business or clients, provided that at least some part of his purpose is justifiable as competitive.³⁴³

Secondly, under similar situation, a person has freedom to induce any party not to enter into a contract with the plaintiff, if he has an interest in such party's financial affairs.³⁴⁴

Thirdly, an individual has liberty to protect a person for whose welfare he has to be responsible by interfering either with a prospective or existing contract on behalf of that person; however, if wrongful means are involved, this does not protect him.³⁴⁵

Fourthly, so long as the interference does not really cause a breach of contract, the interference with the plaintiff's business may be justified on the grounds of competition or pursuing his own business or interests (influencing business policy of the plaintiff by inducing person not to enter into business relations with the plaintiff).³⁴⁶

Finally, a person can assert the claim on the basis of *bona fide* principle despite the fact that he knows that his claim will interfere with the others' prospective contract. For instance, person can say, in good faith, that "you can't buy that land from the plaintiff, it's my land."³⁴⁷

³⁴²Dan B. Dobbs & Ellen M. Bublick. **Cases and Materials on Advanced Torts: Economic and Dignitary Torts : Business, Commercial, and Intangible Harms** (2006).

³⁴³*Id.*

³⁴⁴*Id.*

³⁴⁵*Id.*

³⁴⁶*Id.*

³⁴⁷*Id.*

3.6.2.3 Damages

Damages can be recovered in the form of the plaintiff's direct expenses, lost profits, prospective contracts that had been promised but not executed, damage to the plaintiff's business reputation and permanent destruction of the business relationship.³⁴⁸

(1) Recoverable Damages

The recoverable damages available for interference with existing contract are similar to damages available for unlawful interference with prospective business relations.³⁴⁹ The damages can be recovered by the plaintiff if it is a proximate and natural consequence as a result of the interference³⁵⁰ and actual harm or damage emerges resulting from the interference."³⁵¹ Furthermore, the recoverable damages in the form of pecuniary and consequential losses available for interference with contract are also available for unlawful interference with prospective contract as outlined in §774A of the Restatement (Second) of Torts.

§774A of the Restatement (Second) of Torts states:

"One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for:

(a) The pecuniary loss of the benefit of the contract or the prospective relation;

(b) Consequential losses for which the interference is the legal cause; and

(c) Emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference"³⁵²

³⁴⁸David N. Anthony, "Tortious Interference with Contract or Business Expectancy: An Overview of Virginia Law", Vt. BJ. (2006), http://www.troutmansanders.com/files/upload/Tortious_Interference.pdf.

³⁴⁹Richard G. Munzinger, "Damages in a Commercial Context", TexasBar CLE (2004), http://www.texasbarcle.com/Materials/Events/4214/64758_01.pdf

³⁵⁰*Id.*

³⁵¹*Id.*

³⁵²Restatement (Second) of Torts, §774A

In such case, ill-will, spite or other evil motives are not required to show.³⁵³

(1.1) Compensatory Damages

The substantial element of a claim of unlawful interference is actual damage. If person is held to be liable for unlawful interference either with existing contract or prospective contract, he must be liable for the pecuniary loss of the benefits of the contract or the relation.³⁵⁴ When the defendant interferes with the plaintiff's prospective contractual relations, the plaintiff may recover the lost profits that would have been made from the prospective contracts.³⁵⁵

(1.2) Punitive Damages

Generally, punitive damages are allowable in actions for interference with contract or business relationship under some limitations.³⁵⁶ The punitive damages are permitted to the extent that not violates public policy or the due process clause.³⁵⁷ In Texas, to recover these damages, malice must be proved.³⁵⁸

(1.3) Lost Profits

Owing to the nature of the interference with business relations, a plaintiff may recover lost profits of the reduction in his business, aside from damages recoverable under Restatement (Second) of Torts §774A. Future lost profits is allowable to recover under interference with prospective business relations. Both loss of potential profits and lost profits based on future growth of business can be recovered.³⁵⁹ The competent evidence showing the amount of the loss with reasonable certainty must be shown in order to recover lost profits. It is not necessary that profits must be exactly calculated; rather, it is sufficient that there is an evidence of a reasonable degree of certainty and exactness.³⁶⁰

³⁵³Munzinger, *supra* note 349.

³⁵⁴*Id.*

³⁵⁵ABA Section of Antitrust Law, **Business Torts and Unfair Competition Handbook**, 2nd ed. (2006)

³⁵⁶*Id.*

³⁵⁷Munzinger, *supra* note 349.

³⁵⁸*Id.*

³⁵⁹*Id.*

³⁶⁰*Id.*

(2) Unrecoverable Damages

(2.1) Attorneys' fees

Like tortious interference with contract claims, attorneys' fees are not recoverable under the claim for unlawful interference with prospective relations.³⁶¹ Likewise, it should be noted that a claim for unlawful interference with a prospective contract cannot rely upon a void contract.

3.6.2.4 Justification, Defenses and Privileges

To examine the unlawful interference, the court will balance the competing interests to determine whether a privilege exists or not.³⁶² The interests under the contract weigh heavier than those under the prospective contract or under the competition. Therefore, competition is not a justification for inducing breach of a contract. In contrast to the right to receive the benefits of a contract, the right to engage in a business relationship is not absolute, and must be exercised with regard to the right of others. Simply, each time a person competes with others, he interferes with the prospective advantage of others.³⁶³ When the contractual relations between the plaintiff and the third party are only potential, it is deemed as the interest of the public that anyone is entitled and free to gain them for himself provided that he uses reasonable and fair means.

“Competitive privilege” to interfere with prospective business a relationship is widely recognized although its permutations are not always thoroughly understood.³⁶⁴ This privilege is reflected in §768 of the Restatement (Second) of Torts,

“(1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if;

³⁶¹Munzinger, *supra* note 349.

³⁶²John A. Sturgeon, “*Business Related Torts*”, **CALIFORNIA BUSINESS LITIGATION**, 11-1 (David Peyerwold and Sally St. Lawrence eds., 2015).

³⁶³*Id.*

³⁶⁴ABA Section of Antitrust Law, *supra* note 355.

1. The relation concerns a matter involved in the competition between the actor and the other.

2. The actor does not employ wrongful means.

3. His action does not create or continue an unlawful restraint of trade and

4. His purpose is at least in part to advance his interest in competing with others.

(2) The fact that one is competitor of another business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.”³⁶⁵

This rule is a special application of the principle that actionable interference must be improper and recognizes that one’s privilege to engage in business and to compete with other implies a privilege to induce third persons to do business with him rather than with his competitors.³⁶⁶ Accordingly, it is generally accepted that a competitor who causes a third person not to enter into a prospective contractual relation, or not to continue in existing contracts terminable at will, is not liable for interference so long as the competitor does not employ improper means and his purpose is at least in part to advance his interest in competing with the other. Nonetheless, this rule does not apply in cases of interfere with an existing contract not terminable at will.

The Restatement (Third) of Unfair Competition rejects the notion that competition is a defense, justification or privilege, in favor of a general principle of non-liability.³⁶⁷ This view is in accordance with the recognition underlying the Restatement (Third) that there is a freedom to compete in the marketplace that should be upheld absent the use of unfair means.³⁶⁸

³⁶⁵Restatement (Second) of Torts, §768

³⁶⁶ABA Section of Antitrust Law, *supra* note 355.

³⁶⁷*Id.*

³⁶⁸*Id.*

Burden and Types of Proof

While the prima facie elements of this tort are frequently quite similar, the burden of proof can vary greatly from state to state.³⁶⁹ In some jurisdictions, the plaintiff bears the burden of proving that the interference was improper or that the defendant's conduct exceeded the scope of the privilege.³⁷⁰ In other jurisdictions, defendant must prove the privilege which is a defense. Some courts have held that the burden shifts depending on whether or not a qualified privilege exists.³⁷¹

3.6.3 Interests Protected

The business expectancy or prospective relationship must be proved. The tort "protects non-formalized or anticipated business relationships which are reasonably certain to occur, but which are nonetheless prospective."³⁷²

This tort protects expectancies engaged in ordinary commercial dealings, not expectancies involved, for example, in governmental licensing processes.³⁷³ In addition to proving the existence of the relationship, a plaintiff must demonstrate that "it is reasonably probable that the economic advantage would have been realized but for the defendant's interference."³⁷⁴ Anyway, it does not require the plaintiff to prove that the defendant was aware of the exact prospective relationship.³⁷⁵

3.6.3.1 Definition and Scope of Economic Relationship

The terms "business advantage", "business expectancy", "business interests", "business relations", "economic advantage", "economic interests", "economic relations" and any others similar terminology are prevailingly and interchangeably used. Some courts have provided some guidance to determine

³⁶⁹ ABA Section of Antitrust Law, *supra* note 355.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

economic relation and explained that it is “something less than a contractual right, something more than a mere hope and exists only when there is a reasonable probability that a contract will arise from the parties’ current dealings.”³⁷⁶

Trade or business interest is a broad concept which surrounds limited interests e.g. franchisees, agents, retailer, distributors³⁷⁷, which are not the owner of business, may sue under this tort. Business interests have wide scope including interests which are equal to economic interests i.e. interests from the formation of contract, employee’s employment, ability to sell goods, deliver goods, hire out goods, or provide services to prospective customers and to obtain a financial support from a financier.³⁷⁸ The future interests can also be protected as well as present interests. Breach of contract is not required to be actionable, mere interference with the prospective business interests is adequate. The examples of interest protected are as follows:

(1) At-Will Employment Relationship

A prospective advantage may exist between an employer and at-will employee. The term “at-will employment” is a term used in US labor law for the employment which an employer is entitled to terminate the employment with the employee for any reason without just cause and prior notice, and vice versa, except for illegal reason³⁷⁹ like discrimination. Interference with an employer and at-will employee is primarily an interference with the future relationship between them since the interest under this contract is future relations between the parties; the contracting party has no legal guarantee of them.³⁸⁰

Procuring the termination of an at-will employment relationship may be actionable under intentional interference with prospective advantage.³⁸¹ An at-

³⁷⁶ABA Section of Antitrust Law, *supra* note 355.

³⁷⁷Leahy et al., *supra* note 42.

³⁷⁸*Id.*

³⁷⁹Bridget Miller, “*What Does At-Will Employment Really Mean?*”, HR DAILY ADVISOR (2014), <http://hrdailyadvisor.blr.com/2014/05/01/what-does-at-will-employment-really-mean/>.

³⁸⁰*Id.*

³⁸¹Sturgeon, *supra* note 362.

will contract is in reality only a prospective economic expectancy, not an enforceable contract.³⁸²

Each state takes different approaches when applying unlawful interference claims to at-will contract. Some jurisdictions hold that at-will contracts cannot give rise to tortious interference claims at all while some state recognize this as an interest protected under interference with prospective advantage or business expectancy.³⁸³

For example, a claim for unlawful interference lay against the defendant who induces at-will employees of a law firm to join a new firm. The California Supreme Court decided that interference with an at-will employment relationship is unable to be pleaded as unlawful interference unless the defendants had engaged in independently wrongful acts.³⁸⁴ Such claim is considered to be for interference with prospective economic advantage rather than interference with contractual relations³⁸⁵ as appeared in *Reeves v. Hanlon*, 17 Cal.Rptr.3d 289 (Sup. Ct., Calif., 2004) .

In *Reeves v. Hanlon*, 17 Cal.Rptr.3d 289 (Sup. Ct., Calif., 2004), two lawyers left a law firm to create a rival firm and they induced at-will employees of Reeves to quit and join them. The court concluded that a former employee is free to involve in a competitive business for themselves and to compete with his former employer, provided that such activity must be fair and legitimate. Ordinarily, hiring the employees of another is not a tort but if unfair means are employed in interfering with such relations, the liability can be incurred. Here, the two lawyers engaged in wrongful conducts such as taking client information and it therefore can be count as unfair methods of competition.³⁸⁶

³⁸²Dobbs & Bublick, *supra* note 342.

³⁸³Jeremy V. Farrell, “Blended Liability for a Blended Tort: The Interaction Between At-Will Employees, Non-Compete Covenants and Tortious Interference Claims”, (2011) Louis Jackson National Student Writing Competition, Paper 10, **Chic Kent Law Rev.**, http://scholarship.kentlaw.iit.edu/louis_jackson/10

³⁸⁴Sturgeon, *supra* note 362.

³⁸⁵Conrad L. Rushing et al., **Matthew Bender Practice Guide: California Unfair Competition and Business Torts**, (2016).

³⁸⁶“Hiring Away At-Will Employees from a Competitor Can Involve a Tort”, SOUTH WESTERN CENGAGE LEARNING,

(2) Debtor and Creditor Relationship

A person unfairly induced creditors to reject an extension of credit to and ask for immediate payment from the debtor for the purpose of ruining the business of the debtor may commit an action for interference with a prospective economic advantage as appeared in *Masoni v. Board of Trade* 119 Cal.App.2d 738 (1953).³⁸⁷

(3) Customer Relationship

Occasionally, the length of the relationship was taken into account; a customer relationship is contemplated as a protectable right by some courts. For example, the relationship remained for close to twenty years although the customer offered its potential business interests to all bidders every year as appeared in *Conoco, Inc. v. Inman Oil Co. Inc.*, 815 F.2d 514 (8th Cir. 1987)³⁸⁸

(4) Course of Dealing

Some courts accepted valid business expectancy may stem from a regular course of similar prior dealings.³⁸⁹

(5) Invalid Contract

An action for unlawful interference is not barred by an invalid contract. Conversely, a claim for interference with contract or contractual relations cannot be based upon an invalid contract.³⁹⁰

(6) Sale of Business

A main customer of a supplier informed a prospective purchaser of the supplier's business that the customer would exercise its right to terminate the contract with the supplier if the proposed sale of the supplier's business will occur. The customer's statements were made solely to frustrate the proposed sale and allow the customer to purchase the business for a fraction of the original price. The court held that a cause of action for interference with a prospective advantage was

http://www.swlearning.com/blaw/cases/employment_law/1204_employment_law_01.html.

³⁸⁷Sturgeon, *supra* note 362.

³⁸⁸Zachary G. Newman & Anthony P. Ellis, "Navigating the Nuances of Tortious Interference Claims", 18 **ABA Sec. Litig.**1, 20 (2011), available at

http://www.hahnhausen.com/uploads/39/doc/2011_06_zgn_ae_navigatingnuances.pdf

³⁸⁹*Id.*

³⁹⁰Rushing et al., *supra* note 385.

established as appeared in *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal.App.3d 13 (1978)³⁹¹

(7) Real Estate Commissions

A land owner placed a sign on her property written "For Sale-Contact Your Local Broker." The final buyer contacted the broker who supplied information on the property. Finally, the buyer completed the sale directly with the owner who then refused to pay the broker his commission. Despite the absence of contract between the owner and the broker, the court determined that there was an economic relationship between the owner and the broker with the capability to evolve into a contractual relationship as appeared in *Buckaloo v Johnson*, 14 Cal.3d 815 (1975)³⁹²

(8) Right to Seek Office

A candidate for elected office stated a cause of action against a defendant who disseminated a pamphlet containing false and misleading representations of endorsement by the Democratic Party, with the intention of preventing the candidate the opportunity for election to the office as appeared in *Gold v Los Angeles Democratic League* 49 Cal.3d 365 (1975).³⁹³

(9) Bidder

Regarding bribery appeared in the case of *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003)³⁹⁴, it involved with a bid to provide South Korea the military equipment. The plaintiff was a military contractor's agent that failed to win the bid because the winning company had bribed state officials in order to acquire the contract. It is obvious that the plaintiff had a reasonable expectancy to get the bid because of the lower price and better equipment but for the interference of the defendant that bribed the official. Notwithstanding the superior bid, the principal lost its bid and the agent therefore did not receive the commission from the principal as a result of the defendant's unlawful act.

³⁹¹Sturgeon, *supra* note 362.

³⁹²*Id.*

³⁹³*Id.*

³⁹⁴*Id.*

In 2015, the decision in *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.*, 234 Cal.App.4th 748 (Cal. App. 2d Dist., 2015), was released by the California Court of Appeal that a second-place lowest bidder on public works projects may sue the winning bidders for intentional interference with prospective economic advantage. In this case, the defendant could win the bid because of the failure to pay its worker the prevailing wage.

In *Roy Allan Slurry Seal, Inc.* 234 Cal.App.4th 748³⁹⁵, the public works contracts were awarded to the defendant to perform road work in Southern California. Later, it was alleged that its winning involved with the failure to comply with the requirement of California's prevailing-wage law. The plaintiffs filed multiple cases suing the defendants on theories that included intentional interference. The plaintiff only sued the defendants and not pursued claims directly against the public entities.

At the beginning, the trial court held that the plaintiff failed to show the economic relationship between him and public agency; however, the appeal court ruled that the relationship between the plaintiff and the public agency that had awarded the contracts existed and it is adequate to maintain the cause of action for intentional interference with prospective economic advantage. Relied upon *Korea Supply Co.* 29 Cal. 4th 1134 (2003), the courts' conclusion limits this claim to bidders who are able to show the cause of action. If the losing bidders can demonstrate that they were the legitimate lowest and actual bidders on a public works contract, they are allowed to file a suit.

In such a case, the plaintiffs were the second-place lowest bidders on public works projects, they claimed that the contract shall be awarded to the lowest bidder and the plaintiffs were the lawful lowest bidders who complied with law requirements and qualified for such contracts. *Korea Supply Co.*, 29 Cal. 4th 1134 (2003) were adopted and expanded to apply to any circumstances that the second-place lowest bidder would have obtained the contract but for the wrongful conduct of the lowest bidder. The court denied the defendant's argument that the plaintiff's protectable potential interest did not exist. The court highlighted its analysis

³⁹⁵Sturgeon, *supra* note 362.

more on the actual expectations of the second-place lowest bidders and less on the existing formal economic relationship between the public entity and the plaintiffs.³⁹⁶

3.6.3.2 Level of the Relationship or Specificity of the Relationship

To constitute the claim, the existence of a business or economic relationship between the plaintiff and a third party must be proved. However, it should understand the level of specificity of the relationship to sustain the claims. Some courts apply lenient approach allowing claim despite the absence of identification or any specific potential customer or prospective contracts. In the case of *Floorgraphics Inc. v. News Am. Marketing In-Store Serv., Inc.*³⁹⁷, the court held that it is not needed to identify specific lost business opportunities in its pleading.³⁹⁸ Conversely, other courts rejected the pleadings that do not contain or identify the actual customers or contracts that were lost in consequence of the alleged conduct as stated in *Soaring Helmet Corp. v. Nanal, Inc.*³⁹⁹ Also, tenuous or insubstantial relationships are insufficient as appeared in *AB Group v. Wertin.*, 59 Cal.App.4th 1022 (1997).⁴⁰⁰

3.6.3.3 Reasonable Probability

The probability of future economic benefit must be proved. The term “probable for the future benefit” means it is more than a mere hope or desire for a benefit.

For example, a Freelance reporter alleged that the defendant’s act forced a newspaper to cease accepting articles written by reporter. The reporter’s expectation to receive newspaper’s payment for future articles, which was the future benefit, was an acceptable expectation for the grounds of the reporter’s past

³⁹⁶Matthew Struhar & Matthew A. Richards. “Bidder Beware: California Court Recognized Intentional Interference Claims for Second Place Bidders in Public Works Contracts”, NIXON PEABODY (25 February 2015), http://www.nixonpeabody.com/CA_court_recognizes_intentional_interference_claims

³⁹⁷Newman & Ellis, *supra* note 388.

