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A Critical Analysis of Promise in Scots
Law and Thai Law

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Presented for the Degree of Doctor of Philosophy

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Declaration

I confirm that I have composed this thesis myself. This thesis has not been submitted for any other degree or professional qualification.

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Abstract

This thesis critically analyses the law of promise. It does so for the purposes of identifying potential solutions to practical and doctrinal problems in the Thai law of promise. Scots law is chosen as the main point of comparison because, inter alia, both jurisdictions are mixed jurisdictions. Scots promissory law was influenced by the Canon Law and was part of the *ius commune* tradition. Scots law was not influenced by English law in this area. Scots law has developed its own promissory obligation as a free standing legal entity outwith contract. Thai promissory legal principles were derived from both Civilian and English sources. Consequently, promissory language is used both in the sense of a unilateral obligation and a contractual promise. Moreover, the Thai drafters did not acknowledge the different attitude towards a unilateral promise of French law (where a promise must be accepted in order to be binding) and German law (where particular types of unilateral obligations are recognised). This thesis argues that the flaws in promissory provisions under the Thai Code stem from the fact that, inter alia, the drafters did not understand the difference between unilateral and bilateral obligations.

This thesis argues that the Scots promissory approach presents a more efficient structure of the law of obligations than the Thai approach. It encounters fewer problems than Thai law because a promise is deemed to be a standalone obligation. This thesis further analyses the practical applications of promise, arguing that a promissory analysis is useful in conceptualising practical circumstances. Adopting a promissory approach is beneficial, making doctrinal analysis clearer in comparison with the offer and acceptance approach.

This thesis takes into account the role given to promise in the DCFR. The notion of a unilateral undertaking in the DCFR illustrates that the most recent model rule of European private law recognises the importance of a unilateral obligation. This reflects the fact that the notion of a contract cannot appropriately deal with certain

situations in which a person unilaterally intends his/her undertaking to be bound without acceptance.

It is concluded that the Scots approach of regarding a promise as an independent obligation separate from contract could be adapted to Thai law. There are certain resemblances between Scots and Thai law in promissory theories and the obligational nature of a promise. Therefore, Thai law is not unfamiliar with the notion that a declaration of wills can unilaterally create an obligation. The proposed approach provides a number of advantages e.g. eradicating an overlap between a promise and an offer; clarifying the legal status of promise; and making the legal status of a promise to make a contract compatible with a promise of reward. In particular, this thesis postulates that promise has a substantive role to play in governing an offer specifying a period of acceptance. This particular observation has, to date, not been made in relation to Thai law.

Lay Summary

A one-sided promise is legally binding in some legal systems, i.e. a person who makes a promise is bound to keep it. The law of promise is critically analysed in this thesis. The enquiry is inspired by the problems encountered with the application of promise in Thai law. There are two major legal traditions in the world, namely the Continental European and the English legal traditions. The concept of promise in Thai law was derived from both Continental European and English sources. However, the attitudes towards a one-sided promise between these two legal traditions differ. The fact that Thai law derived its law of promise from both sources results in confusion over the usage of the term “promise”. The drafters of the Thai Code used the term “promise” both in the sense of one-sided obligation (similar to German law) and two-sided obligation or contract (similar to English law). Therefore, Thai law lacks clarity on what defines a promise as a promise.

Scottish law is chosen for this comparative study because the Scottish law of promise appears to function effectively at a theoretical level. It has been discovered that the Scottish approach to the application of a promise is more efficient. It encounters fewer problems than Thai law because, among other things, a promise is deemed to be an independent obligation separate from a contract. This thesis further addresses practical applications of a promise and it has been found that the concept of promise is useful in conceptualising day-to-day transactions. The approach of regarding transactions as a promise is particularly useful when it concerns transactions related to customers where the law wishes to provide more protection to customers or less powerful parties.

Reference is also made to a model rule for European private law, namely the Draft Common Frame of Reference (DCFR). Like Scottish law, the DCFR recognises a one-sided promise as an independent obligation separate from a contract. This reflects the fact that there are certain situations in which a person intends his/her undertakings to be bound without acceptance. The idea of a contract cannot

appropriately deal with this kind of situation, since it requires the acceptance of the other party.

It is concluded that the Scottish approach of regarding a promise as an independent obligation separate from contract could be successfully adapted to Thai law. There are similarities between Scottish and Thai law in terms of the underlying basis of promise. Therefore, the approach of regarding a promise as an independent obligation would not be a total change for Thai law. The new approach would do much to improve the application of the law of promise within the Thai legal system.

List of Abbreviations

Books and Articles

- | | |
|--|--|
| <i>An Introduction to Scottish Legal History</i> | Various Authors, <i>An Introduction to Scottish Legal History</i> (1958) |
| Aristotle, <i>Nicomachean Ethics</i> | Aristotle, <i>Nicomachean Ethics</i> , in <i>The Basic Works of Aristotle</i> , R McKeon (ed) (2001) (Modern Library Edition) |
| Atiyah, <i>Promises</i> | P S Atiyah, <i>Promises, Morals, and Law</i> (1981) |
| Atiyah, <i>Sale of Goods</i> | P S Atiyah, <i>Atiyah's Sale of Goods</i> , 12 th edn (2010) |
| Bankton, <i>Inst</i> | A McDouall, Lord Bankton, <i>An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Delivery between Them and the Laws of England Vol I</i> (1751-53) |
| Bell, <i>Com</i> | G J Bell, <i>Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence</i> (5 th edn, 1826) |
| Bell, <i>Prin</i> | G J Bell, <i>Principles of the Law of Scotland</i> (4 th edn, 1839, reprinted Edinburgh Legal Education Trust, Vol 1 2010) |
| Black, <i>Obligations</i> | R Black, "Obligations", in <i>The Law of Scotland: Stair Memorial Encyclopaedia Vol 15</i> (1995) |
| Boonchalermvipast, <i>Thai Legal History</i> | S Boonchalermvipast, <i>ประวัติศาสตร์กฎหมายไทย (The Thai Legal History)</i> , 12 th edn (2013) |
| Buckland, <i>Roman Law</i> | W W Buckland, <i>A Text-book of Roman Law From Augustus to Justinian</i> (1921); reprinted 1990 |
| Colquhoun, <i>Roman Civil Law</i> | P M C D Colquhoun, <i>A Summary of the Roman Civil Law</i> (1951) |

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- Enonchong, Letters of Credit* N Enonchong, *The Independence Principle of Letters of Credit* (2011)
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- Evans-Jones, Receptions of Law* R Evans-Jones, “Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law” (1998) 114 LQR 228
- Erskine, Inst* J Erskine of Carnock, *An Institute of the Law of Scotland*, (1773)
- Erskine, Prin* J Erskine of Carnock, *The Principles of the Law of Scotland* (1754)
- Farnsworth, Contracts* E A Farnsworth, *Contracts*, 2nd edn (1998)
- Farran, Is the Tartan Fading?* S Farran, “Scotland: Is the Tartan Fading?”, in S Farran et al (eds), *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended* (2014) 13
- Forbes, Inst* W Forbes, *The Institutes of the Law of Scotland* (1722 and 1730); reprinted Edinburgh Legal Education Trust, Vol 3, 2012)
- Forte, Good Faith* A D M Forte (ed), *Good Faith in Contract and*

- Property* (1999)
- Fried, *Contract* C Fried, *Contract as Promise: A Theory of Contractual Obligation*, 2nd edn (2015)
- Gloag, *Contract* W Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland*, 2nd edn (1929)
- Gloag & Irvine, *Law of Rights in Security* W M Gloag & J M Irvine, *Law of Rights in Security, Heritable and Moveable including Cautionary Obligations* (1897)
- Goode on Commercial Law* R M Goode, *Goode on Commercial Law*, 4th edn, by E McKendrick (2009)
- Gordley, *Contract Doctrine* J Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991)
- Gordley, *Good Faith* J Gordley, “Good Faith in the Medieval Ius Commune”, in R Zimmermann & S Whittaker (eds), *Good Faith in European Contract Law* (2000) 93
- Gordley, *Promise* J Gordley, “Some Perennial Problems” in J Gordley (ed), *The Enforceability of Promises in European Contract Law* (2001) 1
- Grotius, *De jure belli ac pacis* H Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations – Primary Source Edition* (1903) M Walter Dunne Publisher; (2014) Nabu Public Domain Reprints
- Grotius, *Jurisprudence of Holland* H Grotius, *The Jurisprudence of Holland, The Text Translated with Brief Notes and a Commentary by R W Lee*, Vol I Text Translation and Notes (1936)
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- Helmholz, *Contracts* R H Helmholz, “Contract and the Canon Law”, in J Barton (ed), *Towards a General Law of Contract* (1990)

- Helmholz, *Canon Law of Oaths* R H Helmholz, “Religious Principles and Practical Problems: The Canon Law of Oaths”, in R H Helmholz, *The Spirit of Classical Canon Law* (1996) 145
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- Hogg, *Promises* M Hogg, *Promises and Contract Law: Comparative Perspective* (2011)
- Hogg, *Promises in European Private Law* M A Hogg, “Promise: The Neglected Obligation in European Private Law” (2010) 59 ICLQ 461
- Hume, *Treatise* D Hume, *A Treatise of Human Nature: Being An Attempt to Introduce the Experiment Method of Reasoning Into Moral Subject*, available at <http://davidhume.org/texts/thn.html>
- Index of Civil Code* Phraya Manavarajasevi (Plod Vichian Na Songkhla). “Index of Civil Code.” in Phraya Manavarajasevi (Plod Vichian Na Songkhla). Transcript of Interview with Phraya Manavarajasevi, Department of Legal Study in Society, Philosophy and History, Faculty of Law, Thammasat University. 2nd edition. Bangkok: Winyuchon, 2014.
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- MacCormack, *Pollicitatio* G MacCormack, “A Note on Stair’s Use of the Term Pollicitatio” (1976) JR 121
- Mackenzie, *Inst* Sir George Mackenzie of Rosehaugh, Knt, *The Institutions of the Law of Scotland* (2nd edn, 1688)
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- Translation of Japanese Civil Code* L H Lönholm, *The Civil Code of Japan (1898)*
- Translation of Swiss Code of Obligations (1984)* S L Goren, *The Swiss Code of Obligations (as of January 1, 1984) (1984)*
- Translation of Thai Code* K Sandhikshetrin , *The Civil and Commercial Code Books I-VI and Glossary (2008)*

Journals

| | |
|------------|---|
| AM J Juris | The American Journal of Jurisprudence |
| EdinLR | Edinburgh Law Review |
| HarvLRev | Harvard Law Review |
| ICLQ | International and Comparative Law Quarterly |
| JR | Juridical Review |
| LQR | Law Quarterly Review |
| OxJLS | Oxford Journal of Legal Studies |
| SLT | Scots Law Times |

National Civil Codes

| | |
|---------------------------|--|
| BGB | Bürgerliches Gesetzbuch (The Civil Code of Germany) |
| Code civil | Code Napoléon (The Civil Code of France) |
| Italian Code | Codice Civile Italiano (The Civil Code of Italy) |
| Japanese Code | 民法 (The Civil Code of Japan) |
| Swiss Code of Obligations | Code des obligations / Obligationenrecht (The Swiss Federal Code of Obligations) |
| Thai Code | ประมวลกฎหมายแพ่งและพาณิชย์ (The Civil and Commercial Code of Thailand) |

Introduction

A. OVERVIEW

(1) Backgrounds and reasons for the enquiry

Some jurisdictions recognise a unilateral binding obligation generally known as promise or unilateral promise.¹ This thesis critically analyses this type of voluntary obligation. The enquiry is inspired by Thai private law in which the application of promise has been facing difficulties.

Under Thai law, there are two main types of promises. First, promises without a specific promisee (public promises) comprise advertisements of reward and prize competitions. Second, promises with a specific promisee can be divided into four main groups, namely (i) promises to pay a penalty for not performing an obligation, (ii) promissory notes, (iii) promises to pay remuneration and (iv) promises to enter into a contract.

There are ambiguities regarding the juristic nature and legal effects of promise. For example, as the Thai Code only has provisions in relation to promises to enter into a contract in certain specific contracts, namely sale and gift, it is doubtful whether an individual can make promises which will constitute other types of contract other than those specified under the Code.² Moreover, the lack of general concepts and definitions of a promise results in confusion over its legal characteristic. It is questionable whether a promise is a unilateral juristic act or a unilateral contract (bilateral juristic act).³ Also, the issue as to whether or not a promise is required to be communicated to the promisee remains unsettled.⁴ Another issue concerns the

¹ See the introductory paragraph of Chapter I.

² This is discussed in Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (4) Will theory in Thai law, (a) Will theory from the perspective of an analysis of voluntary obligation.

³ This is discussed in Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (2) Promissory theory as explained by Thai writers, (a) Controversies over legal status of promise.

⁴ This is discussed in Chapter VI, B. COMMUNICATION OF A PROMISE, (2) Thai law.

distinction between a promise to enter into a contract and an offer. The common view suggests that a promise to enter into a contract is per se an offer, resulting in a difficulty in distinguishing them.⁵

As the problems and controversies regarding promise under Thai law still exist and there have been only few studies in this field⁶, this thesis aims to study Thai legal principles by comparison with other legal systems or legal models which have more obvious concepts of promise.

This thesis chooses Scots law for the purpose of a comparative study because both Scots and Thai law are mixed jurisdictions. Moreover, the promissory obligation is recognised in Scotland and appears to function effectively at a conceptual level. Additionally, the law of promise in both Scots and Thai law derives in part from Civilian sources. The differences, however, may be as to how they have been developed and applied. Scots law has developed its own promissory obligation as a free standing legal entity. Thailand could learn from Scots law in applying and developing the law of promise from this comparative analysis. This may help to suggest the satisfactory solutions for the problems experienced under Thai law. It is hoped that this comparative analysis could benefit Thai law in producing a better approach to the law of promise. Similarly, there may be some aspects of Thai law from this comparative analysis which can be useful to Scots law.

Additionally, this thesis refers in passing to promise under the Draft Common Frame of Reference (DCFR). There has been co-operation in creating legal models for European contract law. A reference to those legal models could also benefit Thai law on the grounds that Thai contract/promissory law mainly derived its principles from

⁵ This is discussed in Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (2) Thai law, (c) Binding characteristics of a promise.

⁶ According to the database of the National Library of Thailand, there are three Master's Theses in respect of the law of promise, namely (1) คำมั่น (Promises) by P Sugandhavanij (1983), (2) คำมั่นเกี่ยวกับการเช่าอสังหาริมทรัพย์ (Promises to Lease Immoveable Properties) by P Lengeaw (1998) and (3) คำมั่นจะทำสัญญา: ศึกษาในเชิงทฤษฎี (Promise to Contract: Theoretical Study) by T Yodcharn (2001), available at <http://www.opac.nlt.go.th:82/ipac20/ipac.jsp?index=TITLEP&term=%E0%B8%84%E0%B8%B3%E0%B8%A1%E0%B8%B1%E0%B9%88%E0%B8%99&x=23&y=9>.

the Civil Law.⁷ The DCFR is chosen because it is the latest legal framework seeking to harmonise the principles of European private law, and it recognises the concept of unilateral obligations.⁸ Accordingly, the principles under the DCFR are very modern, and are worthy of study. In addition, since the DCFR has been drafted by leading scholars throughout Europe, it may be assumed that it contains the best, or most appropriate, rules of contract/promissory law. Consequently, the DCFR could be a useful model from which to draw in order better to understand the law of promise.

(2) Scope of the study

This thesis focuses on the law of promise used in a Civilian sense, namely a unilateral binding obligation. It is not the law of promise as traditionally recognised in the Common Law, where promises are used to define a contract. This thesis also deals with the law of contract because in Thai law promises are not standalone obligations, but exist as an aspect of contract law. Thus, theories and doctrines which solely deal with the law of promise are of limited use in analysing promise within Thai law. Nevertheless, only contractual theories/doctrines which have connections with the law of promise will be discussed. This thesis mainly focuses on the Thai and Scottish jurisdictions. Nonetheless, the legal principles in other jurisdictions, such as England, France and Germany, are also referred to when it is relevant to the issues under discussion.

⁷ See Chapter II, C. THAILAND: A NEWLY DISCOVERED MIXED LEGAL SYSTEM?, (2) Reception of foreign laws in Thailand, (b) Reception of the Civil Law.

⁸ The DCFR uses the term “unilateral undertaking”, rather than “unilateral promise”. Nevertheless, both terms are regarded as expressing the same concept. This can be traced through the Interim Outline Edition of the DCFR, in which the words “promise or undertaking” were previously used. For example, Art II-1:103 of the Interim Outline Edition states: “A valid unilateral promise or undertaking is binding on the person giving it if it is intended to be legally binding without acceptance.” However, this was criticised as an unnecessary duplication. Consequently, the word “promise” was removed and the word “undertaking” alone is used under the DCFR. (C V Bar et al (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Outline Edition* (2009) 20).

B. METHODOLOGY

This thesis adopts a common methodology in comparative legal research: it explores similarities and differences⁹ between two legal systems¹⁰ in order to critically analyse advantages and disadvantages of each system. It does so partly from an historical perspective, in order to understand the development of the law of promise in each jurisdiction. It examines the reasons behind the legal principles in each system in order to deeply understand the nature of those principles, with the aim of providing suggestions for improving Thai law. Suggestions are made concerning appropriate interpretations of the law as well as legislative revision.

⁹ G Samuel, *An Introduction to Comparative Law Theory and Method* (2014) 53-57.

¹⁰ J Husa, "Legal Families", in J M Smits (ed), *Elgar Encyclopedia of Comparative Law*, 2nd edn (2012) 491 at 491.

Chapter I

General Nature and Requirements of Promise

Some jurisdictions recognise the idea of promise. The Civilian tradition¹ regards promise as an exception, rather than a general principle. For example, German law enforces some promises e.g. promises of reward² and promises of donation.³ Italian law provides that a unilateral promise of performance is enforceable only in specific circumstances.⁴ The Swiss Code of Obligations contains a provision concerning promises of reward.⁵ French law recognises some promises, such as promises of sale⁶ and unilateral promises to contract (*promesse unilatérale de contrat*),⁷ despite the fact that these promises are not unilateral obligations but are created by an agreement of two parties.⁸ In English law, promises are not generally binding, despite exceptions such as a promise made by way of deed or under seal.⁹ Scots law is different in regarding promise as an independent obligation, that is one the enforceability of which does not depend on contract.¹⁰

As the main purpose of this thesis is to critically analyse the doctrine of promise under Scots law and Thai law, the study begins with the historical development of the legal obligation of promise. The definition¹¹ of a promise is not discussed due to

¹ For the approaches of other European systems to unilateral promises see *Commentary on the Draft Common Frame of Reference* 340-342.

² BGB, §657

³ BGB, §518.

⁴ Italian Code, Art 1987.

⁵ Swiss Code of Obligations, Art 8 para 1.

⁶ *Code civil*, Art 1589.

⁷ J Bell et al, *Principles of French Law*, 2nd edn (2008) 305; H Beale et al (eds), *Cases, Materials and Text on Contract Law*, 2nd edn (2010) 64.

⁸ For further discussion see section A. THE LEGAL OBLIGATION OF PROMISE, (4) Northern Natural Law jurists, (b) Grotius' influence on French law.

⁹ *Chitty on Contracts* para 1-128; *Treitel The Law of Contract* paras 3-170-171; For case law see *Hall v Palmer* (1844) 3 Hare 532; *Macedo v Stroud* [1922] 2 AC 330; *HSBC Trust Co (UK) Ltd v Quinn* [2007] EWHC 1543 (Ch).

¹⁰ Stair, *Inst* 1.10.4.

¹¹ Although philosophers and lawyers explain the nature and characteristics of promise, most of them tend not to give a clear definition of promise. Examples include Atiyah (Atiyah, *Promises*), Fried (Fried, *Contract*), Kimel (Kimel, *Promise*), Pratt (Pratt, *Promises*), Gilbert (M Gilbert, "Is an Agreement an Exchange of Promises?" (1993) 90(12) *Journal of Philosophy* 627 at 627-649), Gordley (J Gordley, "Enforcing Promises" (1995) 83 *California Law Review* 547). Examples of writers who provide a definition of promise are L P Simpson, *Handbook of the Law of Contracts* (1954) 2; Hogg,

space constraints. However, the requirements for a legally binding promise will be considered.

A. THE LEGAL OBLIGATION OF PROMISE

(1) Roman law

Since the Civilian systems significantly derive their law of obligations from Roman sources, it is appropriate to begin the chapter by considering the Roman law of unilateral obligations.

(a) Promises in Roman law

Zimmermann suggests that the concept of *pollicitatio*¹² in the *Digest* is the nearest comparator to the unilateral promise of modern law.¹³ Under Roman law, a *pollicitatio* was “an undertaking (*promissio*) made merely by him who affirms it.”¹⁴ It was distinguished from an agreement (*pactum*), which was “a consent and covenant between two persons”.¹⁵ Under Roman law the term *pollicitatio* was used in two different contexts: as an absolute unilateral promise not requiring acceptance; as an offer irrevocable before acceptance.¹⁶

In the *Digest*, there were certain circumstances in which a promise, without *stipulatio*, could be binding: (i) as a vow;¹⁷ (ii) as a promise of dowry;¹⁸ (iii) when given in exchange for an office granted to the promisor;¹⁹ (iv) if the promisor had already

Promises 6; and W R Anson, *Principles of the English Law of Contract*, 25th edn (1979) 4. (This edition is the last edition of this book in which a definition of a promise is provided).

¹² There is no consensus amongst legal scholars in relation to the exact meaning of the term *pollicitatio*. See Zimmermann, *Obligations* 575-576.

¹³ Zimmermann, *Obligations* 574.

¹⁴ Voet, *Commentary on the Pandects* 707.

¹⁵ Dig L, 12, 3, (as discussed by Voet, in Voet, *Commentary on the Pandects* 707).

¹⁶ Voet, *Commentary on the Pandects* 708-709.

¹⁷ Dig L, 12, 2, *in principio* and following sections, (as discussed by Voet in *Ibid* at 708).

¹⁸ Code V, 11, 6, (as discussed by Voet in *Ibid* at 708).

¹⁹ Dig L, 12, 6, 2, (as discussed by Voet in *Ibid*).

performed, or the work already started by a community.²⁰ In these circumstances *pollicitationes* were usually held to be irrevocable offers;²¹ and (v) if made as a result of a natural disaster e.g. a fire, an earthquake or a collapse of a building.²²

Consequently, the common opinion is that these circumstances under the *Digest* cannot be equated to the modern doctrine of promise on the grounds that it was used only in a public context, and there is no case of *pollicitatio* in favour of a private individual.²³

(b) Contracts under Roman law

Not all contracts were recognised as enforceable obligations under the *ius civile*, but depended on whether a transaction fell within a recognised type of contract. Contracts “*re*” were enforceable upon delivery of the subject matter.²⁴ Contracts *consensu* were bilateral, consensual agreements.²⁵ Some contracts required formalities. The most obvious example of a Roman contract with a promissory aspect to it was the “*stipulatio*”, formed by question and answer. The promisee asked “*spondesne?*”²⁶ (Do you solemnly promise?).²⁷ The promisor replied “*spondeo*”²⁸ (I do solemnly promise).²⁹ Contracts not falling into these categories were called “innominate contracts”³⁰, and were unenforceable, unless a party had performed.³¹

²⁰ Dig L, 12, secs 1-5; and lex 3, *in principio* and sec 1 of the same title, (as discussed by Voet in Voet, *Commentary on the Pandects* 709).

²¹ *Ibid.*

²² Dig L, 12, 1, 1; and *leges* 3, 4 and 7 of the same title, (as discussed by Voet in Voet, *Commentary on the Pandects* 709).

²³ Zimmermann, *Obligations* 574-575; McBryde, *Promises* 51.

²⁴ Buckland, *Roman Law* 459. As for examples of contract *re*, see Buckland, *Roman Law* 459-462, 479-487, 470-478, and 488-494; Colquhoun, *Roman Civil Law* 469-472, 467-470, 470-478 and 488-494; See also Zimmermann, *Obligations* 153-229.

²⁵ Buckland, *Roman Law* 410. Examples of contract contracts *consensus* can be found in Buckland, *Roman Law* 479-494, 495, 504 and 512-518; See also Zimmermann, *Obligations* 230-476.

²⁶ G.3.93, (as discussed by Buckland in Buckland, *Roman Law* 434).

²⁷ Translation by W L Burdick, *The Principles of Roman Law and Their Relation to Modern Law* (2004) at 434.

²⁸ G.3.93, (as discussed by Buckland in Buckland, *Roman Law* 434).

²⁹ Translation by W L Burdick (n 27).

³⁰ “Innominate contract” is the term used by modern scholars. In Roman contexts these contract had names. However, they did not fall within any categories of contracts which had names. Buckland, *Roman Law* 518 (at note 9).

³¹ For a detailed account see Buckland, *Roman Law* 518-523.

By contrast, all agreements were treated as enforceable obligations under the *ius gentium*.³² Medieval jurists were of the view that a person must keep his word “as a matter of "faith", "equity" and the *ius gentium*, a law binding upon all people”.³³ The fact that the *ius civile*³⁴ applied to Roman citizens and the *ius gentium*³⁵ applied to non-citizens rendered them different in practice. Promises made between Romans could not be enforced, unless they complied with the necessary formalities. In contrast, promises made between Romans and non-citizens or amongst non-citizens were binding regardless of the formalities. Thus, it was more flexible to enforce a promise in which at least one party was not a citizen than one in which both parties were Romans. This reflects the fact that the idea of promise under the *ius gentium* was closer to the notion of promise held by later Natural Law jurists, in that the binding obligation of promise arises from the parties’ will.³⁶

(c) Conclusion on Roman law

Although Roman jurists explained that one must keep one’s word (a similar idea to promising), this principle was enforceable only in the *ius gentium*. Under the *ius civile*, there was an action akin to (and usually translated as) promise – the *stipulatio*. Nevertheless, it had the formality of a contract. Not even all bilateral agreements were recognised as enforceable obligations under the *ius civile*. Thus, given the absence of any general enforceability of unilateral promises in Roman law, the European promissory obligation must have as its source something other than the Roman law.

³² For full discussion see Gordley, *Good Faith* 95-100.

³³ See *Ibid.*

³⁴ The term “*ius civile*” is used in two different senses. The first definition refers to the law that was applied in the Roman Empire. The second definition had a broader meaning and it was used by the classical jurists. See Buckland, *Roman Law* 52-53.

³⁵ There is a controversy over the exact meaning of “*ius gentium*”. Some jurists (e.g. Gaius) treated *ius gentium* as exactly the same as *ius naturale*. G.1.1. Frag Dos 1. 1, (as discussed by Buckland in Buckland, *Roman Law* 53). However, some (e.g, Ulpian) were of the view that it is different from *ius naturale*. D.1.1.1.4, (as discussed by Buckland in Buckland, *Roman Law* 53).

³⁶ E.g. Grotius, *De jure belli ac pacis* 2.11.4; Stair, *Inst* 1.10.1; Pufendorf, *Duty of Man and Citizen* 3.5.9. For further discussion see section (4) below.

(2) Canon Law

The character of Roman law was formalistic. This is seen from the approach to obligations, discussed above. The canonists departed from this formalism and focused on the actuality of obligations. Although the canonists themselves saw breach of promise as a sin, rather than looking to legal enforcement,³⁷ they emphasised the recognition of the principle of keeping one's word.³⁸ The canonists focused on the substance of the obligation, rather than on formality,³⁹ thus becoming the first jurists to break away from the formalism of Roman law.⁴⁰

The notion of enforcing unilateral promises in the Canon Law derived from the ethical principle: "*ita quoque in verbis nostris nullum debet esse mendacium*"⁴¹ ("There ought to be no falsehood in our words").⁴² The canonists concluded that God made no distinction between sworn promises and man's words.⁴³ Hence, there should be no difference between oaths and simple promises for Christians either.⁴⁴ This advanced the idea that all promises could be enforceable regardless of their formalities.⁴⁵ This principle led to the enforceability of unilateral promises.⁴⁶ The basic contractual principle *Pacta sunt servanda* was developed from this canonical principle.⁴⁷ In the case of unilateral promises, the principle could be applied to all

³⁷As Astuti observes, "they said little about the matter because, unlike the civilians, their prime concern was not whether an agreement was actionable but whether breach was a sin". Astuti, "I principii fondamentali dei contratti nella storia del diritto italiano", *Annali di storia del diritto* 1 (1957) 34-37, (discussed by Gordley in Gordley, *Good Faith* 99 at note 29).

³⁸McBryde, *Promises* 54.

³⁹Helmholz, *Contracts* 50; McBryde, *Ibid.*

⁴⁰J Roussier, *Le fondement de l'obligation contractuelle dans le droit classique de l'Eglise* (1933), esp 46-97 and F Spies, *De l'observation des simples conventions en droit canonique* (1928), (as cited by Helmholz in Helmholz, *Canon Law of Oaths* 162).

⁴¹Decretum Gratiani C 22 q 5 c 12, in *Corpus Iuris Canonici*, A Friedberg (ed) (1879), (as cited by Helmholz in Helmholz, *Contracts* 50).

⁴²Translation by Helmholz in *Ibid.*

⁴³Decretum Gratiani C 22 q 5 c 12, (as cited by Helmholz in Helmholz, *Canon Law of Oaths* 162; See also Decock, *Contract* 129).

⁴⁴*Ibid.*

⁴⁵*Gl: ord ad C 12 q 2 c 66 sv promiserint*: "Videtur quod aliquis obligetur nudis verbis, licet non intercesit stipulation.", (as cited by Helmholz in Helmholz, *Canon Law of Oaths* 162); See also Helmholz, *Contracts* 50.

⁴⁶*Ibid.*

⁴⁷Decretales Gregorii IX X 1.35.1, in *Corpus Iuris Canonici*, A Friedberg (ed) (1879): "Universi dixerunt, pax servetur pacta custodiantur.", as discussed by Helmholz in Helmholz, *Contracts* 50. It is important to note that the idea of enforcing promises of the Canon Law did not become a foundation

types of promises,⁴⁸ such as to stand as surety for a debt, to pay a dowry, to obey guild regulations, to complete construction, and to deliver goods.⁴⁹ Nevertheless, in order to restrain ecclesiastical power⁵⁰, jurisdiction extended solely to cases where the promise had been accompanied by an oath.⁵¹ The canonical promissory account inspired both the late scholastic jurists and Natural Law commentators.⁵²

In short, while the Roman approach was one where promises were only binding in limited circumstances, the canonical approach was one where promises were binding in broader circumstances.

(3) The late scholastics

During the sixteenth century, the late scholastics in Spain, e.g. Soto, Molina, and Lessius, analysed Roman law with Aristotle's philosophy⁵³ and Aquinas's⁵⁴ promissory account.⁵⁵ They modified Aquinas's account, giving promise a central role in explanations of contractual liabilities.⁵⁶ These jurists regarded promises as morally binding by the law of nature. They disagreed with Cajetan, who argued that it was not immoral not to keep a promise.⁵⁷ Molina suggested that simple promises

of modern contract law. A complete system of what equivalent to today contract law did not exist under the Canon Law. See Helmholz, *Contracts* 52-53.

⁴⁸ Helmholz, *Ibid* at 50.

⁴⁹ *Ibid*.

⁵⁰ An oath is not merely the measure used for carrying litigation within the ecclesiastical courts. An oath itself could be a source of obligations. See Helmholz, *Canon Law of Oaths* 161-164.

⁵¹ Helmholz, *Contracts* 51; Helmholz, *Canon Law of Oaths* 164.

⁵² Zimmermann, *Obligations* 568. For further discussion on this point see Chapter III, A. STAIR AND THE DOCTRINE OF PROMISE, (1) Canon Law; and (2) *ius commune*, (a) Debate on the binding force of promise.

⁵³ For Aristotle's view on promise see Aristotle, *Nicomachean Ethics*, Bk IV Ch 7, 1127a – 1127b.

⁵⁴ For Cicero's view on promise see M T Cicero, *De Officiis*, trans W Miller (1913) Bk I Moral Goodness, §32; and see also Bk III §§92-96.

⁵⁵ Gordley, *Promise* 4; Hogg, *Promises* 118.

⁵⁶ For an analysis see Gordley, *Contract Doctrine* 69-111 esp at 71-77.

⁵⁷ Cajetan commented on Aquinas's *Summa Theological* that promise is only binding as a matter of truth. The promisor does not owe anything as a matter of justice to the promisee, except where the promisee suffers as a result of the promisor breaking the promise. Cajetan, *Commentaria* (Padua, 1698), to *Summa theologica*, 11-11, q 88, a 1; q 113, a 1 (as cited by Gordley in Gordley, *Contract* 73). For further discussion see Gordley, *Contract* 73; Gordley, *Promise* 6; Decock, *Contract* 199-200; Hogg, *Promises* 118.

are naturally binding regardless of any acceptance.⁵⁸ Even a non-onerous promise such as a gift was binding.⁵⁹ Similarly, Soto argued that all promises are binding even if lacking an acceptance.⁶⁰ Lessius agreed that gratuitous promises created an enforceable obligation, but argued that a promise must be accepted by the promisee.⁶¹ Therefore, there was a debate amongst the late scholastics on whether a promise requires an acceptance.

The late scholastics' treatment of the moral force of promise was followed by later Natural Law commentators e.g. Grotius⁶², Pufendorf⁶³, and Stair.⁶⁴ By the end of the seventeenth century, most scholars throughout Europe adopted the view that naked pactions, derived from a bare agreement between parties, were enforceable.⁶⁵ As for unilateral promises, most commentators, except for Connanus⁶⁶ who followed Cajetan, regarded them as morally binding.⁶⁷ In addition, some commentators e.g. Grotius⁶⁸ and Stair⁶⁹ went further by suggesting that promises should also have legal effect, as discussed in the next section.

⁵⁸ Molina, *De iustitia et iure*, tom 2 (*De contractibus*), tract 2, disp 263, col 47, num 12, (as cited by Decock in Decock, *Contract* 190).

⁵⁹ Molina, *De iustitia et iure*, disp 262, (as cited by Gordley in Gordley, *Promise* 6).

⁶⁰ Soto, *De iustitia et iure*, lib 3, q 5, art 3 (as cited by Gordley in Gordley, *Promise* 14).

⁶¹ Lessius, *De iustitia et iure*, lib 2, cap 18, dub 6, num 34, 219-220, (as cited by Decock in Decock, *Contract* 190).

⁶² Grotius, *De jure belli ac pacis* 2.11.1.

⁶³ S V Pufendorf, *Of the Law of Nature and Nations* (1729) 3.5.9.

⁶⁴ Stair, *Inst* 1.10.10.

⁶⁵ Sellar, *Promise* 259.

⁶⁶ F Connanus, *Commentariorum iuris civilis libri X* (1724), I.6.v.1, as cited by Gordley in Gordley, *Promise* 6.

⁶⁷ E.g. Stair wrote: "Connanus, *lib.1.cap.6, lib.5.cap. 9* holdeth, that promises, or naked pactions, where there is no equivalent cause onerous intervening, do morally produce no obligation or action..." Stair, *Inst* 1.10.10. See also Grotius, *De jure belli ac pacis* 2.11.1.

⁶⁸ His important work on promise is *De jure belli ac pacis*.

⁶⁹ His important work on promise is the *Institutions of the Law of Scotland*.

(4) Northern Natural Law jurists

(a) Grotius

Grotius argued that a promise needs acceptance to be legally binding;⁷⁰ before acceptance it is revocable because the right has not been transferred to the promisee yet.⁷¹ Thus, the revocation of such a promise can be made “without the imputation of injustice and levity.”⁷² It appears that Grotius’ view was inspired by Lessius. As noted above, while Molina and Soto suggested that a promise is per se binding, Lessius disagreed and argued that an acceptance of a promise is required as a matter of both civil and Natural Law.⁷³

A number of jurists followed Grotius e.g. Pufendorf and Pothier. Pufendorf adopted Grotius’ approach in distinguishing imperfect and perfect promises.⁷⁴ He explained that both contracts and promises require mutual consent from the parties.⁷⁵ As long as a promise has not been accepted, the promisor may revoke it.⁷⁶ Pufendorf’s approach is similar to that of Grotius in that a promisee needs to accept the promise to acquire a right. As for Pothier, he distinguished contracts from pollicitations,⁷⁷ the latter being “a promise not yet accepted by the person to whom it is made”.⁷⁸ Pothier expressly cited Grotius (*lib 2 c 2*) in supporting the idea that a promise requires an acceptance,⁷⁹ because a promise is not per se obligatory under Natural Law.⁸⁰

⁷⁰ Grotius, *De jure belli ac pacis* 2.11.14.

⁷¹ *Ibid* at 2.11.16.

⁷² *Ibid*.

⁷³ Lessius, *De iustitia et iure*, lib 2, cap 18, dub 6, num 34, 219-220, (as cited by Decock in Decock, *Contract* 190).

⁷⁴ Pufendorf, *Duty of Man and Citizen* 1.9.6. For Grotius’ account on perfect and imperfect promises see section (c) Grotius’ influence on Stair.

⁷⁵ *Ibid*.

⁷⁶ *Ibid*.

⁷⁷ Pothier, *Obligations*, 1 Art 1 §2.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*.

⁸⁰ *Ibid*.

(b) Grotius' influence on French law

Grotius' influence on the *Code civil* may be observed from two perspectives. First, from the sources of the *Code civil*, Pothier's commentary (*Traite des obligations*) was a source which the drafters of the *Code civil* consulted.⁸¹ Given that Pothier adopted Grotius' promissory account, it may be inferred that Grotius' influence on promises under the *Code civil* came through Pothier.

Second, one may note the close resemblance between Grotius' treatment of promise and the promissory approach in the *Code civil*. It is important to understand that in Grotius' view promises are not entirely distinguished from contracts. Although in the *De jure belli ac pacis* Grotius discussed promises and contracts in separate chapters, it appears that he intended the obligatory force of promise to apply to contracts too.⁸² This can be inferred from the fact that there was no explanation regarding rights and obligations arising from contracts in the Chapter on Contract.⁸³ In addition, in the *Jurisprudence of Holland* Grotius explained that contract is "a voluntary act of a man whereby he promises something to another with the intention that such other shall accept it and thereby acquire a right against the promisor".⁸⁴ In Grotius' account the actual characteristics of binding promises are seen as either "(a) irrevocable offers or (b) offers which are presumed by law to have been accepted."⁸⁵ He further explained that, although it is wrong not to keep a promise, the promisee does not have any right to enforce it.⁸⁶ In short, in Grotius' account a promise which is legally binding will also be regarded as a contract.

The approach adopted in the *Code civil* is compatible with Grotius' account. The first comparison is the concept of a third-party beneficiary. Under the *Code civil*, the right

⁸¹ G A Bermann & E Picard (eds), *Introduction to French Law* (2008) 206; E Steiner, *French Law: A Comparative Approach* (2010) 191-192; E Descheemaeker, "Pothier and the French Civil Code", in E Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (2009) 107.

⁸² Maccormack, *Grotius and Stair* 163.

⁸³ *Ibid.*

⁸⁴ Grotius, *Jurisprudence of Holland* 3.1.10.

⁸⁵ TB Smith, "Pollicitatio—Promise and Offer: Stair v Grotius", in the same author, *Studies Critical and Comparative* (1962) 168 at 172.

⁸⁶ Grotius, *Jurisprudence of Holland* 3.1.11.

of the beneficiary only comes into existence when the beneficiary declares his/her intention that he/she wishes to receive the benefits.⁸⁷ This is compatible with Grotius' requirement of an acceptance.⁸⁸

Secondly, the general attitude of French law towards promise is similar to Grotius' promissory account in that a promise must be accepted in order to be binding. The *Code civil* states: "A promise of sale is the same as a sale, where there is reciprocal consent of both parties as to the thing and the price."⁸⁹ The foregoing texts suggest that under French law "the promise to buy is not obligatory if it is not accompanied by the promise to sell and that, reciprocally, the promise to sell is null if it is not accompanied by the promise to buy..."⁹⁰ Although it has been suggested that a unilateral promise (*engagement unilatéral de volonté*), in the sense of a genuine unilateral obligation, should be binding in certain limited circumstances, this proposition is subject to academic debate.⁹¹ For example, a promise of reward, not recognised under the *Code civil*, has been enforced by the French courts.⁹² However, there is a controversy whether a promise of reward is contractual⁹³ or promissory in nature.⁹⁴ In short, as a general rule, under the *Code civil*, a unilateral declaration of will cannot create an obligation, which is similar to Grotius' promissory account.

⁸⁷ *Code civil*, Art 1121.

⁸⁸ This can be usefully compared with Scots law where JQT is enforceable once a promise is made. For further analysis see Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (5) The doctrine of third party rights.

⁸⁹ *Code civil*, Art 1589 para 1. (Translated by G Rouhette), available at www.legifrance.gouv.fr/content/download/1950/13681/.../Code_22.pdf.

⁹⁰ P M Merlin, *Répertoire Universel et Raisonné de Jurisprudence, Vente*, 5th edn (1828) §VII, V, 85, as cited by B Schwartz (ed), *The Code Napoleon and the Common-Law World* (1998) 131; See also A v Mehren, "The French Civil Code and Contract: A Comparative Analysis of Formation and Form" (1955) 15(4) *Louisiana Law Review* 687 at 690-691 (at note 6).

⁹¹ For further discussion see M Fabre-Magnan, *Les Obligations* (2004) no 30 and Terre et al, *Les Obligations*, 10th edn (2009) paras 53ff (as cited by H Beale et al (eds), *Cases, Materials and Text on Contract Law*, 2nd edn (2010) 64).

⁹² Beale, *Ibid*.

⁹³ The traditional analysis of reward under French law is a contractual approach: "an offer of a reward could not be accepted merely by the doing of the indicated act, in ignorance of the offer." CF Schlesinger (ed), *Formation of Contracts* at 667, 1255, (as cited by Nicholas in B Nicholas, *The French Law of Contract*, 2nd edn (1992) 144).

⁹⁴ Beale (n 91); See also Bermann & Picard (n 81) 206.

Thirdly, another area of the *Code civil* which was influenced by Grotius' promissory account is the approach of interpreting an obligation using a subjective test. This issue will be discussed later.⁹⁵

(c) Grotius' influence on Stair

Grotius influenced Stair in a number of ways. First, there are a number of occasions on which Stair expressly cited Grotius in his *Institutions*. For example, in 1.2.5, he explained that man's liberty is not absolute but bounded by obediencial obligations to God. He ended the paragraph by referring to Grotius (*De jure belli*, lib 2 Cap 22 §12).⁹⁶ In 1.1.17, Stair argued that the law is a rational discipline by making reference to Duarenus and Grotius.⁹⁷

Second, there are passages in Stair's *Institutions* which, though not openly citing Grotius, show some similarities to Grotius' works. For example, in *De jure belli ac pacis*, Grotius classified "ways of speaking" regarding the future into three types:⁹⁸ (i) an assurance of a future intention which the speaker is at liberty to change;⁹⁹ (ii) a future intention in which the speaker indicates that he/she does not intend to change his/her mind ("imperfect obligations"),¹⁰⁰ such statements creating natural but not civil obligations;¹⁰¹ and (iii) "the perfect obligations of a promise."¹⁰² Stair distinguished three acts of human will, namely desire¹⁰³, resolution¹⁰⁴ and engagement.¹⁰⁵ Only the third act of these can create a right, because "the will confers a power of exaction in another, and thereby becomes engaged to that other to

⁹⁵ See C. NATURE AND REQUIREMENTS OF PROMISE, (3) The intentions of the promisor, (b) How to measure seriousness of intention?

⁹⁶ Stair, *Inst* 1.2.5.

⁹⁷ Stair, *Inst* 1.1.17. For an analysis of what Stair has taken from Grotius in the account of natural law and slavery see J W Cairns, "Stoicism, Slavery, and Law", in H W Blom & L C Winkel, *Grotius and the Stoa*, 197 at 218-220.

⁹⁸ Grotius, *De jure belli ac pacis* .2.11.2-4.

⁹⁹ "For the human mind has not only a natural power, but a right to change its purpose." Grotius, *De jure belli ac pacis* 2.11.2.

¹⁰⁰ *Ibid* at 2.11.3.

¹⁰¹ *Ibid*.

¹⁰² *Ibid* at 2.11.4.

¹⁰³ "[A] tendency or inclination of the will towards its object..." Stair, *Inst* 1.10.2.

¹⁰⁴ "[A] determinate purpose to do that which is desired..." *Ibid*.

¹⁰⁵ *Ibid*. He cited February 27 1673, *Kincaid contra Dickson*.

perform”.¹⁰⁶ Stair’s treatment is somewhat similar to Grotius’ analysis of modes of speaking concerning future intentions, in that intentions are classed into three types and only the third one is obligatory.

Thirdly, Stair and Grotius used the same references in some areas of their works.¹⁰⁷ For instance, in 1.10.10 concerning promise, Stair referred to Connanus as an example of the opposite view i.e. holding that promises are not obligatory. Grotius used the same reference, beginning his promissory chapter by stating that Connanus was opposed to his view that an obligation can arise from promise.¹⁰⁸

All these similarities between Stair’s *Institutions* and Grotius’ commentaries show that Stair was influenced by Grotius.

(d) Stair

Although Stair was influenced by Grotius, he clearly disagreed with Grotius’ view that a promise required acceptance to become legally binding. Stair’s view that promise is binding without any requirement of acceptance¹⁰⁹ was influenced, inter alia, by Molina and was said to accord with the *ius commune*.¹¹⁰ Molina explained that, while as a matter of civil law the promisee is required to accept a promise in the interest of the common good,¹¹¹ as a matter of the Natural Law an acceptance is not required.¹¹² He reasoned that a promise is per se a source of a promissory obligation whereas an acceptance of a promise is not.¹¹³ Molina’s view contrasts with that of

¹⁰⁶ Stair, *Inst* 1.10. 2.

¹⁰⁷ For other passages in which Stair and Grotius used the same references see W M Gordon, “Stair, Grotius and the Sources of Stair’s *Institutions*”, in W Gordon, *Roman Law, Scots Law and Legal History: Selected Essays* (2007) 255-266.

¹⁰⁸ Grotius, *De jure belli ac pacis* 2.11.1.

¹⁰⁹ Stair, *Inst* 1.10.4.

¹¹⁰ In 1.10.5 concerning a promise made in favour of a third person, Stair began the passage by stating that “[i]t is likewise the opinion of Molina...” Stair, *Inst* 1.10.5.

¹¹¹ Molina, *De iustitia et iure, tom 2 (De contractibus)*, tract 2 disp 266, col 64, num 10, (as cited by Decock in Decock, *Contract* 185).

¹¹² *Ibid.*

¹¹³ Molina, *De iustitia et iure, tom 2 (De contractibus)*, tract 2 disp 263, col 47, num 12, (as cited by Decock, in Decock, *Contract* 190).

Lessius (who explained that a promise is not per se a source of obligation), as previously mentioned.

In short, Stair did not always follow Grotius, as can be seen by reference to the need for acceptance of a promise.

(5) Concluding remarks

The general enforcement of promises was absent from Roman law. It was first recognised by the canonists, and gained ground during the seventeenth century. A number of commentators proposed that promises were not only morally binding but also legally binding. These commentators were inspired by the canonical doctrine of promise. However, leading commentators took a different approach on the need for acceptance and on distinguishing promises and contracts. This legal development is analysed, so far as Scotland is concerned, in Chapter III.

B. IS PROMISE DISTINCT FROM CONTRACT?

Contract and promise have a long and tangled relationship.¹¹⁴ Under the influence of Aristotle and Aquinas, scholastic theorists and Natural lawyers regarded promise as playing a central role in legal obligations and used promise in explaining the law of contract.¹¹⁵ Modern philosophers and lawyers, especially those in jurisdictions where promise is employed to explain contract law, consider promise as similar to contract.¹¹⁶ However, a competing theory is that promise is distinct from contract.

¹¹⁴ Habib, *Promise* at heading 6.3.

¹¹⁵ For an overview of the role of promising in contract law during this period see W Swain, "Contract as Promise: The Role of Promising in the Law of Contract. An Historical Account" (2013) 17(1) *EdinLR* 1 at section E.

¹¹⁶ For an overview of the role of promising in modern contract theories see Habib, *Promise* at heading 3.

(1) An historical point of view

As the late scholastics made an important contribution to the development of modern contract law, it is helpful to begin by considering their views on the differences/similarities between contract and promise.

Unlike modern scholars, the late scholastics did not directly address whether a promise is distinct from a contract. Rather, they recognised the enforceability of promise and its utility in explaining the concept of contract.

An appropriate analysis for the discussion here is Oñate's discussion of the term "promise".¹¹⁷ Oñate suggested that "promise" has three different definitions. Firstly, it refers to an offer of a contract, this being a proposal to do something in favour of another with the "intention of obligation even before the other party has accepted the offer."¹¹⁸ It is "part and parcel" of a contract.¹¹⁹ Secondly, a promise refers to the blend between an offer and an acceptance "that forms the backbone of contract understood both in generic and specific term."¹²⁰ Thirdly, a promise is a specific type of contract.¹²¹ It can be seen that in this late scholastic view a promise is not completely similar to a contract. Rather, it depends on which sense of the meaning of the term is being used.

¹¹⁷ For full discussion see Decock, *Contract* 177.

¹¹⁸ Oñate, *De contractibus*, tom 2, tract 9, disp 29, set 1, num 6, 87, (as cited by Decock in Decock, *Contract* 177).

¹¹⁹ Oñate, *De contractibus*, tom 2, tract 9, disp 29, set 1, num 6, 87, as cited by Decock in Decock, *Contract* 177).

¹²⁰ (Decock's translation). Oñate, *De contractibus*, tom 2, tract 9, disp 29, set 1, num 6, 87, (as cited by Decock in Decock, *Contract* 178).

¹²¹ Decock, *Contract* 177.

(2) Contemporary debates

(a) Promise is a contract

It is widely assumed, notably in the Anglo-American jurisdictions, that contract and promise originate from “cognate ideas”.¹²² Common Law standard textbooks, for example, usually explain that a contract is a promise or an exchange of promises.¹²³ The typical approach of American jurists is that contracts are “the art of enforcing promises”¹²⁴ They believe that contract law is mostly “confined to promises that the law will enforce.”¹²⁵ Theorists under the so called “contract-as-promise” theory explain that the main purpose of the law of contract is to enforce the moral obligation of keeping a promise.¹²⁶

A number of commentators support the foregoing theory. Fried, for instance, explains that promise is the moral basis of contract law. Some argue that promises entail moral obligations whilst the law of contract is not grounded in morality but is more concerned with serious business.¹²⁷ However, Fried argues that nonetheless it is necessary to use promise to explain the basis of contract,¹²⁸ concluding that “since a contract is first of all a promise, the contract must be kept because a promise must be kept.”¹²⁹

Shiffrin supports the approach that contracts are (or should be regarded as) similar to promises. She particularly deals with the concept of divergence between the

¹²² Pratt, *Promises* 531.

¹²³ E.g. J Chitty, *Chitty on Contracts*, 26th edn, by A G Guest (1989) para 1. There are two rival theories regarding the definition of contract in English law, namely (i) a contract is an exchange of two promises and (ii) a contract is an agreement giving rise to obligations. The 1989 edition of *Chitty on Contracts* is being referred to as an example of the former. In later editions of *Chitty on Contracts*, the latter theory was adopted. See J Chitty, *Chitty on Contracts*, 30th edn, by H G Beale (2008) para 1-002. Nevertheless, in the latest edition, both definitions are referred to. See *Chitty on Contracts* (32nd edn) para 1-016-021.

¹²⁴ R Kreitner, *Calculating Promises* (2007) 1.

¹²⁵ Farnsworth, *Contracts* 4.

¹²⁶ The leading scholar of this theory is Charles Fried (Fried, *Contract as Promise*). See also S A Smith, *Contract Theory* (2004) 56-78.

¹²⁷ Fried, *Contract* 29. He cites J Dawson, *Gifts and Promises* (1980) 199-207.

¹²⁸ *Ibid* at 38.

¹²⁹ *Ibid* at 17.

requirements of contract law and the moral norms of promises,¹³⁰ arguing that the legal norms regulating contracts and promises diverge from the applicable moral ones. Thus, an aggrieved contractual party is generally granted damages¹³¹ and cannot enforce specific performance from the other party.¹³² This contrasts with the morality of promising in which a promisor is obliged to perform what was promised whenever possible, rather than paying damages.¹³³ Shiffrin argues that the divergences between contract law and the morality of promising cause problems about, for example, “how the moral agent is to navigate both the legal and moral systems.”¹³⁴ These divergences do not support the attempt by a moral agent to behave decently in law. In Shiffrin’s view, contracts are rooted in promises, and should be treated as similar to promise.

(b) Promise is not a contract

Some scholars view contract as different from, or at least not exactly the same as, promise. Kimel, for example, argues that “contract, as a practice, does not possess the same intrinsic value as promise.”¹³⁵ A voluntary undertaking can indicate “a certain range of attitudes of the kind that tends to be highly valuable in personal relationships.”¹³⁶ According to Kimel, one main difference between contract and promise is that the former is typically a matter of mutual undertakings, whereas the latter involves unilateral undertakings of obligation.¹³⁷ Kimel argues that scholars who hold the view that contracts are promises usually do not see promise as existing

¹³⁰ S V Shiffrin, “The Divergence of Contract and Promise” (2007) 120 HarvLRev 709 at 709.

¹³¹ *Ibid* at 722-723.

¹³² In mixed legal systems like Scotland and Thailand, one can get enforcement of a contract. Therefore, the supposed divergence is less evident in those jurisdictions. For further discussion on this point see Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (4) Will theory in Scots law, (b) Will theory from the perspective of remedy; and B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (4) Will theory in Thai law, (b) Will theory from the perspective of remedies.

¹³³ Shiffrin (n 130) 713.

¹³⁴ *Ibid* at 709.

¹³⁵ Kimel, *Promise* 72.

¹³⁶ *Ibid* at 73.

¹³⁷ *Ibid*.

in isolation.¹³⁸ Instead, they change the focus from the one-sidedness of promise to one where promises are exchanged or are made conditionally.¹³⁹

Pratt distinguishes contract from promise. He argues that “the commissive speech act¹⁴⁰ by means of which a contract is formed is not the same speech act as that by means of which we voluntarily undertake moral obligations to others”,¹⁴¹ and, contrary to Shiffrin, that the law of contract has no connection with promises. In allowing payment of damages for breach of contract, the law does not separate this from the moral obligation of promise. Therefore, “there is no divergence between contract and promise to be justified”,¹⁴² as Shiffrin argues.¹⁴³ According to Pratt, an undertaking creates a moral obligation of promise only if “it is given with the obvious intention of creating a moral obligation.”¹⁴⁴

(3) The preferred approach

(a) Unilateral nature of promise

It is universally accepted that a contract is made from the intentions of, at least, two parties. This is the case in both the ordinary and legal senses of the term. The Oxford English Dictionary defines contract as “[a] mutual agreement between two or more parties that something shall be done or forborne by one or both...”¹⁴⁵ Therefore, a layman will generally understand that a contract is made by, at least, two contracting

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ Austin offered a theory that what humans say has three kinds of meaning, namely propositional meaning, illocutionary meaning and perlocutionary meaning. (J L Austin, *How to Do Things with Words* [1962]). In addition, according to Austin (1962) and Searle (*Speech acts: An Essay in the Philosophy of Language*, 1969), speech acts are classified into five types, namely assertives, directives, commissives, expressives and declarations. Commissive speech acts refer to speech acts “whose point is to commit the speaker ... to some future course of action”. Promises fall within this category. For a comprehensive analysis see J R Searle, “A Taxonomy of Illocutionary Acts”, in K Günderson (ed), *Language, Mind, and Knowledge*, (*Minneapolis Studies in the Philosophy of Science*, vol 7) (1975) 344-369.

¹⁴¹ Pratt, *Contract* 801.

¹⁴² *Ibid* at 806.

¹⁴³ *Ibid* at 802.

¹⁴⁴ *Ibid* at 812.

¹⁴⁵ Oxford English Dictionary: Contract, available at <http://www.oed.com/view/Entry/40328?rskey=UTowM5&result=1&isAdvanced=false#eid>.

parties. Where, for example, A proposes to B that he wishes to sell B a pet rabbit, it would be reasonably understood that A's expression is merely a proposal to enter into a contract. As for the legal context, A's proposal is generally deemed to be an offer, which can result in a contractual obligation if B accepts it. A contract therefore always arises from the wills of two parties.

The English word "promise", in a general sense, is defined as:

"A declaration or assurance made to another person (usually with respect to the future), stating a commitment to give, do, or refrain from doing a specified thing or act, or guaranteeing that a specified thing will or will not happen."¹⁴⁶

A layman would therefore understand this concept as being different from that of a contract. Generally speaking, when a person makes a promise, he/she is obliged to keep it, and the other party does not need to accept the promise. A promise can thus be regarded as unilateral in nature. For example, A assures B that he will give B a pet rabbit. A's proposal is reasonably understood by a lay person as a promise. This is also the case in a legal context. A one-side commitment is sufficient to constitute a promise.¹⁴⁷ From the above example, A's proposal is regarded as a promise (despite the fact that it is enforceable in law or not depending on the rules of each jurisdiction).

The unilateral nature of promise can also be observed from an historical point of view. Firstly, as discussed earlier, in Roman law a promise was a unilateral undertaking made by one person, distinguishable from an agreement or covenant between two persons. Secondly, the late scholastics, who used the idea of promise as explaining a contractual obligation, did not view a promise as being completely similar to a contract. Promise was identical to a contract only when used in the sense of the mixture of an offer and an acceptance. In another sense, it referred to a

¹⁴⁶ Oxford English Dictionary: Promise, available at

<http://www.oed.com/view/Entry/152432?rkey=9czB6Q&result=1&isAdvanced=false#eid>.

¹⁴⁷ For example, Smith states: "a promise binds only one person, the promisor, while an agreement binds two persons..." S A Smith, *Contract Theory* (2004) 56. However, Smith is of the view that the promissory theories can explain the nature of contracts. For full discussion see S A Smith, *Contract Theory* (2004) 63-64.

person's proposal to enter into a commitment in favour of another person, which is binding even before any acceptance, this being closer to the nature of promise discussed in this thesis (i.e. a unilateral undertaking intended to be legally binding). Finally, the distinction between promise and contract can be observed in the notion of promise in the Canon Law. Recall that, although in the Canon Law promise and contract originated from the same ethical principle, the canonists made a distinction between a unilateral promise and promise as a contract (bilateral promises).

(ii) Promise is a future commitment

A promise, in both the ordinary and legal sense, must relate to a performance in the future. In the ordinary sense, a promise is generally conceived as “[a] declaration or assurance that one will do something or that a particular thing will happen.”¹⁴⁸ This suggests that a promise must relate to a future event. As for the legal context, it is widely accepted amongst contemporary scholars¹⁴⁹ that a promise must relate to a future commitment.¹⁵⁰

In contrast, a contract need not necessarily relate to the future. Some contracts may involve merely a present performance. An example is barter. Traditionally, barter is a system of “bilateral simultaneous trades in which the goods are used by each side for their own purposes.”¹⁵¹ The bargaining and the exchange can take place

¹⁴⁸ Oxford Dictionaries: Promise, available at <http://www.oxforddictionaries.com/definition/english/promise?q=promise>.

¹⁴⁹ Atiyah argues that that it is possible to “promise that a fact is so”, or that the promisor has done something. P S Atiyah, “Promises and the Law of Contract” (1979) 88 (351) *Mind* (New Series) 410 at 413; However, the common view among philosophers and legal scholars is that a promise must relate to some future acts. See Fried, *Contract* 11, 17; Farnsworth, *Contracts* 4-5; Kimel, *Promise* 9; Hogg, *Promises* 22-23; J R Searle, “What is a Speech Act?” in J R Searle (ed), *The Philosophy of Language* (1971) 48; V Peetz, “Promises and Threats” (1977) 86 *Mind* 578 at 578; Hogg, *Promises* 22-23.

¹⁵⁰ For example, Fried writes: “A promise invokes trust in my future actions, not merely in my present sincerity”, and “a promise binds into the future, well past the moment when the promise is made.” Fried, *Contract* 11, 17; Farnsworth explains that “a promise is a commitment as to future behaviour.” Farnsworth, *Contracts* 4-5; Kimel states “...through promising a person purports to commit herself in a special way to a certain course of future action”. Kimel, *Promise* 9; Hogg indicates that “...statements do not relate to the future they are not promises...” Hogg, *Promises* 22-23

¹⁵¹ C Humphrey, “How is Barter Done? The Social Relations of Barter in Provincial Russia”, in P Seabright (ed), *The Vanishing Rouble Barter Networks and Non-Monetary Transactions in Post-Soviet Societies* (2000) 259 at 265.

simultaneously.¹⁵² The same idea as traditional barter occurs in other spontaneous exchange, including sale. In spontaneous exchanges, the parties' declarations of intention do not involve any future commitment because the transaction takes place immediately. The parties' intention therefore cannot be regarded as being a promise.¹⁵³ However, the transaction between the parties can be regarded as a contract because it is an agreement between two parties, creating an obligation which is legally enforceable.¹⁵⁴

(c) Concluding remarks

The main distinction between promise and contract is that the former is a one-sided commitment whereas the latter is always a bilateral one. Additionally, promise must relate to a future performance whereas contract may merely relate to a present transaction. Also, as explained by the canonists and some of the late scholastics, promise is unilateral and binding without acceptance. Therefore, the view that promises are distinct from contracts is supported in this thesis.

C. NATURE AND REQUIREMENTS OF PROMISE

In order to define promise, one must consider what the nature of, and requirements for, promise are. This section makes references to both legal and philosophical usages of promise in order to understand the idea of promise used in both of those contexts.

¹⁵² C Humphrey & S Hugh-Jones, "Introduction: Barter, Exchange and Value", in C Humphrey & S Hugh-Jones (eds), *Barter, Exchange and Value: An Anthropological Approach* (1992) 1 at 1.

¹⁵³ Hogg offers a different view to the effect that a simultaneous transaction can still be deemed an act concerning the future. See Hogg, *Promises* 217; See also S A Smith, *Contract Theory* (2004) 62-63, 176-179.

¹⁵⁴ A spontaneous exchange may not be regarded as a contract in the Anglo-American jurisdictions according to the promissory theory of contract since in a spontaneous exchange there is no exchange of two promises. See Farnsworth, *Contracts* 4-5.

(1) Who can be a promisor and a promisee?

It is usually assumed by philosophers that only humans are able to make promises.¹⁵⁵ However, in legal contexts, not only natural persons, but also legal persons can also make a promise.¹⁵⁶ Both natural and legal persons can be promisees too.¹⁵⁷

(2) A promise must be expressed

The late scholastics debated the issue whether a promise must be expressed. Some explained that an intention itself sufficiently confers an obligation (in both contracts and promises). For instance, Vitoria explained that a promissory obligation already exists as a result of “the virtue of the will”.¹⁵⁸ The expression of intention adds nothing to the obligation,¹⁵⁹ a mere internal mental process of the promisor sufficiently creating a promissory obligation.¹⁶⁰ Molina suggested that an expression of a promise is not necessary. Although positive law always requires an expression of the will, the will of the promisor suffices in creating a natural binding obligation.¹⁶¹ In contrast, Lessius suggested that an intention to promise must be expressed, external signs being necessary because they “have the effect of making the inner volition effective and real. Language does not passively convey the act of will...”¹⁶²

¹⁵⁵ Atiyah, *Promises* 151-152.

¹⁵⁶ Atiyah, *Ibid*; Hogg, *Promises* 5.

¹⁵⁷ Atiyah, *Ibid*; Hogg, *Ibid*.

¹⁵⁸ Francisco de Vitoria, *Commentarii in Hammiae*, quaest 88, art 1, num 5, in: *Comentarios a la Secunda secundae de Santo Tomás*, edición preparada por V Beltrán de Heredia, tom 4: De Justitia (qq 67-88), [Biblioteca de Teólogos Españoles, 5], Salamanca 1934, 329, (as cited by Decock in Decock, *Contract* 183.

¹⁵⁹ *Ibid*.

¹⁶⁰ Vitoria made a distinction between the case of simple promises and of contracts on this issue. For the case of a contract, he argued that it is necessary to communicate the promisor’s intention. See Decock, *Contract* 183.

¹⁶¹ Molina did not particularly explain whether a promise must be expressed or not. Rather, his treatment directly focused on contractual obligation. However, it may be implied that his treatment in this case can also apply to the case of promise. See Decock, *Contract* 184-186.

¹⁶² Lessius, *De iustitia et iure*, lib 2, cap 18, dub 5, num 30-31 at 219, as cited by Decock in *Ibid* at 186.

Modern legal systems¹⁶³ and model rules follow Lessius, rather than that Vitoria and Molina. For example, under the DCFR, notice of the promise must reach the promisee,¹⁶⁴ an approach supported in this thesis.

Broadly speaking, in making a declaration of intention, e.g., an offer¹⁶⁵, withdrawal of an offer¹⁶⁶, or termination of contract¹⁶⁷, the person making such declaration must express his/her intention by announcing it or communicating it to the other party. An internal expression of will is generally insufficient as a declaration of intention. Similarly, a mere internal desire of the promisor to make a promise is inadequate and is not considered as a promise.¹⁶⁸ Consequently, a promisor must express his/her intention in some objectively observable way.¹⁶⁹ Fried suggests that “a promise is something essentially communicated to someone—to the promisee, in the standard case”.¹⁷⁰ Therefore, a person cannot promise to himself/herself to do something.¹⁷¹ According to Fried, “[a] promise to oneself adds nothing to the moral grounds for making the contribution absent the promise”.¹⁷²

(3) The intentions of the promisor

The intention of the promisor is the most important requirement. Lessius argued that the binding force of a promise lies in intention.¹⁷³ Lugo suggested that without the promisor’s intention, there is no binding promise.¹⁷⁴

¹⁶³ This includes France, Austria, Poland and Czech Republic. See *Commentary on the Draft Common Frame of Reference* 340-342.

¹⁶⁴ DCFR Art II-4:301.

¹⁶⁵ Examples are the DCFR and German law. See *Commentary on the Draft Common Frame of Reference* 292 and Markesinis, *German Contract Law* 67.

¹⁶⁶ E.g. DCFR, Art II-4:202 (1).

¹⁶⁷ E.g. DCFR, Art III-3:507 (1).

¹⁶⁸ Hogg, *Promises* 10-11; S A Smith, *Contract Theory* (2004) 57.

¹⁶⁹ Hogg, *Ibid.*

¹⁷⁰ Fried, *Contract* 42.

¹⁷¹ Trying to make an obligation to oneself would engage the doctrine of confusion (*confisio*) in Scots law. See Stair, *Inst* 1.18.9; Smith, *Short Commentary* 844; Gloag, *Contract* 725-730.

¹⁷² Fried, *Contract* 42.

¹⁷³ Lessius, *De iustitia et iure*, lib 2, cap 18, dub 1, Mi, 6, at 216 (as cited by Decock in Decock, *Contract* 178).

¹⁷⁴ Lugo, *De iustitia et iure*, tom 2, disp 23, sect 1, num 4, at 103, (as cited by Decock in Decock, *Contract* 178-179).

(a) The promisor must have a serious intention to bind him/herself

The intention of the promisor to bind him/herself must be sufficiently serious. The canonists held that promises should be kept if “seriously” intended.¹⁷⁵ This was emphasised by the late scholastic jurists (Lessius’ view was noted above¹⁷⁶). The seriousness of intention is recognised in modern legal systems¹⁷⁷ by reference to “intention to be legally bound”¹⁷⁸ or “intention to create legal relations”.¹⁷⁹ Contemporary contractual theorists also suggest that a promise must be seriously intended.¹⁸⁰ The promisor must realise the legal consequence of the promise at the time he/she promised.¹⁸¹

(b) How to measure seriousness of intention?

An important question is how “serious intention” should be measured. There are two rival theories, namely the subjective and objective approaches.

(i) Late scholastics and Natural Law jurists

The late scholastics and Natural Law jurists did not deal with this issue by viewing promises as an isolated concept. Rather, their analysis of the subjective and objective tests applied to both promissory and contractual obligations. There was no consensus amongst these jurists. Some were in favour of the subjective approach, Molina, Lugo and Oñate, for instance, arguing that the actual intention of the promisor is the only

¹⁷⁵ Decretals, lib I, tit XXXV, cap I, (as cited by Sellar in Sellar, *Promise* 258).

¹⁷⁶ Lessius, *De iustitia et iure*, lib 2, cap 18, dub, 8 num 59, at 225, (as cited by Decock in Decock, *Contract* 195).

¹⁷⁷ E.g. §118 of the BGB states: “A declaration of intent not seriously intended which is made in the expectation that its lack of serious intention will not be misunderstood, is void.” For an explanation of this provision see Markesinis, *German Contract Law* 87.

¹⁷⁸ E.g. PECL, Art 2:102; DCFR, Art II.-4:302.

¹⁷⁹ English and Scots law are more familiar with this term. For English law see *Chitty on Contracts* paras 2-161-192; McKendrick, *Contract Law* 271-272. For Scots law see McBryde, *Contract* 5-02-5-09; McBryde, “The Intention to Create Legal Relations” (1992) JR 274. In *Contract Law in Scotland*, the phrase “intention to create legal obligations” is used. MacQueen & Thomson, *Contract* para 2.64.

¹⁸⁰ Fried, *Contract* 38.

¹⁸¹ *Ibid*; See also J Searle, *Speech Acts: An Essay in The Philosophy of Language* (1969) 50-51; Armstrong proposes a similar condition for sincerely promising. See D M Armstrong, “Meaning and Communication” (1971) 80 *Philosophical Review* 427 at 446.

relevant factor.¹⁸² Molina further dealt with the case of doubtful promises, explaining that the will of the promisor is the sole determinant of whether a promise is obligatory merely as a matter of honesty or also as a matter of justice.¹⁸³ The subjective approach was supported by Grotius, who argued that, if there is a real contradiction between the contracting parties, this makes their previous agreement void: “no one can design to make contradictory resolutions at the same time.”¹⁸⁴ This reflects the fact that Grotius applied the criterion of subjective intention of the parties in determining whether there is a binding obligation or not.

However, Lessius disagreed with the sole application of the subjective intentions of the parties, arguing that an objective assessment should also be used in interpreting whether a promise is morally/legally binding or not.¹⁸⁵ In the case of doubtful promises, he explained that both onerous and gratuitous promises, which are serious, are binding on “pain of mortal sin”.¹⁸⁶ An illustration given is where a promisee suffers because he/she has mistakenly relied on a promise. Lessius argued that the promisor, even if he lacked serious intention, is bound to perform the promise “on pain of mortal sin”.¹⁸⁷

(ii) Modern legal systems

There is no consensus amongst modern legal systems on the approach to be used for determining intention. Some jurisdictions favour the subjective approach. French law is well-known for applying the subjective intentions of the parties when determining the extent of the intention to be legally bound:¹⁸⁸ if a person’s actual intention

¹⁸² See Decock, *Contract* 201-202.

¹⁸³ Molina, *De iustitia et iure*, tom 2 (*De contractibus*), tract 2, disp 262, col 37, num 2, (as cited by Decock in Decock, *Contract* 202).

¹⁸⁴ Grotius, *De jure belli ac pacis* II.XVI.IV. He explained this approach by referring to contract, rather than unilateral promises.

¹⁸⁵ Lessius, *De iustitia et iure*, lib 2, cap 18, dub 8, num 55, 224, (as cited by Decock in Decock, *Contract* 201).

¹⁸⁶ Decock, *Ibid.*

¹⁸⁷ Lessius, *De iustitia et iure*, lib 2, cap 18, dub 8, num 54, 224, (as cited by Decock in Decock, *Contract* 202).

¹⁸⁸ *Commentary on the Draft Common Frame of Reference* 277; See also W Barnes, “The French Subjective Theory of Contract: Separating Rhetoric from Reality” (2008) 83 *Tulane Law Review* 359; B Nicholas, *The French Law of Contract*, 2nd edn (1992) 35.

contrasts with his/her declaration, the former is preferred, if it can be certainly established.¹⁸⁹ This is compatible with Grotius' treatment, discussed above. Both Grotius' account and the *Code civil* hold that a binding obligation must reflect a party's actual intention. The subjective approach is followed by some Civilian systems such as Luxembourg¹⁹⁰ and Portugal.¹⁹¹

Why does French law adopt an approach which, as argued in this thesis, produces a less fair outcome? The subjective theory was supported by Pothier.¹⁹² For example, when explaining the formation of a contract of sale between parties which are not present, he stated:

“[i]n order that the consent of the parties may take place,...., it is necessary that the will of the party, who makes a proposition in writing, should continue until his letters reaches the other party, and until the other party declares his acceptance of the proposition.”¹⁹³

Pothier's commentaries were important sources for the drafters of the *Code civil*. Therefore, it is not surprising that the French draftsmen preferred a subjective approach. Moreover, the will theory played a significant role in nineteenth century contract law. The philosophical foundation of contract theory is based on the parties' meeting of minds:¹⁹⁴ the parties' wills are key to formation of a contract. Therefore, the fact that French law favours the subjective approach is based on it being in accordance with the idea of the will.

¹⁸⁹ *Commentary on the Draft Common Frame of Reference* 277.

¹⁹⁰ The Commentary states that the French subjective theory of contract (Terré/Simler/Lequette, *Les Obligations*, no. 93, as cited in *Commentary on the Draft Common Frame of Reference* 277) also applies in Luxembourg. See *Ibid*.

¹⁹¹ Portuguese Civil Code, Arts 245 and 246.

¹⁹² For further discussion about Pothier's preference for the subjective approach see J M Perillo, "Robert J Pothier's Influence on the Common Law of Contract" (2004) 63 *Fordham University School of Law (Research Paper)*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=610601.

¹⁹³ R J Pothier, *Treatise on the Contract of Sale (Translated from the French by L S Cushing)* (1999, The Lawbook Exchange edition) Art III, §2.