³⁹⁸*Id.*

³⁹⁹*Id.*

⁴⁰⁰Rushing et al., *supra* note 385.

relationship with the newspaper, as appeared in *Savage v. Pacific Gas & Elec. Co.*, 21 Cal.4th 434 (1993).⁴⁰¹

In contrast, if the prospective advantage is mere speculative, the cause of action is not established. In *Youst v Longo*, 43 Cal.3d 64 (1987) the racehorse owner sued a competitor racehorse rider for interference because of his accidental whipping of plaintiff's horse during a race, the court stated that the competitor's expectation to win a sport event was too speculative to fulfill the criteria of economic interests.⁴⁰²

Nonetheless, even when the outcome of the contest is virtually certain, a cause of action for interference with prospective advantage may not be allowed, the courts have distinguished *Youst* from cases involving political campaigns and judicial contests in which liability was imposed, recognizing that, in these cases, important public policy considerations were raised.⁴⁰³

Further, the refusal of issuance of a governmental license is too speculative to constitute the cause of action. In *Blank v Kirwan* 39 Cal.3d 311 (1958), the businessman applying for poker club license could not sue city or third party for conspiring to deny license because he had no reasonable expectation it would be granted.⁴⁰⁴

If a discharged attorney has a lien on a former client's recovery, an insurer who pays judgment to the client, despite knowledge of the lien, is liable for intentional interference with prospective economic advantage for making the payment as appeared in *Levin v Gulf Ins. Group.*, 69 Cal.4th 1282 (1999).⁴⁰⁵

In short, the potential interest must be substantial enough to maintain an action for intentional interference and probability of future economic benefit must be more than hope or desire.⁴⁰⁶

⁴⁰¹Rushing et al., *supra* note 385.

⁴⁰²*Id.*

⁴⁰³Sturgeon, *supra* note 362.

⁴⁰⁴*Id.*

⁴⁰⁵*Id.* at 11-18.

⁴⁰⁶Rushing et al., *supra* note 385.

3.6.4 Interpretation of Improper Means

Unlike inducing breach of contract, interference with prospective economic relations is tortious due to the means not because of the ends of the relations. Arguably, improper means element is still not clarified whether it must be independently unlawful or mere unfair practice in many states.

Under US jurisdiction, the improper element varies wildly from state to state and is complex that can cause difficulties in an attempt to instruct the jury. To fulfill this requirement, either “independently wrongful” or “improper” are proposed to instruct the jury. When independently wrongful conduct is required, the act must ordinarily be tortious or criminal pursuant to an independent legal standard. On the other hand, if only improper conduct is required, the factors provided in the Restatement may be considered.⁴⁰⁷

To describe what is improper means, apart from independently tortious or illegal, improper conduct also includes any actions which are not *per se* tortious or unlawful, such as unethical behavior or unfair competition. Improper methods include defamation, misuse of confidential information, violation of established standard of a trade or profession, unethical conduct, and litigation initiated for the wrong reasons.⁴⁰⁸ This shows the difficulty to determine what exactly qualifies as unlawful or improper means requirement. Each state deals with this matter in various ways. Some states interpret in broad manner that the defendant’s conduct will be improper if it is against fair competition or trade practices. On the other hand, some states interpret in narrow basis that the defendant’s act must *per se* unlawful or tortious.

The uncertainty of the unlawful conduct interpretation lasts for long period of time. Some opinion was given that unethical acts and an act violating industry practices and standards should be included in the context of wrongful

⁴⁰⁷Karen S. Precella, “*Jury Instructions for a Claim of Tortious Interference with Prospective Relations*”, 16 **A.B.A. Section Litig.** 4 (2009), law.capital.edu/WorkArea/DownloadAsset.aspx?id=19325.

⁴⁰⁸Anthony, *supra* note 348.

conduct.⁴⁰⁹ The issue that conducts violating “an industry standard” alone may be “wrongful by some legal measure other than the fact of interference itself” was refused by the California courts.⁴¹⁰ The court opined that if allowing conduct which was “unethical” or violated “industry standards” to create unlawful means, it would not maximize the competition and would generate the uncertainty.”⁴¹¹

Also, deceptive conduct was found, by several courts, to be wrongful, the element is fulfilled despite not necessarily unlawful conduct.⁴¹² For instance, in *Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F.Supp.2d 695 (M.D. Pa. 2006) by applying Pennsylvania law, a federal court rejected to grant a defendant a summary judgment in the dispute between competing automobile glass replacement companies.⁴¹³

The defendant, who knew the appointments between the plaintiff and its customer, arranged its technicians to serve the plaintiff’s customer before the time of the scheduled appointment. Such conducts was neither illegal nor independently actionable; however, the federal court applying Pennsylvania law determined that defendant’s acts established wrongful means element required for claim for unlawful interference with plaintiff’s prospective relationships.⁴¹⁴

At the national level, many states are leaving from the Restatement (Second) of Tort while interpreting the improper conduct. Only thirteen states still use the Restatement factors to determine improper conduct whereas thirty-seven states refuse to use the Restatement guideline.⁴¹⁵ Twenty-two of those thirty-seven states require interference to be wrongful or improper as defined by state case law.⁴¹⁶ For the remaining, fifteen states required the interference to be an independent tort or an

⁴⁰⁹Zuber, *supra* note 52.

⁴¹⁰Watkins, *supra* note 1.

⁴¹¹Zuber, *supra* note 52.

⁴¹²*Id.*

⁴¹³*Id.*

⁴¹⁴*Id.*

⁴¹⁵Watkins, *supra* note 1.

⁴¹⁶*Id.*

unlawful act.⁴¹⁷ Evaluating interfering conduct by legal measure instead of factors or standards is likely to be certain and can give the clear guideline for the court.

3.6.5 Cause of Action

The Restatement's analysis has been adopted as a guideline to examine the case. In each state in the U.S., the cause of action varies broadly from state to state and may generate the troubles in guiding the judge.

As guided by the Restatement, the interference can happen when procuring a person not to enter or continue a future business relation. Likewise, it also consist of preventing a person from entering or continuing such relation. The interference is regarded to be legitimate unless improper conduct was committed. Destroying the other's business relations has been considered to be an interference with prospective contractual relations when the defendant has engaged in competition with malice motive.

Even if the elements to constitute the tort of interference with prospective economic advantage differ from state to state, many states share the major elements. The example of elements of gist of action in Texas, Illinois and California will be studied thereafter.

3.6.6 Under California law

Typically, California courts treat contracts as more deserving of protection than prospective economic interests⁴¹⁸ as shown in the case *Della Penna v. Toyota Motor Sales, U.S.A., Inc*, 11 Cal.4th 376 (1995) . It is easier to bring litigation in case of interference with an existing contract than in case where only prospective business interests exist. To sustain a claim for the interference with prospective economic advantage, independently unlawful act must be proved as appeared in the case *Korea Supply Co. v. Lockheed Martin Corp.* 29 Cal. 4th 1134 (2003)⁴¹⁹ whereas it is not required for a claim for interference with an existing contract.

⁴¹⁷Watkins, *supra* note 1.

⁴¹⁸Rushing et al., *supra* note 385.

⁴¹⁹*Id.*

Subject to the California approach, the following elements must be satisfied to establish the cause of action. First of all, the plaintiff has a burden to prove that he had an economic relationship with a probability of future economic benefit. Then, the defendant knew about the plaintiff's economic relationship. Next, the defendant's conduct was substantially certain to interfere with the plaintiff's relationship. After that, the defendant's conduct was independently unlawful. Besides, the defendant disrupted plaintiff's relationship. Eventually, the plaintiff suffered actual injury and the defendant's conduct was a substantial factor in causing the disruption.⁴²⁰

3.6.6.1 Existence of Economic Relationship

If the plaintiff fails to ensure the fact whether they had any prospective contracts with the third party, the court will hold in favor of the defendant. In this tort, existing contract is not required. The defendant usually committed other tort that led to this interference⁴²¹ such as misrepresentation, defamation, assault, and battery.

A prospective contractual relationship is "something less than a contractual right, something more than a mere hope."⁴²² A plaintiff is required to demonstrate that there was a "reasonable probability that a contract will arise from the parties' current dealings."⁴²³

The plaintiff must show the existence of a prospective advantage or business relationship with which the defendant allegedly interfere.⁴²⁴ The plaintiff has a burden to manifest "a colorable economic relationship between the plaintiff and a third party with the potential to develop into a full contractual relationship" as appeared in *Aydin Corp. v Loral Corp.*, 718 F2d 897 (9th Cir 1983)⁴²⁵

⁴²⁰Rushing et al., *supra* note 385.

⁴²¹Sturgeon, *supra* note 362.

⁴²²Vincent R. Johnson, **Advanced Tort Law: A Problem Approach** (2010).

⁴²³ABA Section of Antitrust Law, *supra* note 355.

⁴²⁴Sturgeon, *supra* note 362, at 11-16.

⁴²⁵*Id.*

3.6.6.2 Knowledge of the Economic Relationship

The defendant's knowledge of relationship after interfering is not adequate to maintain the claim. It must be shown that the defendant knew the economic relationship before interfering.⁴²⁶ However, the defendant's knowledge of the plaintiff's specific name or identity is not necessary. General knowledge of the plaintiff's involvement in the relationship is sufficient.⁴²⁷ In brief, knowledge of economic relationship is essential whereas the plaintiff's actual name or identity is not necessary.⁴²⁸

3.6.6.3 Intention

It is not necessary to prove that the defendant acted with specific intention to disrupt with prospective advantage of the plaintiff. Instead, the plaintiff has to prove that the defendant knew that their conduct was "certain or substantially certain to interfere with the plaintiff's economic interest" as appeared in *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937 (2008).⁴²⁹

3.6.6.4 Interference or Disruption

The actual interference with the prospective advantage must be proved.⁴³⁰ The defendant does not interfere or disrupt with the prospective advantage when the defendant's lonely act is to induce meritorious litigation as appeared in *Sessions Tank Liners, Inc. v Joor Mfg., Inc.*, 17 F3d 295 (9th Cir 1994).⁴³¹ Inducing third party to bring litigation on meritorious claim cannot be basis for this liability.⁴³² Likewise, only hiring a competitor's employee without the use of unfair methods is not actionable for interference.⁴³³

⁴²⁶Sturgeon, *supra* note 362, at 11-16.

⁴²⁷*Id.*

⁴²⁸*Id.*

⁴²⁹*Id.*

⁴³⁰*Id.*

⁴³¹*Id.*

⁴³²*Id.*

⁴³³*Id.*

Moreover, it is under the causation. The plaintiff has to show that but for the tortious interference, a reasonable probability of prospective advantage would have been attained.⁴³⁴ It must be reasonable that the prospective advantage would have been realized but for defendant's interference. In *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003)⁴³⁵, the court spelled out that interference with existing contract is a wrong in and of itself which constitutes a cause of action. On the contrary, interference with prospective advantage is not actionable by itself.

3.6.6.5 Improper Means

Under California's approach, interference must be wrongful by some legal measures. The court reasoned that interference with prospective advantage must be differently treated from interference with contract because law should carefully draw the boundaries of legal liability in a manner that maximizes the competition and the legal penalties should not be imposed on fair competition.⁴³⁶ In addition, the court should not use the same standard for evaluating the unlawful interference with prospective advantage as it does when examining the interference with the contract because the contract rights deserve greater protection than prospective advantage.⁴³⁷ Finally, evaluating improper conduct in the same manner for interference with business expectancy and interference with contract "blurs the analytical line"⁴³⁸ between the two and "invites both uncertainty in conduct and unpredictability of its legal effect."⁴³⁹

The plaintiff must prove that the act of the defendant was unlawful far beyond the fact of the interference itself. To satisfy this requirement, the defendant's conduct must violate the constitutional, statutory, regulatory, common law, or other determinable legal standard. However, allegations of unethical conduct or conduct that violates vague industry standards and practices are not sufficient to be considered independently unlawful.

⁴³⁴Sturgeon, *supra* note 362, at 11-16.

⁴³⁵*Id.*

⁴³⁶Watkins, *supra* note 1.

⁴³⁷*Id.*

⁴³⁸*Id.*

⁴³⁹*Id.*

The California Supreme Court required that a defendant's conduct must be either an independent tort or an unlawful act because this requirement creates a clear distinction between the types of conduct that is improper for interference with contract versus interference with business expectancy. Further, this requirement provides notice to defendants that their behavior may subject them to tortious liability.

(1) Independently Unlawful Conduct

To increase his gain, person may cut rates or prices, allow rebating or discounts, deny dealing with the third party unless they stop negotiating with the claimant. All of these actions do not constitute the liability.⁴⁴⁰ In California State, the California Supreme Court ruled that an employer who used a non-compete agreement to force an employee's future contract committed intentional interference with the employee's prospective economic advantage⁴⁴¹ on the grounds that non-compete provisions are illegal under California law.⁴⁴²

The conduct of the defendant must be independently unlawful. The term "independently wrongful conduct" means that "it was wrongful by some legal measure other than the fact of interference itself."⁴⁴³ That is to say, apart from the act of the interference itself, the conduct must violate some laws or statutes.

The California courts spelled out that the defendant's conduct is independently wrongful when it is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard"⁴⁴⁴ and it is "wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive."⁴⁴⁵ The core of the competition privilege is that as long as the interfering act does not engage in any independently wrongful conduct which is other

⁴⁴⁰Zuber, *supra* note 52.

⁴⁴¹*Id.*

⁴⁴²"*California Law on Restrictive Covenants and Trade Secrets*", AMERICAN BAR, https://www.americanbar.org/content/dam/aba/events/labor_law/2013/03/employment_rightsresponsibilitiescommitteemidwintermeeting/4_orrick.authcheckdam.pdf

⁴⁴³*Id.*

⁴⁴⁴*Id.*

⁴⁴⁵*Id.*

than the act of interference, person is able to interfere with a prospective relationship of the competitors with a third party.⁴⁴⁶

Della Penna v. Toyota Motor Sales⁴⁴⁷

Facts: The plaintiff was a distributor of automobiles. The defendant issued a policy to prohibit Toyota dealer to sell luxury cars to the other parties outside the United States for the purpose of protecting its dealership network. The defendant published a list of “offenders”, who broke this policy and distributed it to all the franchise owners. The defendant declared that if any franchise owners dealt with the parties on the list, they would be sanctioned from and punished by the defendant including the loss of the franchise. The plaintiff’s name was on the list of offenders. Consequently, the plaintiff lost much of its business and therefore sued the defendant for tortious interference with business prospects.

Held: The court held that to rule in favor of the plaintiff, the defendant’s act must satisfy the unlawful conduct requirement. The court explained “wrongful” as “outside the act of legitimate business transactions.” As a result, the court held in favor of the defendant.

It must be proved that the defendant not only interfered with the plaintiff’s potential relationship, but also committed an act that was wrongful by some legal measure other than the fact of interference itself. Multiple acts seemed to be interference with economic relations is only the competitive practice in the market system. For the purpose of recovery for the interference of economic relation, the claimant must prove that the unlawful means are employed in the course of interference. Mere evidence that the interference happened is not enough to make a case for this tort. This case announced that both malicious motives and mere evidence of interference is not enough to constitute the tort.

⁴⁴⁶California Civil Jury Instructions (CACI), <https://www.justia.com/trials-litigation/docs/caci/2200/2202.html>

⁴⁴⁷ *Della Penna v. Toyota Motor Sales, U.S.A., Inc*, 11 Cal.4th 376 (1995)

(2) Example of Unlawful Conduct Shown

(2.1) Bribery or Fraud

Regarding bribery appeared in the case of *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003), the losing bidder for a contract for the sale of military equipment sued the winning bidder on a claim for unlawful interference. It was obvious that the plaintiff had a reasonable expectancy to get the bid because of the lower price and better equipment but for the interference of the defendant that bribed and offered sexual favors to the official.

Likewise, in the case of *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.*, 234 Cal.App.4th 748 (Cal. App. 2d Dist., 2015) , the California Court of Appeal decided that a second-place lowest bidder on public works projects may sue the winning bidders for intentional unlawful interference.⁴⁴⁸ In this case, the defendant won the bid because of the failure to pay its worker the prevailing wage. At the beginning, the trial court decided that the plaintiff failed to show the economic relationship between him and public agency; however, the appeal court ruled that the relationship between the public agency and the plaintiff existed and it is enough to maintain the claim for unlawful interference. Nonetheless, the courts' conclusion limits this claim to the bidders who is capable to demonstrate that they are the legitimate lowest bidders on a public works contract.⁴⁴⁹

(2.2) Conduct Expressly Prohibited by Law

The noncompetition clause is not permitted in California State and using this clause is therefore determined as independently unlawful conduct. In *Edwards v. Arthur Andersen LLP* 44 Cal.4th 937 (2008), the defendant who was an employer used the noncompetition clause to restrain the plaintiff who was an employee from future employment. It was held by the California Supreme Court that using a non-compete agreement by an employer to restrict his employee from future employment satisfied the unlawful interference with prospective advantage of the employee.⁴⁵⁰

⁴⁴⁸Struhar & Richards, *supra* note 396.

⁴⁴⁹*Id.*

⁴⁵⁰Zuber, *supra* note 52.

(3) Example of Unlawful Conduct Not Shown

(3.1) Improper Industry Practices

California courts had previously rejected the argument that conduct merely violating “industry standards” could be “wrongful by some legal measure other than the fact of interference itself.”⁴⁵¹

In *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, 116 Cal.Rptr. 2d 358 (Ct.App. 2002) the defendant who was an aluminum parts subcontractor sought business from a third party, with which the plaintiff already had a contract. The plaintiff who was a manufacturer of the aluminum parts sued the defendant, one of its subcontractors that the defendant obtained the drawings in the course of its work as subcontractors and employed such drawings to gain a competitive edge against the plaintiff in violation of industry practices and standards.⁴⁵² But, it was insufficient to be considered independently unlawful.⁴⁵³

The court reasoned that if allowing conduct which was “unethical” or violated “industry standards” to create unlawful means and impose the liability, it would not maximize the competition and would generate the uncertainty.⁴⁵⁴ In summary, while independently wrongful act is not required for interference with contractual relations claim, it is essential element to satisfy and support the interference with prospective economic advantage claim.

3.6.6.6 Damages

The plaintiff has to prove the actual damages. Both compensatory and punitive damages are available for interference with a prospective economic advantage.⁴⁵⁵

In *Robi v Five Platters Inc.* 918 F2d 1438 (9th Cir 1990), compensatory damages were awarded for lost profits, which were calculated by taking the most conservative difference between the parties’ gross earnings and applying the

⁴⁵¹Zuber, *supra* note 52.

⁴⁵²*Id.*

⁴⁵³Rushing et al., *supra* note 385.

⁴⁵⁴Zuber, *supra* note 52.

⁴⁵⁵Sturgeon, *supra* note 362.

plaintiff's lowest profit rate.⁴⁵⁶ The evidence needed to support the award of punitive damages was the defendant's malice and ill will towards the plaintiff.⁴⁵⁷

In summary, to satisfy the claim for unlawful interference under California law⁴⁵⁸, the plaintiff has to prove that the plaintiff has an existing economic relationship with a third party, with a probability of future economic benefit. Moreover, the defendant knows about the economic relationship. Such knowledge must occur before performing interfering act. The defendant acted intentionally or negligently to disrupt relationship between plaintiff and third party. The defendant's conduct must violate a constitutional, statutory, or any other legal standard as well as common law standard other than interference itself. The defendant must disrupt with the relationship; defendant's act was cause in fact of disruption and the plaintiff suffered loss of economic interests. Lastly, the defendant's conduct was a substantial factor in the plaintiff's injury.