¹⁹⁴ J M Perillo, "The Origins of the Objective Theory of Contract Formation and Interpretation." (2000) 69(2) *Fordham Law Review* 427 at 429-430.

However, most European legal systems take the objective approach to determining intention,¹⁹⁵ including English law¹⁹⁶ and Scots law.¹⁹⁷ The DCFR also adopts the objective approach¹⁹⁸ for two reasons. Firstly, it is used by the majority of Member States.¹⁹⁹ Secondly, even in the jurisdictions where subjectivity is preferred, “the party will normally be liable on some other basis for having carelessly misled to the other party.”²⁰⁰

(iii) The preferred approach

Objectivity is preferable because it provides a fairer outcome. A promissory obligation should be legally enforced when a person to whom a promise is made can be reasonably expected to acquire a right from it. If a subjective test is applied, the promisor can easily deny his/her obligations. For example, A makes an online promise that he will give £100 to any person who finds his lost rabbit. However, he does not have any serious intention to make such a reward, even if someone finds the rabbit. If a subjective perspective is used to determine the seriousness of his intention, A will not be bound by his statement, because it was not subjectively intended. Moreover, it would be highly difficult for courts to measure the seriousness of subjective intention.

In contrast, if the objective theory is applied, A’s intention is deemed serious if a reasonable person would expect that A intended to be legally bound. This approach provides a fairer outcome to the promisee. While there might be a few situations where a promisee is able to know the promisor’s subjective intention, in general a promisee will not know the promisor’s internal hidden intention.

¹⁹⁵ Examples include Poland, Slovakia, Spain, Czech Republic, Slovenia, Hungary and Bulgaria. See *Commentary on the Draft Common Frame of Reference* 274-277.

¹⁹⁶ *Chitty on Contracts* paras 2-161-168; B A Hepple, “Intention to Create Legal Relations” (1970) 28(1) *Cambridge Law Journal* 122-137. For case law see *Smith v Hughes* (1871) LR 6 QB 597, 607.

¹⁹⁷ The objective approach is characteristic of Scots law, particularly Scots contract and promissory law in general. See MacQueen & Thomson, *Contract* 77-80.

¹⁹⁸ DCFR, Art II-4:102.

¹⁹⁹ *Commentary on the Draft Common Frame of Reference* 274.

²⁰⁰ *Ibid.*

(4) A promise is an undertaking to perform something in favour of another party

As explained by Grotius, a promise is “an intention to convey a peculiar right to another.”²⁰¹ This means that if someone intends to do something to another person but there is no right for the latter to acquire, it is not a promise: there must be some liability that will occur if a promisor does not perform. For instance, if A promises B that he will take action against B, this is not a promise because A does not intend to give any enforceable benefit to B.

If one promises to do something which benefits himself/herself alone, this is not a promise, even if he/she seriously intends to do so.²⁰² Suppose that A makes a promise to himself that he will stop drinking alcohol, A’s intention is not a promise because it does not benefit any other persons.

(5) A promise must relate to a performance in the future

As earlier discussed, a promise is a commitment to a future performance: a present transaction which does not involve any future commitment is not a promise. In Grotius’ account, there are three ways of speaking concerning the future, and making a promise is one of them.²⁰³ Thus, a promise cannot be a statement which only confirms a state of affairs or merely involves a present performance such as a spontaneous transaction.

(6) Concluding remarks

According to the nature and requirements of promise mentioned above, this thesis suggests a definition of a promise as follows:

²⁰¹ Grotius, *De jure belli ac pacis* 2.11.4.

²⁰² Hogg, *Promises* 23. In non-legal contexts, this kind of statement can be regarded as a vow. See Hogg, *Promises* 23, 39-41.

²⁰³ Grotius, *De jure belli ac pacis* 2.11.1-4.

A promise is a unilateral commitment, made by one natural or legal person to another, demonstrating a serious intention of the former to perform, or not to perform, some future certain acts for the benefit of the latter.

D. CONCLUSION

The legal obligation of promise was first recognised by the canonists. They broke away from Roman law, where promises, although they might be morally binding, were not generally enforceable. The canonist approach of enforcing promises influenced the late scholastics and Natural Lawyers, whose works had an important influence on modern contract and promissory law.

There has been a complex relationship between promise and contract. In the Canon Law, the notions of enforcing promise and contract derived from the same ethical principle. In the Natural Law tradition, promise was a core idea explaining contractual obligation. It is therefore no surprise that promises and contracts are conceived by some philosophers and legal commentators as being similar. However, this thesis argues that it is more appropriate to treat a promise as distinct from a contract. This is principally based on the unilateral nature of promise. A unilateral commitment can be regarded as a promise whereas a contract cannot. Also, both in the Canon Law, where the idea of promise and contract originated, and in the late scholastics tradition, where contract was explained through a promissory concept, distinction existed between a bilateral and unilateral promise. In Roman law a promise was defined as a unilateral undertaking, which was distinguished from a bilateral agreement. This is despite the fact that generally a unilateral undertaking was not binding under the *ius civile*. Hence, if we accept the idea that there is an obligation which is unilateral and binding without acceptance, it should be treated as a unilateral promise, distinct from a bilateral obligation of contract. In addition, promise must relate to a future commitment, whereas a contract may relate to either a past, present, or future event. Henceforth in this thesis the term “promise” will be used in a different sense from the way it is used in the context of the law of contract.

Chapter II

A Common Ground between Scots Law and Thai Law: Mixed Legal Systems

One reason for choosing to compare Scots and Thai law is that they are mixed jurisdictions. This chapter considers their mixed characters, focusing on the reception of the Civilian and Common Law traditions as well as its relevance to the law of promise in both jurisdictions.

A. GENERAL CONCEPT OF MIXED LEGAL SYSTEMS

Although the concept of mixed legal systems has been increasingly well-known, there has yet to be an accepted definition among comparative jurists.¹ The factors which have been used to describe a legal system as a mixed jurisdiction differ according to which theory one chooses.² Nonetheless, these theories could be grouped into two main groups of theories.

Firstly, the classical (or traditional/conventional) view of mixed legal systems defines mixed jurisdictions by reference to private law systems, which are based on the Common and Civil Law.³ Only a number of jurisdictions, including Scotland, fall within this category.⁴ The criticism has been made that this view is too narrow and restricted in that it considers only the interaction between the Civilian and Common Law traditions.⁵ Such criticism has led to another theory which considers mixed jurisdictions in a wider sense.

¹ Examples of definitions of mixed jurisdictions can be found in F P Walton, *The Scope and Interpretation of the Civil Code* (1907, reprinted 1980) 1; Evans-Jones, *Receptions of Law* 228; J McKnight, "Some Historical Observation on Mixed Systems of Law" (1977) 22 JR 177 at 177; TB Smith, "The Preservation of the Civilian Tradition in "Mixed Jurisdictions"", in A N Yiannopoloulos (ed), *Civil Law in the Modern World* (1965) 1-5; P Glenn, *On Common Laws* (2005) 119; Öricü, *Mixed Legal System* 54.

² B Andò, "'As Slippery as an Eel'? Comparative Law and Polyjural Systems", in V V Palmer et al (eds), *Mixed Legal Systems, East and West* (2015) 3 at 6.

³ Palmer, *Mixed Legal Systems* 26. See also V V Palmer (ed), *Mixed Jurisdictions Worldwide, The Third Legal Family*, 2nd edn (2012) 7-8

⁴ The list of these jurisdictions can be found in J Du Plessis, "Comparative Law and the Study of Mixed Legal System", in M Reimann and R Zimmermann, *The Oxford Handbook of Comparative Law* (2006) 477 at 484; See also Palmer, *Ibid* at 5-6.

⁵ Öricü, *Mixed Legal System* 53-54.

Secondly, some offer a wider conception of mixed jurisdictions in the so-called “pluralist theory”.⁶ There is only one requirement for being regarded as a mixed legal system: “the presence or interaction of two or more kinds of laws or legal traditions within the same system...”⁷ Thus, any interactions of the laws of a different type of source are sufficient for them to be considered as mixed jurisdictions.⁸

The more flexible approach of the pluralist theory is preferred. There are other types of legal systems which are distinct and neither fit within the scope of the Civil nor Common Law such as Muslim law⁹ and customary law.¹⁰ The concept of “mixed” legal system should not be limited merely to those mixed systems which are based upon the two major systems. Additionally, considering such mixed legal systems within a more flexible approach would promote the idea of mixed legal systems. If the pluralist theory is adopted, the number of mixed jurisdictions will be significantly increased.¹¹ For example, Japan, where private law is codified, is not regarded as a mixed system in the classical theory. However, according to the pluralist theory, it could be regarded as a mixed system of the Civil Law and customary law.¹² As for Thailand, as the later discussion will indicate, it can be regarded as a mixed system both in the classical and the pluralist theories. Nonetheless, it is argued in this thesis that the pluralist theory is more accurate in explaining the mixed nature of Thai law because there are three legal traditions which are constituent parts of the Thai legal system, namely the Civil Law, the Common Law and traditional law.

⁶ See Tetley, *Mixed Jurisdictions* 699-700; Öricü, *Mixed Legal System* 68, 55, 54, 75; R Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (2001) 159.

⁷ Palmer, *Mixed Legal Systems* 35.

⁸ See *Ibid* at 36.

⁹ JuriGlobe- World Legal System Research Group, *Muslim Law Systems And Mixed Systems With a Muslim Law Tradition*, available at <http://www.juriglobe.ca/eng/sys-juri/class-poli/droit-musulman.php>.

¹⁰ JuriGlobe- World Legal System Research Group, *Customary Law Systems And Mixed Systems With a Customary Law Tradition*, available at <http://www.juriglobe.ca/eng/sys-juri/class-poli/droit-coutumier.php>.

¹¹ Palmer concludes that these two rival theories are compatible. See Palmer, *Mixed Legal Systems* 26, 47-48.

¹² JuriGlobe- World Legal System Research Group, *World Legal System, Civil Law Systems and Mixed Systems with a Civil Law Tradition*, available at <http://www.juriglobe.ca/eng/sys-juri/class-poli/droit-civil.php>.

B. SCOTS LAW: A CLASSICAL MIXED LEGAL SYSTEM

(1) Reception of the Civil Law and the Common Law in Scotland

Scots law has traditionally been conceived of as a mixture between the Civil and Common Law.¹³ It is debatable as to when Roman law and English law were first received into Scots law, leading to the question when Scots law actually became mixed.¹⁴ However, the foregoing question is not directly relevant to the study undertaken in this thesis because Scots promissory law neither came from Roman nor English law. Nonetheless, it is still helpful to include the discussion of the receptions of Roman/Civil law and English law in Scots law. It may provide an answer as to whether or not there is (or was) anything of relevance in the reception of Roman and English law for the historical development of promise in Scots law.

(a) Reception of the Civil Law

It is important to note that it is not the intention of this chapter to assess which proposition regarding the first century that Roman law came to Scotland is correct, but to consider all the centuries proposed by legal historians, and assess any relevance between Roman law and the Scots law of promise in each proposed century.

There has been no consensus among legal historians in relation to the starting date of the reception of Roman law in Scotland. It was some time between the thirteenth and the seventeenth century. Gordon suggests that the oldest evidence of Roman law in Scotland shows that Roman law first came to Scots lawyers through the Canon Law¹⁵

¹³ For example, Evans-Jones describes the Scottish legal system as presenting characteristics of both the Civilian and the Common Law traditions. Evans-Jones, *Receptions of Law* 228; For an analysis of the mixed nature of Scots law in terms of language, legal education and legal literature, see Farran, *Is the Tartan Fading?* 18-24.

¹⁴ For an analysis on this point see W D H Sellar, "Scots Law: Mixed from The Very Beginning? A Tale of Two Receptions" 2000 4(1) EdinLR 3.

¹⁵ It is important to note that the Canon Law is not entirely different from Roman law. Although some of the legal principles of the Canon Law are similar to those of Roman law, it is clear that the canonist approach is different from the Roman approach in terms of promissory law.

in the thirteenth century.¹⁶ Cairns states that Roman law had some influence on Scots law as early as the fourteenth century.¹⁷ This view is also shared by Neilson.¹⁸ During the fifteenth century, the reception of Roman law took place in Scotland, inter alia, through the French influence. This proposition is suggested by Walker.¹⁹ The reception of Roman law through the French influence shows how Scots law resembled the legal systems of Continental Europe.²⁰ Furthermore, Scots lawyers were educated and trained at leading universities in France and some other continental European countries.²¹ They then returned to Scotland with Civilian ideas.²²

Although Scots law did not derive its promissory law from Roman sources, this does not necessarily mean that Roman law did not have any impact on the law of promise between these three centuries. As will be fully discussed, the Canon Law took jurisdiction over promises backed by an oath, leaving other ordinary promises to be governed by civil law. Moreover, the earliest evidence of a Scottish court enforcing a promise was in 1551.²³ Therefore, in Scotland such ordinary promises seem not to have been enforced before the mid sixteenth century. Therefore, the Roman position might have influenced the area of promissory law between the thirteenth and fifteen century, given that the position in Scots law is likely to be similar to that of Roman law.

¹⁶ W M Gordon, “Roman Law in Scotland”, in Evans-Jones, *Civil Law in Scotland* 13-40; W M Gordon, “A Comparison of the Influence of Roman Law in England and Scotland”, in D L C Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997) 309 at 313-314.

¹⁷ J W Cairns, “Historical Introduction”, in K Reid & R Zimmermann (eds), *A History of Private Law in Scotland (Vol 1, Introduction and property)* (2000) 14 at 44-47.

¹⁸ G Neilson and H Paton (eds), *Acta Dominorum Concilii*, ii, 1496-1501 (1918) at lxxvi (discussed in Sellar (n 14) 12 [at note 52]).

¹⁹ D M Walker, *A Legal History of Scotland / Vol. 3, The Sixteenth Century* (1995) 827.

²⁰ Tetley, *Mixed Jurisdictions* 689. See also W M Gordon, *Roman Law, Scots Law and Legal History: Selected Essays* (2007) 304-305.

²¹ Tetley, *Ibid.*

²² *Ibid.*

²³ E.g. *Drummond v Bisset* (1551) Mor 12381; *Regiam Majestatem* (Lord Cooper (ed) (1947), Chap 28; *Hope's Major Practicks* (J A Clyde (ed) (1937-1938) 89, (as discussed by McBryde in McBryde, *Promises* 56 at note 48).

Sellar proposes the sixteenth century,²⁴ whereas TB Smith²⁵ and Birks²⁶ point to the seventeenth century as the period when Roman law was first received into Scotland. During these two centuries, the relevance of the Civilian tradition on the development of promise may be observed from the standpoint of attempts at codification. There were a number of such attempts at codification, but they were not successful.²⁷ The last attempt was made in 1649 when Stair was one of the Commissions for Revising the Law (the 1649 Commission).²⁸ These attempts at codification suggest that there had been an increase of Civilian influence during these two centuries.²⁹ Although it cannot be precisely predicted what a successful Scottish Code would have been like, it is likely that a promissory obligation would have been recognised under the completed Code. The 1649 Commission was appointed to

“reweise and consider all the Lawes statuts and acts of parliament of this kingdome made & inacted at anie tym bygaine alsweill printed as not printed and als to consider all the consuetudes and practises of the kingdome q[ui]lk hav had the force of law and q[ui]lk hav beine recalled as practiks...”³⁰

As will be discussed in Chapter III, the Canon Law and the *ius commune* were important sources of promise which Stair relied on. Moreover, the Scottish courts enforced promissory obligations even before Stair’s period.³¹ Given that Stair was a member of the 1649 Commission, the general concept of obligations under the Code drafted by this commission would have been similar to that of Stair’s *Institutions*. Therefore, if the codification had succeeded, the recognition of promise in Scots law would have been clearer before Stair published his *Institutions* in 1681. The

²⁴ See Sellar (n 14) 15-16.

²⁵ See Smith, *Short Commentary* 23.

²⁶ See P Birks, “The Foundation of Legal Rationality in Scotland”, in Evans-Jones (ed), *The Civil Law in Scotland* 81-99; P Birks, “More Logic and Less Experience: The Difference Between Scots Law and English Law”, in Evans-Jones, *Civil Law in Scotland* 167-190.

²⁷ See J I Smith, “The Transition to the Modern Law 1532-1600”, in *An Introduction to Scottish Legal History* 25 at 31; J W Cairns, “Historical Introduction”, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) 14 at 66-67.

²⁸ J I Smith, *Ibid.*

²⁹ France also attempted to codify its laws during the sixteenth century, but the attempts were not successful. See J P Dawson, “The Codification of the French Customs” (1940) 38(6) *Michigan Law Review* 765.

³⁰ Warrants of Parliament, *Commissione for Reviseing the Lawes 15 March 1649*, NAS PA6/9 at 15 March 1649.

³¹ See Chapter III, A. STAIR AND THE DOCTRINE OF PROMISE.

application of the law of promise by the Scottish courts might have been more frequent than it is today, given that the courts in a codified system would commonly rely on legal principles under the Code, rather than other legal sources such as the doctrine of precedent. In short, the failure of codification may not have had any direct impact on the course of the development of promise in Scots law. However, a successful codification could have strengthened the notion of promissory obligation.

In the eighteenth century the influence of Roman law declined because, inter alia, the Court of Session developed its own jurisprudence.³² Also, Institutional writers had commented on Scots law to the point where reference to Continental jurisprudence and doctrine became less and less necessary.³³ In contrast, the influence of English law in Scots law increased in this century, as discussed below.

(b) Reception of English law

The period when the reception of English law in Scotland took place is debatable. The common view is that Scots law had been initially influenced by the Civil Law before it was influenced by English Law.³⁴ English law was adopted in Scotland because of both a strong legal culture and political factors.³⁵ The competing view argues that Scots law was open to the influence of English law from an early stage.³⁶ However, the period when English law was first received into Scotland is not directly relevant to the issue under discussion because English law is not a source of the promissory doctrine.

³² Tetley, *Mixed Jurisdictions* 690.

³³ Tetley, *Ibid.* This is further discussed in Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (2) Promissory theory as explained by Institutional and contemporary writers, (b) Later Institutional writers.

³⁴ This theory is supported by Evans-Jones and Tetley. See R Evans-Jones, "Mixed Legal System, Scotland and the Unification of Private Law in Europe", in J Smits (ed), *The Contribution of Mixed Legal Systems to European Private Law* (2001) 39; Tetley, *Mixed Jurisdictions* 688-692.

³⁵ A Rodger, "Thinking about Scots Law" (1996) 1 EdinLR 3 at 18.

³⁶ This view is supported by MacQueen and Sellar. See H L MacQueen, "Scots Law", in J Smits (ed), *Elgar Encyclopedia of Comparative Law*, 2nd edn (2012) 789 at 789; H L MacQueen and W D H Sellar, "Unjust Enrichment in Scots Law", in E J H Schrage (ed), *Unjust Enrichment: The Comparative History of the Law of Restitution* (1995) 289.

Nonetheless, the same point about the relevance of the relation between codification and the development of promise can be considered in the context in the reception of English law too. There were attempts at unifying Scots and English law as a result of the Union of the Crowns in 1603.³⁷ The unification of the Anglo-Scottish legal project was originally proposed by King James VI and I, who enthusiastically wished for a unified law of Great Britain, among other unifications.³⁸ This attempt encountered several problems and eventually it was not successful.³⁹ TB Smith pointed out that the attempt to unify Scots and English law was flawed from the beginning.⁴⁰ The King simply assumed that a unified law of Scotland and England could have been easily achieved by “blending abstracts” of the law of the two jurisdictions into one common law.⁴¹

What is relevant to the discussion here is that if the unification of Scots and English law had succeeded, it would have potentially altered the course of the development of promise in Scots law. It is more likely that English law would have been preferable as a basis for the law of the Union. When a common law between two or more jurisdictions is created, the more powerful system would naturally have a larger role to play. As TB Smith observed, “[i]n a “British” context there has seldom been consideration whether Scots law provided a better solution on the merits than did the English law.”⁴² Since English law does not enforce unilateral promise, it is unlikely that promissory obligation would have been accepted by English lawyers as a general obligation within a unified English and Scots law.

The assumption that the Scots promissory doctrine is not likely to be accepted by English lawyers may be observed from English lawyers’ attitudes towards the concept of third party rights. English lawyers were struggling for decades with the

³⁷ See Smith, *British Justice*; Wijffels, *British Ius Commune*; B P Levack, “The Proposed Union of English Law and Scots Law in the Seventeenth Century” (1975) 20 JR 97; B P Levack, “English Law, Scots Law and the Union, 1603-1707”, in A Harding (ed), *Law-making and Law-makers in British History* (1977) 103.

³⁸ Smith, *British Justice* 158; Levack, *Ibid* at 97.

³⁹ For an overview about the problem of the attempt to unify British law see Levack, *Ibid* esp at 99-101.

⁴⁰ A Wijffels, *British Ius Commune* 322.

⁴¹ Smith, *British Justice* 161.

⁴² *Ibid* at 163.

concept of third party rights.⁴³ It was not until 1999 that English law enforced the right of a third party who had not given consideration to the main contract as a result of the Contracts (Rights of Third Parties) Act 1999.⁴⁴ If English lawyers were preparing to accept Scots law, they could have looked north of the border to Scotland as a model. Then they would have discovered that *jus quaesitum tertio* (JQT), traditionally seen as promissory in nature, had been operating functionally for over 300 years. However, that never happened. Under the 1999 Act, a third party right is, of course, seen as contractual in nature. The case of third party rights may reflect an attitude of English lawyers towards Scots law in general. Scots law would not be preferred by English lawyers if it is fundamentally in conflict with English law.

The assumption that English law is likely to be preferred may also be observed when considering this issue from an historical perspective. When the law of the British Empire was introduced into native countries, it was always English law that was imposed even if Scots law was another legal system that existed under the Empire.⁴⁵ As observed by Latham, "...the law that followed citizens of the united realm to colonies subsequently founded was invariably the law of England. There is nothing in the Acts of Union or elsewhere expressly prescribing this."⁴⁶

In the eighteenth century, there was an increasing English legal influence in Scots law,⁴⁷ especially commercial law.⁴⁸ This is because commerce in Scotland faced many new problems for which Scots law could not provide a solution but for which English law could.⁴⁹ The doctrine of precedent was increasingly accepted because of

⁴³ For an overview of the reform of third party rights under English law see *Treitel The Law of Contract* para 14-002. See also para 14-016 for the discussion regarding the development of the doctrine.

⁴⁴ See *Chitty on Contracts* para 18-002.

⁴⁵ N R Whitty, "'A Token of Independence': Debates on the History and Development of Scots Law", in H L MacQueen et al (eds), *Regional Private Laws and Codifications in Europe* (2007) 60 at 61. For further discussion why Scots law was never introduced into the British colonies see Mr Justice B H McPherson "Scots Law in the Colonies" (1995) JR 191.

⁴⁶ R T E Latham, *The Law and The Commonwealth* (1949) 517.

⁴⁷ Tetley, *Mixed Jurisdictions* 690.

⁴⁸ It is observed later in this thesis that a possible reason why Institutional writers after Stair did not pay much attention in explaining the law of promise is an increase of English influence on Scots law during their times. See Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (2) Promissory theory as explained by Institutional and contemporary writers.

⁴⁹ Farran, *Is the Tartan Fading?* 16.

the influence of the House of Lords.⁵⁰ Scots jurists looked to English case law as well as English legal literature.⁵¹ As the later discussion will show, it is observed in this thesis that a possible reason why Institutional writers after Stair did not pay attention in analysing the law of promise is because of an increase in the English influence on Scots law at that time.⁵² Also, as a result of the English influence, the Scottish courts tended to follow the English approach by characterising transactions using a contractual analysis, even though these could be viewed as being promissory in nature. This reflects the increase of the English influence on Scots promissory law.

To conclude, Scots promissory law was not influenced by English law in relation to the origin of the doctrine.. The English influence on Scots promissory law occurred later. Therefore, the English influence did not affect the underlying basis of Scots promissory law as a unilateral obligation because the doctrine was established before the English influence occurred. Rather, it affected the attitudes of Scottish writers as well as the Scottish courts towards the application of promissory law.

(2) Other legal influences on the Scottish legal system

The Civil and Common Law are not the only legal influences which have had an effect on the development of Scots law. Another important legal influence is the Canon Law. As discussed, the canonists were the first who enforced unilateral promises. What relevant to the discussion here is that the Canon Law, as a legal source, supports the pluralist theory of mixed legal systems. This theory gives us a greater understanding of the mixed characteristics of Scots law as a whole. It explains that the Civil and Common Law are not the only elements which are constituent parts of the Scottish legal tradition, but there are also other traditions such as the Canon Law. It offers a more precise analysis of the actual sources of the area of the law of promise.

⁵⁰ G C H Paton, "The Eighteenth Century and Later", in *An Introduction to Scottish Legal History* (1958) 54.

⁵¹ Tetley, *Mixed Jurisdictions* 691; Farran, *Is the Tartan Fading?* 16.

⁵² See Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (2) Promissory theory as explained by Institutional and contemporary writers.

C. THAILAND: A NEWLY DISCOVERED MIXED LEGAL SYSTEM?

The development of the Thai legal system can be divided into two main periods, namely the pre-modern law and the modern law.⁵³ The distinction between them derives from the reformation of the modern Thai legal system.⁵⁴ The pre-modern Thai law does not relate to the discussion in this chapter because the law in this period has had no effect on promissory law under the Thai Code.⁵⁵

(1) Reformation of modern Thai law

The reformation leading to the modern Thai legal system has its origins in the nineteenth century, during the colonial period. Thailand is the only country in South East Asia which was never colonised. Yet, in order to remain independent, Thailand was forced to sign some disadvantageous treaties with western countries e.g. the Bowring Treaty⁵⁶ with Great Britain.⁵⁷ Thailand realised that the Thai legal system required reform because Thailand was considered to be an undeveloped legal system.⁵⁸ For example, under European law⁵⁹ persons are equal before the law, and are equally protected by law.⁶⁰ In contrast, under the old Thai law the system of slavery existed and persons were accorded differential treatment on the basis of their status.⁶¹ This led to the necessity of reform.

⁵³ Boonchalermvipast, *Thai Legal History* 50-55.

⁵⁴ A summary of pre-modern Thai law can be found in F C Darling, "The Evolution of Law in Thailand" (1970) 32:2 *Review of Politics* 197-202; Kasemsup, *Reception of Law* 268-276.

⁵⁵ Thai private law prior to the existence of the Code had only some basic principles about property and obligations. It did not recognise promissory obligations. For further discussion see Chapter IV, A CONTRACT AND PROMISE IN OLD THAI LAW.

⁵⁶ For a detailed account see BJ Terwiel, "The Bowring Treaty: Imperialism and Indigenous Perspective (1991) *Journal of the Siam Society* 79(2), available at http://www.siamese-heritage.org/jsspdf/1991/JSS_079_2f_Terwiel_BowringTreaty.pdf.

⁵⁷ F B Sayre, "The Passing of Extraterritoriality in Siam" (1928) 22 *American Journal of International Law* 70 at 71.

⁵⁸ Boonchalermvipast, *Thai Legal History* 140.

⁵⁹ Kasemsup, *Reception of Law* 289.

⁶⁰ Boonchalermvipast, *Thai Legal History* 140.

⁶¹ *Ibid* at 141.

(2) Reception of foreign laws in Thailand

(a) Reception of English law

As noted, it was merely English law which was introduced to British colonies. This is also the case in non-British colonies such as Thailand. Thailand had diplomatic and trade relationships with Great Britain. Thailand modernised its legal system by borrowing legal principles from Great Britain. Although, officially, this was a matter between Thailand and Great Britain, it was merely English law which was received into Thai law.

In the Thai language there is no translation into Thai for the term “British”. The Thais, both officially and unofficially, use the term “อังกฤษ” when referring to both the “English” and the “British”. This term (อังกฤษ) however literally means England and English.⁶² The British Embassy is officially called “สถานทูตอังกฤษ”⁶³ (which literally means the English Embassy).⁶⁴ The people of the United Kingdom are officially called “คนอังกฤษ”⁶⁵ (which literally means English people⁶⁶). These examples may reflect the perception of Great Britain and England for Thai people in general. They tend to think of Great Britain in the same sense as England, given that even in official matters, the terms “British” is used as interchangeably as “English”. Thus, it came as no surprise that Thailand did not take Scots law into consideration when borrowing legal principles from Great Britain.

English law was received into Thailand during the reign of King *Rama V*.⁶⁷ English legal doctrines were taught in the Law School of the Ministry of Justice, the first

⁶² Author’s translation.

⁶³ GOV.UK, *British Embassy Bangkok*, available at <https://www.gov.uk/government/world/organisations/british-embassy-bangkok.th>.

⁶⁴ Author’s translation.

⁶⁵ The Royal Institute, *หลักเกณฑ์การทับศัพท์ภาษาอังกฤษ* (General System of Transliteration), available at http://www.royin.go.th/upload/246/FileUpload/2371_6847.pdf (in Thai).

⁶⁶ Author’s translation.

⁶⁷ Kasemsup, *Reception of Law* 292.

Thai law school.⁶⁸ It was established by Prince Rabi, a law graduate of Oxford University, who brought the principles of English law into Thai law. Some English legal principles were taught in the Law School e.g. the doctrines regarding consideration⁶⁹, bills of exchange⁷⁰ and trusts.⁷¹

English legal principles were adopted in Thailand on a case-by-case basis, rather than through the reception of the whole system.⁷² The Thai courts initially employed English legal principles only if they could not find principles under traditional Thai law.⁷³ However, later when commerce between Thailand and foreign countries increased, it was necessary to apply English law to solve commercial disputes. Accordingly, if there was no traditional Thai law, the courts would apply English law, such as the doctrines regarding wages, estoppel, and trusteeship, directly in the cases.⁷⁴

Although later on Thailand adopted a Code based on the Civil Law model⁷⁵, English law was also used as a source for the drafting of the Code in the areas of partnerships, bills of exchange, promissory notes and specific contracts.⁷⁶ Therefore, there is still some influence of English law to a certain degree on the Thai Code.

⁶⁸ Boonchalermvipast, *Thai Legal History* 199.

⁶⁹ H R H Prince Rabi of Rajburi, *เสด็จชอรัฎฎหมาย* (Lectures on Jurisprudence) (1925) 138-140.

⁷⁰ *Ibid* at 18.

⁷¹ *Ibid* at 158-159.

⁷² P Kasemsup, *นิติปรัชญา* (Philosophy of Law), 3rd edn (1996) 49.

⁷³ *Ibid*.

⁷⁴ T Kraivixien, “อิทธิพลของกฎหมายอังกฤษในระบบกฎหมายไทย” (The influence of English law on the Thai legal system) (1974) Vol 1 (2) Chulalongkorn Law Journal 1 at 3-4.

⁷⁵ See section (b) Reception of the Civil Law.

⁷⁶ Kraivixien (n 74) 2.

(b) Reception of the Civil Law

After about fifty years of the reception of English law, the Thai government decided to create a complete Code of Thai law.⁷⁷ In 1908 a Legislative Council was appointed to draft the Civil and Commercial Code (the Code). The completed Code, Books I and II, drafted by French legal advisors, was promulgated in 1923.⁷⁸ However, it was repealed two years later.⁷⁹ The 1925 Code also contains two Books, but it was drafted along the lines of the Japanese Code, which had been modelled on the BGB.⁸⁰ Later, Book III and Book IV of the Code were promulgated in 1928 and 1930, and Books V and VI in 1934, respectively.⁸¹ The Code was first drafted in English and then translated into Thai. Since the draftsmen were foreigners, it was believed to be more efficient to draft in English. Some English and French legal words were directly translated into Thai e.g. cheque (เช็ค), trust (ทรัสต์), and *aval* (อาวัล)⁸². The Code also borrowed legal principles from other Continental European countries such as Belgium⁸³, the Netherlands⁸⁴, France⁸⁵, Italy⁸⁶, and Switzerland.⁸⁷

⁷⁷ Kasemsup, *Reception of Law* 293.

⁷⁸ Boonchalermvipast, *Thai Legal History* 235.

⁷⁹ *Ibid* at 236.

⁸⁰ The view that the Japanese Code is modelled on the BGB has been commonly accepted by comparative jurists. See Watson, "Legal Transplants and Law Reform" (1976) 92 LQR (1976) 79 at 83; K Zweigert & H Kötz, *Introduction to Comparative Law* (1998) 298. Also, Thai lawyers generally believe that the Japanese Code is based on the BGB e.g. Phraya Manavarajasevi, บันทึกคำสัมภาษณ์พระยามานวราชเสวี (Transcript of Interview with Phraya Manavarajasevi), Department of Legal Study in Society, Philosophy and History, 12 September 1980 at 2-4.

⁸¹ Boonchalermvipast, *Thai Legal History* 237.

⁸² Kraivixien (n 74) 3.

⁸³ Belgian legal principles were mainly used as sources for the Thai Code in contract of insurance. For example, §742, concerning the rights and duties of the transferee of a mortgaged property, was borrowed from, among other sources, Art 105 of the Belgian Law of 6th December 1841. *Index of Civil Code* 185.

⁸⁴ E.g. §742 (dealing with rights and duties of the transferee of a mortgaged property) of the Code is inspired, inter alia, by Art 1249 of the Dutch Civil Code. *Index of Civil Code* 185.

⁸⁵ A large number of provisions under the Code are borrowed from French law e.g. §350 (dealing with a novation by a change of the debtor) of the Code is inspired, inter alia, by Arts 1274-1277 of the *Code civil*. For further discussion regarding the promissory provisions that were inspired by French law see Chapter IV.

⁸⁶ A number of provisions under the Code, notably sales, were borrowed from Italian law. For example, the definition of sale (§453) was inspired by Art 1447 of the Italian Code. *Index of Civil Code* 165.

⁸⁷ A large number of provisions under the Code were borrowed from Swiss law e.g. §§358 (dealing with late notice of acceptance) and 361 (dealing with the formation of a contract between persons at a distance) of the Code are inspired, inter alia, by Arts 5 and 10 of the Swiss Code of Obligations respectively. *Index of Civil Code* 160.

Promissory legal principles borrowed from these Continental European countries are explored in Chapter IV.

(c) The reason for change of the model of the Code from French to German law

The reason for the sudden change from a French to a German model was given by *Phraya Manavarajasevi*⁸⁸, a drafter of the 1925 Code. He recited that France had offered to draft the Code for Thailand. As Thailand had a close relationship with France, Thailand did not refuse the offer of French help.⁸⁹ Initially, the French drafters proposed a Code containing three Books, like the *Code civil*. However, the process of drafting the Code lasted for several years (1908-1916) without success because the draftsmen tried to create an original Code of Thai law, rather than modelling the Code on the French system.⁹⁰

Phraya Manavarajsevi stated that he translated the draft of the 1923 Code from English to Thai with difficulty and lack of understanding.⁹¹ The translated draft was submitted to the King and he did not have a clear understanding of it either.⁹² Nevertheless, as France was such a powerful country and Thailand wanted to foster a good relationship with France, the King did not complain about the disadvantages of the draft.⁹³ The Code was eventually promulgated on 11 November 1923. Judges and lawyers indicated that the Code was difficult to understand.⁹⁴

Accordingly, there was an attempt to revise the 1923 Code. *Phraya Manavarajsevi* suggested that Thailand should use the same approach as Japan in creating the Code i.e. modelling it on foreign Codes, rather than creating its own Code as the former drafters had done.⁹⁵ His proposal was adopted, and a new Legislative Council was

⁸⁸ Phraya Manavarajasevi, บันทึกสัมภาษณ์ภรรยาแมนวราชเสวี (Transcript of Interview with Phraya Manavarajasevi), Department of Legal Study in Society, Philosophy and History, 12 September 1980.

⁸⁹ *Ibid* at 2-4.

⁹⁰ *Ibid*.

⁹¹ *Ibid*.

⁹² *Ibid*.

⁹³ *Ibid*.

⁹⁴ Boonchalermvipast, *Thai Legal History* 235.

⁹⁵ *Ibid* at 236.

appointed. It comprised four drafters, of which three were Thai and one was French.⁹⁶ The new Code was drafted on the lines of German law. The BGB was chosen because it was a leading Civil Code of the world. However, apart from keeping a French drafter in order to keep a good relationship with France, some French principles from the 1923 Code were also borrowed.⁹⁷ Thailand used the same method as Japan in drafting the new Code, that is, by borrowing only precise legal principles but not ones which seemed to be hard to interpret.⁹⁸

(d) Effects on the Thai promissory law as a result of the codifications

(i) Effects of the change from the Common Law to the Civilian tradition

The foundations of modern Thai law were based upon English and Civilian legal traditions. The fact that Thailand adopted a codified system caused a significant change in the historical development of its legal system. It was a change from reforming the law on the model of English law to reforming it on the model of the Civil Law. The legacy which the Civil Law has left on Thai private law is much greater than that of English law as a result of codification. Consequently, the structure of Thai private law essentially resembles the Civil Law. For example, there are four main types of obligations in Thai private law, namely contract, wrongful act (delict), undue enrichment (unjustified enrichment), and management of affairs without mandate (*negotiorum gestio*).⁹⁹ This is based on the obligations recognised in the Civil Law and Roman law (from which Thai law derives its law of obligations).¹⁰⁰ The legacy which English law has left on the Thai Code appears in the forms of the legal principles involved in some concepts such as bills of exchange and specific contracts, as previously noted.

⁹⁶ Phraya Manavarajasevi (n 88) 2-4.

⁹⁷ C Sawangsak, *อิทธิพลของฝรั่งเศสในการปฏิรูปกฎหมายไทย* (The French Influence on the Reformation of Thai Law) (1996) 68.

⁹⁸ Phraya Manavarajasevi (n 88) 2-4.

⁹⁹ S Rattanakorn, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้* (Commentary on the Civil and Commercial Code: Obligations), 11th edn, (2013) 28-30; D Thirawat, *กฎหมายลักษณะหนี้: หลักทั่วไป* (Law of Obligations: General Principles) (2013) 18.

¹⁰⁰ S Rattanakorn, *Ibid* at 28.

Moreover, the shift from the English to the Civil Law model potentially altered the course of the development of the law of promise in Thailand. English law had a strong influence on modern Thai law at an early stage of the reformation of the Thai legal system. Recall that English principles were taught in Thai law schools as well as being applied by the Thai courts. This suggests that if Thailand had not codified its law, the influence of English law in the Thai legal system would have been much stronger than it is today. Thai law is likely to have ended up borrowing the entire set of concepts of the English law of obligations and incorporating them into its modern law. This would have had the result that Thai private law would not recognise the binding force of unilateral promises.

(ii) Effects of the change from French to German models for the Thai Code

The shift of the Thai Code from the French to the German model also changed the course of the development of the law on promise under the Code. The 1923 Code used the concept of “contract” (similar to French law), whereas the 1925 Code uses the concept of “juristic act”¹⁰¹ (similar to German law), as a general principle of obligations.¹⁰² If the 1923 Code had not been replaced, the idea of a juristic act would not have been recognised under Thai law. This would make a difference in relation to how promises are regarded under Thai law. Under the wider scope of juristic acts, promises can be characterised as unilateral juristic acts which are distinct from bilateral juristic acts (or contracts).¹⁰³ If there were no general idea of juristic acts, Thai law would consider a promise as being something which constitutes a complete contractual obligation. The Thai approach to promise would be more similar to that of French law, in which the scope of recognition of unilateral obligations is narrower than that of German law. For example, Thai law borrowed the concept of promise of reward from the BGB. It is a genuine unilateral obligation

¹⁰¹ For further discussion about the concept of juristic acts under Thai law see Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (1) The notion of a juristic act.

¹⁰² Y Saenguthai, “การร่างกฎหมายในประเทศไทย” (Legislative Drafting in Thailand) (1964) 6 วารสารทนายความ (Lawyer Journal) 122 at 129.

¹⁰³ See Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (2) Promissory theory as explained by Thai writers, (a) Controversies over legal status of promise.

on the basis that it does not require acceptance.¹⁰⁴ The *Code civil* does not recognise the concept of promise of reward.¹⁰⁵ This is one of the differences between the *Code civil* and the BGB.¹⁰⁶ The idea of unilateral obligation was proposed by Siegel who attempted to differentiate between the German and French legal traditions, proposing that there was a possibility of recognising unilateral promises.¹⁰⁷ The notion of a promise of reward was adopted by the draftsmen of the BGB.¹⁰⁸ Under the BGB, a promise of reward is a unilateral act which is binding without acceptance.¹⁰⁹ The change from the French to the German model of the Thai Code therefore has had a significant impact to the development of promise under Thai law. It led Thai law to the position that unilateral declarations of will can create obligations.

(3) Traditional Thai law

There are two main reasons for considering traditional Thai law. First, it reflects the influence of Buddhism on Thai family law while there is no such influence on the law of promise, despite the fact that in Buddhism there is an obligation to keep a promise. This makes possible a good comparison with promise in Scots law which, historically, originated in Christian beliefs. Second, it supports the approach that Thai law can be regarded as a mixed legal system according to the pluralist theory.¹¹⁰

(a) *Utthalum*

Utthalum is a Thai legal term which means “unconventional, immoral, ungrateful, or against the custom”.¹¹¹ The concept of *Utthalum* appeared under the Law of Case

¹⁰⁴ This is further discussed in Chapter VI, C. ACCEPTANCE AND REJECTION OF A PROMISE, (2) Thai law, (a) Acceptance of a promise, (i) Acceptance of promise of reward.

¹⁰⁵ As noted in Chapter I, the French courts enforced a promise of reward. However, it is debateable whether a reward is contractual or promissory in nature.

¹⁰⁶ H Siegel, *Das Versprechen als Verpflichtungsgrund in heutigen Recht*, (1873), (as discussed by Lerner in P Lerner P Lerner, “Promises of Reward in a Comparative Perspective” (2004) 101 *Annual Survey of International & Comparative Law* 53 at 62-63).

¹⁰⁷ P Lerner, *Ibid.*

¹⁰⁸ Zimmermann, *Obligations* 576.

¹⁰⁹ BGB, §657; See also Zimmermann, *Obligations* 574.

¹¹⁰ This is later discussed in section (4) Thailand as a mixed legal system?

¹¹¹ Royal Institute Dictionary 1992 (author’s translation).

Admission under the Code of the Three Great Seals.¹¹² Later in the codification of the Thai Code, the drafters resolved to derive certain rules of virtue from the Code of the Three Great Seals, including the principle of *Utthalum*.¹¹³ This principle prohibits a person from raising a case, either civil or criminal case, against his/her own ascendants.¹¹⁴

Utthalum was “an internal affair to be solved by family members”.¹¹⁵ Family law is considered by traditional Thai law as an “autonomous legal domain” or an “autonomous domain of written law”.¹¹⁶ This norm was based upon “usages, customs, morals or even religious teachings”, with which all Thai people were familiar and aware of.¹¹⁷ The concept of *Utthalum* is influenced by Buddhist philosophy. In Buddhism, children are greatly indebted to their parents because parents give birth to them as human beings. It is believed that human beings are more highly favoured than animals because they have an immediate reason to seek out the *Dharma*,¹¹⁸ whereas the animals cannot. Children are therefore not supposed to be ungrateful to their parents. Acting against one’s parents is regarded as an ungrateful act.

(b) Duties of children to parents

The Code states: “Children are bound to maintain their parents”.¹¹⁹ Like the concept of *Utthalum*, this rule is inspired by the Buddhist thought that children are indebted to their parents. They are morally bound to maintain their parents to repay their favours. Children who fail to do so would be considered as ungrateful persons in a Buddhist context.

¹¹² Prince D Nivat, “The Reconstruction of Rama I of the Chakri Dynasty” (1955) 43(1) *Journal of the Siam Society* (Siam Society Heritage Trust), available at http://www.siamese-heritage.org/jsspdf/1951/JSS_043_1c_PrinceDhaniNivat_ReconstructionOfRamaI.pdf.

¹¹³ *Ibid* at 255-256.

¹¹⁴ Thai Code, §1562.

¹¹⁵ Kasemsup, *Reception of Law* 278.

¹¹⁶ *Ibid* at 278.

¹¹⁷ *Ibid* at 279.

¹¹⁸ *Dharma* (Sanskrit) is “an Indian spiritual and religious term that means one’s righteous duty, or any virtuous path in the common sense of the term.” D S Babu & R S Khare (eds), *Caste in Life: Experiencing Inequalities* (2011) 165.

¹¹⁹ Thai Code, §1563.

(c) The influence of Buddhism on Thai family law in comparison with the law of promise

There is a Buddhist moral principle relating to promise, the so-called Sacca. Sacca means “truthfulness, keeping to one’s words without breaking promises”.¹²⁰ Sacca does not merely mean speaking truthfully “but fulfilling one’s engagement or keeping one’s word, assurance or promise even at the point of death”.¹²¹ The Buddhist Sacca shows similarities to an obligation to keep a promise in Christianity.

However, the role of promise in Buddhism on the effect of promise in Thai law is different from that of Christian influence on Scots law. In Thailand, where nearly 95 per cent of population is Buddhist¹²², there are a number of legal rules regarding promise. Those provisions, however, did not derive from Buddhist principles or from traditional Thai law. Instead, they are borrowed from European legal principles, as the later discussion will indicate.¹²³ In contrast, the binding force of promise in the Canon Law has its origin in Christian beliefs. Recall that the church taught that there should be no distinction between God’s promises and men’s promises. Hence, there should be no difference between oaths and simple promises for Christians either.¹²⁴

The reason why under Thai law Buddhism does not play any role in the law of promise can be explained by considering the role of Buddhism in society. Buddhist principles are not seriously regarded as either social rules or law. The Buddha taught that individuals should have their own choice to choose religion freely because “religion is not a law, but a disciplinary code”.¹²⁵ People thus should follow it of

¹²⁰ E Perera available at <http://lankarama.com.au/NewSite/wp-content/uploads/2011/05/Lankarama-Dhamma-School-Text-Class-4-Part-B.pdf>.

¹²¹ S Katre, *A Comparative Study of the Ten Perfections*, PhD Thesis, University of Pune (2010) 157, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/2040/11/11_chapter%204.pdf.

¹²² According to the census in 2010, 93.6% of Thais are Buddhists of the Theravada tradition, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/th.html>.

¹²³ See Chapter IV, B. PROMISE UNDER THE THAI CODE.

¹²⁴ See Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (2) Canon Law.

¹²⁵ Venerable K Sri Dhammananda Maha Thera, *What Buddhists Believe, Religion of Freedom*, available at <http://www.buddhanet.net/budsas/ebud/whatbudbeliev/277.htm>.

their own free will, rather than as a result of being forced because “true religious principles are neither a divine law nor a human law, but a natural law”.¹²⁶

Nonetheless, in Thailand Buddhism is not entirely distinguished from law. Some Buddhist philosophical concepts have become, or been mixed with, various Thai customs and traditional Thai beliefs. Then they have been adopted as domestic law. This can be found from the cases of *Utthalum* and children’s duties to maintain their parents, discussed above.

To conclude, the examples of *Utthalum* and duties of children to parents reflect the fact that Buddhist beliefs have a significant influence on modern Thai law because they became or were mixed with traditional Thai beliefs. In contrast, the Buddhist obligation to keep promises never became a traditional Thai belief. It therefore does not have any role to play in modern Thai law. This illustrates that religious beliefs only survive in modern Thai private law through traditional Thai beliefs/customs.

(4) Thailand as a mixed legal system?

In Thailand, the concept of mixed legal systems is not well-known. Generally, Thai law students are taught that there are two main legal systems in the world¹²⁷, namely Civil Law¹²⁸ and Common Law systems.¹²⁹ Other legal systems such as Socialist and Muslim laws are only mentioned briefly.¹³⁰ Although it is taught that the Thai legal system has been influenced by both the Civil Law and English law, mixed legal systems are not recognised under Thai legal education.¹³¹ The main criterion which has been used to distinguish between the Civil and Common Law is that a country in

¹²⁶ *Ibid.* For further discussion about the relationship between Buddhism and law see A Huxley, “Buddhist Law as a Religious System?”, in A Huxley (ed), *Religion, Law and Tradition: Comparative Studies in Religious Law* (2002) 127.

¹²⁷ S Chuathai, *คำอธิบายวิชากฎหมายแพ่ง: หลักทั่วไป* (Commentary on Civil Law: General Principles), 21st edn (2015) 24.

¹²⁸ E.g. Germany, Italy and Spain. *Ibid.*

¹²⁹ E.g. England and the United States of America. *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

which the laws are codified is a Civil Law system.¹³² A country in which the doctrine of precedent is used as the main source of law is regarded as a Common Law. Among Thai academics, therefore, the Thai legal system is categorised as a Civil Law country.¹³³

Under the legal system classification of the University of Ottawa, Thailand is grouped in Civil Law monosystems.¹³⁴ However, Du Plessis comments that there are some systems which also contain mixes of the Civil Law and the Common Law, but have not been described as mixed, for example, Cyprus, Malta, Iran, as well as Thailand.¹³⁵ Additionally, some foreign comparative jurists suggest that Thailand could be regarded as a mixed legal system on the basis that its legal principles were influenced both by the Civilian and Common Law traditions. For example, Palmer concludes that the term “mixed” should not be construed restrictively, as certain authors have done.¹³⁶ Thus, Thailand is categorised as a mixed system of the Civil Law and the Common Law.¹³⁷ Örücü has a slightly different approach in explaining the mixed nature of Thai law. She¹³⁸ describes the Thai legal system as a real mixture of sources from foreign countries, and doctrines from Thai customary laws (indigenous culture and Hindu jurisprudence) are still found in modern Thai law.¹³⁹ Hence, Thailand is regarded as a mixed jurisdiction: the blend of the Civil Law, the Common Law and customary law.¹⁴⁰

The author supports the view that Thailand can be regarded as a mixed jurisdiction. The study in this chapter has shown that the Civil and Common Law traditions, as well as traditional Thai law, are all constituent parts of the modern Thai legal system. Therefore, the mixed nature of Thai private law is more accurately explained using

¹³² Chuathai *Ibid.*

¹³³ Kraivixien, (n 74) 2; Chuathai, *Ibid.*

¹³⁴ JuriGlobe- World Legal System Research Group, *World Legal System, Civil Law Systems and Mixed Systems with a Civil Law Tradition*, available at <http://www.juriglobe.ca/eng/sys-juri/class-poli/droit-civil.php>.

¹³⁵ Du Plessis (n 4) 484.

¹³⁶ Palmer, *Mixed Legal Systems* 49. He cites N Mariani & G Fuentes, *World Legal Systems* (2000) 16-17.

¹³⁷ *Ibid.*

¹³⁸ Örücü, *Mixed Legal System* 59.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid* at 75.

the pluralist theory of mixed legal systems. The influence from the Civil Law is stronger than the other two legal traditions as a result of the codification. However, a Common Law element was also a contributor to modern Thai law. Although its influence declined because of codification in Thailand, English law was used as a point of reference in drafting the Code. Finally, traditional Thai law, which had its roots in Buddhist beliefs, still exists in family law. Consequently, according to the pluralist theory, Thailand can be sufficiently regarded as a mixed legal system on the basis that its modern legal system has its origins in three sources.

One purpose of comparative law is that it seeks “to place comparable elements of two or more legal systems up against each other in order to learn about the relevant differences and similarities between them.”¹⁴¹ Therefore, the fact that Thailand is a mixed jurisdiction gives this thesis an opportunity to discover the salient differences and similarities between Scots and Thai law. There have been a number of comparative researches on the relation between Scots law and other mixed legal systems such as South Africa¹⁴² and Louisiana.¹⁴³ Although Thailand is a newly discovered mixed jurisdiction, it shares some commonalities with Scotland, to be discussed later.¹⁴⁴ This could benefit the comparative study between these two systems.

¹⁴¹ J Husa, “Legal Families”, in J M Smits (ed), *Elgar Encyclopedia of Comparative Law*, 2nd edn (2012) 491 at 491.

¹⁴² E.g. H MacQueen & R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (2006); Reinhard Zimmermann et al (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005).

¹⁴³ E.g. V V Palmer and E Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (2009).

¹⁴⁴ See Chapter V at sections C and D.

D. SALIENT SIMILARITIES AND DIFFERENCES BETWEEN SCOTS LAW AND THAI LAWS

It is helpful to summarise salient similarities and differences between Scots and Thai law and their relevance to the comparative study of this thesis. This would provide us an understanding about the important bases of Scots and Thai legal systems which have been discovered in this chapter. In addition, it provides some signposts which would potentially benefit the comparative studies in later chapters.

(1) Similarities between Scots law and Thai law and their relevance to the study of the law of promise

Although promise is not a main source of obligation, Thai law recognises certain types of genuine unilateral obligations such as promises of reward, promises of sale and promise of a gift as a result of the German influence. The idea that a declaration of wills can unilaterally create an obligation is therefore not completely unfamiliar in Thai law. These points suggest that, for example, if Thai law were to adopt the same approach as Scots law in recognising promise as a separate obligation from contract, there would not be much difficulty in adopting the new approach.

This situation may usefully be compared with the jurisdictions that are not familiar with the notion that declaration of wills can unilaterally create an obligation. Suppose that English law were to recognise unilateral promises as standalone obligations, the new approach would be fundamentally in conflict with the concept of contract that exists under English law. The conflict occurs because the structure of obligations under English law is fundamentally different from that of Roman/Civil Law. Particularly, English law has traditionally explained contract as an exchange of two promises¹⁴⁵, and a unilateral promise is not generally binding.¹⁴⁶

¹⁴⁵ *Chitty on Contracts* para 1-016-021.

¹⁴⁶ *Chitty on Contracts* para 3-001.

(2) Differences between Scots law and Thai law and their relevance to the study of the law of promise

While the similarity could benefit comparative study between these two jurisdictions for the reasons mentioned above, their differences may also be a disadvantage for the study. One obvious difference between the two studied systems is the role that religious beliefs play in the law of promise of each system. Historically, promise in Scots law was influenced by Christian belief through the Canon Law, whereas Buddhist beliefs did not have any significant impact on the Thai law of promise.

Nonetheless, the difference mentioned above is not likely to disadvantage the study of promise in these two systems. Instead, the fact that religious beliefs have no role to play in Thai promissory law gives Thailand a flexibility in borrowing promissory legal concepts from other jurisdictions. This would be different from the cases of legal concepts which were derived from Buddhist ideas. For instance, suppose that there was a proposition that the legal principle that children are bound to maintain their parents should be abolished, on the grounds that it is disadvantageous to children and is not compatible with the law in other developed countries. This proposition would be negatively responded to by conservative Thai lawyers based on the argument that Buddhist beliefs and traditional Thai customs are constituents of this legal concept. However, if there was a proposal to amend the law of promise, for example, to follow English law in holding that unilateral promises are not legally binding, the acceptance or rejection of this proposal would not depend on the fact that it contradicts Buddhist beliefs or that it does not do so. The Buddhist concept of promise does not need to be taken into account if Thailand decides to alter its promissory law.

E. CONCLUSION

At first glance, the legal systems of Thailand and Scotland seem to be different from each other: the former is codified whereas the latter is not. Nonetheless, within the framework of the concept of mixed jurisdictions, both of them could be considered as mixed legal systems, despite their differences in terms of the degree of mixture.

There is no doubt that Scots law is a mixed legal system. The study in this chapter has shown that there are influences other than the Civilian and Common Law traditions which have left a legacy in Scottish legal history. One example is the Canon Law, which plays a significant role in the historical development of the notion promise. Therefore, the pluralist theory of mixed systems enhances the study of the law of promise more than the classical one. The mixed nature of whole areas of Scots private law cannot accurately be explained by the classical theory because it neglects to consider the influence of the Canon Law in the area of promissory law. Under the pluralist theory, one can understand that there are at least three legal traditions, namely the Civil Law, the Common Law and the Canon Law, which are constituent parts of the Scottish legal system.

Similarly, by considering the history of Thai law, this thesis agrees with the view that the Thai legal system is a mixture (to a degree) because it has been influenced both by the Civil Law and the Common Law, as well as traditional Thai law. The mixed characteristics of Thai and Scots law are therefore similar in the sense there is an interaction of more than two kinds of legal traditions within these two jurisdictions.

Another similarity between Thai law and Scots law relates to the reception of commercial law from England. Thailand received the principles of English commercial law because it wished to trade with England. English principles were necessary to solve commercial disputes since there were no equivalent commercial principles under Thai law at that time. This also happened to Scotland. English commercial law had a large influence on Scots law after the Act of Union of 1707.

In short, this chapter has proved that both Scotland and Thailand are clearly to be regarded as mixed jurisdictions. The pluralist theory is more accurate in describing the mixedness of Scots law and Thai law on the grounds that there are legal traditions other than the Civil Law and the Common Law which are constituent parts of both these systems. The fact that the underlying basis of the doctrines of obligation in the studied systems is similar (to a certain degree) suggests that there is a possibility for Thai law to borrow the promissory concept from Scots law.

Chapter III

History of Promise in Scots Law

This chapter explores the history of promise in Scots law in order to understand how the doctrine has been developed in this jurisdiction. As the historical origins of the Scots doctrine of promise lie outwith Scots law, this chapter makes references to the Canon Law and the *ius commune*.

A. STAIR AND THE DOCTRINE OF PROMISE

Scots law followed Stair's approach that promise and contract are different concepts. Promises were treated as different from pollicitation or offer and from paction or contract.¹ There is a debate regarding the meaning of the term "pollicitation" used by Stair- whether it was the Roman *pollicitatio*, or an absolute promise, or an offer.² This chapter, however, does not discuss this debate. Whether the term "pollicitation" was referring to a promise or an offer, it does not change the fact that Stair treated promises as distinct from offers and contracts.

Two important sources, *inter alia*³, which Stair consulted for his promissory account are the Canon Law and the *ius commune*.

(1) Canon Law

Stair regarded unilateral obligations as being under the influence of the canonical obligation to keep one's word. He referred to passages in the Bible in support of the idea that unilateral promise is enforceable.⁴ He stated: "every paction produceth action".⁵ This was devoted to the canonical rule *et omne verbum de ore fideli cadit in*

¹ Stair, *Inst* 1.10.4.

² In the first edition (1681) of Stair's *Institutions* the phrase appears as "promise, pollicitation, or offer, paction and contract" However in the second edition (1693) it appears as "promise, pollicitation or offer,..." (Stair, *Inst* 1.10.3).

³ Stair also referred to the common law of Scotland and Scottish practice to support his proposition regarding unilateral promise. For a detailed account see Sellar, *Promise* 260-266.

⁴ Stair, *Inst* 1.10.10.

⁵ Stair, *Inst* 1.10.7.

debitum. He explained that there was a non-application of the Roman *nuda pacta* to the Canon Law. These pieces of evidence show that Stair derived the promissory doctrine from the Canon Law. However, Stair did not cite any source when referring to the Canon Law in relation to his attitude to promise. Hogg suggests that the reference to the Canon Law was not necessary because Stair may have thought that his readers would have been familiar with an obligation to keep one's word under the Canon Law already.⁶

Nevertheless, it does not mean that it is uncertain whether unilateral promises were enforceable under the Canon Law. As discussed in Chapter I, it is clear that unilateral promises were enforceable under the ecclesiastical jurisdictions. As the *Decretum* put it, “[t]here ought to be no falsehood in our words”⁷ Accordingly, formless promises (both unilateral and bilateral ones) were binding within the ecclesiastical jurisdiction. Therefore, Gratian's *Decretum*, dealing with the binding force of promises (e.g. C 22 q 5 c 12), and later commentaries which followed the *Decretum*⁸ are believed to be particular sources in the Canon Law which Stair relied on.

Moreover, this can be explained by considering legal sources that Stair would have been familiar with. Stair was influenced both by the Spanish scholastics and the other members of the Northern Natural Law School such as Molina⁹ and Grotius.¹⁰ As noted, during the sixteenth century, promise was treated as playing a central role in obligations by the late scholastics. Then it was followed by later Natural Law jurists in the seventeenth century.¹¹ These jurists were also inspired by the canonical doctrine of keeping one's word.¹² Furthermore, the influence of the canonical rule of enforcing promise in Scots law occurred in the sixteenth century because the

⁶ Hogg, *Promises* 136.

⁷ *Decretum Gratiani* C. 22 q. 5 c. 12, in *Corpus Iuris Canonici*, A Friedberg (ed) (1879), as discussed by Helmholz in Helmholz, *Contracts* 50; See also Gordley, *Good Faith* 99.

⁸ E.g. Panormitanus, *Commentaria in Libros Decretalium* (ed 1502-04) ad X 1.35.3, (as cited in Helmholz, *Contracts* 50). See also Decock, *Contract* 187-188.

⁹ E.g. in 1.10.5, Stair cited Molina to support his account of JQT. For a general discussion on this point see A Rodger, “Molina, Stair, and the *Jus Quaesitum Tertio*” (1969) 14 JR 34.

¹⁰ See Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (4) Northern Natural Law jurists, (c) Grotius' influence on Stair.

¹¹ For full discussion on this point see Gordley, *Contract Doctrine* 69-111.

¹² Zimmermann, *Obligations* 568.

ecclesiastical jurisdiction of the church courts was taken over by the Scots civil courts.¹³ Accordingly, the practice of enforcing promises was adopted into Scots private law.¹⁴ Thus, it is perhaps no surprise to find that Stair did not cite any reference when claiming that promises were enforced by the Canon Law, given that it was widely accepted amongst most scholars in Stair's time that promise produced legal consequences.

To conclude, what Stair's analysis took from the Canon Law was the idea of a general enforcement of unilateral promises. This also explains why Stair regarded promises as an independent source of obligations.

(2) *ius commune*

(a) Debate on the binding force of promise

Stair referred to "the common custom of nations" (*ius commune*), inter alia, to support the enforcement of bare promises and bare contracts: "[w]e shall not insist in these [necessary formalities], because the common custom of nations hath resiled therefrom, following rather the cannon law..."¹⁵ This passage does not suggest that Stair claimed that promises were commonly held to be obligatory amongst European nations. Rather, it reflects the notion of enforcing bare agreements as a general idea. This contrasts with Roman law, where only particular kinds of contracts were enforceable.¹⁶ By following the Canon Law, bare agreements, without any requirement of formalities, are enforceable amongst European nations. Nonetheless, there was a continuing debate about the enforceability of unilateral promises across Europe at the time. As noted, by the end of the seventeenth century a number of jurists throughout Europe proposed that promises should have legal force, but they disagreed on some aspects of promises.

¹³ Hogg, *Promise in European Private Law* 464.

¹⁴ *Ibid.*

¹⁵ Stair, *Inst* 1.10.7. The spelling of the Canon Law in these passages appears as "cannon law".

¹⁶ See Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (1) Roman law.

It will be recalled, although Grotius explained that promises are both morally and legally binding, he intended the obligatory force of promises to apply to contracts too.¹⁷ He reasoned that a promise requires an acceptance. Thus, in Grotius' account a promise which is legally binding will also be regarded as a contract.¹⁸ This shows that Grotius followed the late scholastic approach in explaining contracts using promissory obligations as a core idea. Stair departed from the traditional approach by viewing a contract as an agreement. In addition, an absolute promise can be binding without acceptance. Hence, a promise is per se binding and is entirely distinct from a contract in Stair's account.

(b) Was Stair correct on his promissory account?

One might argue that Stair may have been wrong in claiming that bare promises are binding without acceptance. For instance, if Stair was correct, Scotland should not be the only European jurisdiction which recognises promise as a standalone obligation.

In assessing whether Stair was correct on this point or not, it is helpful to go back to an earlier point of discussion in previous chapters. Recall that the provenance of promissory obligation is the Canon Law. Additionally, the canonical obligation to keep one's word led to the legal enforcement of both unilateral promises and contracts within the ecclesiastical jurisdiction.¹⁹ Although the Romans had enforced contracts, they were based on formalities. The general enforceability of all contracts, even *nuda pacta*, was derived from canonical thought. Therefore, in the Canon Law there was a distinction between unilateral promises and contracts.

In fact, the foregoing disagreement between Grotius and Stair was not new. In the previous century, there had been a debate over this issue amongst the late scholastics. As discussed, while Molina²⁰ explained that simple promises are binding regardless

¹⁷ Maccormack, *Grotius and Stair* 163.

¹⁸ See Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (4) Northern Natural Law jurists, (a) Grotius.

¹⁹ Helmholz, *Contracts* 50.

²⁰ Molina, *De iustitia et iure*, tom 2 (*De contractibus*), tract 2, disp 263, col 47, num 12, (as cited by Decock in Decock, *Contract* 190).

of any acceptance, Lessius proposed a counter argument.²¹ This suggests that while Stair relied on the views of Molina to support the enforcement of gratuitous promises, Grotius followed Lessius. Also, this shows that Stair was not alone in holding that a promise was enforceable without acceptance.

Furthermore, the enforceability of promises and contracts was widely applied in Europe during the medieval period.²² Jurists were familiar with these canonical doctrines because they had studied in European universities as well as practised in ecclesiastical courts.²³ In fact, as pointed out by Helmholz, it was more common for the Canon Law to enforce unilateral promises, rather than to enforce contract.²⁴

Given that both Stair and Grotius were influenced by the canonical doctrine of promise (as transmitted both through the works of the late scholastics and through the influence of the Canon Law itself during their times)²⁵, one can argue that in fact Stair was correct on this point. His promissory account is compatible with the canonist approach, which is the root of promissory obligations. It is clear that in the Canon Law a promise is a source of obligation on its own. While Grotius was the one who ended the distinction between unilateral and bilateral promises which was meant to exist (arising from the Canon Law), it was Stair who firmly preserved such a distinction.

²¹Lessius, *De iustitia et iure*, lib 2, cap 18, dub 6, num 34, 219-220, (as cited by Decock in Decock, *Contract* 190).

²² Helmholz, *Contracts* 52.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ As Zimmermann observes: “For the fundamental category in Grotius’ system of natural law was neither contract (or convention) nor consensus, but the (unilateral) promise. This was a heritage of scholastic moral theology, where the binding nature of both the promissory oath and the simple promise had been emphasized; breach of faith displeases God and is a sinful deviation from the precepts of honesty and truthfulness”. Zimmermann, *Obligations* 568.

(3) The divergence between Scots law and other European systems

Grotius' approach has had an extremely strong impact on the concept of promise and contract in the Civilian tradition. This is because it was the approach adopted by the *Code civil* (through Pothier's commentary), as discussed in Chapter I.²⁶ Recall that the *Code civil* does not distinguish between promise and contract as separate obligations. A promise which is enforceable is also considered as being a contract under the *Code civil*. For instance, a promise of sale is not a unilateral obligation (in the sense that it is understood in Scots law) because it cannot be created by one party. Rather, it requires mutual consent between the seller and the buyer.²⁷ This reflects the fact that an enforceable promise under the *Code civil* is similar to Grotius' explanation. The *Code civil* has influenced the codifications in a large number of European countries, particularly as a result of the Napoleonic Wars e.g. Belgium²⁸ and Italy.²⁹

Yet, the idea of recognising unilateral promises as standalone obligations did not entirely disappear from the course of historical development of the law of obligations in Continental Europe. During the course of the drafting of the BGB, unilateral promises were proposed by Kübel to be recognised as independent obligations.³⁰ However, Kübel's proposal was not adopted. Accordingly, the BGB did not eventually give rise to unilateral promises as free standing legal institutions. Nonetheless, it recognises particular types of unilateral obligations which cannot be

²⁶ See Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (4) Northern Natural Law jurists, (b) Grotius' influence on French law.

²⁷ *Code civil*, Art 1589.

²⁸ The Belgian Codes were largely influenced by the French Code. For a detailed account see E Butaye & G D Leval, *A Digest of the Laws of Belgium and of the French Code Napoleon* (1918).

²⁹ The first Italian Code, after Italian unification, was promulgated in 1865. The 1865 Code was fundamentally based on the French Civil Code. However, later it was replaced by a new Code in 1942. See J M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2012) 2nd edn 457; For an overview of the influence of French law in the Italian Civil Codes see A Triggiano, "Towards A Civil Code: The Italian Experience", Testo delle lezioni tenute all'Università di Valladolid il 14 e 15 dicembre 2009, nell'ambito del Corso di Historia del Derecho Privado Europe, available at http://www.teoriaestoriadeldirittoprivato.com/media/rivista/2010/contributi/2010_Contributi_Triggiano_CivilCode.pdf.

³⁰ Hogg, *Promises in European Private Law* 463.

characterised by any other ways, such as promises of a reward.³¹ This is an aspect in which German law is distinct from French law. A number of European civil codes, which are based on the BGB model, also adopted a similar approach e.g. Austria³² and Italy.³³

To conclude, the difference between Scots law and other European systems on the notion of unilateral promises diverged from the different approaches between Stair and Grotius on acceptance of promise. A large number of European countries followed Grotius' account due to the influence of the *Code civil*. Although there was later an attempt to make promises exist as independent obligations under the BGB, this attempt was not successful. Unlike France, Scotland never had a strong political power in Continental Europe. Therefore, the Scots law of promise never influenced any of the other Civilian systems in the same way as the *Code civil* did. Nor was it used as a model for any of the European civil codes, which was the case with the BGB.

B. LATER INSTITUTIONAL WRITERS

This section further considers later Institutional writers' promissory accounts in order to see how the law of promise was developed after Stair's period. This section also makes references to Institutional writers' views on contract in order to show whether or not they agreed with Stair's views.

³¹ See BGB, §§657-661; See also P Lerner, "Promises of Reward in a Comparative Perspective" (2004) 101 Annual Survey of International & Comparative Law 53 at 57-58.

³² ABGB, Art 860.

³³ The 1942 Italian Code followed the German approach by recognising that a unilateral declaration of will can create an obligation promise of reward. Lerner (n 31) at 62-63.

(1) Mackenzie

MacKenzie,³⁴ who was Stair's contemporary, followed Stair's accounts on both contract³⁵ and promise.³⁶ However, he only explained the doctrine of promise briefly. He wrote:

“Though *verbal promises* do by our Law, bind the *Promiser*, yet because the *position* and import of words may be easily mistaken by the *hearers*, therefore verbal *Obligations* or *Promises* can only be proven by *Oath of party*, and not by *witness*, though the sum be never so small.”³⁷

(2) Bankton

Bankton³⁸ explained that a conventional obligation arises from the will of the parties.³⁹ He considered contract as based upon agreement.⁴⁰ He wrote: “A Promise is, whereby one obliges himself to another, without any *mutual obligation* or *valuable consideration*”.⁴¹ He noted: “In a general acceptance, Promise may be applied to all contracts that are binding upon the part of one of contractors only, which is called ... unilateral, or binding upon one side only”.⁴² His explanation causes ambiguities since promise and gratuitous contract are not adequately distinguished.⁴³

³⁴ Sir George Mackenzie of Rosehaugh, Knt (1638-1691). His primary work is *The Institutions of the Law of Scotland* (1684).

³⁵ Mackenzie, *Inst* 3.1.5.

³⁶ MacKenzie, *Inst* 3, 2.

³⁷ MacKenzie, *Inst* 3, 2.

³⁸ Andrew McDouall, Lord Bankton (1685-1760). His important work is *An Institute of the Laws of Scotland* (1751).

³⁹ Bankton, *Inst* 1.11.1.

⁴⁰ *Ibid.*

⁴¹ Bankton, *Inst* 1.11.1.

⁴² *Ibid.*

⁴³ Sellar, *Promise* 269.

(3) Erskine

Erskine⁴⁴ also considered a contract as an agreement.⁴⁵ In his *Principles*, it was stated that a promise “is gratuitous, does not require the acceptance of him to whom the promise is made.”⁴⁶ However, in the *Institutes*, he used the term “verbal obligations” to explain obligations “as have no special name to distinguish them by.”⁴⁷ There are two types of verbal obligations, namely promises, “where nothing is to be given or performed but upon one part, and which are therefore always gratuitous”⁴⁸, and verbal agreements, “which require the intervention of two different persons at least, who come under mutual obligations to one another”.⁴⁹ Erskine proposed the doctrine of “presumed acceptance.”⁵⁰ However, critics claim that Erskine’s explanation in relation to presumed acceptance is doubtful because it contradicts the theory that a promise does not require acceptance.⁵¹

(4) Bell

Bell⁵² distinguished between unilateral obligations⁵³ and mutual contracts.⁵⁴ He only briefly dealt with the doctrine of promise, following Erskine’s view regarding presumed acceptance. A promise is distinct from an offer, “as being a unilateral agreement, to which acceptance is presumed; while an offer is always and in terminis conditional, raised into an obligation only by acceptance.”⁵⁵ Bell cited Stair as authority, though he explained matters in a different manner. It seems that Bell had

⁴⁴ John Erskine of Carnock (1695-1768). His famous works are *Principles of the Law of Scotland* (1754) and *An Institutes of the Law of Scotland* (1773)

⁴⁵ Erskine, *Inst* 3.1.16; See also 3.2.1.

⁴⁶ Erskine, *Princ*, 3.2.1.

⁴⁷ Erskine, *Inst* 3.2.1.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Erskine, *Inst* 3.3.88.

⁵¹ Cross, *Bare Promise* 147. See also Sellar, *Promise* 271.

⁵² George Joseph Bell (1770-1843). His famous work is *Principles of the Law of Scotland* (1830).

⁵³ Bell, *Comm* I, 351.

⁵⁴ Bell, *Comm* I, 454.

⁵⁵ Bell, *Prin*, §9.

little interest in analysing promise, given that, in his *Commentaries*, all reference to promise in this sense were omitted.⁵⁶

(5) Forbes

Forbes⁵⁷ seemed to suggest that promises were a type of contract. In his *Institutes*⁵⁸, he defined a contract as “an Engagement betwixt two or more Persons, effectual to force Performance by an Action”.⁵⁹ However, he employed the idea of promise to explain verbal contracts, which are a type of contract. He stated: “Verbal Contracts are those, made by the Interposition of Words. Which are either Promises, verbal Offers, or Pactions.”⁶⁰ A promise is “a Contract, whereby one doth verbally engage himself to pay, or do something to another, without mutual Agreement. Which is binding before the Person, to whom it is made, accept thereof.”⁶¹

The explanations concerning promises in his *Great Body*⁶² are, in essence, similar to those he gave in his *Institutes*. However, the manuscripts in the *Great Body* are much richer in details. Additionally, it contains references to the works that he consulted, which also appeared in the body texts.⁶³ Like the *Institutes*, in the *Great Body* the discussion of promise appears in the section of verbal contract. On the section of verbal contract, the first part of the *Great Body* is the same as the first part of the title in the *Institutes*. Thereafter, the texts differ, but the explanations of the *Institutes* and the *Great Body* are similar. The greater length of the passage in the *Great Body* is attributable to discussion of cases and commentaries. Forbes made reference to Stair.⁶⁴ He also recited the facts and outcomes of a few cases.⁶⁵ In short, the passage

⁵⁶ Sellar, *Promise* 271.

⁵⁷ William Forbes. His primary work is *The Institutes of the Law of Scotland* (1722).

⁵⁸ W Forbes, *The Institutes of the Law of Scotland* (1722 and 1730) reprinted Edinburgh Legal Education Trust, vol 3, 2012)

⁵⁹ Forbes, *Inst* 3.1.3.

⁶⁰ Forbes, *Inst* 3.1.5.

⁶¹ *Ibid*.

⁶² *A Great Body of the Law of Scotland – Forbes Manuscript*, available at <http://www.forbes.gla.ac.uk/contents/>.

⁶³ For example, when explaining that “a promise is a Contract, whereby one does verbally engage...”, he cited Franciscus Connanus as an example of an opponent of the view that promises are morally binding. *Ibid* at 818.

⁶⁴ *Ibid* at 820.

in the *Institutes* is more distilled. The treatment of the area in the *Institutes* is not complete, and not systematic.

Forbes' explanation on promise is rather unsatisfactory because it mixes the concepts of contracts and promises together. Forbes appeared to follow Stair that contracts are mutual agreements made by two parties, whereas promises are unilateral obligations made by one party. However, he categorised promises as a type of contracts. In addition, he seemed to suggest that a promise requires an acceptance but it is binding before the acceptance. This causes confusion with the legal characteristics of promises. It must have been obvious during Forbes' time that there was a clear distinction between unilateral promises and contract in Scots law, following the publication of Stair's *Institutions*, as well as the decisions of the Scottish courts themselves. Therefore, Forbes should have made clearer whether he disagreed with Stair or with the practice of the courts. If he argued that promises were a kind of contracts, he should have explicitly criticised Stair's theory. This is what Adam Smith did, as discussed below.

(6) Concluding remarks

Most of the Institutional writers' views on promise offer disappointing insights in this area of law. Crucially, the clear distinction between promise and contract made by Stair was undermined and confusion was introduced into the concept.

⁶⁵ He mentioned fraud and circumvention at one point in the *Great Body*, which is not mentioned in the *Institutes*. However, this is not particularly important for the issue under discussion.

C. SCOTTISH MORAL PHILOSOPHERS

Some Scottish moral philosophers also offered explanations of promissory accounts.

(1) Kames⁶⁶

Kames⁶⁷ dealt with promises in a way that is different from that of Stair. Stair wrote his *Institutions* in a more general and traditional way. He explained the general concept of obligations first before dealing with particular kinds of obligations. Later Institutional writers tended to follow Stair's method. However, Kames did not set out the general concept of obligation as a whole. Instead, he employed the concept of equity as the basis of law. All kinds of obligations can be explained using the concept of equity. Therefore, Kames' view concerning promise can be traced through his treatment of equity. Kames' *Principles of Equity*⁶⁸ is divided into three books. The explanations on the subject of promises are mostly found in Book I, concerning powers of a court of equity derived from the principle of justice.

In Chapter IV of Book I, Kames discussed the formation of a covenant or contract and how a promissory obligation is created. He categorised acts of wills into five types, namely contracts (or covenants), promises, offers, acceptances and deeds. A contract arises from the "mutual acts of wills"⁶⁹ of two persons. A promise is the case when only one person "binds himself to another without any reciprocal obligation".⁷⁰ He also distinguished between offer and promise. An offeror is not bound until the offer has been accepted by the offeree.⁷¹

⁶⁶ Kames is not always regarded as an Institutional writer. J W Cairns, "Institutional Writings in Scotland Reconsidered", in A Kiarlfy and H MacQueen (eds), *New Perspectives in Scottish Legal History* (1984) 76 at 101. Therefore, in this thesis he is classified as a Scottish moral philosopher.

⁶⁷ Henry Home, Lord Kames (1696-1782). His important work is *Principles of Equity* (1760).

⁶⁸ The first edition of Kames' *Principles of Equity* was published in 1760. However, the edition used as the reference in this chapter is the third edition published in 1778, which was the final authorial edition.

⁶⁹ Kames, *Principles* (Vol I) 195.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

Although the style in which Kames wrote his *Institutions* is different from that of Stair, their views on promise are conceptually similar. Like Stair, Kames clearly supported the approach that a promise is an obligation which can be unilaterally made and that is binding without an acceptance. The fact that Kames was a judge may have been a factor which made him familiar with the doctrine of unilateral promise in Scots law. This can be observed from his collection of remarkable decisions of the Court of Session between 1730 and 1752, in which one of the reported cases was concerned with promise.⁷²

(2) Adam Smith

Adam Smith did not consider promises as another type of voluntary obligation separate from contract. He employed the idea of promise in explaining contractual obligation. He stated: “obligation to performance which arises from contract is founded on the reasonable expectation produced by a promise, which considerably differs from a mere declaration of intention.”⁷³ Smith’s explanation is similar to late scholastic jurists in that promise is used as a core idea in the explanation of voluntary obligation. However, he added the idea of reasonable expectation to explain the nature of contract. The idea of reasonable expectation makes Smith’s explanation compatible with the modern reliance theory of contract law. The basic idea of the reliance theory is that “contractual obligations are obligations to ensure that others whom we induce to rely upon us are not made worse off as a consequence of that reliance”.⁷⁴

Smith disagreed with Stair on the point that promises are binding because it was the intention of the promisor to bind him/herself. He wrote, “...the obligation to perform a promise can not proceed from the will of the person to be obliged, as some authors imagine.”⁷⁵ Here, he made references to Grotius (2.11.2) and Stair (1.10.1).⁷⁶ This

⁷² See H Home, Lord Kames, *Remarkable Decisions of the Court of Session (1730 - 1752)*, 2nd edn (1799) 175.

⁷³ Smith, *Lectures* 533.

⁷⁴ S A Smith, *Contract Theory* (2004) 78. For a detailed account of the reliance theories see at 78-97.

⁷⁵ Smith, *Lectures* 124.

⁷⁶ *Ibid.*

quotation shows that he clearly disagreed with Stair's use of the will theory.⁷⁷ Smith reasoned that one cannot be bound by his/her promise if he/she had no intention to be bound. Rather, such a person is bound by his/her promise because such a promise produces "the same degree of dependance and the breach of them the same disappointment as the others".⁷⁸ Smith nevertheless acknowledged that in Scots law unilateral promises were legally binding as a result of the ecclesiastical courts.⁷⁹

(3) David Hume

In Hume's view obligations can mainly arise in two different ways, either artificially or naturally. He wrote: "where an action is not requir'd by any natural passion, it cannot be requir'd by any natural obligation."⁸⁰ A promise is viewed as an artificial obligation.⁸¹ Hume explained that promises are not naturally understandable.⁸² When a person makes a promise, there is no act of mind attending to it.⁸³ Humans do not naturally desire to keep their promises.

There are conflicts between Hume's and Stair's promissory accounts, particularly on the point concerning the natural obligation of promise. This comes as no surprise. Stair is regarded as a member of the Natural Law tradition.⁸⁴ It is well-known that Hume's theory on obligations contradicts Natural Law theory.⁸⁵ While the doctrines of the Natural Law taught that humans can find their proper ends by following right

⁷⁷ Stair's analysis of promissory obligations draws on natural law, but is also consistent with will theory. Stair, *Inst* 1.1.10 and 1.1.21. This is further explored in Chapter V.

⁷⁸ Smith, *Lectures* 124-125.

⁷⁹ Smith, *Lectures* 122.

⁸⁰ Hume, *Treatise* 3.2.5.6.

⁸¹ Hume particularly discussed promises in Book III, Section V of the Obligation of Promises. Hume, *Treatise* 3.2.5.

⁸² Hume, *Treatise* 3.2.5.1.

⁸³ Hume, *Treatise* 3.2.5.2.

⁸⁴ Stair wrote: "Law is the dictate of reason determining every rational being to that, which is congruous and convenient for the nature and condition thereof." Stair, *Inst* 1.1.1.

⁸⁵ Modern philosophers tend to suppose that Natural Law theory has been essentially destroyed by Hume's arguments. For example, Lloyd explains that Natural Law was rejected by Hume as "an illogical attempt to establish the objective character of what is necessarily normative". Lord Lloyd of Hampstead, *Introduction to Jurisprudence*, 4th edn (1979) 282; Friedmann states that Hume "destroyed the theoretical basis of natural law". W Friedmann, *Legal Theory*, 5th edn (1967) 129.

reason,⁸⁶ Hume argued that reason cannot cause man's actions. Hence, one cannot discover one's proper ends by following reason. Instead, the passions are the only things which can lead man to discover his proper ends. Additionally, it is the passions which cause human actions.⁸⁷ In short, while Stair supported the view that promises are morally binding by the law of nature,⁸⁸ Hume argued that promises do not produce any natural obligation.

(4) Concluding remarks

Smith's and Hume's accounts of promise are both interesting in that they clearly explained their views on promises as well as providing reasons to support their arguments. Their promissory accounts contradict that of Stair. While Stair distinguished between promises and contracts, Smith used the notion of promise to explain the obligation of contracts, and offered another approach in analysing the binding force of promise based on expectations. Hume explained the origin of promise in a way that is as different from that of Stair. While Stair followed the Natural Law tradition in holding that promises are naturally binding, Hume argued that we have no natural obligations to keep a promise. Nonetheless, neither Smith's nor Hume's promissory accounts have had significant impact on the law of promise in Scots law today. Both the Scottish courts and legal scholars have followed Stair's approach both in his account which shows that promises are distinct from contracts and in his account of the will theory. As for Kames, his promissory analysis is interesting in that he provided a doctrinal foundation for principles of equity which can be applied to promissory obligations. Additionally, he emphasised the distinction between contracts and promises, established by Stair, which also reflects the actual legal doctrine in Scotland in his time.

⁸⁶ E.g. Aquinas, *Summa Theologica: Latin Text and English Translation*, T Gilby (ed) (1964), I-II, Q 91, a 2.

⁸⁷ For further discussion see A T Nuyen, "David Hume on Reason, Passions and Moral" in *Hume Studies Vol 10* (1984) 26-45, available at <http://www.humesociety.org/hs/issues/v10n1/nuyen/nuyen-v10n1.pdf>; See also W Vitek, "The Humean Promise: Whence Comes Its Obligation?" in *Hume Studies*, b5 (1986) 160-176, available at <http://www.humesociety.org/hs/issues/v12n2/vitek/vitek-v12n2.pdf>.

⁸⁸ E.g. Stair, *Inst* 1.1.10.

D. CASE LAW

(1) Eighteenth century case law

Unilateral promises had been enforced by the Court of Session at least a century before the publication of Stair's *Institutions*.⁸⁹ Therefore, it was not surprising to find that promise was regarded by Stair as distinct from contract.⁹⁰ However, it was not until early in the eighteenth century that the question of the legal consequences of promises was pointedly raised. *Reoch v Young*⁹¹ in 1712 was a case in which the court clearly considered the legal effects of promise.⁹² A lady who was dying wished to give her friend, Mackie, a sum of money in return for his kindness in visiting her. The lady expressed her desire to her landlady, the defendant, who informed Mackie that she would give him that sum of money if it had not been done in any other way. It was averred by the defendant that, although her expression complied with being a promise, it did not amount to a binding promise as recognised in law because it required an acceptance to be enforceable. The court, however, held that a promise is obligatory without acceptance, subject to being proved on oath.⁹³

The significance of this case is that it was the first case regarding the legal consequences of promises after its doctrinal foundations were established by Stair in the previous century. In addition, the pursuer of this case relied on Stair as an important authority in making a successful claim. This shows that Stair was regarded as a high authority in this area of Scots law. After the *Reoch v Young* case, there were a number of cases in relation to unilateral promises in the same century. These included a promise converted into a written obligation in 1742⁹⁴; a promise to keep

⁸⁹ E.g. *Drummond v Bisset* (1551) Mor 12381; *Regiam Majestatem* (Lord Cooper (ed) (1947), Chap 28; *Hope's Major Practicks* (J A Clyde (ed) (1937-1938) 89, (as discussed by McBryde in McBryde, *Promises* 56 at note 48).

⁹⁰ McBryde, *Promises* 56.

⁹¹ *Reoch v Young* (1712) Mor 9439.

⁹² Sellar, *Promise* 273.

⁹³ The details of the case can be found at Scottish Court of Session Decisions, *William Reoch Wright in Edinburgh v. Catharine Young Relict Alexander Crawford Residenter There*, available at <http://www.bailii.org/scot/cases/ScotCS/1712/Mor2309439-022.html>.

⁹⁴ *Cave v Spence* (3rd December 1742). In this case, a promise was converted into a written obligation.

an offer open in 1747⁹⁵; a promise to convey property rights in 1748⁹⁶; a promise concerning right in security in 1750⁹⁷; and a promise of marriage in 1771.⁹⁸

(2) Nineteenth century case law

The number of cases in which the Scottish courts dealt with promissory issues appears to have gradually increased during the nineteenth century. For instance, in 1812, there were two cases of enforceable promises.⁹⁹ Cases of a promise to give money¹⁰⁰ and a promise to pay an annuity¹⁰¹ appeared in 1821 and 1831, respectively. In 1834, there was a case of reward for information which might lead to the detection of the author and printer.¹⁰² Both the cases in 1836¹⁰³ and 1839¹⁰⁴ involved promises to guarantee payments under bills of exchange. In 1862, the courts considered whether an act was a promise or a mere expression of future intention.¹⁰⁵ In 1864, the court ruled that the statement in the form “We agree to pay you...” was a promissory note.¹⁰⁶ Cases concerning promises to confer heritage were raised in 1868¹⁰⁷ and 1891.¹⁰⁸ In 1882, the court considered whether an expression was a promise to keep an offer open for a specified period.¹⁰⁹ In 1892, it was held that a letter imported a promissory obligation.¹¹⁰ In 1895, a promise of reward made by a public body was enforced.¹¹¹ Finally, in 1899, it was held that a promise to make annual instalments to a charity was enforceable.¹¹²

⁹⁵ *Marshall v Blackwood* 1747 Elchies, voce Sale, No 6.

⁹⁶ *Sir James Ferguson of Kilkerran v Paterson* (1748) Mor 8440.

⁹⁷ *Kinloch v Dempster*, 13th June 1750 Kaimes’s Rem Dec Kilkerran voce per and real 293.

⁹⁸ *Millar v Tremamondo* (1771) Mor 12395.

⁹⁹ *Porteous v McBeath* (1812) Hume 98; *McQueen v McTavish* 3 March 1812 FC, as cited by McBryde, in McBryde, *Promises* 60.

¹⁰⁰ *McLachlan v McLachlan* (1821) I S 45 (revised ed 49), as cited by McBryde in *Ibid.*

¹⁰¹ *Duguid v Caddall’s Trustees* (1831) 9 S 844.

¹⁰² *Petrie v Earl of Airlie* (1834) 13 S 68.

¹⁰³ *National Bank v Robertson* (1836) 14 S 402

¹⁰⁴ *Watt v National Bank* (1839) 1 D 827.

¹⁰⁵ *Scott v Dawson* (1862) 24 D 440.

¹⁰⁶ *Macfarlane v Johnston and Others* (1864) 2 M 1210.

¹⁰⁷ *Goldston v Young* (1868) 7 M 188.

¹⁰⁸ *Miss Agnes Christina Malcolm v Mrs Agnes Traill or Campbell* (1891) 19 R 278.

¹⁰⁹ *Littlejohn v Hadwen* (1882) 20 SLR 5.

¹¹⁰ *Miss Eliza Harris Shaw and Others v Mrs Caroline Muir (Muir’s Executrix)* (1892) 19 R 997.

¹¹¹ *Campbells v Glasgow Police Commissioners* (1895) 22 R 621; (1895) 3 SLT 26.

¹¹² *Morton’s Trustee v Aged Christian Friend Society of Scotland* (1899) 2 F 82.

(3) Twentieth century case law

In 1901, the court considered whether a letter written by a debtor constituted a binding obligation to pay back the debt or merely an honourable understanding.¹¹³ Cases involving promises of donations appeared in 1907¹¹⁴ and 1945.¹¹⁵ In 1911, the court held that a promise (to leave money by will) could not be converted into a contract.¹¹⁶ Promises to leave particular things in a will were enforced in 1916.¹¹⁷ In 1918, there was case of a promise to guarantee a debt.¹¹⁸ In 1928, the court considered whether a deceased made a promise to make an heir or merely representation of intention.¹¹⁹ In 1946, an option to purchase a property was deemed to be a promise.¹²⁰ A promissory note case appeared in 1949.¹²¹ In 1957, it was held that a contract could not be converted into a promise.¹²² A case in 1976 concerned a promise to pay damages.¹²³ In 1979, the court applied a promissory analysis to an option to buy a property.¹²⁴ In 1990, the court considered whether an undertaking made by a council was a promise or an offer.¹²⁵ A case in 1991¹²⁶ involved a promise to pay for the cost of carrying out some works. Finally, in 1993, the court regarded a letter of obligation as a unilateral promise.¹²⁷

¹¹³ *Ritchie v Cowan & Kinghorn* (1901) 3 F 1071.

¹¹⁴ *Hallet v Ryrie and others* (1907) 15 SLT 367.

¹¹⁵ *Denny's Trustees v Dumbarton Magistrates* 1945 SC 147; 1946 SLT 68.

¹¹⁶ *Smith v Oliver* 1911 SC 103.

¹¹⁷ *Cairney v Macgregor's Trustees* 1916 1 SLT 357.

¹¹⁸ *Fortune v Young* 1918 SC 1; 1917 2 SLT 150.

¹¹⁹ *Gray v Johnston* 1928 SC 659; 1928 SLT 499.

¹²⁰ *Sichi v Biagi*, 1946 SN 66.

¹²¹ *McTaggart v MacEachern's Judicial Factor* 1949 SC 503; 1949 SLT 363.

¹²² *Forbes v Knox* 1957 SLT 102.

¹²³ *Bathgate v Rosie* 1976 SLT (Sh Ct) 16.

¹²⁴ *Stone v Macdonald* 1979 SC 363; 1979 SLT 288.

¹²⁵ *Lord Advocate v City of Glasgow DC* 1990 SLT 721.

¹²⁶ *JW Soils (Suppliers) v Corbett*, Court of Session (OH), 12 September 1991.

¹²⁷ *Mason v A & R Robertson* 1993 SLT 773 per Lord Cameron at 778.

(4) Case law since 2000

In 2002, the court determined whether or not a letter given by a business amounted to an unqualified promise to pay a sum of money as a result of a sub-consortium agreement.¹²⁸ In 2005, it was considered whether or not a letter issued by a developer of projects stating that payment would be made from the joint venture account was a unilateral binding undertaking.¹²⁹ In 2006, the court deliberated whether a letter given by an insurance company acknowledging liability for damages for personal injuries was promissory in nature.¹³⁰ There were three cases relating to promises in 2007. First, the House of Lords held that an option to purchase certain land amounted to a unilateral obligation.¹³¹ Second, the court considered whether or not a statement made at a meeting in relation to transfer of share to another scheme's asset was a unilateral undertaking.¹³² Third, the court considered whether statements in letters sent by representatives of the Home Office to a refugee amounted to a binding promise that (i) he and his family would be dealt with under a concession in relation to asylum claims announced by the Home Secretary, or that (ii) he and his family's application was being reviewed under the concession.¹³³ In 2009, the court considered whether a letter was a promise to indemnify the pursuer or a mere admission or statement of fact.¹³⁴ In 2010, the court was asked to determine if a promise to enter into a minute agreement to give the promisee the proceeds of the sale of land was an obligation relating to land, in which case a twenty-year prescription applied.¹³⁵ In 2011, the court held that the implied assumption by a new partnership in paying the debt of the old partnership was a unilateral promise.¹³⁶ In another case, the Court of Session addressed the issue of whether the nature of a relationship between a doctor and a patient in terms of a clinical drugs trial was

¹²⁸ *Krupp Uhde GmbH v Weir Westgarth Ltd* 31 May 2002 (CSOH, unreported).

¹²⁹ *Ballast Plc v Laurieston Properties Ltd* [2005] CSOH 16.

¹³⁰ *Van Klaveren v Servisair (UK) Ltd* [2009] CSIH 37 2009.

¹³¹ *Simmers v Innes* 2008 SC (HL) 137.

¹³² *Cawdor v Cawdor* 2007 SLT 152.

¹³³ *Petition of Bashkim Elshani for Judicial Review of a decision dated 6 October 2005 by the Secretary of State for the Home Department to refuse to grant indefinite leave to remain in the United Kingdom to the petitioner and his family* [2007] CSOH 164.

¹³⁴ *James Braes v The Keeper of Registers of Scotland* [2009] CSOH 176.

¹³⁵ *Smith v Stuart* [2010] CSIH 29.

¹³⁶ *Sim v Howat and McLaren* [2011] CSOH 115.

promissory or contractual.¹³⁷ In 2013, the court considered whether a letter issued by a bank confirming that it held a deposit on behalf of the owner of a development related to the fit-out costs was a unilateral obligation to pay the cost to the addressee of the letter (who completed the fit-out work).¹³⁸

In 2015, although the pursuer did not rely on promissory grounds, the Supreme Court held that an assurance by a bank that it would provide funding for both the purchase and development when the pursuer applied for it amounted to a unilateral binding obligation.¹³⁹ Most recently, in *MacDonald v Cowie's Executrix Nominated*,¹⁴⁰ it was held that the statement “I have promised to give him this house for many years...”¹⁴¹ did not constitute a binding promise.

(5) Concluding remarks

The *Reoch v Young* case in 1712 shows that, at an early period, it had not been common for individuals in Scotland to rely on promissory grounds, given that it took three decades after Stair published his *Institutions* before the question of the legal effects of promise was clearly raised. However, promissory grounds were becoming more common in the nineteenth and twentieth centuries. The statistics show that various kinds of promises were enforced in daily life. This begins with a simple form of promise made in daily life such as promises to pay a sum of money, promises of reward, and promises to guarantee existing debts. Then it moves to a more complex form of promises used in commercial practice e.g. promissory notes, promises to guarantee payments under bills of exchange, and promises granted as an option to buy a property. In addition, it appears that the courts had to deal with more complex issues of promise later, such as the distinction between promise and other types of expression, some of which had legal effect, and some that did not have legal effect. Other complex issues included whether a promise could be converted into a contract. This illustrates the gradual development of promissory law in Scotland. Cases related

¹³⁷ *Wylie v Grosset* 2011 SLT 609.

¹³⁸ *Regus (Maxim) Limited v The Bank of Scotland Plc* [2013] CSIH 12.

¹³⁹ *Carlyle v Royal Bank of Scotland PLC* 2015 SLT 206.

¹⁴⁰ [2015] CSOH 101.

¹⁴¹ *Ibid* at para 20.

to promise have continued to be brought in the twenty-first century, particularly since 2005, when one of the parties raised a promise as the possible ground for a claim and/or when the courts dealt with promissory law in more than ten cases. This illustrates the revival of the use of promissory obligation. The increase of promissory case law reflects the importance of the doctrine in the modern Scottish legal system. As the later discussion will indicate, Institutional writers after Stair in the eighteenth and nineteenth centuries, as well as early modern Scottish writers, such as Gloag, paid little attention in analysing the law of promise. This suggests that these writers, did not consider this doctrine to be an important legal concept. Therefore, the fact that the number of promissory case law appears to have increased during the past decade suggests that there is a greater awareness of the existence of the promissory doctrine as a source of voluntary obligation apart from contract. This is why litigants alternatively seek to enforce damages through a promissory obligation.

E. CONSTITUTION AND PROOF OF PROMISE

Before 1995, a unilateral promise was provable only by the writ or oath of the promisor.¹⁴² In 1771, the court ruled in *Millar v Tremamondo*¹⁴³ that “verbal promises did not admit of a proof by witnesses, and could only be established by writing or oath of party.”¹⁴⁴ This decision was substantially different from that of the Canon Law, where the substance of obligations is more important than their form.¹⁴⁵ Proof by witness was deemed to be “the ancient custom of the Commissaries”.¹⁴⁶ The writ and oath of the promisor came to be the measures that were used for the proof of promise.¹⁴⁷ However, in practice a promissory liability could be enforced only if it was in the form of a written document.¹⁴⁸

¹⁴² Bell, *Prin*, §8.

¹⁴³ (1771) Mor 12395; cf *Smith v Oliver* 1911 SC 103.

¹⁴⁴ (1771) Mor 12395 at 12395.

¹⁴⁵ McBryde, *Promises* 61.

¹⁴⁶ *Wood v Robertson* (1672) Mor 12225 at 12226.

¹⁴⁷ Gloag, *Contract* 50-51; McBryde, *Contact* para 2-35; M Ross & J Chalmers, *Walker & Walker, The Law of Evidence in Scotland*, 4th edn (2015) para 22.1.3.

¹⁴⁸ McBryde, *Promises* 63; M Ross & J Chalmers, *Ibid*.

Proof of promise by the writ or oath of the promisor had been thought to be the main factor which negatively affected the development of the promissory doctrine in Scotland.¹⁴⁹ The Scottish Law Commission¹⁵⁰ suggested that the rule that promise must be proved by writ or oath should be abolished. The Commission¹⁵¹ further recommended that there should be a requirement for the constitution of gratuitous obligations by writ.¹⁵² This would fundamentally change the legal doctrine of promise because the new requirement was not merely concerned with the proof of gratuitous obligations but also with the constitution of such obligations. MacQueen suggested that a writ should not be required as a constitution of gratuitous obligations.¹⁵³ MacQueen's concern was taken into account to some degree. Eventually when the new Act¹⁵⁴ governing the requirements of writing for obligations was promulgated, there is no absolute requirement for gratuitous obligations to be constituted by a writ.

Currently, the form required for contracts and promises is regulated by the Requirements of Writing (Scotland) Act 1995. The general rule for contracts and unilateral obligations is that they do not require writing.¹⁵⁵ However, a written document subscribed by the grantor(s) is required for the constitution of a contract or unilateral obligation for "the creation, transfer, variation or extinction of an interest in land".¹⁵⁶ In addition, the Act provides that a written document is required for the constitution of a "gratuitous unilateral obligation", except one undertaken in the course of business.¹⁵⁷ However, it does not provide any definition of the term "gratuitous". This causes ambiguities concerning the meaning of "gratuitous" amongst legal scholars.¹⁵⁸

¹⁴⁹ McBryde, *Promises* 65-66; MacQueen, *Constitution and Proof* 3; Report on the *Requirements of Writing* (Scot Law Com No 112, 1988) 11.

¹⁵⁰ Memorandum, *Constitution and Proof of Voluntary Obligations and the Authentication of Writings* (Scot Law Com No 66, 1985).

¹⁵¹ Memorandum, *Constitution and Proof of Gratuitous Obligations* (Scot Law Com No 39, 1977).

¹⁵² *Ibid.*

¹⁵³ MacQueen, *Constitution and Proof* 1-5.

¹⁵⁴ Requirements of Writing (Scotland) Act 1995.

¹⁵⁵ Requirements of Writing (Scotland) Act 1995, s 1(1).

¹⁵⁶ Requirements of Writing (Scotland) Act 1995, ss 1(2)(a)(i), 2(1).

¹⁵⁷ Requirements of Writing (Scotland) Act 1995, ss 1(2)(a)(ii).

¹⁵⁸ For a discussion on this point see Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (6) Gratuitousness of promise.

To conclude, there have been restrictions on the circumstances in which the unilateral obligations can be created and proved from an early period of the development of promise in Scots law. Historically, the law provided that proof of promise could be done either by the writ or oath of the promisor. Proof of promise by oath shows that not only did the notion that a promise is binding without acceptance in Scots law originate in the Canon Law, but the proof of a promissory obligation by way of an oath was also inspired by the Canon Law. Although later the proof of promise by oath or writ was abolished, the law continues to control constitutive requirements of form of unilateral obligation, with the exception of promise made in the course of business.

F. CONCLUSION

The Canon Law is the most important source of Scots promissory law. The canonists did not follow the Roman rule regarding *nuda pacta*. Bare promises were enforced within the ecclesiastical jurisdiction. Scots law thus adopted the canonical approach, albeit with stricter requirements as to proof. The evidence suggests that unilateral promise had been enforced by the Scottish courts since the sixteenth century. It can therefore be inferred that the enforcement of unilateral obligations must have been common in Scotland during Stair's own time.

Moreover, Stair's references to promise lie within a wider context of the *ius commune*. There was a continuing debate amongst leading European Natural Law commentators about whether a promise required acceptance. While Stair, under the influence of Molina, argued that a simple absolute promise is binding without acceptance, Grotius, under the influence of Lessius, suggested the contrary. Nonetheless, it has been found in this chapter that medieval jurists throughout Europe were familiar with the canonical principles to enforce (both unilateral and bilateral) promises. Such principles were put into practice in the ecclesiastical courts. Given that the notion of the enforcement of promise had its origin in the Canon Law and there was the influence of the Canon Law itself during those times, this thesis

argues that Stair was correct in making a distinction between unilateral promise and contract.

This thesis further postulates that the divergences between Scots law and the rest of Europe on the subject of promises occurred because of Stair's and Grotius' disagreements on acceptance of promises. Grotius' approach was followed by Pothier, whose commentaries were heavily consulted by the draftsmen of the *Code civil*. The *Code civil* later had a strong impact on other European civil codes. Although later there was an attempt to recognise a promise as a standalone obligation under the BGB, this attempt did not succeed. The German attempt nonetheless shows that Scots law has not been entirely alone in enforcing unilateral promise amongst the Civilian systems. At least unilateral promises have a role to play under the BGB as an exception rule for obligations which cannot be explained by using a contractual analysis. Consequently, Scots law is the only system in the Civilian tradition in which unilateral promise is recognised as a free-standing legal institution outwith contract.

Chapter IV

History of Promise in Thai Law

This chapter considers the history of promise in Thai law in order to achieve a greater understanding about the development of this controversial doctrine.

A. CONTRACT AND PROMISE IN OLD THAI LAW

Thai private law prior to the existence of the Code had only some basic principles about property and obligations.¹ It did “not govern the all-inclusive area of human relations.”² A completely coherent system of the law of contract did not exist. Only a few particular types of contract such as loan and deposit were recognised.³ In fact, the idea of contract under old Thai law is completely different from that in the modern law. In modern law contract is perceived as a voluntary obligation which arises from the parties’ wills. In contrast, in old Thai law a contractual relationship did not arise from the parties’ wills, but rather depended on external factors such as formalities or the delivery of the property.⁴ In the case of promises, they could not be enforceable because there could be no requirement of completing formality or delivery.⁵

B. PROMISE UNDER THE THAI CODE

(1) Promise without a specific promisee

Promises without a specific promisee are promises in which the promisor does not specify who the promisee is, i.e. they are made to the public. There are two types of public promises, namely advertisement of reward and prize competitions (regarded as subsets of the wider class of a “promise of reward”).

¹ Boonchalermvipast, *Thai Legal History* 141.

² Kasemsup, *Reception of Law* 277.

³ Boonchalermvipast, *Thai Legal History* 141.

⁴ Lingat, *Thai Legal History* 166; S Rattanakorn, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้* (Commentary on the Civil and Commercial Code: Obligations), 11th edn, (2013) 27.

⁵ Sotthibandhu, *Sale* 70-71.

(a) Advertisements of reward

There are three provisions regarding advertisements of reward, namely §§362-364. This chapter only discusses the sources of §362 because it is the provision dealing with the juristic nature of advertisements of reward.⁶

Initially, during the drafting period, §362 appeared as §359.⁷ The evidence⁸ shows that this provision finds its origins in Art 529 of the Japanese Code and §657 of the BGB. First, Art 529 of the Japanese Code, in the textual forms of this provision in force at the time of drafting of the Thai Code, reads: “A person who advertises that he will give a certain reward to whoever shall do a certain act is bound to give such reward to any person who does the act.”⁹ Second, §657 of the BGB, in the textual forms of this provision in force at the time of drafting of the Thai Code, states:

“A person who by public notice announces a reward for the performance of an act, *e.g.*, for the production of a result, is bound to pay the reward to any person who has performed the act, even if he did not act with a view to the reward.”¹⁰

During the meeting on 1 October 1925, *Phraya Thep Widun*, one of the draftsmen, indicated that §657 of the BGB contained the phrase “even if he did not act with a view to the reward”.¹¹ He then suggested that Thai law should follow the German approach to prevent the problems arising from the circumstances where a person performs the act as specified in the advertisement without knowing of its existence.¹² His proposal was adopted. Therefore, afterwards the texts of §359 read: “A person who advertises that he will give a reward to whoever shall do a certain act is bound

⁶ The texts of §§363 and 364 and the foreign sources which these provisions were derived from can be found in Appendices Table 1.

⁷ รายงานการประชุมกรรมการร่างกฎหมาย (*Memorandum of the Committee of Codification*), 1 October 1925 (B.E. 2468) 3-4.

⁸ *Report of the Revised Drafts* 236; *Index of Civil Code* 160; รายงานการประชุมกรรมการร่างกฎหมาย (*Memorandum of the Committee of Codification*), 1 October 1925 (B.E. 2468) 3-4.

⁹ The texts are from *Translation of Japanese Civil Code (1898)* 139.

¹⁰ The texts are from *Translation of German Civil Code (1907)* 144.

¹¹ รายงานการประชุมกรรมการร่างกฎหมาย (*Memorandum of the Committee of Codification*), 1 October 1925 (B.E. 2468) 3-4.

¹² *Ibid.*

to give such reward to the person who does the act, even if he did not act with a view to the reward.”¹³

Later, in the meeting on 3 October 1925, the Drafting Committee made a few changes in terms of wording (without providing any reasons for the changes). First, the word “advertises” was changed to “by advertisement promises”.¹⁴ Second, the words “the person” were changed to “any person”.¹⁵ Finally, the words “if he did” were changed to “if such person did”.¹⁶

Furthermore, before the Code was promulgated on 11 November 1925, the final approval of the drafts of the Code was made by another committee, the so-called “Approval Committee”. The Approval Committee changed the number of this provision from 359 to 362.¹⁷ Eventually this provision appeared as §362, and its texts read:

“A person who by advertisement promises that he will give a reward to whoever shall do a certain act is bound to give such reward to any person who does the act, even if such person did not act with a view to the reward.”¹⁸

It is difficult to find the exact reason why the Thai drafters used the words “by advertisement promises” instead of “advertises”. In fact, the English texts of both the Japanese and German sources (in the textual forms of these provisions in force at the time of drafting of the Thai Code) do not contain any promissory language.¹⁹ A possible answer is that the change is intended to reflect the importance of promissory obligation under the Thai Code. The drafters of the Thai Code might have intended these provisions to contain promissory language because they deal with the concept of promises of reward. This is despite the fact that the Thai drafters did not

¹³ The texts are from *Ibid* at 7.

¹⁴ รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 3 October 1925 (B.E. 2468) 3.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Report of the Revised Drafts* 236.

¹⁸ The texts are from *Ibid*.

¹⁹ The current §657 of the BGB contains promissory language: “Anyone offering by means of public announcement a reward for undertaking an act, including without limitation for producing an outcome, is obliged to pay the reward to the person who has undertaken the act, even if that person did not act with a view to the promise of a reward.” Federal Ministry of Justice and Consumer Protection, *German Civil Code: BGB*, available at http://www.gesetze-im-internet.de/englisch_bgb/.

differentiate between unilateral and bilateral obligations, as the later discussion will show.²⁰

(b) Prize competitions

The rules on prize competitions are contained in §365. In drafting this provision, the drafters compared Art 532 of the Japanese Code and §661 of the BGB. Para 1 of the Japanese provision, in the textual forms of these provisions in force at the time of drafting of the Thai Code, states:

“If there are several persons who have done the act specified in the advertisement, but only the one who has done it best is to receive the reward, such advertisement is valid only if a time is fixed therein within which the invitation must be acted upon.”²¹

Para 1 of the German provision, in the textual forms of these provisions in force at the time of drafting of the Thai Code, reads: “A promise of reward which has a prize competition for its object is valid only if a period of time for the competition is fixed in the notice.”²²

It was agreed that the German provision was more precise because it contained the words “prize competition”.²³ Therefore, in drafting the provision on prize competitions, the draftsmen largely followed §661 of the BGB.²⁴

Initially, the provision on prize competitions appeared as §362. Para 1 of §362 stated: “A promise of reward which has a prize competition for its object is valid only if a period of time is fixed in the notice.”²⁵ Subsequently, the last word of the text was changed from the word “notice” to “advertisement” by the Drafting Committee.²⁶ In

²⁰ See F. Conclusion, (2) Flaws in promissory provisions.

²¹ The texts are from *Translation of Japanese Civil Code (1898)* 140.

²² The texts are from *Translation of German Civil Code (1907)* 145.

²³ รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 1 October 1925 (B.E. 2468) 4.

²⁴ *Ibid*; *Index of Civil Code* 160.

²⁵ The texts are from *Report of the Revised Drafts* 238.

²⁶ รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 3 October 1925 (B.E. 1928) 4.

addition, the Approval Committee changed the number of this provision from 362 to 365.²⁷ After the promulgation of the Code, para 1 of §365 reads: “A promise of reward which has a prize competition for its object is valid only if a period of time is fixed in the advertisement.”²⁸

This final change of the word used from “notice” to “advertisement” is interesting because the German provision uses the word “notice”. One possible reason for the change is that the word “advertisement” is more precise than the word “notice”. Generally speaking, a prize competition refers to an action where a person invites others to compete in his/her competition. The winner of such a competition will be then given the reward. Hence, the term “advertisement” is more accurate in this context because it refers to the means of publishing the competition and making it available to others. More specifically, it refers to a public means of notification. While a “notice” may be something circulated privately, an advertisement is by nature something shared publicly.

(c) Analysis of promises of reward

The legal characteristic of a promise of reward under Thai law shows similarities to that of German law²⁹ in that it is a unilateral obligation. This is on the basis that it does not require any acceptance.³⁰ The Code clearly states that a promisor of an advertisement promise is bound to give the reward to whoever performs the act, even if that person does not have an intention to obtain the reward.

However, under the Thai Code the provisions regarding promise of reward are contained in Book II (Obligations), Title II (Contract), Chapter I (Formation of Contract). One might argue that this is because Thai law does not have a general

²⁷ *Report of the Revised Drafts* 238.

²⁸ *Ibid.*

²⁹ See Chapter II, C. THAILAND: A NEWLY DISCOVERED MIXED LEGAL SYSTEM?, (2) Reception of foreign laws in Thailand, (d) Effects on the Thai promissory law as a result of the codification.

³⁰ For further discussion see Chapter V, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (2) Thai law, (c) Binding characteristics of a promise, (i) A promise of reward is binding without acceptance.

promissory provision. Therefore, specific provisions of promise have to appear together with the contractual provisions. Yet, this explanation is not satisfactory. If Thai law does not regard these promises as contracts, they could appear elsewhere in the Book of Obligations, and not in the part on formation of contract.

This could be compared with the provisions regarding promise of reward and prize competitions under German law, which the Thai provisions were modelled on. The provisions of promises of reward and prize competitions under the BGB (1907 edition)³¹ were contained in the Second Book: Law of Obligations, Seventh Section: Particular Kinds of Obligations, Ninth Title: Promise of Reward.³² They were divided from the contractual provisions (contained in the Second Book: Law of Obligations, Second Section: Obligations *Ex Contractu*).³³ Therefore, under the BGB, there is no conflict in terms of the legal nature of unilateral binding obligations and contractual obligations.

The fact that the provisions on promises of reward are regarded as part of the formation of a contract suggests that the draftsmen of the Code did not understand the actual nature of unilateral binding obligations. It appears that they simply followed §657 of the BGB by adding the phrase “even if he did not act with a view to the reward” to the Thai provision. There was no discussion among the drafters of the fact that, by following the German approach, the juristic nature of promises of reward would no longer be regarded as contractual.³⁴

(2) Promise with a specific promisee

Promises with a specific promisee are promises which are made to a specific person. Therefore, only that specified person can accept and enforce the promise. They can

³¹ Under the current BGB, the provisions of promise of reward and prize competitions are contained in Book 2: Law of Obligations, Division 8: Particular types of obligations, Title 11: Promise of a reward.

³² *Translation of German Civil Code (1907)* x-xi.

³³ *Ibid* at x.

³⁴ รายงานการประชุมคณะกรรมการร่างกฎหมาย (*Memorandum of the Committee of Codification*), 1 October 1925 (B.E. 2468) 3-4.

be divided into four groups, namely promises to pay a penalty for not performing an obligation, promissory notes, promises to pay remuneration and promises to enter into a contract.³⁵

(a) Promise to pay a penalty for not performing an obligation

The provisions of promise to pay a penalty for not performing an obligation exist within the wider concept of “stipulated penalty”. The rules of promise to pay the penalty for not performing obligation are contained in §§379-385.

(i) Sources of promise to pay a penalty

In drafting the notion of promise to pay a penalty, the drafters took into account English, Indian, French and German law. They were of the view that the German concept was the most precise.³⁶ Accordingly, German law was chosen to be the model for the drafting.³⁷ All provisions on the promise to pay a penalty were borrowed from German law.³⁸ Due to the limitations of the space available, this section only makes reference to §379, which deals with the general concept of this type of promises.

During the period of the drafting of the Code, the texts of §379 appeared as:

“If the debtor promises to creditor the payment of a sum of money in case he does not perform his obligation, or does not perform it in the proper manner, the penalty is forfeited if he is in default. If the performance due consists in a

³⁵ There are three provisions under the Code mentioning a promise made by a third party to an agent, namely §825 (promise made by a third party to an agent in agency law), §847 (promise made by a third party to a broker) and §1724 (promise made by a third party to administrator in succession law). Nevertheless, this type of promise is seldom mentioned in the area of the law of promise in legal literatures because these provisions are not directly concerned with a unilateral binding effect of a promise. Therefore, the origins of these provisions are not explored in this chapter due to the limited space.

³⁶ รายงานการประชุมคณะกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 8 October 1925 (B.E. 2468) 3.

³⁷ *Ibid.*

³⁸ *Ibid.* For the texts of the relevant Thai and German and provisions see Appendices Table 3.

forbearance, the penalty is forfeited as soon as any act in contravention of the obligation is committed.”³⁹

However, during the final revision, the Approval Committee made two changes to this provision by (i) amending the words “promises to creditor” to “promises the creditor” and (ii) adding the words “as penalty” after the phrase “the payment of a sum of money”.⁴⁰ After the promulgation of the Code, §379 states (the words that are different from §379 during the period of the drafting appear in italic):

“If the debtor promises ~~to~~ *the* creditor the payment of a sum of money *as penalty* in case he does not perform his obligation, or does not perform it in the proper manner, the penalty is forfeited if he is in default. If the performance due consists in a forbearance, the penalty is forfeited as soon as any act in contravention of the obligation is committed.”⁴¹

This provision derives from §339⁴² of the BGB. The German provision, in the textual forms of this provision in force at the time of drafting of the Thai Code, states:

“If the debtor promises the creditor the payment of a sum of money as penalty in case he does not perform his obligation or does not perform it in the proper manner, the penalty is forfeited if he is in default. If the performance due consists in a forbearance, the penalty is forfeited as soon as any act in contravention of the obligation is committed.”⁴³

The final texts of §379 of the Thai Code are exactly the same as the texts of §339 of the BGB. This suggests that the amendments made by the Approval Committee were not their original ideas. It is likely that the amendments were to make the Thai texts more accurate, and equivalent to the texts of the BGB.

³⁹ รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 8 October 1925 (B.E. 2468) 6.

⁴⁰ *Report of the Revised Drafts* 259.

⁴¹ Thai Code, §379.

⁴² *Report of the Revised Drafts* 259; *Index of Civil Code* 161.

⁴³ The texts are from *Translation of German Civil Code (1907)* 76.

(ii) Analysis of promise to pay a penalty

There is a contradiction between the English and Thai terms that are used in the provisions regarding promise to pay a penalty. In §§379-385, the English texts use the term “promises”. However, when it is translated into Thai⁴⁴, the Code uses the term “สัญญา” (which literally means “contract”⁴⁵) instead of using the term “คำมั่น” (which literally means “promise”⁴⁶). This differs from provisions of other types of promises, e.g. promise of reward, promise of sale, promise of a gift, promise to pay remuneration, and hire purchase, in which the term “คำมั่น”, which literally means promise, is used. It is unclear why the term “สัญญา” (contract) is used when the provision is concerned with a promise to pay a penalty. There may be an error in translation here. As the provisions of promise to pay a penalty are contained in the Title of Contract (Chapter III earnest and stipulated penalty), the draftsmen may have unwittingly used the term “สัญญา” (contract) in the Thai texts, without realising that the term was not a correct translation.

The fact that the drafters translated the term “promise” as “สัญญา” (which literally means “contract”) has a significant impact on its legal status. The Thai courts and Thai lawyers explain that a promise to pay a penalty is collateral to the principal contract.⁴⁷ In other words, it depends on the principal contract. In terms of the rescission of a contract, the Thai Code states: “If one party has exercised his right of rescission, each party is bound to restore the other to his former condition; but the rights of third persons cannot be impaired.”⁴⁸ Thus, Thai commentators explain that creditors cannot claim any stipulated penalty as a result of the rescission of a contract, because it is collateral to the principal contract, which has also been

⁴⁴ As noted in Chapter II, the Thai Code was initially drafted in English and then translated into Thai.

⁴⁵ The Royal Institute, *ศัพท์นิติศาสตร์ อังกฤษ-ไทย ไทย-อังกฤษ ฉบับราชบัณฑิตยสถาน* (Legal Terms: English-Thai, Thai-English, Edition of the Royal Institute), 6th edn (2006) 672.

⁴⁶ *Ibid* at 506; Similarly, according to the glossary of the edition of the Thai Code which the author of this thesis consults, the translation of the term “promise” is “คำมั่น”. *Translation of Thai Code* 446.

⁴⁷ Supreme Court Decision 2983/1998 (B.E. 2541); Sotthibandhu, *Juristic Acts and Contracts* 389-392; K Jongjakapun, *เอกสารประกอบการสอน สัญญา ชุดที่ 5* (Handout: Contract (Vol 5), available at <http://kumchia.com/?cat=1>).

⁴⁸ Thai Code, §391 para 1.

rescinded.⁴⁹ However, this seems to be unfair to creditors, who have been promised that debtors will be penalised if they fail to perform their obligations. Therefore, some propose that creditors should be able to enforce the stipulated penalty. Two proposals have been made as to why creditors should be able to enforce the stipulated penalty. The first is that creditors can still enforce the stipulated penalty in cases where the contract has been rescinded, provided that they reserved the right to do so before they rescinded the contract by informing the debtor that they would enforce the stipulated penalty.⁵⁰ The second is based on §391 para 4 (dealing with the effect of the rescission of a contract) in which it states that: “the exercise of the right of rescission does not affect a claim for damages.”⁵¹ According to this view, a promise to pay a penalty is akin to paying damages. Therefore, creditors are entitled to claim the stipulated penalty as damages, irrespective of the contract being rescinded.⁵²

(b) Promissory notes

There are five provisions, namely §§982-986, under the Code concerning promissory notes. The evidence shows that §§983-986 were borrowed from foreign law.⁵³ For example, §983 specifies the details which must be contained in the promissory note.⁵⁴ There are several sources in relation to the origins of §983, namely French law⁵⁵, German law⁵⁶, Swiss law⁵⁷, Japanese law⁵⁸, English law⁵⁹ and Uniform Law.⁶⁰

⁴⁹ Sothibandhu, *Juristic Acts and Contracts* 484-485.

⁵⁰ *Ibid.*

⁵¹ Thai Code, §391 para 4.

⁵² A. Sumawong, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วยนิติกรรม สัญญา* (Commentary on the Civil and Commercial Code: Juristic acts and Contracts), 6th edn (2010) 295.

⁵³ *Index of Civil Code* 203.

⁵⁴ See Appendices Table 4.

⁵⁵ *Cour de Paris* 23 Mars 1892; French Commercial Code, Art 188.

⁵⁶ Byle's (German Bills). See sub-heading (ii) below for the discussion about the ambiguities of this German source.

⁵⁷ Swiss Code of Obligations, Arts 838 and 839. These provisions currently appear as Art 1096.

⁵⁸ Japanese Commercial Code, Art 525.

⁵⁹ Bills of Exchange Act 1882, s 83.

⁶⁰ Art 77. This is believed to refer to the *Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes*. See Appendices Table 4.

However, there is no reference to the source of §982 (dealing with the definition of promissory notes).⁶¹

(i) Ambiguities regarding sources of §982

It is doubtful why there is only one promissory note provision, namely §982, for which the source is not specified. There are two possibilities. Firstly, it was borrowed from foreign laws but the draftsmen mistakenly did not record its original sources. Secondly, this provision was originally created by the committee who drafted the Code.

It is suggested in this thesis that the first possibility is likely to be correct. As noted, prior to the existence of the Code, there were only a few particular types of contract in Thai law e.g. loan and deposit. This means that there had never been any existing system of promissory notes in Thailand before.

Moreover, foreign laws which are used for other promissory note provisions are German, French, Swiss, Japanese and English law. Among these five sources, English law has a provision dealing with the definition of promissory notes. The Bills of Exchange Act 1882 defines a promissory note, in the textual forms of this provision in force at the time of drafting of the Thai Code, as:

“an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.”⁶²

This definition shows similarities to §982 of the Thai Code, which states: “A promissory note is a written instrument by which a person, called the maker, promises to pay a sum of money to, or to the order of, another person, called the payee.”⁶³

⁶¹ *Index of Civil Code* 203.

⁶² Bills of Exchange Act 1882, s 83(1) The texts are from W J B Byles & E R Watson, *A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank-Notes and Cheques*, 17th edn (1911) 427.

⁶³ Thai Code, §982.

Furthermore, the discussion in this chapter shows that that the drafters of the Thai Code relied on foreign sources in drafting the Code heavily. It is therefore unlikely that they would originally create a provision without consulting foreign sources, especially where foreign sources were available. Since English law had specific legislation dealing with the definition of promissory notes, the Thai drafters could benefit from the English source. In fact, as noted above, s83 of the Bills of Exchange Act 1882 was a source of the drafting of §983 (regarding the details of promissory note) under the Thai Code. Accordingly, it seems very likely that the Thai drafters had seen the definition of promissory notes under UK law. Consequently, given that both §982 of the Thai Code and s83 of the Bills of Exchange Act 1882 show similarities, this thesis argues that the Thai drafters were likely to have been inspired by this UK provision as a source of §982.

(ii) Ambiguities regarding the German source

According to *Index of Civil Code*, the German source for drafting §983 is specified as “Byle’s (German Bills)”.⁶⁴ However, there is a very famous English source on Bills of Exchange that is called “Byles on Bills of Exchange and Cheques”. Therefore, it is unclear whether “Byle’s (German Bills)” refers to a German or an English source. It has been found that the 17th edition of *Byles on Bills of Exchange and Cheques*⁶⁵, published in 1911, contains the English translation of the German Bills of Exchange Act 1849.⁶⁶ Therefore, it can be inferred that the phrase “Byle’s (German Bills)”, given by the Thai drafters, may have been intended as a reference to the English translation of the German Bills of Exchange Act 1849 which appeared in the 17th edition of *Byles on Bills of Exchange and Cheques*. In short, the phrase “Byle’s (German Bills)” is a shorthand reference to the drafters having used that English translation of the German Act.

⁶⁴ *Index of Civil Code* 203. The List of Abbreviations of this source does not specify the full name of “Byle’s (German Bills)”.

⁶⁵ W J B Byles & E R Watson, *A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank-Notes and Cheques*, 17th edn (1911).

⁶⁶ *Ibid* at 437ff (Appendix III German Law of Bills of Exchange, 1908).

(iii) Analysis of promissory notes

Like the case of promise to pay a penalty for not performing an obligation, the drafters translate the term “promissory note” as “ตั๋วสัญญาใช้เงิน” (which literally means “a contractual note to pay a sum”). This suggests that the drafters may have used the term “promissory” in a “contractual” sense. At first glance, it appears to be reasonable to refer to a promissory note as a contractual obligation, given that the concept was derived in part from English law, where the term “promise” is generally used in the sense of a contractual promise. However, if one thoroughly considers the text of §982, it would be found that a promissory note is promissory (and not contractual) in nature. The phrase “a written instrument by which a person... promises to pay a sum of money to... another person...” suggests that the maker of a promissory note unilaterally binds him/herself to pay a stated sum to the payee. The payee does not generally need to agree with the conditions of the note, but rather he/she can enforce the payment once he/she receives the promissory note. This suggests that a promissory note is binding without acceptance.

(c) Promise to pay remuneration

In employment contracts,⁶⁷ §576 states: “The promise to pay remuneration is implied, if, under the circumstances, it cannot be expected that the services are to be rendered gratuitously.”⁶⁸

(i) Sources of promise to pay remuneration

Section 576 was inspired by two German provisions, namely §612 of the BGB and §59 of the German Commercial Code, and one Swiss provision, namely Art 338 of the Swiss Code of Obligations.⁶⁹

⁶⁷ The Thai Code uses the term “hire of service”.

⁶⁸ Thai Code, §576. The texts are from D Bunnag, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 3* (Commentary on the Civil and Commercial Code, Book 3) (1981), 211.

⁶⁹ *Index of Civil Code* 173.

Firstly, §612 of the BGB, in the textual forms of this provision in force at the time of drafting of the Thai Code, states:

“Remuneration is deemed to have been tacitly agreed upon if, under the circumstances the performance of the service is to be expected only for remuneration.

If the amount of remuneration is not specified, and if there is a tariff, the tariff rate of remuneration, or, if there is no tariff, the usual remuneration is deemed to have been agreed upon.”⁷⁰

Secondly, §59 of the German Commercial Code, in the textual forms of this provision in force at the time of drafting of the Thai Code, states:

“Any person employed in a mercantile business to perform mercantile services for a remuneration (hereinafter called a mercantile employee) must, in the absence of any special agreements as to the nature and extent of his services or as to his remuneration, perform the services and receive the remuneration usual according to local custom. In default of any local custom the services to be performed must be held to be such as appear reasonable under the circumstances of the case.”⁷¹

Thirdly, §576 was borrowed from Art 338 of the Swiss Code of Obligations.⁷² However, there appears to be a mistake here. According to the *Code des obligations* (published in 1911)⁷³, Art 338 is concerned with an employer’s duties in providing tools and materials.⁷⁴ The provisions of employment contract under the 1911 edition of the Swiss Code of Obligations that the present writer consults should be similar to those of the Swiss Code of Obligations that the Thai drafters consulted.⁷⁵ Under the 1911 edition of the Swiss Code of Obligations, the provision which is the most similar to that on promise to pay remuneration appears to be Art 320 para 2, which states:

⁷⁰ The texts are from *Translation of German Civil Code (1907)* 133.

⁷¹ The texts are from *The German Commercial Code* (translated and briefly annotated by A F Schuster) (1911). Therefore, it is believed to be the genuine original provision which was used as the model for §576 of the Thai Code.

⁷² *Index of Civil Code* 173.

⁷³ Recueil Des Lois Fédérales No 18 (19 juillet 1911), Loi fédérale complétant le Code civil suisse. (Livre cinquième: Droit des obligations (du 30 mars 1911).

⁷⁴ *Ibid.*

⁷⁵ The text of Art 338 of the 1967 edition of the Swiss Code of Obligations is exactly the same as that of the 1911 edition.

“It is in particular deemed to have been concluded as soon as the performance of work has been accepted for a certain period of time and which in the circumstances could be expected only in exchange for a salary.”⁷⁶

Consequently, there might have been a mistake about the reference of the Swiss source. The correct reference should be Art 320, rather than Art 338. Therefore, the following analysis will be based on Art 320 of the Swiss Code of Obligations.

(ii) Ambiguities and analysis of promise to pay remuneration

Although §576 is concerned with “promise to pay a remuneration”, the texts of §576 suggest that the employer does not intend to make a promise in the sense of a unilateral obligation. Rather, according to the circumstances of the case, one would not expect the employee to do unpaid work. Accordingly, the law regards that there is an implied contract between the parties, and that the employer has made a promise to pay the remuneration. Therefore, the binding characteristic of promise to pay remuneration contrasts with other promises under the Thai Code. For example, as previously discussed, promise of reward is a genuine unilateral obligation. Also, in the cases of promise to pay a penalty for not performing an obligation and promissory notes, the promisee can choose whether he/she will accept or enforce the promise or not. However, the promisee in the case of promise to pay remuneration is not really in the situation where he/she can choose to enforce or refuse the promise. The employees in this instance would always naturally want to receive remuneration.

This can be usefully compared with the foreign sources where §576 was derived from. The German and the Swiss provisions are contractual principles, rather than promissory ones. In fact, all the sources of §576 do not use promissory language. This suggests that the nature of a promise to pay remuneration under the Thai Code is not actually a unilateral binding obligation, but rather a contractual one.

⁷⁶ Author’s translation. The French texts appear as: “Il est notamment présumé conclu dès que du travail a été accepté pour un temps donné et que, d’après les circonstances, ce travail ne devait être fourni contre un salaire”.

It is unclear why the Thai drafters used the term “promise to pay remuneration”, despite the fact that §576 is not a unilateral obligation. One possible answer is that they used the word “promise” in the sense of a contractual “promise”, i.e. promissory language was used here to describe a contractual situation. The fact that the Thai drafters used the term “promise” in the provision of promise to pay remuneration in a contractual sense reinforces the argument that they did not acknowledge the difference between bilateral and unilateral obligation.

(d) Promise to enter into a contract

The final type of promises specifying a promisee is “promise to enter into a contract”. The origins and analysis of the provisions in relation to promise to enter into a contract will be explored specifically in the next section.

C. PROMISE TO ENTER INTO A CONTRACT

There are two main types of promises to enter into a contract under the Code, namely promises of sale (§454, 456 para 2) and promises of a gift (§526). In addition, this thesis argues that hire purchase can be characterised as a contract containing a promissory undertaking by the hirer. Therefore, this section also discusses the origins of hire purchase under the Code.

(1) Promise of sale⁷⁷ (§454)

Section 454 of the Code states:

“A previous promise of sale made by one party has the effect of a sale only when the other party has given notice of his intention to complete the sale and such notice has reached the person who made the promise.

If no time has been fixed in the promise for such notification, the person who made the promise may fix a reasonable time and notify the other party to give a definite answer within that time whether he will complete the

⁷⁷ The idea of promise of sale also appears in §456 para 2. However, it is concerned with the conditions under which a promise to sell immovable property can support a lawsuit action. As §456 para 2 is not directly concerned with the juristic nature of a promise to make a contract, this chapter does not consider the origins of this provision.

sale or not. If within that time he does not give a definite answer, the previous promise loses its effect.”

(a) Sources of §454

This provision was drafted under the influence of Art 1589 of the *Code civil*, Art 22 of the Swiss Code of Obligations and Art 556 of the Japanese Code.⁷⁸

First, Art 1589⁷⁹ of the *Code civil*,⁸⁰ in the textual forms of this provision in force at the time of drafting of the Thai Code, states: “Promise of sale is as good as sale, where there is the reciprocal consent of parties as to the thing and as to the price.”⁸¹

Second, Art 22 of the Swiss Code of Obligations, in the textual forms of this provision in force at the time of drafting of the Thai Code, states:

“A party may by contract bind himself to enter into a future contract. Where the law for the protection of the parties prescribes a certain form for the validity of the future contract, the preliminary contract must also be made in that form.”⁸²

Finally, Art 556 of the Japanese Code, in the textual forms of this provision in force at the time of drafting of the Thai Code, states:

“A promise to buy or sell made by one party has the effect of a sale, as soon as the other party expresses his intention to complete the sale.

If no time is fixed for such expression of intention, the promisor may fix a reasonable time and notify the other party to give a definite answer within that time whether he will complete the sale or not. If within that time he does not give any definite answer, the promise loses its effects.”⁸³

⁷⁸ รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 21 May 1924 (B.E. 2467) 1176; *Index of Civil Code* 165.

⁷⁹ The current texts of this provision read: “The promise of sale is equivalent to a sale, where there is a mutual agreement of the two parties upon the article and the price.”

⁸⁰ All the texts of the *Code civil* which are mentioned in this chapter are from *Translation of Code Napoleon (1811)*. Therefore, these provisions are believed to be the genuine original provisions which were used as the model for the Thai provisions.

⁸¹ The texts are from *Translation of Code Napoleon (1811)* 326.

⁸² The texts are from *Translation of Swiss Code of Obligations (1984)* 245. The French texts of Art 338 of the 1984 edition are the same as those of Art 338 of the 1911 edition. Therefore, it can be inferred that this provision was not amended between 1911 and 1987. This thesis therefore uses the English translation from the 1984 edition. It is believed to be the genuine original provision which was used as the model for §454 of the Thai Code.

⁸³ The texts are from *Translation of Japanese Civil Code (1898)* 146.

The texts of the Japanese provision show the greatest similarity to the Thai provision. Moreover, like the Thai provision, the Japanese provision contains the rule regarding lapse of the promise of sale, whereas the French and Swiss provisions do not.

(b) Promise of sale under the drafts of the Code

During the drafting period, there were three provisions concerning promise of sale, namely §§461-463. The drafters, however, did not use the term “promise” in those provisions.⁸⁴ This was different from the Japanese, French and Swiss Codes, the original sources of promise of sale, in which the term “promise” was used. Nonetheless, in the understanding of the drafters those provisions concerned the concept of promise of sale.⁸⁵

There were several terms which the drafters used in those provisions. The most obvious evidence shows that the draftsmen had used the term “contract” and then changed to the term “offer”, without giving any reasons for the amendment.⁸⁶ In considering these provisions, the drafters occasionally used the term “an agreement to buy or sell” although the provisions were about a promise of sale (according to current law).⁸⁷ This could suggest that perhaps the draftsmen understood this concept as an agreement to buy or sell, which binds only one party (either the seller or buyer), rather than a promise of sale. Eventually, the term “offer” was changed to “promise”. It was not appropriate to use the term “offer” in the provision of promise of sale because the concept of promise of sale would appear in Book III (Specific Contracts) and the term “offer” had already been used in the Book of Obligations,

⁸⁴ รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 21 May 1924 (B.E. 2467) 1179; รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 22 May 1924 (B.E. 2467) 1190.

⁸⁵ รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 21 May 1924 (B.E. 2467) 1176.

⁸⁶ รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 29 May 1924 (B.E. 2467) 1207.

⁸⁷ รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 21 May 1924 (B.E. 2467) and *Ibid.*

which had been promulgated.⁸⁸ If the term “offer” was used again in Book III, this could cause confusion and overlap between the term “offer” in the provisions regarding the formation of a contract in Book II and the term “offer” in “promise of sale” (Book III).⁸⁹ It appears that most of the draftsmen considered a promise of sale as a kind of contract which unilaterally binds either the buyer or the seller.⁹⁰

(c) Problems with, and analysis of, promise of sale

The concept of promise of sale is a mixture of several foreign laws. This concept was drafted with an unclear understanding of the underlying basis of the concept. As noted, when the draftsmen was drafting the provision concerning promise of sale, the terms “contract”, “offer”, and “an agreement to buy or sell” had been used. The drafters followed the Japanese provision heavily. However, most of the drafters were of the view that a promise of sale was a unilateral contract binding only one party, despite the fact that the legal characteristics of the Japanese concept are those of a unilateral obligation. This suggests that perhaps the drafters did not clearly understand the actual legal nature of promise of sale.

Moreover, the provision of promise of sale originated in three sources, namely French, Swiss and Japanese law. The texts of the Japanese provision suggest that a promise of sale under Japanese law is a genuine unilateral obligation because it can be unilaterally created. In contrast, a promise of sale under French law is not a unilateral obligation on the basis that it cannot be created by one party. The Swiss provision deals with a future contract. This reflects the fact that there is no consistency amongst these foreign sources in terms of the legal characteristics of promises. The difference between the Japanese, Swiss and French sources in relation to the juristic nature of promises helps to explain why the Thai drafters were facing such difficulties when drafting this provision.

⁸⁸ รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 29 May 1924 (B.E. 2467)1185.

⁸⁹ *Ibid.*

⁹⁰ รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 22 May 1924 (B.E. 2467) 1185.

(2) Promise of a gift (§526)

(a) General concept of promise of a gift

The notion of promise of a gift appears in §526 of the Code, which states:

“If a gift or a promise for a gift⁹¹ has been made in writing and registered by the competent official and the donor does not deliver to the donee the property given, the donee is entitled to claim the delivery of it or its value, but he is not entitled to any additional compensation.”⁹²

This provision does not govern the juristic nature of a promise of a gift. Rather, it is concerned with the formalities of promises of a gift in order for them to be enforceable.

(b) Sources of §526

There are four foreign sources for the concept of promise of a gift, namely French, German, Swiss and Japanese law.⁹³

(i) French law

The concept of promise of a gift is influenced by Art 931 of the *Code civil*. Art 931, in the textual forms of this provision in force at the time of drafting of the Thai Code, states “All acts of gift shall be passed before notaries, in the ordinary form of contracts; and a minute thereof shall be left, under pain of nullity”.⁹⁴ It can be seen that the French provision does not actually deal with a promise of a gift, but rather a contract of gift. It appears that there is no notion of promise to make a gift under the *Code civil*.⁹⁵ This is compatible with the position of promises under the *Code civil* that, as has been argued in this thesis, a unilateral promise made by one party is not

⁹¹ According to the translation of the Thai Code that the author of this thesis consults, the term “promise for a gift” is used. However, the author suggests that a more proper term would be “promise of a gift”.

⁹² Thai Code, §526.

⁹³ *Index of Civil Code* 170.

⁹⁴ The texts are from *Translation of Code Napoleon (1811)* 190.

⁹⁵ Art 931 of the *Code civil* deals with contract of gift.

binding. Recall that under French law an enforceable promise of sale has to be made by two parties, i.e. it requires an agreement between the seller and the buyer.⁹⁶

(ii) German law

Section 526 also finds its origin in §522 of the BGB.⁹⁷ However, according to the edition of the BGB that the present writer consulted (published in 1907)⁹⁸, §522 concerns “interest of default in a gift”.⁹⁹ Instead, the BGB provision which deals with the concept of “form of a gift” is §518. According to the 1975 edition of the BGB, there was no change to §522 between 1900 and 1975.¹⁰⁰ Therefore, there was likely to be an error in the evidence regarding the origin of §526 under the Thai Code. The actual origin of §526 should be §518 of the BGB, rather than §522.

Section 518, concerning “form of promise of gift”, in the textual forms of this provision in force at the time of drafting of the Thai Code, states:

“For the validity of a contract whereby an act of performance is promised gratuitously, judicial or notarial authentication of the promise is necessary. If a promise of debt or an acknowledgement of debt of the kind specified in 780, 781, be made gratuitously, the same rule applies to the promise or the declaration of acknowledgement.

Any defect of form is cured by the performance of the promise.”¹⁰¹

The German provision is similar to the Thai provision in that it is directly concerned with the form of promise of a gift, as discussed below.

⁹⁶ See Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (4) Northern Natural Law jurists, (b) Grotius’ influence on French law.

⁹⁷ *Index of Civil Code* 170.

⁹⁸ *Translation of German Civil Code (1907)*.

⁹⁹ “A donor is not bound to pay interest for default.” BGB, §522. The texts are from *Ibid* at 113.

¹⁰⁰ *The German Civil Code as amended to January 1975* (translated by I S Forrester et al) xxvi.

¹⁰¹ The texts are from *Translation of German Civil Code (1907)* 112-113.

(iii) Swiss law

Another source of the provision of promise of a gift is Art 59 of the Swiss Code of Obligations. The Swiss provision, in the textual forms of this provision in force at the time of drafting of the Thai Code, reads:

“The promise of a gift to be valid requires a written form. If pieces of land or real rights in such are the subject of the gift, the public authentication thereof is requisite for their validity. If a promise of gift is fulfilled, the situation will be considered as a gift from hand to hand.”¹⁰²

Like the German provision, the Swiss provision deals with the formal requirements of promise to make a gift. However, the Swiss approach is more flexible than the German approach towards making a promise. Parties who want to make a promise of a gift in Swiss law generally can make the promise by themselves, unless such promises are related to real property. In contrast, in German law, promises of a gift for all types of properties must be authenticated by a notary.

(iv) Japanese law

The final source of §526 is Art 550 of the Japanese Code, which, in the textual forms of this provision in force at the time of drafting of the Thai Code, states: “A gift not expressed in writing can be rescinded by either party, except so far as performance has already been made.”¹⁰³

Unlike the German and Swiss provisions, the Japanese provision deals with form of a gift contract. Under the Japanese Code, a gift is defined, in the textual forms of this provision in force at the time of drafting of the Thai Code, as “where one party expresses his intention to give property of his own to the other party without consideration, and the other party expresses his acceptance.”¹⁰⁴ This shows that gift in Japanese law is different from that of Thai law. Under Thai law, “A gift is valid

¹⁰² The texts are from *The Swiss Civil Code of December 10, 1907 (Effective January 1, 1912)*. Translated by R P Shick (1915) 245.

¹⁰³ Japanese Code, Art 549. The texts of are from *Translation of Japanese Civil Code (1898)* 145.

¹⁰⁴ *Ibid.*

only on delivery of the property given.”¹⁰⁵ Thus, under Thai law a mere agreement between the donor and the donee cannot constitute a complete contract of gift. In contrast, in Japanese law the parties can agree to make a valid contract of gift without delivery the property given. However, if the contract is not made in writing, each party can terminate the contract freely.

(c) Problems with, and analysis of, promise of a gift

Section 526 is a mixture of foreign sources, namely French, German, Swiss and Japanese laws. However, the French and Japanese sources are not directly concerned with the form of promise of a gift, but rather about the form of a contract of gift. In contrast, the German and Swiss provisions are directly concerned with the form of promise of a gift, which is similar to §526.

Nonetheless, all the foreign sources of §526 are about necessary formalities. Such formalities in these four sources can be grouped into two types. First, French and German law require the transaction to make a gift to be verified by a notary. Second, Swiss and Japanese law require the transaction to be made in writing. This shows that the Swiss/Japanese approach is more flexible than the French/German one.

Thai law adopted both these two approaches into §526: it requires a promise of a gift both to be made in writing and to be registered by a competent official. This approach, however, causes a problem about the application of §526. The formal requirement of a promise of a gift under Thai law is impractical. It may be reasonable for a promise of a gift of an immovable property to be made in writing and registered, given that immovable properties are governed by a system of registration. However, this is not the case with moveable properties, which are not governed by a registration system, i.e. they are not stored in the records of any government offices. Therefore, it is unclear which official or government agency would have the authority to register a promise of a gift of moveable property.¹⁰⁶

¹⁰⁵ Thai Code, §523.

¹⁰⁶ Sotthibandhu, *Sale* 391.

The impracticality of §526 probably results from the fact that Thai law adopted this provision from foreign approaches without taking into consideration whether such approaches are compatible with the situation in Thailand or not. Since there is no notarial profession within the Thai legal system, the idea of a competent official was thus chosen to be the authority for the purpose of validating a promise of a gift. Nonetheless, notaries in the Civil Law systems are not equivalent to competent officials. While a competent official in Thailand is a government agency, a notary in the Civil Law systems is a private lawyer who is given the power to authenticate certain kinds of transactions. For example, in France, notaries are trained legal professionals whose important role is the drawing up of legal instruments in certain areas of the law such as the law of property, family law, and corporate law.¹⁰⁷ Some transactions such as conveyancing, matrimonial contracts and wills, need to be authenticated by a notary to be valid.¹⁰⁸ In Germany, a notary is a specialist legal professional, who is appointed by the Land Justice Department to exercise his/her profession in a particular area. Like French law, in many cases, transactions are required to be authenticated by a notary in order to be valid.¹⁰⁹ In short, notaries in France and Germany have the power to authenticate certain kinds of transactions, including the promise of a gift. In France and Germany, it is more convenient for individuals to have the transaction of a promise of a gift verified by a notary, unlike Thailand, where the same transaction needs to be authenticated by a competent official. This explains why this provision concerning the form of promise of a gift under the Code has seldom been applied in practice.

In fact, if Thai law had adopted the Swiss approach, then this provision may have been more often applied in practice. The Swiss approach provides a flexibility which enables the parties to make their promises of a gift of moveable property in writing by themselves. However, such promises which are related to real property have to be

¹⁰⁷ G A Bermann & P Kirch, *French Business Law in Translation*, 2nd edn (2008) preface at vi; P E Herzog & M Weser, *Civil Procedure in France* (1967) 102.

¹⁰⁸ *Ibid.*

¹⁰⁹ N G Foster & S Sule, *German Legal System and Laws*, 4th edn (2010) 113.

authenticated by an authority. This appears to be a more practical approach than the current one for Thailand.

(3) Promise of sale in hire purchase (§§572-574)

Most of the Thai commentators do not consider hire purchase to be a type of promise to make a contract. Rather, they generally consider hire purchase to be a type of specific contract without making reference to promise. Nonetheless, some writers¹¹⁰ consider hire purchase as a type of promise to make a contract. For example, Sethabutr explains that there are three types of promise to make a contract under the Code, namely promise of sale, promise of a gift, and promise of sale in a contract of hire purchase.¹¹¹ In addition, promissory language is used in §572. It is therefore worth considering the origins of this provision.