3.6.7 Texas Approach

Like most states in U.S., a claim for unlawful interference has long been recognized in Texas⁴⁵⁹. However, the liability basis which conduct is prohibited has never been explicitly clarified until 2001.⁴⁶⁰

With respect to Texas law, to give rise to the cause of action, the ingredients consist of a reasonable expectancy that the plaintiff would enter into a business relationship, the independent tortious or wrongful conducts of the defendant, the defendant's desire to prevent the relationship from establishing, damage or loss resulting from the defendant's interference.⁴⁶¹

3.6.7.1 A Reasonable Probability that the Plaintiff Would Have Entered Into a Business Relationship

⁴⁵⁶Sturgeon, *supra* note 362.

⁴⁵⁷*Id.*

⁴⁵⁸Rushing et al., *supra* note 385.

⁴⁵⁹Christie et al, *supra* note 9.

⁴⁶⁰*Id.*

⁴⁶¹Rushing et al., *supra* note 385.

A claim for unlawful interference can be established if a plaintiff can prove that more than mere negotiations occurred.⁴⁶² Though it is not required to show that the contract would have certainly been made but for the interference, the result must have been reasonably probable and the entire facts and situations attributable to such transaction will be considered.⁴⁶³

3.6.7.2 The Independent Tortious or Wrongful Conducts of Defendant

Unlawful interference with prospective contract is different from unlawful interference with contract. It is reasonable when the defendant procuring a breach of contract is obliged to demonstrate some privileges or justifications for preventing others from their interests acquired under the contract. Nonetheless, in the event that two parties compete for same interest which no one is entitled, then no one can be more privileged or justified in their enrichment.⁴⁶⁴ If the acts of each individual are legitimate, no one should be alleged on his acts.⁴⁶⁵ In evaluating interference with prospective relations, privilege and justification are useful whereas these are not helpful for assessing the interference with an existing contract.⁴⁶⁶

As quoted from the Texas Supreme Court, liability for unlawful interference may be imposed if the plaintiff can prove that the act of the defendant resulted in loss to him and such conduct was either independently tortious or unlawful.⁴⁶⁷ By “independently tortious”, the court provided that the acts must breach some other recognized tort duty.⁴⁶⁸ Simply, it means the action that is already considered to be wrongful in accordance with the statute or the common law.⁴⁶⁹

Previously, Texas courts described that the act which is “wrongful”, “malicious”, “improper”, “below the behavior of fair men similarly situated,” or done

⁴⁶²Richardson-Eagle, Inc. v. William M. Mercer, Inc., 213 S.W.3d 469, 475 (Tex.App.-Houston [1st Dist.] 2006, pet. denied).

⁴⁶³*Id.*

⁴⁶⁴*Id.*

⁴⁶⁵*Id.*

⁴⁶⁶Christie et al, *supra* note 9.

⁴⁶⁷Wal-Mart Stores, Inc. v. Sturges 52 S.W.3d 711 (2001)

⁴⁶⁸*Id.*

⁴⁶⁹Precella, *supra* note 409.

“with the purpose of harming the plaintiff” may result in the actor’s liability but not including the conduct which is “competitive”, “privileged”, or “justified”.⁴⁷⁰ The court used a specific description by applying the vague and wide terminology to define the standard of unacceptable, unreasonable and illicit action.

The Texas Supreme Court mentioned that the Restatement (First) of Torts “did almost nothing to define the parameters of tortious conduct” and even if the Restatement (Second) realizes the problems but the solution is not given.⁴⁷¹ Then, in 2001, the case *Wal-Mart Stores, Inc. v. Sturges* 52 S.W.3d 711 (2001) was released and it therefore clarified this body of law.

In 2001, the Supreme Court of Texas stated that “to establish liability for interference with a prospective contractual or business relation, the plaintiff must prove that it was harmed by the defendant’s conduct that was either independently tortious or unlawful.”⁴⁷² To avoid any misunderstanding, the court stated “we mean conduct that would violate some other recognized tort duty.”⁴⁷³ The court reasoned that a requirement that interference must be either an independent tortious or otherwise unlawful is necessary because “no other workable basis exists for distinguishing between tortious interference and lawful competition.”⁴⁷⁴

When glancing at most Texas cases where the claimant actually recourse damages for unlawful interference claim, most acts of the defendant were independently unlawful in these forms, i.e. fraudulent or defamatory statement or breach of state law.⁴⁷⁵ By independently tortious, the independent tort is not required to be proved by the plaintiff. Rather, the plaintiff is required to prove that the defendant’s conduct would-be actionable under a recognized tort.⁴⁷⁶

By creating more understanding, the court gave the examples:

The first example, a defendant, by threatening a customer with bodily harm if he deals or establishes the business relationship with the plaintiff, will

⁴⁷⁰Christie et al, *supra* note 9.

⁴⁷¹Connor, *supra* note 339.

⁴⁷²Watkins, *supra* note 1.

⁴⁷³*Id.*

⁴⁷⁴*Id.*

⁴⁷⁵*Id.*

⁴⁷⁶*Id.*

be held liable for unlawful interference on the grounds that his conduct towards the customer can be recognized as assault, which is independently tortious⁴⁷⁷ and defendant therefore commits an unlawful interference against the plaintiff. This action can be a remedy for any acts that other tort actions may not reach because the action is available only for an act that is recognized to be wrongful pursuant to the statute or the common law.⁴⁷⁸ As appeared in the abovementioned scenario, the plaintiff cannot sue for assault. In such case, what the plaintiff has to prove is that the act of the defendant towards the plaintiff's potential customers could satisfy the requirement of assault.⁴⁷⁹

The second example, it relates to defamatory or fraudulent statement about the plaintiff that was asserted by the defendant to the plaintiff's prospective customer. Such conducts which are defamation and fraudulent misrepresentation are prohibited by law. The plaintiff suffered from the fraudulent statements made by the defendant may recover for damages and the plaintiff is not required to show the third person was really defrauded.⁴⁸⁰ Nevertheless, if the statements asserted by the defendant were not made with an intention to deceive, then they are not actionable.⁴⁸¹

3.6.7.3 Desire to Prevent the Relationship from Establishing

With regard to intent to injure, the plaintiff must demonstrate that the defendant acted with an intention to disrupt with the plaintiff's prospective contract with the potential customers or the third party.⁴⁸² As held in *Bradford v. Vento*, 48 S.W.3d at 757, if there is no an intent to injure the plaintiff's business relations, tortious interference cannot be found. The court has summarized that interference is intentional "if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result."⁴⁸³ The court further stated that "if the actor had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose,

⁴⁷⁷Wal-Mart Stores, Inc. v. Sturges 52 S.W.3d 711 (2001)

⁴⁷⁸*Id.*

⁴⁷⁹*Id.*

⁴⁸⁰*Id.*

⁴⁸¹*Id.*

⁴⁸²Coinmach Corp. v. Aspenwood Apartment Corp. 417 S.W.3d 909 (Tex. 2013).

⁴⁸³*Id.*

the interference may be found to be not improper.” Only participating in the transaction is not sufficient to establish an intentional action to harm the plaintiff.⁴⁸⁴

3.6.7.4 Harm or Damage As a Result of Defendant’s Interference

For recovering damages under unlawful interference with prospective advantage, the actual damages proximately caused by defendant’s willful and intentional action must be proved.⁴⁸⁵

*Wal-Mart Stores, Inc. v. Sturges (2001)*⁴⁸⁶

Facts: Sturges, local investors, desired to buy an area situated next to a Wal-Mart store and Wal-Mart was entitled approve development of that area. They wished to build a facility of 51,000 square feet and then, they sent a non-binding letter of intent to lease aforementioned structure to Fleming Foods, a grocery store chain. Fleming liked the location which is right next door to Wal-Mart.

However, Wal-Mart only allowed a construction of 36,000 square feet. After that, Wal-Mart desired to buy the vacant lot for the purpose of extending its existing store. Wal-Mart notified Fleming Foods’ management that it desired to buy the lot and if Fleming Foods refused, it would relocate its existing store elsewhere. Fleming Foods then ceased negotiating with Sturges on the grounds that there is no need to construct a grocery store if it will not situate adjacent to a Wal-Mart store. Sturges brought a suit against Wal-Mart for tortious disruption with their future lease with Fleming Foods.

Held: The plaintiff did not have any evidence to show that the defendant engaged in the conduct that was considered as wrongful by any other law; there is no evidence of deceit, fraud, defamation or misrepresentation. The case therefore was dismissed.

The legitimate competition is not unlawful interference unless it is accomplished by independently tortious conduct, even though it might be unlawful

⁴⁸⁴Coinmach Corp. v. Aspenwood Apartment Corp. 417 S.W.3d 909 (Tex. 2013).

⁴⁸⁵Munzinger, *supra* note 349.

⁴⁸⁶Wal-Mart Stores, Inc. v. Sturges.(2001), 52 S.W.3d 711.

interference with any contract not terminable at will. This case demonstrates the encouragement of competition; as long as the actions are not independently tortious then it is all good to go. When two parties attempt to compete for interests which no one has privilege, their conduct can be justified or privileged for the purpose of pursue his own interests and neither can claim that he has more privilege. If the conduct of each individual is lawful, such conduct should not be actionable.

3.6.8 Illinois Law

In accordance with Illinois law, to constitute this claim, “the existence of valid business expectancy by the plaintiff, the defendant’s knowledge of the expectancy, the defendant’s intentional and unjustified interference which prevents the realization of the business expectancy and damages” must be proved.

3.6.8.1 Existence of Valid Business Expectancy

To fulfill the requirement, the loss of specific opportunity or customers must be proved. Some courts says that the opportunity interfered with must be represented by a specific person. Illinois courts have stated that the first element of a prima facie case for tortious interference is the plaintiff had valid business expectancy. This requires allegations of business relationships with specific third parties or that the plaintiff must identify specific lost customers or economic relationships.⁴⁸⁷ Identifying the third parties with whom he had valid business expectancy is required to be proved by the plaintiff; otherwise the claim would be failed.

Moreover, the Supreme Court of Illinois stated that “hope of receiving a job offer is not a sufficient expectancy” to sustain the requirement of existing business expectancy.⁴⁸⁸ Only tenuous basis for claiming business expectancy is not enough.

⁴⁸⁷Dobbs & Bublick, *supra note* 342.

⁴⁸⁸Anderson v. Vanden Dorpel, 172 Ill.2d 399, 217 Ill.Dec. 720, 723-24, 667 N.E.2d 1296, 1299 (1996), <http://caselaw.findlaw.com/us-7th-circuit/1011601.html#sthash.66iCqH0r.dpuf>

In that case, the plaintiff had alleged that she was the “leading candidate” for the position and that she had received assurances from the persons who had interviewed

3.6.8.2 The Defendant's Knowledge of the Expectancy

3.6.8.3 The Defendant's Intentional and Unjustified Interference which Prevents the Realization of the Business Expectancy

In *Speakers of Sport, Inc. v. Proserv, Inc.*, 178 F.3d 862 (7th Cir. 1999) the court summarized that independently tortious act by nature is required for actionable unlawful interference. It is not enough that the defendant's act affects a third party, rather, his conduct must be directed towards the third party⁴⁸⁹ or parties with whom the plaintiff had the business expectancy.

3.6.8.4 Damages

Pecuniary loss of the benefits of the future contract, the injury to reputation if the interference may reasonably result in those damages, and consequential losses are the damages recoverable for tortious interference with contract or prospective advantage.⁴⁹⁰

*Speakers of Sport, Inc. v. Proserv, Inc.*⁴⁹¹

Facts: The plaintiff had a contract to represent a baseball player; the contract was terminable at will. The plaintiff alleged that the defendant promised Ivan Rodriguez, the baseball player, certain amount of money from endorsement to induce him to join the defendant and to terminate the contract with the plaintiff. Then, the plaintiff brought a suit against the defendant for unlawful interference with its business relationship by means of fraud. The plaintiff claimed that the promises made by the defendant were fraudulent.

her that she was being "seriously considered" for the job and that they would recommend that she be hired.

⁴⁸⁹Schuler v. Abbott Laboratories, 265 Ill. App. 3d 991, 995 (1993)

Where the plaintiff alleged the defendant, his former employer, interfered with prospective economic advantage by threatening to enforce a noncompetition agreement with respect to two prospective employers, section 2-615 dismissal was proper because the defendant did not direct its activity to anyone other than the plaintiff, even though such activity would likely dissuade the prospective employers.

⁴⁹⁰Morton F. Daller. Business Torts: A Fifty State Guide, 2016 Edition (2016).

⁴⁹¹Speakers of Sport, Inc. v. Proserv, Inc. , 178 F.3d 862 (7th Cir. 1999)

Held: The Circuit Court concluded that although the termination of contract is not a breach owing to an at-will terminable contract, inducing the termination of at-will terminable contract could still be actionable according to Illinois tort law; it could either be actionable as an interference with the contract at-will itself or as an interference with prospective advantage.

The competitor's privilege cannot be a defense for inducing a breach of contract; however, competition is not a tort, procuring the legitimate termination of at-will terminable contract can be the competitor's privilege and served as a defense for unlawful interference with prospective advantage. The customers are not owned by the sellers or agents or sellers of services. The claim cannot be sustained unless the defendant's conduct engaged in independent unlawful conduct but in this case, no illegal conduct was proved and therefore inducing lawful termination is not actionable.

3.6.9 Other Jurisdictions and Sample Case

3.6.9.1 Under Minnesota Law

A claim for unlawful interference has not been formally recognized in Minnesota until March 2014.⁴⁹² There are three essential cases in Minnesota relevant to this area of law. Firstly, *Witte Transportation Company v. Murphy Motor Lines, Inc.* 193 N.W. 2d 148 (Minn. 1971), this case acknowledged claim for wrongful interference with non-contractual business relationships.⁴⁹³ Then, *Wild v. Rarig*, 234 N.W.2d 775 (Minn. 1975), this case stated that wrongful interference with business relationship is actionable and an interest in the reasonable expectation of economic advantage may be protected.⁴⁹⁴ Finally, *United Wild Rice, Inc. v. Nelson*,

⁴⁹²Aaron D. Hall. "Protecting your Business' Reasonable Expectation of Prospective Business Relationships and Economic Advantage", JUX LAW FIRM, <http://jux.law/interference-with-economic-advantage/>

⁴⁹³*Id.*

⁴⁹⁴*Id.*

313 N.W.2d 628 (Minn. 1982), the court re-acknowledged the cause of action for wrongful interference with prospective contractual relations.⁴⁹⁵

Tuttle v Buck⁴⁹⁶

Facts: The outstanding case relating to prospective economic relations emerged in the case *Tuttle v Buck*. The plaintiff was a barber and the defendant was a banker who set up the rival shop. The banker tried to induce customers to go to his shop instead of the plaintiff's shop by undercutting the plaintiff's rates. Additionally, the banker hired another barber to compete with the plaintiff to harm the plaintiff and to drive him out of business. Finally, the banker spread false rumors that ruined the plaintiff's reputation.

Held: The court held that the banker's conduct can be count as an interference with prospective contractual relations and the barber was entitled to compensation. The court reasoned that to persuade the customer to go to his shop by offering the goods at lower prices is generally lawful means of obtaining the interests, it is justifiable as fair competition but when a man begin his business by setting up his shop opposite to the others, it is not for the sole purpose of profit to himself but he has an intention to drive his opposing shop out of business.

The Minnesota Supreme Court decided, in 2014, that "tortious interference with prospective economic advantage" is a separate, viable claim under Minnesota law. By doing so, a cause of action, whose existence remained in Minnesota since at least 1909, is officially recognized.

Gieseke ex rel Diversified Water Diversion v. IDCA, Inc., et al.⁴⁹⁷, the Minnesota Supreme Court held that a claim for tortious interference with prospective economic advantage is a recognized cause of action under Minnesota law. Relying on the Restatement (Second) of Torts § 766(B) and existing jury instructions for wrongful interference with an existing contract, the court set forth five elements required to satisfy a claim as follows:

⁴⁹⁵Hall, *supra* note 492.

⁴⁹⁶*Tuttle v Buck* 119 N.W. 946 (1909)

⁴⁹⁷*Gieseke ex rel Diversified Water Diversion v. IDCA, Inc., et al.*, 844 N.W.2d 210, 214 (Minn. 2014)

- “1. The existence of a reasonable expectation of economic advantage;
2. The defendant’s knowledge of that expectation of economic advantage;
3. That the defendant intentionally interfered with the plaintiff’s reasonable expectation of economic advantage, and the intentional interference was either independently tortious or in violation of a state or federal statute or regulation;
4. That in the absence of the wrongful act of the defendant, it is reasonably probable that the plaintiff would have realized an economic advantage or benefit; and
5. That the plaintiff sustained damage”⁴⁹⁸

Even though the court formally recognized unlawful interference as a claim under Minnesota law, the court held in favor of the defendant by reasoning that the plaintiff failed to establish each of the five elements of the claim, especially in, failure to specify the third parties with whom it had a reasonable expectancy of a prospective relations as well as failure to show its actual loss caused by the unlawful interference with the relationship.⁴⁹⁹

In the following case after *Gieseke’s* decision, the courts have followed the abovementioned requirements and refused to sustain a claim for this kind of tort⁵⁰⁰, for instance, *Peterson v. Northern Gaul Properties, Inc.*, 2014 WL 2921956 (Minn. App., June 30, 2014) and *Ahlers v. CFMOTO Powersports, Inc.*, 2014 WL 2574747 (D. Minn., 2014).⁵⁰¹

3.6.9.2 Under New York Law

New York law turns to the Restatement (Second) of Torts and defines “wrongful means” as “including physical violence, fraud or misrepresentation,

⁴⁹⁸Gieseke ex rel Diversified Water Diversion v. IDCA, Inc., et al., 844 N.W.2d 210, 214 (Minn. 2014)

⁴⁹⁹Bruce J. Douglas, “Bad Blood Makes Good Law: Minnesota Supreme Court Recognizes Tortious Interference Claim”, OGLETREDEAKINS (13 May 2014), <http://www.ogletreedeakins.com/shared-content/content/blog/2014/may/bad-blood-makes-good-law-minnesota-supreme-court-recognizes-tortious-interference-claim>.

⁵⁰⁰Hall, *supra* note 492.

⁵⁰¹*Id.*

civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract” as provided in the Restatement (Second) of Torts § 768.⁵⁰²

Carvel Corp. v. Noonan⁵⁰³

Facts: Carvel sold its ice cream only through franchised stores. However, it began selling its product in supermarkets so that many of the franchised stores (franchisees) went out of business. Therefore, the franchisees claimed their franchisor interfered with franchisees’ sales when the franchisor sold directly to supermarkets and gave customers coupons that made supermarket purchases cheaper. The franchisor caused the customers cease purchasing the products from the franchisees. The franchisees sued on tortious interference with a prospective advantage by using wrongful economic pressure.⁵⁰⁴

Held: The court recognized that inducing breach of contract and interference with nonbinding economic relations could be torts, but the two torts have different elements. The court stated that the franchisees cannot show that the defendant’s action was independently tortious or criminal, the franchisees therefore cannot recover and an exception to the general rule cannot be applicable.⁵⁰⁵ The exception is applicable when the defendant involves with the act with the sole intent to inflict willful harm on plaintiffs, in this case, it obviously cannot be applied because the defendant’s motive in interfering with the relationship between the franchisees and their customer was normal economic self-interest; it was not solely to harm the franchisees.⁵⁰⁶

The franchisees alleged wrongful “economic pressure” was employed by Carvel; however, that claim is improperly founded for two grounds that firstly, the economic pressure required to be proved must be placed to their customers

⁵⁰²Precella, *supra* note 409.

⁵⁰³Carvel Corp. v. Noonan 3 N.Y. 3d 182 (2004)

⁵⁰⁴*Id.*

⁵⁰⁵*Id.*

⁵⁰⁶*Id.*

not the franchisees itself.⁵⁰⁷ Under New York law, the defendant's act must be directed towards the third party for the purpose of sustaining a claim for unlawful interference with prospective advantage.⁵⁰⁸

The defendant only attempted to make the products available at the lucrative prices in the supermarket. It was a lawful persuasion and there was no pressure on the third party (franchisees' customers), it therefore failed to establish the claim for unlawful interference.⁵⁰⁹ Generally, the conduct that is not tortious or criminal will be "lawful" and will be incapable to sustain the claim for unlawful interference with prospective contracts.⁵¹⁰ Also, the defendant's act could not be classified as the unfair and extreme "economic pressure" which may amount to "wrongful."⁵¹¹

3.6.9.3 Other Cases

*Santana Products Inc. v. Bobrick Washroom Equip. Inc. (2005)*⁵¹²

Facts: The defendant interfered with the plaintiff's business operation that prevented the plaintiff from bidding on a public construction project at the Rio Hondo Community College while the other contractors were permitted to bid.

Held: The tort of interference with prospective contract has four elements in Pennsylvania: "(1) a prospective contractual relation; (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage resulting from the defendant's conduct." There was an argument about Santana's existence of prospective contractual relationship.

A prospective contractual relationship is "something less than a contractual right, something more than a mere hope." "Reasonable probability that a

⁵⁰⁷Carvel Corp. v. Noonan 3 N.Y. 3d 182 (2004)

⁵⁰⁸*Id.*

⁵⁰⁹*Id.*

⁵¹⁰*Id.*

⁵¹¹*Id.*

⁵¹²Santana Products, Inc. v. Bobrick Washroom Equipment, Inc., 249 F. Supp. 2d 463 (M.D. Pa. 2003)

contract will arise from the parties' current dealings" must be shown by the plaintiff. Therefore, the plaintiff must demonstrate that, reasonable probability to obtain the contract existed but for the defendant's act.⁵¹³

The court relied on the Pennsylvania Supreme Court's decision in *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 471 that an existing year-to-year lease, which is a continuous relationship between the third party and the plaintiff, cannot imply that the lease would be renewed and it therefore cannot be count as reasonable business expectancy.⁵¹⁴

The plaintiff has failed to show "reasonable probability of a chance to obtain a contract." It cannot show that, but for the defendant's actions, the plaintiff would have obtained the contract for this project because other manufacturers may underbid the plaintiff for the project or the plaintiff may be out of the bid for many other reasons.⁵¹⁵ Resulting from this, the summary judgment is granted in favor of the defendants for the claim under unlawful interference with prospective contract.

*Jackson v Stanfield*⁵¹⁶

Facts: The retail lumber dealers' association required members to deny supporting or dealing with the wholesaler who sold to a person not a regular dealer. The plaintiff, who was not a regular dealer, underbid the defendant on a contract, but the wholesaler refused to sell to him and he was obliged to abandon the prospective economic advantage.

Held: In this case, the defendant's act was not mere interference with contract or prospective contract but he breached the antitrust laws. The defendant became liable to retailer when it influenced the wholesalers not to deal with retailer, thereby preventing the retailer from fulfilling a favorable order from customers. The

⁵¹³*Santana Products, Inc. v. Bobrick Washroom Equipment, Inc.*, 249 F. Supp. 2d 463 (M.D. Pa. 2003)

⁵¹⁴*Id.*

⁵¹⁵*Id.*

⁵¹⁶*Jackson v Standfield*, 137 Ind. 592 (1893)

defendant was liable for the amount which plaintiff lost by abandoning his future contract.⁵¹⁷

Baum Research and Development Co., Inc. v. Hillerich & Bradsby Co., Inc., (1999)⁵¹⁸

Facts: In NCAA (National Collegiate Athletic Association) baseball games, both aluminum and wooden bats were allowed.⁵¹⁹ Baum, the plaintiff who was a manufacturer of wooden baseball bats alleged that absence of limitation of bat types resulted in a conspiracy to decrease the use of wooden bats in the collegiate market.⁵²⁰ The plaintiff claimed that the defendants engaged in the conspiracy to spread the false information in relation to the accuracy of the Baum Hitting Machine to arrange the baseball bats standards with the NCAA, and disseminate to baseball coaches in high school and college such false result test to drive him out of the business.⁵²¹ He also claimed that the defendant prevented him from establishing relationships with amateur baseball teams by replacing his bats with aluminum bats. The plaintiff filed a suit against the defendant on the grounds of interference with prospective economic advantage against many producers of aluminum baseball bats.

Held: Under Michigan law, to sustain a claim for tortious interference with a business relationship, a plaintiff must establish: “(1) the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; (2) knowledge of the relationship or expectancy on the part of the defendant interferer; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resulting damage to the party

⁵¹⁷Jackson v Standfield, 137 Ind. 592 (1893)

⁵¹⁸Baum Research and Development Co., Inc. v. Hillerich & Bradsby Co., Inc., 31 F. Supp. 2d 1016 (E.D. Mich. 1999)

⁵¹⁹Cary M. McCallister, “*Aluminum Bat Manufacturers Anticompetitive Trade Practices in Collegiate Baseball: A Case Review*”, 2 DePaul J. Sports L. & Contemp. Probs. 293 (2004), available at

<http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1087&context=jslcp>

⁵²⁰*Id.*

⁵²¹Constance E. Bagley, **Managers and the Legal Environment: Strategies for the 21st Century** (2013).

whose relationship or expectancy has been disrupted.”⁵²² The court said that some degree of specificity in business relationship must be proved; at least the prospective profit must be a plausible expectancy and not only wishful thinking, in order to satisfy the requirement of unlawful interference.⁵²³

By applying the Michigan’s criteria for unlawful interference, the Kansas District Court ruled that there were: “(1) sufficient allegations of the existence of a valid business expectancy; (2) an identifiable class of prospects to whom Baum had a reasonable expectation of selling composite wood bats; (3) indications that Baum’s composite wood bats were well received by baseball players and coaches and had previously enjoyed not insubstantial sales; and (4) expectations for better sales and profits from the amateur baseball bat market.”⁵²⁴

The court decided that the absence of rules regarding the types of bats by NCAA actually promoted competition; claim for infringement of antitrust law was dismissed. However, the plaintiff had more than a mere hope for business expectancy. The court thus ruled that this was prima facie case. The plaintiff’s claim for unlawful interference with business relationships and prospective advantage was appropriately maintained in accordance with Michigan law.⁵²⁵

Smith v. Ford Motor Co., 626 F.2d 784 (10th Cir. 1980), a claim of unlawful interference may be made notwithstanding at-will terminable agreement.⁵²⁶

Fact: The claimant was hired by Ford Motor Company Franchise as a president. The defendant hired him based on at-will terminable employment so that the defendant could fire him for no reasons. Similarly, in relation to Ford’s franchise, the franchise may be terminated by Ford for no reason. After that, the claimant affiliated himself with Ford Dealer Alliance, a group of Ford dealer capably hostile to Ford. Therefore, Ford exercised its termination rights to force the local franchise to discharge the claimant. The claimant was not entitled to recourse from the agreement

⁵²²McCallister, *supra* note 519.

⁵²³*Id.*

⁵²⁴*Id.*

⁵²⁵*Id.*

⁵²⁶Dobbs & Bublick, *supra* note 342.

by reason of at-will terminable agreement. Also, in case that Ford committed its threat and terminated its franchise, the local franchise would have had no recovery against Ford under contract law.

Held: The North Carolina Supreme Court maintained the claimant's action against Ford for disrupting with his continued at-will employment.⁵²⁷

In conclusion, when comparing the requirement of the three states those are California, Texas and Illinois, it is found that the main focus is on the first element that is prospective relationship or business expectancy between the plaintiff and the third party. It must be proved that the reasonable business expectancy can be realized but for the defendant's interference. In some cases, knowledge of the defendant of the prospective relationship is not necessary. All three states required unlawful conduct which is independently wrongful apart from the act of interference itself. Finally, damages are also required by all states.

3.4.10 Summary

Most states of the United States have long recognized a tort for interference with a prospective contractual relation but after looking multiple American cases, it is evident that the courts are less willing to award damages for this kind of tort by ruling that competition is sufficient justification unless improper means are employed.

For example, even if this kind of tort has its root in the United Kingdom according to the United State legal system, the American solutions have something in common with those of France, although these two countries are under different legal systems. American and French laws demonstrate the similar protective attitude towards trade stability and realize that trade freedom is not an absolute freedom but this is a freedom to trade without undue interference from a third party.⁵²⁸

⁵²⁷William J. Woodward Jr., "*Contractarians, Community, and the Tort of Interference with Contract*", 80 Minn. L. Rev. 1103, 1112-1113 (1996), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1843&context=facpub>

⁵²⁸Anderson, *supra* note 47.

CHAPTER 4

LIABILITY OF INTENTIONAL UNLAWFUL INTERFERENCE UNDER THAI LAW AND COMPARATIVE ANALYSIS BETWEEN FOREIGN LAWS AND THAI LAW

4.1 Law and Problems Relating to Liability of Unlawful Interference under Thai law

4.1.1 Thailand Civil and Commercial Code

Section 420⁵²⁹ of Thailand Civil and Commercial Code is a key provision of Thai tort law which was derived from German law.⁵³⁰ Under German tort law, the general provision is found in accordance with section 823(1) that the rights which will be protected are the right of life, body, health, liberty, property or any right. Only these injured rights are able to recover under such section. This section aims to protect only absolute rights⁵³¹ and does not permit recovery of pure economic loss. Interference with contractual relations is deemed as relative rights, it therefore will not be protected under Section 823(1).⁵³²

Even if the existing contract deserves greater protection than the future contract, reasonable future contract or business expectancy should also be protected in some legal measures. As compared to the US law, most states of the United States have explicitly recognized this liability and the basis of this liability are provided in

⁵²⁹Section 420 “a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation there for.”

⁵³⁰Nopparat Sananpanichkul. “Any Right Pursuant to Section 420: Study on Historical Dimension and Comparative Law.” Master’s thesis, Thammasat University, Laws, 1995.

(นพรัตน์ สนั่นพานิชกุล. “สิทธิอย่างหนึ่งอย่างใดตามบทบัญญัติมาตรา 420: ศึกษาในแง่ประวัติศาสตร์และหลักกฎหมายเปรียบเทียบ.” วิทยานิพนธ์ปริญญาโทบริหารธุรกิจ, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2538)

⁵³¹Michael Wendler, Bernd Tremml & Bernard John Buecker, **Key Aspects of German Business Law: A Practical Manual** (2008).

⁵³²Spindler & Rieckers, *supra* note 189.

the Restatement (Second) of Tort⁵³³ as well as in state case law. However, if such fact occurred under Thai jurisdiction, the issue which will be considered is how Thai court deals with this matter because Thai law lacks of the specific provisions as prescribed in the US jurisdiction and what law and which provision the court may apply to such case. To solve this problem, Thai tort law will be primarily studied in order to clarify the basis of such liability under Thai jurisdiction.

4.1.2 General Tort Provision under Section 420

The elements constituting the tort under section 420 consist of unlawful act, committing willfully or negligently, damage suffered by another and such damage incurred as a result of such act. Firstly, regarding the unlawful conduct, if there are specific provisions stating which conduct is regarded against law, it is easy to identify like conduct violating the criminal law. However, Thai tort law does not have the express stipulation to determine which conduct is unlawful. Hence, if individual's conduct injures the rights of person, which are right of life, body, health, freedom, property or any right, person can be liable under tort law. Next, as to committing willfully or negligently, it means any act committed with consciousness and awareness that his conduct may result in damages of others. If being conscious that the conduct may injure the others' right, it can be deemed as willful act. Then, relating to damage suffered by another, if no damage occurs, liability cannot therefore happen. Furthermore, damage must occur to subject-matter protected under law and must be certain. Finally, the causation between conduct and damage must be considered.

4.1.3 Any Right

By reason of the society's growth and commercial activity, the violation of the right of the people increase. Prospective interests should be considered as protectable right. The prospective economic relation is protected in the US legal

⁵³³§766B, one who intentionally and improperly interferes with another's prospective contractual relation is subject to liability to the other for the pecuniary harm resulting from the loss of the benefits of the relation, whether the interference consists of:

- (a) Inducing or otherwise causing a third person not to enter into or continue the prospective relations or
- (b) Preventing the other from acquiring or continuing the prospective relation.

system as well as in the French jurisdiction. Despite the different techniques, the result is the same.

Under Thai law, in relation to any right under Section 420, there are two divergent approaches given in the interpretation of “any right.” The first one considers that any right under section 420 should not be narrowly interpreted to cover only absolute right as interpreted by section 823 BGB of German Civil Code but should be interpreted to protect any right against the *contra bonos mores* by reasoning that section 826 BGB (provision prohibiting immoral conduct) is not adopted in Thai tort law.⁵³⁴ In contrast, the other one interprets that any right should cover only absolute right.⁵³⁵

Relating to the first approach, the lack of definition of “any right” may facilitate a flexibility of a case-by-case basis and the court can broadly interpret the protected right; however, it can generate the inconsistency in the jurisprudence.⁵³⁶ On the other hand, as to the second approach, it gives the clear boundaries between tortious and contractual liability.⁵³⁷ Nonetheless, it may result in the problems when applying this interpretation to certain facts, for example, in case of inducement of breach of contract or enticement of the others’ employee which are the case under section 826 which is not stipulated in Thai law.⁵³⁸

Professor Jitti Tingsaphat⁵³⁹ opined in case of any other right according to section 420 that it must be broadly interpreted and must include the case that a third party persuades a contracting party to breach a contract. In the Supreme Court Decision no. 1081-1082/2522, only land sale agreement was executed, the parties had not yet registered the transfer to complete the sale. During this time, anyone who

⁵³⁴Sananpanichkul, *supra* note 530.

⁵³⁵*Id.*

⁵³⁶*Id.*

⁵³⁷*Id.*

⁵³⁸*Id.*

⁵³⁹Jitti Tingsaphat, **Civil and Commercial Code Part II section 354-452 Relating to Source of Obligations** (1983). (จิตติ ดิงศภัทย์. ป.พ.พ. บรรพ 2 มาตรา 354 – 452 ว่าด้วยมูลหนี้ (2526)).

prevented the transfer of land had to be liable under tort. This case demonstrates the interference with contractual relations, the interferer must be liable under tort and the contracting party has to be liable under contract. Concerning interference with the existing contract, the interferer will be liable under section 420.

On the other hand, no comments were given in terms of interference with prospective contract or business expectancy. As a consequence, the problem is the probability to enter into contract or to acquire the business interests without undue interference can be also protected under Thai tort law. Can it be deemed as any right under section 420?

In case a person only offers a higher price to buy land when land sale agreement was formalized but the parties had not yet registered the transfer to complete the sale, the element which must be taken into account is such person's knowledge of existence of agreement. In the event of absence of knowledge, his action may be justified on the grounds of good faith. Conversely, if he knows or should have known that the agreement between the parties exists and he still attempts to acquire such property, his act may be regarded as freedom to pursue his own interests but it cause loss to others under section 421. Moreover, it can be deemed against good faith principle under section 5.

On the other hand, if no contract exists and only potential advantage, offering a higher price to acquire the property is totally lawful conduct; however, if the interferer engaged in the blameworthy conduct or unlawful means, his conduct may be subject to liable under section 420.

Any right protected under this section 420 should be the right which is, whether expressly or impliedly, protected and ascertained by law and should not be limited only to absolute right. The right of earning is the right protected under the Constitution. If any person induces others not to purchase goods from the plaintiffs' shop, or prevent them from conducting its business, it is deemed to harm "any right"⁵⁴⁰ and the damages arising from the infringement are the loss of income.⁵⁴¹

However, the right to acquire any favorable interests is the right to public and no one is more privileged and this right therefore should be balanced with the

⁵⁴⁰Sananpanichkul, *supra* note 530.

⁵⁴¹*Id.*

right of others. As a consequence, the manner of the conduct and the intention must be considered in order to determine whether the interference is proper or not

In the author's point of view, the range of any right should include the right to pursue his own financial gain, to acquire the favorable interests, to operate the business, and to conduct the negotiation or dealing without any undue interference. Consequently, it is significant to interpret the right to obtain the prospective advantage as the right protected under the wording "any right" under section 420.

4.1.4 Good Faith Principle under Section 5

Section 5⁵⁴² provides the principle of *bona fide* while requires person to act in good faith while exercising the right. This section derives from the concept of section 242 BGB in German Civil Code which is known as "*Treu and Glauben*" or good faith principle which requires a person exercises a right in good faith.⁵⁴³ This principle lays the basis of exercising the right in wide application; this is the general provision which will be used in the event of absence of specific provision and only be applied in necessary case or in case of unavailability of specific provisions.⁵⁴⁴ If exercising the right against *bona fide* principle, person can be held liable such as vexatious case.

4.1.5 Abuse of Right under Section 421

Section 421⁵⁴⁵ adopts the concept of section 226⁵⁴⁶ of German Civil Code which prohibits any exercise of right which has a sole intent to injure another person. This principle occurred in 19th Century in France.⁵⁴⁷ Originally, Roman law had a principle that exercising the right is not wrongful even can result in damage to others,

⁵⁴²Section 5 "Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith."

⁵⁴³Sananpanichkul, *supra* note 530.

⁵⁴⁴*Id.*

⁵⁴⁵Section 421 "The exercise of a right which can only have the purpose of causing injury to another person is unlawful."

⁵⁴⁶Section 226 "The exercise of a right is not permitted if its only possible purpose consists in causing damage to another."

⁵⁴⁷Sananpanichkul, *supra* note 530.

there were no legal limits on the exercise of rights.⁵⁴⁸ Then, this principle was developed to the good faith principle on the grounds that no one should suffer damage from others' exercise of right. Therefore, the abuse of rights is prohibited. Rule on the abuse of rights is not recognized in the common law systems.⁵⁴⁹ Abuse of rights involves the case that intentionally injures another, exercise the right without gaining any interests or the case that damage which occurs on the other is greater than the benefit that person will acquire.

Section 421 is an additional provision which extends the general tort provision under section 420, even person has the right under law to exercise, if exercising the right with a sole purpose to cause harm to another, it can give rise to wrongful conduct.⁵⁵⁰ Therefore, to constitute the liability, the elements under section 420 must also be satisfied.

On the other hand, some legal philosophers had different opinion that section 421 is not the extended provision of section 420 and it must be treated separately or specifically by reasoning that section 421 does not apply only in the case of intentionally injuring another but it includes the case of the excessive exercise of the right which causes detriment to another more than it should be despite the absence of malicious intent to cause loss⁵⁵¹ and to constitute the abuse of rights under section 421, it must meet the requirements which comprise of the existing right under law, exercising right cause harm to another and damage as a consequence of exercising of right.