(a) Sources of §572 and analysis

Section 572 states: “A hire-purchase is a contract whereby an owner of a property lets it out on hire and promises to sell it to, or that it shall become the property of, the hirer, conditionally on his making a certain number of payments.”¹¹²

This provision was inspired by *Halsbury’s Commentary on The Law of England*.¹¹³

Under this English law commentary¹¹⁴, hire purchase was explained as:

“The contract of hire-purchase, or, more accurately, the contract of hire with an option to purchase, is one under which an owner of a chattel lets it out on hire and undertakes to sell it to, or that it shall become the property of, the

¹¹⁰ E.g. Sethabutr, *Juristic Acts and Contracts* 224; K Chutiwong, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและสัญญา* (Commentary on the Civil and Commercial Code: Juristic Acts and Contracts) (n.d., Faculty of Law, Chulalongkorn University) 304; S Mekkiangkrai and N Thongdee, *คำอธิบายประมวลกฎหมายนิติกรรมและสัญญา* (Commentary on the Code: Juristic Acts and Contracts), (n.d., Faculty of Law, Chulalongkorn University) 145.

¹¹¹ Sethabutr, *Juristic Acts and Contracts* 224.

¹¹² Thai Code, §572. The texts are from *Translation of Thai Code* 124.

¹¹³ The Council of State, *อุทธรณ์ประมวลกฎหมายแพ่งและพาณิชย์* (Drafting’s Instances of the Civil and Commercial Code) n.d, n. pag.

¹¹⁴ The Earl of Halsbury, *The Laws of England*, 1st edn, Vol 1 (1907).

hirer, conditionally on his making a certain number of payments. Until the making, however, of the last payment, no property in the chattel passes.”¹¹⁵

The above definition shows great similarities to that of the Thai Code. It appears that the Thai drafters mainly followed the definition given by Halsbury. The draftsmen, nevertheless, omitted some phrases which may appear (to them) to be unnecessary such as “...contract of hire with an option to purchase” and “However, no property in the goods passes until the making of the last payment”. Omitting these phrases, however, does not change the basis of this definition.

Nonetheless, there is one difference between the English and Thai definitions. While the definition given by Halsbury uses the words “undertakes to sell”, the Thai definition uses the words “promise to sell”. The use of promissory language of the Thai definition may support the argument that hire purchase can be characterised as a type of promise. Moreover, the definition under English law enhances the understanding of hire purchase under Thai law. Based on the origin of §572, hire purchase can be analysed using the idea of an “option”, i.e. a hirer is given an option but not an obligation to purchase the property hired. This is compatible with the nature of unilateral obligation.¹¹⁶ Accordingly, it is appropriate to regard hire purchase as a contract containing a promissory undertaking by the hirer under Thai law.

(b) Sources of §§573 and 574 and analysis

Section 573 states: “The hirer may at any time terminate the contract by redelivering the property at his own expense to the owner.” In drafting this provision, the drafters benefited from consulting foreign sources.¹¹⁷ First, it was inspired by §§542 and 649 of the BGB.¹¹⁸ The drafters also consulted “The Principles of German Civil Law”,

¹¹⁵ *Ibid* at 554 (para 1124). Three English cases are cited, namely *Helby v Matthews* [1895] AC 471; *Re Davis & Co, Ex parte Rawlings* (1888), 22 QBD 193; and *Cramer v Giles* (1883), 1 Cab & El 151.

¹¹⁶ This is later discussed in Chapter VII, B. USING PROMISE TO CREATE OBLIGATIONS, (1) Options, (b) Thai law, (i) Hire purchase.

¹¹⁷ The Council of State, *คูหาหรับประมวลกฎหมายแพ่งและพาณิชย์* (Drafting’s Instances of the Civil and Commercial Code) n.d, n. pag.

¹¹⁸ *Ibid*.

which is a commentary on German Law written by Earnest J Schuster.¹¹⁹ Second, it was inspired by Art 620 of the Japanese Code.¹²⁰ Third, the drafters benefited from *Halsbury's Commentary on The Law of England*.¹²¹ Finally, §561 of the Thai Code itself was also used as a source.¹²²

The sources of §574, concerning the right of the owner of the property hired to terminate the contract, are similar to those of §573, except that the drafters did not consult English law.¹²³

Unlike §572, the drafters used a number of foreign sources in drafting §§573 and 574. Nevertheless, most of the sources of §§573 and 574 are not directly concerned with the subject of hire purchase. For example, §§542 and 649 of the BGB are provisions of hire and contracts of work, respectively.¹²⁴ Art 620 of the Japanese Code deals with lease. Section 561 of the Thai Code is a provision of hire of property.

The reason why the Thai drafters consulted foreign legal principles which do not directly deal with hire purchase can be explained by considering the status of the law of hire purchase during the period of the drafting of the Thai Code. In the 1920s, it appears that the notion of hire purchase was not fully developed in most jurisdictions. In Japan, for example, the notion of hire purchase began after the Second World War.¹²⁵ The Japanese Hire Purchase Act was later enacted in 1961.¹²⁶ In England, the Hire Purchase Act 1938 was the first legislation dealing with hire purchase that came into force. It was then followed by the 1954, 1964 and 1965 Acts, respectively.¹²⁷ However, these Acts only applied to hire purchase contracts in which

¹¹⁹ The reference pages of this commentary are pages 249-250. *Ibid.*

¹²⁰ The Council of State, *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Translation of German Civil Code (1907)* 117 and 142.

¹²⁵ M Takizawa, "Consumer Protection in Japanese Contract Law" (2009) 37 *Hitotsubashi Journal of Law and Politics* 31 at 31.

¹²⁶ *Ibid.*

¹²⁷ M P Furmston et al, *Cheshire, Fifoot and Furmston's Law of Contract*, 16th edn (2012) 184.

“the hire-purchase price was below a certain figure”.¹²⁸ Hire purchase contracts which fell outside the scope of these Acts were governed by the common law.¹²⁹ Therefore, at the time of the drafting of the Thai Code, there was no legislation dealing with hire purchase in England.¹³⁰ That explains why the Thai drafters had to consult a commentary on English law, rather than English legislation, when drafting the definition of hire purchase. Also, when consulting German and Japanese law, the draftsmen used their provisions of hire of property (lease) and hire of work instead.

D. CASE LAW

The Thai courts were asked to decide if there was a promise of sale between the parties as early as 1929, only one year after the promulgation of Book III of the Thai Code. In the Supreme Court Decision 121/1929 (B.E. 2472)¹³¹, a sale of land was concluded. The seller transferred the ownership to the buyer. The buyer drew up a document which was given to the seller stating that the seller could redeem the property. It was held that the document giving the seller a right to redeem the property was a promise to sell. After the foregoing 1929 case, there have been number of cases in which the Thai Court dealt with promissory grounds as summarised below.

(1) Case law concerning a promise of reward

The Supreme Court Decision 1265/1953 (B.E. 2496) appeared to be the first case in which the Thai courts dealt with a promise of reward. The Police Department had announced that it would give a reward for information leading to the arrest of anyone who was found illegally exporting rice from the country. In this case, the rice had

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ The names of the pursuer and the defender do not appear as titles of case law in the Thai legal culture. In fact, case law that is publicly reported does not contain the full names of the parties to the dispute. The terms “โจทก์” (equivalent to plaintiff/pursuer) and “จำเลย” (equivalent to defendant/defender) is used, or sometimes the initials of the names of the pursuer and defender. The title of the case law appears (in sequence) as the name of the court (e.g. Court of First Instance, Court of Appeal or Supreme Court), the number of the case, and the year in which the case was decided in B.E. (Buddhist Era).

been exported from Indochina and was destined for importation into Singapore. However, a serious storm had caused the shipper to bring it to Thailand. Therefore, this could not be regarded as rice that had been illegally exported from Thailand. Thus, the person who gave the information leading to the arrest was not entitled to the reward. In 1965, it was held that an internal regulation of a government department which was announced to the public amounted to a promise of reward.¹³² In 1979, by using a promissory analysis, the court enforced a promise of reward made by a company to pay a bonus to its employees.¹³³ In this case, the defender (the company) had issued a directive about paying its employees a pension when they retired or the employment contract ended. When the pursuer (the defender's employee) fulfilled the conditions stated in the directive, the defender was bound to pay the pursuer the bonus. Although the defender reserved the right to alter the conditions of the directive, it had not done so before the pursuer fulfilled them. As a result, the pursuer was entitled to the bonus. Later in 1995 and 2003, the courts, again, enforced the effects of a promise of reward using a promissory analysis, which can be found in the Supreme Court Decisions 5933/1995 (B.E. 2538) and 5149/2000 (B.E. 2543), respectively. These two cases were analysed using a promissory approach. More recently, in the Supreme Court Decision 810/2011 (B.E. 2554), the court was asked to determine if a promise made by clients to give a reward equivalent to five percent of the value of the asset to their lawyer was a promise of a reward in the sense of advertisement of reward under the Thai Code. The factual circumstances of this case and the reasoning in the case will be revisited in Chapter VI, which contains a comparison of the nature and characteristics of a promise in the studied systems.¹³⁴

¹³² Supreme Court Decision 1153/1965 (B.E. 2508).

¹³³ Supreme Court Decision 2302/1979 (B.E. 2522).

¹³⁴ See Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (2) Thai law, (b) Words used for promissory liability.

(2) Case law concerning a promise to enter into a contract

(a) Promise of sale

There are a number of cases in which the Thai courts have dealt with issues relating to a promise of sale, particularly in terms of whether there was a promise of sale between the parties.¹³⁵ The factual background and decisions of some cases regarding a promise of sale can be found in Chapter VI, which contains a comparison of the features of a promise in Thai law and Scots law.

(b) Promise of a gift

In 1947¹³⁶ and 1965¹³⁷, it was held that a promise of a gift of immovable property was unenforceable because the parties did not register the transaction. In 1980, the court considered whether the pursuer's undertaking to give part of the disputed land to the defender was a promise of a gift or a compromise agreement.¹³⁸ In 1994, it was held that a promise of a gift of immovable property needed to be in writing and registered with the competent official.¹³⁹ There were two cases in 1995¹⁴⁰ in which the court, again, held that a promise of a gift was invalid unless it complied with the formality requirements. In 1998, there was a case in which a father acknowledged in the divorce agreement that he would give land to his children. The court was asked to consider whether the case involved a promise to make a gift of immovable property or a third party right (the latter is not subject to the formality requirement).¹⁴¹ In 2000, the court considered if there was a promise to make a gift.¹⁴² In 2004, it was

¹³⁵ E.g. Supreme Court Decisions 121/1929 (B.E. 2472), 965/1935 (B.E. 2478), 1004/1942 (B.E. 2485), 347/1945 (B.E. 2488), 411/1947 (B.E. 2490), 853/1947 (B.E. 2490), 100/1954 (B.E. 2497), 1240/1962 (B.E. 2505), 489/1966 (B.E. 2509), 764/1964 (B.E. 2509), 2214/1976 (B.E. 2519), 2597/1987 (B.E. 2530), 1032/1993 (B.E. 2536), 4145/1996 (B.E. 2539), 5758/2539, 25787/1996 (B.E. 2539), 2192/1998 (B.E. 2541), 2838/1998 (B.E. 2541), 2551/2006 (B.E. 2549) and 2493/2010 (2553)

¹³⁶ Supreme Court Decision 1374/1947 (B.E. 2493).

¹³⁷ Supreme Court Decision 999/1965 (B.E. 2508).

¹³⁸ Supreme Court Decision 2537/1980 (B.E. 2523).

¹³⁹ Supreme Court Decision 1931/1994 (B.E. 2537).

¹⁴⁰ Supreme Court Decisions 586/1995 (B.E. 2538) and 8504/1995 (B.E.2538).

¹⁴¹ Supreme Court Decision 6478/1998 (B.E. 2541)

¹⁴² Supreme Court Decision 1035/2000 (B.E. 2543).

held that a promise to redeem a mortgage is required to be made in writing and registered.¹⁴³

(c) Promise to lease

As can be seen from earlier sections, foreign legal sources from which the provision of promise to lease was derived from are not discussed. This is because the concept of promise to lease is not recognised under the Code. However, the court has held that a promise to lease is enforceable as a result of the doctrine of autonomy of will, which plays an important role in Thai private law.¹⁴⁴

There have been cases since at least 1942 in which the court enforced a promise to lease.¹⁴⁵ The notion of a promise to lease in Thai law is revisited in Chapter VII, where it is argued that the concept can be analysed using the idea of an option.

(3) Case law concerning hire purchase

There have been several cases in which the Thai courts have considered, *inter alia*, the legal status and legal effect of hire purchase. The Thai courts, of course, have referred to hire purchase as a contract without making reference to a promise. Nonetheless, in the Supreme Court Decision 6967/2002 (B.E. 2545), the court adopted a slightly different approach by referring to the idea of a promise in hire purchase. The court explained that, according to §572, the law categorises hire purchase into two conditions, namely (i) where an owner rents a property out on hire and promises to sell it, and (ii) where an owner rents a property out on hire and agrees that it shall become the property of the hirer on condition that the latter makes

¹⁴³ Supreme Court Decision 4729/2004 (B.E. 2547).

¹⁴⁴ See Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (4) Will theory in Thai law.

¹⁴⁵ E.g. Supreme Court Decisions 1004/1942 (B.E. 2485), 368/1945 (B.E. 2488), 411/1946 (B.E. 2490), 626/1946 (B.E.2490), 146/1951 (B.E. 2495), 1324/1952 (B.E. 2496), 170/ (B.E. 2497), 1170/1962 (B.E. 2506), 661-662/1968 (B.E. 2511), 1051/1971 (B.E. 2514), 294/1972 (B.E. 2515), 1213/1974 (B.E. 2517), 1925/1974 (B.E. 2517), 3670/1985 (B.E. 2528), 316/1987 (B.E. 2530), 450/1988 (B.E. 2531), 748/1990 (B.E. 2533), 3761-3765/1990 (B.E. 2533), 3263/1992 (B.E. 2535), 876/1994 (B.E. 2537), 6515/1995 (B.E. 2538), 5995-5996/1995 (B.E. 2538), 563/1997 (B.E. 2540), 7386/2005 (B.E. 2548), 3078-3079/2009 (B.E. 2552).

a certain number of payments. It can be inferred from the court's decision that hire purchase can be characterised in two different ways. It can either be a contract of hire containing a promise to sell made by the hirer, or a contract of hire containing an agreement of sale between the parties (i.e. the former is a unilateral obligation and the latter is a bilateral one). Therefore, it is possible to regard hire purchase as a contract that contains a promissory undertaking by the hirer.

(4) Case law concerning other types of promise

There is case law concerning other types of promise, namely a promise to pay a penalty for not performing obligation, a promise to pay remuneration, and promissory notes. However, since the Thai courts generally did not provide a promissory analysis when dealing with these kinds of promises, the case law concerning them is not included in this chapter due to space constraints.

(5) Concluding remarks

Although promise is not a main source of voluntary obligations in Thai law, the concept of promise has been used by Thai people in various forms in practice. This is particular in the case of a promise to enter into a contract, as can be seen from several cases relating to promise of sale and promise of a gift. Additionally, individuals have begun to include some practical usage that does not exist in the Code, such as a promise to lease. The fact that the court enforced this usage reinforces the importance of a promise in practical terms. Also, the Court Decision 6967/2002 (B.E. 2545) suggests that analysing hire purchase as a contract that contains a promissory obligation is a possible approach. These examples suggest that the application of a promissory obligation could be expanded if the concept was developed to clarify its legal status in the obligational framework. As in the case of Scots law, the increase in promissory case law reflects the importance of the promissory doctrine. In addition, it indicates that there is a need to reform the law of promise in Thai law. As argued in this thesis, Thai law lacks a clear the underlying basis of promissory law. The fact that people have begun to make promises that are

not recognised under the Code suggests that there is a practical demand for the enforcement of promissory undertakings which is not being adequately reflected in legal recognition. Thus, the proposed approach of this thesis to clarify the underlying basis of Thai promissory law can help to deal with the uncertainty in this area of Thai law.

E. CONSTITUTION AND PROOF OF PROMISE

There is no unified rule regarding constitution and proof of a promise in Thai law. Rather, the constitution and proof of both promise and contract, as well as other juristic acts, are discussed in the wider scope of the constitution and proof of juristic acts. Therefore, it is helpful to provide the general background of the formality requirement (governing the constitution of juristic acts) and written evidence (governing proof of juristic acts) in Thai law.

(1) Constitution of juristic acts

There are three formality requirements under Thai law, the first of which is the requirement of writing, or the written form. Certain kinds of juristic acts are required to be in a written form. Examples include the declaration to make a will¹⁴⁶, the transfer of an obligation performable to a specific creditor¹⁴⁷, and the transfer of shares.¹⁴⁸ A transaction relating to promise that the law requires to be in writing is hire purchase.¹⁴⁹ Second, some juristic acts are required to be in writing and registered with the competent official. Examples are sale of immovable property,¹⁵⁰ donation/gift of immovable property,¹⁵¹ and mortgaging of immovable property.¹⁵² The final kind of formality required by the law is registration, whereby the law requires some juristic acts to be registered with the competent official. Examples

¹⁴⁶ Thai Code, §§1646, 1657, 1658, 1660 and 1705.

¹⁴⁷ Thai Code, §306.

¹⁴⁸ Thai Code, §1135.

¹⁴⁹ Thai Code, §572 para 2.

¹⁵⁰ Thai Code, §456.

¹⁵¹ Thai Code, §525.

¹⁵² Thai Code, §703.

include marriage¹⁵³ and divorce.¹⁵⁴ These formality requirements govern the validity of the constitution of an obligation or a juristic act. Juristic acts which do not comply with formality requirements will be void or invalid.¹⁵⁵ In short, these formality requirements mean that, as a general rule, there is no requirement for the constitution of a promise. Only certain kinds of contracts, especially those that relates to immoveable property, and some important juristic acts are subject to formality requirements.

(2) Proof of juristic acts

The law requires some juristic acts to have “written evidence” or they will not be enforceable by action. Examples include a loan of money for a sum exceeding two thousand baht¹⁵⁶, a hire of immoveable property¹⁵⁷, an agreement to buy or to sell immoveable property¹⁵⁸, a contract of sale of moveable property where the agreed price is 20,000 baht or more¹⁵⁹, and surety.¹⁶⁰ In the case of promise, a promise of sale of immoveable property “is unenforceable by action unless there is some written evidence signed by the party liable or unless earnest is given¹⁶¹, or there is part performance.”¹⁶² Since written evidence does not govern the validity of an obligation, it does not need to exist at the time the obligation is created. The most important point is that it must be signed by the person who is liable, for example, the borrower in the case of a loan.

¹⁵³ Thai Code, §1457-1458.

¹⁵⁴ Thai Code, §§1514-1515.

¹⁵⁵ Thai Code, §§152.

¹⁵⁶ Thai Code, §653.

¹⁵⁷ Thai Code, §538 para 2.

¹⁵⁸ Thai Code, §456 para 2.

¹⁵⁹ Thai Code, §456 para 3.

¹⁶⁰ Thai Code, §680 para 2.

¹⁶¹ This is the exact official translation of the Thai Code. The term used by the Code is earnest, which means “deposit”.

¹⁶² Thai Code, §456 para 2.

(3) Concluding remarks

In general, the constitution of obligations and juristic acts do not require formality. Thus, the requirement of formality under Thai law is an exceptional rule. There are only some kinds of transactions that Thai law requires to be made in writing or in writing and registered. These are transactions that are considered by law to be important transactions because, for example, they relate to immovable property. In the case of written evidence, it appears that the law intends the parties to have clear evidence of entering into the agreement for particular transactions. Hence, transactions of which the law requires written evidence are unenforceable if the parties fail to provide written evidence, although they are validly made.

F. CONCLUSION

(1) The mixture of the Civilian and Common Law traditions

The law of promise under the Thai Code is derived from several sources. The main influence is from the Civil Law systems, such as French, German, Swiss and Japanese law. Nonetheless, English law was also used as a point of reference e.g. the concepts of promissory notes and hire purchase. Moreover, some of the usages of the term “promise” under the Thai Code might be referring merely to contractual promises, i.e. contractual obligations. This is seen from the example of promises to pay remuneration. This usage shows similarities to the usage of the word “promise” in English contract law. This suggests that English law also has had an effect upon the usage of the word “promise” in a more generalised sense in Thai law.

(2) Flaws in promissory provisions

One may assume that the concept of promise under Thai law could be productive because it was influenced by the promissory principles of leading European jurisdictions. The drafters could therefore choose the “best” rules of promise for the Code. However, this assumption is far from being correct. The reception of law in

this case was rather unsuccessful. In fact, the Thai promissory doctrine is confused because it was derived from too many sources. The end result is the existence of ambiguities in the doctrine which cause difficulties in terms of its application by Thai lawyers. These ambiguities would not have occurred if the promissory principles had been successfully received into Thai law.

Furthermore, there appear to be flaws in most of the provisions in respect of promise. Firstly, there is a contradiction between the actual characteristics of promises of reward and the section under the Code to which this concept belongs. Its juristic nature, like that of German law, is regarded as genuine unilateral obligations. However, the provisions of promises of reward are placed in the part on the formation of contract.

Secondly, there is an inconsistency in the usage of promissory language. In the provisions of advertisements of reward, prize competitions, promises of sale and promises of a gift, the term “promise” is used in the sense of a unilateral obligation. However, in the provision of a promise to pay remuneration, the term “promise” is used in the sense of a contractual promise. Moreover, there is an inconsistency in the translations between the terms “contract” and “promise” under the Code. In the case of a promise to pay a penalty for not performing an obligation, the term “promise” was translated as “สัญญา”, which literally means contract. Also, a promissory note is translated as “ตั๋วสัญญาใช้เงิน”, which literally means “a contractual note to pay a sum”. However, the juristic nature of a promise to pay a penalty and a promissory note is promissory in nature. These inconsistencies reflect the fact that the draftsmen of the Code misunderstood the difference in nature between unilateral obligations (promises) and bilateral obligations (contracts). They used the terms “contract” and “promise” as if they were interchangeable.

Thirdly, it appears that the draftsmen of the Code did not clearly understand the concept of a promise of sale. They used the term “offer” and “agreement to buy or sale” when drafting the provisions relating to promises of sale. This reinforces the

argument that the drafters did not realise the distinction between unilateral and bilateral obligations.

Finally, the drafters adopted the formalities of a promise of a gift from several foreign sources without having thoroughly considered whether such foreign methods were suitable for the situation in Thailand or not. The result is that the approach regarding the formalities of a promise of a gift that the Code adopted is an impractical one.

(3) Different attitudes on unilateral promises between French and German law and their effects on the Thai Code

The shift of the Thai Code from the French to the German model is an important factor which affects the quality of the drafting of the Code. It will be recalled, the 1923 Code (based on the French model) was replaced by the 1925 Code (modelled on the BGB). With this in mind, the draftsmen of the Code had very limited time to make this sudden change. Therefore, defects in the drafting of the Code might have occurred as a result of the limited amount of time.

Moreover, the switch from French to German law is a substantial change from one legal model to another. The attitudes to unilateral obligations between French and German law differ significantly. The scope of unilateral obligation in German law is broader than it is in French law. The Thai drafters cannot have realised this difference. They consulted both French and German law when drafting promissory provisions. While the provisions of promise of reward were derived from German law, the provision of promise of sale was inspired, among other sources, by French law. Therefore, the provenances of the idea of promise under the Thai Code are from both the German and the French legal traditions, which have different attitudes towards unilateral promises. Consequently, there are defects in most of the kinds of promises that exist under the Thai Code.

(4) Concluding remarks

The ambiguities regarding the application of promise under Thai law occur, inter alia, because of the defects in drafting the promissory provisions. It is important to learn from these flaws. As one aim of this thesis is to offer satisfactory solutions for the problems related to promises, understanding the actual nature of contract and promise is necessary. Then such mistakes will not be repeated.

Chapter V

Theoretical Framework of Promise in Scots Law and Thai Law

This chapter considers theories and doctrines relating to promises in both jurisdictions in order to understand those theories themselves, and the role of promise in the overall obligational framework of each system.

A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW

(1) The notion of a juristic act

As the later discussion will show, in order to understand the ideas of both contract and promise under Thai law, it is necessary to understand the concept of juristic acts. This is because all acts which have legal effects are deemed to be juristic acts. Therefore, an examination of Scots law is considered to be beneficial for a comparative study.

A useful explanation of the unified idea and general nature of a juristic act can be obtained from the chapter entitled Objects of Law in TB Smith's *Short Commentary*. The doctrine of juristic act governs "a declaration or manifestation of the will [which] creates, modifies, transfers or extinguishes a right."¹ Juristic acts can be classified by various approaches such as between *inter vivos* and *mortis causa* juristic acts² and between gratuitous and onerous juristic acts.³ Moreover, the distinction can be made between unilateral and bilateral juristic acts. An example of bilateral juristic acts is a contract.⁴ Examples of unilateral juristic acts are "renunciation of rights, wills and enforceable promises (pollicitations)".⁵ TB Smith stated, "[t]he unilateral juristic act *inter vivos* in the form of enforceable promises has special importance in Scots law."⁶

¹ Smith, *Short Commentary* 284.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

However, it appears that modern literature tends to ignore the general concept or unified idea of a juristic act.⁷ Nonetheless, there is some private law literature using the term “juristic act”. For example, in *Contract Law in Scotland*, assignation is distinguished from JQT because “the latter is a creation of the original contract whereas assignation requires a further and independent juristic act by one of the contract parties”.⁸ In *Family Law in Scotland*, it is stated that “the child [under 16] cannot enter into juristic acts, for example make a contract”.⁹ In *Institutions of Law: An Essay in Legal Theory*, it is stated that “[t]he legal ability to enforce, secure, uphold or vindicate—or waive or abandon—one’s rights involves a capacity to perform ‘juristic acts’ or ‘acts-in-the-law’, that is, to carry out legal transactions.”¹⁰ The Scottish Law Commission defines a juristic act as “[a] manifestation of will or intention by a person acting in the realm of private law which has, or is intended to have, a legal effect as such.”¹¹ Similarly, the term “juristic act” is used by the Scottish courts.¹² For instance, in *Regus (Maxim) Ltd v Bank of Scotland Plc*¹³, when dealing with the nature of promissory liability, the court stated: “a promise in the law of Scotland is a unilateral juristic act.”¹⁴ As can be seen, contemporary writers, the Scottish Law Commission and the Scottish courts use the term “juristic acts” in a similar sense to that of TB Smith.

⁷ It has been observed that “the concept is not widely used and a general theory of juridical [juristic] acts is missing.” P Hellwege, “Juridical Acts in the Draft Common Frame of Reference - a Model for Scotland?” (2014) 18(3) EdinLR 358 at 381.

⁸ MacQueen & Thomson, *Contract* para 2.84.

⁹ J Thomson, *Family Law in Scotland*, 7th edn (2014) para 10.1.

¹⁰ N MacCormick, *Institutions of Law: An Essay in Legal Theory* (2007) 88.

¹¹ The term used by the Scottish Law Commission is “juridical act”, rather than “juristic act”. However, they refer to the same concept. The Commission explains that the term “juristic act” may be confused with the act of a jurist. Therefore, it is more appropriate to use the term “juridical act”. Discussion Paper, *Interpretation in Private Law* (Scot Law Com No 101, 1996), 3 at note 18.

¹² Examples can be found in *Port of Leith Housing Association v Akram* [2011] CSOH 176 at para 15; *Sheltered Housing Management Ltd v Bon Accord Bonding Co Ltd* [2010] CSIH 42 at para 23; *Halifax Life Ltd v DLA Piper Scotland Ltd* [2009] CSOH 74 at para 8.

¹³ [2013] CSIH 12.

¹⁴ *Ibid* at para 33 per Lord President Lord Bonomy.

(2) Promissory theory as explained by Institutional and contemporary writers

(a) Stair

In Stair's account, promise is distinguished from contract: the former is unilateral whilst the latter is bilateral.¹⁵ Stair defined contract as based upon agreement, rather than an exchange of promises (as traditionally explained in England).¹⁶ Thus, promises and contracts are distinguished from each other within the obligational framework.¹⁷ Stair's promissory theory has been accepted and followed by both later Institutional writers¹⁸ and legal scholars.¹⁹

Similarly, the Scottish courts have relied on Stair's theory when dealing with cases concerning promises. For example, in *Macfarlane v Johnston and Others*²⁰, the court referred to Stair's approach when dealing with the distinction between promise and offer. The court stated: "[t]here is a philosophical and practical distinction between a promise and an obligation, which is nowhere better stated than by Lord Stair".²¹ In *Cawdor v Cawdor*²², the court relied on Stair's account of three acts of wills, in which he stated that only an engagement is obligatory.²³ In *Regus (Maxim) Ltd v Bank of Scotland Plc*²⁴, the court stated: "Stair tells us that a promise is obligatory *per se*".²⁵ Most recently, in *MacDonald v Cowie's Executrix Nominated*²⁶, the court, again, benefited from Stair's approach of three acts of will when considering whether an expression amounted to a promissory obligation.²⁷

¹⁵ Stair, *Inst* 1.10.3.

¹⁶ Stair, *Inst* 1.10.6.

¹⁷ It is worth noting that there is a small overlap in Stair's treatment on promise and contract. He stated that an offer is a "promise pendent upon acceptance", i.e. a promise with the condition attached that it will not be binding unless it is accepted by the offeree. Stair, *Inst* 1.10.6.

¹⁸ MacKenzie, *Inst* 3, 2; Bankton, *Inst* 1.11.1; Erskine, *Inst* 3.2.1; Bell, *Prin*, §9.

¹⁹ E.g. Smith, *Short Commentary* 744-746; Gloag, *Contract* 25; McBryde, *Contract* para 2-02-2-03.

²⁰ (1864) 2M 1210.

²¹ *Ibid* at 1213 per Lord Justice-Clerk.

²² 2007 SLT 152.

²³ *Ibid* at para 15 per Lord President (Hamilton).

²⁴ [2013] CSIH 12.

²⁵ *Ibid* para 33 per Lord President (Gill).

²⁶ [2015] CSOH 101.

²⁷ Lord Tyre stated: "[a]dopting Stair's categorisation, I do not consider that the deceased's act of will passed beyond resolution to engagement." *Ibid* at para 20.

Moreover, the courts benefited from Stair's promissory theory in making a doctrinal distinction between promise and offer. For example, in *Macfarlane v Johnston* mentioned earlier, Lord Justice-Clerk Inglis explained that "[a] promise is a pure and simple expression of the will of the party undertaking the obligation, requiring no acceptance, and still less requiring mutual consent..."²⁸ Therefore, it was held that the term "I agree to pay" constituted a promissory obligation.²⁹ As Lord Neaves explained, "...when a party, in terms of this letter, agrees to pay £100 ... he is making a promise and that by the bare act of his will thus expressed he undertakes an obligation to pay..."³⁰ The fact that the party agreed to make a payment without requiring the other party to accept it led the courts to believe that there was a promise. This can be usefully compared with courts in other jurisdictions where there is no sharp distinction between promise and offer. Obvious examples are jurisdictions where promissory law is similar to Grotius' account: promises are not entirely distinguished from contracts because they require acceptance. In other words, a promise which is legally binding will also be regarded as a contract.³¹ Therefore, courts in jurisdictions which followed Grotius' approach would not be able to make a doctrinal distinction by relying on the same grounds as Scots law. For instance, in France, a promise of sale requires an acceptance from the promisee to be binding.³² Therefore, the French courts cannot make the distinction between promise of sale and a sale by relying on the ground that a promise is binding without acceptance.

Furthermore, Stair's theory of voluntary obligations is influenced by the Natural Law tradition. With particular regard to the law of promise, this can be observed from his explanation in 1.10.10. Stair began the paragraph by writing "[b]ut let us inquire whether promises, or naked pactions, are morally obligatory by the law of Nature?"³³ He gave Connanus as an example of the opposite view that promises are not naturally binding. Stair stated:

"if promises were not morally obliging, they could have no effect, but by positive law, which is no more itself than a public paction. ... and then all pactions and

²⁸ (1864) 2 M 1210 at 1213.

²⁹ *Ibid* at 1214.

³⁰ *Ibid* at 1214.

³¹ As discussed in Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (4) Northern Natural Law jurists (a) Grotius.

³² *Code civil*, Art 1589.

³³ Stair, *Inst* 1.10.10.

agreements among nations would be ineffectual, and all commerce and society among men would be destroyed.”³⁴

It can be seen that in Stair’s account, the idea of promises as voluntary obligations is grounded in the doctrine of the Natural Law.³⁵

(b) Later Institutional writers

As pointed out, Institutional writers after Stair did not pay much attention in explaining the law of promise.³⁶ Therefore, their passages dealing with promises do not contain any promissory theory that we would not find in Stair’s account. Accordingly, modern writers tend to criticise the later Institutional writers suggesting that they lacked Stair’s analysis of promise. For instance, McBryde seems to suggest that not much theoretical analysis can be gained from the later Institutional writers’ works. In *Promises in Scots law*, McBryde made only one brief reference (consisting of a short paragraph) to Erskine and Bankton as examples of later Institutional writers.³⁷ A stronger criticism has been made by Sellar who writes that later Institutional writers “lacked Stair’s clarity of analysis”³⁸ and “[n]one was so deeply imbued in the tradition of the jus commune as Stair had been”.³⁹

It is possible that later Institutional writers paid little attention to explaining the law of promise because of the increased influence of the English law on Scots law at that time. Stair published his *Institutions* before Scotland and England became part of the same political union. Other Institutional writers, except Mackenzie, published their works after 1707. Broadly speaking, English commercial law had a large influence on Scots law after the Act of Union of 1707.⁴⁰ An example may be observed from Bell’s work. Bell brought English legal influence into Scots law.⁴¹ Bell referred to English case law and this created

³⁴ *Ibid.*

³⁵ This is usefully compared with the obligational nature of a promise explained by David Hume. See Chapter III, C. SCOTTISH MORAL PHILOSOPHERS, (3) David Hume.

³⁶ See Chapter III, B. LATER INSTITUTIONAL WRITERS.

³⁷ McBryde, *Promises* 56-57.

³⁸ Sellar, *Promise* 269.

³⁹ *Ibid.*

⁴⁰ For a general discussion on this point see TB Smith, “English Influences on the Law of Scotland”. (1954) 3(4) *The American Journal of Comparative Law* 522 at 552-542.

⁴¹ It is suggested that Bell’s *Principles* is “the first attempt to integrate reference to Common Law materials into a comprehensive treatment of Scots private law.” J Macleod, “Book Review on George Joseph Bell,

English influence.⁴² The fact that Bell largely focused on commercial law but paid little interest to the law of promise suggests that he may have thought promise was not useful, given that English law, which was such a successful commercial legal system, does not have this doctrine. Furthermore, while doctrinal analysis of promise is mostly absent from later Institutional writers' works, a number of novel contractual analyses have been derived from those sources. For example, some later Institutional writers introduced the concept of a "valuable consideration" in their definitions of contract.⁴³ This is something which, not surprisingly, cannot be found in Stair's account.⁴⁴ Consequently, in relation to Sellar's aforementioned argument, this may explain why later Institutional writers departed from the tradition of the *ius commune*. Due to the increasing importance of the commerce between Scotland and England and the increasing influence of English law, it is perhaps not unexpected that later Institutional writers placed more focus on contractual theories, and less on promise.

To conclude, the doctrinal foundation of the law of promise was well established by Stair. However, Institutional writers after Stair plainly followed his analysis, whilst only making a brief discussion of promise. Hence, there is no really helpful doctrinal analysis which can be obtained from their accounts.

Principles of the Law of Scotland, Fourth Edition, with an introduction by Kenneth G C Reid, (2011) 15 EdinLR 331 at 331.

⁴² It is observed that Bell "does not content himself with simply citation from the great civilians, as the Continental jurists do, but he adds the English and, in many cases, the American authorities also." *Principles of the Laws of Scotland by George Joseph Bell*, The American Law Register (1852-1891) Vol 9 No 5 (Mar 1861) 315 at 317.

⁴³ E.g. Bankton, *Inst* 1.11.6; Bell, *Prin* §34.

⁴⁴ The term "valuable consideration" used by some Institutional writers does not suggest that consideration is needed in constituting a contract. This can be observed from Bell's *Principles* (1839) when he explained gratuitous and onerous obligations. He noted: "[t]he word *onerous* in contradistinction to *gratuitous*, is used in the law of Scotland, as synonymous with the English phrase "for a valuable consideration".⁴⁴ Thus, Bell was using the word "consideration" not to mean that it is an absolute requirement, as would be the case in English law.

(c) Contemporary writers

During the twentieth century, a number of writers sought to contribute to Scots promissory theory. It is therefore interesting to assess whether their contributions to the law of promise were valuable. Two examples are Gloag and TB Smith.

(i) Gloag

In Gloag's *The Law of Contract*, the reference to promissory law is very brief. There is no single chapter in the book that belongs to the topic of promise. The section on unilateral obligation is part of the chapter on "Requisites of Contract".⁴⁵ The subjects of a promise to keep offers open and proof of promises are discussed in the chapter "Formation of Contract"⁴⁶ and the chapter "Onerous and Gratuitous Contracts",⁴⁷ respectively. Thus, there is not much doctrinal analysis of promissory law that can be drawn from Gloag's account.

However, Gloag has provided a number of new analyses for contractual theories. For example, he explained the notion of patrimonial interest as a basis of contract which the courts will enforce.⁴⁸ Moreover, when discussing the idea of an agreement, two definitions of an agreement are provided.⁴⁹ The first definition is grounded in Pothier's⁵⁰, Stair's⁵¹, Erskine's⁵² and Bell's⁵³ accounts.⁵⁴ The second definition is from Pollock⁵⁵, an English writer.⁵⁶ The idea in the second definition regarding an "act in the law" was also adopted in Scots law as a result of case law⁵⁷ in 1910.⁵⁸ Gloag's work reflects a closer relationship to English legal tradition than does Stair's work. In short, like the case of Institutional writers after Stair, Gloag placed more focus on contractual theories, but less

⁴⁵ Gloag, *Contract* at 1-15.

⁴⁶ *Ibid* at 35-36.

⁴⁷ *Ibid* at 48-65.

⁴⁸ *Ibid* at 9.

⁴⁹ *Ibid* at 6.

⁵⁰ Pothier, *Obligations* §3.

⁵¹ Stair, *Inst* 1.10.1.

⁵² Erskine, *Inst* 3.2.3.

⁵³ Bell, *Prin* §7.

⁵⁴ Gloag, *Contract* 6.

⁵⁵ F Pollock, *Principles of Contract*, 9th edn, 2.

⁵⁶ Gloag, *Contract* 6.

⁵⁷ *Millen & Somerville, Ltd (Liquidators of) v Millen*, 1910, SC 868 (per Lord Kinnear), as cited by Gloag in *Ibid*.

⁵⁸ Gloag, *Ibid*.

on promise. He provided a useful analysis for contractual theories, but did not do so for a promissory analysis.

(ii) TB Smith

In turn, TB Smith, who published his *Short Commentary* half a century after Gloag's, is more conservative in relation to the traditional scholarship of the *ius commune*. He devoted a chapter to the account of promissory obligation. The historical development of the promissory doctrine and the relevant debates within the *ius commune* are discussed at great length. Although Smith's theory of the fundamental basis of promissory obligations mainly follows that of Stair, the part of his promissory account that cannot be found in Stair's account relates to the view of a promissory obligation within the scope of a juristic act.

As noted, Smith classified unilateral juristic acts on the one hand and bilateral juristic acts on the other. A promise belongs to the former, "where effect is given to a single will".⁵⁹ A contract falls within the scope of the latter because it "involve[s] the concurrence of the plurality of wills."⁶⁰ Although a contract may appear in a unilateral form, a unilateral contract is distinctive from a unilateral promise because "no obligation is created in the former case [unilateral contract] until offer has been met by acceptance, and performance must thereafter be accepted".⁶¹

Moreover, what Smith has achieved is his contribution in emphasising the value of the promissory doctrine. He made references to JQT, promises to keep an offer open and promises of reward, each of which can be analysed using a unilateral promissory approach.⁶² The discussion of promises of reward is much longer than the others. The reason for this is probably because, after the famous English *Carlill*⁶³ case in 1893, there appeared to be a tendency for the Scottish courts to decide reward cases based on a

⁵⁹ Smith, *Short Commentary* 284.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.* at 746-751.

⁶³ *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

contractual analysis. Smith then argued that a promissory analysis can be perfectly applied to the reward case which also produces a more satisfactory outcome.⁶⁴

(iii) Concluding remarks

Smith's promissory analysis is more valuable than that of any Institutional writers after Stair and modern commentators such as Gloag. His evaluation of a unilateral juristic act is especially useful for an analysis of the way the term "unilateral" is used in Scots law. Within the framework of juristic acts, a promise can be clearly distinguished from a contract as different kinds of juristic acts. In addition, Smith's focus on promise shows that there was an attempt to make this doctrine more attractive. The promissory doctrine was well set out by Stair, who was inspired by, among other things, the *ius commune* tradition. However, afterwards, the importance of the doctrine began to decline. This decline appears to have been caused by, inter alia, the influence of English law. Given that TB Smith was, broadly speaking, well-known for being a conservative and nationalist Scots lawyer⁶⁵, it comes as no surprise that he wanted Scots law on the area of promise to return to its roots.

(3) Unilaterality of promise

It is worth explaining what "unilaterality"⁶⁶ means in Scots law. In general, a unilateral obligation, as opposed to a bilateral obligation, may have more than one meaning. Firstly, it refers to an obligation which is made by merely one party, without the requirement of an act performed by the other party.⁶⁷ Secondly, it can be an obligation in which only one party is obliged to perform the obligation.⁶⁸

In Scots law, each definition of a unilateral obligation is compatible with the nature of a promise. As can be seen from Stair's account, a promissory obligation can be constituted

⁶⁴ Smith, *Short Commentary* 747-751.

⁶⁵ E.g. Smith expressed his concern that English influence could undermine the doctrine of promise. He wrote: "we are in danger of confusing and frustrating one of the most valuable doctrine of our law of obligations—the unilateral juristic act by bare promise or *pollicitatio* (as contrasted with contract or agreement)". TB Smith, "Strange Gods: The Crisis of Scots Law as a Civilian System", in TB Smith, *Studies Critical and Comparative* (1962) 72 at 86.

⁶⁶ In this context, "unilaterality" refers to the quality of being unilateral.

⁶⁷ Hogg, *Promises* 36.

⁶⁸ *Ibid.*

by the only will of the promisor. Hence, it is compatible with the first definition of unilaterality. The second definition is also suitable for the situation in Scots law because a promisee is obliged for nothing but to be benefited from the performance of the thing promised.

To conclude, the unilateral nature of a promise in Scots law means that the promissory obligation can be created by one party and that only the party who creates the obligation is bound to perform it. This is also compatible with the fact that a promise is classified within the scope of juristic acts as a unilateral juristic act: it can be created by the will of one party.

(4) Will theory in Scots law

(a) Will theory from the perspective of an analysis of voluntary obligation

The role of the will theory in Scots law can be clearly found from Stair's analysis of conventional obligations. Stair divided obligations into two categories. First, an "obediential obligation" arises from the will of God and the law of nature.⁶⁹ Second, a "conventional obligation"⁷⁰ arises from the will and consent of individuals.⁷¹ Contract and promise are regarded as conventional obligations because they are made by the consent of human beings. He wrote:

*"Conventional obligations do arise from our will and consent, for, as in the beginning hath been shown, the will is the only faculty constituting rights, whether from him to the acquirer. so in personal rights, that freedom we have of disposal of ourselves, our actions and things, which naturally is in us, is by our engagement placed in another, and so engagement is a diminution of freedom, constituting that power in another...."*⁷²

Stair's account of conventional obligation is deeply rooted in the will theory. In Stair's explanation, one can understand that a promissory obligation has its origin in the will of the person who undertook the obligation.

⁶⁹ Stair, *Inst* 1.10.1.

⁷⁰ In modern Scots law the term "voluntary obligation" is widely used instead of the term "conventional obligation". See Smith, *Short Commentary* 284, McBryde, *Promises* 1; MacQueen & Thomson, *Contract*, Ch 2; Hogg, *Obligations*; Sellar, *Promise* 253, 267; Gordley, *Promise* 48.

⁷¹ Stair, *Inst* 1.10.1.

⁷² Stair, *Inst* 1.10.1.

Similarly, TB Smith explained that a juristic act “depend[s] on the manifestation of wills”.⁷³ He wrote:

“If this is expressed by persons of full capacity in the form required by the law for the category of act in question, and contemplates a lawful object, the freedom of the declarant to act as he pleases thereafter is restricted to the extent he himself has willed in his declaration.”⁷⁴

Also, in the *Regus (Maxim)* case earlier discussed, the court stated: “[a promise] acquires its binding force by reason of the declarant's expression of his will to be bound.”⁷⁵ Both the explanations of Smith and the court in *Regus (Maxim)* imply that a promissory obligation is based on the will of the person who performs the promissory obligation.

(b) Will theory from the perspective of remedies

The role of will theory in relation to promise may also be observed from the perspective of remedies. This perspective, however, requires us to discuss remedies in Scots contract law first. As argued by Hogg, “will theory is more easily supported in Scots law because of the importance placed upon performance remedies (specific implement is the primary remedy in Scots Law, rather than damages)...”⁷⁶

Before considering Hogg’s argument, it is helpful to explain the general theory regarding the role of specific implement in Scots contract law. While specific implement is described as the primary remedy as can be seen from Hogg’s statement above, McBryde argues that, both in theory and practice, an aggrieved party is “not bound to seek implement but may seek damages”.⁷⁷ Therefore, “neither damages nor implement (nor any other remedy) have automatic priority”.⁷⁸

Initially, it seems that Hogg and McBryde’s views fundamentally contradict each other, given that the former considers the role of specific implement as the primary remedy whereas the latter suggests the contrary. However, the difference between these two views may be more subtle than substantial. It appears that Hogg uses the term “primary

⁷³ Smith, *Short Commentary* 284. He cited Stair, *Inst* 1.10.1.

⁷⁴ *Ibid.*

⁷⁵ [2013] CSIH 12 at para 33.

⁷⁶ M Hogg, “Perspectives on Contract Theory from a Mixed Legal System” (2009) 29(3) *OxJLS* 643 at 666.

⁷⁷ W W McBryde, “Remedies for Breach of Contract” (1996) 1 *EdinLR* 43 at 49.

⁷⁸ *Ibid* at 50. For full discussion see *Ibid* at 48-50.

remedy” to mean that it is an entitlement that applies in every case unless there are reasons to exclude it. Thus, he perhaps does not suggest that the primary remedy has priority over damages. McBryde, however, seems to imply that it means that one remedy has “priority” over another. This suggests that these two writers use the term in two different senses, thus they can be actually reconciled. Hence, it is perhaps more appropriate to refer to specific implement as the “primary right of the creditor”.⁷⁹ This approach is found in the court’s statement in *Highland and Universal Properties Ltd v Safeway Properties Ltd*⁸⁰. Lord Penrose stated: “[i]n Scotland there is no doubt that—unlike the position in England—a party to a contractual obligation is, in general, entitled to enforce that obligation by decree for specific implement as a matter of right...”⁸¹

As argued by Hogg, “Scots contract law can withstand the criticism that contracts are really only about making reparation for breach”.⁸² This same analysis can also apply to the case of promissory law. By way of analogy, promissory obligations are not merely about compensating the promisee, but rather about enforcing the performance of the obligation which has been promised. This key characteristic is compatible with the nature of promissory obligation. A promise is a unilateral obligation which a promisee can choose either to enforce or to reject. Hence, if a promisee chooses to enforce the promise, it means that he/she wishes to demand the performance of what was promised. In fact, given that a promisee is not bound to perform any obligation, it is more natural for an aggrieved promisee to use specific implement, rather than seeking damages. It would be rather strange if the promisee were to seek damages if the performance of what was promised is still obtainable.

⁷⁹ Smith, *Short Commentary* 854; See also MacQueen & Thomson, *Contract* para 6.6 and L Macgregor, “Specific Implement in Scots Law”, in J Smits et al (eds), *Specific Performance in Contract Law: National and Other Perspectives* (2008) 67 at 70.

⁸⁰ 2000 SC 297.

⁸¹ *Ibid* at 309; Lord Rodger stated: “even where the obligation of the debtor is to do something, the basic rule is that the creditor has a choice of remedies: he may either seek specific implement of the obligation or damages.” *Ibid* at 299.

⁸² M Hogg, “Perspectives on Contract Theory from a Mixed Legal System” (2009) 29 (3) *OxJLS* 643 at 666.

(c) Concluding remarks

The role of the will theory in Scots promissory law can be viewed from two different perspectives, the first of which is Stair's promissory account, which is rooted in the will theory. This can be observed from his explanation that promissory obligations arise from the will of the promisor. The second perspective by which the role of will theory can be viewed is remedies. In jurisdictions where damages are the primary remedy, it can be argued that the law of voluntary obligation is not compatible with the will theory on the grounds that it merely refers to compensation, i.e. not enforcing the actual obligation of the parties. Scots promissory law can defend itself against the criticism that the law is only concerned with compensating the aggrieved party: the fact that the promisee has the right to enforce the promised obligation shows that Scots law enforces the actual obligation made by the will of the parties, thus demonstrating the compatibility of promissory law with the will theory.

(5) The doctrine of third party rights

A *jus quaesitum tertio* ("JQT") also shares some similarities with promise. Stair explained that promises to create rights in favour of persons who are not yet born or who are absent can be enforceable.⁸³ Stair's approach of characterising JQT as a promise in favour of a third beneficiary is supported by contemporary scholars such as TB Smith,⁸⁴ MacQueen⁸⁵ and Hogg.⁸⁶ The fact that a promise is binding without acceptance helps to explain why JQT in Scots law is enforceable regardless of the beneficiary's acceptance. This is different from third party rights in other systems, in which the rights of beneficiaries come into existence when they express their intention to take the benefit, i.e. to accept the offer of a contract.⁸⁷

⁸³ Stair, *Inst* 1.10.4

⁸⁴ Smith, *Short Commentary* 746-747

⁸⁵ H L MacQueen, "Third Party Rights in Contract: Jus Quaesitum Tertio" in K Reid & R Zimmermann, *A History of Private Law in Scotland: Volume 2: Obligations* (2000) 220 at 250-251.

⁸⁶ Hogg, *Promises* 305-307.

⁸⁷ See Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (4) Northern Natural Law jurists, (b) Grotius' influence on French law.

Nonetheless, some propose that JQT is not promissory in nature.⁸⁸ McBryde, for instance, suggests that JQT should be regarded as “an independent right, which shares some of the characteristics of other contractual rights but also has special features.”⁸⁹ Moreover, it appears that some of the requirements for a JQT that have been developed do not apply to an ordinary promise. For instance, as proposed by Gloag, an intention to confer a right for a third party beneficiary in JQT may be either express or implied.⁹⁰ This rule does not apply to an ordinary unilateral promise. As the later discussion will show, the constitution of a unilateral obligation must be expressed in clear terms.⁹¹

To conclude, traditionally a JQT is analysed using a promissory analysis. However, there is a modern debate over whether or not a JQT is promissory in nature. Also, some of the requirements for a JQT that have developed do not apply to a unilateral promise.

(6) Gratuitousness of promise

Fundamentally, it is suggested that promises are always gratuitous. Whether an obligation is gratuitous or onerous is determined when it is first constituted. This approach had been suggested by certain of the Institutional writers, e.g. Erskine⁹² and Bankton.⁹³ This view is also supported by the Scottish Law Commission.⁹⁴ Subsequently, this approach has been adopted by a number of contemporary scholars. TB Smith, for instance, explained that gratuitous juristic acts include “a donation and promise.”⁹⁵ MacQueen argues that all promises are gratuitous by explaining that a unilateral statement cannot bind anyone else to do anything.⁹⁶ This conviction is also shared by Hogg,⁹⁷ Black⁹⁸ and Sellar.⁹⁹

⁸⁸ For an analysis see H L MacQueen, “Third Party Rights in Contract: Jus Quaesitum Tertio” in K Reid & R Zimmermann, *A History of Private Law in Scotland: Volume 2: Obligations* (2000) esp sections IV-XI.

⁸⁹ McBryde, *Contract* para 10-07.

⁹⁰ Gloag, *Contract* 236.

⁹¹ For further discussion see Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (1) Scots law, (b) Words used for promissory liability.

⁹² “Where nothing is to be given or performed but upon one part, and which are therefore always gratuitous” Erskine, *Inst* 3.2.1.

⁹³ Bankton, *Insti* 1.11.2.

⁹⁴ Memorandum, *Constitution and Proof of Voluntary Obligations: Formalities of Constitution and Restrictions on Proof* (Scot Law Com No 39, 1977) 41.

⁹⁵ Smith, *Short Commentary* 284.

⁹⁶ MacQueen, *Constitution and Proof* 3.

⁹⁷ Hogg, *Obligations* 46.

⁹⁸ Black, *Obligations* para 613.

⁹⁹ Sellar, *Promise* 281.

Conversely, some argue that promises can either be gratuitous or non-gratuitous. For instance, Cross proposed that a promise may be onerous.¹⁰⁰ A promise is gratuitous where only the promisor undertakes an obligation. Gloag suggested that a promise can be non-gratuitous by giving an example of a promise to keep an offer open for a specified period.¹⁰¹ McBryde argues, by using promissory notes and banker's irrevocable credits as examples of non-gratuitous promises, that not all promises are gratuitous.¹⁰² Also, Thomson¹⁰³ explains that a promise is gratuitous only where the promisor receives no benefit from the promisee.¹⁰⁴

This thesis supports the theory that promises are not always gratuitous. Firstly, the terms "gratuitous" and "unilateral" do not necessarily have the same meaning, especially in the Scottish legal context. This may be usefully compared with the idea of unilateral contracts in relation to gratuitous contracts in the Civilian tradition, which is different from the usage in Scots law. In the Civil Law, a unilateral contract will arise from the agreement of the contracting parties. However, only one party has a duty to perform an obligation. For example, gratuitous loan is deemed to be a unilateral contract.¹⁰⁵ In this context, unilateral contracts can also be called "gratuitous contracts" because they are always gratuitous.¹⁰⁶ Therefore, in the context of Civilian contract law, "unilateral" and "gratuitous" tend to have the same meaning. Scots legal commentators tend to refer to a contract in which only one party is required to perform an action (i.e. unilateral contract in the Civilian sense) as a "gratuitous" contract. They, however, tend not to refer to this kind of contract as a unilateral contract or unilateral obligation.¹⁰⁷ Rather, the term "unilateral contract"¹⁰⁸ is normally applied to the English legal concept, which, in many circumstances, equates to the notion of promise in Scots law.¹⁰⁹ As for the term

¹⁰⁰ Cross, *Bare Promise* 139.

¹⁰¹ Gloag, *Contract* 25.

¹⁰² McBryde, *Promises* 48.

¹⁰³ J M Thomson, "Promise and the Requirement of Writing" (1997) 134 SLT 284 at 284-286.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Code civil*, Arts 1102-1103; B Nicholas, *The French Law of Contract*, 2nd edn (1992) 38; G A Bermann & E Picard (eds), *Introduction to French Law* (2008) 208.

¹⁰⁶ Bermann & Picard, *Ibid.*

¹⁰⁷ E.g. Gloag, *Contract* 48-65; MacQueen & Thomson, *Contract* para 2.62; Hogg, *Obligations* 78-79.

¹⁰⁸ TB Smith explained that a contract can be either synallagmatic or unilateral. A unilateral contract is "where one party alone is bound to performance". In this sense, the term "unilateral contract" used by Smith is similar to the Civilian idea of "unilateral contract". (Smith, *Short Commentary* 284) Nonetheless, Smith's approach of classifying contract into synallagmatic and unilateral contracts are not followed by modern writers.

¹⁰⁹ E.g. Memorandum, *Constitution and Proof of Voluntary Obligations: Unilateral Promises* (Scot Law Com No 35, 1977) 10-11; MacQueen, *Options* 190; Hogg, *Obligations* para 1.09.

“unilateral obligation”, it is normally applied to a promise.¹¹⁰ Thus, in the Scottish legal context, unilateral obligation, namely a promise, does not necessarily mean a gratuitous obligation, given that unilateral and gratuitous do not necessarily mean the same thing.

Moreover, as the later discussion will show, a number of commercial transactions can be characterised as promises.¹¹¹ This illustrates that business transactions are often structured using a number of connected contracts or obligations. While one obligation initially looks gratuitous when it is looked at on its own, when it is placed in its context within the transaction as a whole it is not gratuitous. A promise, while in itself unilateral, can be used to form part of a wider series of transactions in which the promisor intends to make some gain if the promise is accepted. For example, a pre-contractual undertaking (e.g. promises attached to invitations to tenders) is a unilateral promise that is intended to follow at the contractual stage. A firm offer is a gain which the offeror intends to make if the party in receipt of the firm offer accepts it. Also, a landlord who unilaterally grants a tenant an option to purchase the property intends to make a gain in a sale if the tenant exercises it. In these circumstances the person who unilaterally makes a promise intends to make some gain, suggesting that the nature of the obligation itself is not gratuitous.

Furthermore, the approach of regarding a promise as either onerous or gratuitous supports the application of the doctrine. According to this theory, not all promises are required to be made in a written form. Rather, it depends on whether or not the promisor gains some benefit from making the promise. This would make the application of this doctrine more flexible.

¹¹⁰ McBryde, *Contract* para 2-03.

¹¹¹ See Chapter VII, F.CONCLUSIONS, (1) Promises in commercial practice,

B. THEORIES AND DOCTRINES RELATING TO PROMISES IN THAI LAW

(1) The notion of a juristic act

Juristic acts are “voluntary lawful acts, the immediate purpose of which is to establish between persons relations, to create, modify, transfer, preserve or extinguish rights.”¹¹² Different juristic acts can be distinguished in a variety of ways. For example, a distinction can be made between *inter vivos* juristic acts (e.g. gifts) and *mortis causa* juristic acts (e.g. wills).¹¹³ Also, juristic acts can be distinguished based on the side of the declarant who creates the juristic act. There are two main types of juristic acts in this category.¹¹⁴

First, “unilateral juristic acts” are juristic acts in which the person making the act alone declares his/her intention and that declaration has a legal effect regardless of any acceptance.¹¹⁵ Unilateral juristic acts can be further categorised into two groups, namely, unilateral juristic acts that require to be communicated to the recipient and unilateral juristic acts that do not require to be communicated. Examples of the former include the declaration of termination of contract¹¹⁶ and the declaration to set aside avoidable juristic act.¹¹⁷ An example of the latter is the declaration to make a will.¹¹⁸

Second, “bilateral juristic acts” are acts which have legal effects when two persons make their declarations of intention.¹¹⁹ Thai commentators are of the view that a contract is a bilateral juristic act. They explain contract as based upon an agreement.¹²⁰ As for

¹¹² Thai Code, §149.

¹¹³ Sothibandhu, *Juristic Acts and Contracts* 25-26.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Thai Code, §387

¹¹⁷ Thai Code, §178.

¹¹⁸ Thai Code, §1646.

¹¹⁹ Sothibandhu, *Juristic Acts and Contracts* 26.

¹²⁰ E.g. H R H Prince Rabi of Rajburi, เล็กเซอร์กฎหมาย (Lectures on Jurisprudence) (1925) 132; P Hutasing คำสอนชั้นปริญญาตรี กฎหมายแพ่งและพาณิชย์ ว่าด้วยนิติกรรมและสัญญา (Bachelor Lecture on Civil and Commercial Law: Juristic acts and Contracts) (1961) 134; S Pramoj, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วยนิติกรรมและหนี้ เล่ม 1 (ภาค 1-2) (Commentary on the Civil and Commercial Code: Juristic acts and Obligations Book 1 [Parts 1-2]), (1962) 437-438; S Vinijchaikul, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ลักษณะนิติกรรมและหนี้ (Commentary on the Civil and Commercial Code: Juristic acts and Obligations) (1971) 361; Sethabutr, *Juristic acts and Contracts* 200; Lingat, *Thai Legal History* 163; A Chularatana, คำอธิบายกฎหมายแพ่งและพาณิชย์ ว่าด้วยนิติกรรมและสัญญา (Commentary on Civil and Commercial Code: Juristic acts and Contracts) (1988) 117; C Hemarachata, กฎหมายว่าด้วยสัญญา (The Law of Contract), 3rd edn (2003) 14; Sothibandhu, *Juristic acts and Contracts* 285; Sanongchart, *Juristic acts and Contracts* 341-342; K Prokati, เอกสารประกอบการศึกษาวิชากฎหมายลักษณะนิติกรรมสัญญา (น. 101) (Handout:

promise, there is a debate amongst Thai lawyers as to whether a promise is a unilateral or a bilateral juristic act, as discussed below.

(2) Promissory theory as explained by Thai writers

(a) Controversies over legal status of promise

The number of scholars who make a contribution to the law of promise is fewer than to that of contract law. Some explain the notion of promise briefly.¹²¹ Some merely make reference to promises to make a contract.¹²² This is likely to be because this type of promise is linked to contract. A unified concept of promise was therefore seldom discussed in literature. Amongst scholars who make a contribution to scholarship on promises, there has been much controversy over the juristic nature of promise.

Firstly, some suggest that promises are unilateral contracts (or bilateral juristic acts). Saenguthai explains that a promise of sale is a contract between two parties, but only one party is bound.¹²³ Prokati¹²⁴ suggests that a promise is a unilateral contract having a condition precedent. When a condition is fulfilled, the contract will take effect and then the promisor is bound to do as he/she has promised.

Secondly, it is argued that promises are “unilateral juristic acts”. Tingsabadh explains that a promise creates an obligation binding a promisor to perform the obligation before the contract is concluded.¹²⁵ Sothibandhu explains that in general promises are unilateral juristic acts.¹²⁶ Pramoj¹²⁷ explicitly disagrees with the view that promises are unilateral

Juristic Acts and Contracts [LA 101]), Faculty of Law, Thammasat University, 6, available at <http://www.law.tu.ac.th/teacher/kittisak-prokati>.

¹²¹ E.g. Sethabutr, *Juristic acts and Contracts*.

¹²² E.g. P Eagjariyakorn, *คำอธิบายซื้อขาย แลกเปลี่ยน ให้* (Commentary on Sale, Exchange and Gift), 6th edn (2011) 68-79; W Krea-ngam, *คำอธิบายกฎหมายว่าด้วยซื้อขาย แลกเปลี่ยน ให้* (Commentary on the Law of Sale, Exchange and Gift), 10th edn (2006) 97-98.

¹²³ Y Saenguthai, *กฎหมายแห่งลักษณะมูลหนี้หนึ่ง* (Private Law: Source of Obligations 1) (1974) 221.

¹²⁴ In fact, Prokati explains that a promise can be created by the will of one party, namely the promisor. In addition, unlike a contract, a promise is binding without acceptance. His explanation initially seems to suggest that a promise is a unilateral juristic act. However, he concludes that, in terms of legal analysis, a promise is a unilateral contract having a condition precedent. Prokati (n 120) 75-76.

¹²⁵ C Tingsabadh, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 2 มาตรา 354-452* (Commentary on the Civil and Commercial Code: Book 2 §§354-452), 5thedn (1983) 27.

¹²⁶ Sothibandhu, *Juristic acts and Contracts* 327.

contracts. When a promisee acknowledges a promise, it has not been accepted yet. Thus, there is no concluded contract. If a promise is regarded as a unilateral contract, this would suggest that a contract can be concluded by the consent of one party only, which in fact it is not possible¹²⁸ because “one hand cannot clap loud.”¹²⁹ Nevertheless, amongst those who are of the view that promises are unilateral juristic acts, there is a disagreement between them as to whether a promise requires a communication to the promisee or not. The issue regarding the communication of a promise will be particularly discussed in the next chapter.¹³⁰

(b) Analysis

The issue under discussion concerns the fundamental basis of promise. Each theory places promises in different positions in the framework of juristic acts. However, if one thoroughly considers the features of promise in Thai law, it would be found that a promise produces legal effects regardless of the mutual consent of the parties. First, as discussed, a promise of reward is binding once it is made. The knowledge of the promisee regarding the existence of the reward is not essential.¹³¹ Therefore, a promise of reward is not a bilateral juristic act, given that the person who fulfils a specific act can claim the reward even if he/she was not aware of its existence.

Second, in the case of promise of sale, the promisee has to accept the promise by giving his/her notice to the promisor so that a contract of sale is concluded. However, the promise of sale itself does not require mutual consent from both parties.¹³² Therefore, the juristic nature of a promise of sale is clearly not a bilateral juristic act. It binds the party who made it without the consent of the other party.

¹²⁷ S Pramoj, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ 2 เล่ม* (Civil and Commercial Code on Juristic acts and Obligations 2 Books (n.d., Thaiwattanapanich Publishing), vol 1. 363.

¹²⁸ *Ibid.*

¹²⁹ “One hand cannot clap loud” is a Thai idiom which is equivalent to “it takes two to tango” in English. (author’s translation).

¹³⁰ See Chapter VI, B. COMMUNICATION OF A PROMISE.

¹³¹ See Chapter IV, B. PROMISE UNDER THE THAI CODE, (1) Promise without a specific promisee, (a) Advertisements of reward.

¹³² See Chapter IV, C. PROMISES TO ENTER INTO A CONTRACT, (1) Promises of sale (§454), (c) Problems with, and analysis of, promise of sale.

The feature of promise of sale under Thai law may be usefully compared with that of French law, which is a bilateral juristic act because it requires an agreement from both parties.¹³³ Recall that the provision of promise of sale under Thai law was inspired by three foreign sources, namely French, Swiss and Japanese law. However, the characteristics of promise of sale under the Thai Code are closer to the Japanese concept: a binding promise of sale can be made by either the seller or the buyer. The fact that French law is a source of the Thai concept may have convinced some scholars that the juristic nature of promise of sale under Thai law is similar to that of French law. However, in fact they have different characteristics.

To conclude, a promise is a unilateral juristic act on the basis that it arises from the intention of one party only. This is different from a unilateral contract which must be made by two persons. Additionally, the notion of juristic acts enhances the understanding of this feature of promises and contracts under Thai law. Although promises are not a free-standing legal obligation and exist alongside contracts, they are distinguished from contracts within the framework of juristic acts.

(3) Unilaterality of promise

As noted, the unilaterality of an obligation can be viewed in two different senses. In Thai law, a promise is also a unilateral obligation in the first sense. Both a promise of reward and a promise of sale can be unilaterally created by the promisor's will. Also, a promise in Thai law is compatible with the second sense of unilaterality that only the promisor is bound. Like the case of Scots law, both definitions of unilaterality are compatible with the unilateral obligation of promise under Thai law. Hence, although promises are not regarded as a freestanding ground of liability, Thai law is not unfamiliar with the idea of unilateral binding obligations.

¹³³ *Code civil*, Art 1589.

(4) Will theory in Thai law

(a) Will theory from the perspective of an analysis of voluntary obligation

The notion of freedom of contract is an important basis of Thai contract law.¹³⁴ Freedom of contract is related to will theory, which was dominant in the nineteenth century and still has a strong influence.¹³⁵ In Thailand will theory is generally perceived as a doctrine which permits individuals to make a contract freely. Moreover, it is generally explained by Thai lawyers that a contract generally arises when the wills of two or more parties coincide.¹³⁶

Legal commentators do not explicitly discuss the role of will theory in the law of promise because, as one might expect, promises are not a main source of voluntary obligations. Nonetheless, the connection between will theory and the law of promise may be observed from the perspective of some controversies about the law of promise.

As noted in Chapter IV, the Thai Code contains provisions regarding promise of sale and promise of a gift. This causes ambiguities whether or not an individual can make promises to enter into other types of contract than sale and gift. One might argue that, for example, if the Code is intended to permit individuals to make promises to enter into other types of contracts, then promise of sale and promise of a gift should not be specified. There has been no writer who expressly suggests that promises to enter into other types of contract than promises of sale and promises of a gift should not be enforceable. However, most writers acknowledge this uncertainty in Thai law.¹³⁷ Most commentators, nevertheless, suggest that an individual can make promises to enter into any type of contract as a result of the theory of autonomy of individual will.¹³⁸ Since will theory plays an important role in contract law, individuals should have the freedom to make a promise to enter into any kind of contracts that they wish to enter into.¹³⁹ The

¹³⁴ Sothibandhu, *Juristic acts and Contracts* 293-294.

¹³⁵ See *Chitty on Contracts* para 1-028.

¹³⁶ Sethabutr, *Juristic acts and Contracts* 217.

¹³⁷ Sethabutr, *Juristic acts and Contracts* 224-225; Sothibandhu, *Lease and Hire Purchase* 42.

¹³⁸ Sethabutr, *Ibid*; Sothibandhu, *Lease and Hire Purchase* 43.

¹³⁹ *Ibid*.

Thai courts also support this view. There have been a number of cases in which the court decided that a promise of lease, which is not recognised by the Code, was enforceable.¹⁴⁰

Sethabutr has a unique approach in explaining the issue under discussion by making reference to English and French law. First, he explains that in English law a bare promise is unenforceable because consideration is required.¹⁴¹ Second, he explains that in the Civilian systems such as France a promise to enter into a contract is a unilateral juristic act recognised by law.¹⁴² Hence, by analogy, such a promise is enforceable as a result of the general theory of juristic acts in Thai law (§149), although those promises are not specified under the Code.¹⁴³ However, he argues that a promise to enter into a contract where, (i) the promisor receives no benefits and (ii) the contract in which the promise is intended to enter into is a gratuitous contract such as gratuitous loan, should not be enforceable. He reasons that there is no justification why this kind of promise should be enforceable because it is more like the matter of hospitality or kindness between parties.¹⁴⁴ However, where a promisor receives benefits or where there is a contract in which a promise is made to enter into is a commutative contract e.g. sale, then the promise is enforceable.¹⁴⁵ It appears that Sethabutr is inspired by both English and French law in reaching this conclusion.

Sethabutr's explanation is not satisfactory. It is clear that, under Thai law, there is no requirement of consideration. Also, if a promise to enter into an onerous contract is enforceable according to the theory of autonomy of will, there is no theoretical objection why a promise to enter into a gratuitous one should not be enforceable. In fact, the reference that Sethabutr made to French law is not entirely correct. Recall that a promise to enter into a contract under French law requires mutual agreement between two parties.¹⁴⁶ Therefore, if a promise is classified as a kind of juristic acts¹⁴⁷ under French law, it cannot be a unilateral juristic act.

¹⁴⁰ See Chapter IV, (2) Case law concerning a promise to enter into a contract, D. CASE LAW, (c) Promise to lease.

¹⁴¹ He does not cite any English source, but rather cites a Thai writer, namely S Pramoj, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้* (Civil and Commercial Code on Juristic acts and Obligations) (2005) at 473. Sethabutr, *Juristic acts and Contracts* 224.

¹⁴² He does not cite any French source. Sethabutr, *Juristic acts and Contracts* 225.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Code civil*, Art 1589.

(b) Will theory from the perspective of remedies

In Thai law, there are two main types of remedies, namely specific performances and damages. The Thai Code states: “If a debtor fails to perform his obligation, the creditor may make a demand to the Court for compulsory performance, except where the nature of the obligation does not permit it.”¹⁴⁸ As for damages, the Code states: “When the debtor does not perform the obligation in accordance with the true intent and purpose of the same, the creditor may claim compensation for any damages caused thereby.”¹⁴⁹ Thai scholars therefore explain that specific performance is the right of the pursuer.¹⁵⁰ Thus, like the analysis of Scots law, one can argue that promissory obligations in Thai law are not merely about compensating an aggrieved promisee, but rather about enforcing the performance of the obligation that has been promised.

(c) Concluding remarks

Will theory plays an important role in the law of promise. This can be observed from two perspectives. First, it permits individuals to make a promise to enter into other kinds of contract than promises of sale and promises of a gift. The second is observable from the perspective of the remedy. The law of promise lends itself to criticism for only being about compensating the aggrieved promisee.

(5) The doctrine of third party rights

A third party right is viewed as a contract.¹⁵¹ Unlike Scots law, the concept is not linked to the notion of unilateral obligations. A beneficiary has to declare his/her intention to acquire the right.¹⁵² The declaration of the third party is equivalent to a declaration to accept an offer in the case of a regular contract. Thus, as long as a beneficiary has not yet

¹⁴⁷ It is worth noting that, although this concept may exist in French law, under the *Code civil* “there is no general part and thus no reference to “juristic act”.” S Grundmann & M Schauer, *The Architecture of European Codes and Contract Law* (2006) 36.

¹⁴⁸ Thai Code, §213.

¹⁴⁹ Thai Code, §215.

¹⁵⁰ S Rattanakorn, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้ (Commentary on the Civil and Commercial Code: Obligations), 11th edn, (2013) 132-136.

¹⁵¹ Thai Code, §374. The Thai Code derives this doctrine from the Japanese Code. *Index of Civil Code* 161. See Appendices Table 7 for a detailed account.

¹⁵² Thai Code, §374 para 2.

come into existence, the contracting parties can always revoke it.¹⁵³ The Thai approach on third party right is similar to that of French law, as previously discussed.¹⁵⁴

(6) Gratuitousness of promise

The idea of gratuitousness is discussed in the wider scope of juristic acts. Juristic acts can be distinguished by reference to, *inter alia*, benefits received by parties.¹⁵⁵ First, a “commutative juristic act” is where each of the parties gives and receives benefits. Benefits may be in the form of payments, properties or other performances such as sale.¹⁵⁶ Second, a “gratuitous juristic act”¹⁵⁷ is where only one of the parties receives benefits e.g. gifts, loans for use, and wills.¹⁵⁸ It appears that an important factor of being a commutative, or non-gratuitous, juridical act is that each of the parties gives and gains an equivalent. This suggests that whether a juristic act is gratuitous or non-gratuitous depends on whether or not both parties gain or receive benefits. In short, Thai law does not consider “gratuitousness” from the moment that a juristic act is constituted, but rather from its actual nature. Thus, a promise under Thai law is not always gratuitous.

C. THEORETICAL FRAMEWORK OF PROMISE IN SCOTS LAW AND THAI LAW: COMPARISON

(1) The notion of a juristic act

Both systems recognise the notion of a juristic act, but its role in Thai law is clearer than in Scots law. The definition of a juristic act appears to be similar in both systems, as illustrated by TB Smith and the definition in the Thai Code. Specifically, juristic acts are classified as being unilateral and bilateral in both systems. Most importantly, a promise belongs to the former, whereas a contract belongs to the latter.

¹⁵³ Thai Code, §375; Supreme Court Decision 1200/2009 (B.E. 2552)

¹⁵⁴ See Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (4) Northern Natural Law jurists, (b) Grotius’ influence on French law.

¹⁵⁵ C Hemaratchata, *กฎหมายว่าด้วยนิติกรรม* (The Law of Juristic Acts), 3rd edn (1997) 25-27.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

(2) Unilateral nature of a promise

Although the roles of promise within the obligational framework in Scots and Thai law differ, the idea of unilaterality is compatible with the nature of promises in both systems. In Scots law, a promise is made by one party and only that party is obliged to perform the obligation. Although in Thai law promise is not regarded as a separate legal institution from contract, it is binding without acceptance, which reflects the fact that it can be unilaterally created. Also, only the promisor has an obligation to perform what he/she has promised. Therefore, Thai law has not been antagonistic to the notion that unilateral declarations of will can create obligations. This is something which even some Civilian jurisdictions, e.g. France, do not have. French and Scots law may be similar to each other in a number of aspects of their doctrine of obligations. However, when it comes to the idea of a declaration of will as a source of obligation, the French approach fundamentally contradicts the Scots approach.

(3) The role of will theory

Will theory also has a substantive role to play in both jurisdictions. The role of will theory in Scots law can be traced from Stair's idea explaining that a promissory obligation is an exercise of the will. As for Thai law, it can be observed from the fact that will theory permits individuals to make a promise to enter into any kind of contract, not strictly to only promises of sale and promises of a gift (which are specified in the Code).

Moreover, will theory can be observed from the perspective of remedies. Specific implement/performance is the primary remedy in both systems in the sense it is the right of the pursuer to choose whether to enforce the performance or damages. Therefore, promissory obligations in both systems are not merely about compensating the aggrieved promisee. This is in accordance with will theory.

(4) The doctrine of third party rights

While in Scots law JQT is traditionally analysed using a promissory analysis, under Thai law the concept of third party right is seen as contractual in nature. Thai law adopted the doctrine from Continental European systems, which had been inspired by Grotius' promissory account. Therefore, this difference stems from different attitudes towards promissory obligations between Stair and Grotius.

Moreover, this difference may arise from the fact that in Scots law promise is a free-standing legal obligation. Therefore, the scope of promissory obligation in Scots law is wide enough to cover some concepts such as third party rights. However, under Thai law, unilateral promise is only recognised in certain limited circumstances. Thus, if the law does not clearly state that an obligation is a promise, Thai lawyers would not analyse it by using a unilateral approach.

(5) Gratuitousness of promise

In Scots law, there is a debate over whether promises are always gratuitous. There is no consensus amongst Scots lawyers because they view the issue from different angles. While the first theory considers gratuitousness from the moment that the promissory obligation comes into existence, the second theory looks at whether the promisor has gained anything or not. The second theory is preferred in this thesis, based on the argument that unilateral nature and gratuitousness are not necessarily similar. In addition, a promise is often used to form part of a wider series of transactions in which the promisor intends to make some gain if the promise is accepted.

In Thailand, the idea of gratuitousness is discussed in the wider scope of juristic acts which can also apply to promises. The main condition of being a non-gratuitous juristic acts under Thai law is that both parties receive benefits. This suggests that Thai law does not consider the gratuitousness of a juristic act from the moment when it comes into existence, but rather from the actual nature of the obligation. Therefore, this thesis suggests that a promise can be either gratuitous or non-gratuitous.

D. CONCLUSION

There are certain resemblances between Scots and Thai law in promissory theories and the obligational nature of a promise, which suggest that the underlying basis of the promissory obligation between the two systems is similar.

Firstly, both systems recognise the concept of a juristic act, which can be classified into a unilateral juristic act (which involves promise) and a bilateral juristic act (which involves contract). Secondly, the studied systems both accept the notion that an obligation can be created by a unilateral act of will and that only one party is obliged to fulfil an obligation. Thirdly, will theory plays an important role in promissory law of both systems. Fourthly, according to the preferred approach of this thesis, promises in both systems can be either gratuitous or non-gratuitous. The only difference in the theories that relate to promise between these two systems is the relationship between promises and third party rights. However, this difference is perhaps fairly insignificant, given that Scots law does not entirely accept that the third party right is promissory in nature. All of these commonalities illustrate that the underlying basis of promissory law in both of the studied systems is fundamentally similar.

Moreover, the discovery in this chapter confirms what has been argued in Chapter II: not only are Scots and Thai law a mixture of the Civil and Common Law traditions, but there are also certain similarities in promissory theories between them. This is likely to benefit a comparative analysis of these two jurisdictions, given that they already share important commonalities in their fundamental basis of promissory obligations.

Nonetheless, there are certain issues in which Thai law appears to have a more precise approach than Scots law. For example, Thai law has a clearer general theory of juristic acts. The discussion in this chapter shows that this general theory enhances the understanding of the actual legal nature of a promise in Thai law. In addition, although the discussion regarding gratuitousness of promise does not exist, this can be achieved by an analogy of the idea of the gratuitousness of a juristic act. Thus, that there may be some useful facts that Scots law can learn from Thai law.

A comparative treatment of the relations between Scots law and Thai law on some other important aspects of promise will be particularly provided in the next chapter. This requires us to investigate deeply whether or not the attitude of Scots law towards unilateral obligations as a main source of obligations can improve the theoretical structure of Thai law of promise.

Chapter VI

Promise in Scots Law and Thai Law: Comparative Perspectives

This chapter compares the concept of promise between the studied systems. There are five aspects which are focused on, namely (i) its nature and characteristics, (ii) communication, (iii) acceptance and rejection (iv) legal effects and (v) promises to keep offers open. The chapter also refers to the role of unilateral promise under the DCFR.

A. THE NATURE AND CHARACTERISTICS OF PROMISE

(1) Scots law

(a) Promise as distinguished from other types of expressions

(i) Expressions which have no legal effects

There are some types of expressions which may be somewhat similar to promises in the sense that they express a person's intention to undertake to do something. However, a person who uses these expressions has no intention to be legally bound by these expressions. Therefore, these expressions have no legal effect.

Firstly, an expression of a "resolution" does not confer an obligation. In *Kincaid v Dickson*,¹ the court held that an oath of a person was merely an expression of a resolution, not a promise to pay a sum of money.² In *Ilona (Countess of Cawdor) v Vaughan (Earl of Cawdor)*,³ (henceforth: *Cawdor v Cawdor*) a husband and a wife (the Countess) were members of a pension scheme (the No 1 Scheme). At a formal meeting they instructed the trustees of the No 1 Scheme to transfer "an equitable share of the scheme's assets" to the No 2 Scheme. The Countess claimed that a

¹ (1673) Mor 12143. Stair referred to this case when he distinguished between desire, resolution and engagement. Stair, *Inst*, 1.10.2.

² See also *Gordon of Ellon v Dr Cunningham* (1740) Mor 9425.

³ 2007 SLT 152.

promise had been made by the trustees of the No 1 Scheme in favour of the trustees of the No 2 Scheme. However, it was held that the statement made at the meeting was merely an indication of a future intention. As noted in Chapter V, the court in this case relied on Stair's account of three acts of will: only the third act, namely engagement, leads to a binding obligation. Although the meeting between the parties was formal, the court was of the view that the professional advice given by the defenders did not go any further than the stage of resolution. The court was influenced by the fact found from the case that the defenders "decided that they would comply"⁴ with the pursuer's request. This fact suggests that the defenders' expression had not reached the stage of engagement, given that it was still in their power to choose to do or not to do as the pursuers requested.

More recently, in *MacDonald v Cowie's Executrix Nominated*,⁵ the pursuer averred that the letter given by Mrs Hazel Moir, his grandmother who had died, created a binding promise to make an *inter vivos* gift of the deceased's house in his favour. The contents of the letter appeared as "I have promised to give him this house for many years because of the work he has done in looking after the property and the kindness he has always shown to me..." By referring to Stair's account regarding three acts of will, the court concluded that the deceased's intention did not pass from the stage of resolution to the stage of engagement. In reaching this conclusion, the court construed from the words of the letter. As Lord Tyre explained:

"I ...wish to give" is the language of resolution, ie expression of intention, and not of disposal or immediate commitment to disposal. "I have promised to give him this house for many years..." is no more than a description of something that may or may not have occurred in the past, and not an expression of a current promise or commitment. Taken on its own, the Writing says no more than "It is my present intention to make a gift of the house to [the pursuer]".⁶

In short, the tone of the language suggests that the deceased did not seriously intend to undertake an obligation.

⁴ 2007 SC 285 at 290.

⁵ [2015] CSOH 101.

⁶ *Ibid* at para 20.

Secondly, a mere expression of future intention or a statement of intention is not obligatory.⁷ In *Scott v Dawson*,⁸ the defender wrote a letter to the pursuer that “[i]t is absolutely out of my power to pay off any of my debt to you until my return, when, if I find I can draw anything from the firm, I will certainly do so.” It was held that a general statement of intention is not sufficient to constitute a promissory obligation.⁹ In *Ritchie v Cowan & Kinghorn*¹⁰, C and K granted R a receipt for the payment “being 10s. per £1, in full [settlement] of our claim against the said Ritchie, ... it being, however, understood that the said Ritchie will pay the balance of 10s. per £1 whenever he is able to do so”. It was held that the document did not impose legal liability. It only expressed an honourable understanding or an honourable intention that the debtor would pay the debt when he could.¹¹ The circumstances of these two cases are similar in that they are concerned with acknowledgement of the debts. In both cases, the tone of the language used by the defenders was an important factor which convinced the court that the defenders did not intend to make a binding promise. In the first case, the defender wrote “if I find I can..., I will certainly do so”. In the second case, the receipt stated that the defender would pay the debt “whenever he is able to do so”. The tone of the language was not strong enough to suggest that they were absolute undertakings on the part of the debtors, given that the debtors would only pay the debt in full when they were able to do so.

In *Aitken v Standard Life Assurance Ltd*¹², the pursuer took out a pension policy with the defender. The defender had sent out the “Annual Statements” to the pursuer at least from 1998. The “Annual Statements” sent out in 2000 contained a statement that “You’ll get an update every year to help you review your pension needs.” Afterwards, the defender had failed to send out an updated policy to the pursuer before the pursuer made a decision to reduce the final bonus. The pursuer averred that the above mentioned statement made by the defender contained an implied contract and/or an implied promise. However, it was held that neither a contractual

⁷ Bell, *Prin* §8.

⁸ (1862) 24 D 440.

⁹ *Ibid* at 443.

¹⁰ (1901) 3 F 1071.

¹¹ *Ibid* at 1073-1074.

¹² [2008] CSOH 162.

nor promissory obligation could be inferred from the statement of the defender. Lord Glennie stated that the “Annual Statements” were “designed to keep the policyholder updated on an annual basis of the value of his policy...”¹³ The “Annual Statements” themselves, however, did not suggest that other types of document would be sent out every year. This suggests that people are bound to perform an obligation as a result of making a statement, rather than what they intended to do, i.e. evidence of an intention to be bound, disclosed in the language used.

More recently, in *Regus (Maxim) Ltd v Bank of Scotland Plc*¹⁴, the pursuer expressed an interest that it wanted to take a sub-lease of a building at a development. The Bank of Scotland issued a letter to the pursuer confirming that the bank held a deposit on behalf of the owner of the development relating to the fit-out costs incurred by the pursuer when it carried out fit-out works. It was stated in the letter that:

“It may assist the proposed tenant to have confirmation from us that ... we hold the sum of £913,172 to meet the landlord's commitment to fit-out costs. These funds will be released in accordance with the drawdown procedure agreed between the parties...”

The pursuer carried out the works and issued invoices but the Bank of Scotland refused to pay the cost. The pursuer averred, inter alia, that the letter was an undertaking in terms of which the bank were obliged to make payment. The court, however, held that the letter did not constitute a legally enforceable obligation. It was merely a letter of comfort which can carry a moral, but not a legal obligation. As in the *Scott v Dawson*¹⁵ and *Ritchie v Cowan & Kinghorn*¹⁶ cases, it appears that the tone of the language used by the bank was not strong enough to suggest that the bank absolutely undertook to make payment to the addressee of the letter.

Moreover, a declaration of intention expressed by one person may lead another person to believe that the former has promised to undertake or perform an obligation,

¹³ *Ibid* at para 22.

¹⁴ [2013] CSIH 12.

¹⁵ (1862) 24 D 440.

¹⁶ (1901) 3 F 1071.

i.e. it creates a hope or an expectation on the part of the recipient. However, such expressions do not amount to any binding obligation. For example, in *Gray v Johnston*,¹⁷ the pursuer claimed that he had received a proposal from the defender that if he lived with and looked after the defender, he would become the defender's heir. The pursuer did as the defender proposed but he was not made the defender's heir. It was held that there was no promise made by the defender on the grounds that the defender did not make anything other than an expression of intention. The pursuer "acted on a *spes* or expectation (be it more or less justified) which was disappointed."¹⁸

Analysis of expressions which have no legal effect

There are several kinds of expressions which can be distinguished from promises. They can be made either in the form of conduct, words or documents. These expressions are referred to by several names e.g. an expression of resolution, an expression of future intention, an indication of a future intention, an honourable understanding and a letter of comfort. Despite their different names, their commonality is that they reflect a person's future intention to undertake or do something unilaterally. Additionally, expectations/hopes are usually created on the part of the recipients of these expressions. These two characteristics make the nature of these expressions similar to promises. As discussed, a promise is an undertaking to perform something in favour of another party.¹⁹ Nevertheless, what makes them distinct from promises is that the persons making these expressions do not intend themselves to be legally bound. For instance, in the *Regus (Maxim)*²⁰ case discussed above, the letter from the bank carried a moral obligation, i.e. the bank did not intend to be legally bound by issuing the letter. Consequently, in reaching the conclusion that a person's undertaking is a promise, the courts have to assess whether or not that person intended to be legally bound.

¹⁷ 1928 SC 659.

¹⁸ *Ibid* at 663 per Lord Murray's; See also *Mackersy v Davis & Sons Ltd* (1895) 22 R 368.

¹⁹ See Chapter I, C. NATURE AND REQUIREMENTS OF PROMISE (4), A promise is an undertaking to perform something in favour of another party.

²⁰ [2013] CSIH 12.

An objective assessment is applied by the courts when determining whether or not a person's intention is sufficiently binding to be regarded as a promise.²¹ For instance, in the *Regus (Maxim)*²² case, under reference to *Ballast plc v Laurieston Properties Ltd*²³, the court stated that a promissory obligation "should be approached objectively on the basis of what a reasonable recipient with knowledge of the background would have understood by the documents in question".²⁴

Moreover, in determining whether a person's declaration of intention is to make a promise or not, regard cannot be had merely to the nature or types of circumstances in which the declaration was made. For instance, in the *Gray v Johnston*²⁵ case discussed earlier, the claim arose from the circumstance where the defender indicated that he would make the pursuer his heir if the pursuer looked after him. The pursuer's proposal did not give rise to a promise. Nevertheless, this does not necessarily mean that where a person proposes to another person that the former would benefit the latter in some ways if the latter does him a favour then that cannot constitute a promissory obligation. This may be usefully compared with English cases which have a similar circumstances to the *Gray v Johnston* case, namely *Wayling v Jones*²⁶ and *Gillett v Holt*.²⁷ As will be fully discussed later, the English courts enforced the promise based on promissory estoppel.²⁸ This suggests that if both cases arose in Scotland, the Scottish courts could simply enforce the promises, given that, objectively assessed, the promisors in both cases seriously intended their promises to be legally binding.

²¹ McBryde, *Contract* para 2-04.

²² [2013] CSIH 12.

²³ [2005] CSOH 16 at para 143, (as cited in *Ibid* at para 38).

²⁴ [2013] CSIH 12 at para 38 per Lord President; See also *Royal Bank of Scotland Plc v William Derek Carlyle* [2013] CSIH 75 2013 at para 54.

²⁵ 1928 SC 659.

²⁶ (1995) 69 P & CR 170.

²⁷ [2001] Ch 210.

²⁸ See section (c) Binding characteristics of a promise, (i) A promise is binding without acceptance.

(ii) Offers

As a promise does not require an act of acceptance²⁹, it is distinguished from an offer. Thus, when analysing a promise, it is then not necessary to question whether the promisee is a party to the obligation or not.³⁰ However, if the expression is deemed an offer, it must be followed by an acceptance in order to constitute a complete contractual obligation. In *Wylie v Grosset*³¹, the pursuer, who participated in a clinical drugs trial, raised an action for compensation against the doctor, who was the principal investigator of the trial, and the health board. The pursuer argued that the defender had undertaken a unilateral obligation regarding payment of compensation, as provided in the patient information sheet. The significant words that required the court's interpretation were as follows:

“Compensation for any injury caused by taking part in this study will be in accordance with the guidelines of the Association of the British Pharmaceutical Industry (ABPI). Broadly speaking the ABPI guidelines recommend that the sponsor without legal commitment, should compensate you without you having to prove that it is at fault.”

The court held that those words did not “amount to any sort of guarantee that compensation will actually be paid.”³² Consequently, the patient information sheet constituted merely an offer made by the defenders, and the consent form signed by the pursuer was the acceptance.

Furthermore, the gratuitous nature of an undertaking is not the main factor in ascertaining whether such an undertaking is a promise or an offer. For example, in *Smith v Oliver*,³³ the church's trustees claimed that Mrs Oliver had promised to give £7,000 in her will for the church's construction. The church had been given money from time to time by Mrs Oliver during her lifetime for alterations of church building, but there was no provision of promise appearing in her will. The courts had to decide whether Ms Oliver's statement was an offer or a promise. The approach

²⁹ Stair, *Inst* 1.10.4.

³⁰ Lord Norman, “Consideration in the Law of Scotland” (1939) 55 LQR 358 at 361.

³¹ 2011 SLT 609.

³² *Ibid* at para 22.

³³ *Smith v Oliver* (No 1) 1911 SC 103 at 111; (No 2) 1911 1 SLT 451.

that the courts used for the justification of this decision was that Ms Oliver did not receive or gain any benefit in return for the payment. Consequently, her statement was regarded as a promise.³⁴ However, in *Morton's Trs v The Aged Christian Friend Society of Scotland*³⁵, Morton wrote to the Society, offering to pay £1,000 (by 10 annual instalments of £100) if certain conditions about its constitution were observed. The Society accepted Morton's offer. Morton paid the instalments every year during his life time. He, however, died at a point when there were two unpaid instalments left. The court held that there was a contract between Morton and the Society. Unlike the *Smith* case, although the undertaking made by Morton's was gratuitous, it was nonetheless deemed to be an offer. These two examples suggest that the fact that an undertaking is gratuitous does not necessarily mean that it naturally constitutes a unilateral obligation. It depends on the factual circumstance of each case whether a person intended to be bound immediately.

(b) Words used for promissory liability

The words used are not the only relevant factor in determining whether an act is a promise. The most natural form of making a promise is "I promise."³⁶ Yet, the form of expression "I promise" does not always constitute a promissory liability.³⁷ The statement in the form "I promise" may be used without the intention to be bound at law or in a non-beneficial sense such as the phrase "I promise that I will sue you."³⁸ Also, an expression in the form "I promise" may constitute a contractual obligation if the parties intend to enter into an agreement.³⁹ In contrast, there are some circumstances in which other similar forms of expression are used instead of "I promise" such as the words "I engage" or "I will do it"⁴⁰ which are promises and are legally enforceable as promises too. In *Macfarlane v Johnston and Others*⁴¹, it was held that the statement in the form, "we agree to pay you" could be regarded as a

³⁴ The case was dismissed on the grounds that the promise was not formally constituted.

³⁵ (1899) 2 F 82.

³⁶ Observed by Lord Neaves in *Macfarland v Johnston* (1864) 2 M 1210 at 1214.

³⁷ *Yeo v Dawe*, (1885) 53 L T 125.

³⁸ McBryde, *Contract* para 2-09.

³⁹ *International Correspondence Schools Ltd v Irving* (1914) 2 SLT 284.

⁴⁰ (1864) 2 M 1210.

⁴¹ *Ibid.*

promissory note.⁴² As Lord Neaves explained, he saw “no difference between the expressions “I agree to pay,” and “I promise to pay.” ... therefore, ... the words “I agree to pay” are expressive of a promise.”⁴³

More recently, in *Carlyle v Royal Bank of Scotland PLC*⁴⁴, the appellant (Carlyle) appealed against the decision of the Second Division,⁴⁵ which had overturned a decision of the Lord Ordinary. The background of the case was that Carlyle had sought funding from the respondent (RBS) for the purchase and development of a property. RBS had then raised an action against Carlyle for the repayment of the loan. Carlyle defended the action and counterclaimed for damages. The counterclaim was that he had entered into the loan with RBS subject to the condition that RBS would provide him with a collateral warranty. It is important to note that a collateral warranty in this case is different from a collateral warranty used in construction law, which will be discussed in Chapter VII as an example of a promise used in practice. In this case, the statement on the phone was argued to be a collateral warranty to provide funds for both the purchase and the development when Carlyle had applied for the funds. In other words, a collateral warranty in this context refers to an undertaking made as collateral to a principal contract (namely a contract of loan), and the borrower was led to enter into the principal contract as a result of this collateral. The Lord Ordinary had held that the telephone conversation in which RBS told Carlyle that his proposal was approved (“You’ll be pleased to know it’s all approved”) amounted to a binding agreement. RBS was therefore in breach of a collateral warranty. On appeal, the Second Division of the Inner House decided in favour of RBS by holding that there had been no agreement between the parties. Carlyle appealed to the Supreme Court, which reversed the decision of the Inner House decision and held that a statement concerning additional future funding of Carlyle prior to the loan agreement did not constitute a collateral warranty. However, the statement was binding as an independent obligation of promise. It can be inferred

⁴² *Ibid* at 1213. See also *Goldston v Young* (1868) 7 M 188 at 191; *Morton’s Trustee v Aged Christian Friend Society of Scotland* (1899) 2 F 82.

⁴³ *Ibid* at 1214 per Lord Neaves.

⁴⁴ 2015 SLT 206.

⁴⁵ 2013 CSIH 75, 2014 SC 188.

that where a party assures another party that a certain act would occur, such assurance can be binding as a promise, even if the word “promise” is not used.

However, although promissory language is not required, a person’s undertaking to be legally bound as a promise must be expressed in clear words for the constitution of a promissory obligation. In the *Morton’s Trustees* case earlier mentioned, the court observed that “[w]hat is necessary is that the promisor should intend to bind himself by an enforceable obligation, and should express that intention in clear words.”⁴⁶ Also, in *Dow v Tayside University Hospitals NHS Trust*,⁴⁷ a patient undergoing treatment by the NHS made a claim against an NHS trust on the basis of breach of contract. Nevertheless, the court also made reference to the formation of a promissory obligation in this case. The pursuer’s claim arose from the circumstances where the doctor had guaranteed a successful outcome of the pursuer’s treatment, namely the termination of the pursuer’s pregnancy. The treatment, however, did not succeed. The pursuer then sought damages for breach of contract. The case was dismissed on the grounds that there was no contractual relationship between the parties. The court ruled that any further obligations which are imposed on doctors other than those set out by statutory requirements have to appear in clear terms. In reference to the constitution of a promissory obligation, the court stated:

“There would need to be demonstrated an intention to add an additional liability on the part of the doctor. That would correspond with the requirements for a unilateral promise in any circumstances which would not be implied but would require expression in clear terms.”⁴⁸

The approach that holds that clear words are required for the constitution of promise was applied again in 2009. In *Jeroen Van Klaveren v Servisair UK Limited*,⁴⁹ the court was influenced by the idea that a promise is a unilateral obligation which is generally gratuitous. Hence, “clear intention must be shown”.⁵⁰

⁴⁶ (1899) 7 SLT 220 at 221 per Lord Inneer.

⁴⁷ [2006] SLT (Sh Ct) 141.

⁴⁸ *Ibid* at para 20.

⁴⁹ [2009] CSIH 37.

⁵⁰ *Ibid* at para 9.

Similarly, in *Regus (Maxim)*⁵¹ discussed earlier, the court explained that a promissory obligation has to be made by clear words only because the obligation is based on intention. Hence, it has to be considered whether “the evidence, objectively assessed, discloses an intention on the part of the alleged promisor to incur a legally binding engagement”⁵² Here, the court made a strong conclusion that “[c]lear words are required to constitute a promissory obligation in every case”.⁵³ More recently, in the *Carlyle*⁵⁴ case discussed before, although the Supreme Court held that the bank’s assurance amounted to a promise, the court observed that had the Supreme Court been deciding the case, it would perhaps have held that there was no promise between the parties during the telephone conversation. As stated by Lord Hodge,

“Were I deciding the matter at first instance ..., I might have shared the view of the Second Division (a) that the statement by Ms Hutchison on 14 June 2007 did no more than communicate to Mr Carlyle that the bank had reached a decision in principle to provide funding for the development of the two plots and (b) that the parties were required to take further steps to create a legally binding obligation....”⁵⁵

Lord Hodge’s statement shows that this kind of statement by the bank employee (“it’s all approved”) may be thought to be promissory in nature by some judges, but others may disagree. This implies that some judges would only decide that a promissory obligation has been created if the factual circumstances of the case show that the promisor clearly intends his/her undertaking to be legally binding.

The approach under discussion appears to be different from the approach that was applied in *Smith v Oliver*⁵⁶ in 1911. Here, the court took other circumstances into account to determine whether a person wishes to make or not to make a promise. Ms Oliver initially expressed her concern to those who had responsibility for the church’s construction. She then indicated that she would cover the various costs of the construction. This was followed by her donations towards the cost of construction from time to time. Ms Oliver could not give a large sum of money during her lifetime

⁵¹ 2013 SC 331.

⁵² *Ibid* at para 37 per Lord President (Gill).

⁵³ *Ibid* at para 41 per Lord President (Gill).

⁵⁴ [2015] UKSC 13.

⁵⁵ *Ibid* at para 20.

⁵⁶ 1911 SC 103.

because the money was kept in the form of trust funds held by trustees in England. She therefore proposed that she would do this by the way of a testamentary will. As can be seen, although Ms Oliver did not make a clear statement that she promised to leave money by means of her will, her statement could nonetheless give rise to a unilateral obligation. The court took other circumstances of the case and the fact that Ms Oliver received nothing in return into consideration to support that she intended to make a binding promise. However, in this case a promise could not be enforced because the obligation had not been formally constituted.⁵⁷ At first glance, this suggests that, if the approach that clear terms are required had been applied to the *Smith* case, Ms Oliver's statement might not have been deemed to be a promise. On closer inspection, however, the court in the *Smith* case may have been less worried about the lack of precise words. This is because the promise made by Ms Oliver would not be enforceable in any case, given that it could not be proved by her oath and there was no writ to support the obligation.⁵⁸

To conclude, the court's approach regarding the requirement of precise words for the constitution of the unilateral obligation has not changed. This approach was established in at least 1899 and has been followed by a number of cases. Modern case law from 2006 has particularly emphasised that a promissory obligation must be expressed in clear terms.

(c) Binding characteristics of a promise

(i) A promise is binding without acceptance

A promise is "simple and pure, and hath not implied *in it* as a condition *of its being*, the acceptance of another".⁵⁹ It is a "unilateral juristic act"⁶⁰ arising from the will of

⁵⁷ At the time of the decision, a promise could only be proved by writ or oath. See Chapter III, E. CONSTITUTION AND PROOF OF PROMISE.

⁵⁸ The outcome of this case had it arisen today is discussed in the next section. See sub-heading (ii) An accepted promise does not convert into a contract.

⁵⁹ Stair, *Inst* 1.10.4.

⁶⁰ *Regus (Maxim) Limited v Bank of Scotland plc* [2013] CSIH 12 2013 at para 33 per Lord President.

a party.⁶¹ It does not need acceptance.⁶² A promise therefore can be enforceable regardless of whether anything has followed on from it or not.⁶³ In *Bathgate v Rosie*⁶⁴, a mother promised the shopkeeper's wife that she would pay for the damage which had arisen because her son broke a shop window. The court held that the mother was bound to pay damages.⁶⁵ This, in principle, fundamentally contrasts with English law. In English law, a bare promise, without consideration and acceptance, is generally unenforceable.⁶⁶ For instance, in *Combe v Combe*⁶⁷, a husband promised his ex-wife that he would pay her an annual maintenance. The English court did not enforce the obligation on the grounds that "there was no consideration for the husband's promise."⁶⁸

The doctrine of estoppels under English law

There is an exception to this English general rule that a bare promise is not legally binding. Where the doctrine of estoppel applies, a bare promise, without consideration and acceptance, is obligatory. Estoppel is described as "an impediment or bar to a right of action arising from a man's own act as, for example, where a man is forbidden by law to speak against his own deed".⁶⁹ There are various kinds of estoppels under English law and these are linked "by the broadest of general principles: that a person's taking of inconsistent positions is in some situations to be discouraged by law."⁷⁰ However, there is no common set of rules to govern them.⁷¹ Due to the limited space, this thesis only discusses the doctrines of promissory and proprietary estoppels for the purpose of a comparative study.

⁶¹ *Lord Advocate v City of Glasgow District Council* 1990 SLT 721 at 725 per the Lord President (Hope).

⁶² *Cawdor v Cawdor* 2007 SLT 152 at para 15 per the Lord President (Hamilton).

⁶³ *Stair Inst.*, 1.10.4; *Morton's Trs v Aged Christian Friend Society of Scotland* (1899) 2 F 82.

⁶⁴ 1976 SLT (Sh Ct) 16.

⁶⁵ *Ibid* at 18.

⁶⁶ *Chitty on Contracts* para 3-001.

⁶⁷ [1951] 2 KB 215.

⁶⁸ *Ibid* at 216.

⁶⁹ McKendrick, *Contract Law* 215.

⁷⁰ *Chitty on Contracts* para 3-090.

⁷¹ *Ibid*; McKendrick, *Contract Law* 214-215.

Firstly, promissory estoppel is “[a] representation of *intention* or a *promise* suffices for the purpose of the equitable doctrine”.⁷² A promissory estoppel arises, for example, “when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party.”⁷³ The important requirements of a promissory estoppel are (i) a clear or unequivocal promise or representation, (ii) reliance, (iii) detriment and (iv) inequity.⁷⁴

Secondly, proprietary estoppel arises “in certain situations in which a person has done acts in reliance on the belief that he has, or that he will acquire, rights in or over another’s land.”⁷⁵ A clear or unequivocal promise or representation is not required.⁷⁶ In proprietary estoppel, the claimant is required “to prove a promise or assurance that he will acquire a proprietary interest in specified property.”⁷⁷

Traditionally, estoppels can only be used as a defence in action, and not to make a claim.⁷⁸ In *Combe v Combe*⁷⁹ mentioned above, the court stated that the doctrine of estoppel “cannot of itself give a cause of action.”⁸⁰ There have been a number of cases in which the English courts enforced a bare promise based on promissory and proprietary estoppels. For instance, in *Central London Property Trust Ltd v High Trees House Ltd*,⁸¹ the court held that, despite the lack of consideration, where “a promise intended to be binding, intended to be acted on and in fact acted on”⁸², such a promise is legally binding. Similarly, in *Wayling v Jones*⁸³, the claimant and the defendant lived together as partners. The claimant helped the defendant run his business. The defendant made a number of promises that the claimant would inherit his business. However, the defendant did not do as he had promised and then he

⁷² *Chitty on Contracts* para 3-090.

⁷³ *Emmanuel Ayodeji Ajayi v RT Briscoe (Nigeria) Limited* [1964] 1 WLR 1326 at 1330 per Lord Hodson.

⁷⁴ *Treitel The Law of Contract* paras 3-081-085; McKendrick, *Contract Law* 221.

⁷⁵ *Chitty on Contracts* para 3-118.

⁷⁶ *Sledmore v Dalby* (1996) 72 P & CR 196 at 207 Hobhouse LJ.

⁷⁷ *Thorner v Majors* [2009] UKHL 18 at para 2.

⁷⁸ *Treitel The Law of Contract* para 3-089.

⁷⁹ [1951] 2 KB 215.

⁸⁰ *Ibid* at 217.

⁸¹ [1947] KB 130.

⁸² *Ibid* at 136.

⁸³ (1995) 69 P & CR 170.

passed away. It was found as a matter of fact in the case that the claimant would have left the defendant if he had known that the defendant would not honour his promise. The court held that the promise made by the defendant gave rise to a proprietary estoppel.⁸⁴ More recently, in *Gillett v Holt*⁸⁵, the English court adopted a very broad approach in applying the doctrine of proprietary estoppel. The case had a somewhat similar character to the *Wayling* case but the relationship between the parties in this case was a relationship of employment and friendship, rather than a relationship between partners. Nevertheless, the similarity to the *Wayling* case was that the claimant had helped the defendant in the running of his business and was promised that he would inherit it. As in the *Wayling* case, the claimant had relied on the defendant's promise. The Court of Appeal enforced the promise based on proprietary estoppel. As the court explained, where the assurances given "were intended to be relied on, and were in fact relied on"⁸⁶, there is no necessity to search for an irrevocable promise. It is the promisee's "detrimental reliance on the promise which makes it irrevocable".⁸⁷

To conclude, at first glance, the theoretical status of promise in Scots law and English law appears to be completely different. As a general rule, in Scots law unilateral promises are binding without consideration and without acceptance, whereas in English law both consideration and acceptance are required. Nevertheless, the example of the cases discussed above shows that the Scottish and English approaches in relation to unilateral promises are not as different as they initially appear. Under the doctrines of promissory and proprietary estoppels, the English courts can enforce a bare promise, making its approach towards unilateral promise closer to the Scottish approach than might at first glance be thought to be the case. This reflects the importance of unilateral obligations in practice. Traditionally, English law is renowned for not enforcing unilateral promises as a general rule. However, the fact that the English courts in modern case law adopt a holistic approach when dealing with promissory and proprietary estoppels suggests that a

⁸⁴ *Ibid* at 175.

⁸⁵ [2001] Ch 210; For the most recent case regarding proprietary estoppel see *Davies v Davies* [2016] EWCA Civ 463.

⁸⁶ *Ibid* at 228 per Robert Walker LJ.

⁸⁷ *Ibid* at 229 per Robert Walker LJ.

contractual analysis cannot appropriately deal with all the issues in the law of voluntary obligation. This is why the English courts adopt the doctrine of promissory and proprietary estoppels, which shows similarities to the doctrine of promise in Scots law, as an alternative approach.

(ii) An accepted promise does not convert into a contract

A promise is binding without an acceptance. Thus, even if there is an action following on it, a promise is not converted into a contract. In the *Smith v Oliver*⁸⁸ case discussed earlier, a promise made by Mrs Oliver to give money for the church's construction followed by the construction performed by the church did not result in a contractual obligation. As the court explained, "a party cannot turn what is, in its nature, a mere promise into a contract".⁸⁹ Accordingly, in this case a promise could not be enforced because the obligation was not formally constituted. Nevertheless, if the circumstance resembling the *Smith* case were to occur today, the outcome might have been different. In 1991, proof of promise could be carried out only by oath or by writ.⁹⁰ However, these methods of proof were abolished in 1995 when the Requirements of Writing (Scotland) Act 1995 was introduced. Currently, a gratuitous unilateral obligation requires a written document for the constitution of the obligation, except for those undertaken in the course of business.⁹¹ However, where "...a creditor in the obligation...has acted or refrained from acting in reliance on the ... obligation...with the knowledge and acquiescence of ...the debtor in the obligation..."⁹², the Act provides that the debtor "shall not be entitled to withdraw from the...obligation"⁹³, and "the obligation...shall not be regarded as invalid, on the ground that it is not so constituted, if the condition set out in subsection (4) ... is satisfied."⁹⁴ The condition is that "the position of the first person— (a) as a result of acting or refraining from acting as mentioned in that subsection has been affected to

⁸⁸ 1911 SC 103.

⁸⁹ *Ibid* at 111.

⁹⁰ *Ibid* at 110-111 per Lord President.

⁹¹ Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(ii).

⁹² Requirements of Writing (Scotland) Act 1995, s 1(3).

⁹³ Requirements of Writing (Scotland) Act 1995, ss 1(3)(a).

⁹⁴ Requirements of Writing (Scotland) Act 1995, ss 1(3)(b).

a material extent; and (b) as a result of such a withdrawal as is mentioned in that subsection would be adversely affected to a material extent.”⁹⁵ Had the *Smith* case arisen after 1995, Mrs Oliver’s promises could have been enforced because the church had relied on Mrs Oliver’s promise, and with the knowledge of Mrs Oliver.

However, there is an opposite view to the theory that an accepted promise cannot be converted into a contract. This will be later discussed in the section on acceptance and rejection of a promise.⁹⁶

(2) Thai law

(a) Promise as distinguished from other types of expressions

Thai law distinguishes promises from other types of expressions. Conceptually, a promisor has a stronger intention to bind himself/herself in comparison with a person who makes other types of expressions, which are an overture, an invitation to treat or an offer. Consider the following situations:

(i) A is leaving the country so he has to rehome his pet rabbit. He prefers to sell it so that he can ensure that the rabbit will go to a good home. He knows that B his friend loves animals, so he asks B when he has a chance whether B is thinking about adopting a pet or not. A’s expression is deemed to be an “overture” because he merely makes preliminary enquiries as to B’s interest in order to know the possibility of having a contract with B.

(ii) B responds that he has not thought about adopting any pet. A then states that he has to find someone to look after his pet rabbit and he prefers to sell it to someone that he knows personally. Therefore, if B is interested, he can let A know a price that he can afford. A’s expression of willingness is still not regarded as an offer because

⁹⁵ Requirements of Writing (Scotland) Act 1995, s 1(4).

⁹⁶ See section C. ACCEPTANCE AND REJECTION OF A PROMISE.

it does not contain certain terms which shall become binding (as a contract) if B accepts. It is only an invitation to treat made by A to invite B to make an offer.

(iii) B still does not make an offer to A. Then A proposes that he wishes to sell his pet rabbit and its cage to B for the price of 5,000 Thai baht. A's declaration of intention is regarded as an offer on the basis that a sale can be concluded if B accepts A's proposal.

(iv) B does not accept A's offer. A then makes a new proposal by stating that he wishes to sell his rabbit and its cage to B for the price of 5,000 Thai baht, and during the period of one month, A will not sell the rabbit to any other person. If B wishes to buy the rabbit and its cage, B can inform him, and he will sell them for the stated price. A's proposal is regarded as a promise to sell so that a sale is concluded if and when B accepts the promise.

From the above examples, these types of expression are categorised into four levels, according to the degree to which a person who makes the expression intends to be bound. The extent to which a promisor wishes to bind himself/herself is the greatest. An offeror intends to be legally bound to a certain degree, which is less than that of the promisor. A person who makes an overture and an invitation to treat does not wish to be legally bound by his/her action at all.⁹⁷

It is unclear why Thai lawyers introduce the concept of overture when making a distinction between promises and other expressions. In fact, an overture and an invitation to treat can be simply classed as the same kind of expression, given that neither of them amount to an offer and neither can be accepted. A possible reason is that they want to emphasise the fact that these expressions can be distinguished from each other by the extent to which the person making the expression desires to be bound.

⁹⁷ Sethabutr, *Juristic acts and Contracts* 202.

The foregoing theory is supported by both academics⁹⁸ and courts.⁹⁹ For example, in the Supreme Court Decision 411/1947 (B.E. 2490), the defender wrote a letter to the pursuer stating that he wished to buy 60 tons of a mineral, 10 tons to be purchased immediately. It was held that the letter was an offer to buy 10 tons, whilst the statement concerning the remaining 50 tons was neither an offer nor a promise to buy, but only an overture.¹⁰⁰ In another case¹⁰¹, the parties made a contract of loan and the debtor gave his title deeds as the warranty. It was stated in the contract that the land would be sold to the creditor, not anyone else, within 3 years for the price of 20,000 baht. The court decided that the agreement between the parties was merely a contract of loan. There was no promise of sale made by the debtor. It was only a proposal without an intention to create legal relations. In the Supreme Court Decision 100/1954 (B.E. 2497), the landlord promised the tenant that if he were to sell the rented land, he would let the tenant buy it first, but an agreed price was not mentioned. It was held that there was no promise of sale between the two parties. The court explained that, in general, an agreed price is, *inter alia*, an essential condition of an offer for sale. As the parties did not agree on the price, the landlord's proposal was not an offer, and could not be a promise either.¹⁰²

Moreover, these decisions show that the Thai courts are required to undertake two stages of analysis in order to determine whether a person's expression is a promise or other expressions. First, the courts objectively¹⁰³ assess whether that expression is an offer or whether it is another expression which is not legally binding. Therefore, although the person who expresses an intention does not intend to create a legal relation, his/her expression could still give rise to a binding obligation. Second, the determination of the difference between an offer and a promise will be made. As will be discussed below, other forms of statement than the form beginning "I promise"

⁹⁸ E.g. S Pramoj, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ 2 เล่ม* (Civil and Commercial Code on Juristic acts and Obligations 2 Books (n.d., Thaiwattanapanich Publishing), vol 1. 342-343; Soththibandhu, *Sale* 76-81.

⁹⁹ E.g. Supreme Court Decisions 748/1990 (B.E. 2533); 3924/2008 (B.E. 2551); 2509/2012 (B.E. 2555); 22777/2012 (B.E. 2555).

¹⁰⁰ Supreme Court Decision 411/1947 (B.E. 2490).

¹⁰¹ Supreme Court Decision 1240/1962 (B.E. 2505)

¹⁰² This can be described accurately as an option to purchase property contained in a lease. This is explored further in Chapter VII.

¹⁰³ Thai Code, §154.

are deemed by the courts to be promises. This suggests that the objective approach is used for distinguishing between a promise and an offer, given that the courts do not merely consider the words used, but rather the circumstances of the case.

(b) Words used for promissory liability

The words used are not the main factor in deciding whether an expression is a promise under Thai law. There are a number of cases in which the courts have enforced statements taking the form “you may redeem”¹⁰⁴, “I will return”¹⁰⁵, “I consent to buy”¹⁰⁶ or “I certify that I will buy”¹⁰⁷ which are deemed to be promises. For example, in the Court Decision 121/1929 (B.E. 2472) discussed earlier in Chapter IV, it was held that the document stating that the seller could redeem the property was a promise to sell.¹⁰⁸ Similarly, in the Court Decision 1004/1942 (B.E. 2485), a sale of farmland was agreed by the parties. Then the buyer drew up a document stating that if the seller had the money to redeem the farmland, the buyer would return it at any time. The court held that this statement was a promise. As can be seen, although the word “redeem” was used by the buyers, the courts regarded it as a promise to sell and not as a sale with a right of redemption.

There are a number of cases in which the parties used the word “promise” but the courts did not decide it was a promise. For instance, in the Court Decision 1398/1952 (B.E. 2495), an employer terminated the employment contract of one of his employees by stating that he promised that he would pay a pension to the employee. This was agreed by the employee. However, the employer refused to pay the pension, claiming that he later knew that the employee had not performed his duty properly. It was held that the act of the employee in agreeing with the employer’s proposal was regarded as an acceptance. Thus, there was a concluded contract.¹⁰⁹ More recently, in the Supreme Court Decision 810/2011 (B.E. 2554), the defenders

¹⁰⁴ Supreme Court Decision 121/1929 (B.E. 2472).

¹⁰⁵ Supreme Court Decision 1004/1942 (B.E. 2485).

¹⁰⁶ Supreme Court Decision 347/1945 (B.E. 2488).

¹⁰⁷ Supreme Court Decision 2214/1976 (B.E. 2519).

¹⁰⁸ Supreme Court Decision 121/1929 (B.E. 2472).

¹⁰⁹ Supreme Court Decision 1398/1952 (B.E. 2495).

had appointed the pursuer as their lawyer in a case concerning the right of inheritance. They had later promised to give him a reward equivalent to five per cent of the value of the asset they would receive from the inheritance. Although the parties used the term “promise to give a reward”, the court held that this was not an advertisement of reward as appeared in §362 of the Code. Rather, it was an agreement between the parties to pay the lawyer’s fee. It can be seen from these cases that, although the parties used the word “promise”, their statements were deemed to be an offer.

(c) Binding characteristics of a promise

The binding characteristics of a promise of reward and a promise to enter into a contract under Thai law are not exactly the same. Therefore, this section discusses their binding characteristics in different sub-headings.

(i) A promise of reward is binding without acceptance

As discussed in Chapter V, a promise of reward under Thai law can be perfectly analysed using a promissory analysis. However, the provisions of promise of reward belong to the section of “formation of contract” under the Code. This leads to a debate amongst Thai lawyers whether a promise of reward requires acceptance or not.

Firstly, a number of writers, e.g. Pramoj¹¹⁰, Tingsabadh,¹¹¹ Sethabutr¹¹², and Sujiva¹¹³, consider a promise of reward to be equivalent to an offer. It is an offer to make a contract, like a normal offer but made to the public.¹¹⁴ Therefore, acceptance

¹¹⁰ S Pramoj, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ 2 เล่ม* (Civil and Commercial Code on Juristic acts and Obligations 2 Books (n.d., Thaiwattanapanich Publishing), Vol 1 at 470.

¹¹¹ C Tingsabadh, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 2 มาตรา 354-452* (Commentary on the Civil and Commercial Code: Book 2 Sections 354-452), 5th edn (1983) 27.

¹¹² Sethabutr, *Juristic Acts and Contracts* 226. He cited C Tingsabadh, *Ibid*.

¹¹³ B Sujiva, “ข้อสัญญาที่กำหนดขึ้นฝ่ายเดียว” (Unilateral contract) (1966) 24(1) บทบัญญัติ (Thai Bar Journal) 58 at 58-59.

¹¹⁴ Tingsabadh (n 111) 27; B Sujiva, “ข้อสัญญาที่กำหนดขึ้นฝ่ายเดียว” 58.

is required. Secondly, some commentators, such as Sotthibandhu,¹¹⁵ argue that a promise of reward is not an offer made to the public, but rather a unilateral juristic act. Hence, it is binding without acceptance.

In order to decide whether a promise of reward is distinct from an offer or not, it is helpful to consider the types of persons to whom a promise/an offer is made. Practically, a promise of reward is usually made to the public, whereas an offer is normally made either to the public or to an individual. Thus, there are differences between a promise of reward and an offer as a matter of practice. However, there is no theoretical objection to anyone who wishes to make a promise of a reward to a specific individual. Thus, one may argue that this distinction between promise of reward and offer is not significant in terms of legal theory, given that in principle they can be made to either the public or an individual.

Nonetheless, Thai law lends itself to the defence of the claim under discussion. The Thai Code states: “A person who by advertisement promises that he will give a reward to whoever shall do a certain act is bound...”¹¹⁶ The Code uses the term “advertisement”. An advertisement is by nature something shared publicly. It can be inferred that a promise of reward under Thai law is intended to be made to the public only, given that the term “advertisement” is used. If Thai law had intended a promise of reward to be made either publicly or privately, the provision should have used other proper terms such as “notice”, rather than “advertisement”. Also, in the Supreme Court Decision 810/2011 (B.E. 2554) earlier discussed, although the defenders promised to give a reward equivalent to five per cent of the value of the asset to their lawyer, it was held that this was not an advertisement of reward. Rather, it was an agreement between the parties. The court’s decision reinforces that a promise of reward under Thai law intended to be made to the public only. Thus, under Thai law, there are not only practical reasons but also doctrinal reasons for the distinction between promise of reward and offer in terms of their recipients.

¹¹⁵ Sotthibandhu, *Juristic acts and Contracts* 327.

¹¹⁶ Thai Code, §362.

Consequently, the theory that a promise of reward is distinct from an offer, thus binding without acceptance, provides a more satisfactory explanation.

(ii) A promise to enter into a contract can be converted into a contract

While the debate whether or not a promise of reward is distinct from an offer remains unsettled, legal writers agree that a promise to enter into a contract can be converted into a contract. There is a theory, which is commonly understood amongst Thai commentators, explaining promise to enter into a contract as *per se* an offer on the grounds that a promisor also makes an offer to a promisee to enter into a contract. The Code does not give a definition of an offer. Nonetheless, generally an offer is defined by Thai writers as a “request for a contract”.¹¹⁷ Most Thai academics explain that a promise to make a contract can always be regarded as an offer because a promisor also invites a promisee to enter into a contract.¹¹⁸ Eventually there will be a concluded contract if the promisee accepts the promise.¹¹⁹ Thai commentators further explain that the rules regarding offer can be applied to this kind of promise too. The Thai courts¹²⁰ also applied the principles of offer to promise as the provision most nearly applicable.¹²¹

However, the foregoing theory fails to explain some theoretical questions about the difference between a promise and an offer. For instance, if a promise to make a contract is *per se* an offer, why does Thai law need to have a specific provision on promises of sale and promises of a gift? In addition, it is questionable whether the rules of offer can appropriately apply to promise. Clearly, some rules regarding offer cannot be applied to promise. There are certain circumstances where the intention of the promisor is intrinsically different from that of the offeror. For example, an offer

¹¹⁷ S Pramoj, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ 2 เล่ม* (Civil and Commercial Code on Juristic acts and Obligations 2 Books (n.d., Thaiwattanapanich Publishing), Vol 1.342; cf Sethabutr, *Juristic acts and Contracts* 201; Sothibandhu, *Juristic acts and Contracts* 311-313.

¹¹⁸ E.g. Sothibandhu, *Juristic acts and Contracts* 327; Sothibandhu, *Lease and Hire Purchase* 43; Sothibandhu, *Sale* 80; P Punyapan, *คำมั่นสัญญาและจดหมายเปิดผนึกถึงศาสตราจารย์นิรันดาม* (Promises and an Open Letter to an Anonymous Professor) (2004) 78.

¹¹⁹ E.g. Sothibandhu, *Lease and Hire Purchase* 43; Sothibandhu, *Juristic acts and Contracts* 327; Punyapan, *Ibid* at 92.

¹²⁰ Supreme Court Decision 4995-4996/1995 (B.E. 2538).

¹²¹ Thai Code, §4 para 2.

made to a present person without specifying a period for acceptance can be accepted only there and then.¹²² Apparently, this rule cannot apply to a promise in which the promisor does not specify a period of acceptance, made to a present person. It would be strange if a promise made to a present person lapsed immediately if it was not accepted at the time at which it was made. The promisor normally has an intention to bind himself/herself for a period of time and the promisee should be able to accept the promise after that, not only there and then.

More importantly, the theory under discussion causes difficulties in distinguishing a promise to make a contract from an offer. Some academics argue that it is impossible to distinguish a promise to make a contract and an offer because they are both in fact offers.¹²³ All these examples show that there are theoretical problems arising from the theory that a promise to enter into a contract is per se an offer.

(3) Comparison

(a) Words used for promissory liability and an objective test of promise

The Scottish courts use an objective approach in determining whether an act is a promise or an offer, or something which merely expresses a statement of future intention. Similarly, an objective assessment is applied both (i) when the Thai courts distinguish an expression which has legal consequences from one which does not and (ii) when dealing with the distinction between promise and offer.

In both systems, the language used is not the only tool used to differentiate between a promise and other expressions. Statements in the form of “I engage”, “I will do it”, “you may redeem” or “I will return” may be deemed to be promises, whereas the phrase “I promise” does not necessarily infer promissory liability. This is similar to the approach under the DCFR where statements in the form such as “I undertake

¹²² Thai Code, §356.

¹²³ S Maneesorn, เอกสารประกอบการสอนวิชากฎหมายลักษณะนิติกรรมและสัญญา (น. 101) (Handout: Specific Contract 1 (LA 230]), Faculty of Law, Thammasat University, (2009).

to", or "I bind myself to" or "I promise to"..."¹²⁴ may be sufficient for it to be regarded as a unilateral undertaking, if a person wishes to be legally bound by his/her intention without acceptance.¹²⁵ Also, under the DCFR, the perspective used to determine whether someone wishes to make an offer or a promise is an objective one.¹²⁶ If a promisor were permitted to use his/her subjective intention, then that would be unfair to the promisee, as that might contradict the promisee's reasonable understanding of the promisor's expression.¹²⁷

(b) Promise as distinguished from other types of expression

Promise in both systems is distinguished from other types of expressions which do not infer a legal obligation, e.g. expression of future intention, invitation to treat and overture. It is also distinguished from an offer (but in Thai law this distinction is not as clear as in Scots law). Similarly, the DCFR distinguishes between an offer¹²⁸ and a promise (known as a unilateral undertaking).¹²⁹ Under the DCFR, a unilateral promise can be legally binding without any acceptance if this is the intention of the promisor.¹³⁰

(i) The extent to which a person who makes an expression intends to be bound

The way in which Thai commentators classify promises, offers and other expressions which are not legally binding is different from that of Scots lawyers. In Thai law, each type of expression is categorised into levels according to the degree to which a person who makes the expression wishes to bind him/herself. These expressions of willingness may be viewed along a spectrum. A promise is placed in the top layer since the degree to which a promisor wishes to be bound is the greatest amongst others. An offer is placed one layer below on the grounds that an offeror also wishes

¹²⁴ *Commentary on the Draft Common Frame of Reference* 133.

¹²⁵ *Ibid.*

¹²⁶ DCFR, Art II.-4:302.

¹²⁷ *Commentary on the Draft Common Frame of Reference* 342.

¹²⁸ *Ibid* at 292.

¹²⁹ *Ibid* at 134.

¹³⁰ DCFR, Art II.-1: 103 (2).

to be bound by his/her offer, but the extent to which a person making an offer intends to be bound is less than that of a person making a promise.¹³¹ The third level is an invitation to treat. The main feature of an invitation to treat is that the person making it has no intention to be legally bound. Moreover, it does not contain sufficient detail, and so cannot result in a contract when it is accepted by the other party. Finally, the expression in the lowest level is the so-called “overture”. A person’s statement is regarded as an overture if he/she only intends to know about the other person’s interest so that he/she can know the possibility of having a contract with that person.

The explanation of an overture is different from that of Scots law, which only recognises the terms “invitation to treat”, “offer” and “acceptance”. Hence, the Thai analysis regarding the pre-contractual stage is more extended than the Scots one. Nevertheless, the explanation regarding an overture may be not helpful in terms of legal analysis. Like an invitation to treat, an overture has no legal consequences. Thus, distinguishing them from each other does not help to differentiate an act which has a legal effect from another one which does not. This is different from the case of distinguishing an invitation to treat from an offer, in which the latter is binding and can constitute a contractual obligation when it is accepted.

Scottish writers do not explain the difference between a promise and other types of expressions by reference to the extent to which a person who makes the expression wishes to be bound. However, the approach of characterising these expressions proposed by Thai lawyers can also apply to Scots law, albeit that Scots law does not recognise an overture as a separate class. In Scots law, a promise is binding once it is made and a promisor cannot revoke it thereafter. In contrast, an offeror can withdraw his/her offer as long as it has not been accepted. This difference reflects the level to which a person commits him/herself to perform an obligation.

However, one might argue that the distinction between promise and offer by reference to the extent to which a person who makes them intends to be bound distinguishes their effects after the event, rather than the nature of the juristic acts

¹³¹ Sothibandhu, *Juristic acts and Contracts* 327.

themselves. In other words, it can be argued that a promisor is bound, whereas an offeror is not, because of the structure of the law of obligation that enforces a promise once it is made, but does not enforce an offer until it has been accepted. In short, opponents of the notion of hierarchy of intention to be bound argue that this theory does not reflect a higher intention to be bound between the promisor and the offeror. Rather, it depends on whether or not the law will enforce the promise or the offer.

In response to this, the fact that a promise is generally irrevocable suggests that a promisor intends his/her expression to be binding immediately. The fact that an offer can be generally withdrawn suggests that the offeror does not have an intention to be bound immediately, given that he/she can still withdraw the offer as long as it has not been accepted. Consider the following example. Both A and B desire to buy C's pet rabbit. A makes a promise to buy that rabbit to C, whereas B makes an offer to buy that rabbit to C. As a general rule, A's promise is irrevocable, whereas B's offer can be withdrawn before it has been accepted. Certainly, the intention to be bound is not equal in both cases. The degree to which B (offeror) desires to bind himself is less strong than that of A (promisor) on the basis that B still has an opportunity to change his mind, whereas A does not.

Moreover, the notion of hierarchy of intention to be bound can be supported by referring to the notion of a juristic act. As noted in Chapter V, under Thai law a juristic act is defined as an act that is voluntarily created by a person, with "the immediate purpose ... to create, modify, transfer, preserve or extinguish rights."¹³² Thus, a promise is regarded as a juristic act because a promisor immediately binds him or herself to confer rights to the promisee. In contrast, an offer is not regarded as a juristic act because an offeror does not have an immediate purpose to confer any rights on the offeree. This certainly reflects a hierarchy of the intention to be bound between the promisor and the offeror. It would be strange if the extent to which a promisor and an offeror intend to be bound was equal, but only the intention of the promisor was regarded as being a juristic act.

¹³² Thai Code, §149.

Furthermore, it is helpful to revert to the late scholastics' promissory account and recall their explanation that the binding force of a promise lies in the intention of the promisor and that a promise creates an obligation *per se*.¹³³ This suggests that a person who makes a promise must have a stronger intention to bind him or herself than a person who makes other expressions that are not legally binding, given that the intention of the promisor creates an obligation without any further requirement. This suggests that the counterargument of the notion of hierarchy of intention to be bound can only apply in jurisdictions in which a promise does not create an obligation *per se*, but further conditions, such as acceptance, are required. An example of this is French law, in which, as already noted, a promise of sale is only binding if it is accepted. Therefore, under French law there is no real difference between a promise of sale and an offer of sale, because they both must be accepted in order to be binding. Thus, this suggests that the theory that a promisor has a stronger intention to bind him/herself than an offeror is particularly true in jurisdictions in which a promise is regarded as a unilateral obligation, i.e. it is binding without having to be accepted.

To conclude, not only the difference in terms of their effects after the event, but an offer and a promise are also different in nature. This difference can be justified by reference to the extent to which offerors and promisors intend their expressions to be binding.

(ii) Problems of the Thai approach

Initially, the Thai approach seems to be workable because it distinguishes a promise from other expressions which do not infer legal obligation. Yet, a difficulty arises at the stage of distinguishing an offer from a promise. Although there is an attempt to distinguish them by reference to the degree to which a promisor/offeror intends to be bound, the distinction is unclear. This is because in Thai law a promise to make a

¹³³ Lessius, *De iustitia et iure*, lib 2, cap 18, dub 1, Mi, 6, at 216 (as cited by Decock in Decok, *Contract* 178).

contract is regarded as per se an offer. Therefore, there is an overlap between these two types of expressions.

In Scots law promise stands as a promissory obligation whilst offer, requiring an acceptance, is considered to be a contractual obligation. Scots law therefore makes a clearer distinction between promise and offer than Thai law. The Scots approach can be helpful for Thai law. Given that the Thai theory that a promise and an offer are distinguishable is based on the degrees to which a person who makes them wishes to be bound is compatible with the situation in Scots law, it would be possible for Thai law to distinguish a promise from an offer if they are regarded as different types of obligations.

B. COMMUNICATION OF A PROMISE

(1) Scots law

There are two competing theories in relation to communication of a promise in Scots law.

(a) Theory that communication of a promise is required

The first theory suggests that the law requires the promisor to communicate his/her intention to the benefited party. For example, in *Beatrix Tunno and Brotherstons v Andrew Tunno*,¹³⁴ a brother expressed his intention in giving a sum of money, as a dowry, to his sister. The brother's expression was known to the sister's husband. It was held that the brother was obliged to pay that sum of money. However, if the promise is not communicated but the benefited person accidentally or through an unauthorised person becomes aware of it, he/she cannot claim the reward or benefit. For instance, in *Burr v Bo'ness Police Commissioners*¹³⁵, the defenders had decided to increase the pursuer's salary but then it was cancelled. The pursuer heard of the

¹³⁴ (1681) Mor 9438; See also *Margaret Ker v Ker of Keith* (1751) Mor 9442.

¹³⁵ (1896) 24 R 148.

increase from conversation but did not receive any official notice about this increase. It was held that there was “no *jus quæsitum* under the resolution, as it had not been intimated to”¹³⁶ the pursuer.

Moreover, literature and case law suggest that a written promise must be delivered. This is based on the general rule that writing must be delivered in order to be effective,¹³⁷ which also applies to promise. Thus, a written promise takes effect when it is delivered to the promisee¹³⁸, or to someone empowered to receive delivery of the promise on behalf of the promisee.¹³⁹

(b) Theory that communication of a promise is not required

The other theory suggests that the communication of a promise is not an essential requirement for the constitution of a promissory obligation.¹⁴⁰ This theory cited Stair as an authority to support this proposition.¹⁴¹ In *Cawdor v Cawdor* earlier discussed¹⁴², the court explained that “[d]elivery to or acceptance by the promisee is not necessary to the constitution of a promise.”¹⁴³ In the *Regus (Maxim)*¹⁴⁴ case earlier discussed, the court also observed that a promise “is binding even though it is not known to the promisee.”¹⁴⁵ More recently, in *MacDonald v Cowie's Executrix Nominatæ*,¹⁴⁶ Lord Tyre, by citing the Lord President Hamilton’s opinion in the *Cawdor v Cawdor* case, supported the theory that communication of a promise is not required.¹⁴⁷

¹³⁶ *Ibid* at 148.

¹³⁷ McBryde, *Promises* 75.

¹³⁸ Bell *Prin* §23; Black, *Obligations*, para 618; *Miss Eliza Harris Shaw and Others v Mrs Caroline Muir (Muir's Executrix)* (1892) 19 R 997.

¹³⁹ Hogg, *Obligations* 55.

¹⁴⁰ Memorandum, *Constitution and Proof of Voluntary Obligations: Formalities of Constitution and Restrictions on Proof* (Scot Law Com No 39, 1977) 23.

¹⁴¹ Stair, *Inst* 1.10.4.

¹⁴² 2007 SLT 152.

¹⁴³ *Ibid* at para 15, per Lord President (Hamilton). The court further observed that in practice “the presence or absence of communication to the other party may be an adminicle of evidence in the question whether the statement amounts to a promise in law.” (at para 15).

¹⁴⁴ [2013] CSIH 12.

¹⁴⁵ *Ibid* at para 34.

¹⁴⁶ [2015] CSOH 101.

¹⁴⁷ *Ibid* at para 19.

Similarly, some writers suggest that an oral promise becomes effective when a promisor utters the promissory words.¹⁴⁸ Thus, the promisee does not need to be present when the words of promise are uttered or at the time the promise is made¹⁴⁹ although in practical terms he/she has to be aware of the existence of the promise.¹⁵⁰

(c) The preferred approach and analysis

The theory that a promise needs to be communicated to the promisee is supported. The justification goes back to Stair's explanation. Although the main authority for the theory that a promise can be legally binding without any delivery to the promisee is Stair (1.10.4), it is arguable whether Stair in fact suggested that there is no requirement of communication for the constitution of promise in every case.

It appears that in 1.10.4 Stair mainly dealt with the subject of an acceptance of a promise (that it is not required), rather than the subject of a communication/delivery of a promise. It is true that Stair explained that a promise gives rise to a binding obligation for third party "absents, infants, idiots, or persons not yet born, who cannot accept..."¹⁵¹ However, this explanation is concerned with the case of JQT, which shares similarities to promise in that they do not require an acceptance on the part of the promisee/beneficiary. The crucial factor in deciding if something is a simple promise or a JQT is whether the debtor intends to make a free-standing promise in favour of someone or whether he is entering into a contract with the stipulator from which a third party will benefit. Therefore, in the case of JQT, there is always a stipulator who is the recipient of the expression of the promisor. This is in contrast with a unilateral promise in which the promisor creates an obligation him/herself, i.e. does not agree with the stipulator. This further suggests that it is reasonable to treat the obligation of JQT as coming into existence when it is made, i.e. when the debtor utters the promissory words to the stipulator (in the case of oral

¹⁴⁸ However, a promise for the creation, transfer, variation or extinction of an interest in land needs to be in writing, according to the Requirements of Writing (Scotland) Act 1995, s 1 (2) (a) (i).

¹⁴⁹ M Hogg, *Obligations* 55.

¹⁵⁰ *Ibid.*

¹⁵¹ Stair, *Inst* 1.10.4.

promises) or when the promise is delivered to the stipulator (in the case of written promise). There is no necessity to deliver such a promise to a third party, given that it has been communicated to the stipulator already. In some circumstances, it is not possible to deliver such a promise to the beneficiary at all, e.g. if a promise is made in favour of a foetus or an infant who cannot be aware of its existence. Thus, Stair might have intended the rule that a communication of a promise is not required to apply to the case of JQT only. This does not necessarily mean that in the case of an ordinary unilateral promise, a communication to the promisee will not be required at all. In the case of unilateral promise, it is possible that in reality there is no one to witness the promisor's expression because the promissory obligation is unilaterally created. Hence, a promise should be required to be delivered to the promisee.

Moreover, as discussed in chapter I, merely an internal thought of a person who wishes to make a promise is generally inadequate to constitute a legal obligation. The intention must be expressed in some way which can be objectively observed.¹⁵² There must be a person present so that the promisor's expression can be sufficiently regarded as communicating a serious intention.¹⁵³

Furthermore, the rules regarding the effectiveness of written and oral promises reflect an inconsistency in relation to the requirement of the communication of a promise. As noted, the rule that a written promise takes effect when it is delivered to the promisee suggests that a promise requires an act of communication. The rule that the promisee does not need to be present at the time when promissory words are uttered suggests the contrary. Thus, adopting the theory that a promise requires communication would make the rules regarding the effectiveness of written and oral promises compatible with each other.

¹⁵² See Chapter I, C. NATURE AND REQUIREMENTS OF PROMISE, (2) A promise must be expressed.

¹⁵³ Black, *Obligations* para 618.

(2) Thai law

It is questionable whether or not a promise needs to be communicated in order to have legal effect.

(a) Theory that communication of a promise is required

A number of academics suggest that the communication of promise is required in order to be effective. Sotthibandhu¹⁵⁴ explains that a promise is a declaration of intention in which the extent to which it is binding is stronger than that of an offer.¹⁵⁵ Thus, it should be communicated to the relevant party so that he/she can be made aware of the promise.¹⁵⁶ Krea-ngam particularly explains a promise of sale that the promise of sale must be communicated, but the acceptance of promise is not required.¹⁵⁷

(b) Theory that communication of a promise is not required

Certain commentators suggest that that promises do not need to be communicated. Therefore, it becomes effective once a promise is made. Tingsabadh explains that a promise (to enter into a contract) creates an obligation binding a promisor to perform the obligation before the contract is concluded.¹⁵⁸ Neither the communication of the promise nor the acknowledgement of the promisee (regarding the existence of promise) is necessary.¹⁵⁹

¹⁵⁴ Sotthibandhu, *Juristic acts and Contracts* 327.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ W Krea-ngam, *คำอธิบายกฎหมายว่าด้วยซื้อขาย แลกเปลี่ยน ให้* (Commentary on the Law of Sale, Exchange and Gift), 10th edn (2006) 97-98.

¹⁵⁸ C Tingsabadh, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 2 มาตรา 354-452* (Commentary on the Civil and Commercial Code: Book 2 §§354-452), 5thedn (1983) 27.

¹⁵⁹ *Ibid.*

(c) The preferred approach and analysis

The theory that a promise requires a communication is preferred. According to the nature of public promises, a promisor has to make his/her promise available to others, generally by way of an advertisement. This suggests that a public promise requires a communication. As for a promise made to a specific person, it is naturally concerned with two parties because it confers rights/benefits on the other party. Accordingly, it is more appropriate to assume that a promise needs to be communicated to the benefited person. Otherwise, the benefited person would not know of its existence and would not be able to enforce the promise. Moreover, the approach holding that a promise is binding without any communication causes uncertainties regarding the moment when the promise first comes into existence. Such a moment is important in circumstances where one has to determine whether a promise is still enforceable or not (e.g. if a promisor specifies a period during which a promise is binding). Consequently, the more satisfactory approach is to consider a promise as an act which requires communication.

(3) Comparison

Neither Scots nor Thai law has a clear approach dealing with the communication of a promise. This thesis supports the theory that a communication of a promise is required for both the cases of Scots and Thai law. Thus, according to the preferred approach, the communication of promise should be the same between the two jurisdictions.

Under the DCFR,¹⁶⁰ a unilateral juristic act¹⁶¹ must be communicated to the person to whom it is addressed.¹⁶² The rule applies to a unilateral promise too on the basis that

¹⁶⁰ The DCFR regulates three requirements for constituting a unilateral juristic act. See DCFR, Art II.-4:301.

¹⁶¹ Under the DCFR the term “juridical act” is used. However, the Thai Code uses the term “juristic act”. Also, Scots law is more familiar with the term “juristic acts”. Therefore, the term “juristic acts” is adopted in this thesis; An example of the concept of juristic act in the DCFR can be found in the Art II.-1:101 [2]); See also *Commentary on the Draft Common Frame of Reference* 125-129; For a comparison between the concept of juristic acts in Scots and the DCFR see P Hellwege, “Juridical Acts in the Draft Common Frame of Reference - A Model for Scotland?” (2014) 18(3) *EdinLR* 358.

it is a type of unilateral juristic act. This rule reflects the fact that giving notice of a juristic act is mandatory. The Commentary states: “[a] secret intention which is not communicated to anyone is not binding”.¹⁶³ Therefore, the DCFR approach supports what is argued here in relation to both Scots law and Thai law, i.e. that a promise should take effect when it is communicated to the recipient.

C. ACCEPTANCE AND REJECTION OF A PROMISE

(1) Scots law

(a) Acceptance of a promise

Unilateral promise is enforceable without the requirement of acceptance.¹⁶⁴ Moreover, an action following on a promise does not convert it into a contract.¹⁶⁵ Yet, there is a view suggesting that the promisee’s acceptance can result in a concluded contract. As explained by McBryde, the law permits the future effect of juristic acts to alter according to the reaction of another.¹⁶⁶ Thus, a contract may be created if a promise is accepted. McBryde’s argument was made with reference to *Chapman v Aberdeen Construction Group Plc*¹⁶⁷, where the court made an observation regarding the effect of an option when it is accepted. An option can be seen either as a firm offer or as a unilateral promise, the latter being the more common.¹⁶⁸ The issue under discussion here is concerned with the latter point. If an option is a unilateral obligation, what is the legal effect of an option when it has been accepted? By citing Gloag,¹⁶⁹ the court explained that “...if the option fell to be regarded as a promise or unilateral obligation on the part of the defenders, that

¹⁶² DCFR, Art II.–4:301.

¹⁶³ *Commentary on the Draft Common Frame of Reference* 340.

¹⁶⁴ Stair, *Inst* 1.10.4; Smith, *Short Commentary* 745-746; Gloag, *Contract* 4; McBryde, *Contract* para 2-03; *Smith v Oliver* 1911 SC 103 at 111, per Lord President Dunedin; *Cawdor v Cawdor* 2007 SLT 152 at para 15, per Lord President (Hamilton); *Regus (Maxim) Limited v Bank of Scotland plc* [2013] CSIH 12 2013 at para 34 per Lord President.

¹⁶⁵ *Smith v Oliver* 1911 SC 103; See also *Miller v Tremamondo* (1771) Mor 12395.

¹⁶⁶ McBryde, *Contract* paras 2-28-2-34.

¹⁶⁷ 1993 SLT 1205.

¹⁶⁸ This is discussed again in Chapter VII.

¹⁶⁹ Gloag, *Contract* 24–25.

promise was accepted by the payment of £1 by the pursuer and accordingly a contract was thereby constituted.”¹⁷⁰ The court’s explanation suggests that there is a possibility that an accepted promise can be converted into a contract in certain circumstances such as the case of an option.

Nevertheless, in the recent 2013 case of *Regus (Maxim)* earlier mentioned,¹⁷¹ the court explicitly disagreed with the view that a promise can be converted into a contract. The court stated: “where the promise is made subject to a condition requiring action by the promisee, the fulfilment of the condition does not convert the promise into a contract *ex post facto*.”¹⁷² The distinction between a conditional promise and a conditional offer “is a material and significant distinction...”¹⁷³ Although this explanation is directly concerned with the case of a conditional promise, it may be inferred that the court suggested that a promise cannot be converted into a contract in every case.

This thesis supports the approach that a promise cannot be converted into a contract even if it is accepted. The theory that an accepted promise can give rise to a contract creates an inconsistency in the concept of a voluntary obligation in Scots law. In Scots law promise and contract are different obligations within the obligational framework, and their juristic nature is determined from the moment that the obligation comes into existence. Thus, if an accepted promise can be converted into a contract, this would cause the distinction between unilateral and bilateral obligations to become less precise since both of them can constitute a bilateral obligation. There would be no certainty whether an undertaking is a promissory or a contractual obligation. Consequently, the approach that a promise cannot be converted into a contract would provide a more satisfactory outcome.

¹⁷⁰ 1993 SLT 1205 at 1213, per Lord Justice Clerk (Ross).

¹⁷¹ [2013] CSIH 12.

¹⁷² *Ibid* at para 35, per Lord President.

¹⁷³ [2013] CSIH 12 at para 35, per Lord President.

(b) Rejection of a promise

The Institutional writers stated that under Scots law a promisee may reject a promise, resulting in lapse of the obligation.¹⁷⁴ Therefore, if a promisee rejects the promise, he or she is no longer entitled to enforce it.¹⁷⁵ .