The exercise of rights must be compatible with the social functions.⁵⁵² If the rights are exercised for any purpose other than from their lawful functions, such rights are no longer protected.⁵⁵³ This section establishes limits on the use of rights. In this author's opinion, section 421 should be treated separately from the general

⁵⁴⁸Sananpanichkul, *supra* note 530.

⁵⁴⁹*Id.*

⁵⁵⁰Susom Suphanit, **The Explanation of Civil and Commercial Code relating to Tort** (2000)

⁵⁵¹Chantaraopakorn, *supra* note 188.

⁵⁵²*Id.*

⁵⁵³*Id.*

provision (section 420) because this section should also apply in the case of exercising the right in the excessive manner notwithstanding the absence of ill will and it therefore enables the injured person to recover damages.

4.1.6 Civil Defamation under Section 423

Section 423⁵⁵⁴ is designed to protect people from damages caused by defamation. This section derived from the concept of section 824⁵⁵⁵ of German Civil Code which prohibits the defamatory statement causing harm to others' reputation, credit, earning or prosperity. Tortious liability under this section is stipulated separately from the provision of section 420 and it was called as "civil defamation."

There are two divergent approaches given to determine the element of this liability. Firstly, it is regarded that this provision can ground the independent liability from the general provision (section 420).⁵⁵⁶ Therefore, section 423 alone can constitute the liability. On the other hand, it is deemed that this provision is an additional provision which extends the general tort provision under section 420.⁵⁵⁷ Thus, when considering the liability, section 420 shall be taken into account together with section 423. In other words, the requirement of section 420 shall also be considered. In German law, this section is treated as the additional provision which

⁵⁵⁴Section 423. "A person who, contrary to the truth, asserts or circulates as a fact that which injurious to the reputation or the credit of another or his earnings or prosperity in any other manner, shall compensate the other for any damage arising therefrom, even if he does not know of its untruth, provided he ought to know it.

A person who makes a communication the untruth of which is unknown to him, does not thereby render himself liable to make compensation, if he or the receiver of the communication has a rightful interest in it."

⁵⁵⁵Pornsiri Tuatsin. "Legal Problems on Article 423 in Civil And Commercial Code." Master's thesis, Chulalongkorn University, Laws, 2010.

(พรศิริ ทวดสิทธิ์จันต์ : "ปัญหากฎหมายของมาตรา 423 ในประมวลกฎหมายแพ่งและพาณิชย์." วิทยานิพนธ์ปริญญาโทบริหารธุรกิจ, คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, 2553)

⁵⁵⁶Ichkan Charoenwanich. "Protection of Rights of Persons Against Violation of Privacy in relation to Photographs." Master's thesis, Thammasat University, Laws, 2008.

(อิชกันต์ เจริญวานิชย์. "การคุ้มครองสิทธิผู้ได้รับความเสียหายจากภาพถ่าย" วิทยานิพนธ์ปริญญาโทบริหารธุรกิจ, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2551)

⁵⁵⁷*Id.*

extends the general provision.⁵⁵⁸ Accordingly, to establish the claim, the requirement of general provision must also be satisfied.

To constitute the liability under section 423, it must be considered along with section 420, the following elements must be met, i.e., unlawful act (asserting the untrue statement), committing willfully or negligently, damage to reputation, credit, earning or prosperity of others and such damage incurred as a result of such act.⁵⁵⁹

By comparing to the right protected under section 420, the range of protection of the right under section 423 is limited because it merely protects the right of reputation, credit, earning or prosperity. Moreover, if the defamatory statement contains the true matter, it will not be tortious under the section 423 but if such defamatory statement harms the others' right, it may be tortious under section 420.⁵⁶⁰ In addition, there is the exclusion of liability if a person makes a communication the untruth of which is unknown to him provided that he or the receiver of the communication has a rightful interest in it.

Hence, if, in the course of competition or dealing, the rival competitor asserts any untrue statements which injure the person's reputation, he may be liable under this section. However, if the defamatory statement is true, he will not be liable under this section despite the fact that it may cause loss to others. Likewise, if he does not know that such statement was untrue and he has rightful interest in it, he will not subject to liable. However, when applying this section in case of unlawful interference, it can only handle with the specific area that is defamation in the course of competition, if it occurs outside this scope, the general provision must be taken into account.

⁵⁵⁸Charoenwanich, *supra* note 556.

⁵⁵⁹*Id.*

⁵⁶⁰*Id.*

4.1.7 Summary of Tort Law Provision

After exploring the main provisions of Thai tort law, even though Thai tort law does not have a specific provision to deal with the liability of unlawful interference, the general provision may also be applied with such problems. However, it is found that the main provisions of Thai tort law lay the very wide basis to tackle with the problems in general.

It may be useful to leave the court using the discretion because lack of specific requirement may facilitate a flexibility of a case-by-case basis; however, it can generate the inconsistency in the jurisprudence. If applying such provisions to the liability of unlawful interference, it may be advantage to allow the court to determine the case in wide scope but the absence of specific requirement or guidance can also make the difficulties to the court to examine the case because the court will wonder whether what can be count as prospective advantage, when such advantage are deemed to be exist, what type of knowledge and intent is required and what genre of conduct is amount to tortious conduct under this liability.

4.1.8 Competition Act B.E. 2542

In this topic, Thai competition law will be generally summarized in order to consider if this law can also handle the problems on liability of unlawful interference or not. The Competition Act B.E. 2542 only concerns the issue between the business operators.⁵⁶¹ Its scope is limited than tort law. There are multiple factors attributing this Act to inefficiently enforce.

First of all, the main reason is lack of explicit approach relating to the analysis of the scope of market and the calculation of the market share. As a consequence, some companies take an advantage to claim that their market share is less than it actually is. Moreover, the state sector responsible for this matter has no evident basis to determine the accuracy of the market share.

⁵⁶¹Section 3 “Business operator” means a distributor, producer for distribution, orderer or importer into the Kingdom for distribution or purchaser for production or redistribution of goods or a service provider in the course of business

Next, the determination basis of the business operator with market domination which set forth in section 25⁵⁶² is considerably high so that the business operator can commit the wrongful conduct without falling within the scope of this Act. In accordance with “the Regulation of the Competition Commission on the Determination Basis of the Business Operator with Market Domination B.E. 2550” prescribed that “the business operator having market domination means the business operator who has a market share over 50 percentages and has the sales volume in the previous year more than 1 billion baht or the first three business operators who have a market share in total over 75 percentages and have the sales volume in the previous year more than 1 billion baht.

Furthermore, there is no express and exact stipulation/definition of the “interference with operation of the business relation. So, the duty to determine the scope depends on or lefts to the discretion of the court. Hence, it is necessary to lay the basis or principle of the description of such conduct in order to ease the court to determine.

Eventually, there is a problem when a business operator does not have market domination. It will fall into section 29⁵⁶³ but in such section, the clear content

⁵⁶²Section 25 “A business operator having market domination shall not act in any of the following manners:

- (1) unreasonably fixing or maintaining purchasing or selling prices of goods or fees for services;
- (2) unreasonably fixing compulsory conditions, directly or indirectly, requiring other business operators who are his or her customers to restrict services, production, purchase or distribution of goods, or restrict opportunities in purchasing or selling goods, receiving or providing services or obtaining credits from other business operators;
- (3) suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than the market demand;
- (4) intervening in the operation of business of other persons without justifiable reasons.”

⁵⁶³Section 29 “A business operator shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business.”

is not prescribed. The problem arising is that how the injured person seek the compensation when their business is interfered or intervened by other persons without justifiable reasons. Hence, liability tort of intentional interference with economic or business relation can be designed to fill this gap.

4.1.9 Sample Case

*Big C v. Lotus Case*⁵⁶⁴

Fact: Big C, the big retailer merged with Carrefour, alleged that Tesco Lotus, rival retailer, was a dominant business operator and his trade practice met the clause of interference with other business operation without justifiable reasons pursuant to Section 25(4) and this act was against the fair competition pursuant to Section 29 of the Competition Act B.E. 2542 on the grounds that

1) Tesco Lotus announced that it would take the coupons valued 80 baht issued by Carrefour and would double the value of the coupon to be 160 baht with the condition that the customers must purchase the goods in Tesco Lotus supermarket

2) Tesco Lotus advertised towards the consumer holding the member card of Carrefour to send SMS to Tesco in order to obtain Gift Voucher valued 200 baht provided that the customer must apply to be the member of Club Card of Tesco

Tesco's operation was obviously to scramble for Big-C's customers. However, to satisfy the requirement of Section 25(4), the dominant market requirement shall be met. It is uncertain that Tesco Lotus is the dominant market operator or not. When considering Section 29, it involved with the unfair trade practices causing harm to others. It was irrelevant to antitrust. Thus, the proof of dominant is not needed. However, this section is broad provision and no exact explanation is given. The burden is left to the discretion of the court to determine whether such conduct which aimed to snatch Big C's customers is wrongful or not.

⁵⁶⁴Deunden Nikomborirak, “*The Case between Big C and Lotus: the First Case of Thailand Competition Act (2012)*”, <http://tdri.or.th/tdri-insight/ar012/>.

(เดือนเด่น นิคมบริรักษ์, คดีข้อพิพาทระหว่างบิ๊กซีกับเทสโก้: คดีประเดมิกฎหมายการแข่งขันทางการค้าไทย (2012), <http://tdri.or.th/tdri-insight/ar012/>)

Held: In 2013, the court of first instance held that Tesco Lotus's conduct was wrongful against section 421⁵⁶⁵ while the competition law matter was not given and Tesco Lotus has to reimburse Big C for the amount more than two million baht. However, the claim under competition law is still in the Competition Committee.

Allowing the rivals' coupon seems to be normal in the vigorous competitive market in foreign countries. For example, the retailer business issues a policy to redeem the competitors' coupon. In the United States, redeeming competitor's coupons are prevailing, the large retailer of the world like Wal-Mart also use this strategy to boost sales. Some gas stations will double the competitor's coupon. No case is filed on such grounds in the United States. This fact also emerged in China⁵⁶⁶, when McDonald's launched the campaign to accept the rivals' coupon. It demonstrates the fierce competition in the fast food industry. In this case, Zhang Huiging, who specializes in consumer law at Shanghai Wongliping Law Firm, gave an opinion that this is mere sales promotion and McDonald's did not commit any wrong.⁵⁶⁷ There is no case to be filed against McDonald's.

Another case is the case of *Thai Suzuki Motors Co., Ltd, Thai Yamaha Motors Co., Ltd and Kawazaki Motors Enterprise Co., Ltd. v. A.P. Honda Co., Ltd* which is filed in 2003. This is the first case under the Competition Law B.E. 2542.

The defendant who was the distributor of motorcycle under "Honda" brand was alleged before the Competition Committee on the grounds that it enforced the retailers of motorcycle to exclusively sell its own products. This act may be deemed as restriction of business operation of other business under Section 29. The Minister of Commerce firstly submitted this case to Attorney General in 2005 but the Attorney General issued a non-prosecution order by reasoning that the inquiry of the Competition Committee did not comply with law. Again, in 2013, the Minister of Commerce submitted this case to Attorney General. Similarly, the Attorney General

⁵⁶⁵Section 421 "The exercise of a right which can only have the purpose of causing injury to another person is unlawful."

⁵⁶⁶Shang Ban, "McDonald's to accept rivals' coupons in food fight" (2010), CHINADAILY, http://www.chinadaily.com.cn/bizchina/2010-02/26/content_9509294.htm

⁵⁶⁷*Id.*

issued a non-prosecution order by opining that there is lack of evidence to prove the defendant's liability under Section 29. Lastly, nothing can be fixed because the period of prescription expired.

This is the first case under Thai Competition Law but the defendant's liability was not successfully constituted. Indeed, when the defendant enforced the retailers not to sell his rival products as appeared in above case, it may be considered as exclusive dealing which is restriction of business operation of others' business and should be liable under Section 29 of competition law. Moreover, such conduct may be regarded as unlawful interference with prospective business expectancy.

4.2 Comparative Analysis

4.2.1 General Concept of this Liability in Various Jurisdictions

As to basic concept of this liability in foreign jurisdictions, the common law system which is based on judge-made law will be primarily summarized.

First of all, regarding the UK jurisdiction which is the origin of this claim, the UK court recognized the tort of "causing loss by unlawful means or interference with trade or business by unlawful means", which is separable from the inducement tort. The House of Lords clarified the basis of this tort in *OBG Ltd*⁵⁶⁸. case (2007). The unlawful interference tort enables a plaintiff to file the suit against a defendant for economic infliction resulting from the defendant's unlawful conduct notwithstanding the absence of the existing contract.

Secondly, referring to the Canadian jurisdiction, the Supreme Court of Canada, followed the UK court, recognized tort of "unlawful interference with economic interests" where there was no breach of contract.⁵⁶⁹The claim permits a plaintiff to bring a suit against a defendant for economic loss resulting from the defendant's unlawful interference despite the absence of the existing contract. The basis of this kind of liability remained novel for long period of time until in 2014

⁵⁶⁸ *OBG Ltd v Allan* [2007] UKHL 21

⁵⁶⁹ Kain & Alexander, *supra* note 62.

where the decision of *A.I. Enterprise Ltd*⁵⁷⁰ was released; the Court laid the principle of unlawful interference which was narrowed and clarified.⁵⁷¹

Thirdly, in United States, the *Lumley v Gye*⁵⁷² Principle of the UK law has been widely accepted in the US and the English case of *Temperton v Russel*⁵⁷³ had a deep impact on the evolution of the tort in the United States which leads to the protection of commercial expectations.⁵⁷⁴ This liability is officially recognized in the Restatement (Second) of Torts as well as state case law. Most states formally recognized this liability in the various ways. Some states follow the principle suggested by the Restatement while other states create its own criteria to evaluate the claim.

Likewise, the civil jurisprudence whose case is based on the codified law is also explored and briefed.

Primarily, as to French approach, Article 1382 which is the general provision of French tort law has generous view to protect all rights and interests except illegal interests. When a person who has already known of the existing relations between the parties engaged in negotiation thereof and this conduct leads to the failure of execution of the contract, it may not be deemed as a fault based on competition notion unless it is done by an intention to cause loss or is accompanied by fraudulent misrepresentation.⁵⁷⁵

Next, under German tort law, the prospective interests may be protected under section 826 BGB. The person's wealth is protected based on this section. Even if the scope of section 826 BGB seems to be at first glance wider than section 823(1) BGB to the extent that its application is not limited to the violation of specific interests and provides for compensation even of pure economic loss, it is narrower as

⁵⁷⁰ *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177

⁵⁷¹ Morritt et al, *supra* note 68.

⁵⁷² *Lumley v. Gye* 118 ER 749 (KB 1853)

⁵⁷³ *Temperton v Russell* [1893] 1 QB 715

⁵⁷⁴ Carty, *supra* note 248.

⁵⁷⁵ Youngs, *supra* note 147.

it is available only in case of willfully inflicted damage.⁵⁷⁶ Even if it seems to be broad in nature, the German courts have applied this section in the case similar to English torts, such as intimidation, inducing breach of contract and deceit.⁵⁷⁷

Finally, under Thai law, the term “any right” pursuant to section 420 of Thai Civil and Commercial Code is interpreted in the broader manner than section 823(1) BGB of German law because in Thai law, there is no specific provision as appeared in section 826 BGB. Therefore, the liability of unlawful interference may rely upon this section provided that the defendant’s conduct satisfies the cause of action requirement. Likewise, if the defendant’s conduct is lawful but done with the pure malice or sole intent to injure the plaintiff, his conduct may be wrong under section 5. Moreover, in case of improperly exercising the right or abuse of right, the liability may also be imposed pursuant to section 421.

Analysis

It is apparent that all three common law countries recognized the unlawful interference with economic relations claim separated from the inducing breach of contract claim; however, the principle for cause of action is different; they use the various approaches or different cause of actions when applying this kind of claim and the extent to apply. The UK court recognized the claim but its application is limited. The UK basis is followed by the Canadian court while the US law has a specific provision and state case law also create its own rule. Moreover, the US law relating to unlawful interference goes beyond the UK law which is the origin of this tort.

The civil law system has no specific provision regarding this area of law. However, the general provision of tort can be applied, for example, the general and very wide basis of Article 1382 of French tort law can apply to if the defendant’s conduct engaged in wrongful conduct or done by the intention to cause loss. In Germany, there is a specific provision regarding immoral conduct in section 826 BGB which can be applied in this claim if the defendant’s conduct is *contra bonos mores* or

⁵⁷⁶Spindler & Rieckers, *supra* note 189.

⁵⁷⁷Youngs, *supra* note 147.

against the good moral. Under Thai law, the interests protected under this claim may be regarded as “any right” under section 420 so that the plaintiff is allowed to sue for damages if other requirements are satisfied. Also, if the defendant’s conduct was committed for the sole intent to cause loss, he may be subject to liability and abuse of right.

4.2.2 Cause of Action

UK The tort of unlawful interference requires:

- “1) An unlawful act committed by the defendants;
- 2) The interference with the actions of a third party in relation to the claimant;
- 3) Intention to cause loss to the claimant;
- 4) Damage to the claimants”⁵⁷⁸

Canada The tort of unlawful interference requires:

- “1) An intention to injure and cause loss to the plaintiff;
- 2) Interference with the plaintiff’s business or livelihood by illegal or unlawful means;
- 3) Unlawful means were directed at a third party who has an actionable claim or an actionable claim but for the absence of having suffered a loss; and
- 4) Economic loss as a result of the unlawful means”⁵⁷⁹

US Under Restatement (Second) of Torts⁵⁸⁰, §766B, “one who intentionally and improperly interferes with another’s prospective contractual relation is subject to liability to the other for the pecuniary harm resulting from the loss of the benefits of the relation, whether the interference consists of:

- (a) Inducing or otherwise causing a third person not to enter into or continue the prospective relations or

⁵⁷⁸SJ Berwin LLP, *supra* note 291.

⁵⁷⁹Bucholz, *supra* note 77.

⁵⁸⁰Restatement (Second) of Torts, §766B

(b) Preventing the other from acquiring or continuing the prospective relation”

Subject to the California approach, the subsequent elements must be satisfied to establish the cause of action. First of all, the plaintiff has a burden to prove that he had an economic relationship with a probability of future economic benefit. Then, the defendant knew about the plaintiff’s economic relationship. Next, the defendant’s conduct was substantially certain to interfere with the plaintiff’s relationship. After that, the defendant’s conduct was independently unlawful. Besides, the defendant disrupted plaintiff’s relationship. Eventually, the plaintiff suffered actual injury and the defendant’s conduct was a substantial factor in causing the disruption.

With respect to Texas law, to give rise to the cause of action, the ingredients consists of a reasonable probability that the plaintiff would have entered into a business relationship, the independent tortious or wrongful conducts of defendant, desire to prevent the relationship from establishing, harm or damage as a result of defendant’s interference.

In accordance with Illinois law, to constitute this claim, “the existence of valid business expectancy by plaintiff, the defendant’s knowledge of the expectancy, the defendant’s intentional and unjustified interference which prevents the realization of the business expectancy and damages” must be proved.

France, In spite of its broad manner of application, the plaintiff must demonstrate the main requirement of Article 1382:⁵⁸¹

- 1) Fault; any breach of the law can constitute a fault under this section
- 2) A causal connection between the tortious conduct and the damage; the possibility or opportunity to conclude the contract was destroyed as a result of tortious conduct
- 3) The chance is real and serious; chance is likely to occur, not rather than a mere hypothetical.

⁵⁸¹Ferreira, *supra* note 64.