(2) Thai law

(a) Acceptance of a promise

(i) Acceptance of promise of reward

Thai commentators have different views regarding acceptance of promise of reward. First, some explain that the “completed act” as specified in the advertisement of reward is regarded as an acceptance.¹⁷⁶ The acceptance arises when the person who completes the act asks for the reward, rather than at the time when the act is completed.¹⁷⁷ Hence, notification to the promisor that the performing person wishes to get the reward is regarded as an acceptance, and it creates a contract between the parties.¹⁷⁸

Secondly, opponents of the aforesaid theory argue that the completed act stated in the advertisement of reward should not be regarded as the “acceptance” on the grounds that the intention of the offeree who accepts the offer is different from the intention of the person who completes the act in the case of reward.¹⁷⁹

This thesis supports the view that a promise of reward does not require an acceptance. When an offeree accepts an offer, he/she must always have the intention

¹⁷⁴ Stair, *Inst* 1.10.4; Bell, *Prin* §8 (He cited *Allan v Colzier* (1664) Mor 9428).

¹⁷⁵ McBryde, *Contract* para 2-30. He cited Stair 1.10.4 and Bell, *Prin* s8.

¹⁷⁶ C Tingsabadh, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 2 มาตรา 354-452* (Commentary on the Civil and Commercial Code: Book 2 Sections 354-452), 5thedn (1983) 27; B Sujiva, “ข้อสัญญาที่กำหนดขึ้นฝ่ายเดียว” (Contract Terms that are Made Unilaterally) (1966) 24(1) *บทบัญญัติ* (Thai Bar Journal) 58 at 58-59.

¹⁷⁷ *Ibid.*

¹⁷⁸ Sujiva (n 176) 58-59.

¹⁷⁹ Sothibandhu, *Juristic acts and Contracts* 326.

to accept the offer. This differs from the completed act in the case of a promise of reward. A promisor of an advertisement promise is bound to give the reward to whoever performs the act, even if that person does not have an intention to obtain the reward.¹⁸⁰ It is therefore possible that a person who completes the act may not know that by doing that action he/she can get the reward, and even then there is no contract between the parties.

(ii) Acceptance of promise to enter into a contract

It is agreed amongst Thai scholars that a promise to make a contract requires an acceptance. This stems from the fact that, as already noted, under Thai law this type of promise is regarded as per se an offer. Hence, it is necessary for the promisee to accept the promise in order to complete the contractual obligation. For example, the court held that if the tenant did not accept the promise of lease before the lease ended, the promise of lease lapsed and the expression of intention to accept the promise of lease after that had no legal effect.¹⁸¹

(b) Rejection of a promise

Thai law does not regulate the rejection of a promise. However, according to the theory of autonomy of will¹⁸² and the fact that a promise is a unilateral obligation binding only the promisor, the promisee should have a right either to accept or reject the promise.

¹⁸⁰ Thai Code, §362.

¹⁸¹ Supreme Court Decision 1051/1971 (B.E. 2514).

¹⁸² As discussed in Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (4) Will theory in Thai law.

(3) Comparison

(a) Acceptance of a promise

(i) Similarities and differences between the studied systems

The position regarding acceptance of a promise in the two systems shows some similarities but is not exactly the same. In Scots law, a promise, in any case, does not require an acceptance. Although there is a theory suggesting that an accepted promise can be converted into a contract, this explanation nevertheless seems to contradict the position of a promise as a separate class of obligation. Hence, the view that the promisee's acceptance creates an agreement between the promisee and the promisor is not satisfactory.

Under Thai law, one has to distinguish between promise of reward and promise to make a contract. According to the preferred approach of this thesis, the former is similar to the approach under Scots law in that a promise of reward is binding without acceptance. The Thai and Scottish approaches, however, differ when it concerns promise to make a contract. Thai law requires an acceptance for such a promise.

(ii) The more effective approach

The Scottish promissory approach, without the requirement of acceptance, presents a more effective structure of the law of obligations than the Thai approach. This is seen from a number of doctrinal applications. Firstly, in Scots law it is easier to distinguish the obligation of contract and the obligation of promise. The promisee can enforce the promise regardless of acceptance.¹⁸³ Consequently, there is no necessity to consider the method or time of acceptance.¹⁸⁴

¹⁸³ *Cawdor v Cawdor* 2007 SLT 152 at para 15 per The Lord President (Hamilton).

¹⁸⁴ McBryde, *Promises* 51.

In Thai law it is much more difficult to distinguish between an offer and a promise to make a contract. Both can constitute a contract and they each require an acceptance from the offeree/promisee. Moreover, there is an inconsistency between promise to make a contract and promise of reward. The former requires an acceptance whereas the latter does not. Therefore, the approach of Scots law may be useful for Thai law. A sharp distinction between promise and offer results from the approach of Scots law in seeing them as separate obligations.

Under the DCFR, a unilateral promise can be merged into a contract if it is accepted by the promisee.¹⁸⁵ Nevertheless, this suggests that there is no consistency on the legal character of unilateral promise under the DCFR. It is doubtful why a unilateral obligation can be merged into a bilateral one. This approach may cause complications. Thai law has experienced this complexity. As noted, Thai lawyers have struggled to distinguish a promise to make a contract from an offer.

The discussions under the DCFR and Thai law can be helpful for resolving the controversy regarding an accepted promise under Scots law. They reflect the fact that the approach which holds that a unilateral undertaking can be merged into a contract if it is accepted makes it difficult to distinguish between a unilateral undertaking and an offer. Scots law therefore should retain its approach that a promise cannot be converted into a contract, given that this is the approach which provides a satisfactory outcome already.

(b) Rejection of a promise

In Scots law, it is clear that a promise may be rejected by the promisee, and if so, it lapses once it is rejected. The Thai Code, by contrast, does not regulate this matter. The DCFR provides a similar rule to Scots law. The general rule is that if a unilateral juristic act, including a promise, confers a right or benefit on the person to whom it is addressed, it can be rejected by that person.¹⁸⁶ The reason behind this rule is that an

¹⁸⁵ *Commentary on the Draft Common Frame of Reference* 126.

¹⁸⁶ DCFR, Art II-4:303.

individual should have the freedom not to accept a right or benefit which he/she does not want.¹⁸⁷ The result in the case where a promise is rejected is that any right or benefit conferred by a promise is treated as never having arisen.¹⁸⁸

Thai law could benefit from these examples in order to develop a clearer rule on the promisee's ability to reject the promise. This would prevent theoretical problems arising e.g. whether a promisee has a right to reject a promise, and whether he/she still retains the right to enforce the promise if he/she had rejected it.

D. LEGAL EFFECTS OF A PROMISE

There are two important issues regarding the legal consequences of promises which will be discussed in this section, namely the revocation/withdrawal of a promise and lapse of a promise.

(1) Scots law

(a) Revocation of a promise

Once a promise is validly made, the promisor is legally bound by his/her promise and cannot revoke it thereafter,¹⁸⁹ unless he/she has reserved the right to revoke.¹⁹⁰ This contrasts with an offer which can be revoked at any time before it is accepted.¹⁹¹

¹⁸⁷ *Commentary on the Draft Common Frame of Reference* 343.

¹⁸⁸ *Ibid.*

¹⁸⁹ Gloag, *Contract* 25; *Campbells v Glasgow Police Commissioners* (1895) 22 R 621 at 624; *Duguid v Caddall's Trustees* (1831) 9 S 844 at 847 per Lord Glenlee; *Effold Properties Ltd v Sprot* 1979 SLT (Notes) 84 at 85; *Regus (Maxim) Limited v Bank of Scotland plc* [2013] CSIH 12 2013 at para 34.

¹⁹⁰ *Love v Amalgamated Society of Lithographic* 1912 SC 1078 at 1082 per Lord Salvesen.

¹⁹¹ McBryde, *Promises* 50; McBryde, *Contract* para 6-53; Walker, *Contracts* para 2.9; *Campbell v Glasgow Police Comrs* (1895) 22 R 621; *J M Smith Ltd v Colquhoun's Tr* (1901) 3 F 981; *Countess of Dunmore v Alexander* (1830) 9 S 190; *Thomson v James* (1855) 18 D 1; *Regus (Maxim) Limited v Bank of Scotland plc* [2013] CSIH 12 at para 34.

(b) Lapse of a promise

(i) A reasonable period of time

The general rule is that if the offer fixes no time for acceptance, it must be accepted within a reasonable time.¹⁹² Conversely, a promise does not lapse after a passage of a reasonable period of time.¹⁹³ If a promise lapses after a period of time, this would suggest that “reasonable time” is treated as a period of prescription or limitation of obligation.¹⁹⁴

However, it may be possible for a promise to lapse after a period of time. In *Sichi v Biagi*¹⁹⁵, the defender granted an option to purchase a shop to the pursuer who was the tenant. It was held that the option granted could be exercised without any time limit. The decision is in accordance with the rule that a promise does not lapse after a reasonable time. Lord Keith, nevertheless, further observed that:

“Gloag suggests that an option might have to be exercised within a reasonable time. I doubt whether mere delay would be enough without some circumstances from which abandonment or personal bar might be inferred...”¹⁹⁶

There are two points which can be inferred from this observation of Lord Keith. Firstly, according to the court, Gloag suggested that there might be time-limit on the exercise of the option. Nevertheless, in Gloag’s *The Law of Contract*, he explained the issue regarding the lapse of a promise as being part of the general explanation of unilateral obligation, i.e. not being restricted only to the case of an option. He wrote “a promise is irrevocable, unless refused, subject probably to the condition that fulfilment is demanded within a reasonable time.”¹⁹⁷ It appears that Gloag in fact suggested that a time-limit on the exercise of a unilateral obligation applies to a case where a promise is made with a condition, and such a condition requires it to be

¹⁹² McBryde, *Contract* para 6-66-70; Gloag, *Contract* 36; *Hall-Maxwell v Gill* (1901) 9 SLT 222.

¹⁹³ Stair, *Inst* 1.10.4; Black, *Obligations* para 617.

¹⁹⁴ McBryde, *Promises* 65.

¹⁹⁵ 1946 SN 66 at 68 per Lord Keith.

¹⁹⁶ *Ibid.*

¹⁹⁷ Gloag, *Contract* 25.

fulfilled within a reasonable length of time. This is normally the case where the promisor has clearly stated such a condition when he/she made the promise. It does not apply to the case of simple, unconditional, promise. Secondly, it seems that Lord Keith himself suggested that there might be some circumstances where a delay in the exercise of an option may amount to abandonment or personal bar. These doctrines then prevent the promisee from exercising the option. In short, there may be an exception in that a promise may lapse after a reasonable length of time if the courts are satisfied that the doctrines of abandonment or personal bar, which arise from a delay in exercising the option, apply in this case.

The general period of prescription for obligations is five years, from the date when the obligation first became enforceable.¹⁹⁸ However, prescriptive periods of twenty years apply if it is a bank note¹⁹⁹ or any obligation relating to land.²⁰⁰ In *Smith v Stuart*²⁰¹, the defender had undertaken to enter into an agreement with the pursuer, his sister, to give her half of the proceeds of the sale of a land. It was accepted by both parties that the pursuer had made a unilateral binding obligation. The main dispute was whether the defender had undertaken an obligation relating to land to which the twenty-year prescription applied. The court explained that “the obligation contained in the Undertaking is not an obligation relating to land and so prescribes in 5 years.”²⁰² It is further observed that “the obligation does not come into force until the Defender sells his land, which may never take place.”²⁰³

(ii) Death of the promisor

An offer lapses because of the death of the offeror. The offeror’s heir is therefore not bound by the offer.²⁰⁴ Conversely, a promise does not cease to be effective when the

¹⁹⁸ Prescription and Limitation (Scotland) Act 1973, ss 6 and 7, Sched 1.

¹⁹⁹ *Ibid.*

²⁰⁰ Prescription and Limitation (Scotland) Act 1973, s 6 (1) (2) Schedule 1.

²⁰¹ 2010 SCLR 131; 2009 GWD 8-140; 2009 WL 392203. The decision was upheld by the Court of Session ([2010] CSIH 29). However, the Court of Session only considered whether the obligation of the party related to the land. Therefore, this thesis refers to the decision of the Sheriff Court for the discussion regarding the date when the obligation first became enforceable.

²⁰² *Ibid* at 13.

²⁰³ *Ibid.*

²⁰⁴ Stair, *Inst* 1.10.6; Bell, *Prin* §79; McBryde, *Contract* paras 6-69-6-73.

promisor dies and the promisor's heir will be bound by the promise.²⁰⁵ In the *Sichi v Biagi*²⁰⁶ case discussed earlier, the court ruled that “[a]n obligation [unilateral promise] conferring an option on the pursuer, the agreement is clearly binding on the deceased's representative in the property in question, who in this case is his heir...”²⁰⁷

(2) Thai law

(a) Withdrawal of a promise

A promise of reward can be withdrawn even after it becomes effective. Unless stated otherwise by the promisor, he/she is entitled to withdraw his/her promise by the same means used for advertising.²⁰⁸ If a promise cannot be withdrawn by the same means used for advertising, withdrawal may be made by other means. However, such withdrawal is valid only against those persons who know of it.²⁰⁹ In contrast, a promise made to a specific promisee, e.g. a promise to make a contract, cannot be withdrawn. If the promisor withdraws it, the withdrawal has no legal effect and he/she is still bound by the promise.²¹⁰

(b) Lapse of a promise

(i) A reasonable period of time

Unlike an offer, a promise does not lapse after a reasonable period of time. This rule applies to both a promise made to the public and to a specific individual. However, as discussed, a promise of reward can be withdrawn before a specified act has been

²⁰⁵ *Smith v Oliver* 1911 SC 103 at 111; *Sichi v Biagi*, 1946 SN 66 at 67 per Lord Keith; Black, *Obligations* para 616; McBryde, *Contract* para 2-16; McBryde, *Promises* 50.

²⁰⁶ *Sichi v Biagi*, 1946 SN 66 at 68 per Lord Keith.

²⁰⁷ *Ibid* at 67 per Lord Keith.

²⁰⁸ Thai Code, §363.

²⁰⁹ *Ibid*.

²¹⁰ *Sotthibandhu, Sale* 76-77.

fulfilled. This means that a promise of reward lapses if it is withdrawn by the promisor.

As noted, the law does not permit a promisor to withdraw a promise to make a contract once becoming effective. Nonetheless, a promise of sale may lapse if the promisor complies with the means stated in §454 para 2. A promisor can cause a promise of sale to lapse by fixing a reasonable time and notifying the promisee that he/she must give a definite answer within that time. If the promisee does not provide an answer within the specified time, the promise will lapse. As can be seen, the promisor is not entitled to withdraw the promise freely.²¹¹ Thus, if the promisor tries to withdraw the promise of sale, for example, the withdrawal has no legal effect and the contract of sale will still be concluded if the promisee accepts the promise.²¹²

According to the court's decision, a promise of sale without specifying a period for acceptance binds the promisor although it was made over ten years ago.²¹³ The court held that if the promisor did not comply with the means stated in §454 para 2, he/she would still be bound by his/her promise.²¹⁴ The court's decision suggests that there is no circumstance where a promise to make a contract lapses automatically or after a reasonable period.

Nevertheless, the criticism has been made that this decision is unfair to the promisor on the grounds that he/she is bound by his/her promise for too long a period.²¹⁵ Some²¹⁶ therefore suggest that a promise to make a contract which does not specify a period of acceptance should not bind the promisor forever, even if he/she does not comply with the means stated in §454 para 2. However, there is no consensus amongst legal scholars as to the period during which a promise should be binding. Consequently, clarity is required in Thai law.

²¹¹ Thai Code, §454 para 2.

²¹² Sothibandhu, *Sale* 76-77.

²¹³ Supreme Court Decision 1004/1942 (B.E. 2485).

²¹⁴ Supreme Court Decision 1004/1942 (B.E. 2485); cf Supreme Court Decision 5649/2014 (B.E. 2557).

²¹⁵ Sothibandhu, *Sale* 79-80.

²¹⁶ *Ibid.*

(ii) Death of the promisor

In Thai law, an offer does not automatically lapse because of the death of the offeror. It depends on whether the offeree had notice of the fact of the offeror's death before accepting the offer or not. If yes, the offer lapses and does not bind the offeror's heir.²¹⁷

The Code does not contain a provision dealing with the legal effect of a promise if the promisor dies. The Thai courts, nonetheless, have applied the rule that an offer lapses on the offeror's death (if the offeree was aware of the death of the offeror) to the case of promises.²¹⁸

(3) Comparison

(a) Revocation/Withdrawal of a promise

There are both similarities and differences regarding revocation/withdrawal of promise between the studied systems. In Scots law a promise, unless the right to revoke has been reserved, is irrevocable once the obligation comes into existence. In Thai law, the rule regarding a promise made to a specific promisee such as promise to make a contract is similar to that of Scots law. However, a promise made to the public can still be withdrawn after it is made.

There is a contradiction between the withdrawal of a promise made to the public and a promise made to a specific person in Thai law. Initially, it seems that there is a theoretical incoherence between these two types of promises. However, there is a reason why the law permits promisors of a public promise to withdraw their promises. When a promise made to the public becomes effective, no one individual has the right to enforce it yet. This is different from a promise made to a specific person where the promisee has the right to enforce it. Therefore, it is reasonable for

²¹⁷ Thai Code, §§169 para 2, 360.

²¹⁸ Supreme Court Decisions 1212/1974 (B.E. 2517); 5995-5996/1995 (B.E. 2538); 4392/2004 (B.E. 2547); 1602/2005 (B.E. 2548).

the law to permit the promisor of a public promise to withdraw it. Although a promisor is permitted to withdraw his/her promise, the recipients of the promise are also protected by the provision that the withdrawal must be made by the same means used for advertising the promise, and it is only valid against those who know of the withdrawal.

(b) Lapse of a promise

A promise in both Scots law and Thai law does not lapse after a reasonable period of time. However, the position of Scots law is more precise than in Thai law. There is a clear principle that, in normal cases, a promise will prescribe in five or twenty years. Moreover, the death of the promisor does not terminate the promise.

The Thai courts held that a promise of sale does not lapse as long as the promisor does not comply with the means stated in §454 para 2.²¹⁹ Initially, the court's decision appears to be satisfactory because the decision is based on the existing law. There is no provision under the Code providing that a promise will lapse after a reasonable period of time. However, the court's decision reflects an unfairness to the promisor. In comparison with other juristic acts such as contract, the debtor of a contractual obligation is bound for only ten years, according to the general provisions regarding prescription.²²⁰ It therefore seems anomalous for the promisor to be bound forever. In addition, in the case of a promise to make a contract, there is no certainty whether the contract will be concluded or not. This may have economically adverse effects on commercial transactions. Also, it could be difficult to find evidence to prove the existence of the promise if too much time has passed. This problem reflects a defect in this area of Thai law.

Moreover, the Thai courts apply to the case of a promise the rule that an offer ceases to be effective because of the death of the offeror. Nevertheless, the court's decision is rather unsatisfactory on the basis that it is not compatible with the actual nature of

²¹⁹ Supreme Court Decision 1004/1942 (B.E. 2485).

²²⁰ Thai Code, §193/30.

a promise. If a promisor has a stronger desire to bind him/herself than that of an offeror, a promise should still be binding even if the promisor dies. Thus, the rule that an offer lapses because of the death of the offeror should not apply to the case of promise.

The DCFR specifies a rule governing the time limit for enforcing an obligation. The period of prescription for an obligation is generally three years.²²¹ A person should not be bound by his/her obligation for too long a period. It causes an uncertainty whether the obligation will be enforced or not.²²² This policy derives from the Civilian idea of extinctive prescription, namely the loss of a right due to the lapse of time.²²³ This instrument permits the debtor to refuse performance because of the lapse of time.

In fact, Thai law has a general rule regarding prescription: a claim is barred by prescription if it has not been enforced within ten years,²²⁴ unless the law is otherwise stipulated.²²⁵ This rule, however, is not applied to promise because it is not a standalone obligation. The act of accepting a promise by a promisee is not regarded as a claim, but as a completion of an obligation of contract. Therefore, the period of prescription starts from the time by which the contract is concluded, and not the time at which the promise is made. This enhances the idea that if Thai law regards a promise as a standalone obligation, the general rule of prescription can apply to promises.²²⁶

²²¹ DCFR, Art III.-7:201.

²²² The Commentary states: “One of the functions of the law of prescription is to prevent costly and long-drawn out law-suits (*ut sit finis litium*).” *Commentary on the Draft Common Frame of Reference* 1145.

²²³ *Ibid* at 1139.

²²⁴ Thai Code, §193/30.

²²⁵ For example, the claim for damages arising from delict is barred by prescription after one year. Thai Code, §448.

²²⁶ See F. CONCLUSIONS, (2) Advantages of regarding promise as a standalone obligation.

E. PROMISES TO KEEP AN OFFER OPEN

(1) Scots law

Although promise is obviously distinguished from offer in the obligational framework, it is possible to make a promise in an offer. This could take the form of a promise to keep an offer open for a certain specific period of time. A number of commentators suggest that in these circumstances an offeror should be obliged to keep his/her offer open for the specified period.²²⁷ There have been a number of cases in which the courts held that a statement to keep an offer open is an enforceable promise.²²⁸ In *Marshall & M'Kell v Blackwood of Pitreavie*²²⁹, the defender offered a sale of victuals to the pursuers by giving “a fortnight to return an answer.” The acceptance reached the defender within the specified time. However, the defender had sold the victuals to another person before he received the acceptance. It was held that the defender was liable in the pursuers’ damages for the higher price of the victuals. Also, in *Littlejohn v Hadwen*²³⁰, although the offer made by the defender did not give rise to a binding contract, the court made an observation that a statement to keep an offer open is an enforceable promise. One of the defender’s claims was that he was entitled to withdraw the offer although his offer had specified a period of ten days for acceptance. The court, however, explained that the defender was not free to withdraw his offer within the specified period. As Lord Ordinary Fraser stated, “it was an obligation, no doubt unilateral, but still binding upon the offeror during the appointed period”.²³¹ The court explained that the English legal doctrine that an offer can be withdrawn at any time before it is accepted is not in accordance with the rule under Scots law.²³² The court also referred to the decision in the *Marshall* case to support the irrevocability of this kind of offer in Scots law.²³³

²²⁷ E.g. TB Smith, *Short Commentary*, 747; Gloag, *Contract* 35; McBryde, *Promises* 50.

²²⁸ The author of this thesis has found three cases dealing with a promise to keep an offer open.

²²⁹ *Marshall & M'Kell v Blackwood of Pitreavie*, 12th Nov 1747 (Elch Sale).

²³⁰ (1882) 20 SLR 5.

²³¹ *Ibid* at 7.

²³² *Ibid*.

²³³ *Ibid* at 8.

The rule that an offeror who undertakes to keep his/her offer open for a certain time cannot withdraw his/her offer in that period was observed by the House of Lords in *Paterson v Highland Railway Co.*²³⁴ Here, Viscount Dunedin stated:

“[T]he opinion of Lord Ordinary Fraser, expressed in the now old case of *Littlejohn v. Hadwen* ... is right, *i.e.*, if I offer my property to a certain person at a certain price, and go on to say: "This offer is to be open up to a certain date, " I cannot withdraw that offer before that date, if the person to whom I made the offer chooses to accept it.”²³⁵

He further explained that “the offer as made contained two distinct promises: (1) to sell at a certain price, and (2) to keep the offer open. It seems to me that (2) is completely wanting in the present case.”²³⁶ Although Viscount Dunedin disagreed with the respondent who argued that there was a promise to keep an offer open, it can be inferred from his explanation mentioned above that he supported the proposition that in Scots law a promise to keep an offer open is binding within the stated time.

In short, literature and case law suggest that in Scots law an offeror can make a unilateral promise to keep his/her offer open until a particular time. By doing so, the offeror is not entitled to withdraw the offer before the expiry of the specified period.

(2) Thai law

(a) Irrevocable offers under Thai law

An offeror who specifies a fixed time for acceptance cannot withdraw his/her offer within that period. The law states: “An offer to make a contract in which a period for acceptance is specified cannot be withdrawn within such period.”²³⁷ This is similar to the effect of a promise to keep an offer open in Scots law. However, Thai academics

²³⁴ 1927 SC (HL) 32.

²³⁵ *Ibid* at 38.

²³⁶ *Ibid*.

²³⁷ Thai Code, §354.

do not explain this obligation on the basis of promise. Indeed, it appears that there is no discussion amongst Thai academics on this point.²³⁸

There is one writer who superficially explains the issue under discussion. Pramoj states that irrevocable offers are prohibitions against destroying a declaration of intention which has been made (by the offeror).²³⁹ This explanation, however, does not directly explain the actual idea behind the rule. It seems that the writer tries to explain that an offeror is obliged to keep his/her offer open because he/she has already expressed his/her intention and should respect it. However, this explanation does not clarify the theory regarding the binding nature of the obligation. It does not explain why an offer can bind an offeror even if there is no contractual obligation existing.

(b) Origins of the Thai principle

The idea that an offer specifying a period for acceptance cannot be withdrawn in Thai law is influenced by §145 of the BGB.²⁴⁰ It is therefore worth analysing the actual idea behind this principle by considering the German principle.

Section 145 of the BGB²⁴¹, in the textual forms of this provision in force at the time of drafting of the Thai Code, states: “If a person offers to another the making of a contract he is bound by the offer, unless he has excluded this obligation”²⁴² Unlike the Thai Code, §145 of the BGB does not clearly state that an offer in which a period

²³⁸ The author is not aware of any writer explaining the idea behind an irrevocable offer. Most writers only explain that an offer is bound by his/her offer because of the effect of §354 e.g. Sothibandhu, *Juristic acts and Contracts* 313-314; Sanongchart, *Juristic acts and Contracts* 348; Sethabutr, *Juristic acts and Contracts* 211-212; A Sumawong, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วย นิติกรรม สัญญา (Commentary on the Civil and Commercial Code: Juristic acts and Contracts), 6th edn (2010) 230.

²³⁹ S Pramoj, ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ 2 เล่ม (Civil and Commercial Code on Juristic acts and Obligations 2 Books (n.d., Thaiwattanapanich Publishing), vol 1. 450.

²⁴⁰ The other source of this provision is Art 521 para 1 of the Japanese Code. *Report of the Revised Draft* 235-238; *Index of Civil Code* 160.

²⁴¹ The current §145 of the BGB appears as “Any person who offers to another to enter into a contract is bound by the offer, unless he has excluded being bound by it.” Federal Ministry of Justice and Consumer Protection, *German Civil Code: BGB*, available at http://www.gesetze-im-internet.de/englisch_bgb/.

²⁴¹ The texts are from *Translation of Japanese Civil Code (1898)* 140.

²⁴² The texts are from *Translation of German Civil Code (1907)* 33.

for acceptance is specified cannot be withdrawn within such period. Nevertheless, §148 of the BGB²⁴³, in the textual forms of this provision in force at the time of drafting of the Thai Code, states: “If the offerer²⁴⁴ has fixed a period of time for acceptance of the offer, the acceptance may take place only within that period.”²⁴⁵ It can be seen that under German law an offeror is bound to keep his/her offer open by the effect of §145. However, §145 does not specify the period during which the offer binds the offeror, but this is governed by §148. Therefore, these two provisions of the BGB make the effect of irrevocable offers under German law similar to that under Thai law.

The texts of the German provisions do not express the reasons compelling an offeror to keep his/her offer open. However, the theory behind this idea can be traced through the history of the drafting of the BGB. The evidence shows that the provisions regarding withdrawal of offer under the BGB were suggested by Franz von Kübel.²⁴⁶ He wrote in his submission to the first drafting Commission of the BGB on the topic of contractual offers of “[t]he unilateral promise as grounding the obligation to keep one’s word (contractual offer)”.²⁴⁷ This explains why under German law an offeror is bound to keep his/her offer open for a specified period. Without a promissory analysis it would be highly difficult to understand why an offer binds the offeror.²⁴⁸ This is because within a contractual analysis, there is no contract as long as the offer has not been accepted. A promissory analysis therefore gives us

²⁴³ The current §148 of the BGB appears as “If the offeror has determined a period of time for the acceptance of an offer, the acceptance may only take place within this period.” Federal Ministry of Justice and Consumer Protection, *German Civil Code: BGB*, available at http://www.gesetze-im-internet.de/englisch_bgb/.

²⁴⁴ The source that the present writer consults uses the spelling “offerer”.

²⁴⁵ The texts are from *Translation of German Civil Code (1907)* 33.

²⁴⁶ As discussed in Chapter II, during the course of the drafting of the BGB, Kübel proposed that unilateral promises should to be recognised as a main source of obligations. However, his proposal was not adopted. Nonetheless, Kübel’s proposal was taken into account to some degree. The BGB eventually recognises particular types of unilateral obligations which cannot be characterised by any other forms of obligations e.g. a promise of a reward and an irrevocable offer.

²⁴⁷ Translation by Hogg of von Kübel’s original German text, which reads: “Das einseitige Versprechen als Grund der Verpflichtung zum Worthalten (Vertragsantrag)” (von Kübel, in Werner Schubert (ed), *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuchs, Recht der Schuldverhältnisse*, (De Gruyter, Berlin 1980) vol 3, s 1145 f), as cited by Hogg in Hogg, *Promises* 217-218.

²⁴⁸ BGB, §§145, 148.

the reason why the offeror should be bound to keep his/her offer open even if there is no contractual liability.²⁴⁹

(c) Conclusion

In German law the binding characteristics of an offer containing a time limit for acceptance are not contractual, but rather promissory. This analysis can apply to an offer specifying the period for acceptance in Thai law too. The Thai principle has its source in German law and has the same legal effects as the German provisions.

(3) Comparison

Irrevocable offers in the two systems are, in essence, similar: the offeror who has bound himself/herself to keep his/her offer open for a certain specified period of time cannot withdraw his/her offer. The difference, however, is that in Scots law this idea is precisely explained through promissory language. In Thai law there is no reference to promissory liability. In fact, Thai scholars do not explain the theory behind the rule. Nonetheless, by tracing the origins of the model of the Thai provision, it is found that the obligation binding the offeror in this case has a promissory nature. Therefore, the binding nature of an irrevocable offer in both Scots and Thai law is promissory.

The DCFR also covers an offer containing a time limit for its acceptance. The rule is that the revocation of such an offer is ineffective.²⁵⁰ It is justified to assume that, if the offeror states a period for the acceptance for his/her offer, the offeree will reasonably believe that there will be a concluded contract if he/she accepts the offer within the specified time.²⁵¹

The effect of an offer stating a period for acceptance under the DCFR is similar to it is under Scots law and Thai law. However, like Thai law, the DCFR does not

²⁴⁹ Hogg, *Promise in European Private Law* 465.

²⁵⁰ DCFR, Art II.-4:202.

²⁵¹ *Commentary on the Draft Common Frame of Reference* 302.

regulate the rule through promissory language. Nonetheless, there is a link to the idea of unilateral promise. The Commentary explains that in circumstances where an offer is specified with a fixed time for acceptance, “the offer itself amounts to a unilateral juristic act which is binding without acceptance, since it carries with it an express or implied unilateral undertaking not to revoke it.”²⁵² Therefore, the actual binding characteristic of an offer specified within a time limit for acceptance is a promissory obligation. This is similar to the position explored within this thesis in Thai law, i.e. that the real binding characteristic of this obligation is promissory, albeit promissory language is not used.

F. CONCLUSIONS

(1) What conclusions can be reached on the Scots/Thai comparative analysis?

(a) A clear Scottish and an unclear Thai concept

The law of promise is well worked out in Scots law on a conceptual level. Generally Scots law appears to have clear rules dealing with promise in most of the studied aspects, whereas Thai law has ambiguous concepts on the law of promise.

Firstly, as Scots law makes clear that a promise does not require an acceptance, a promissory and a contractual obligation are clearly distinguished from each other. In Thai law, a promise to make a contract requires an acceptance whereas a promise of reward does not. Thus, there is no consistency amongst types of promise. In addition, as both an offer and a promise to make a contract require the acceptance of the other party, there is no theory which could offer a satisfactory approach in distinguishing them either at a conceptual or at a practical level.

Secondly, Scots law has satisfactory rules in relation to the legal consequences of promissory obligation, namely (i) a promise does not lapse after a certain period of time and (ii) a promise does not lapse as a result of the promisor’s death. These rules

²⁵² *Ibid* at 135.

are compatible with the juristic nature of a promise that it is a freestanding ground of liability. Thai law, conversely, has unsatisfactory rules about the legal effect of promise. The Thai court's approach in applying the rule that the offeror's death terminates the offer to promise is unsatisfactory. This is because it is not compatible with the theory that the extent to which the promisor wishes to be bound is stronger than that of an offeror. Also, the court's approach to the effect that a promise of sale binds the promisor forever appears to be unfair to the promisor on the grounds that there should be a prescriptive period in enforcing an obligation.

Thirdly, Scots law offers a clear justification regarding the irrevocability of offers specifying a period of acceptance. Although there is no contractual obligation between the parties as yet, the offeror is obliged to keep his/her offer open for the specified period due to the binding force of a promissory obligation. In Thai law, the legal effects of an offer specifying a period of acceptance are similar to those of Scots law. However, Thai lawyers cannot provide any satisfactory legal reasoning to establish the principles behind this rule.

Nevertheless, there is an uncertainty in relation to the communication of a promise in both systems. Neither Scots nor Thai law has a clear approach to the question whether a promise requires a communication to the promisee. Consequently, clarity is required in both systems.

(b) Factors causing differences between Scots and Thai law

(i) Institutional writers/ Drafters of the Thai Code

The difference between the two systems in relation to a clear and coherent concept of promise may arise from the fact that, inter alia, in Scotland the law of promise has been well set out since the period of the Institutional writers, notably Stair. A number of clear promissory rules which have been discussed in this chapter have benefited from Stair's approach. An obvious example is the sharp distinction between promise and contract, which can be down to Stair's promissory account. Subsequently,

Scottish legal scholars²⁵³ and the Scottish courts²⁵⁴ have generally relied upon Stair's promissory approach when explaining promissory obligations.

In contrast, the law of promise has not been well organised and clarified under the Thai Code. Neither the general provision nor definition of a promise is given by the Code. As such, Thai law lacks conceptual clarity on what defines a promise as a promise. In addition, the drafters of the Code suffered from a misunderstanding about the actual nature of unilateral binding obligations. Recall that the drafters used the term "promise" both in the sense of a contractual promise and in the sense of a unilateral obligation. Also, the provisions of promise of reward (which is a genuine unilateral obligation) belong to the part related to the formation of a contract under the Code.²⁵⁵ Therefore, the fact that the Code was not well drafted, inter alia, results in difficulties in the application of this doctrine.

(ii) Courts

The Scottish courts also have an important role in establishing and clarifying the promissory rules. For instance, the Institutional writers did not clearly provide the objective test as a means of ascertaining the intention to undertake a binding promise. Instead, this approach was established by the Scottish courts. Also, the approach that a promissory obligation can only be created by clear and unambiguous words was not found from the Institutional writers' works. The courts had developed this specific rule based on the idea that, inter alia, promise is a unilateral obligation which is usually, although not exclusively, gratuitous (subject to the debate). It is an obligation that can only be undertaken by the promisor and brings no reciprocal benefit to the promisor in many cases. Hence, it must be clearly expressed in order to protect the promisor who is being enforced to perform the obligation.

²⁵³ E.g. Smith, *Short Commentary* 742-746; Gloag, *Contract* 5; McBryde, *Contract* para 2-02.

²⁵⁴ See Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (2) Promissory theory as explained by Institutional and contemporary writers, (a) Stair.

²⁵⁵ See Chapter IV, F. CONCLUSION, (2) Flaws in promissory provisions.

The role of the Thai courts in establishing promissory rules is not as obvious as that of the Scottish courts. This stems from the fact that Thailand is a codified system. Thus, it is not common for the courts to establish new legal principles. However, the fact that there are several uncertainties in the law of promise gave the Thai courts the opportunity to clarify a number of ambiguous promissory rules. Nevertheless, the promissory rules established by the Thai courts offer a rather unsatisfactory outcome. The rule that a promise of lease (which is not specified in the Code) is enforceable is sound because it is compatible with the will theory which plays a significant role in Thai private law. Nevertheless, both the rules that a promise is at an end if a promisor dies and that a promise binds the promisor even after ten years result in unfair outcomes.

(iii) Legal scholars

Part of the development of promissory doctrine must be attributed to Scottish legal scholars, who have helped to clarify promissory legal principles. For instance, the Institutional writers did not explain that rewards and options²⁵⁶ can be viewed as promissory in nature. These analyses were proposed by later legal scholars.²⁵⁷ Moreover, they have emphasised the value of the doctrine, especially its application in a commercial context. This is particularly the case of TB Smith, as noted in Chapter V.²⁵⁸

Thai commentators have also had a role in developing promissory doctrine, especially by pointing out the uncertainties and ambiguities of promissory principles. All of the issues which have been discussed in this chapter (except for the issue of the irrevocability of an offer) have already been pointed out by Thai scholars. However, their suggestions generally cannot satisfactorily resolve these problems.

²⁵⁶ See Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (2) Promissory theory as explained by Institutional and contemporary writers, (c) Contemporary writers, (ii) TB Smith.

²⁵⁷ E.g. TB Smith, *Short Commentary*, 747; Gloag, *Contract* 35; McBryde, *Promises* 50.

²⁵⁸ See Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (2) Promissory theory as explained by Institutional and contemporary writers, (c) Contemporary writers, (ii) TB Smith.

For instance, Thai academics argue that the courts' decision that a promise binds the promisor forever is not fair to the promisor. However, there has been no satisfactory approach offered by Thai scholars regarding the period during which a promise should be binding, and on what grounds. Moreover, thus far there has been no justification for the reason why an offeror who specifies a period for acceptance has to keep his/her offer open. In fact, this issue is completely omitted from the discussions amongst Thai lawyers.

(iv) Canon Law and the *ius commune*

The difference between the two systems may stem in part from the fact that Scots law was influenced by the Canon Law and was part of the *ius commune* tradition. Firstly, recall that the legal enforceability of a promise originated in the Canon Law, where both unilateral and bilateral promises were recognised. Secondly, the *ius commune* was the tradition where promise played a central role in analysing voluntary obligations. Although most of the *ius commune* systems did not develop a general enforcement of a unilateral promise, there was an ongoing debate within the *ius commune* regarding the acceptance of a promise during Stair's time. Stair, under the influence of Molina, supported the view that a promise is binding without acceptance. Thus, it is not surprising that Stair, who was inspired by, inter alia, the Canon Law and the *ius commune*, was able to propose the idea of a standalone promise.

Thai law was, of course, never directly influenced by the Canon Law. Thus, the canonists' treatment of promise was never directly received into Thai law. In addition, although Thai law was influenced by a number of Civilian jurisdictions, it is not a part of the European *ius commune* as such. Thai law borrowed some promissory principles from the Civilian tradition. However, the idea of a promise as a free-standing legal entity outwith contract was never introduced to Thai law. This stems from the fact that there is no Continental European system regards promise as an independent obligation. As discussed, the *Code civil* adopted a similar approach to Grotius in relation to promise in that a binding promise requires the acceptance of the

promisee. Although there was a later attempt to regard a promise as a source of obligation in the BGB, it did not succeed.²⁵⁹ This helps to explain why the notion of a standalone promise was never introduced to Thai law. Furthermore, English law was the first legal system which was received into Thailand. Recall that, before the promulgation of the Thai Code, the Thai courts applied English legal principles when traditional Thai law was not available. Also, Thai jurists, including those who were later appointed as the drafting committees of the Code, went to study in England.²⁶⁰ Presumably, those jurists were not familiar with the idea that a declaration of will can unilaterally create an obligation, given that this idea did not exist under English law. In addition, the drafting committee of the Thai Code comprised four drafters, of which three were Thai and one was French. Presumably, the French drafter was not familiar with the idea that a unilateral declaration of will can create an obligation either, given that under the *Code civil* a promise is not a genuine unilateral obligation. With this in mind, it comes as no surprise to find that the drafters of the Thai Code did not clearly understand the difference between unilateral and bilateral obligations.

The lack of understanding of unilateral and bilateral obligations has continually affected modern Thai scholars when dealing with the law of promise. As has been discussed, a number of Thai lawyers have explained that the complete act in the case of a promise of reward is deemed to be an acceptance, resulting in a contract between the parties.²⁶¹ This, however, contrasts with the fact that a person who completes the specified act can claim the reward even if he/she is not aware of its existence. Also, as noted in Chapter V, some suggest that promises under Thai law are unilateral contracts between two parties, but only one party is bound.²⁶² However, this theory fundamentally contradicts the nature of a promise in Thai law, in which a promise

²⁵⁹ As discussed in Chapter II, C. THAILAND: A NEWLY DISCOVERED MIXED LEGAL SYSTEM?, (2) Reception of foreign laws in Thailand, (d) Effects on the Thai promissory law as a result of the codification, (ii) Effects of the change from French to German models for the Thai Code.

²⁶⁰ This is explored in Chapter II, C. THAILAND: A NEWLY DISCOVERED MIXED LEGAL SYSTEM?, (2) Reception of foreign laws in Thailand, (a) Reception of English law.

²⁶¹ See Chapter VI, C. ACCEPTANCE AND REJECTION OF A PROMISE, (2) Thai law, (a) Acceptance of a promise, (i) Acceptance of promise of reward.

²⁶² See Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (2) Promissory theory as explained by Thai writers, (a) Controversies over legal status of promise.

can be created by a single party. Neither is it compatible with the characteristics of contract as an agreement between two parties. Also, some, under the influence of English law, propose that a promise to make a gratuitous contract or where a promisor receives nothing in return should not be enforceable.²⁶³ However, this proposition is not satisfactory because there is no requirement of consideration under Thai law.

(v) Concluding remarks

The fact that Thai academics have not yet acknowledged the distinction between unilateral and bilateral obligations, as different sources of obligation, may be an important factor in explaining why there has been no satisfactory approach dealing with the problems in this area of law. This therefore provides this thesis with an opportunity to offer a satisfactory approach in order to improve the theoretical structure of the Thai law of promise, given that, *inter alia*, the distinction between unilateral and bilateral obligations has been acknowledged in this thesis. There will be no defects, in relation to the confusion between unilateral and bilateral obligations, in the approach that this thesis will offer.

(c) Substantive roles of promise in the obligational framework

Promise has a substantive role in the obligation framework in Scots law. Scots law offers a clear doctrinal analysis regarding promissory legal issues, which stems from the fact that, *inter alia*, a promise is deemed to be an independent obligation. Moreover, as promise is binding without acceptance, it can be applied in any circumstance where a person unilaterally binds himself/herself for his/her expression.

As for Thai law, despite problems regarding its application, the functions that the law of promise performs in Thai law are useful. Promise has been used to oil the wheels of the law of obligations. It governs certain types of obligations which are both

²⁶³ See Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (4) Will theory in Thai law, (a) Will theory from the perspective of an analysis of voluntary obligation.

unilateral and binding. Obvious examples are promises of reward, which are legally enforceable regardless of the acceptance or even the acknowledgement of the promisee. Another example is the role that unilateral promise plays in an offer containing a time limit for acceptance. This type of offer binds the offeror because of the binding nature of promise. In addition, promise to make a contract can also be analysed as a unilateral binding obligation. Therefore, promise is a useful legal tool within the Thai legal system. There are also other practical circumstances under both Scots and Thai law which can be explained using a promissory analysis, to be discussed later in the next chapter.

Furthermore, the example of the DCFR in recognising unilateral undertaking as a source of obligation reflects the importance of unilateral obligation. The fact that there are similarities between the most recent model rule of European private law and the Scottish approach in enforcing unilateral promises shows that the idea that a declaration of will can unilaterally create an obligation is important in the theoretical framework of the law of obligations. This reflects the fact that the idea of bilateral obligation cannot deal with every issue in the area of voluntary obligations. There are circumstances where a person wishes his/her intention to be legally binding without any acceptance of the other party. Additionally, it is interesting to see that promise now has an important role to play in the most recent model of European private law.. It was once the case that a promise played a leading role in voluntary obligations within the *ius commune*. Its status was then no longer dominant in the European private law, and Scotland is the only jurisdiction which has continued to regard promise as a source of obligation. Although the DCFR is not regarded as the common law of Europe, at least the recognition of unilateral undertakings under the DCFR shows that the idea of unilateral obligation is important, and this is why it is included in the most recent model of European private law.

Finally, the reference to the doctrine of promissory estoppel under English law also reflects the importance of unilateral promise. Traditionally, English law has adopted a very restricted approach in enforcing a bare promise due to, inter alia, the doctrine of consideration. However, the discussion in this chapter shows that the traditional

approach that promissory estoppel could only be used as a “shield”, rather than a “sword”, appears to have been changed. Recent case law suggests that the English courts are prepared to recognise an estoppel if the courts are satisfied with the requirements of the doctrine.²⁶⁴ The English courts also appear to have used a holistic approach when dealing with estoppel in recent cases.²⁶⁵ The change in the English courts’ attitude towards bare promise therefore reflects the importance of unilateral obligations, given that the courts in jurisdictions where it is most difficult to enforce unilateral promises have made it more flexible for a unilateral promise to be enforceable than it used to be.

(2) Advantages of regarding promise as a standalone obligation

From the comparative treatment, the approach of considering promise as a source of obligations, as existed in Scots law and the DCFR, is very attractive to Thai law. It sharply divides the obligations of promise and contract, which will help to solve problems under Thai law. This section will describe benefits which Thai law could gain if it were to recognise promise as a separate class of obligation which is independent from contract. This will be done by making reference to the ambiguities regarding promissory principles which have been discussed in this chapter (and previous chapters).

Firstly, recall that it has been generally explained in Thai law that a promisor has a stronger intention to bind him/herself than that of an offeror, a person making an invitation to treat, and a person making an overture, respectively. However, the fact that Thai lawyers regard a promise to make a contract as per se an offer causes difficulties in distinguishing them.²⁶⁶ The Thai courts are required to engage in two stages of analysis in determining whether a person’s expression is a promise or not. The approach of regarding promise as an independent obligation can help to eradicate an overlap between promise to make a contract and an offer. Distinguishing

²⁶⁴ This is discussed in section A. THE NATURE AND CHARACTERISTICS OF PROMISE, (1) Scots law, (c) Binding characteristics of a promise, (i) A promise is binding without acceptance.

²⁶⁵ See *Ibid.*

²⁶⁶ This is discussed in section A. THE NATURE AND CHARACTERISTICS OF PROMISE, (2) Thai law and (3) Comparison.

them will be easier as they will be regarded as different juristic acts. If the courts find that a person intends his/her expression to be binding without the acceptance of the other party, it can be simply regarded as a binding unilateral obligation. Thus, the current approach of considering promises to enter into a contract as per se offers has to be changed. In the new approach, a promise to make a contract is entirely distinguished from an offer.

Secondly, the proposed approach helps to clarify the legal status of promise to make a contract under Thai law. If a promise is per se obligation, its legal nature would be clearly regarded as a unilateral juristic act, and not a unilateral contract. This suits its actual characteristics on the grounds that a promise under Thai law can be unilaterally made. Additionally, this makes the position of a promise to make a contract compatible with that of a promise of reward since the latter is seen as a “genuine unilateral promise” already.²⁶⁷ Consequently, there would be no confusion regarding the legal status of a promise to make a contract and promise of reward under Thai law.

Thirdly, the new approach helps to solve the problem regarding the period during which a promise is binding. A promise to make a contract is binding as long as the promisor does not comply with the means stated in §454 para 2. However, it is unfair for the promisor because he/she is bound for too long a period.²⁶⁸ The general rule regarding prescription suggests that there are limited periods of time in enforcing obligations. Hence, it is not justifiable that a creditor of a promissory liability can still enforce the obligation even if the time limit of the obligation has already passed. If promise is regarded as an independent obligation, the general rule of a prescriptive period of ten years can then undoubtedly apply to a promise. There is no need to provide a new provision regarding the period after which a promise lapses.

²⁶⁷ This is discussed in section A. THE NATURE AND CHARACTERISTICS OF PROMISE, (2) Thai law Binding characteristics of a promise.

²⁶⁸ This is discussed in section D. LEGAL EFFECTS OF A PROMISE, (2) Thai law, (b) Lapse of a promise, (i) A reasonable period of time.

Fourthly, the proposed approach provides a more satisfactory outcome to the case of the death of the promisor.²⁶⁹ If a promise is an independent obligation, it does not lapse when the promisor dies. The promisor's successor is still bound to perform the obligation. This is also compatible with the theory that the degree to which a promisor wishes to be bound is greater than that of an offeror. Finally, the new approach enhances the reason behind the rule concerning the irrevocability of offers specifying a period for acceptance.²⁷⁰ Although there is not yet contractual obligation, an offeror is bound to keep the offer open for the specified period as a result of a unilateral obligation.

However, considering promise as a separate class of voluntary obligations cannot automatically resolve the issue regarding its communication. This can be observed from the example of Scots law, where it has remained unsettled whether or not a promise requires communication to the promisee to becoming binding.²⁷¹ According to the preferred approach of this thesis, the theory which holds that a promise requires a communication to the promisee provides a more satisfactory outcome.

²⁶⁹ As discussed in section D. LEGAL EFFECTS OF A PROMISE, (2) Thai law, (b) Lapse of a promise, (ii) Death of the promisor.

²⁷⁰ This is discussed in section E. PROMISES TO KEEP AN OFFER OPEN, (2) Thai law.

²⁷¹ This is discussed in section B. COMMUNICATION OF A PROMISE.

Chapter VII

The Practical Application of Unilateral Promise

A promise is a unilateral obligation binding without acceptance. It is within this framework that a promissory analysis of obligations can play an important role in explaining aspects of transactions. It can help us understand and explain the obligations parties owe to each other.

This chapter discusses the practical applications of promise. This will help emphasise the practical value of a promissory analysis. Similar practical usages of promise are grouped together under the same headings, namely (i) pre-contractual promises, (ii) using promises to create obligations, (iii) using promises as enticements, (iv) using promises to guarantee existing obligations, and (v) promises to waive contractual right. This chapter is divided into two parts due to its substantial length. As a consequence, there is no conclusion at the end of Part I. The final conclusion is presented at the end of Part II.

Chapter VII Part I

A. PRE-CONTRACTUAL PROMISES

(1) Promises to keep offers open

(a) Scots law

The unilateral binding effect of promise benefits Scots law in dealing with the situation in which an offeror states that he/she will keep his/her offer open for a certain period. Such offeror is bound to keep his/her offer open until the stated period of time has elapsed because of the binding nature of promises.¹ This is useful in practice since it excludes the general rule in which an offeror can withdraw his/her offer any time before it is accepted.² A firm offer is practically useful for forward planning, since it enables a company to rely on the prices quoted by potential sub-contractors when tendering for a major contract.³

Moreover, it is more flexible in comparison with English law where a unilateral promise is generally not legally binding.⁴ Under English law, an offeror is generally not bound to keep his/her offer open even if he/she specifies the period of time for acceptance.⁵ This rule was established in *Routledge v Grant*,⁶ and has been followed

¹ E.g. *Marshall & M'Kell v Blackwood of Pitreavie*, 12th Nov 1747 (Elch Sale); *Littlejohn v Hadwen* (1882) 20 SLR 5; *Paterson v Highland Railway Co* 1927 SC (HL) 32. However, where it was stated that “[i]t is a condition of this acceptance that missives must be concluded by...”, the court held that it was not a promise to keep an offer open, but rather “a condition of acceptance.” *Effold Properties Ltd v Sprot* 1979 SLT (Notes) 84 at 85. See also *Henry Heys v Kimball & Morton, Limited*. Here, the court observed that an offer that was “made on condition of immediate entry being given, and of acceptance within three days ... does not mean that the offerer might not withdraw his offer within these three days”. ([1890] 17 R 381 at 384 per Lord President).

² E.g. *Countess of Dunmore v Alexander* (1830) 9 S 190; *Thomson v James* (1855) 18 D 1; *Campbell v Glasgow Police Comrs* (1895) 22 R 621; *J M Smith Ltd v Colquhoun's Tr* (1901) 3 F 981; *Effold Properties Ltd v Sprot* 1979 SLT (Notes) 84; *Smith v Aberdeen City Council* 2001 Hous LR 93 at para 10-28.

³ This example is particularly suggested by Poole. J Poole *Textbook on Contract*, 12th edn (2014) 72; See also R Stone, *The Modern Law of Contract*, 10th edn (2013) para 2.13.3.

⁴ *Misa v Currie* (1876) 1 App Cas 554; *Combe v Combe* [1951] 2 KB 215.

⁵ *Routledge v Grant* 130 ER 920, (1828) 4 Bing 653; *Offord v Davies* 142 ER 1336, (1862) 12 CB NS 748; *Scammell v Dicker* [2001] 1 WLR 631, [2001] CP Rep 64; *Bircham & Co Nominees (No 2) v*

by a number of cases.⁷ For instance, in *Bristol, Cardiff, and Swansea Aerated Bread Company v Maggs*⁸, it was held that an offer was not a contractual obligation. Therefore, although it was stated that the offer would be held open for ten days, it was not binding.⁹ Nevertheless, there is an exception in English law whereby separate consideration is given so that a firm offer is irrevocable.¹⁰ In *Holwell Securities Ltd v Hughes*¹¹, the defendant granted the plaintiff an option to purchase a property within a period of six months for a consideration of £100. However, since the notice of the exercise of the option had not reached the defendant, it was held that the option was invalid and no contract had been concluded. It can be inferred from the decision that the firm offer was binding because separate valuable consideration was given.¹² Another exception is when a promise to keep an offer open is made in a deed¹³ so that the firm offer is irrevocable. However, in this case, a promise made in a deed under seal would be considered to be per se a complete contract.

Furthermore, the practical value of promises to keep an offer open for a definite period can be reinforced by the fact that most model rules dealing with sales adopt a similar approach to the Scottish approach. These include the CISG¹⁴, the PECL¹⁵ and the DCFR.¹⁶ Additionally, rather than following the English approach, some Anglo-American systems have taken a different attitude towards the irrevocability of a firm offer. For instance, the Uniform Commercial Code (UCC) provides that “an offer by

Worrell Holdings (2001) 82 P & CR 34, (2001) 82 P & CR DG18; *Dickinson v Dodds* (1876) 2 Ch D 463.

⁶ 130 ER 920, (1828) 4 Bing 653.

⁷ E.g. *Dickinson v Dodds* (1876) 2 Ch D 463.

⁸ [1889 B 535], (1890) 44 Ch D 616.

⁹ See also *Cooke v Oxley* (1790) 3 Term Reports 653 100 ER 785. Although this case was not directly related to the validity of a firm offer but rather about the validity of a contract, it could be inferred from the court’s decision that a promise to keep an offer open for a specified period is not binding. This is based on the fact that the contract itself (an offer that has been accepted) is unenforceable, thus an offer containing a promise to keep it open would not be binding either.

¹⁰ *Chitty on Contracts* para 3-191; W R Anson, *Anson’s Law of Contract*, 29th edn by J Beatson, A Burrows and J Cartwright (2010) 56.

¹¹ [1974] 1 WLR 155.

¹² See also *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch 231; *Pitt v PHH Asset Management Ltd* [1994] 1 WLR 327; *Tye v House* (1998) 76 P & CR 188

¹³ *Treitel The Law of Contract* para 3-170; For case law see *Hall v Palmer* (1844) 3 Hare 532; *Macedo v Stroud* [1922] 2 AC 330; *Glessing v Green* [1975] 1 WLR 863; *Pennington v Waine* (No 1) [2002] EWCA Civ 227

¹⁴ CISG, Art 16.

¹⁵ PECL, Art 2:202 (3)(b).

¹⁶ DCFR, Art II.–4:202 (3)(b).

a merchant to buy or sell goods in a signed record that by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time...”¹⁷ In fact, in England the criticism has been made by legal scholars¹⁸ (both native and external) that the English rule that an offer specifying a period for acceptance is freely revocable is not satisfactory. Also, it was proposed by the Law Commission¹⁹ that there should be changes in relation to this rule but the suggestion was not implemented.

(b) Thai law

An offeror who states in his/her offer the period within which it must be accepted is obliged to keep his/her offer open for the specified period. This type of offer is commonly used in practice.²⁰ Although promissory language is not used in the Thai provision, the binding nature of an irrevocable offer is promissory, rather than contractual, as discussed.²¹

(c) Conclusion

The example of promises to keep offers open is referred to again in this chapter in order to emphasise the value of the binding force of promises. It has a useful function to play in practice. In comparison with English law, in Scots law, it is less difficult to deal with the situation of a promise to keep offers open. Also, the Scottish approach is compatible with the approach adopted by most legal model rules, suggesting that it is an appropriate approach in dealing with commercial practice. Additionally, the Scottish approach helps to explain the irrevocability of offers specifying a period for acceptance under Thai law.

¹⁷ UCC, §2-205.

¹⁸ J Poole, *Textbook on Contract Law*, 12th edn (2014) 72; M Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (1999) 116; J Gordley, *The Enforceability of Promises in European Law* (2001) 279.

¹⁹ Law Commission Working Paper No 60, “Firm Offers”.

²⁰ E.g. Supreme Court Decisions 927/1955 (B.E. 2498); 73/1966 (B.E. 2509); 1809/1968 (B.E. 2511); 2170/1986 (B.E. 2529); 19-21/1994 (B.E. 2537); 1943/1999 (B.E. 2542); 6729/2001 (B.E. 2544).

²¹ See Chapter VI, E. PROMISES TO KEEP AN OFFER OPEN.

(2) Promises about the tendering process

(a) Scots law

In the pre-contractual phase promises are useful where they concern tendering, and promises attached to an invitation to treat. In English law, tenders that contain certain conditions such as to accept the highest bid are viewed as unilateral contracts. The concept of the English unilateral contract can be compared with the Scottish unilateral promissory approach. The essential question is which approach would make better sense doctrinally and provide a fairer result. These two criteria are important. The law should be clear and comprehensible and should provide a satisfactory outcome to all relevant parties.

(i) The English unilateral contract approach

There are two leading cases concerning the concept of the unilateral contract under English law as follows:

*(1) Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd*²² (henceforth: *Harvela*)

Factual circumstances and judicial reasoning

The Royal Trust invited bids for a company in which it owned shares. Sir Leonard Outerbridge (Sir Leonard) bid “C\$2,100,000, or C\$101,000 in excess of any other offer... expressed as a fixed monetary amount, whichever is the higher.” Sir Leonard’s bid was accepted as being \$2,276,000. Harvela, who bid \$2,175,000, sued for breach of contract on the grounds that the referential bid was invalid. The House of Lords held that only fixed price bids were entitled to be considered. Therefore, Sir Leonard’s referential bid was invalid. Royal Trust’s expression (to invite bids) was regarded as a “unilateral contract” on the grounds that only Royal Trust was bound to accept the highest bid once its expression was issued. As stated by Lord Diplock:

²² [1986] AC 207.

“[i]ts legal nature was that of a unilateral or "if" contract, or rather of two unilateral contracts in identical terms to one of which the vendors and Harvela were the parties as promisor and promisee respectively, while to the other the vendors were promisor and Sir Leonard was promisee.”²³

Unilateral contracts

In the Common Law jurisdictions, the term “unilateral contract” has a different meaning from the one used in the Civil Law. As discussed in Chapter V, in the Civilian tradition a unilateral contract is a contract arising from the mutual agreement of the offeror and the offeree, but one party is obliged to perform an obligation.²⁴ However, in the Anglo-American systems, a contract has traditionally been defined as a promise or set of promises which the law will enforce, rather than an agreement.²⁵ Unilateral contract under English law is then a contract in which only one party to the contract promises to undertake an obligation.²⁶ For example, in the case of rewards only the person offering the reward is obliged, whereas the offeree/promisee is not.²⁷ Nonetheless, the situation in the *Harvela* case is not exactly the same as the case of unilateral contracts of rewards. Royal Trust’s invitation constituted an obligation to accept the highest bid made by either Harvela or Sir Leonard. In this sense, it is similar to the case of reward: only the promisor is bound to perform the obligation. However, the court’s decision seems to suggest that Royal Trust made an offer to sell shares to the highest bidder, and the offer itself was also a unilateral contract. The offer was concluded with Harvela, the highest bidder. It was then transformed into a binding bilateral contract between Royal Trust and Harvela. As Lord Diplock explained, “the obligation [of Royal Trust] was to enter into a synallagmatic contract to sell the shares to the promise, the terms of such synallagmatic contract being also set out in the invitation.”²⁸ Conversely, Royal Trust’s offer with Sir Leonard, which was not the highest bidder, was not concluded

²³ *Ibid* at 224 per Lord Diplock.

²⁴ See Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (6) Gratuitousness of promise.

²⁵ See Chapter I, B. IS PROMISE DISTINCT FROM CONTRACT?, (2) Contemporary debates, (a) Promise is contract.

²⁶ *Chitty on Contracts* para 1-099.

²⁷ See Chapter VII Part II, C. USING PROMISES AS ENTICEMENTS, (1) Advertisements of reward.

²⁸ [1986] AC 207 at 224 per Lord Diplock.

and lapsed. Royal Trust's expression was thus regarded as both an offer and also as imposing a binding obligation on the offeror (to accept the highest bidder). It had at one and the same time two different characteristics. In this sense, it is different from the unilateral contract of reward because in the reward case there is only one unilateral contract which is not converted into a bilateral one.

Referential bids

Although the question of validity of referential bids is not directly relevant to the issue under discussion here, namely the characteristics of unilateral contract, it is nonetheless helpful to consider this point. This is to see the reasons behind the judgement as to why the court treated referential bids as being invalid. The court made a distinction between an auction sale and a fixed bidding sale. In the former "each bidder may adjust his bid by reference to rival bids",²⁹ whereas in the latter "a bidder may not adjust his bid. Each bidder specifies a fixed amount which he hopes will be sufficient, but not more than sufficient, to exceed any other bid."³⁰ The court further explained that there would be a number of flaws as a result of referential bids. One of these flaws is that if referential bids were allowed, then such bids could have been submitted by both tenderers. If so, "there was a danger, far from negligible, that the sale might be abortive and the shares remain unsold."³¹

Criticism by commentators

The decision of the House of Lords in the *Harvela* case has important practical implications in relation to the tendering process.³² Previously, there had been no legal obligation dealing with the liability of the party issuing an invitation to tender because the English courts had established that an invitation to tender did not amount to an offer.³³ However, the *Harvela* decision established the new rule that a vendor

²⁹ [1986] AC 207 at 230 per Lord Templeman.

³⁰ *Ibid.*

³¹ *Ibid* at 231 per Lord Templeman.

³² R Stone, *The Modern Law of Contract*, 10th edn (2013) 49; A Haidar, *Global Claims in Construction* (2011) 31.

³³ *Spencer v Harding* (1870) LR 5 CP 561.

making an invitation to tender may have a liability prior to the concluded contract.³⁴ Consequently, the *Harvela* decision has attracted a great deal of comment from both legal and non-legal commentators. Leaving aside the criticisms from non-legal perspectives³⁵, the criticism can be made from a legal perspective that it is not entirely clear what the consideration of the unilateral contract in the *Harvela* case was. This is because in the tendering process, “there is no element of bargain--an exchange based on consideration from both sides--which is normally required for a binding contract”.³⁶ Moreover, it is questionable whether the term “unilateral contract” was used in the correct sense. In the *Harvela* case, the court suggested that there were two unilateral contracts: one was transformed into a bilateral contract and the other lapsed. It is not clear how a unilateral contract can be transformed into a bilateral one. Additionally, it is doubtful whether “one” undertaking could constitute “two” binding (unilateral) contracts. Accordingly, it has been suggested that it would be more appropriate to characterise Royal Trust’s undertaking as, for instance, a “unilateral offer”³⁷, or “an offer ... of a unilateral contract”³⁸ to accept the highest bid.³⁹ These suggestions appear to be sound. If Royal Trust’s invitation was regarded as an offer, there would be no theoretical problem as to how a unilateral offer (to accept the highest bid) could be transferred into a bilateral contract.

³⁴ Haidar (n 32) 31.

³⁵ For the criticism from an economic point of view regarding referential bids see T Blyth & S Garrett, “The Rule against Referential Bids: *Harvela* Revisited and the Prisoners’ Dilemma” (2002) 4(3) *Journal of International Financial Markets* 103.

³⁶ S Arrowsmith, “The “Blackpool” Implied Contract Governing Public Sector Tenders: A Review in the Light of Pratt and Other Recent Case Law” (2004) 5 *Public Procurement Law Review* NA125 at NA131; See also Hogg, *Obligations* 58; *Chitty on Contracts* para 3-90.

³⁷ This example is particularly suggested by Halson in R Halson, *Contract Law*, 2nd edn (2013) 131.

³⁸ This example is particularly suggested by Burrows in A Burrows, *A Casebook on Contract*, 4th edn (2013) 22.

³⁹ These points are not raised in high authorities on English contract law such as *Chitty on Contract* and *Treitel The Law of Contract*.

(2) *Blackpool and Fylde Aero Club v Blackpool Borough Council*⁴⁰ (henceforth: *Blackpool*).

Factual circumstances and judicial reasoning

Blackpool Borough Council (the Council) had invited Blackpool & Fylde Aero Club (the Aero Club) and others to submit tenders for a pleasure flight concession from Blackpool airport. The deadline was 12 noon. The Aero Club posted their tender at 11am on that day in the Town Hall post box. Normally the contents of the post box were collected at noon every day, but not on that day, so the Aero Club's tender was considered to be late. The Aero Club brought an action against the Council claiming that the Council had promised to consider all tenders submitted by the deadline. The Court of Appeal decided in favour of the Aero Club. It was held that tenderers who submitted their tenders before the due date were entitled to have their tenders considered.

Unilateral contracts

Although the court did not use the term "unilateral contract" in the *Blackpool* case, the nature of the undertaking is quite similar to that which took place in the *Harvela* one. In both cases only one party is bound under the obligation to perform: in the *Harvela* case, Royal Trust, and in the *Blackpool* case, the Council. The difference is that in the former, only the party who submits the highest bid could fulfil the requirement of the obligation of unilateral contract. In the latter the benefit results from the submission of the tender on time.

Criticism by commentators

Like the *Harvela* decision, the *Blackpool* decision has attracted a vast amount of comments from legal scholars.⁴¹ In fact, the degree to which the *Blackpool* decision

⁴⁰ [1990] 1 WLR 1195.

⁴¹ E.g. I Brown & A Chander, "Intent and Contract Formation" (Case Comment) (1991) *Conveyancer and Property Lawyer* 149; J N Adam & R Brownsword, "More in Expectation Than Hope: the Blackpool Airport Case" (1991) *Modern Law Review* 54(2), 28; S Arrowsmith, "The "Blackpool" Implied Contract Governing Public Sector Tenders: A Review in the Light of Pratt and Other Recent Case Law" (2004) 5 *Public Procurement Law Review* NA125.

reversed the traditional approach of the formation of contract in tendering situations is stronger than that of the *Harvela* one. While the *Harvela* decision established the rule that an invitor is bound to accept the highest bid if this is “expressly” stated, the *Blackpool* decision went further by suggesting that a vendor inviting tenders could be bound to consider simultaneously submitted tenders if it may be “implied” from the intentions of the parties that the invitor would do so. Traditionally, the offer and acceptance approach is used to determine whether a contract has been concluded between the parties.⁴² It has also been used to refute the idea that every declaration of an intention amounts to a contractual obligation.⁴³ Critics claim that it is not clear that this approach was properly examined by the court in the *Blackpool* case. Rather, there appears to be only...

“the hint of a self-fulfilling prophesy in the logic adopted by the court: the implied intention of both parties was that properly submitted tenders would be considered, therefore, such intent could be conveniently translated into an offer which was accepted by each tenderer.”⁴⁴ .

This thesis does not entirely agree with this criticism. The offer and acceptance analysis is not the only approach that can be used to determine whether an expression can create a contractual relationship between parties. For example, a unilateral contract is an alternative approach in English law that can be used to determine whether a contractual obligation exists. Nonetheless, the fact that the court in the *Blackpool* case failed to clarify its adoption of a unilateral contract approach or offer and acceptance approach caused the judicial reasoning of the decision to be ambiguous.

Moreover, unlike the *Harvela* case, there is no clear explanation from the court in the *Blackpool* case as to why the Council’s expression (that it would not consider late tenders) contained a unilateral binding obligation. Therefore, it is argued that there is a danger in enforcing a contractual obligation on the basis of unclear terms.⁴⁵

⁴² I Brown & A Chander, *Ibid* at 150.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

Furthermore, critics claim that the court's decision gave rise to a legal obligation in response to an expectation. The *Blackpool* decision reflects the fact that an expectation may amount to a binding contract even if there is no reliance on the part of the promisee.⁴⁶ By analogy, this is similar to circumstances where a person makes a promise to give another person a sum of money and such a promise is binding because the promisee reasonably expects the promisor to keep his/her promise.⁴⁷ More importantly, the *Blackpool* decision shows that the court did not merely limit the scope of expectations to express promises, but also extended it to include implied ones.⁴⁸ Although the court accepted that "contracts are not to be lightly implied"⁴⁹, the court "proceeded to establish the requisite intention without any appreciable difficulty."⁵⁰ Similarly, it is argued that "the court appears to be manipulating contractual principles simply to provide a remedy where it felt one ought to be given by some means."⁵¹ In fact, in this case there was also a claim based on tort liability. The claim was brought before Judge Jolly, who decided in favour of the Club that the Council owed it a duty of care in tort. This suggests that the court could have only awarded damages based on tort liability if it had found no contractual relationship between the parties. All the negative comments show that there were doubts and concerns expressed by legal scholars about the practical implication of the *Blackpool* decision.

Concluding remarks

The English courts applied the notion of a unilateral contract to both the *Harvela* and the *Blackpool* cases (albeit the term "unilateral contract" was not used in the latter). The characteristics of the unilateral contract in the *Harvela* case, however, differ from the traditional definition of a unilateral contract. The court suggested that there

⁴⁶ J N Adam & R Brownsword, "More in Expectation Than Hope: the Blackpool Airport Case" (1991) *Modern Law Review* 54(2), 281 at 283-285.

⁴⁷ This view makes a comparison between the reliance principles and the expectation principles that they are not the same thing. For further discussion see *Ibid* at 283-285.

⁴⁸ Haidar (n 32) 31.

⁴⁹ [1990] 1 WLR 1195 at 1202 per Bingham LJ.

⁵⁰ I Brown & A Chander (n 41) at 150.

⁵¹ S Arrowsmith, "The "Blackpool" Implied Contract Governing Public Sector Tenders: A Review in the Light of Pratt and Other Recent Case Law" (2004) 5 *Public Procurement Law Review* NA125 at NA131.

were two unilateral contracts: only one of which was transformed into a bilateral one. The features of the unilateral contract in the *Blackpool* case were not so very different from the traditional meaning: only a promisor is bound to perform an obligation whereas a promisee is not. The difference, however, is that in the *Blackpool* case the court found that a unilateral contract was created by an implied term. Both the *Harvela* and the *Blackpool* cases can be usefully compared with the doctrine of promise in Scots law.

(ii) The Scottish unilateral promise approach

In Scotland, tenders are treated as offers. However, certain conditions in invitations to tender may be treated as “unilateral promises”. The circumstances where the English courts applied the concept of unilateral contract can be resolved using a promissory analysis under Scots law.⁵² Firstly, in the *Harvela* case, Royal Trust is legally bound by its promise to make a contract with the highest bidder. The highest bidder can directly enforce Royal Trust’s obligation because of the binding effect of a promise. Secondly, in the *Blackpool* case, the Council is legally bound by a unilateral obligation to give proper consideration to all timely submitted bids.

It is worth making a reference to a recent Scottish case in which the petitioners relied on the rule regarding an obligation to consider tenders in the *Blackpool* case. This Scottish case is related to both private law and public law matters. However, this thesis is only concerned with private law matters. In *Sidey Ltd v Clackmannanshire Council*,⁵³ Clackmannanshire Council (the Council) invited four tenderers to submit bids for the contract to provide replacements of kitchens and bathrooms in council houses. Sidey, whose bid was not successful, sought a judicial review of the Council’s decision on the basis of an error of valuation. It was averred, inter alia, that there was a binding contract on the part of the invitor of tenders to consider all the submitted tenders. By citing *Blackpool*, it was argued that the tender documentation constituted an implied contractual obligation to give proper consideration to all the submitted tenders as a result of the principles of fairness and equality. Additionally,

⁵² MacQueen, *Options* 190; Hogg, *Obligation* 60.

⁵³ 2012 SLT 334.

it was further argued that if the invitor chose to award the contract to any bidder, it was legally bound to award the contract to “the most economically advantageous tender.”⁵⁴ The court, however, held that the circumstances of the present case differed from the *Blackpool* one. This is based on the fact that, inter alia, the Council’s statement did not contain terms which would suggest that it was intended by the parties to create a binding contract. As the court explained, “there was no evidence available to the court to say that the parties had intended to create a contractual relationship.”⁵⁵ Moreover, in the *Blackpool* case, the pursuer’s tender was not considered fairly and honestly because the plaintiff’s bid was not considered at all. However, in the present case Sidey’s tender was considered.⁵⁶ The way in which the court interpreted the obligation in the tendering process was quite strict. This may stem from the fact that the rule applied in the *Blackpool* case fundamentally contrasts with the traditional rule of the formation of contracts. In short, the approach applied in the *Blackpool* case is an exception to the general rule of the formation of contracts. Therefore, the application of this rule only applies in exceptional circumstances.

What would be the outcome of the case if promise was argued by the petitioners? As noted, recent case law suggests that a unilateral obligation in Scots law must be expressed in clear terms.⁵⁷ Therefore, it would be highly unlikely that the Scottish courts would regard the Council’s statement as a unilateral obligation to consider all submitted tenders and to award the contract to the most economically advantageous tender, given that the Council did not expressly state in the tender documentation that it would award the contract to any specific bidder.⁵⁸

⁵⁴ *Ibid* at para 11.

⁵⁵ *Ibid* at para 16 per Lord Brailsford.

⁵⁶ *Ibid*.

⁵⁷ E.g. *Dow v Tayside University Hospitals NHS Trust* [2006] SLT (Sh Ct) 141; *Jeroen Van Klaveren v Servisair UK Limited* [2009] CSIH 37 2009; *Regus (Maxim) Limited v Bank of Scotland Plc* [2013] CSIH 12.