Germany Section 826 “a person who willfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage.” This provision will only apply only in case of willfully inflicted damage and there is no other special protection. The plaintiff must prove that the defendant’s act amounted to conduct which was against good moral or public policy.

4.2.3 Scope of Business Expectancy or Prospective Interests

To determine the liability of unlawful interference, the scope of business expectancy or prospective relationship should be clarified. Generally, the liability on unlawful interference protects non-formalized or anticipated business relationships which are reasonably certain to occur, but which are nonetheless prospective.

This tort protects expectancies engaged in the ordinary commercial dealings, not expectancies involved, for example, in governmental licensing processes, sport contest or any other activities whose nature are outside the commercial dealings. In addition to proof of the existence of the relationship, a party must establish that it is reasonably probable that the economic advantage would have been realized but for the defendant’s interference. Anyway, it is not necessary for the plaintiff to prove that the defendant was aware of the exact prospective relationship.⁵⁸²

The terms “business advantage”, “business expectancy”, “business interests”, “business relations”, “economic advantage”, “economic interests”, “economic relations” and any others similar terminologies are prevailingly and interchangeably used. However, in the US, some states, i.e. California, have provided some guidance to determine economic relation that it is “something less than a contractual right, something more than a mere hope and exists only when there is a reasonable probability that a contract will arise from the parties’ current dealings.”⁵⁸³

⁵⁸²ABA Section of Antitrust Law, *supra* note 354.

⁵⁸³Newman & Ellis, *supra* note 388.

Trade or business interest is a broad concept which surrounds limited interests e.g. franchisees, agents, retailer, distributors⁵⁸⁴, which are not the owner of business, may sue under this tort. Business interests have wide scope including interests which are equal to economic interests i.e. interests from the formation of contract, employee's employment, ability to sell goods, deliver goods, hire out goods, or provide services to prospective customers and to obtain financial support from a financier.⁵⁸⁵ The future interests can also be protected as well as present interests. Breach of contract is not required to be actionable, mere interference with the prospective business interests is adequate.

In France, prospective economic relations are protected under the general clause of Article 1382. In French law, loss of profit resulting from non-conclusion of contract is protected. If negotiation only has the point in detail, the chance to conclude the contract is deemed obvious and the indemnification shall be envisaged.⁵⁸⁶ Under the US law, prospective interest is widely protected. The probability to obtain various kinds of contracts is protected and it goes beyond to protect an "at-will employment"⁵⁸⁷, this type of employment does not exist in Thailand. The prospective interests that should be protected under this claim can be roughly divided into two groups, e.g. interests expected to receive from the formation of contract, and interest expected to receive from the business or trades or general dealings.

4.2.3.1 Contract

Interests expected to receive from the formation of contract include many genres of contracts. Ordinarily, it emerges from the ordinary commercial dealing as well as employment contract. In addition, an action for unlawful

⁵⁸⁴Leahy et al, *supra* note 42.

⁵⁸⁵*Id.*

⁵⁸⁶Wéry, *supra* note 145.

⁵⁸⁷A term used in US labor law for the employment which an employer has the right to terminate the employment with the employee for any reason without just cause and prior notice, and vice versa, expect for illegal reason.

interference is not barred by an invalid contract. Conversely, a claim for interference with contract or contractual relations cannot be based upon an invalid contract.⁵⁸⁸

4.2.3.2 Trade and Business Expectancy or Prospective Interests

Trade and business expectancy as well as prospective economic advantage has so wide scope that the whole details cannot be described. However, in sum, the scope of prospective advantage may refer to an ability to obtain the favorable interests in the general commercial dealings. For example, sale of business, sale of goods, providing of services as well as similar activities should also be deemed as prospective interests under this claim. Furthermore, the scope of interests should also protect interest expected to obtain from the bid if the plaintiff has a reasonable expectancy to get the bid, for example, the plaintiff is the second-place lowest bidder who loses the bid despite the lower price and better equipment because the winning bidder engaged in unlawful act.

Under Constitution of the Kingdom of Thailand B.E.2550 (2007), section 43⁵⁸⁹, it ensures the person's liberty to trade or gain interests; freedom to make a living or trade is confirmed. When the defendant induces the customers not to purchase the goods from any shop or agitate the plaintiff's business so that the plaintiff cannot operate the business, the defendant should be liable⁵⁹⁰

With regard to the decision of the Supreme Court no. 809/2487, in the event the defendant hindered the plaintiff from operating its business and gaining his interests, the defendant can be liable.⁵⁹¹ As to the fact of this decision of the

⁵⁸⁸Rushing et al., *supra note* 385.

⁵⁸⁹Section 43 "A person shall enjoy the liberties to engage in an enterprise or an occupation and to undertake a fair and free competition.

The restriction on such liberties under paragraph one shall not be imposed except by virtue of the law specifically enacted for maintaining the security and safety of State or economy of the country, protecting the public in regard to public utilities, maintaining public order and good morals, regulating the engagement in an occupation, consumer protection, town and country planning, preserving natural resources or the environment, public welfare, preventing monopoly, or eliminating unfair competition."

⁵⁹⁰Sananpanichkul, *supra note* 530.

⁵⁹¹*Id.*

Supreme Court no. 809/2487, the plaintiff was a temple conducting the amusement. On the night of the amusement, the defendant thwarted the performance of Thai traditional southern dance (Norah) by using weapon and the performance therefore fell through. The plaintiff lost profit arising from collecting money from the audience. The defendant's conduct directly injured the right of the plaintiff's freedom according to law. The court held that the defendant's conduct interfered with the business operation's freedom of the plaintiff given by law so that the plaintiff lost any prospective economic advantage. Therefore, the plaintiff was entitled to recover damages. The court held based on section 420 and awarded damages pursuant to section 438 and 446.

4.2.3.3 Interests Not Protected

The interests expectancy which should not be protected under this claim are the expectancy engaged in the governmental license process, expectancy to win the sport contest or competition, expectancy to receive a job offer or any other activities whose nature are outside the commercial dealings or far beyond to count as interests expectancy.

Analysis

The scope of prospective interests is so broad that the entire specific interests protectable under this claim cannot be enumerated, instead, only the general outline or main basis to determine the interests can be given. However, to enable this claim in Thailand, the most crucial thing is to allow the prospective interests be protectable right under Thai law.

The prospective interests under this claim should be interpreted as "any right" under section 420 of Thai Civil and Commercial Code. The main characteristics of the interests must involve expectancy in ordinary commercial dealings, not engage in expectancy to obtain the governmental license, sport contest or any other similar activity whose nature is not relevant to ordinary commercial dealing. After contemplating the concept of interests in different countries, the proposed scope of prospective interests should cover two principle areas; prospective contract and trade or business expectancy.

Firstly, in relation to prospective contract, the scope of prospective contract should include various types of contract. If there is the reasonable probability to obtain the contract, loss of interests resulting from non-conclusion of the contract should be recovered. Likewise, with regard to trade or business expectancy, it should cover the ability to sell goods, deliver goods, hire out goods, or provide services to prospective customers as well as ability to obtain any favorable interests or ability to establish the business relations.

It is very substantial to clarify the scope of economic advantage in order to evaluate which conduct should be deemed as unlawful interference. After considering, it is reasonable that the scope of economic advantage should include the reasonable probability to enter into the contract regardless of types of contract, as well as the potential to establish the business relation or to reasonably acquire any interests protected by law.

4.2.4 Existence of Business Expectancy or Prospective Relationship

In order to constitute the liability for unlawful interference, there must be the existence of business relation between the claimant and the third party or any potential business interests. The economic interests can be broadly identified as appeared in the previous topic; however, the degree of certainty must also be considered. To widely illustrate the degree of certainty, suppose if a person only passes by your shop and take a glance at your goods, it is too remote to consider that he is your prospective advantage or potential customer because there is no reasonable expectation that he will buy your goods. But in case he gets into your shop, selects the goods, asks for their prices and bargains, it is reasonably presumed that he may decide to purchase the goods. Moreover, the amount of protection granted to expectancy should be consistent to the degree of certainty that the prospective advantage will come into being.

It is quite difficult to determine what degree of business expectancy can establish the elements of unlawful interference. However, some factors can be used to examine the existence of potential interests, for example, the length of the relationship if the relationship remained for long period of time or regular course of

similar prior dealing. In the US, there are two divergent approaches given in defining the existence of business expectancy. The first one relates to lenient approach allowing the expectation in general that the identification of the specific reasonable business expectancy is not required and the second one involves with the stricter approach requiring the plaintiff to identify the specific potential customers.

Relating to lenient approach, unidentified or general business expectancy is sufficient to recover. Some US courts accepts this as “business expectancy.” For instance, in the Motor Show, company A and company B show the innovation of super car. While company A presents its new innovative product, company B realizes that such product is identical to its product. Thus, company B suspects that company A committed misappropriation of trade secrets of company B. Company B therefore goes to company A’s boot and allege that company A acquire its trade secrets. During the allegation, many participant who may be deemed as potential customers of company A are sitting there and hear such claim.⁵⁹² Resulting from this, based on this approach, it is deemed that there is the existence of business expectancy because it is probable to establish the business relationship with such potential customers.

On the other hand, the court denied the pleading which is unable to identify the specific loss potential customer or business opportunities. Moreover, some courts deemed that the relationship between a plaintiff and a third party cannot simply be characterized as an unknown people.⁵⁹³ The business expectancy must be specific and reasonably certain to be materialized. In other words, some negotiations must be conducted and it is close to selling goods to a particular customers or executing the contract. If negotiation only has the point in detail, the chance to conclude the contract is deemed obvious and the indemnification may be awarded.

⁵⁹² Daniel P. Lyon & R. Peyton Mahaffey, “*When is Raiding a Competitor’s Employees Illegal?*”, MCCANDLISHLAWYERS, <http://mccandlishlawyers.com/wp-content/uploads/2013/12/Raiding-Competitors-Emp.pdf>

⁵⁹³ ABA Section of Antitrust Law, *supra* note 324.

Analysis

It is obvious that the future economic benefit must be proved and the probability or the degree of certainty of expectancy must be substantially taken into account. The business expectancy must be proved with some degree of specificity. It is reasonable that when the plaintiff alleges there is the prospective advantage, he is not required to show the guaranteed relationship since anything that is in nature prospective is substantially uncertain. The claim does not cope with certainty; instead, it handles with reasonable probability or likelihood. Importantly, the prospective advantage must exist in the manner that more than a mere hopes.

Two divergent approaches are given to evaluate the degree of business expectancy; these are general business expectancy and specific business expectancy. Personally, the author prefers the first approach.

Indeed, when there is no existence of prospective specific customers, it is too remote to count as business expectancy. When the specific customers are not required but only general or unidentified customers, it may not maximize the competition. As to strict approach, to determine whether the business expectancy exist or not, specific potential customers or identified business expectancy must be shown. Several factors may be used to determine the expectancy such as previous relationship between the plaintiff and the third party, duration of relationship, circumstances, or the negotiation has only the point in details.

However, in case it engages in people in general as presented in the first above case where no actual customer can be identified, how can the plaintiff recover loss? It may be useful to apply the lenient approach to leave open to the court to decide based on case-by-case basis. Regarding the unidentified prospective customers, the plaintiff has to show some potential evidences to reasonably identify that the relationship is reasonably certain to occur i.e. in case of redeeming of coupons.

In short, the economic advantage must be substantial enough to maintain an action for intentional interference and probability of future economic

benefit must be more than hope or desire.⁵⁹⁴ Additionally, both general and specific business expectancy should be allowed to sustain the existence of prospective business relations requirement. However, noting that even if the requirement of existing business expectancy is fulfilled, it does not mean that the claim can be sustained because there are other requirements left to be satisfied like unlawful means and intention.

4.2.5 Culpable, Improper or Unlawful Conduct

The lack of definition of “improper means” as one element of the unlawful interference requirement may facilitate a flexibility of a case-by-case basis; however, it can generate the inconsistency in the jurisprudence. The unclear basis of what amount to unlawful or improper means brings about the difficulty for the court and also the would-be plaintiff and defendant. Accordingly, the approaches or guidance given by each jurisdiction will be compared to figure out what path Thai law should follow.

In the United Kingdom, pursuant to *OBG Ltd v Allan* [2007] UKHL 21, the House of Lord enumerated that only unlawful conduct directed at a third party would satisfy the requirements of the unlawful interference tort if such conduct was “independently and civilly actionable by the third party or would have been had the third party suffered a loss⁵⁹⁵ and such conduct “interfered with the third party’s liberty to deal with the plaintiff.”⁵⁹⁶

In Canada, the Supreme Court of Canada has clarified the unsettled scope of “unlawful means” in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 by enunciating that “unlawful means must be narrowly interpreted and should apply only to conduct which give rise to a civil cause of action by the third party”.⁵⁹⁷ Simply, criminal offences and breach of statute may not be *per*

⁵⁹⁴Rushing et al., *supra* note 385.

⁵⁹⁵Kain& Alexander, *supra* note 62 at 88.

⁵⁹⁶*Id.*

⁵⁹⁷Phillips, *supra* note 85.

se actionable but the defendant's act must give rise to a civil action by a third party and it therefore interfere with the plaintiff's economic interests.⁵⁹⁸

In the United States, the improper element varies wildly from state to state and is so complex that can cause difficulties in an attempt to instruct the jury. Even if the Restatement (Second) of Torts is regarded as the guideline for considering the conduct but it is rather not useful because it only gives the broad factor to determine the defendant's conduct. Consequently, some states leave away from this advice and create their own standard. Now, some states like California, Texas and Illinois already have already clarified the unlawful element requirement which provides the lucid standard to examine the defendant's conduct.

In California, the conduct of the defendant must be independently unlawful. The term "independently wrongful conduct" means "it was wrongful by some legal measure other than the fact of interference itself."⁵⁹⁹ That is to say, apart from the interference itself, the conduct must violate some laws or statutes or be proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. "Unethical" or violated "industry standards" conduct alone cannot fulfill this requirement.

As quoted from the Texas Supreme Court, the liability for unlawful interference may be imposed if the plaintiff can prove that the defendant's act cause loss to him and such conduct was either independently tortious or unlawful.⁶⁰⁰ By "independently tortious" the court means conduct that would violate some other recognized tort duty.⁶⁰¹ Simply, it means conduct that is already recognized to be wrongful under the common law or by statute.

Similarly, under Illinois law, actionable interference requires conduct that is independently tortious by nature. Illinois law require the defendant's conduct to involve actionable fraud or be otherwise independently tortious.

⁵⁹⁸Mellett et al, *supra* note 69.

⁵⁹⁹*Id.*

⁶⁰⁰Wal-Mart Stores, Inc. v. Sturges 52 S.W.3d 711 (2001)

⁶⁰¹*Id.*

In France, when a person who has already known of the existing relations between the parties engaged in negotiation thereof and this conduct leads to the failure of execution of the contract, it may not be deemed as a fault unless it is done with an intention to cause loss or involve with fraudulent misrepresentation.⁶⁰² Besides, despite the lawful conduct, the defendant's act can amount to abuse of right if his motive is only to injure the plaintiff.⁶⁰³ Liability may be imposed in the event of conduct which amounts to an abuse of right pursuant to Article 1382.⁶⁰⁴ Any breach of law constitutes a fault under this section. Moreover, the court may also consider the unreasonable behavior to constitute a fault.⁶⁰⁵ Under French law, the criminal conducts are automatically civil wrong and all breach of a criminal statutory provision is a fault in civil and thus violate Article 1382 of the *Code Civil*.⁶⁰⁶

In Germany, when considering section 826 BGB⁶⁰⁷ (intentional damage against good morals or public policy), the inducement to breach a contract falls into this section; conduct of the inducer is categorized as unlawful or as *contra bonos mores*. As to interference with prospective economic advantage, it also falls into this section if the doer's act is determined against good morals. Even if the conduct is not wrongful pursuant to section 823 BGB, if a third person interferes the existing business expectancy in the manner contrary to good moral, it can be deemed as a tortious act according to section 826 BGB. Concept of abuse of right is also developed in German law but it is weaker than French law.⁶⁰⁸

Additionally, in civil law system, there is the development of abuse of right concept involving with the case that the defendant intentionally injures another and exercises the right in the excessive manner which causes loss to others; this principle was developed on the grounds that no one should suffer damage from

⁶⁰²Youngs, *supra* note 147.

⁶⁰³*Id.*

⁶⁰⁴*Id.*

⁶⁰⁵Momège & Bessot, *supra* note 168.

⁶⁰⁶Youngs, *supra* note 147.

⁶⁰⁷Section 826 “a person who willfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage”

⁶⁰⁸Youngs, *supra* note 147.

others' exercise of right and the abuse of rights is prohibited whereas the abuse of rights concept is not recognized in the common law systems.⁶⁰⁹

Finally, under Thai jurisdiction, liability under tort law does not have express stipulation to determine which conduct is unlawful. Hence, if individual's conduct injures the rights of person, which are right of life, body, health, freedom, property, or any right, person can be liable under tort law. Under Thai law, in relation to any right under section 420, Professor Jitti Tingsaphat opined in case of any right according to section 420 that it must be broadly interpreted and must include the case that a third party persuades a contracting party to breach a contract.⁶¹⁰ In this author's view, the prospective advantage may also be deemed as any right for the purpose of this section. Also, if a person acts against *bona fide* principle, person can hold liable under section 5 as well as in case of abuse of right which intentionally injures another, exercising the right without gaining any interests or in the event that damage which occurs on the other is greater than the benefit that person will acquire under section 421.

The following hypothetical cases are demonstrated to describe each country's approach:

(1) First Hypothetical Case

When A offers to sell a used car to B for the amount of 320,000 baht, but before B accepts such offer within specified time, C offers A to purchase such car for the amount of 350,000 baht. A therefore sells such car and delivers it to C.⁶¹¹ Due to the fact that B's acceptance has not been reached A, the contract between A and B is still not executed. Hence, A will not be liable for B under the contract.

⁶⁰⁹Michael Byers. *Abuse of Rights: An Old Principle, A New Age*. 47 McGill LJ. 389 (2002), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5574&context=faculty_scholarship

⁶¹⁰Tingsaphat, *supra* note 539.

⁶¹¹Paijit Punyapan, "Precontractual Liability and Concurrent Liability", 47 **Dullapaha**. 3 (2000).

(ไพจิตร ปุญญพันธ์, "ความรับผิดก่อนสัญญากับความรับผิดซ้อนกัน", 47 **ตุลพาท**. 3 (2543))

However, A's sale of car to C infringes the provisions of law as set forth in section 354 of Thailand Civil and Commercial Code⁶¹² on the grounds that A cannot withdraw his offer within specified time. Although A does not breach the contract with B because when A sells and delivers car to C, contract between A and C is not established yet, A's conduct may be deemed as wrongful act under section 420.⁶¹³

In such case, is there any liability against C? Can C's inducement be deemed as interference with future contract which B reasonably expects to enter into? Ability to obtain the reasonable prospective contract may be deemed as one genre of business interests. The relationship between A and B would have to rest in precontractual liability and the right between the parties is relative right. Relative right only exists in a relationship to a specific person. In the typical case is the creditor's right against the debtor, only creditor is entitled to oblige the debtor to pay the money back to him.⁶¹⁴ In contrast to relative right, absolute right is the right exists in relationships to all other people who are not owners i.e. right of property or personal rights. It can be simply said that it is the right against the world.⁶¹⁵ As to C's conduct, each jurisdiction has different point of views as follows:

UK Approach

In light of absence of the existing contract, this is exactly free market where an individual is free to compete with others for gaining his own benefits. It is that that C's action interferes with B's prospective economic interests by offering A the better price while it is in the specified duration for B to accept the proposal. However, to satisfy the unlawful conduct requirement of the UK law, C's conduct must be civilly actionable by A or would had been actionable if A had suffered loss and it must interfere with A's liberty to deal with B. In this case, it is clear that what C has done is only to offer a better price to A, it is not actionable by A and it does not interfere with A's liberty to deal with B. However, the circumstances

⁶¹²Section 354 "An offer to make a contract in which a period for acceptance is specified cannot be withdrawn within such period."

⁶¹³Punyapan, *supra* note 610.

⁶¹⁴Hans Kelsen, **General Theory of Law and State** (1945).

⁶¹⁵*Id.*

will be changed if C's conduct engaged in intimidation, threat or similar acts which prevent the liberty of A to deal with B.

Canadian Approach

In line with the UK court, on account of the absence of the existing contract, one can pursue their own interests by virtue of competition in the free market system. Obviously, C's conduct has not directed at A and not given rise to civil cause of action by A. Even if C's action interferes with B's prospective economic interests, what C has done is only to offer the lucrative price to A. It is the act to gain his interests based on competition and it is therefore totally lawful. In contrast, by changing the situation, if C does not simply offer A the attractive price, instead, he threat A that if A does not send the car to him, C will disseminate the false statement about A. In accordance with the latter case, C's act give rise to a civil action by A and thus satisfies the unlawful means element of unlawful interference tort.

US Approach

By applying California state law, to satisfy the unlawful element, the conduct of the defendant must be independently unlawful; it means the conduct must be unlawful by some legal measure or breach of statute. In this case, simply offering the higher price to get the deal; this is not against any law and is completely lawful. However, if C's conduct involved with the breach of statute like defamation whether directed at the plaintiff or the third party, it may fulfill the unlawful element to establish the unlawful interference claim.

French Approach

In the above scenario, B has no contractual relationship with A, therefore a claim for damages may rest in tort. To be liable under Article 1382, C's conduct must amount to fault, it means engaging in criminal conducts which are automatically civil wrong and all breach of a criminal statutory provision is a fault, fraudulent misrepresentation or unreasonable behavior can be count as a fault for the purpose of this Article. In this case, French law will not only examine C's conduct but also verify the intention of C. If C knows the existence of negotiation between A and B that A already makes an offer and it is during the time for acceptance by B, C's

conduct may be against the *bona fide* principle and may be liable for abuse of right under this Article.

German Approach

Based on such fact, C has not violated any of B's absolute rights, thus when considering German law, there is no claim under section 823(1) BGB because of relative natures. However, section 826 BGB allow recovery for pure economic loss, but C's act must deliberate and against public moral. If C knows the negotiation between A and B, C acts intentionally. Nevertheless, although C knows, C is not liable because intentional interference does not *per se* violate the public policy. There is no obligation to surrender its own interest to the prospective contractual right of another.⁶¹⁶ C will not be liable under section 826 BGB unless special circumstances which made the interference culpable can be proved such as conspiracy or improper means.

(2) Second Hypothetical Case⁶¹⁷

Justin, a famous singer, has a contract with a record company, ABC Ltd., to promote the album he has recorded for it. Steve, an executive from a rival record company, offers Justin 2,000,000 baht if he ceases promoting the album and signs to the rival company for his next album. The executive also states in case Justin does not accept this offer, he will see that he will not have been invited to perform for any major music festivals. If Justin accepts Steve's proposal, can ABC Ltd sue for any remedy against him? For other case, if Steve directly goes to ABC Ltd and says that he wants this employee, otherwise he would defame ABC Ltd., and it would lose the prospective benefits for Justin's next album. To answer the question, Steve's conduct can be classified into two groups:

- 1) If the act is directed towards Justin; and
- 2) If the act is directed towards ABC Ltd.

UK Approach

⁶¹⁶Bussani & Palmer, *supra* note 165.

⁶¹⁷Bagshaw, *supra* note 307.

Applying the judgment of the House of Lords, we can say that Steve will only be liable to ABC Ltd for ‘inducing a breach of contract’ as long as Justin broke a contract and thus he may be liable for persuading him to stop promoting his current album if he knew of his contract and intended to cause it to be breached. Similarly, this tort will only cover persuading him to sign to the rival company for his next album if he was contractually obliged not to do this.⁶¹⁸

1) If Justin did not have a contractual obligation to record his next album for ABC Ltd then Steve may still have committed the tort of “causing loss by unlawful means or interference with trade by unlawful means” to ABC Ltd, but only if his threat with regard to big music festivals was a threat of an actionable civil wrong to Justin (for instance a threat to defame him, this restricts the freedom of a third party to deal with the plaintiff), and only if he made this threat with the intention of causing harm to ABC Ltd. If Steve’s threat was merely to prevent Justin from being invited to the music festivals by using means that would not involve with any civil wrong to him, for instance, offering the festival organizers other artistes at highly reduced rates, then he would not commit a tort to ABC Ltd even if his primary purpose was to cause loss to it.⁶¹⁹

2) On the other hand, if the conduct was directed towards ABC Ltd., Steve did not commit the tort of “causing loss by unlawful means or interference with trade by unlawful means” against ABC Ltd. because his conduct was not directed at Justin, the third party and was not actionable by Justin. Ultimately, the conduct did not interfere with Justin’s liberty to deal with ABC Ltd.; ABC Ltd. therefore is not entitled to Steve sue under unlawful interference claim.

Canadian Approach

1) Applying the basis given by the Supreme Court of Canada, if Justin had no contractual obligation to sign for next album with ABC Ltd., Steve may also be liable under “unlawful interference with economic relations” if his threat with regard to big music festivals gave rise to a *civil* cause of action by Justin (for instance

⁶¹⁸Bagshaw, *supra* note 307.

⁶¹⁹*Id.*

a threat to defame him which would be actionable by him or would have been actionable if he had suffered loss). Such unlawful conduct intentionally interfered or harmed the plaintiff's economic interests. However, if Steve's threat simply prevented Justin from being invited in the festival by simply offering other singers at lower rates, his conduct was totally lawful.

2) In contrast, if the conduct directly towards ABC Ltd., Steve did not commit the tort of "unlawful interference with economic relations" because his act did not give rise to a civil action by the third party, what ABC Ltd can recover may be based on threat or defamation.

US Approach

By applying California law, it does not contribute to any difference whether Steve's conduct is directed towards Justin or ABC Ltd., if his conduct did not engaged in any unlawful means; he can pursue his own gain without any liability. Nonetheless, if Steve's conduct is independently unlawful by some legal measures, for instance, if he threat Justin that Justin will be attacked unless Justin signs his next album with him or he threat ABC Ltd. that he will spread false information about ABC Ltd. to public unless ABC Ltd. entitles him to sign with Justin for his next album. Steve may be liable for unlawful interference.

French Approach

By answering in a single set of two questions, if Steve's action engaged in fault under Article 1382, as appeared in the example like defamation regardless of directed at the third party or the plaintiff, it seems that there is no difficulties to impose liability on Steve. This does not make any different between the conduct towards Justin or ABC Ltd. Normally, apart from examining the conduct, the French law tends to focus on the defendant's intention whether it aims to cause loss to the plaintiff (ABC Ltd.) or involving with the abuse of right or not.

German Approach

Steve can pursue his prospective interests as long as his action is not against good morals or public policy. This interest is protected under section 826 BGB provided that there must be some deliberate infliction of damages and engaged in *contra bonos mores* conduct. No matter his conduct directed at Justin or ABC Ltd., this does not make any difference. The main focus is to evaluate the conduct whether it is against good morals or not, irrespective of whom Steve's conduct is directed at. In this case, if he deliberately threatens Justin that he will defame Justin unless Justin ceases dealing with ABC Ltd and sign to Steve for his next album or threatens ABC Ltd that he will disseminate false information about ABC Ltd unless ABC Ltd allows Justin to sign to Steve, Steve's both actions may be deemed as *contra bonos mores* and may be liable for his action.

3) Third Hypothetical Case

Lime Inc., the second-place lowest bidder who loses its bid for the project of providing military equipment to the authorities notwithstanding its better equipment and lower price, its loss arises as a result of the winning bidder', Banana Inc., who offers the benefits and sexual favor to the officials by means of bribery. How can Lime Inc., recover any damages resulting from Banana Inc.'s act?

UK Approach

In this case, Banana Inc.'s conduct did not interfere with the authorities' liberty to deal with Lime Inc. The authorities remained at liberty to deal with Lime Inc. Hence, Banana Inc.'s conduct did not satisfy the unlawful conduct requirement under UK law.

Canadian Approach

In line with UK law, Banana Inc.'s conduct did not give rise to a civil action by the authorities. Criminal act or breach of statute is not *per se* actionable. Hence, Banana Inc.'s conduct did not satisfy the unlawful conduct requirement under Canadian law.

US Approach

In the US, under California path, the California court formally allows the second-place lowest bidder to sue the winning bidder on the grounds of unlawful interference with economic relations provided that the plaintiff has a reasonable expectancy to succeed in the. In this case, Lime Inc., with its efficient equipment and favorable price, has a reasonable expectancy to succeed the tender but for the defendant's conduct engaged in the independent unlawful act, which is bribery. Thus, Banana Inc.'s act meets the unlawful act requirement.

French Approach

Under French law, the criminal conducts are automatically civil wrong and all breach of a criminal statutory provision is a fault in civil and thus violate Article 1382 of the *Code Civil*.⁶²⁰ This also applies to other violation of statutory duties under *lois* and *règlements* despite the fact that the sanction is not criminal.⁶²¹ Therefore, Banana Inc.'s conduct can amount to fault under Article 1382's requirement and can fulfill the unlawful conduct requirement.

German Approach

In case of bribery, it can be regarded as interference with prospective economic interests if the individual has a reasonable expectation to win the bid but for the bribery.⁶²² German law does not provide for specific civil sanctions against persons who paid bribes to officials. Nonetheless, when person deliberately harms another in a way that breaches public morals or *contra bonus mores*, damages can be recovered against him based on section 826 BGB. It stated that section 826 BGB applies to willfully bribery of official. It allows plaintiffs to sue for damages when they have been injured by bribery of officials.

⁶²⁰Youngs, *supra* note 147.

⁶²¹*Id.*

⁶²²Eicher, *supra* note 236 at 173.

Analysis

Preventing others from obtaining economic interests or business expectancy can be justified on the grounds of competition or acquirement of their own interests even if it causes loss to others. However, if the interference involves with the improper conducts, the interferer should be liable under some legal measures.

After exploring the concept of unlawful means in different countries, each jurisdiction copes with this matter in various approaches. Under common law countries, despite the same law system, each country applies the claim in distinct way. UK law has a rigid view when applying the unlawful interference claim; it reflects the common law perspective which is reluctant to support the fair competition rules, it rather promotes and maximizes the competition. The plaintiff can only allege based on the defendant's act directed towards the third party and actionable by that third party. Further, the defendant's conduct must also affect the third party's liberty to deal with the plaintiff.

Like the UK law, the Canadian courts follow the concept of the UK law and declare that the plaintiff can constitute the tort only when the defendant's act give rise to a civil action by the third party; however, it is not required that the interference must affect the third party's liberty to deal with the plaintiff as appeared in UK law. In contrast, the US law seems to have more lenient approach to accept this kind of liability. It does not restrict the defendant's act to be directed at the third party, otherwise it only focuses on the nature of the defendant's act whether it is improper or not. Improper means are defined by giving factors to determine as appeared in the Restatement (Second) of Torts. Many states refuse to apply such basis due to lack of clear definition and define that the conduct must amount to independent tort.

To narrow the scope of application of this claim by UK and Canadian court, it has rationale support that if violation of criminal act or breach of statute can be *per se* actionable, it will end up with the situation that the delivery company may be liable for the rival business if his employee violates the traffic act. On the contrary, the US seems to allow the unlawful interference claim despite no action against the third party by focusing on the defendant's act to violate the law like

in case of bribery. The US court has a tendency to award the damages to the second-lower bidder losing the tender because the winning bidder succeeds the bid because of bribery to the officials.

The Canadian Common law approach is different from the wider approach given by the Civil Code of Québec and the US law. Many states in the US has given a wide interpretation of unlawful interference claim and the prohibited conduct sometimes is simply as “improper” without requiring an actionable wrong conduct.

As to civil law jurisprudence, the blameworthy conduct is based on the general provision of tort, in France, to be liable under Article 1382; the defendant’s action must fall within the definition of a fault requirement. Any breach of the law constitutes a fault under this section. Moreover, the court may also consider the unreasonable behavior to constitute a fault. Under French law, the criminal conducts are automatically civil wrong and all breach of a criminal statutory provision is a fault in civil and thus violate Article 1382 of the Code Civil.⁶²³ In Germany, the defendant’s act is classified as unlawful when it falls within the scope of *contra bonos mores* principle; in other words, it is against good morals pursuant to section 826 BGB.

Additionally, in civil law system, there is the development of abuse of right concept involving with the case that the defendant intentionally injures another; this principle was developed on the grounds that no one should suffer damage from others’ exercise of right and the abuse of rights is prohibited whereas the abuse of rights concept is not recognized in the common law systems.⁶²⁴ Also, in Canada, under Québec jurisdictions, an actionable wrong is not required pursuant to Québec Civil Code. Moreover, the Québec Civil Code has developed the doctrine of

⁶²³Youngs, *supra* note 147.

⁶²⁴Michael Byers. “Abuse of Rights: An Old Principle, A New Age”, 47 **McGill LJ**. 389 (2002), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5574&context=faculty_scholarship

“abuse of rights” that liability may be imposed for conduct committed with an intention to cause economic loss to the plaintiff despite the lawful conduct.

With respect to Thai law, person can be liable under general tort law under section 420 if the interference is wrongful itself. Moreover, a person is entitled to exercise their right as long as it is not done for the sole intention to cause harm to another. However, even if there is no malicious intent to cause harm, if the person uses the right in the manner that cause loss to another more than it should be, the person can be liable under section 421.

The conduct of the defendant should not be restricted as advocated by UK and Canadian court because if the action targets at the plaintiff, the plaintiff should be entitled to recover the damages. In this regard, the US law based on California approach should be adopted in case of determining the defendant’s conduct. Also, the French concept of abuse of right should remain when applying this claim.

When considering Thai law, in spite of lack of specific provisions as appeared in US or any basis given as appeared in UK and Canadian court, the general tort provision of Thai tort law can be applied in this situation. To be liable, the defendant’s conduct must fulfill the requirement of section 420. If it is outside the scope of section 420, section 421 can be regarded to cover this circumstance, if the defendant exercises a right which can only have the purpose of causing injury to another person, he may be liable. Moreover, it also against the *bona fide* principle as suggested by section 5.

In this author’s opinion, to establish the liability, the conduct can be both independently wrongful or expressly against the law as required under section 420 and conduct which the doer has liberty to commit but he abuses his right and cause damages to others pursuant to section 421. For instance, the double of the value of coupon issued to Big C’s customer can be deemed as pursuing its own business interests but it can be regarded as exercising the right to cause loss to others, which is abuse of right.

To satisfy the unlawful requirement, it should be classified into two types. Firstly, the defendant's act must be independently unlawful which means it is against law apart from the act of interference itself, the defendant's conduct must breach of statute or violation of any law. The violation of industry standard or ethical practices should not be solely grounds the cause of action to avoid any uncertainty to this area of law. Secondly, if the conduct of the defendant's is not against law but he commits the act with the sole intent to injure the plaintiff and satisfies the abuse of right requirement, he should be liable for his malice intent.

It is advantage to include conduct which is independently wrongful and the conduct which a person has the right to commit but abuse his right. As to independently wrongful, the typical conduct for interference with economic advantage may cover several illegal actions such as defamation, conspiracy, bribery, threat or assault. The defendant may acts directly against the plaintiff in order to ruin plaintiff's business by means of illegal conduct like defamation or acts directly to the third party and it then results in plaintiff's damages. For instance, the defendant threatens the third party (plaintiff's potential customers) that he will hurt them, if they still buy goods from the plaintiff. Such threat may be actionable by the third party based on assault but it would not be actionable by the plaintiff, therefore allowing this claim may be a valuable remedy for the plaintiff. In addition, if person only gently persuades, outbids, or offers the attractive interests to induce the others' potential customer or prospective partner not to enter into the future contract, trade or business, the inducer does not commit any unlawful act unless the improper means or abuse of right are employed.

4.2.6 Knowledge and Intention

In UK, with regard to intent to injure, the plaintiff must demonstrate that the defendant acted with an intention to disrupt with the plaintiff's prospective contract with the potential customers or the third party.⁶²⁵ Without an intention to injure the plaintiff's business relations, tortious interference cannot be found. The court has summarized that interference is intentional "if the actor desires to bring it

⁶²⁵Coinmach Corp. v. Aspenwood Apartment Corp. 417 S.W.3d 909 (Tex. 2013).

about or if he knows that the interference is certain or substantially certain to occur as a result.”⁶²⁶ The court further reasoned that “if the actor had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose, the interference may be found to be not improper.” (“Mere participation in the transaction is not sufficient to establish an intentional action to harm the plaintiff.”).⁶²⁷

In Canada, with reference to *A.I. Enterprises Ltd.*, the court found that the defendant’s knowledge of business relationship between the plaintiff and the third party was not a substantial element of the unlawful means tort. Instead, the vital element is to determine whether the unlawful conduct intentionally interfere or harm the plaintiff’s economic interests.⁶²⁸ Nevertheless, the following question is how the defendant deliberately injures the plaintiff’s economic advantage without knowing the business relationship between them.

In US, under California law, the defendant’s knowledge of relationship after interfering is not adequate to maintain the claim. It must be shown that the defendant know the economic relationship before interfering.⁶²⁹ However, the defendant’s knowledge of plaintiff’s specific name or identity is not necessary. General knowledge of plaintiff’s involvement in the relationship is sufficient.⁶³⁰ In brief, knowledge of economic relationship is essential whereas the plaintiff’s actual name or identity is not necessary as stated in California 40.103. Moreover, it is not necessary to prove that the defendant acted with specific intent to interfere with plaintiff’s prospective economic advantage. Instead, plaintiff has to prove that the defendant knew that their conduct was certain or substantially certain to interfere with the plaintiff’s economic interest as appeared in *Edwards v. Arthur Andersen LLP* (2008).⁶³¹

⁶²⁶*Coinmach Corp. v. Aspenwood Apartment Corp.* 417 S.W.3d 909 (Tex. 2013).

⁶²⁷*Id.*

⁶²⁸*Phillips, supra* note 85.

⁶²⁹*Id.*

⁶³⁰*Id.*

⁶³¹*Id.*

In France, liability may be imposed in the event of conduct which amounts to an abuse of right pursuant to Article 1382.⁶³² In this regard, despite the lawful conduct, the defendant's act can amount to abuse of right if his motive is only to injure the plaintiff⁶³³ or his rights is exercised in an excessive manner which causes harm to another.⁶³⁴

In Germany, the intention must cover the infliction of harm as well as the conduct causing it. Conditional intention suffices when the defendant prepared to take the risk of a perceived possible consequence occurring.⁶³⁵ The defendant may commit a tort under section 826 BGB if he realized of the fact that the plaintiff could suffer loss as a result of his action.⁶³⁶

Malicious motive is variously regarded in different jurisdiction. Despite the same law system, the UK and the US law have different point of view. With respect to English approach, a malicious motive of the defendant cannot turn the lawful conduct into wrongful conduct. In contrast, the intent to injure the rival trader rather than for the purpose of competition can be deemed as illegitimate act in the United States.