⁵⁸ Alternatively, it has been suggested that the petitioners could have “argued that the respondents had impliedly held out that they would, as a bare minimum, evaluate each tender in accordance with the scoring criteria and procedures which they had settled upon.” For full discussion see M Hogg, “Liability for Improperly Rejected Contract Tenders: Legitimate Expectations, Contract, Promise and Delict” (2012) 16(2) EdinLR 246.

(iii) Comparison

The English unilateral contract and the Scottish promissory approaches provide the same outcome for the issue under discussion. Had the *Harvela* and *Blackpool* cases arisen in Scotland and the doctrine of promise been applied, the results would have been similar to the decisions of the English courts. Also, if the petitioners had argued in favour of promissory liability in the *Sidey* case, the claim would have been unlikely to be successful. Therefore, in relation to the question as to whether the English or the Scottish approach would provide a more satisfactory outcome to relevant parties, the answer would be that they are equal.

However, the Scottish approach provides a more understandable legal analysis in comparison with the English approach. It clearly explains why a party calling for tenders is bound to accept the highest bid (in *Harvela*) or to consider timely submitted tenders (in *Blackpool*). This is because the inviters' undertakings are regarded as unilateral obligations. Under the English approach it is questionable how a unilateral contract can be transformed into a bilateral one. Also, it is unclear what the consideration is since there is no obvious value given by the bidders. It appears that the English courts tried to provide a just result to the parties, but the legal analysis of the English courts is not in accordance with the English doctrine of unilateral contract. This reflects the fact that English law has faced theoretical difficulties when the English courts wished to enforce an obligation in circumstances where only one party unilaterally binds himself/herself to perform an obligation. Conversely, the concept of unilateral promise provides the Scottish courts with greater flexibility in dealing with such circumstances, hence such conceptual difficulties do not arise in Scots law.

(b) Thai law

(i) General concept of tenders in Thailand

A tender is regarded as an invitation to treat⁵⁹ while a bidder's submission is deemed an offer.⁶⁰ Hence, a person calling for bids is entitled to cancel the tendering process at any time without any liability.⁶¹ The act of an invitor of tenders in selecting the bidder and informing him/her is regarded as an acceptance. When the notification reaches the chosen bidder, a contract is concluded. This concluded contract is called a "tender contract"⁶² or an "agreement of tender".⁶³ It is not deemed a main contract: a final actual contract under circumstances in which there are two stages or phases of the contract. In tenders, the first stage involves the tendering process. At this stage, there is an agreement between the party inviting the tender and the chosen bidder. The second stage involves an actual contract, i.e. a contract in which a tendering process is being called for.

The parties still have to make a further contract, which is a main one, in writing. This rule also applies even where the tender is already in writing, i.e. they still need another contract, because in the court's view tenders are not main contracts.⁶⁴ Thus, as long as the parties have not signed a contract, there is no main contract concluded which could be enforced by the parties.⁶⁵

(ii) Problems with, and analysis of tenders in Thai law

If circumstances like the *Harvela* case arose in Thailand, the result would have been different. In that case, such call for bids could be regarded as an offer because it is

⁵⁹ Supreme Court Decision 3550/1983 (B.E. 2526) at 2730.

⁶⁰ Supreme Court Decisions 931/1937 (B.E.2480); 1825/1979 (B.E. 2522); 2811/1986 (B.E. 2529).

⁶¹ Supreme Court Decision 3550/1983 (B.E. 2526) at 2730.

⁶² Supreme Court Decision 931/1937 (B.E. 2480).

⁶³ Supreme Court Decisions 1131/1977 (B.E. 2520) at 703; 1418/1986 (B.E. 2529) at 687; 1825/1979 (B.E. 2522) at 1512.

⁶⁴ Thai Code, §366 para 2.

⁶⁵ Supreme Court Decisions 3550/1983 (B.E. 2526) at 2730; 1418/1986 (B.E. 2529) at 687; 931/1937 (B.E. 2480); 1131/1977 (B.E. 2520); 1825/1979 (B.E. 2522); 1418/1986 (B.E. 2529) at 687.

certain that the highest bidder will be accepted.⁶⁶ Therefore, a submission of the highest bid would be considered as an acceptance, upon which a tender contract would be concluded once the highest bid reaches the offeror.

There appear to be no Thai authorities on the issue regarding referential bids. Nonetheless, it is more likely that the Thai courts would adopt a similar approach as the English courts when dealing with referential bids. This assumption is based on the principles of good faith. Good faith is a broad general concept which governs the whole of Thai private law.⁶⁷ The fact that a tenderer who submitted non-referential bids has no chance to win the tender at all would make referential bids not in accordance with the doctrine of good faith.

Yet, there is still an issue in relation to the main contract. As discussed, the concluded contract is considered to be merely a tender contract or an agreement of tender, and the main contract is required to be in writing. Therefore, if a party refuses to sign a contract, the other party cannot force him/her to do so even if the tender contract has been concluded. In this scenario, the result is unfair to the aggrieved party (which would usually be the highest bidder) since he/she cannot force the other party (which would usually be an invitor of tenders) to perform his/her obligation (in the main contract), although the tender contract has been concluded. Also, this allows collusive tendering to occur easily since an invitor of tenders can generally deny his/her liability.

In Thai law the final outcome of the *Harvela* case would have been different from both English and Scots law. Royal Trust would have been bound to accept the highest bid because its offer contained that term. Unlike the English courts, there is no need for the Thai courts to characterise Royal Trust's proposal as a binding unilateral contract. Royal Trust's invitation would amount to an offer to accept the highest bid under Thai law. Moreover, in Thai law an offer which does not specify a

⁶⁶ S Sothibandhu, *หลักความรับผิดก่อนสัญญา* (Principles of Pre-Contractual Liability), 3rd edn (2005) 160.

⁶⁷ Thai Code, §5.

period of acceptance is irrevocable within a reasonable period of time.⁶⁸ Assuming that the Thai courts applied the same approach regarding referential bids, Harvela's bid would be deemed to be an acceptance and would constitute a contract with Royal Trust's offer. Nevertheless, the fact that Thai law requires the parties to make a final contract in writing prevents the court from forcing the parties to enter into the final contract.

The final outcome of Thai law constitutes a disappointment, especially when compared with English law. Whilst the English courts faced theoretical difficulty in treating Royal Trust's statement as a binding obligation, the Thai courts have no such difficulty. The English courts had to find a way to characterise the invitor's statement to make it binding as a unilateral contract, whereas the Thai courts can simply regard it as an irrevocable offer to accept the highest bid. Notwithstanding their clear explanation when dealing with the features of unilateral contracts, the English courts could reach a satisfactory result to the effect that the invitor of tenders is liable if decides not to enter into the final contract. It is a fair result which one can reasonably expect. In this sense, the Scottish approach provides a satisfactory outcome too, because the result of a promissory analysis is similar to that of an English unilateral contract one. Conversely, the Thai courts cannot force the other party to perform the obligation on its part. This is rather a strange, and indeed disappointing, outcome, given that there is a tender contract between the parties already, and the court cannot award contractual damages to an aggrieved party.

Given that both the English and Scottish approaches provide a fair result to the parties in this situation, they could be used as a model for Thai law. However, in comparison, the Scottish approach would be more suitable for Thai law. Firstly, the fundamental basis of Thai contract and promissory law is closer to the Civilian tradition than to the Common Law.⁶⁹ The definition of unilateral contract under Thai law is similar to that of the Civil Law in that it arises from an agreement between two

⁶⁸ Thai Code, §355.

⁶⁹ See Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (2) Promissory theory as explained by Thai writers.

parties but only one party is bound to perform an obligation.⁷⁰ Thus, Royal Trust's statement cannot be regarded as a unilateral contract under Thai law because it does not arise from mutual agreement between two parties. The Scottish approach would be in accordance with the fundamental basis of Thai law because it would not change the understanding of unilateral and bilateral contracts. More importantly, Thai law is familiar, to a certain degree, with the notion that a unilateral declaration of will can create an obligation. Hence, if Thai law recognised unilateral promises as a free-standing ground of liability, there would be no difficulty in applying a promissory analysis to Thai law. The concept of unilateral promise would help to explain why a party calling for bids is bound to enter into the main contract, which is required to be in writing, with the highest bidder. This is a unilateral binding declaration made by the person inviting the tender, which is valid once the tender has been announced.

(c) Conclusion

The application of Scottish promissory reasoning to the tendering process provides a more understandable legal analysis in comparison with the English unilateral contract approach. It clearly explains why an invitor of tenders is bound to accept the highest bid. The Scottish approach could be used as a model for the reform of Thai law. Under a promissory analysis, a party calling for tenders is bound by his/her promise to accept the highest bid, and also to enter into the final actual contract.

⁷⁰ See Chapter VI A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (6) Gratuitousness of promise.

B. USING PROMISES TO CREATE OBLIGATIONS

(1) Options

(a) Scots law

An option is the term frequently used to describe a “right given to a party which may be exercised to secure some benefit for that party.”⁷¹ This type of option could be contained in a lease, allowing the tenant to purchase the property, at some future date.⁷² A prime illustration of such an option is a clause contained in a lease of commercial property. Examples⁷³ can be found in *Davidson v Zani*⁷⁴, *Bisset v Aberdeen Magistrates*⁷⁵ and *Advice Centre for Mortgages v McNicoll*⁷⁶.

There are three main approaches to analysing them: (i) unilateral contract; (ii) offer as part of a contract; and (iii) unilateral promise. With any approach, the person who is granted the option has to exercise the option for it to be enforceable.

(i) Options as a unilateral contract

Three years before the *Harvela* case, Lord Diplock gave a speech regarding an option as a unilateral contract. In *Sudbrook Trading Estate Ltd v Eggleton*⁷⁷, a tenant of a lease was given an option to purchase the freehold of the property at an agreed price. The tenant sought to exercise the option, but the landlord refused. The landlord claimed that the option could not be enforced, because it did not contain a specific price. It was held that the option was enforceable as a unilateral contract, conferring a right to buy upon the lessee. Lord Diplock stated, “[t]he option clause cannot be

⁷¹ Hogg, *Obligations* 63.

⁷² MacQueen, *Options* 189.

⁷³ See also *McDougall v Heritage Hotels Ltd* (2008 SLT 494) for a comparison. In this case, the pursuer cited the *Davidson v Zani* and the *Advice Centre for Mortgages v McNicoll* cases, but the factual circumstance of the case differed from those of *Davidson v Zani* and the *Advice Centre for Mortgages v McNicoll*.

⁷⁴ 1992 SCLR 1001.

⁷⁵ (1898) 1 F 87.

⁷⁶ 2006 SLT 591.

⁷⁷ [1983] 1 AC 444.

classified as a mere "agreement to make an agreement." There are not any terms left to be agreed between the parties. In modern terminology, it is to be classified as a unilateral or "if" contract."⁷⁸ He further stated that the unilateral contract "does not give rise to any legal obligations on the part of either party unless and until the lessees give notice in writing to the lessors..."⁷⁹ However, critics claim that this explanation is not clear and this is what Lord Diplock meant when he referred to "options as unilateral contracts".⁸⁰ Instead, he seems to suggest that the option was, in itself, the contract (which was unilateral). Therefore, when the option is exercised, it transforms the unilateral contract into a bilateral contract.⁸¹ This is an overly complicated analysis.

(ii) Options as a firm offer

In Scots law, an option may be considered as a firm offer.⁸² A conventional use of an option is for the purchase of heritable property.⁸³ For instance, it was held in *Hamilton v Lochrane*⁸⁴ that the nature of an option is that of a firm offer.⁸⁵

In this situation, an option is treated as an offer guaranteed to remain open for a specific period, i.e. the binding nature of the option is of the same species as a promise to keep an offer open for a specific time frame.⁸⁶ As observed by Lord Hodge in *Carmarthen Developments Ltd v Pennington*⁸⁷, "...an option contract is very similar in effect to a unilateral promise to keep an offer open for acceptance for a specified period".⁸⁸

⁷⁸ *Ibid* at 476-477 per Lord Diplock.

⁷⁹ *Ibid* at 477 per Lord Diplock.

⁸⁰ MacQueen, *Options* 189-190.

⁸¹ [1983] 1 AC 444 at 477 per Lord Diplock.

⁸² Hogg, *Obligations* 63.

⁸³ *Ibid* at 66.

⁸⁴ (1899) 1 F 478.

⁸⁵ *Ibid* at 482 per Lord Trayner.

⁸⁶ *Littlejohn v Hadwen* (1882) 20 SLR 5 at 7.

⁸⁷ [2008] CSOH 139.

⁸⁸ *Ibid* at para 14.

The exercise of an option is required. Otherwise, there will not be a concluded contract.⁸⁹ However, it is unclear whether the exercise of an option is regarded as an acceptance or not. In the *Hamilton* case earlier discussed, the court stated that “...the exercise of the option, which was just the acceptance of the offer, to be effectual and binding on either party, required to be in writing...”⁹⁰ However, in the *Carmarthen* case, the court explained that “the exercise of an option is not the acceptance of an offer but the exercise of a contractual right conferred by the option agreement.”⁹¹

Moreover, if the option is for the purchase of heritable property, the notice of intention to exercise the option cannot be regarded as an acceptance. This is evident, as some of the requisite formalities are still required (unless the offer and acceptance are in writing).⁹² This advances the idea that the parties have to conclude the agreement again. It would be better to analyse an option as a unilateral obligation, thus avoiding this complication.

(iii) Options as a unilateral promise

Most of the Scottish authorities regard an option as a unilateral promise.⁹³ Subject to the payment of the purchase price, an option for the purchase of heritable property is treated as a unilateral promise to sell.⁹⁴ There are a number of cases that support this view. For example, in both *Stone v MacDonald*⁹⁵ and *Scott v Morrison*,⁹⁶ the Outer House of the Court of Session decided that options are obligatory in their own right.⁹⁷ More recently, in *Simmers v Innes*,⁹⁸ the House of Lords held that an option

⁸⁹ Walker, *Contracts* para 18.3.

⁹⁰ (1899) 1 F 478 at 482 per Lord Trayner.

⁹¹ [2008] CSOH 139 at para 14. It was held that “the postal acceptance rule has no application in the circumstances of this case.” (at para 19).

⁹² Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(i).

⁹³ Gloag, *Contract* 166; Walker, *Contracts* para 18.3; MacQueen, *Options* 189.

⁹⁴ MacQueen, *Ibid.*

⁹⁵ 1979 SC 363 at 368.

⁹⁶ 1979 SLT (Notes) 65; cf *Trade Development Bank v David W Haig (Bellshill) Ltd* 1983 SLT 107.

⁹⁷ 1979 SC 363 at 368 per Lord Ross; 1979 SLT (Notes) 65 at 66 per Lord Stott.

⁹⁸ 2008 SC (HL) 137.

amounted to a unilateral obligation.⁹⁹ Also, feu dispositions¹⁰⁰ and leases¹⁰¹ are types of instrument which can contain promissory options.¹⁰²

The unilateral promise approach makes case analysis more precise in comparison with the English unilateral contract approach. There are two stages and two obligations when constituting a final contract. At the promissory stage, it is only the promisor who gives the option who is bound to the terms and conditions stated in the option. The next stage concerns the actual contract of sale, with respect to an option to purchase property. It takes effect when the promisee declares his/her intention to exercise the option.¹⁰³ MacQueen opines that the notice of the promisee can be regarded as an offer to enter into a contract. The promisor is bound to accept.¹⁰⁴ Although the English unilateral contract analysis also has two stages, the Scottish approach is more convincing. The English approach is less clear in that it suggests that a unilateral contract can be transformed into a bilateral contract. If the Scottish approach were applied to the facts in *Sudbrook Trading Estate v Eggleton*¹⁰⁵, the landlord could be treated as granting the tenant an option to purchase the property, and the option is enforceable based on the obligatory nature of a promissory analysis.

Furthermore, if an option is regarded as a unilateral obligation, the promisee does not need to accept the option. Instead, he/she is merely the recipient of a unilateral binding declaration. The promisor is the only party bound by the option. Therefore, unlike the firm offer approach, the promissory approach avoids problems arising from the exercise of the option.

⁹⁹ *Ibid* at 141 per Lord Neuberger of Abbotsbury.

¹⁰⁰ *Banff and Buchan District Council v Earl of Seafield's Estate* [1988] SLT (Lands Tr) 21 at 23.

¹⁰¹ *Davidson v Zani* 1992 SCLR 1001.

¹⁰² In some cases, the Scottish courts did not clearly clarify the legal characteristics of an option whether it is a unilateral promise or a contract. For example, in *Miller Homes Ltd v Frame* (2001 SLT 459), it was stated that “under Scots law a valid option to purchase, whether constituted as a promise or bilateral contract, might be created without any consideration.” (at para 14 per Lord Hamilton); In *Carmarthen Developments Ltd v Pennington* ([2008] CSOH 139), Lord Hodge explained that “[t]here may be disagreement as to the correct legal characterisation of an option in Scots law, namely whether it is a unilateral promise by the grantor, a conditional contract of sale or *sui generis*” (at para 15).

¹⁰³ MacQueen, *Options* 190.

¹⁰⁴ *Ibid*.

¹⁰⁵ [1983] 1 AC 444.

Moreover, where the option concerns the purchase of heritable property, the exercise of the option is not required to be in writing.¹⁰⁶ For instance, in *Simmers v Innes*¹⁰⁷, the appellant appealed against a decision of an Extra Division of the Inner House of the Court of Session.¹⁰⁸ The pursuer entered into a shareholder's agreement with the defender. The agreement stated that:

“The terms of this Agreement shall remain in full force and effect for a period of five years expiring on 31 March 2004. If [the pursuer] has not served on [the defender] a notice intimating his intention to effect the Buy-Out prior to [31 March 2004], then this Agreement shall terminate automatically without the requirement of any party to serve notice.”¹⁰⁹

The notice of intention to effect the buy-out of the shares and the property was given to the defender prior to the deadline. It had been held by the Extra Division that the exercise of an option was validly made and that the option could be enforced.¹¹⁰ The appellant argued that “the agreement did not envisage the option being exercised by service of the notice”.¹¹¹ However, the House of Lords upheld the decision and dismissed the appeal. Although it was not expressly stated by the court, it can be inferred that the option to purchase certain property in this case amounted to a unilateral obligation. This is because there was no issue regarding the acceptance of the option which would suggest that the option was an offer. Additionally, the court explained that the exercise of an option is “a unilateral right”.¹¹² Furthermore, the House of Lords stated, by referring to the judgment of the Extra Division, that “time was not of the essence for completion of the purchase of the land.”¹¹³ The fact that the agreement had not been completed by the 31st March 2004 did not prevent the respondent from enforcing the contract of sale, given that he had validly exercised the option before the mentioned date. The decision in the *Simmers v Innes* case reinforces the fact that the grantor and the grantee of the option to purchase heritable property are not required to conclude another agreement of sale if the option is viewed as promissory obligation. The notice of the exercise of the option is sufficient

¹⁰⁶ *Ibid* at 69.

¹⁰⁷ 2008 SC (HL) 137.

¹⁰⁸ [2007] CSIH 12.

¹⁰⁹ 2008 SC (HL) 137 at 137.

¹¹⁰ [2007] CSIH 12.

¹¹¹ 2008 SC (HL) 137 at 137.

¹¹² *Ibid* at para 18 per Lord Neuberger of Abbotsbury.

¹¹³ *Ibid*.

for the grantor of the option to be bound to the contract of sale. As noted, the person that is granted the option under a firm offer approach lacks the right to exercise the option, since the parties have to conclude a further agreement. Therefore, a promissory analysis of an option is more desirable than a firm offer approach.

However, there are limitations when considering an option as a unilateral promise. For instance, if the option is for the purchase of heritable property, formal writing may be necessary to fulfil the option requirements.¹¹⁴ It then becomes questionable as to whether or not the option requires the negotiation of a further contract. Additionally, as the promisee is not obliged to perform any duties, a question arises where the option is accepted but the promisee subsequently revokes the acceptance.¹¹⁵ In response to this, a promisee who has exercised the option is still bound to the negotiation as a result of the statutory personal bar.¹¹⁶ This provides a satisfactory outcome to both parties. Both the grantor and the grantee of such options have reasonable expectations, and these should not be frustrated because of legal requirements in relation to the formation of a contract.¹¹⁷ A promissory analysis provides a more satisfactory and a fairer approach in dealing with options contained in a lease.

Nevertheless, in a case in 2013, the Court of Session treated an option as differing from a unilateral obligation. In *Playfair Investments Ltd v McElvogue*¹¹⁸, the Outer House dealt with the issue of whether s 160 of the Bankruptcy and Diligence (Scotland) Act 2007 changed the law regarding the effect of an inhibition on the existence of a prior obligation to sell.¹¹⁹ It was held that “an inhibition does not strike at a transaction which the inhibited person is bound to carry out as a result of a pre-inhibition obligation.”¹²⁰ In analysing an option, the court described it using a

¹¹⁴ Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(i).

¹¹⁵ Hogg, *Obligations* 65.

¹¹⁶ Sections 1(3) and (4) of the Requirements of Writing (Scotland) Act 1995.

¹¹⁷ This approach had been proposed by MacQueen before the promulgation of the Requirements of Writing (Scotland) Act 1995 under the application of the doctrines of *rei interventus* or *homologation*. See MacQueen, *Options* 189.

¹¹⁸ 2013 SLT 225.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid* at para 24.

contractual analysis: an option took “the form of an offer and acceptance.”¹²¹ It is interesting to assess whether or not a promissory analysis would have changed the court’s decision in this case. Because an option is treated as a unilateral obligation, it would also be considered a pre-inhibition obligation. Yet, as acceptance of the option is not required under a promissory analysis, this approach would make case analysis more straightforward in comparison with the offer and acceptance approach.

(b) Thai law

It is not common to find a lease with an option that allows the tenant to purchase the property at some future date in Thailand.¹²² Nonetheless, there are a number of situations within Thai contract law that may be described by using the idea of option, namely hire purchase and promise to lease.

(i) Hire purchase

In hire purchase, a hirer is required to pay the security deposit and then pay a certain number of payments, as agreed by the parties. Once the hirer completes all the payments, ownership of the property hired will be automatically transferred to him/her. Hire purchase¹²³ is an important part of Scots law too. It has been explained as “a device for financing what in the end will amount to sale”.¹²⁴ Most hire purchases fall within the scope of the Consumer Credit Act 1974.¹²⁵

It may be questionable whether hire purchase is an option or not. One might argue that the hirer does not really have an option to buy the property at some time in the future, but rather ownership will certainly be transferred to him/her if he/she makes all the payments. Nevertheless, this thesis argues that the hirer still has the option not

¹²¹ *Ibid* at para 6 per Lord Hodge.

¹²² This can be observed from the fact that leading textbooks on the hire of property (lease) do not mention this option. E.g. Sotthibandhu, *Lease and Hire Purchase*.

¹²³ For the definition of hire purchase see the Consumer Credit Act 1974, s 189 (1); For a definition of hire purchase at common law see A G Guest, *The Law of Hire Purchase* (1966) 9.

¹²⁴ *Report on Sale and Supply of Goods* (Law Com No 160; Scots Law Com No 104) (1987) para 5.46.

¹²⁵ A D M Forte (ed), *Scots Commercial Law* (1997) 73.

to make the last payment, in which event ownership would not be transferred. As discussed in Chapter IV, the definition of hire purchase under the Thai Code was inspired by *Halsbury's Laws of England*,¹²⁶ which defines hire purchase as “the contract of hire with an option to purchase, is one under which an owner of a chattel lets it out on hire and undertakes to sell it...”¹²⁷ However, the Thai draftsmen omitted the phrase “...contract of hire with an option to purchase”. The origin of the Thai provision suggests that the nature of hire purchase under Thai law is compatible with the idea of an option.

A promissory analysis of hire purchase is useful for Thai law. An owner of the property is bound to sell the property to the lessee because he/she has promised to do so. In fact, promissory language is used to explain the relationship between the owner of the property and the hirer: “contract whereby an owner of a property lets it out on hire and promises to sell it to...”¹²⁸ As mentioned in Chapter IV, some scholars¹²⁹ have suggested that hire purchase is a lease which contains a promise to sell property, which is a type of promise to make a contract. It is therefore not difficult to apply a promissory analysis to hire purchase, especially if Thai law recognised the promise as a free standing legal institution. Also, the argument that hire purchase can be viewed as an option is consistent with the description of hire purchase in Scots law. For example, in *Scots Commercial Law*¹³⁰, it is stated that hire purchase involves “the hire of goods with the option of buying if certain conditions are met.”¹³¹ In *Commercial Law in Scotland*¹³², it is described that in hire purchase agreements, the debtor makes “payments for the ‘hire’ of the goods, with an option but not an obligation to purchase the goods either on paying the final instalment, or on paying a further sum”.¹³³ According to these two explanations, the hirer has an

¹²⁶ The Earl of Halsbury, *The Laws of England*, 1st edn, Vol 1 (1907).

¹²⁷ *Ibid* at 554 (para 1124).

¹²⁸ Thai Code, §572.

¹²⁹ See notes 110, 111 in Chapter IV.

¹³⁰ A D M Forte (ed), *Scots Commercial Law* (1997). Hire purchase is not mentioned in the 2014 edition of *Scots Commercial Law*. Therefore, the 1997 edition is used as a reference in this thesis

¹³¹ *Ibid* at 72.

¹³² Davidson & Macgregor, *Commercial Law in Scotland*.

¹³³ *Ibid* at para 3.1.2.1; For case law concerning hire purchase see *Forthright Finance Ltd v Carlyle Finance Ltd* [1997] 4 All E.R. 90; *Close Asset Finance v Care Graphics Machinery Ltd* [2000] CCLR 43.

option to purchase the property hired. Hence, it is appropriate to consider hire purchase using the option analysis. The characteristics of hire purchase that the hirer has the option but not the obligation to purchase the property hired are compatible with the idea of unilateral obligations. Thus, hire purchase in Scots law can also be viewed as promissory in nature. Under a promissory analysis, the parties enter into an agreement of hire. The owner of the goods also makes a promise to the hirer that the latter can buy the property hired according to the conditions stated in the hire agreement.

(ii) Promise to lease

As noted in Chapter IV, although the Thai Code does not recognise the concept of promise to lease, there has been usage of this concept. Since the doctrines of autonomy of will and freedom of contract play an essential role in Thai law, individuals are permitted to make a promise to enter into a lease.¹³⁴

A lease of immovable property, where the period of the lease is longer than three years or for the life of either the lessee or the lessor, must be made in writing and registered by a competent official. Otherwise, it is enforceable only for three years.¹³⁵ However, in practice the parties may sometimes be uncertain whether they wish to make a long-term lease or not, or they may not want to register with a competent official as it is time-consuming and expensive. Thus, the parties may choose to sign a lease for only three years, but also agree that when the lease ends, the lessee is entitled to renew the lease. According to the Thai courts, in this situation the parties do not have an intention to avoid the requirements of the law because a promise to lease is a unilateral juristic act made by the lessor, and the lessee can choose either to accept or decline it. In the Court Decision 626/1946 (B.E.2490), a two year lease contained a term that after two years the tenant could renew the lease for another two years by giving a notice to the landlord. It was held that the period of the lease was not longer than three years because it was initially enforceable for two years. Instead,

¹³⁴ Sotthibandhu, *Lease and Hire Purchase* 42; Supreme Court Decisions 626/1946 (B.E.2490); 5995-5996/1995 (B.E. 2538).

¹³⁵ Thai Civil Code, §538.

it contained a promise to lease, in which only the landlord was bound. Thus, when the tenant informed the landlord that he wanted to renew the lease, the landlord could not refuse.

Furthermore, a promise to lease also appears in instances where the lease is longer than three years. For example¹³⁶, in the Court Decision 5995-5996/1995 (B.E. 2538), a lease contained the details that “the lease is for ten years, and the lessor allows the lessee to renew the lease two times, for the period of ten years each.”¹³⁷ The court held that it was merely a promise by the lessor, not a contract. However, in the instances in which the lessor can choose to renew the lease, it is not a promise to lease.¹³⁸

Promises to lease can be considered as options. The lessee has an option but not an obligation to renew the lease when the lease ends. The Scottish unilateral promise approach benefits the analysis of the juristic binding nature of promise to lease. In this approach, a promise to lease can be regarded as a unilateral binding declaration on the part of the lessor. He/she is bound to accept if the lessee wishes to renew the lease. In fact, the Thai courts have already considered a promise to lease as a unilateral binding obligation, as discussed above. Like a promise of sale, a promise to lease can be unilaterally made by the lessor. In addition, only the lessor is bound to accept the promise to lease. The Thai courts do not, however, explain it as a promissory obligation. This is, of course, because unilateral promise is not an independent obligation under Thai law.

As discussed, the Thai courts have applied the rule that an offer lapses on the offeror’s death to promises to lease.¹³⁹ The courts held that a promise to lease lapses

¹³⁶ There are also other cases where leases which are longer than three years contain a promise to lease e.g. Supreme Court Decisions 876/1994 (B.E. 2537); 748/1990 (B.E. 2533); 3761-3765/1990 (B.E. 2533).

¹³⁷ Supreme Court Decision 5995-5996/1995 (B.E. 2538).

¹³⁸ Also Supreme Court Decisions 661-662/1968 (B.E. 2511); 294/1972 (B.E. 2515).

¹³⁹ See Chapter VI, D. LEGAL EFFECTS OF A PROMISE, (2) Thai law (b) Lapse of a promise, (ii) Death of the promisor.

on the promisor's death.¹⁴⁰ However, critics claim that the court's decision is unsatisfactory.¹⁴¹ It will be recalled, under Thai law the degree to which a promisor wishes to bind him/herself is greater than that of an offeror. Thus, a promise to lease should not lapse because of the death of the promisor. A promissory analysis is also useful for analysing this situation. Under the promissory rule, if the lessor who made a promise to lease dies, his/her successor is still be bound by the promise.

(c) Conclusion

The analysis of an option as a unilateral binding promise is useful for both systems. In Scots law, the promissory approach provides a more comprehensible analysis in comparison to the English unilateral contract approach. As an option is regarded as a unilateral obligation, the promisee does not need to accept the option. The promisor is the only party who is bound by the option. This approach also makes case analysis more straightforward than the firm offer approach because it avoids problems arising from the exercise of the option.

Moreover, the approach of considering an option as a unilateral undertaking is helpful for the analysis of Thai law. Firstly, hire purchase can be explained as a situation where an owner lets his/her property and also makes a promise that he/she will sell it to the hirer on condition that the latter makes a certain number of payments. Secondly, promise to lease can be regarded as a unilateral undertaking made by the lessor. While the lessor is bound to accept the lessee's acceptance if the lessee wishes to renew the lease, the lessee is not bound to accept the lessor's proposal. This approach also deals more effectively with the situation where a promisor dies because not only a promisor, but also his/her successor is bound by a promise to lease.

¹⁴⁰ E.g. Supreme Court Decisions 1212/1974 (B.E. 2517); 4392/2004 (B.E. 2547); 5995-5996/1995 B.E. 2538; 1602/2005 (B.E. 2548).

¹⁴¹ Sothibandhu, *Lease and Hire Purchase* 46.

(3) Letters of credit

Letters of credit are used in international trade and finance.¹⁴² They are used when the parties in a contract of sale reside in different countries so that the goods purchased have to be transported by a third party.¹⁴³ Since the seller and buyer have usually had no prior contract,¹⁴⁴ the seller may be reluctant to ship the goods without a guarantee of payment¹⁴⁵ and the buyer needs to be sure that the goods will be delivered after the payment has been made.¹⁴⁶ A letter of credit provides both parties with the necessary assurance.¹⁴⁷ The seller is assured of payment by a bank and the buyer is protected because the bank will refuse to pay if the seller fails to comply with the terms in the letter of credit.¹⁴⁸ Examples of the commercial context in which letters of credit are used are the international sale and purchase of oil¹⁴⁹, iron ore¹⁵⁰, cotton,¹⁵¹ and rice.¹⁵²

A letter of credit can be defined as:

“[A]n open letter of request, whereby one person (usually a merchant or banker) requests some other person or persons to advance moneys, or give

¹⁴² McKendrick, *Contract Law* 249.

¹⁴³ *Goode on Commercial Law* 1055; *Jack: Documentary Credits* para 1.2.

¹⁴⁴ *Goode, Ibid.*

¹⁴⁵ *Goode, Ibid; Jack: Documentary Credits* para 1.2; McKendrick, *Contract Law* 249.

¹⁴⁶ A Malek & D Quest, *Ibid; McKendrick, Ibid.*

¹⁴⁷ In *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* ([1983] 1 AC 168 at 183), Lord Diplock stated that “[t]he whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.”

¹⁴⁸ McKendrick, *Contract Law* 249.

¹⁴⁹ E.g. *Trafigura Beheer BV v BCL Trading GMBH* 2001; *United Petroleum Trading (UK) LLP v Varteg Energy SA* [2014] EWHC 4652 (Comm); *Standard Chartered Bank v Dorchester LNG (2) Ltd* [2014] EWCA Civ 1382 (Rev 1); *Euro-Asian Oil SA v Abilo (UK) Ltd* [2015] EWHC 1741 (Comm); *OMV Petrom SA v Glencore International AG* [2015] EWHC 666 (Comm).

¹⁵⁰ *Valency International Trading Pte Ltd v Alton International Resources Pte Ltd Unreported March 3, 2011* (HC [Sing]); *Swiss Singapore Overseas Enterprises Pte Ltd v China CITIC Bank Corp Ltd* [2013] HKCFI 1291 (CFI [HK]); *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm).

¹⁵¹ *Bayerische Vereinsbank AG v National Bank of Pakistan* [1996] CLC 1443; *Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills Ltd* [2011] EWHC 2028 (Comm); *A Ltd v B Ltd* [2015] EWHC 137 (Comm).

¹⁵² *Kinane v Mackie-Conteh* 2005 WL 62273; *DCD Factors Limited v Habib Bank AG* [2007] EWHC 2820 (QB); *Soeximex SAS v Agrocorp International PTE Limited* [2011] EWHC 2743 (Comm); *PEC Ltd v Asia Golden Rice Co Ltd* [2014] EWHC 1583.

credit, to a third person, named therein, for a certain amount, and promises, that he will repay the same to the person advancing the same, or accept Bills, drawn upon himself, for the like amount.”¹⁵³

In short, a letter of credit is “a banker’s assurance of payment against presentation of specified document.”¹⁵⁴

(a) Scots law

(i) Letters of credit in the Common Law

Most jurisdictions have faced difficulty in analysing the juristic nature of a letter of credits, despite the fact that it is enforceable in those jurisdictions. This is particularly the case of the Common Law as a result of, inter alia, the doctrine of consideration. In the Common Law, letters of credit have been enforceable at least since 1871.¹⁵⁵ However, while the early English courts held that a letter of credit took effect when an offer was accepted, the American courts took a different approach. In *Elder Dempster Lines v Ionic Shipping Agency*,¹⁵⁶ the court explained that “the legal phenomenon constituted by a banker’s letter of credit is that it is an offer which is accepted by being drawn upon”¹⁵⁷ However, the American courts held that a letter of credit took effect as soon as it was delivered to the beneficiary. In *Pan-American Bank & Trust Co v National City Bank of New York*¹⁵⁸, the court reasoned that:

“[a]n irrevocable commercial import letter is designed to do more than give the seller a chance to cash his drafts when the time arrives. Granting that the law is not as yet clearly worked out, it is certain, at least in this circuit, that,

¹⁵³ J Story, *Commentaries on the Law of Bills of Exchange*, 2nd edn (1847) 590-593. This definition has been adopted by some English writers e.g. Davis, *Letters of Credit* 1; S Chalmers, *Chalmers' on Bills of Exchange: A Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities*, 12th edn (1952) 168; J W Smith, *A Compendium of Mercantile Law*, 13th edn (1931) 300.

¹⁵⁴ *Goode on Commercial Law* 1059; See also *Jack: Documentary Credits* at 2; Enonchong, *Letters of Credit* para 2.01.

¹⁵⁵ In *Banner v Johnston* (1871-72) LR 5 HL 157, the House of Lords stated that “[t]he transactions out of which this letter of credit arose are of a very ordinary character, as we have been able to learn from numerous cases brought before the Courts with reference to mercantile engagements in the purchase of cotton abroad.” (at 166 per the Lord Chancellor [Lord Hatherly]).

¹⁵⁶ [1968] 1 Lloyd’s Rep 529.

¹⁵⁷ *Ibid* at 535 per Donaldson J.

¹⁵⁸ (1925) 6 F 2d 732.

when once communicated to the seller, the letter creates a contract which is in fact irrevocable.”¹⁵⁹

The American approach is supported by contemporary writers.¹⁶⁰ It is suggested that early English case law that held that a letter of credit only becomes binding when it is received by the beneficiary should not be followed because it no longer reflects the current banking practice.¹⁶¹ Therefore, the preferred approach today is that a letter of credit becomes effective when it is communicated to the beneficiary.¹⁶²

However, it is doubtful whether consideration¹⁶³ is given by the beneficiary to the bank.¹⁶⁴ This is because the bank is given consideration by the applicant, not the beneficiary.¹⁶⁵ Therefore, some suggest that a letter of credit, “for reasons of commercial convenience, ...[should be] treated as binding despite there being no consideration”.¹⁶⁶ In addition, there is no mutual understanding between the bank and the beneficiary regarding the formation of the contract since the bank is committed to the credit immediately once it is communicated to the beneficiary.¹⁶⁷ The analysis of the bank’s undertaking through a contractual perspective is not satisfactory. Posited theories include unilateral contract¹⁶⁸, implied promise¹⁶⁹, assignment theory¹⁷⁰,

¹⁵⁹ *Ibid* at 770; cf *Westpac Banking Corp v Commonwealth Steel Co Ltd* [1983] 1 NSWLR 735 at 740.

¹⁶⁰ E.g. B Kozolchyk, “Letters of Credits” in J S Ziegel (ed), *International Encyclopedia of Comparative Law*, vol ix, Ch 5, at 105-106; P Ellinger & D Neo, *The Law and Practice of Documentary Letters of Credit* (2010) 109-110; R King, *Gutteridge and Megrah’s Law of Bankers’ Commercial Credits*, 8th edn (2001) para 2-04; A Mugasha, *The Law of Letters of Credit and Bank Guarantee* (2003) 30; I Carr & P Stone, *International Trade Law* (2014) 453.

¹⁶¹ E.g. *Goode on Commercial Law* 1078 (at note 87).

¹⁶² I Carr & P Stone, *International Trade Law* (2014) 453.

¹⁶³ The issues regarding consideration were raised in *Urquhart Lindsay & Co Ltd v Eastern Bank* [1922] 1 KB 318; The nature of letter of credit is considered by the Court of Appeal in the leading case on this subject, namely *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189.

¹⁶⁴ A Mugasha, *The Law of Letters of Credit and Bank Guarantee* (2003) 30-31.

¹⁶⁵ *Ibid* at 31.

¹⁶⁶ W R Anson, *Anson’s Law of Contract*, 29th edn by J Beatson, A Burrows and J Cartwright (2010) 116; See also B Wunnicke & P S Turner, *Standby and Commercial Letters of Credit* (2013) §2-07; I Carr & P Stone, *International Trade Law* (2014) 453.

¹⁶⁷ A Mugasha, *The Law of Letters of Credit and Bank Guarantee* (2003) 31.

¹⁶⁸ This theory is supported by Hershey (O F Hershey, “Letters of Credit” (1918-19) 32 HarvLR 1). See also Davis, *Letters of credit* 73-77 for a detailed account about this theory. (in Davis, *Letters of credit*, this theory is discussed under the wider scope of the Offer and Acceptance Theory).

¹⁶⁹ This theory is supported by Story (J Story, *Commentaries on the Law of Bills and Exchange, Foreign and Inland* (2005) 548); See also *Michie on Banks and Banking* (1996) 381.

¹⁷⁰ This approach is adopted by the American courts such as *Old Colony Trust Co v Continental Bank* (288 Fed 979 (SDNY 1921) and *Re Agra Masterman’s Bank Ex parte Asiatic Banking Corporation*

novation theory¹⁷¹, agency theories¹⁷², estoppel or trustee theory¹⁷³, and the guarantee theory.¹⁷⁴ Accordingly, some Anglo-American contract theorists, such as Davis¹⁷⁵, Goode¹⁷⁶, Ellinger¹⁷⁷, and Dolan,¹⁷⁸ have accepted the view that letters of credit should be analysed outside the legal framework of contractual obligations.¹⁷⁹

Consequently, there has been a theory suggesting that a letter of credit is an independent transaction which is separate from the underlying contract (usually a sale) between the importer and the exporter.¹⁸⁰ This theory is adopted by both national courts and model rules. For example, the English courts hold that a letter of credit is independent from an underlying contract of sale between the seller and the purchaser.¹⁸¹ In *W J Alan & Co Ltd v El Nasr Export and Import Co*¹⁸², the court explained that “a confirmed letter of credit is an independent obligation in the form of an assurance of payment coming from the banker and not the buyer.”¹⁸³ More recently, in *Ibrahim v Barclays Bank Plc*¹⁸⁴, the court stated that a Singapore bank “was a party to an autonomous instrument, namely the Letter of Credit.”¹⁸⁵ Similarly, the Uniform Customs and Practice for Documentary Credits (UCP) regards a letter of

[1867] LR 2 CH App 391 (Court of Appeal in Chancery); See W E McCurdy, “Commercial Letters of Credit” (1922) 35(6) HarvLRev 715 at 738-741; Davis, *Letters of Credit* 70.

¹⁷¹ This approach is proposed by McCurdy. See W E McCurdy, “Commercial Letters of Credit” (1922) 5 HarvLRev 539 at 582-584. See also Davis, *Letters of Credit* 71-72 for a discussion.

¹⁷² For a discussion about this theory see H C Gutteridge and Maurice Megrah, *The Law of Bankers’ Commercial Credits* (1984) 33-34; See also Davis, *Letters of Credit* 71-72.

¹⁷³ This theory is supported by Hershey (O F Hershey, “Letters of Credit” (1918-19) 32 HarvLRev 1 at 10); For case law see *Morgan v Lariviere* (1875) LR 7 HL Cas 423.

¹⁷⁴ This theory originated in the United States. However, there has been no particular support for it. For a discussion about this theory see H C Gutteridge and Maurice Megrah, *The Law of Bankers’ Commercial Credits* (1984) at 31; See also Davis, *Letters of Credit* 67-68. For case law see *Boyd v Snyder*, 49 Md. 342 (1878).

¹⁷⁵ Davis, *Letters of Credit* 65-67.

¹⁷⁶ R Goode, “Abstract Payment Undertakings” in P Cane & J Stapleton (eds), *Essays for Patrick Atiyah* (1991) 209; Goode on *Commercial Law* 1078-1079.

¹⁷⁷ P Ellinger and D Neo, *The Law and Practice of Documentary Letters of Credit* (2010) 109-113.

¹⁷⁸ J F Dolan, *The Law of Letters of Credit: Commercial and Standby Credits* (2007) 205.

¹⁷⁹ Some treat letters of credit as contractual in nature. This is, however, despite the fact that it has distinctive features, i.e. being *sui generis*, as far as consideration is concerned. This approach is suggested in the 29th edition of *Chitty on Contracts*. J Chitty, *Chitty on Contracts*, 29th edn, by H G Beale, (2004) para 2-075.

¹⁸⁰ Enonchong, *Letters of Credit* para 2.02.

¹⁸¹ *Themehelp Ltd v West* 1996 QB 84 at 89 per Evans LJ.

¹⁸² [1972] 2 QB 189.

¹⁸³ *Ibid* at 195 per Lord Denning MR.

¹⁸⁴ [2011] 2 CLC 589.

¹⁸⁵ *Ibid* at 619.

credit as a distinct transaction from the contract of sale between the buyer and the seller.¹⁸⁶ The fact that an obligation of a letter of credit is independent from the contract of sale means that the bank deals with documents, rather than the goods that are referred to in the documents.¹⁸⁷

According to the theory of independence of letters of credit, the bank is obliged to pay the beneficiary if the latter complies with the document required regardless of any dispute that has arisen from the underlying contract.¹⁸⁸ As the court explained in *Stein v Hambro's Bank of Northern Commerce*,¹⁸⁹ “[t]he obligation of the bank is absolute, ... when the documents are presented they have to accept the bill. That is the commercial meaning of it.”¹⁹⁰ Also, in *Hamzeh Malas & Sons v British Imex Industries Ltd*¹⁹¹, the Court of Appeal stated:

“the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not.”¹⁹²

More recently, in *Simon Carves Ltd v Ensus UK Ltd*¹⁹³, the court stated:

“Nor, again absent fraud, will the court restrain a beneficiary from drawing on a letter of credit which is payable in accordance with its terms on the application of a buyer who is in dispute with the seller as to whether the underlying sale contract has been broken ... This is the autonomous nature of letters of credit.”¹⁹⁴

However, if the document presented by the beneficiary contains different terms from those in the letter of credit, i.e. the beneficiary is considered to have presented a non-conforming document, the bank is entitled to withhold payment regardless of

¹⁸⁶ UCP 600, Art 4 (a).

¹⁸⁷ Enonchong, *Letters of Credit* para 2.54; *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 W.L.R. 100; Art 5 of the UCP 600 states that “Banks deal with documents and not with goods, services or performance to which the documents may relate.”

¹⁸⁸ *Jack: Documentary Credit* para 1.35; Enonchong, *Letters of Credit* para 2.54; UCP 600, Art 7.

¹⁸⁹ (1921) 9 Ll L Rep 433.

¹⁹⁰ *Ibid* at 507 per Rowlatt J.

¹⁹¹ [1958] 2 QB 127.

¹⁹² *Ibid* at 129 per Jenkins LJ.

¹⁹³ [2011] EWHC 657 (TCC); See also *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* ([1983] 1 AC 168.

¹⁹⁴ *Ibid* at para 32. This was the quote of May LJ when considering the cross appeal (at para 26).

whether the discrepancy is material or immaterial.¹⁹⁵ In short, a letter of credit is viewed by the English courts and the UCP as independent from the underlying contract between the importer and the exporter. It is binding irrespective of consideration.

(ii) Letters of credit in Scots law

Scots lawyers, with no requirement of consideration, have no difficulty in characterising letters of credit. Like the approach adopted by the English courts and the UCP, the obligation under a letter of credit in Scots law is “distinct from the contract on which the letter of credit might be based.”¹⁹⁶ However, it is debatable whether a letter of credit is a contract or a promise. The first theory suggests that a letter of credit constitutes a contractual obligation between the bank and the beneficiary. It is not only a contract between the bank and the buyer, but the bank also makes an offer to “anyone who may take the cheque or bill under it”.¹⁹⁷ The Scottish courts also characterise a letter of credit using a contractual analysis. In *Centri-Force Engineering Ltd v Bank of Scotland*¹⁹⁸, Lord Abernethy stated that “[t]here are therefore contractual relationships between that bank and Software [the beneficiary]”.¹⁹⁹ The second theory suggests that a letter of credit is a unilateral binding undertaking.²⁰⁰ Under a promissory analysis, the bank makes a promise to the beneficiary, i.e. the seller who delivers goods or services, that he/she will be paid if delivery of goods or services has occurred.

Initially, it appears that the approach of characterising a letter of credit as a contract under Scots law is possible, given that there is no requirement of consideration under Scots law. However, a promissory analysis is a more appropriate characterisation of a letter of credit. As noted, the modern view amongst commentators suggests that a

¹⁹⁵ *JH Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37; cf *Glencore International AG v Bank of China* [1996] 1 Lloyd’s Rep 135.

¹⁹⁶ *Centri-Force Engineering Ltd v Bank of Scotland* 1993 SLT 190 at 191.

¹⁹⁷ Gloag, *Contract* 23.

¹⁹⁸ 1993 SLT 190.

¹⁹⁹ *Ibid* at 192.

²⁰⁰ E.g. J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 471; MacQueen, *Options* 188; Thomson & MacQueen, *Contract* para 2.59.

letter of credit generally becomes effective as soon as it is communicated to the beneficiary. This means that letters of credit do not really require mutual agreement between the bank and the beneficiary. Some Anglo-American academics explain that a letter of credit is binding irrespective of acceptance. As stated by Goode, a letter of credit is “a money promise which is independent of the transaction that gives it birth and which is considered binding ... without acceptance...”²⁰¹ Therefore, it is unnecessary to regard a letter of credit as an offer that requires acceptance, given that it is binding without acceptance. Moreover, a letter of credit becomes effective at the same moment as a promissory obligation comes into existence, i.e. when it is communicated to the promisee. Hence, the nature of letters of credit is more compatible with unilateral obligations.

(iii) Benefits of regarding letters of credit as unilateral obligations

The approach of viewing letters of credit as unilateral obligations can help to eradicate some of the practical problems associated with them. It has been argued that the courts have lost sight of the purpose of a letter of credit by viewing it as a contract.²⁰² The case of documentary compliance is an obvious example of this. Traditionally, the Anglo-American courts applied the rule of strict compliance to letters of credits, according to which the beneficiary was required to present documents that strictly complied with the terms of the letter.²⁰³ In *Equitable Trust Co of New York v Dawson Partners Ltd*²⁰⁴, the Court of Appeal stated:

“...the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines.”²⁰⁵

²⁰¹ R Goode, “Abstract Payment Undertakings”, in P Cane & J Stapleton (eds), *Essays for Patrick Atiyah* (1991) 209.

²⁰² J D Their, “Letters of Credit: A Solution to the Problem of Documentary Compliance” (1982) 50(5) *Fordham Law Review* 848 at 854.

²⁰³ E.g. *English, Scottish and Australian Bank Ltd v Bank of South Africa* (1922) 13 Ll L Rep 21; *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* (1972) 46 ALJR 436 (PC).

²⁰⁴ (1927) 27 Ll L Rep 49.

²⁰⁵ *Ibid* at 52 per Sumner LJ.

However, the Anglo-American courts subsequently applied contractual principles when dealing with letters of credit. One of these principles is substantial performance.²⁰⁶ In Anglo-American law, the doctrine of substantial performance allows a court to treat a substantial, or partial, performance a substitute for the actual performance of a contract.²⁰⁷ The application of substantial performance in letters of credit means that it is no longer necessary for the documents presented by the beneficiary to strictly comply with the terms of the letter of credit. This rule is called substantial compliance and it is the strongest opponent of the strict compliance rule.²⁰⁸

The Anglo-American courts have employed substantial compliance to letters of credit in a number of cases.²⁰⁹ However, they have been criticised for wrongly equating “substantial performance of a contract with substantial compliance under a letter of credit.”²¹⁰ The courts “fail to recognize the distinction between a letter of credit and a contract.”²¹¹ Critics claim that “once courts begin inquiring into the state of mind of the issuing bank, the doctrine of strict compliance has lost its starch.”²¹² The application of substantial performance to letters of credit is flawed because “substantial performance is designed to prevent unjust enrichment by one party when the other party has fulfilled substantially all of the duties under the contract.”²¹³ This is different from the obligation of the bank under a letter of credit transaction in which the bank is “merely a payment intermediary and has little to gain by either

²⁰⁶ See A Beck, “Doctrine of Substantial Performance: Conditions and Conditions Precedent” (1975) 38 *Modern Law Review* 413; G Williams, “Partial Performance of Entire Contracts”, (1941) 57 *LQR* 373.

²⁰⁷ E.g. *Hoeing v Issacs* [1952] 2 All ER 176 at 180-181; *H Dakin & Co v Lee* [1916] 1 KB 566.

²⁰⁸ T Conley, “Hanil Bank v Pt Bank Negara Indonesia: The Problem with Form over Substance in Documentary Compliance Rules” (2001) 50(4) *Catholic University Law Review* 989 (henceforth: T Conley, *Substance in Documentary Compliance*.)

²⁰⁹ E.g. *US Industries v Second New Haven Bank* 462 F Supp 662 (D Conn 1978); *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The Messiniaki Tolmi)* [1986] 1 *Lloyd's Rep* 455; *Glencore International AG v Bank of China* [1996] CLC 95.

²¹⁰ T Conley, *Substance in Documentary Compliance* 863.

²¹¹ *Ibid* at 989.

²¹² “Letters of Credit: How Strict Is the Rule of Strict Compliance?” (1979) *LENDING LF* 3 (8) at 7, 8 (cited in S T Kolyer, “Judicial Development of Letters of Credit Law: A Reappraisal” (1980) 66(1) *Cornell Law Review* 144 at 153).

²¹³ T Conley, *Substance in Documentary Compliance* 989.

honor or dishonor.”²¹⁴ In addition, the notion of substantial compliance contradicts the standard practice of letters of credit.²¹⁵ The fact that the courts require the issuing bank to make a discretionary determination of the beneficiary’s documentary compliance means that the bank needs to examine the underlying contract between the beneficiary and the applicant. The fact that the issuing bank is responsible for examining the underlying contract “vitiates the intent of the parties entering into the letter of credit by not enforcing the conditions the applicant believes to be necessary to ensure proper tender on delivery.”²¹⁶ It is therefore difficult for the banks to adopt the application of substantial compliance because they need to possess efficient skill and a comprehensive understanding to justify whether or not they should accept the documents presented.²¹⁷ Furthermore, the application of substantial compliance in letters of credit increases time and costs.²¹⁸

The application of substantial performance to letters of credit may perhaps stem from the fact that a letter of credit is viewed as a contract. Although a letter of credit is a separate transaction from the underlying contract of sale, the contractual rule of substantial compliance can still be applied because the relationship between the issuing bank and the beneficiary is viewed as a contractual relationship.²¹⁹ Accordingly, the approach of considering a letter of credit as a unilateral obligation can avoid the problem that arises from the application of substantial performance to letters of credit. Under a promissory analysis, the relationship between the issuing bank and the beneficiary would be viewed as a promissory relationship. Hence, the contractual doctrine of substantial performance could not be applied. The bank will merely be required to examine the presented document to determine if it complies

²¹⁴ *Ibid.* It is argued that the most dangerous flaw of the doctrine of substantial compliance is because “it violates the spirit of letter of credit law and practice.” T Conley, *Ibid* at 998.

²¹⁵ J F Dolan, *The Law of Letters of Credit* (2001) para 6.05.

²¹⁶ T Conley, *Substance in Documentary Compliance* 998.

²¹⁷ R C Hashim, “Principle of Strict Compliance in Letter of Credit (LC): Towards a Proper Standard of Compliance” (2013) 1 Legal Network Series (A) lix at 5, available at http://repository.um.edu.my/32087/1/A_2013_1_LNS_lix%20copy.pdf.

²¹⁸ J F Dolan, *The Law of Letters of Credit* (2001) paras 6.02, 6.05.

²¹⁹ Although the theory that a letter of credit is independent from an underlying contract has been adopted by both national courts and legal writers, the Anglo-American courts and a number of commentators still refer to the relationship between the issuing bank and the seller as a contractual one. See *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1 AC 168 at 183 per Lord Diplock; *Jack: Documentary Credits* para 5.1.

with the terms of the letter of credit. However, it will not need to scrutinise the underlying contract on which the letter of credit is based.

(b) Thai law

(i) General concept and legal characteristics of letters of credit

Although letters of credit have been used in Thailand, there is no specific legislation dealing with them. This stems from the fact that the usage of letters of credit came into Thailand after the promulgation of the Thai Code in 1920s. Thus, the legal principles used to govern the legal status and legal effects of letters of credit are both contractual principles and general principles of obligations.

The Thai courts consider letters of credit as a contract. For example, in the Supreme Court Decision 4579/2009 (B.E. 2552), the defender opened three letters of credit with the pursuer in order to make payments for an international seller. The pursuer then paid the money to the seller. The defender, however, refused to pay the money back to the pursuer. The court held in favour of the pursuer. The court referred to the obligation between the parties as “the obligation arising from the contract to open a letter of credit”²²⁰ Moreover, the Thai courts adopt the notion that a letter of credit is a separate and independent transaction from the underlying contract between the seller and the buyer.²²¹

It is not surprising why the Thai courts confine their analysis of letters of credit to the contractual approach, given that this is the only standalone voluntary obligation. Nevertheless, the juristic nature of commercial letters of credit is not actually compatible with the characteristics of contract under Thai law. As discussed in Chapter V, under Thai law contract is a mutual agreement, typically arising from an offer and an acceptance, between two or more parties. In letters of credit, however, there is no mutual agreement between the issuer and the beneficiary.

²²⁰ There are also other cases in which the Thai courts have analysed letters of credit as contracts e.g. Supreme Court Decisions 2983/2006 (B.E. 2549); 2647/2005 (B.E. 2548); 5985/2005 (B.E. 2548).

²²¹ Supreme Court Decisions 755/1982 (B.E. 2525), 1561/1986 (B.E. 2529).

However, Thai commentators tend not to refer to a letter of credit as a contract, despite the fact that they do not clarify the actual legal characteristics of a letter of credit. For instance, Chantikul explains that a letter of credit is a document issued by a bank or a similar party, requesting another bank or another party to pay a sum of money to the person stated in the document. The party who has paid the money can get the money back from the person who opened a letter of credit.²²² Jongjakapun states that a letter of credit is a method of payment by which a commercial bank binds itself to pay the beneficiary on the condition that the beneficiary complies with the terms stated in the letter of credit.²²³ Tantikulanan explains that a letter of credit is an assurance of payment of the price the buyer has to pay to a seller who resides overseas, when the bank is the intermediary of the payment.²²⁴ The fact that Thai commentators do not refer to letters of credit as contracts suggests that they may consider a letter of credit to be distinctive from a contractual obligation. However, given that a contract is the only kind of voluntary obligation under Thai law, it would be difficult for Thai scholars to classify letters of credit as a different kind of obligation. It is noteworthy that the definition of letters of credit given by Thai scholars is compatible with the idea of a letter of credit as a unilateral obligation which has been discussed under Scots law.

(ii) Letters of credit and third party rights

Some Anglo-American scholars have suggested that the best approach to characterise a letter of credit within a contractual framework is to regard it as a third party right.²²⁵ Nevertheless, although it initially appears that third party right should be a possible approach to conceptualise letters of credit under Thai law, it is difficult to apply this concept due to the legal nature of letters of credit.

²²² K Chantikul, “ความรู้ทั่วไปเกี่ยวกับธุรกิจระหว่างประเทศและกฎหมายการค้าระหว่างประเทศ” (General Knowledge of International Business and International Trade Law), in *คู่มือการศึกษานิติศาสตร์ระหว่างประเทศ (Studying International Trade Law)* (1999) 14-15.

²²³ K Jongjakapun, *กฎหมายการค้าระหว่างประเทศ (International Trade Law)*, 4th edn (2010) at 411.

²²⁴ W Tantikulanan, *Commentary on Letters of Credit (L/C) and Trust Receipt (T/R)* (2001) 1-2.

²²⁵ A Menendez, *Letter of Credit, its Relation with Stipulation Pour Autrui*, July 30, 2010, at 25, available at <http://ssrn.com/abstract=2019474>.

Firstly, under Thai law the right of the third party beneficiary “comes into existence at the time when he declares to the debtor his intention to take the benefit of the contract.”²²⁶ This means that when the parties make an agreement that benefits a third party, this right does not exist until the beneficiary notifies the debtor that he/she wishes to take the benefit. This fundamentally contrasts with the time when the right of the beneficiary of a letter of credit comes into existence and is enforceable, which is when the letter of credit is communicated to him/her.²²⁷

Secondly, in third party rights, the debtor can assert any defence against the third party beneficiary based on the same claim that he/she could use against the creditor. The Thai Code states that “Defences arising from the contract mentioned in Section 374 [third party rights] can be set up by the debtor against the third person who receive the benefit of the contract.”²²⁸ This would mean that, if a letter of credit was viewed as a third party right, the bank could use any claim arising from the applicant’s relationship with it to refuse to pay the beneficiary, which would clearly contradict the rule of letters of credit. As noted, the relationship between the bank and the beneficiary is totally independent. Since the right of the beneficiary does not depend on the relationship between the bank and the applicant of the letter of credit, the bank cannot use any defence or claim that it has against the applicant to refuse the payment.²²⁹

The aforementioned problems show that the nature of letters of credit is incompatible with third party rights. However, these problems do not arise if a letter of credit is viewed as a unilateral obligation. Firstly, the right of the promisee of a promissory obligation exists as soon as the promise is delivered to the promisee.²³⁰ This is compatible with the right of the beneficiary of a letter of credit that comes into existence when it has been communicated to him/her. Secondly, if a letter of credit is

²²⁶ Thai Code, §374 para 2.

²²⁷ As earlier discussed in sub-heading (i) Letters of credit in the Common Law.

²²⁸ Thai Code, §376.

²²⁹ UCP 600, Art 4(a).

²³⁰ According to the theory that communication of a promise is required, as discussed in Chapter VI, B. COMMUNICATION OF A PROMISE.

viewed as a unilateral promise, the bank will not be able to assert any defence against the beneficiary based on the same defence it has against the buyer. This is also in accordance with the rule which states that the bank must honour the beneficiary of a letter of credit if the latter complies with the terms in it.

To conclude, under a promissory analysis, there would be no difficulty in explaining the relationship between the issuer and the beneficiary. It is a unilateral obligation binding without the acceptance of the beneficiary. Thus, the idea of promise would describe the nature of letters of credit more convincingly.

(c) Conclusion

Promise plays an important role in the legal analysis of letters of credit under Scots law. This type of commercial transaction can easily be analysed using this doctrine. Moreover, a promissory analysis helps to avoid some of the practical problems of letters of credit, such as documentary compliance. The contractual principle of substantial performance will not apply if a letter of credit is viewed as a promise.

The Thai courts analyse letters of credit within a contractual framework. However, the real nature of letters of credit is neither a contract nor a third party-right. Therefore, if Thai law recognised promise as a free-standing legal institution, letters of credit could be characterised as unilateral promises rather than contracts.

(4) IOUs

(a) Scots law

(i) General concept and legal characteristics of IOUs

An IOU is “an acknowledgement of debt”.²³¹ It is a record that “a debt has been incurred for a stated amount, with an undertaking in law, which is implied and not express, that repayment will be made on demand.”²³² The Scottish courts held that an IOU imports an obligation to pay back the money.²³³ It is per se sufficient to “instruct the constitution and resting owing of the debt”.²³⁴ Therefore, a genuine IOU “requires no evidence to support or explain it.”²³⁵ Moreover, an IOU is not merely “an adminicle of evidence”, but rather “a substantive ground of action”.²³⁶ In short, a creditor can use an IOU to support his/her claim in forcing the debtor to repay the debt.

The Scottish courts held that an IOU constituted a unilateral obligation. In *McTaggart v MacEachern's Judicial Factor*²³⁷, the debtor wrote an acknowledgement of the debt in the form: “I the undersigned herewith agree to repay the sum of Two hundred pounds £200 borrowed to-day 10th August 1944”. The document was held to be a promissory note.²³⁸ However, when the Scottish courts held that IOUs implied an obligation to pay back the debt in other cases²³⁹, they did

²³¹ *M'Kenzie's Executrix v Morrison's Trustees* 1930 SC 830 at 836 Per Lord Hunter.

²³² *Black v Gibb* 1939 SLT 571 at 873 per Lord Moncrieff.

²³³ *Thiem's Trustees v Collie* (1899) 1 F 764 at 767 per Lord Justice-Clerk Macdonald; also at 774 per Lord Trayner; *Bishop v Bryce* 1910 SC 426; *M'Creadie's Trustees v M'Creadie*, (1897) 5 SLT 153.

²³⁴ *Thiem's Trustees v Collie* (1899) 1 F at 779 per Lord Moncrieff.

²³⁵ *Haldane v Speirs* (1872) 10 M 537 at 541 per Lord President.

²³⁶ *Thiem's Trustees v Collie* (1899) 1 F 764 at 778 per Lord Moncrieff.

²³⁷ 1949 SLT 363.

²³⁸ It is worth noting in this case Lord MacKintosh stated that, although the pursuer's counsel originally contended that the notes in question were IOUs, counsel subsequently “had come to the conclusion that he could not maintain his previous day's contention that these documents were I.O.U.'s...”. (*Ibid* at 364) Therefore, this does not seem to be a case in which the parties or the court were arguing for an IOU analysis of the document. It was simply a promissory note.

²³⁹ E.g. *M'Kenzie's Executrix v Morrison's Trustees* 1930 SC 830; *Black v Gibb* 1939 SLT 571; *Thiem's Trustees v Collie* (1899) 1 F 764; *Thiem's Trustees v Collie* (1899) 1 F 764.

not clearly explain whether IOUs constituted a contractual or a promissory obligation. The fact that an IOU creates an obligation to pay back the money means that it is not merely evidence to support a claim, but per se an obligation. Moreover, the scope of IOUs is wider than an acknowledgement of a debt due to a contract of loan. In *Black v Gibb*²⁴⁰, the court ruled that a person may grant an IOU for any reasons other than a loan. By citing the opinion of Lord Justice-Clerk in *Thiem's Trs v Collie*²⁴¹, the court stated that an IOU may be given for

“a cause not implying a loan; ... to close an accounting between parties in a matter not involving loan; ...to settle a claim of damages, or to provide a fund of credit, or to induce another to delay or waive exacting some right in which no question of money was involved.”²⁴²

The courts' decisions show that an IOU can be an undertaking to pay money arising from a number of different reasons other than a loan. This suggests that it is perhaps unnecessary for an IOU to be characterised as being contractual in nature. Therefore, it is worth analysing the actual juristic nature of IOUs to determine whether they are contracts or promises.

(ii) Analysis

Promissory analysis

An important issue that needs to be considered is whether the nature of IOUs is compatible with the nature of promises. As discussed in Chapter I, an important requirement for a promise is that it must relate to an event in the future.²⁴³ If that were true then, according to the theory adopted in this thesis that a promise must relate to future affairs, an IOU could not be regarded as a promise. In other words, although an acknowledgement of a debt creates obligation per se, such obligations are not considered as promissory in nature on the basis that it does not relate to future affairs.

²⁴⁰ 1939 SLT 571.

²⁴¹ (1899) 1 F 764.

²⁴² *Ibid* at 767 per Lord Justice-Clerk (cited in *Black v Gibb* 1939 SLT 571 at 572).

²⁴³ See Chapter I, C. NATURE AND REQUIREMENTS OF PROMISE, (5) A promise must relate to a performance in the future.

Also, the features of IOUs and promissory notes are, in essence, different. In *Muir v Muir*²⁴⁴, the court was asked to determine if a document containing the following term, “Glenlee, Kilcregan. November 10th 1892. I. O. U. one hundred pounds which I promise to pay on demand”, amounted to a promissory note or an IOU. Lord Skerrington read the document as meaning “I promise on demand to pay One hundred pounds for value received.”²⁴⁵ Therefore, “[t]his is a common form of promissory note. It acknowledges that value has been received, but it does not state of what that value consisted”²⁴⁶ The court further observed:

“Where a writing takes the shape of an “I. O. U.” pure and simple, recent decisions, and in particular *Thiem's Tr. v. Collie*, go a long way towards assimilating it to a bond, but, these decisions cannot be extended to a writing which is essentially different from an ordinary I.O.U.”²⁴⁷

The court’s decision suggests that an IOU is generally made in the simple form of an acknowledgment of a debt. In contrast, a promissory note must contain certain details to be valid as a promissory note.²⁴⁸

It is further worth analysing whether there is a situation in which a person who gives an IOU not only acknowledges an existing debt, but also makes a promise to pay the money to the other party, i.e. an IOU can be regarded as a promise because it relates to a future event. As noted, it was stated by the court in *Thiem's Trs v Collie* that an IOU may be given for other reasons than a loan; for example, settling a claim for damages. However, in this case a right to damages arises as soon as the harm been inflicted, which means that it relates to a past event, rather than a future one. In another example, an IOU may be given “for a cause not implying a loan; it might be granted to close an accounting between parties...”²⁴⁹ As in the case of settling a claim for damages, this IOU relates to a relationship between the parties that involves closing an account that occurred in the past.

²⁴⁴ *Muir v Muir* 1912 1 SLT 304.

²⁴⁵ *Ibid* at 305.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ Bills of Exchange Act 1882, s 83.

²⁴⁹ *Ibid* at 767 per Lord Justice-Clerk (cited in *Black v Gibb* 1939 SLT 571 at 572).

Contractual analysis

Even though an IOU cannot be regarded as a promise based on the preferred approach of this thesis because it does not relate to a future event, their nature is not compatible with bilateral obligations either. The fact that an IOU is an acknowledgement of a debt suggests that individuals who issue IOUs acknowledge that they owe money and are willing to pay it back, whereas the grantees of an IOU do not need to make any undertaking. It is not necessary for the grantee, i.e. the creditor, to accept an IOU, because naturally, creditors will always want their money back. This suggests that the characteristics of an IOU are not really compatible with the legal nature of a bilateral obligation. As a result, it is perhaps more appropriate to regard IOUs as an independent right, as discussed below.

IOUs as an independent right

It is proposed in this thesis that IOUs, when they create an obligation per se, should be regarded as an independent right which has special features, but also shares some similarities to promises.²⁵⁰ An important feature of promise which should apply to IOUs is the rule that the obligation comes into existence when it is communicated to the recipient. If an IOU was viewed as an independent right which shares this feature to promises, the creditor would generally be in a better position than a creditor in the case of a bilateral analysis. Consider the following example. A, a debtor, writes a letter to acknowledge his debt and sends it to B, his creditor. By treating an IOU as an independent right which shares some of the characteristics of promises, the IOU takes effect once the letter reaches B and it is irrevocable thereafter. In contrast, under a contractual analysis, it may be possible for A to withdraw the IOU, even if it has already reached B, as long as B has not yet agreed or accepted the IOU.

It is worth considering whether there is any drawback to the approach treating IOUs as an independent right caused by the requirements of writing under Scots law.

²⁵⁰ This approach is similar to McBryde's proposition that JQT should be regarded as an independent right. See McBryde, *Contract* para 10-07.

According to this approach, IOU may be viewed as a unilateral obligation under the Requirements of Writing (Scotland) Act 1995 on the grounds that it is binding without acceptance. Nevertheless, in the case of an IOU given in the course of business, the proposed approach is useful because it does not require to be in writing.²⁵¹ As for an IOU not given in the course of business, it is still useful. In a general sense, an IOU is defined as “[a] document bearing these three letters followed by a specified sum, and signed, constituting a formal acknowledgement of a debt.”²⁵² Therefore, one would expect that usually an IOU to be in signed writing.

To conclude, an IOU cannot be regarded as a promise based on the preferred approach of this thesis because it does not relate to a future event. Neither is it compatible with the characteristics of contract because it is natural for creditors to want their money back (so that an acceptance by the creditor would be a superfluous requirement). Therefore, it is more appropriate to regard IOUs as an independent right, when they create an obligation per se.

²⁵¹ Requirements of Writing (Scotland) Act 1995, ss 1(2)(a)(ii).

²⁵² Oxford English Dictionary: IOU, available at <http://www.oed.com/view/Entry/99353?redirectedFrom=iou#eid>.

(b) Thai law**(i) General concept and legal characteristics of IOUs**

There is no requirement of formality in constituting a contract of loan of money. However, if the amount of the debt exceeds 2,000 baht, the law requires written evidence signed by the borrower, otherwise it was unenforceable by action.²⁵³ Written evidence can exist in the form of letters, memos, or any other types of document. It must be signed by the person who is liable, which in the case of loan of money is the borrower.²⁵⁴ Written evidence can be given to the creditor either at the time the contract of loan is made or at any time later.²⁵⁵

The scope of application of an IOU in Thai law is narrower it is in Scots law. Whilst in Scots law an IOU itself constitutes an obligation to pay back the money, in Thai law it can only be used as evidence to support a lawsuit. IOUs would generally be viewed as evidence of a contractual relationship between the parties. They would not be viewed as themselves creating any separate obligation.

(ii) Analysis

If an IOU does not contain the borrower's signature, which is an important piece of written evidence, it would not be sufficient to constitute written evidence of loan under Thai law. This reflects a gap within Thai law. Initially, this suggests that, if Thai law recognised a promissory obligation as a standalone obligation, an IOU which does not contain debtor's signature could be useful to the creditor if it was viewed as a written promise to repay the debt. However, as in the case of the analysis of IOUs under Scots law, according to the theory adopted in this thesis that a promise must relate to a future event, an IOU should not be regarded as a promissory obligation because it relates to a past event rather than a future one.

²⁵³ Thai Code, §653.

²⁵⁴ Sotthibandhu, *Juristic acts and Contracts* 96-97.

²⁵⁵ *Ibid.*

Moreover, as will be fully discussed, according to the proposed promissory provision of this thesis for Thai law, a promissory obligation which is undertaken gratuitously will be required to be made in a written form signed by a person who is liable.²⁵⁶ Thus, even if an IOU was regarded as promissory obligation, where a debtor makes a written promise (IOU) to pay back a debt without a signature and the creditor receives nothing in return, such an IOU would not be enforceable. In this sense, there is no difference between a promissory analysis of IOUs and IOUs as written evidence to support a lawsuit action in a contract of loan, given that neither approach helps a creditor to force the debtor to pay the money back.

One might argue that the analysis of a unilateral promise in the case of IOUs is useful for Thai law in relation to the prescription of obligation. For example, if an IOU can create an obligation to pay back the money, the period of prescription will start when it is given rather than from the date when the contract of loan was concluded. Nevertheless, the Thai Code states “prescription is interrupted if...[t]he debtor has acknowledged the claim towards the creditor by written acknowledgement...”²⁵⁷ Thus, there is no difference between treating an IOU as a separate promise or as evidence of a subsisting obligation because both approaches are useful in terms of interrupting the prescription of a subsisting obligation.

(c) Conclusion

In Scots law, the fact that an IOU can be used as a ground for action means that it is an obligation per se. It is argued in this thesis that an IOU cannot be regarded as a promissory obligation because it is contrary to the theory, which is widely accepted by legal commentators, namely, that a promise must relate to future affairs. The nature of IOUs is not compatible with a bilateral analysis on the basis that creditors would naturally want their money back. Therefore, an IOU should be binding once it has been delivered to the creditor. As a result, it is proposed in this thesis that an IOU

²⁵⁶ See Chapter VIII, C. WHAT CAN BE LEARNED FROM THAI LAW?, (4) Suggestions for Thai law, (a) §354 (General provisions).