Simply inducing the third party not to enter in the future agreement with the plaintiff is not actionable unless motivated by malice despite the absence of conspiracy or unlawful means. This is also appeared in section 5 which highlights on good faith principle; person should exercise his right or commit an act with good faith and not have intent to harm others.

When applying this element in Thailand, it will be useful to follow the California path stating that the defendant's knowledge of plaintiff's specific name or identity is not necessary. General knowledge of plaintiff's involvement in the relationship is sufficient.⁶³⁷ Moreover, it is not necessary to prove that the defendant

⁶³²Youngs, *supra* note 147.

⁶³³*Id.*

⁶³⁴Schammo, *supra* note 177.

⁶³⁵Youngs, *supra* note 147.

⁶³⁶*Id.*

⁶³⁷*Id.*

acted with specific aim to disrupt with the plaintiff's prospective economic advantage. Instead, plaintiff has to prove that the defendant knew that their conduct was certain or substantially certain to interfere with the plaintiff's economic interest.

4.2.7 Notion of Freedom of Trade and Trade Stability

Subject to free market system, one is able to compete for gaining his own interest even it may cause damage to another so long as it is not done for the sole purpose of injuring the others and wrongful means are not employed. In this author's view, acquiring the economic opportunity, favorable prospective interests or business expectancy should be regarded as right to operate the business or to gain his own interests without undue interference.

Generally, before entering into the contract or realizing the business relationship, the parties will pay large amount of money during the negotiation process i.e. legal consultant fee, transportation fee, loss of chance to negotiate with others. If any party does not act in good faith and break off negotiation or the third party interferes with the negotiation, the other party may suffer damages. Despite the absence of contract, person should be liable on other grounds. Most civil law countries in Europe like France, Italy and Germany recognize precontractual liability in different approach. Traditionally, common law countries do not recognize this kind of liability. However, the concept of precontractual liability highlights on the would-be contracting party's liability. If in the event that contract is not established because of third party's interference, does the interferer have to be liable?

The UK courts recognized the claim of "causing loss by unlawful means" which imposes the liability in case of interference with others' prospective advantage in the absence of a contract; however, English notion is rather reluctant to promote fair competition and tends to give less protection to prospective economic relations by narrowing the scope of application of such claim. Similarly, the Canadian law also confirms this concept which demonstrates in the *A.I. Enterprises Ltd. V. Bram Enterprises Ltd.* released by the Supreme Court of Canada in 2014. It underlines the competition and gives less protection to economic interests. Notwithstanding the same law system, US law tends to encourage the fair competition as appeared in the Restatement (Second) of tort which specifically imposes liability

in the event of interference with prospective economic advantage. Like US, French law has a generous view to protect economic interests and promote the operation of business without undue influence.

In the United State, the case relevant to interference with prospective economic advantage frequently filed, in contrast, the case relating to such fact seldom emerges in Thailand, it can be presumed that the interests suffered may be a little amount and the expected award may not be attractive enough or the suffered individual may think that there is no claim available for him. It is interesting to find out if the scenario which occurs in US emerges in Thailand, how the court deals with this matter and relies on which law. To determine the individual who interferes with the prospective business expectancy has to be liable under Thai law or not, tort law and competition law will be taken into account. While claiming under the competition law may not be thoroughly effective because it limits the people who can be sued must be the business operator. Tort law may fill this loophole.

In some circumstances, the plaintiff who suffered economically from the defendant's cannot recover damages because such conduct directed at the third party and such conduct may be actionable by the third party; however, if such act is committed with an intention to injure the plaintiff but directed at the third party, how can the plaintiff recover? Therefore, it will be useful to allow the plaintiff who suffered loss from the defendant's action and cannot seek for recovery from other actions to sue the defendant based on this ground.

4.2.8 Restraint of Free Market System

Some argues that this liability may restraint the free market system by giving the interesting example relevant to this area of liability that suppose you love a beautiful girl and she is neither married nor having boyfriend but you have already known that the other guy are hitting on such girl. Do you have to wait until that guy fails to win her heart so that you can pursue your desire?

The answer for the above scenario is absolutely not. Here, there is no existence of relationship, no marriage and no contract. Thus, this is the free market where everyone can pursue his own interests and compete with others. No one is more justified or more privileged under this situation. However, imagine you are competing

based on fair rule, you give her precious gift and taking care about her but your competitor use the philter to lure and entice her, or simply drug her.

You may think that this is not fair and wonder how you can recover from this grievance. In this situation, it may be difficult to award any damages because of its nature and it may be hard to identify that you have a reasonable expectancy to be her boyfriend. But, this example merely aims to demonstrate that if the competition is fair, no one should be liable in any circumstances because competition is not a tort; person can use every trick on the book to be the winner provided that the action must be legitimate. However, if the blameworthy means are used, there should have any measures to prevent the culpable conduct and any compensation to award the injured person.

Exactly, free market is significant and no liability should be imposed for the course of competition; however, there should have rule of the game to control and ensure the fair competition. This liability has no intention to devalue of the free trade. It does not restrain of trade at all. Although the doer's predominant motive while committing the conduct may be for the purpose of advancing his own business or gaining his living, a person is not entitled to disrupt with another's business by using illicit means. While claim for breach of contract may be not available due to lack of privity, this liability may provide a valuable remedy especially in the aggressive competition.⁶³⁸

It is reasonable that this kind of tort should get less protection than tort arising under existing contract; however, its existence is still vital. In the course of conducting the business or negotiation, people desires to be ensured that he can run the business or conduct the dealing without any unlawful interference. This tort can be served as a protection of economic or business interests and ensures people to conduct the business or dealing under fair competition. Indeed, the rationale of this tort is to promote fair competition. It does not restraint of trade and devalues the competition. Rather, it encourages the competitive activity since if illegitimate conducts of the competitor are ignored, it actually ruins the competition. This tort draws the boundaries between fair and unfair competition.

⁶³⁸ Chisholm, *supra* note 79.

This notion comes from the basis that every business is entitled to assume that it can conduct its business or dealing free of undue disruption. It is designed to protect an economic interest as well as balancing the competition. The main element to constitute this tort is the reasonable business expectancy of the plaintiff. The example of expectation is the chance to acquire the new clients or customers or maintain the relationship with the existing customers. This principle fosters the principle of *bona fide* competition for prospective advantage. If the competition is fair, the interference is justified.

For the purpose of public policy, the courts encourage competition and reject the plaintiff's attempt to prevent competition or to promote their self-interest. Based upon the eyes of the law, the competitors have a preference if their action is competitive and their conduct do not engage in unlawful means or create an unlawful restraint of trade. The analysis of whether the competition is lawful turns on "whether the actor's conduct was fair and reasonable under the circumstances."⁶³⁹

Simply, not every act that disturbs a prospective contract or business expectancy is actionable. If a person only gently offers or persuades the attractive interests to induce the others' potential customer or prospective partner not to enter into the future contract, trade or business, the inducer does not commit any unlawful act unless the improper means or abuse of right are employed.

4.2.9 Specific Provision or Leaving Open to the Discretion of the Court on a Case-by-Case Basis

After comparing the different foreign approaches to Thai law, it is explicit that section 420, section 421, section 423 and section 5 of Thai tort law are sufficient to deal with this matter. However, the most important thing is to interpret the prospective economic interests or business expectancy without undue intervention as a protectable right under the wording "any right" under section 420 so that the court can award damages to the plaintiff. In this regard, it may be better to leave the court using the discretion than to stipulate the specific provisions to specifically handle with

⁶³⁹ Newman & Ellis, *supra* note 388.

this matter. Nevertheless, this writing will propose the outline for determining this liability as follows:

Suggested Basis to Evaluate Elements to Constitute the Tort

4.2.9.1 Existence of Business Expectancy

The main characteristics of the interests must involve expectancy in ordinary commercial dealings, not engage in expectancy to obtain the governmental license, sport contest or any other similar activity whose nature is not relevant to ordinary commercial dealing. The scope of prospective interests may cover the reasonable probability to obtain the contract as well as the probable ability to establish the business relation or to acquire any interests protected by law such as the ability to sell goods, deliver goods, hire out goods, provide services to prospective customers or obtain any favorable interests.

Then, degree of certainty of expectancy is substantially taken into account. The probability should be less than contract but more than only hope. Therefore, to constitute the liability, the expectancy must be reasonable to incur and not just only anticipate without any evidence to support. Both general and specific business expectancy should be allowed to sustain the requirement provided that the plaintiff has a burden to prove that non-formalized or anticipated business relationships are reasonably certain to occur. For example, in case *Big C v. Lotus*; the defendant offered the plaintiff's customers to double the value of coupon issued by the plaintiff provided that the customers must purchase goods from the defendant, the interests expected to obtain by the plaintiff may be deemed as general business expectancy but it also should be protected from any undue intervention.

4.2.9.2 Knowledge and Intention

Specific intent is not needed to establish the torts of interference with prospective economic advantage. Instead, the plaintiff has to prove that the defendant knew that his conduct was certain or substantially certain to interfere with the plaintiff's economic interest and needs not to prove the knowledge of the injured party's name or identity.

4.2.9.3 Unlawful Conduct

This kind of tort covers a wide range of conduct which include the acts that are tortious or wrongful, such as infringement of statutes, law, rules or regulations. Likewise, violence, threats or intimidation are also aggregated including bribery, fraud, defamation, misrepresentation duress, deceit, undue influence, conspiracy, breach of a fiduciary duty and unfair competition.

The standard to evaluate wrongful or improper interference with business expectancy must be a legal measure because in non-contractual relations the “rewards and risks of competition are dominant.” A standard less than a legally measureable standard violation of a statute or common law tort for determining wrongful or improper interference fails to give notice that one’s conduct may have an adverse “legal effect” on him. Evaluating interfering conduct by using a legal measure instead of factors or standards that invite uncertainty provides clarity for the court and potential defendants. Furthermore, the defendant’s conduct directed at the plaintiff as well as conduct directed towards the third party should be both equally treated

4.2.9.4 Damage and Relief

Under section 438, “the court shall determine the manner and the extent of the compensation according to the circumstances and the gravity of the wrongful act.” The issue arising is what the scope of damage include. The injured individual may sue for injunction to cease of tortious conduct as well as pecuniary damages. Can loss of profit, loss of chance to trade, loss of chance to acquire the interests be recovered?⁶⁴⁰

⁶⁴⁰ See also Panita Chansong, “The Assessment of Damages in case of Breaking Off Negotiation in International Sales of Goods Contract”, Thesis of Master of Laws, Faculty of Laws, Thammasat University, 2012. (ปนิตา จันทร์สงค์. “หลักการพิจารณาค่าใช้จ่ายเสียหายอันเกิดจากการล้มเลิกการเจรจาในสัญญาซื้อขายสินค้าระหว่างประเทศ” วิทยานิพนธ์ปริญญาโท มหาวิทยาลัยธรรมศาสตร์, 2555.), Yada Rattanaarakkha. “Damages For Non-Pecuniary Loss: A Case Study on Breach of Contract”, Faculty of Law, Chulalongkorn University, 2009 ญาดา รัตนอารักขา. “ค่าเสียหายสำหรับความเสียหายที่ไม่เป็นตัวเงิน : ศึกษาในกรณีผิดสัญญา” วิทยานิพนธ์ปริญญาโท มหาวิทยาลัยธรรมศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, 2552., Ussarakorn Tiawiset. “The Assessment of Damages in case of

The injured individual may sue for injunction to cease of tortious conduct as well as pecuniary damages. Generally, it should include both present and future loss. Loss of profit, loss of chance to trade, loss of chance to acquire the interests should be included as available recovery if it is certain and foreseeable.

4.2.9.5 Justification

There is a distinction between the competitive activities which are protected under free market system from the actionable interference. To defense for this liability, the defendant should prove that they only act for pursuing his own interests, do not have malicious intention to cause loss to the plaintiff and ultimately do not engage in any unlawful means. The competition between the business operators can be regarded as the justification provided that the competition is performed under fair practices.

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CHAPTER 5

CONCLUSION AND RECOMMENDATION

5.1 Conclusion

In the free market system, competition is encouraged and any anticompetitive act will be deemed malicious; however, it should be under fair practices and good faith principle. As long as an individual interferes with the economic expectancy of others and not with an existing interests or contract, it will be deemed as competitive activity. For example, when the business operator induces the others' customers to be their customer and it results to loss of others' prospective economic advantage, his conduct may be justified on the grounds of pursuing for his own financial gain. However, if the individual's conduct goes beyond the acceptable behavior or improper means are employed in the course of interference, such individual should be liable under some legal measures.

Antitrust law or competition laws are designed to solve this problem as well as tort law; these laws provide the remedy to those suffered from such unfair conduct. Actually, competition law and tort law do not prevent the competition but it truly fosters the competition. They can be regarded as "rules of the game"; they ensure that person can conduct his dealings without undue molestation.

When navigating the foreign laws, it is found that some jurisdictions formally recognize tortious liability of intentional interference with prospective economic advantage such as Canada, the United Kingdom and the United States. Yet, by exploring the civil law approach i.e. France and Germany, they do not have any specific provisions to cope with this matter but they also have the efficient way to handle with this issue. For the good understanding of this liability concept, the foreign laws will be summarized.

5.1.1 Foreign Law

The claim of unlawful interference with prospective economic advantage is recognized in several jurisdictions. With regard to the common law system, under the English law, it recognizes the claim “causing loss by unlawful means” which permits the plaintiff to sue for damages arising from the defendant’s interference with his prospective interests regardless of existing contract. However, the application of this claim is rather narrow because it is sustained only in case the defendant’s act is directed towards the third party, actionable by that third party and ultimately interferes with the third party’s liberty to deal with the plaintiff.

Next, the Canadian law also recognized tortious liability of “intentional interference with economic relations” which allows the plaintiff to file a suit against the defendant who interferes with the plaintiff’s prospective interests irrespective of existing contract. The Canadian court also followed the suggestion given by the English courts when determining the defendant’s conduct. The defendant’s act must give rise to a civil action by the third party. Although these two common law countries recognize this claim but the application is narrow. This reflects the common law perspective which is reluctant to support the fair competition.

Then, relating to the US law, and even if the United States derives this liability concept from UK law, the US admits and applies this claim in the broader manner than its origin. The basis of this liability is expressly provided in Restatement (Second) of Tort as well as in state case law. Notwithstanding the same law system, the US law has a different notion from UK and Canada. Most states in the US recognized this category of tort and each state creates its own criteria. As to defendant’s conduct, some states follow the factors given by the Restatement while some states are away and stipulate that the defendant’s act must be independently unlawful conduct apart from the act of interference. Moreover, it does not restrict that the defendant’s act must be directed at the third party.

With reference to civil law system, despite the absence of specific provisions, civil law countries have no difficulty to handle with this matter. In France, it rather has a generous view to protect person’s prospective interests, breach of statute as well as unreasonable behavior may be deemed as fault and if it causes

damages to another then the liability may be imposed pursuant to Article 1382. Under German law, section 826 BGB can be considered to protect prospective interests. Even at first glance, this section is wider than section 823 because it allows recovery of pure economic loss or people's wealth but its application is limited that the defendant's act must be against good moral or public policy. Moreover, in civil law view, good faith principle and abuse of right is developed and prevails. Even if the defendant does not engage in unlawful conduct, he may be liable if motivated by malicious intent or sole purpose to cause loss to others.

5.1.2 Thai Law

A right of action for breach of contract arises when there is a violation of some rights derived from contract, in contrast, a right of action for tort exists where there is a violation of a right given by law. Although a breach of contract is not tortious, if a third person induces a breach of contract between the contracting parties, that person may become liable, multiple jurisdictions have recognized the liability of inducement to breach of contract. Even if the existing contract deserves greater protection than future contract, the prospective contract or economic opportunities should be protected in some respects.

When glancing at Thailand Civil and Commercial Code, there are three main approaches to be taken into account to settle the issue, which are general tort provision, good faith principle and abuse of right. As to good faith principle, it is prescribed in section 5 which provides that in the exercise of right, the individual must act in good faith. This provision lays a very wide and general basis. Consequently, if applying this section with the case, vagueness will arise and the case can be interpreted in different way. However, it should be used when no specific provisions can be applied.

Regarding general tort provision pursuant to section 420, if the actor's conduct is against the law and results in damages of prospective economic advantage of another, he should be liable under this section even it fits into particular type of tort i.e. defamation, misrepresentation of trade secrets, bribery. Lastly, in terms of abuse of right, person has the right to exercise but such exercise cause detriment to others in

the extent not permitted by law. Therefore, although the person has a legitimate right to pursue his own interests, he has to be aware not to exceedingly use his right that can cause loss to person more than it should occur in the reasonable course of business.

However, to sue based on tort law, the most substantial thing is to accept the plaintiff's prospective interests as protectable right within the scope of "other right" under section 420. As to Thai law, even if there is no express provision providing liability on interference with prospective economic advantage, person can become liable on the grounds that it violates any other rights pursuant to section 420 of Thailand Civil and Commercial Code. 421, section 421 on abuse of right and section 5 on good faith principle.

In short, it is acceptable that person has the right to compete for his own interests or financial gain even exercising such right may cause damage to another. Interference with others' prospective economic advantage may be justified so long as wrongful conduct is not committed and the interference is not performed for sole purpose of injuring another.

5.2 Recommendation

Resulting from the study of foreign laws and Thai law regarding interference with prospective business expectancy, it is not necessary to stipulate specific provision in Thai law relating to interference with prospective economic relations as appeared in the US tort law providing that person shall be liable in case of inducing, preventing or causing a third person not to enter into or continue the prospective relations. It is better to leave the court to consider the case based on case-by-case basis. However, this writing suggests the scope for determining if any case relevant to this liability occurs as follows:

- 1) Despite the absence of contract, the prospective interests of person should be protected from unlawful conduct. The prospective interests, business expectancy or any similar term should refer to an ability to obtain the favorable interests from the general commercial dealings. This prospective advantage should be

regarded as a protectable right under the term “other right” under section 420 of Thai tort law.

2) In relation to the defendant’s knowledge of business expectancy, it is not necessary to prove that the defendant acted with specific intent to interfere with plaintiff’s prospective economic advantage. Instead, plaintiff has to prove that the defendant knew that their conduct was certain or substantially certain to interfere with the plaintiff’s economic interest.

3) Regarding the defendant’s conduct in the course of interference, the defendant’s act must be independently unlawful which means it is proscribed by some laws apart from the act of interference itself. Besides, the defendant’s act should not be limited only to the act directed at the third party as suggested by the UK and the Canadian courts.

4) In term of malicious intent, even if the defendant’s act is lawful but such act is committed with an intention to injure the plaintiff or acts contrary to the social ends of that right, the defendant should be liable based on abuse of rights concept.

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BIOGRAPHY

Name	Miss Pawita Boonliang
Date of Birth	November 14, 1990
Educational Attainment	2013 Bachelor of Arts (First Class Honors) in French, Silpakorn University 2011 Bachelor of Law, Ramkhamhaeng University Thai Barrister at Law Thai Attorney at Law
Work Position	Legal Officer Haier Electric Thailand PCL
Work Experiences	August 2015- Present : Legal Officer Haier Electric Thailand PCL June 2014- June 2015: Legal Counsel Sahaviriya Steel Industries PCL June 2013- December 2013: Legal Advisor Orbis Legal Advisory Ltd.