²⁵⁷ Thai Code, §193/14.

should be regarded as an independent right, which shares some of the characteristics of promise. Moreover, the approach of not regarding an IOU as a promissory obligation helps to distinguish an IOU from a promissory note. Apart from the fact that a promissory note must contain certain details whereas an IOU can appear in a simple form, they can be distinguished by considering whether they relate to future affairs or not.

As for Thai law, it is not proposed to regard IOUs as promissory obligation because this would be contrary to the theory adopted in this thesis that a promise must relate to a future commitment. Moreover, even if Thai law recognised promises as an independent obligation, there is no difference between treating an IOU as a separate promise or as evidence of a subsisting obligation. For example, acknowledgement of a debt also interrupts the prescription under Thai law.

Chapter VII Part II

C. USING PROMISES AS ENTICEMENTS

(1) Advertisements of reward

Advertisements of reward are commonly discussed in both English¹ and Scots² contract law textbooks. Although rewards are less common today, people will occasionally offer rewards for certain purposes such as for the return of lost pets and possessions. There have been a number of advertisements in which rewards were offered for a safe return of lost dogs,³ cats⁴ and rabbits.⁵ Moreover, police have offered rewards for information. For instance, in 2012 a £5,000 reward was offered for information about the murder of a 67 year old man in West Lothian.⁶ More recently, in 2015 the US government offered a \$5million reward for information leading to the recapture of a drug dealer.⁷ Therefore, it is appropriate to include the discussion of rewards in this chapter.

¹ E.g. *Treitel The Law of Contract* para 2-010; *Chitty on Contract* para 2-019; W R Anson, *Anson's Law of Contract*, 29th edn by J Beatson, A Burrows and J Cartwright (2010) 37-38..

² Gloag, *Contract* 24; MacQueen & Thomson, *Contract* para 2.19; Hogg, *Obligations* 73-76.

³ E.g. in 2005, a couple offered a £40,000 reward for the safe return of their dog. *Couple Put Up £40,000 Reward - For a Dog*, available at <http://www.dailymail.co.uk/news/article-360475/Couple-40-000-reward--dog.html>; In 2011, a couple from Cornwall offered a reward for their lost dog. *Olympian Ed Offers Reward to Find Lost Dog*, available at <http://www.thisiscornwall.co.uk/Olympian-Ed-offers-reward-lost-dog/story-14278755-detail/story.html>; In 2012, a £10,000 reward was offered for a safe return of a lost dog, available at <http://www.missingangel.co.uk/>

⁴ E.g. *Student Offers Extraordinary £10k Reward for Safe Return of Her Beloved Cat*, available at <http://www.dailymail.co.uk/news/article-1325587/Heartbroken-cat-owner-puts-extraordinary-10k-reward-pet-vanishes-trace.html>.

⁵ E.g. In 2010, a reward of £50 was offered for a return of a lost rabbit. *Missing Rabbit Greater Manchester M30*, available at <http://www.nationalpetregister.org/mp/22709.htm>; In 2012, a reward of £200 was offered for a safe return of a lost rabbit. *Lost Rabbit Crosby Road Southport '£2000 reward on offer'*, available at <http://www.otsnews.co.uk/lost-rabbit-crosby-road-southport-200-reward-on-offer/>.

⁶ *Ronnie Simpson Murder: £5,000 Reward Offered For Information*, available at <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-19936238>; see also *Damien Nettles: Police Offer £20,000 Reward*, available at <http://onthewight.com/2012/10/04/damien-nettles-police-offer-20000-reward/>.

⁷ *US offers \$5M reward for information on El Chapo as head of DEA suggests escaped drug kingpin may still be in Mexico*, available at <http://www.dailymail.co.uk/news/article-3186151/US-offers-5M-information-escaped-Mexico-drug-kingpin.html>.

(a) Scots law

There is controversy regarding the juristic nature of rewards under Scots law. Again, there are two schools of thought on categorising the legal nature of rewards, namely contractual and promissory.

(i) Offer of reward

As the later discussion will indicate, as a result of English influence, the Scottish courts tend to consider rewards as contractual in nature.⁸ Therefore, it is worth considering the analysis of reward under English law. In English law, advertisements of reward are usually analysed using a contractual approach. A person making an advertisement is deemed to make an offer made to the public.⁹ Thus, the person who completes the specific act stated in the advertisement would be regarded as accepting the offer. A contract of reward is concluded when the beneficiary claims the reward.¹⁰

English courts and scholars, when dealing with the concept of offer of reward, frequently use terminology associated with unilateral contracts. For example, in *Treitel The Law of Contract*, it is stated that “[a]n offer of a unilateral contract is made when one party promises to pay the other a sum of money if the other will do (or forbear from doing) something without making any promise to that effect.”¹¹ In *Carlill v Carbolic Smoke Ball Co*¹², the Court of Appeal regarded the case as a unilateral contract.¹³ The court ruled that the advertisement “was an offer intended to

⁸ See the last paragraph of this section.

⁹ *Fallick v Barber* 105 ER 41. See also note below.

¹⁰ E.g. *Williams v Carwardine* (1833) 5 Carrington and Payne 566, 172 ER 1101; *Lancaster v Walsh* (1838) 4 Meeson and Welsby 16, 150 ER 1324; *Gibbons v Proctor* (1891) 64 LT 594; *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256; *Bowerman v Association of British Travel Agent Ltd* [1996] CLC 451; *Azevedo v IMCOPA - Importacao, Exportacao e Industria de Oleos Ltda* [2013] EWCA Civ 364, [2015] QB 1.

¹¹ *Treitel The Law of Contract* para 2-051; See also *Chitty on Contracts* para 3-008.

¹² [1893] 1 QB 256.

¹³ The term “unilateral contract” was not used by the court in this case. However, it could be inferred from its decision that the advertisement of reward was regarded as a unilateral contract. The *Carlill* case was referred to in *Bowerman v Association of British Travel Agent Ltd* ([1996] CLC 451) in which the term “unilateral contract” was used (at 458 per Hobhouse LJ).

be acted upon, and, when acted upon and the conditions performed, constituted a promise to pay.”¹⁴ The kind of contract which arises in advertisements of reward is unilateral because “it arises without the offeree’s having made any counter-promise to perform the required act or forbearance”.¹⁵

After the *Carlill* case, the Scottish courts tend to apply the offer of reward doctrine. For instance, in *Law v Newnes Ltd*¹⁶ and *Hunter v Hunter*¹⁷, a newspaper included an advertisement that it would pay money to the next of kin of anyone killed in a railway accident where the deceased possessed a copy of the current issue or where he/she was a regular subscriber. In the first case, the court decided in favour of the defender¹⁸, since Lord Young was uncertain whether “any valid contract had been constituted”.¹⁹ In the second case, Lord Trayner was prepared to assume that there was a contract (this was obiter).²⁰ Also, in *General Accident Fire & Life Assurance Corp v Hunter*²¹, the appellant, an insurance company, agreed to pay a thousand pounds to any owner of a diary who was killed in a railway accident on condition that he/she had registered with the appellant company and the claim was made within twelve months. The executor of Mr Hunter, who had been killed in a train accident, claimed the money. The House of Lords analysed the claim of reward using a contractual analysis. The court regarded the advertisement “as an offer by the defenders which can be accepted, and a contract so made, by any person who complies with the conditions.”²²

¹⁴ [1893] 1 QB 256 at 274 per A L Smith, LJ.

¹⁵ *Treitel The Law of Contract* para 2-051.

¹⁶ *Henry Law and Others v George Newnes, Limited* (1894) 21 R 1027.

¹⁷ (1904) 7 F 136.

¹⁸ (1894) 21 R 1027 at 1033 per Lord Rutherford Clark.

¹⁹ (1894) 21 R 1027 at 1027 and 1028-1030 per Lord Young.

²⁰ (1904) 7 F 136. Here, Lord Trayner stated that “[i]t was not argued to us, but I assume for the moment that there was such a contract. But if so what was the contract...” (at 140-141).

²¹ [1909] AC 404.

²² *Ibid* at 411 per Lord Loreburn LC.

(ii) Promise of reward

Under a promissory analysis, an advertisement of reward takes effect once the advertisement is made. While the Scottish courts have been reluctant to apply a promissory approach, this approach has been well supported theoretically by legal scholars e.g. TB Smith²³, McBryde²⁴, MacQueen²⁵, Hogg²⁶, Sellar²⁷ as well as the Scottish Law Commission.²⁸

This thesis argues that the features of rewards are more compatible with unilateral obligations. Rewards are usually created for the purpose of obtaining some information or for the recovery of property regardless of whether the person who brings the information or brings back the lost property has any knowledge of the advertisement of reward. The main purpose of the party issuing an advertisement of reward is to encourage performance of the act specified in the notice of reward, rather than to reach a mutual agreement between the parties. In Scots law a contract is regarded as a mutual agreement between two parties, whereas a promise is a unilateral undertaking which is binding without acceptance. It is therefore more appropriate to treat a reward as a unilateral obligation. Moreover, the adoption of a promissory approach enhances case analysis. Since an acceptance is not required, the person who completes the act can earn the reward even if he/she does not act with intent to get the reward. This makes the situation different from the offer of reward approach where the beneficiary needs to be aware of the reward.²⁹

Moreover, the promisee under a promissory analysis is in a better position than the offeree under a contractual one. This is because an offer can generally be revoked

²³ Smith, *Short Commentary* 747-751; TB Smith, "Pollicitatio - Promise and Offer" (1958) *Acta Juridica* 141-152.

²⁴ McBryde, *Promises* 50; McBryde, *Contract* paras 2-05 and 2-27

²⁵ MacQueen, *Options* 187.

²⁶ Hogg, *Promise* 229-230; Hogg, *Obligations* para 2.77-2.83.

²⁷ Sellar, *Promise* 277.

²⁸ Memorandum, *Constitution and Proof of Voluntary Obligations: Unilateral Promises* (Scot Law Com No 35, 1977) 10-11.

²⁹ Hogg, *Obligations* 76.

any time before it is accepted.³⁰ Thus, there could be a problem for the person who completes the act, particularly if the offeror can withdraw his/her proposal before the act has been done. This can be usefully compared with an American case in which the offeror of a reward was freely entitled to revoke the reward. In *Shuey v United States*³¹, a reward for information leading to the apprehension of a criminal was offered on 20 April 1865. The reward was then withdrawn on 24 November of the same year. The plaintiff who was unaware of the withdrawal subsequently obtained some information which could lead to an arrest a year later. It was held that the plaintiff was not entitled to the reward. This problem would not arise in the Scottish promissory approach since the promise takes effect once it is made. The promisor has no right to withdraw it, unless that right has been reserved.

Nevertheless, the disadvantage of using a promissory analysis of reward is the required form. Promises not undertaken in the course of business need to be made in writing³², whereas contracts not undertaken in the course of business do not. Therefore, when a reward is made by a non-business entity, the constitutive requirement of form by viewing a reward as a contract will be more flexible than it being regarded as a promise. Nonetheless, a promissory analysis would be more attractive than a contractual one in the case of rewards made in the course of business in which the obligation is not required to be in writing.

(b) Thai law

In Thailand people also occasionally offers rewards for certain purposes such as for the return of lost pets. For example, in February 2015, a lady offered a 10,000 baht reward for the safe return of her lost dog.³³ In May 2015, a 50,000 baht reward for

³⁰ E.g. *Countess of Dunmore v Alexander* (1830) 9 S 190; *Thomson v James* (1855) 18 D 1; *Campbell v Glasgow Police Comrs* (1895) 22 R 621; *J M Smith Ltd v Colquhoun's Tr* (1901) 3 F 981; *Effold Properties Ltd v Sprot* 1979 SLT (Notes) 84. *Smith v Aberdeen City Council* 2001 Hous LR 93 at para 10-28.

³¹ (1875) 92 US 73.

³² Requirements of Writing (Scotland) Act 1995, ss 1(2)(a)(ii), 2(1).

³³ Korat, *Reward for a Lost Dog*, available at <http://www.thairath.co.th/clip/13430>.

the return of a missing cat was offered.³⁴ Also, Thai police have offered rewards for information. For instance, in 2014, a 500 baht reward was offered to anybody who provided information about people who planned to protest against the National Council for Peace and Order (NCPO).³⁵ More recently, Thai police offered a 1,000,000 baht reward for information leading to the arrest of the main suspect in the bomb attack in central Bangkok.³⁶ These examples show that rewards have been used in practice in Thailand.

As discussed in Chapter VI, Thai law considers an advertisement of reward as a genuine unilateral promise rather than a contract.³⁷ The person who completes the act can claim the reward even if he/she is not aware of the existence of the advertisement,³⁸ thus there is no intention to enter into an agreement between the parties.

(c) Conclusion

In Scots law, a promissory analysis lends itself to case analysis of advertisements of reward. A beneficiary in the unilateral approach is better protected because he/she can enforce the promise without being required to accept it. In Thai law, it is clear that a promise of reward is considered as a genuine unilateral promise, rather than a contractual obligation.

³⁴ Mthai, *50,000 Bath Reward for Lost Cat*, available at <http://news.mthai.com/hot-news/social-news/450868.html>.

³⁵ The Nation, *Bt500 for Tip-offs on Planned Protests*, available at <http://www.nationmultimedia.com/homeBt500-for-tip-offs-on-planned-protests-30236954.html>.

³⁶ BBC, *Bangkok Bomb: Thailand Trebles Award to Find Main Suspect*, available at <http://www.bbc.co.uk/news/world-asia-34021729>.

³⁷ See Chapter VI, C. ACCEPTANCE AND REJECTION OF A PROMISE, (2) Thai law, (a) Acceptance of a promise.

³⁸ Thai Code, §362.

(2) Prize competitions

Organisations often use prize competitions to promote their businesses. For instance, the Law Society of Scotland ran an Annual New Lawyers Essay Competition.³⁹ Also, the Department of English Literature of the University of Edinburgh held a prize competition for prose and verse compositions.⁴⁰ The Rabbit Awareness Week website ran a competition as a part of an annual event which raises awareness of rabbit welfare.⁴¹ Similarly, firms or companies use prize competitions to attract customers. For instance, the BBC offered a competition for secondary school students to create a soundtrack for one of its series.⁴² It is therefore appropriate to include the discussion of this transaction in this chapter.

(a) Scots law

The writer, despite extensive searches, has not been able to find any Scottish case dealing with the legal nature of prize competitions. There are a few articles in contract law literature discussing the legal characteristics of this transaction.⁴³ Prize competitions are likely to be analysed in Scots law as gratuitous contracts,⁴⁴ although they can be alternatively regarded as unilateral promises.⁴⁵ Nonetheless, there was a case in 1848 in which the Scottish courts dealt with prize competitions. In *Graham v Pollok*⁴⁶, a dog won a prize in a dog race. The main dispute between the parties was who was entitled to receive the prize- the owner of the dog or the person whom

³⁹ The Law Society of Scotland, *Essay Competition*, available at <https://www.lawscot.org.uk/education-and-careers/studying-law/currently-studying-the-llb/essay-competition/>.

⁴⁰ English Literature, The University of Edinburgh, *Writing Prizes*, available at <http://www.ed.ac.uk/literatures-languages-cultures/english-literature/undergraduate/current/beyond-curriculum/prizes-scholarships/writing-prizes>.

⁴¹ Rabbit Awareness Week, *Competition*, available at <http://www.rabbitawarenessweek.co.uk/competition/>.

⁴² BBC, *Doctor Who 'Create a Soundtrack' Competition*, available at <http://www.bbc.co.uk/programmes/articles/Kxwskzz7R0YqwLjknWbtWT/doctor-who-create-a-soundtrack-competition>.

⁴³ Leading literature on Scots contract law, such as *Gloag on Contract*, *The Law of Contract in Scotland*, and *Contract Law in Scotland*, do not discuss the nature of prize competitions.

⁴⁴ Hogg, *Obligations* 76-77.

⁴⁵ *Ibid.*

⁴⁶ (1848) 10 D 646.

nominated it. Although the court did not characterise the nature of the prize competition, it can be inferred from its decision that prize competitions create an obligation. Therefore, it is necessary to characterise the juristic nature of prize competitions as either a contract or a promise, both of which are voluntary obligations in Scots law.

While it can be argued that rewards are unilateral in nature on the grounds that a promisee is not required to have the knowledge of the existence of reward, the same argument cannot be made in the case of prize competitions. Since a person who enters into a prize competition intends to enter the competition, one might argue that prize competitions should be regarded as bilateral agreements on this basis. Nonetheless, the fact that the entrants are always aware of the existence of the competition does not necessarily mean that prize competitions are not unilateral in nature. There are a number of transactions where the recipients always have knowledge of the transaction, but their natures are still compatible with unilateral obligations. Examples include firm offers, options and letters of credits, as have been discussed. In fact, the features of prize competitions are quite similar to those of promises of reward. A person who offers a prize competition also makes a promise to give the remuneration to another person. Moreover, prize competitions are generally made to the public, rather than to an individual person. The difference is that in prize competitions such a prize would be given to the person who wins the competition. However, in promises of reward, the reward is given to a person who completes the specific act as stated in the promise. The nature of the obligation itself is, nevertheless, similar.

It has already been noted that there appear to be no authorities regarding the legal nature of prize competitions in Scots law. It is therefore worth making reference to the Anglo-American approach dealing with prize competitions because there are a number of articles in the Common Law discussing prize competitions.⁴⁷ Also, there

⁴⁷ E.g. *Chitty on Contracts* para 2-111; F Cross, R Miller, *The Legal Environment of Business: Text and Cases: Ethical, Regulatory, Global and Corporate Issues* 8th edn, (2011) 187; R Miller and G Jentz, *Business Law Today: Text & Summarized Cases: Diverse, Ethical, Online and Global Environment*, 10th edn, 2012, 197.

have been a number of cases in which the Anglo-American courts have analysed the juristic nature of prize competitions.⁴⁸

In England, critics claim that prize competitions cause theoretical difficulties in relation to their legal analysis. The traditional offer and acceptance approach cannot appropriately deal with prize competitions. It is doubtful whether the act of an entrant in entering into a contest amounts to an offer or an acceptance, or both of them.⁴⁹ This advances the idea that the traditional rule of offer and acceptance is “out of date”⁵⁰ since it cannot deal with the formation of a contract in some complex circumstances.⁵¹ However, these difficulties do not arise in Scots law. Within the framework of a promissory analysis, there is no question as to whether an entry constitutes an offer or acceptance since the competition itself will be regarded as a unilateral promise to award the prize to the winner. If an entrant wins the competition, he/she can simply enforce the promise.

In the United States, prize competitions are regarded as unilateral contracts.⁵² They are contracts which can be accepted only by completing the anticipated act of performance.⁵³ This is because “the only acceptance of the offer that is necessary is the performance of the act.”⁵⁴ A unilateral contract of prize competition is formed when an entrant complies with the rules of the contest, for example, by submitting an

⁴⁸ E.g. *Englert v Nutritional Sciences LLC*, 2008-Ohio-5062; *Brackenbury v Hodgkin*, 116 Me 399, 102 A 106 (Me. 1917); *Harwood v Avaya Corp* (SD Ohio 2007), No C2-05-828.

⁴⁹ *Chitty on Contracts* para 2-111.

⁵⁰ *Ibid* at para 2-112; For instance, in *Butler Machine Tool Co. Ltd. v Ex-Cell-O Corporation (England) Ltd*, Lord Denning MR stated that “I have much sympathy with the judge’s approach to this case. In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out of date.” [1979] 1 WLR 401 at 404.

⁵¹ In *New Zealand Shipping Co Ltd Appellant v A M Satterthwaite & Co Ltd Respondent*, Lord Wilberforce observed that “[i]t is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations of daily life... These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.” [1975] AC 154 at 167; See also *Chitty on Contracts* 112.

⁵² In *Englert v Nutritional Sciences*, the Ohio Courts of Appeals stated: “[a]s the majority points out, courts have historically treated contests as unilateral contracts.” *LLC*, 2008-Ohio-5062 at para 41.

⁵³ R Miller and G Jentz, *Business Law Today: Text & Summarized Cases: Diverse, Ethical, Online and Global Environment* 10th edn, 2012, 197.

⁵⁴ *Cohn v Levine* 6 RCL 607. This was cited in *Brackenbury v Hodgkin* (116 Me 399, 102 A 106 (Me 1917) at 107.

entry in the competition.⁵⁵ In this sense, it is different from a bilateral contract in which the contract is formed when promises are exchanged.⁵⁶ In a unilateral contract, “the promise becomes binding when the act is performed.”⁵⁷ For instance, in *Brackenbury v Hodgkin*,⁵⁸ the defendant was a widow, who lived alone in Lewiston, Maine. She had asked the plaintiffs, her daughter and son-in-law, to move to Lewiston and look after her in exchange for a farm. The plaintiffs moved to Lewiston, but the defendant subsequently revoked her offer before they arrived. It was held that the contract had been formed when the offeree first initiated the request. The court ruled that “[t]he offer was the basis, not of a bilateral contract, requiring a reciprocal promise, a promise for a promise, but of a unilateral contract requiring an act for a promise.”⁵⁹

As discussed, the promisee is normally better protected than the offeree on the grounds that the offeror has the right to withdraw the offer whereas the promisor cannot. Yet, the Anglo-American courts have developed the rule that the offeror of a unilateral contract cannot revoke his/her unilateral contract once the promisee has begun the performance.⁶⁰ In the case of prize competitions, it would mean that after emailing or posting an entry into the competition, the competition holder cannot cancel the competition. Thus, the Anglo-American unilateral contract approach lends itself to the defence of the claim that the promisee under a promissory analysis is in a better position. This is because under a unilateral contract approach, the offeror cannot withdraw his/her offer either. The offerees under the unilateral contractual approach are therefore protected equally in comparison to the promisees under the unilateral promissory one.

⁵⁵ R Miller and G Jentz, *Business Law Today: Text & Summarized Cases: Diverse, Ethical, Online and Global Environment* 10th edn, 2012, 197.

⁵⁶ J E Murray Jr, *Murray on Contracts*, 5th edn (2011) §18; R Miller and G Jentz, *Business Law Today: Text & Summarized Cases: Diverse, Ethical, Online and Global Environment* 10th edn, 2012, 197; F Cross, R Miller, *The Legal Environment of Business: Text and Cases : Ethical, Regulatory, Global and Corporate Issues* 8th edn, (2011) 186.

⁵⁷ *Cohn v Levine* 6 RCL 607. This was cited in *Brackenbury v Hodgkin* (116 Me 399, 102 A 106 (Me 1917) at 107.

⁵⁸ 116 Me 399, 102 A 106 (Me 1917).

⁵⁹ *Ibid* at 107 per Cornish, CJ.

⁶⁰ E.g. *Harwood v Avaya Corp* (SD Ohio 2007), No C2-05-828.

Nonetheless, in some complex circumstance, the offeror of a unilateral contract may still be able to revoke his/her offer although the offeree/promisee has already begun the performance. It was held in *Englert v Nutritional Sciences*⁶¹ that an offeror of a unilateral contract, who reserved the right to cancel or alter the terms of the contract, is entitled to change the value of the prize after an offeree has already entered the contest. In this case, the respondent sponsored a contest. The appellant, who was chosen as the runner up in her age group, received a “challenge winner agreement” offering the sum of \$250 and another \$250 worth of the product. The appellant averred that she was entitled to the prize worth \$1500 on the grounds that this was the value that appeared in the contest advertisement. It was found as a fact in the case that the contest advertisement stated that “[a]ll winners must agree to the regulations outlined specifically for winners before claiming championship or money.”⁶² In addition, there was an asterisk that appeared next to the said statement that the respondent reserved “the right to cancel the [contest] at anytime, or to make changes as we see fit”.⁶³ Based on these pieces of information, the court held that there was no breach of contract by the respondent.⁶⁴ It can be seen that in these circumstances, the offeree is placed in a very disadvantageous position, given that the offeror can alter the value of the prize freely at any time, even after the contestant has already entered the contest. Clearly, the fact that the value of the prize could be altered from \$1500 to \$250 is an unfair outcome to the aggrieved party.

As there is no authority in Scots law on this point, it is interesting to assess how the Scottish courts, by applying a promissory analysis, would deal with this situation. Although in Scots law a promise takes effect once it is made and cannot be revoked thereafter, the promisor may reserve the right to revoke the promise.⁶⁵ Nonetheless, the ability to revoke the promise should also depend on when the right of the promisee comes into existence. A person who presents a prize competition to the

⁶¹ LLC, 2008-Ohio-5062.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ The result would have been different if the asterisked term reserving the right to withdraw the offer had not been included in the advertisement, in which case, the rule that an offeror is not entitled to withdraw his/her offer after the offeree has begun the performance would have applied.

⁶⁵ McBryde, *Promises* 65.

public should be able to withdraw from the competition (if he reserves that right) as long as the competition has not started. Moreover, when the winner has been chosen, the right to claim the prize would exist and the promisor should not be able to cancel the competition. Therefore, in this case, under a promissory analysis, *Englert's* right to claim \$1500 existed once she was chosen as the runner up. Accordingly, *Nutritional Sciences* would not be able to alter the value of the prize.

To conclude, the unilateral theory of prize competitions avoids complexity arising from the bilateral theory as well as providing better protection to an aggrieved party, i.e. a fairer outcome.

(b) Thai law

Prize competitions are regarded as unilateral promises under the Thai Code. A greater level of protection is provided to the promisee under a promissory analysis. The Code states that "...the promisor may so long as there is no person who has completed the specific act, withdraw his promise by the same means which was used for advertising, unless he declared in the advertisement that he would not withdraw it." Thai law generally permits the promisor of a prize competition to withdraw his/her promise. However, the withdrawal must be made before any promisee has completed the specific act, which in the case of a prize competition is when he/she has been chosen as the winner. Therefore, had *Englert* arisen in Thailand, the contest sponsor would not be able to revoke the promise even though such a right has been reserved. This is because the contestant had been chosen as the winner already. The Thai outcome would also be the Scots outcome given that, in Scots law the right of the promisee in a prize competition would, as one reasonably be expected, exist when he/she is chosen as the winner.

Thai law does not require the value of the prize to appear in the contest advertisement.⁶⁶ This is different from the rule under the Anglo-American Law, where there must be clear details about the value of the prize so that the contest can

⁶⁶ Thai Code, §365 para 2.

be regarded as a unilateral contract. In an unpublished opinion of the Minnesota Court of Appeal, the court was asked to determine when a contract of a contestant was formed. In *Rogalski v Little Poker League*⁶⁷, the appellant had won a tournament managed by the respondent. There was a dispute regarding the nature of the prize between the parties. While it was argued by the respondent that the prize was a seat at an event plus the entry fee of \$10,000 and \$2,500 of travel expenses, it was argued by the appellant that the winner was given an option to choose the prize of \$12,500. Moreover, it was found that the appellant (as well as other contestants) had signed a document called a “WSOP Agreement” with the respondent during the tournament. The agreement provided that the “respondent would pay the WSOP entry fee, worth \$10,000, on the winner’s behalf and pay the winner \$2,500 for travel related expenses.”⁶⁸ It also provided that “the winner would relinquish the WSOP seat and return the expense money to respondent if the winner did not attend the WSOP.”⁶⁹ However, it was averred by the appellant that a unilateral contract was formed when he began to participate in the tournament, not when the agreement was signed. The court nevertheless held that the respondent’s advertisement was not sufficient to be regarded as “an offer for a unilateral contract that may be accepted by performance.”⁷⁰ This is based on the fact which was found from the case that the contest adverts made by the respondent were not definite. Some adverts did not precisely state the ultimate prize; some mentioned \$12,500; and some mentioned \$12,500 as the value of a trip. Most importantly, the “appellant does not allege that respondent offered the winner the option to select either the trip or its cash value.”⁷¹ The court, therefore, held that the contest advert did not amount to a unilateral contract.⁷² Rather, the bilateral contract was formed when the contestant signed an agreement with the offer during the tournament, which “is the first and only contract formed”.⁷³ Had the *Rogalski* case arisen in Thailand, the advertisement could be regarded as a valid prize competition as a binding obligation, although the details

⁶⁷ LLC, 2011 WL 589636 [Minn App 2011].

⁶⁸ *Ibid* at 3.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* at 5.

⁷¹ *Ibid* at 4.

⁷² *Ibid* at 5.

⁷³ *Ibid*.

regarding the value of the prize were vague. It would be the court's role to award an appropriate prize to the winner. Nevertheless, it is clear that under Thai law the contest advertisement would be a promise which is irrevocable once the contestant began to participate in the contest.

(c) Conclusion

Both the Scottish and Thai jurisdictions show that the approach of recognising a prize competition as a promise is possible. The nature of prize competitions is also compatible with unilateral obligations. More importantly, the unilateral theory of prize competitions provides better protection to the promisee in comparison with the bilateral one. Although in the Common Law the offeror of a unilateral contract is not entitled to revoke the offer once the offeree has begun the performance, there is an exception in circumstances where the offeror has reserved the right to revoke or change the conditions of the competition that allows him/her to revoke the offer. In contrast, under a promissory analysis, once the right of the promisee comes into existence, i.e. when he/she has been chosen as the winner, the promisor is not permitted to revoke the promise. Also, in circumstances where the clear details of the prize do not appear, the contest statement cannot be regarded as a unilateral contract under the Common Law. Conversely, this kind of statement can still be regarded as a unilateral promise in Thai law.

(3) Marketing offers

In daily life, shops or stores make sales promotions in the form of "Buy one, get one free"⁷⁴, or "Buy one, get one half price"⁷⁵, or "Buy two get third half price"⁷⁶ and so on. Similarly, some service businesses use the marketing technique in a form which

⁷⁴ E.g. Buy one get one free promotions offered by Tesco, available at <http://www.tesco.com/groceries/specialoffers/specialofferlist/?promoType=buy1get1free>.

⁷⁵ E.g. Buy one, get one half price offered by Holland and Barrett, available at http://www.hollandandbarrett.com/shop/offers/buy-one-get-one-half-price-on-all-neal-s-yard-wholefoods-fruit-nuts-seeds-snacks/#icmp=2Box2_P9_Offers_Slot4_BOGOHPNealsYard&totalNumRecs=242.

⁷⁶ E.g. Buy two get third half price offered by Military Art Company, available at http://www.military-art.com/mall/articles/buy_two_get_third_half_price.php.

guarantees that it provides the cheapest price, or something equivalent, for that type of service. For example, “Flight Centre”, a travel agent, states on its website that “[w]ith our Fly For Free Promise, if we can’t find you a cheaper airfare in the same cabin you’ll fly for free!”⁷⁷ Booking.com uses the marketing technique of “best price guaranteed” on all hotel bookings.⁷⁸ If customers find their reservations with Booking.com at a lower price on any other website, it will match the same price for the customer’s reservations.⁷⁹ Virgin Trains East Coast states on its website that “[i]f you have booked your ticket for travel ... at virgintrainseastcoast.com and found a cheaper price online, we’ll match it and refund you the difference.”⁸⁰

(a) Scots law

There appears to be no authority that deals with the legal nature of marketing offers in Scots law.⁸¹ Therefore, they may be either offers or unilateral promises.

(i) Best price guarantees

Best price guarantees can be analysed within the framework of contractual obligations. The expressions of those businesses are then regarded as public offers. In the case of the promise of “best price guaranteed” made by Booking.com, a passenger who books a room via Booking.com enters into a contract with Booking.com. The price guarantee is a condition of the contract. Booking.com is obliged, as a condition of the contract, to match the price if the customer can find a cheaper price elsewhere. The same analysis applies to the case of a promise made by

⁷⁷ *Fly For Free*, available at <http://www.flightcentre.co.uk/first-and-business/policies/fly-for-free>.

⁷⁸ There are several similar websites to Booking.com which also use the concept of “best price guaranteed” or “best price promise” e.g. The LateRooms.com, *Price Promise*, available at <http://www.laterooms.com/en/price-promise.mvc>; Lastminute.com, *Our Price Match Guarantee*, available at http://www.lastminute.com/site/deals/price_promise/.

⁷⁹ *Best Price Guaranteed*, available at http://www.booking.com/general.en-gb.html?label=gog235jc;sid=a97a79d669d459bad6a58580d9bb05e0;dcid=1;tmpl=doc/rate_guarantee.

⁸⁰ Virgin Trains East Coast, *Our Price Promise*, available at <https://www.virgintrainseastcoast.com/rail-travel/your-ticket/price-promise/>.

⁸¹ The nature of this kind of marketing offer is not discussed in leading literature on Scots contract law and the UK contract of sale. Examples include *Gloag on Contract*, *The Law of Contract in Scotland*, *Contract Law in Scotland*, *Obligations* (Hogg) and *Atiyah’s Sale of Goods*.

Virgin Trains East Coast. However, it is difficult to explain how the contract is concluded in the case of a promise made by the Flight Centre. There will not be a concluded contract until a customer accepts, or fulfils the conditions of the offer. In order to claim a free flight, a customer must give notice of intention to the travel agent that he/she wishes the agent to search for the cheapest flight. It is, however, doubtful whether the customer's notice of intention is to be regarded as an acceptance. There will not be a concluded contract if the agent can provide the cheapest flight to the customer. The contract (to provide the free flight) only arises when the travel agent fails to fulfil the customers' request.

Alternatively, this marketing offer can be characterised as being promissory in nature. While under a contractual analysis it is unclear how a contract is concluded if the Flight Centre can provide the cheapest flight to the customer, there is no such ambiguity under a promissory analysis. The advertisement of the agent is treated as a unilateral obligation. The promisor is bound to provide a free flight to any customer who comes to the agent if it cannot find cheaper flights for them. There is no need for customers to accept it. It is therefore theoretically clearer. It explains how the obligation is binding in comparison to a contractual analysis. There is no need to consider the acceptance of the promise and the conclusion of a contract. The characteristics of such marketing offers are therefore more compatible with the nature of unilateral obligations than that of bilateral ones. The same legal analysis applies to circumstances where stores or service businesses use marketing offers in the form which guarantees that it provides the cheapest price, or something equivalent, for that type of service such as the case of Booking.com and Virgin Train.

(ii) Buy one get one free

“Buy one get one free” may be regarded as an offer to sell two items together at half price. Unlike in the case of the Flight Centre, there is no difficulty in explaining how a contract is concluded because in the “Buy one get one free” case there will always be a concluded contract of sale if the customer decides to buy the products.

Nevertheless, a contractual analysis cannot explain how a contract is concluded in a situation where the customers are not aware of the “Buy one get one free” condition, which can happen in reality. For example, a supermarket places a sign “Buy one get one free” on a pack of free range eggs. The sign accidentally falls down from the shelf. A customer takes a pack of free range eggs to the counter without knowing that the eggs are on promotion. Would the customer be entitled to the other pack of eggs for free? Theoretically, if the promotion is viewed as being promissory in nature, the customer can always get the other item for free regardless of their awareness of the promotion. In contrast, if the “Buy one get one free” example is viewed as an offer to sell two items at half price, the customer would not be entitled to another pack of free range eggs because the customer wants to enter into a contract of sale for only one pack of eggs. It would mean that the customer makes a counter-offer to buy the item at the full price and the shop accepts the counter offer, despite the fact that in practice most supermarkets would be willing to allow customers to get another pack of eggs in order to retain their standards of customer service. Thus, there may not be any practical difference between regarding the “Buy one get one free” example as either a promise or an offer. However, the fact that the store, generally speaking, intends to give another item for free, even if the customer is not aware of the promotion, means that the store unilaterally binds itself to give another item for free.

Moreover, if “Buy one get one free” is regarded as an offer to sell two items together at half price, it would mean that “Buy one, get one half price” means an offer to sell two items together at a 25 per cent discount for each item. It is then more difficult to explain the example of “Buy two get one half price”, in terms of percentage, whether it is an offer to sell three items at however many per cent discount. Conversely, if it is deemed to be a promise, it can simply be explained that “Buy two get one half price” is an offer to sell two items together with a promise to sell the third item at half price.

(b) Thai law

Best price guarantees and “Buy one get one free” offers are also used in Thailand. Some Thai businesses, e.g. Tops Supermarket,⁸² Pizza Hut⁸³ and Samsung⁸⁴, have used these techniques for their marketing. However, there is a lack of discussion of these types of marketing offers in legal business or amongst academics. Leading legal literatures both on contract and on sale⁸⁵ do not discuss these marketing offers.

As contract is the main route for the creation of voluntary obligations under Thai law, these types of marketing offers would be characterised by Thai lawyers as contractual in nature. However, if Thai law recognised the unilateral obligation as an independent obligation, they may alternatively be viewed as unilateral obligations. A unilateral approach is more advantageous to customers because in the promissory approach these advertisements are irrevocable. Customers do not need to accept, but they can enforce the promise as long as they fall within the conditions of the promise. Like the example of “Buy one get one free” discussed under Scots law, a customer who is not aware of the existence of the promotion will be entitled to get another item for free under a promissory analysis.

(c) Conclusion

In Scots law, promissory doctrine is useful for analysing these marketing techniques. It offers a clear explanation of the way in which the obligation is binding as well as providing better protection for customers. The Flight Centre unilaterally promises that customers will get a free flight if it cannot find a cheaper airfare in the same cabin for them. Moreover, for simplicity’s sake, it avoids complexity arising from a

⁸² Tops, *Buy 1 Get 1 Free*, available at http://www.tops.co.th/topsshonline/Promotion/Promotion.aspx?promotion_id=3.

⁸³ Pizza Hut, *Promotion*, available at <http://www.pizzahut.co.th/promotion.php?lang=en>.

⁸⁴ Samsung, *Promotion: Buy 1 get 1*, available at <http://www.samsung.com/th/promotion/buy1get1/>.

⁸⁵ E.g. Sothibandhu, *Juristic acts and Contracts*; Sothibandhu, *Sale*; Sanongchart, *Juristic acts and Contracts*; P Sataman and P Punyapan, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ลักษณะซื้อขาย* (Commentary on the Civil and Commercial Code: Sale), 15th edn (2008); P Eagjariyakorn, *คำอธิบายซื้อขาย แลกเปลี่ยน ให้* (Commentary on Sale, Exchange and Gift), 6th edn (2011); W Krea-ngam, *คำอธิบายกฎหมายว่าด้วยซื้อขาย แลกเปลี่ยน ให้* (Commentary on the Law of Sale, Exchange and Gift), 10th edn (2006).

contractual analysis when explaining the characteristics of the “Buy two get one half price” offer. Thai law could benefit from using a promissory analysis if unilateral promise were recognised as a free standing legal entity. A promissory analysis would be more attractive than a contractual one.

D. USING PROMISES TO GUARANTEE EXISTING OBLIGATIONS

(1) Product or service guarantees

(a) Scots law

In sales contexts, a guarantee is commonly offered by manufacturers of products.⁸⁶ This is usually provided free of charge.⁸⁷ For example, vacuum-cleaner manufacturers will usually offer a guarantee with their products that, for a year or more, they will carry out free repairs for problems caused by a manufacturing defect.⁸⁸ A product guarantee is described as:

“[A] voluntary undertaking given by a manufacturer (the guarantor) without charge to provide a remedy, should the product covered by the guarantee become defective as a result of poor workmanship or the use of faulty materials in the manufacturing process during a specified period of time after purchase.”⁸⁹

Moreover, some businesses or service firms provide guarantees in respect of their services. For example, Pizza Hut guarantees that “the customer will get his next pizza for free if we fail to deliver a hot and on time product.”⁹⁰

⁸⁶ Twigg-Flesner, *Product Guarantees* 1.

⁸⁷ *Ibid.* Twigg-Flesner explains that “consumers are not required to pay for such a guarantee in addition to the overall purchase price of the product covered by the guarantee, because it is an “integral part of the bundle of satisfactions”. He cited J G Udell and E Anderson, “The product warranty as an element of competitive strategy” (1968) 32 *Journal of Marketing* 1 at 1.

⁸⁸ E.g. all Miele vacuum cleaner products come with a free two year guarantee, available at <http://www.miele.co.uk/vacuum-cleaners/guarantees-and-warranties/>.

⁸⁹ Twigg-Flesner, *Product Guarantees* 1. This definition is also adopted in *Aityah's Sale of Goods* at 288.

⁹⁰ Pizza Hut, *The UK's Largest Pizza Chain World Leading Brand*, available at <http://www.franchisebusiness.co.uk/pizzahut/index.htm>.

Although product guarantees are common in practice, there has been a lack of discussion about legal issues both in England and Scotland.⁹¹ Also, there has been a lack of authority on the effect of product guarantees both in English and Scots law.⁹² In circumstances other than those governed by the Sale and Supply of Goods to Consumers Regulations 2002, the legal characteristics of such a guarantee may not necessarily be deemed to be contractual in nature. Examples of such circumstances are non-consumer product guarantees. Also, service guarantees⁹³ generally do not fall within the scope of the Regulations. However, where guarantees are provided free of charge to customers who purchase goods under a sale of goods contract, they are regulated by the Sale and Supply of Goods to Consumers Regulations 2002. Under the Regulations, the nature of the guarantees is regarded as contractual. The Regulations state:

“Where goods are sold or otherwise supplied to a consumer which are offered with a consumer guarantee, the consumer guarantee takes effect at the time the goods are delivered as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and the associated advertising.”⁹⁴

English law has faced difficulties in analysing the legal nature of a product/service guarantee. Non-consumer product guarantees may be treated as collateral contracts. This approach, however, would be possible only in circumstances where the buyers are aware of the guarantee.⁹⁵ The consideration is the purchase of goods from the dealer.⁹⁶ Nevertheless, normally a buyer is not aware of the guarantee until he/she gets home and opens the box, or when he/she receives the product delivered and opens the box.⁹⁷ Alternatively, a unilateral contract analysis may be applied⁹⁸, as is the case in other circumstances e.g. tenders, options and rewards. However, it would still not be clear what the consideration is in the case of a guarantee which is free of

⁹¹ Twigg-Flesner, *Product Guarantees* 1.

⁹² Atiyah, *Sale of Goods* 289.

⁹³ The Regulations do not extend to services in general but only to installation, in certain limited circumstances.

⁹⁴ Sale and Supply of Goods to Consumer Regulations 2002 (SI 2002/3045), reg 15 (1).

⁹⁵ Atiyah, *Sale of Goods* 289.

⁹⁶ *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854.

⁹⁷ Atiyah, *Sale of Goods* 289.

⁹⁸ *Ibid.*

charge between the seller and the buyer. The same difficulty also arises with service guarantees under English law.

However, such difficulties do not arise in Scots law. Such guarantees can be viewed as promissory in nature on the grounds that guarantees are usually provided free of charge.⁹⁹ The nature of a guarantee is compatible with the characteristics of a unilateral promise. As Twigg-Flesner explains, “[e]very guarantee will promise something to the customer. In most cases, the promise is that the product is free from defects in workmanship and material.”¹⁰⁰ Additionally, customers receive greater protection if a promissory analysis is attached to product/service guarantees because a manufacturer is not permitted to revoke a guarantee that is given to customers.¹⁰¹ Thus, a promissory analysis is useful as applied to non-consumer product guarantees and service guarantees in Scotland.

(b) Thai law

Where product or service guarantees are provided by a business to customers, they are regulated by the Consumer Protection Act (No 2) 1998. The Act states:

“In the case where a person operating a business in connection with the sale of goods or the provision of services makes a promise for a guarantee contract to the consumer, such contract shall be made in writing, signed by such person or his agent and delivered to the consumer together with the goods or services.

If the contract under paragraph one is made in a foreign language, the Thai translation shall be attached thereto.”¹⁰²

The law recognises consumer product guarantees as a contract between manufacturers and customers. The Thai provision regarding products or service guarantees is quite restrictive. According to the provision, a guarantee has to be made in writing and signed by the manufacturer. However, in reality, although

⁹⁹ Hogg, *Obligations* 77; C Ervine, “The Sale and Supply of Goods to Consumers Regulations 2002” (2003) SLT (News) 67 at 70; Atiyah, *Sale of Goods* 289; A Wiewiórowska-Domagalska, *Consumer Sales Guarantees in the European Union* (2013) 78.

¹⁰⁰ Twigg-Flesner, *Product Guarantees* 29.

¹⁰¹ M Ebers, A Janssen and O Meyer, *European Perspectives on Producer’s Liability* (2009) 508.

¹⁰² Consumer Protection Act (No 2) 1998, §12.

manufacturer guarantees are commonly made in writing, it is unlikely that such guarantees will be signed by manufacturers.

In circumstances other than those governed by the Consumer Protection Act, Thai law does not have a specific legal principle dealing with product or service guarantees. Nonetheless, in these circumstances, such guarantees would be characterised by Thai lawyers as contracts too.

A promissory analysis of product/service guarantees could be useful for Thai law. Under this analysis, a manufacturer/firm promises the customers that any defects occurring in its products/services are covered by its guarantee. Businessmen or service providers are bound once the guarantee reaches the customers. This contrasts with a contractual analysis in which customers are required to accept the guarantee. Consequently, a unilateral approach is more protective to customers. The adoption of a promissory analysis can apply to both (i) product or service guarantees provided by a business to customers (which are regulated by the Consumer Protection Act (No 2) 1998) and (ii) products or service guarantees in circumstances other than those governed by the Consumer Protection Act.

One might argue that, in the case of product/service guarantees under the Consumer Protection Act, an acceptance may be implied. The texts of the provision under discussion seems not to envisage the need for an acceptance. Nevertheless, a promissory analysis offers a more flexible approach, making clear that an acceptance is not required.

(c) Conclusion

The idea of unilateral promise provides flexibility in analysing product or service guarantees in Scots law. While English law has difficulties because of the requirement of consideration, Scots law can simply apply a promissory analysis to these instances. The Scottish promissory approach could benefit the analysis of consumer product/service guarantees in Thai law. Under a promissory analysis, the

guarantee takes effect spontaneously once the customer purchases the goods or service, without a requirement to accept the guarantee separately for another transaction. In fact, promissory language is used in the provision under the Consumer Protection Act (...a person...makes a promise for a guarantee...). It would not be difficult to characterise product/service guarantees as promissory in nature if unilateral promise were recognised as a standalone obligation under Thai law. The same analysis can also apply in non-consumer cases where a party offers a guarantee in relation to his/her products or services.

(2) Cautionary obligations/Suretyship

(a) Scots law

(i) General concept of cautionary obligations

Another type of guarantee is the instance in which a person undertakes to the creditor that the main debtor will perform his/her obligation under the principal contract.¹⁰³ This type of obligation is classified in Scots law as a cautionary obligation. It is “not an independent obligation, but is essentially conditional in its nature, being properly exigible only on the failure of the principal debtor to pay at the maturity of his obligation.”¹⁰⁴

It is therefore distinct from other obligations such as independent obligations¹⁰⁵, delegations¹⁰⁶, representations as to credit¹⁰⁷, indemnities¹⁰⁸ and insurance.¹⁰⁹ These types of non-independent obligations are commonly recognised under the term

¹⁰³ Bell, *Comm I*, 364, Bell, *Prin* §245; Erskine, *Inst* 3.3.61; Gloag & Irvine, *Law of Rights in Security* 644; W M Gloag, *The Law of Scotland*, 13th edn (2012) para 16.01.

¹⁰⁴ Gloag & Irvine, *Law of Rights in Security* 644. This passage was quoted by Lord Justice Clerk Ross in *City of Glasgow District Council v Excess Insurance* 1986 SLT 585 at 588.

¹⁰⁵ *Morrison v Harkness* (1870) 9 M 35; *Stevenson's Tr v Campbell & Sons* (1896) 23 R 711; *Aitken & Co v Pyper* (1900) 8 SLT 258.

¹⁰⁶ Delegation is “the substitution of a new debtor for the old, with consent of the creditor”. *Prin* §577; See also W A Wilson, *The Scottish Law of Debt*, 2nd edn (1991) para 14.2.

¹⁰⁷ *Fortune v Young* 1918 SC 1.

¹⁰⁸ *Simpson v Jack* 1948 SLT (Notes) 45.

¹⁰⁹ *Laird (Coutts Factor) v Securities Insurance Co Ltd* (1895) 22 R 452.

“accessory”.¹¹⁰ In the case of cautionary obligations, the debt (between the creditor and the debtor) is regarded as “principal”. The “security” of the debt, i.e. a cautionary obligation, is regarded as “accessory”.¹¹¹ The cautioner is required to perform his/her obligation only when the principal debtor fails to pay his/her debt. The cautioner’s liability cannot exceed that of the principal debtor.¹¹²

There are two forms of caution. First, proper caution refers to a cautionary obligation where it is properly understood that the cautioner is bound as a cautioner.¹¹³ Second, improper cautionary obligations refer to circumstances in which the granter of the guarantee is bound, as it appears to the creditor, as a co-debtor. However, the actual relationship between the co-debtors themselves is that one is bound as a cautioner and the other is bound as the principal debtor.¹¹⁴ Traditionally, the main difference between proper and improper caution is that a proper cautioner could request the creditor to enforce the debt against the principal debtor prior to enforcing it against the cautioner, whereas an improper cautioner could not do so.¹¹⁵ However, this right ceased to exist with the introduction of the Mercantile Law Amendment (Scotland) Act 1856.¹¹⁶ Accordingly, today “there is very little difference, from the creditor’s point of view, between an improper cautioner and a co-principal debtor”.¹¹⁷

(ii) Cautionary obligation and guarantee

Cautionary obligations may be similar to guarantees.¹¹⁸ Both the guarantor and the cautioner assure the creditor that the principal debtor will perform his/her obligation,

¹¹⁰ For an analysis on the nature of accessory rights see A Steven, “Accessoriness and Security Over Land” (2009) 13(3) EdinLR 387 at 387-426.

¹¹¹ *Ibid.*

¹¹² *Jackson v McIver* (1875) 2 R 882; For further discussion see H L MacQueen et al (eds), *Gloag and Henderson: The Law of Scotland*, 13th edn (2012), para 16.03.

¹¹³ Bell, *Prin* §247; Erskine, *Inst* 3.3.61

¹¹⁴ *Paterson v Bonar* (1844) 6 D 987; Bell, *Prin* §246; W M Gloag, *The Law of Scotland*, 13th edn (2012), para 16.02.

¹¹⁵ Davidson & Macgregor, *Commercial Law in Scotland* para 5.5.4.

¹¹⁶ Mercantile Law Amendment (Scotland) Act 1856, s 8.

¹¹⁷ S M Eden & J T Pretorius, “Suretyship and Cautionary Obligations” in R Zimmermann et al (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 335 at 343-344.

¹¹⁸ In *Law of Rights in Security*, cautionary obligation is treated as similar to guarantee. Gloag & Irvine, *Law of Rights in Security* 642-643.

otherwise the guarantor/cautioner will take responsibility for non-performance.¹¹⁹ Like caution, a guarantee always requires another, i.e. principal, obligation of some other obligor.¹²⁰ It is always both ancillary and subsidiary to the other contract or liability on which it is founded.¹²¹

Traditionally, the difference between a cautionary obligation and a guarantee is that the former tended to refer to a personal context whereas the latter tended to refer to a commercial context.¹²² In old case law, the court sometimes distinguished between these two obligations.¹²³ Accordingly, the courts attempted to protect a cautioner “by placing him in a favoured position in comparison with other obligants by imposing higher duties on the creditor”.¹²⁴ However, Gloag pointed out that such distinctions “are of little practical value”.¹²⁵ The differences between these two obligations are rather in terminology than in substance.¹²⁶ Furthermore, in modern contexts, it appears that cautionary obligations are not merely used in a personal context¹²⁷, but

¹¹⁹ For the definition of a guarantee under English law see L S Sealy and R J A Hooley, *Commercial Law: Text, Cases and Materials*, 4th edn (2008) 1100; In *The Law of Principal and Surety*, a surety is defined as “one who contracts with an actual or possible creditor of another to be responsible to him by way of security, additional to that other, for the whole or part of the debt.” S A T Rowlatt, *Rowlatt on Principal and Surety*, 5th edn, by G Moss and D Marks (1999) para 1-01.

¹²⁰ *General Surety and Guarantee Co Ltd v Francis Parker Ltd* [1977] 6 BLR 16 at 21 per Donaldson J.

¹²¹ *Mountstephen v Lakeman* [1871] LR 7 QB 196 at 202, Ex Ch, per Willes.

¹²² Gloag and Irvine, *Law of Rights in Security* 643; Bell also distinguished between caution and guarantee. He explained that a cautionary obligation, or surety, is “an accessory obligation or engagement, as surety for another, that the principal obligant shall pay the debt or perform the act for which he has engaged, otherwise the cautioner shall pay the debt”. Bell, *Prin* §§245, 282.

¹²³ For example, in *Wilson v Tait* (1840, 1 Rob App 137), the House of Lords held that a cautionary obligation was not equivalent to a guarantee. According to the Court, the term “guarantee” did not necessarily constitute a cautionary obligation. In a traditional sense, caution was distinct from guarantee because generally a cautioner was a person who voluntarily bound himself under an obligation “out of motives of friendship with no prospect of reward.”

¹²⁴ S M Eden & A Clark, “Cautionary Obligations and Representations as to Credit”, in *The Law of Scotland: Stair Memorial Encyclopaedia* vol 3 (1994) para 801.

¹²⁵ Gloag and Irvine, *Law of Rights in Security* 644.

¹²⁶ *Ibid* at 643.

¹²⁷ E.g. *Smith v Bank of Scotland* 1997 SC (HL) 111; *Forsyth v The Royal Bank of Scotland Plc* [2000] SLT 1295; *Broadway v Clydesdale Bank Plc* 2003 SLT 707; *Ahmed v Clydesdale Bank Plc* 2001 SLT 423; *Wright v Cotias Investments Inc* 2001 SLT 353; *Clydesdale Bank Plc v Black* 2002 SC 555; *Thomson (Laura) v The Royal Bank of Scotland Plc* 2003 SCLR 964; *Royal Bank of Scotland Plc v Wilson* 2004 SC 153; *Cooper v Bank of Scotland Plc* [2014] CSOH 16 2014; This may be usefully compared with English law, where a similar concept applies to all non-commercial case in relation to a personal guarantee, including the relationship between employers and employees. For further discussion see P Hood, *Principles of Lender Liability* (2012) para 4.34.

also in a commercial one.¹²⁸ For example, an insurance company and a contractor jointly gave a bond to pay a fixed sum of money on default by a contractor to a district council.¹²⁹ A partner in a business provided a personal bond as a guarantee in favour of the other partner.¹³⁰ A more recent example of cautionary obligation used in a commercial context can be found in *South Lanarkshire Council v Coface SA*.¹³¹ Here, a French financial institution granted a performance guarantee bond¹³² to a Scottish council to guarantee the performance of a Scottish company's obligation to the council.¹³³

Moreover, there are also a number of cases in which the courts used the terms "caution" and "guarantee" interchangeably. For instance, in *Wallace and Gibson*¹³⁴, the court stated that whether the letters given by the defender "...undertook to give him a guaranty to that effect if and when required to do so... [it] is, in the sense of Scottish law, a "cautionary obligation"". ¹³⁵ In *Aitken's Trustees v Bank of Scotland*¹³⁶, it was stated that "[a] cautioner entered into a guarantee."¹³⁷ Similarly, commentators do not differentiate the usages of the terms "guarantee" and

¹²⁸ See also *Royal Bank of Scotland v O'Donnell* [2014] CSIH 84.

¹²⁹ *City of Glasgow District Council v Excess Insurance Co Ltd* 1986 SLT 585.

¹³⁰ *Hewit v Williamson* 1999 SLT 313.

¹³¹ [2016] CSIH 15.

¹³² A performance bond may be similar or dissimilar from a cautionary obligation, depending on its nature. In *Glasgow District Council v Excess Insurance* (1986 SLT 585), the defender, an insurance company, provided the pursuer, a district council, with a performance bond that contained the following terms: "We are held and firmly bound for the payment..." The court was asked to determine if the bond was insurance or cautionary. The pursuer argued that the bond was an indemnity or insurance and a twenty-year prescription applied. However, the defender argued that the obligation was cautionary by nature and subject to a five-year prescriptive period. It was held that the bond was a cautionary obligation; In contrast, in the English case of *Cargill International SA v Bangladesh Sugar & Food Industries Corp* ([1998] 1 WLR 461), the plaintiffs and the defendant entered into a sale, in which the plaintiffs as sellers were required to provide the defendant with a performance bond issued on their behalf. It was held that such a bond is not a guarantee in the sense of surety.

¹³³ The main points disputed by the parties were the proper construction of the bond and the notice of the bond's compliance with its terms. While these are not directly relevant to the discussion here, what is relevant is that the nature of the bond is the same as that of a cautionary obligation.

¹³⁴ [1895] AC 354.

¹³⁵ *Ibid* at 362 per Lord Herschell LC.

¹³⁶ [1944] SC 270.

¹³⁷ *Ibid*. See also *South Lanarkshire Council v Coface SA* [2015] CSOH 8.

“caution”.¹³⁸ Accordingly, it is suggested that today there is no clear distinction between the terms “guarantee” and “caution”.¹³⁹

To conclude, the distinction between cautionary obligation and guarantee might have once existed. However, the distinction was not particularly obvious. Today caution is used in both personal and commercial contexts, and the terms “caution” and “guarantee” appear to be used, both by courts and academics, correspondingly. This illustrates that the practical usage of cautionary obligation is getting broader since it applies to both personal and commercial contexts. Consequently, in this thesis the concept of a personal guarantee is regarded as being similar to the concept of cautionary obligation. Therefore, case law in relation to personal guarantee will be deemed to be a cautionary obligation. The fact that a guarantee is used interchangeably with a caution also supports the argument presented later in this section, namely, that the legal characteristics of a cautionary obligation are unilateral. This is based on the notion, in general, that a guarantee is promissory in nature.¹⁴⁰ This is seen from the cases of product or service guarantees (discussed earlier) as well as collateral warranties (to be discussed later).

(iii) Legal characteristics

In a modern context in Scots law, a cautionary obligation is often referred to as a contract between a creditor and a cautioner.¹⁴¹ In the well-known case of *Smith v*

¹³⁸ E.g. McClelland, *Cautionary Obligations* para 10.03; D M Walker, *Principles of Scottish Private Law*, 4th edn (1988), vol 2 at 417; Gloag and Irvine, *Law of Rights in Security* 642.

¹³⁹ Gloag and Irvine, *Law of Rights in Security* 643-644.

¹⁴⁰ This can be usefully compared with a former usage of promises in letters of obligation. A letter of obligation is a unilateral promise gratuitously created by the seller’s solicitor. The courts defined a letter of obligation as “a unilateral undertaking given by the seller’s solicitors whereby they undertook a personal obligation on a certain event to deliver a duly executed disposition in terms of the draft to be adjusted between agents to the pursuer’s solicitor.” (*Mason v A & R Robertson* 1993 SLT 773 per Lord Cameron at 778). A letter of obligation is a form of guarantee. By providing a letter of obligation, the seller’s solicitor guarantees that no problem will arise from the transaction during the gap period. (G Gretton and K Reid, *Conveyancing*, 4th edn (2011)173). This therefore supports the theory that the nature of a guarantee is promissory. The gap risks covered by letters of obligation are now governed by a new system of “advance notice”. (Land Registration (Scotland) Act 2012, Part 4 Advance Notices.)

¹⁴¹ Gloag and Irvine, *Law of Rights in Security* 644; Davidson & Macgregor, *Commercial Law in Scotland* para 5.5.3.; H L MacQueen et al (eds), *Gloag and Henderson: The Law of Scotland*, 13th edn (2012), para 16.01.

*Bank of Scotland*¹⁴², the court referred to a cautionary obligation as a contract: “the element of good faith which is required of the creditor on the constitution of a contract of cautionary...”¹⁴³ In *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd*¹⁴⁴, the court explained that the obligation between the parties was not a cautionary obligation and there was no contract between the parties “which determined that one party’s obligation was primary and the other secondary.”¹⁴⁵ Also, the term “contracts of caution” is used by legal writers.¹⁴⁶

Nevertheless, literature and previous case law suggest that a cautionary obligation can arise either from an offer or a unilateral undertaking. First, the obligation of a cautionary obligation arises from circumstances where a cautioner made an offer to guarantee a debt for a debtor to a specific creditor.¹⁴⁷ An express acceptance is therefore required.¹⁴⁸ Second, the obligation of caution may simply arise from a promise “to pay if the debtor fails.”¹⁴⁹ For example, it may arise from circumstances where a cautioner makes an undertaking to guarantee a debt to a principal debtor without specifying whom the caution is provided for.¹⁵⁰ In this sense, a cautionary obligation is unilateral in nature, given that it does not need mutual agreement between the cautioner and the creditor. Also, a cautionary obligation may be a unilateral obligation if it is stated by the cautioner that an express acceptance is not required.¹⁵¹ The approach that a cautionary obligation can arise from a promise can be found in a number of cases. For instance, in *Donald Sinclair v Robert Sinclair*¹⁵², the court analysed a cautionary obligation using a promissory analysis.¹⁵³ Moreover,

¹⁴² 1997 SC (HL) 111.

¹⁴³ *Ibid* at 121 per Lord Clyde.

¹⁴⁴ [2011] CSOH 54.

¹⁴⁵ *Ibid* at para 27.

¹⁴⁶ S M Eden and J T Pretorius, “Suretyship and Cautionary Obligations” in R Zimmermann et al (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 335 at 339-340.

¹⁴⁷ H L MacQueen et al (eds), *Gloag and Henderson: The Law of Scotland*, 13th edn (2012), para 16.06; Davidson & Macgregor, *Commercial Law in Scotland* para 5.5.3; McClelland, *Cautionary Obligations* para 10.10.

¹⁴⁸ Gloag, *Contract* 27.

¹⁴⁹ McClelland, *Cautionary Obligations* para 10.10.

¹⁵⁰ E.g. *Fortune v Young* 1918 SC 1.

¹⁵¹ Gloag, *Contract* 27.

¹⁵² *Donald Sinclair v Robert Sinclair*, reported in Cases decided in the Court of Session: during summer session 1794, - Winter Session 1794-5, - And Summer Session 1795, Edinburgh, 1796, 140.

¹⁵³ *Ibid* at 142.

in *Wallace v Gibson*¹⁵⁴, the court explained that the letter written by the respondent offering a guarantee to the appellants amounted to a conditional offer of caution. However, the offer became binding as a guarantee prior to the acceptance of the creditor.¹⁵⁵

Furthermore, legal scholars frequently use terminology associated with promise when dealing with cautionary obligations. In *Law of Rights in Security*,¹⁵⁶ it is stated that “the person who gives the promise is the cautioner, surety, or guarantor; the person to whom the promise is given is the creditor: and the person whose liability is the foundation of the contract is the principal debtor.”¹⁵⁷ In *Commercial Law in Scotland*¹⁵⁸, it is stated that “the cautioner promises the creditor that, if the principal debtor fails to pay a certain sum or fulfil a certain obligation (the principal debt), then he (the cautioner) will pay or fulfil.”¹⁵⁹ Additionally, some scholars propose that some of the cautionary obligations can be regarded as gratuitous unilateral obligations under the Requirements of Writing (Scotland) Act 1995.¹⁶⁰ Given that in Scots law caution can be viewed as either promissory or contractual in nature, a cautionary obligation should therefore not be exclusively defined as a kind of specific contract.

The discussion above illustrates that a cautionary obligation can be considered either as a unilateral undertaking or an offer. This depends on the factual circumstances of each case. It is further helpful to make a reference to personal guarantees under the DCFR, where personal guarantees can also arise either by a unilateral undertaking or

¹⁵⁴ [1895] AC 354.

¹⁵⁵ See also *Fortune v Young* 1918 SC 1; *Poneous v McBeath* (1812) Hume 98; *Milne v Kidd* (1869) 8 M 250. Here, it was held that a letter of guarantee was a mutual agreement, rather than a cautionary obligation. It could be inferred from the court’s decision that it is not necessary for a cautionary obligation to be created by way of an offer and an acceptance.

¹⁵⁶ Gloag & Irvine, *Law of Rights in Security*. 642.

¹⁵⁷ *Ibid* at 642. In this textbook a cautionary obligation is referred to as a contract even though the word “promise” is used in describing cautionary obligations.

¹⁵⁸ Davidson & Macgregor, *Commercial Law in Scotland*.

¹⁵⁹ *Ibid* at para 5.5.1.

¹⁶⁰ S M Eden and J T Pretorius, “Suretyship and Cautionary Obligations” in R Zimmermann et al (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 335 at 339-340.

by a contract.¹⁶¹ Nonetheless, the rule under the DCFR suggests that a guarantee is unilateral in nature. This is because, even where a personal guarantee arises through an offer, the offer becomes effective once it reaches the creditor, regardless of the acceptance (unless it is expressly stated otherwise).¹⁶² This suggests that in fact the offer of a guarantee can be regarded as unilateral undertaking, given that it is generally binding without acceptance. This approach can be applied to personal guarantees, in a general sense, in Scots law too.¹⁶³ In many circumstances caution is meant to be binding without any acceptance of the creditor. For instance, where a lender requires a borrower to provide a personal guarantee, the lender may advise that the guarantor could be the borrower's spouse/partner. The borrower and his/her partner then agree with each other that the partner will become a cautioner. Then the partner's expression is sent to the lender. There would be no need on the part of the lender to accept such an offer as naturally the lender must be willing to accept it. Promises can also apply to circumstances where a creditor does not know who will become a cautioner and will need to approve that first. As a promise is a unilateral obligation which only binds the promisor, the creditor is not bound by the promise. If he/she does not approve a prospective cautioner, he/she can simply reject or not enforce the promise.

In short, the way in which a cautionary obligation is created, both theoretically and practically, is unilateral in nature in certain contexts. This is because the parties in these circumstances aim that the obligation should be binding without acceptance.

¹⁶¹ DCFR, Art IV. G.-1:103.

¹⁶² *Ibid.*

¹⁶³ This is also the case in English law. "The typical guarantee (and particularly the continuing guarantee) is unilateral in character". *Goode on Commercial Law* 889.

(b) Thai law

Suretyship is defined as “a contract whereby a third person, called the surety, binds himself to a creditor to satisfy an obligation in the event that the debtor fails to perform it”.¹⁶⁴ A surety must be a third party.¹⁶⁵

Thai courts and Thai commentators further explain the essential characteristics of suretyship. Firstly, there must be a valid principal obligation between the parties.¹⁶⁶ Secondly, a surety binds him/herself to perform the obligation in the event that the debtor fails to perform it.¹⁶⁷ Therefore, if a third person merely assures that a debtor has the ability to perform his/her obligation, this is not regarded as a suretyship.¹⁶⁸ Finally, as surety is a contract between the surety and the creditor, the debtor’s consent to the suretyship is not required.¹⁶⁹

Suretyship in Thai law shows some similarities to cautionary obligations in Scots law. A cautioner and a surety assure the creditor of the principal obligation that the debtor will perform his/her obligations. If the debtor does not perform his/her obligation, such performance will be fulfilled by the cautioner/surety. The difference, however, is that under Thai law the equivalent concept of improper caution cannot exist. Under Thai law a surety must be neither the creditor nor the debtor. Hence, a surety cannot appear as a co-obligant even if one of themselves is bound as a surety for the debt of the principal obligant.

Unlike Scots law, an alternative approach of analysing cautionary obligations using promissory doctrine does not exist among Thai legal academics. This stems from the fact that under Thai law promise is not a free-standing ground of liability. However, if Thai law considers unilateral promise as a standalone obligation, the idea of

¹⁶⁴ Thai Code, §680.

¹⁶⁵ Thai Code, §681/1.

¹⁶⁶ S Visruthpich, *หลักกฎหมายค้ำประกัน จำนอง จำนำ* (The Legal Principles of Suretyship, Mortgage and Pledge), 8th edn (2010) 21; Supreme Court Decision 1800/1968 (B.E.2511).

¹⁶⁷ S Visruthpich *Ibid*; Supreme Court Decision 942/1970 (B.E.2513).

¹⁶⁸ Supreme Court Decision 942/1970 (B.E.2513)

¹⁶⁹ S Visruthpich *Ibid* at 23; Supreme Court Decision 762/B.E. 2519.

promise may be an alternative analysis of suretyship. A promissory analysis of suretyship can be useful for the concept of surety under Thai law. Firstly, in some circumstances, an obligation of suretyship arises from an agreement between the debtor and the surety. The debtor and the surety agree that the latter will act as surety before informing the creditor. Thus, the creditor is merely the recipient of the undertaking made by the surety. This is particularly relevant when a surety and a debtor are from the same family. In the case of bank loans, it is common for the bank to require the personal guarantors to be members of the same family as the debtor. For example, the Kasikornbank, a Thai commercial bank, offers a type of loan called “K-Klean Credit”. In relation to the requirement of a loan guarantor, who is a natural person, the “guarantors must have a direct relationship with the borrower, such as parents, spouse or children”.¹⁷⁰ This means that, in reality, the debtor and the surety must agree with each other before the creditor applies for the loan. In this case, it would be more appropriate to treat surety as a unilateral obligation because of its unilateral characteristic.

Moreover, the creditor, who is viewed as a promisee, is placed in a better position than if he/she is regarded as an offeree. This is because under a promissory analysis the obligation of surety is binding upon the communication to the promisee irrespective of acceptance. Consider the following example. A asks B to act as his surety for the existing debts that he owes to C. B agrees to do so. After sending the intention to become a surety to C, B subsequently withdraws his offer. This would mean that if a surety is constituted as a contractual obligation, there has been no concluded contract between B and C, on the basis that B withdraws it before C has accepted. By contrast, under a promissory analysis, B’s proposal would become binding once his expression has been communicated to B (according to the theory that a communication of a promise is required).

¹⁷⁰ Kasikornbank, *K-Klean Credit*, available at <http://www.kasikornbank.com/EN/Corporate/Credit/SpecialProduct/Pages/K-KleanCredit.aspx>.

(c) Conclusion

In Scots law cautionary obligations can be formed either by way of an offer or a promise. It depends on the intentions of the parties whether they wish the obligation to be binding without acceptance or not. Consequently, the legal characteristics of this kind of obligation should not be restricted to being contractual in nature.

As for Thai law, a promissory analysis is helpful to conceptualise the notion of suretyship because a suretyship does not require the acceptance of the creditor in some circumstances, for example, where a surety is required by a Thai bank to have a direct relationship with the borrower. Hence, it should be regarded as unilateral obligation. This helps to explain the actual legal nature of the obligation. Moreover, once a suretyship/caution has been created, it cannot generally be revoked thereafter. A creditor, who is viewed as a promisee, is therefore placed in a better position than if he/she is regarded as an offeree.

(3) Collateral warranties

(a) Scots law

(i) General concept of collateral warranties

Collateral warranties, sometimes known as “a duty of care deed”,¹⁷¹ are documents furnished by a contractor, subcontractor, professional consultant or construction team as a guarantee of construction work.¹⁷² In both English and Scots law of tort/delict, there are limitations on the remedies available to a subsequent purchaser of the

¹⁷¹ *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 at 561 per Lord Jauncey of Tullichettle; see also Institution of Civil Engineers, *Collateral Warranties*, at 2.4, available at <http://www.ice.org.uk/getattachment/f9c77d7a-0a4c-4181-aaee-96fbfe32e4d0/Collateral-Warranties.aspx>.

¹⁷² Institution of Civil Engineers, *Collateral Warranties* available at <http://www.ice.org.uk/getattachment/f9c77d7a-0a4c-4181-aaee-96fbfe32e4d0/Collateral-Warranties.aspx>; Institution of Civil Engineers, *Scottish Court Gives Commercial Effect to Collateral Warranties*, available at <http://www.practicallaw.com/5-501-8323?source=relatedcontent#a185334>.

building for defects arising from the initial construction process.¹⁷³ This has led to the use of collateral warranties. These warranties create a duty of care with respect to defects that arise out of negligence, where the construction team or contractor can be held liable.¹⁷⁴ As observed by Lord Drummond Young, the use of collateral warranties has been more common “following the decision of the House of Lords”¹⁷⁵ in *Murphy v Brentwood DC*.¹⁷⁶ Here, it was held that a contractor had no liability in tort for the failure to comply with the building regulations.¹⁷⁷ Today in the United Kingdom, it is “quite rare to see a construction project which does not require the design team to provide them [collateral warranties]”.¹⁷⁸

Without collateral warranties, it would be very difficult for a buyer to claim his/her loss. From a contractual perspective, an aggrieved party can make a claim through a contractual chain of liability if a contractual obligation exists. However, generally a contractual obligation does not exist. Hence, normally an aggrieved party would be able to claim his/her loss only if he/she has been granted a third party right.¹⁷⁹ As for a direct claim in tort, such a claim against the architect or the contractor is unlikely to succeed.¹⁸⁰

(ii) Legal nature and legal effects

Collateral warranties create “a right of action between parties who, under the standard legal structures used in construction contracts, would not otherwise be in any contractual relationship.”¹⁸¹ In 2010, the Scottish courts analysed the legal effects of collateral warranties. In *Scottish Widows Services Ltd v Kershaw*

¹⁷³ *D&F Estates Ltd v Church Commissioners for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398.

¹⁷⁴ Practical Law Company, *Collateral Warranties on Construction Projects*, available at <http://www.practicallaw.com/0-371-6962>.

¹⁷⁵ *Scottish Widows Services Ltd v Kershaw Mechanical Services Ltd* 2010 SLT 1102 at para 1.

¹⁷⁶ *Murphy v Brentwood District Council* [1991] 1 AC 398.

¹⁷⁷ *Ibid* at 498 per Lord Jauncey of Tullichettle.

¹⁷⁸ H Kilvington, *Understanding Collateral Warranties*, available at <http://www.thkp.co.uk/2012/05/04/understanding-collateral-warranties>.

¹⁷⁹ *Ibid*.

¹⁸⁰ For an analysis in this area see S Furst and V Ramsey, *Keating on Construction Contracts*, 9th edn (2012) Ch 7.

¹⁸¹ *Scottish Widows Services Ltd v Kershaw Mechanical Services Ltd* 2010 SLT 1102 at para 17 per Lord Drummond Young.

Mechanical Services Ltd (henceforth: *Scottish Widows*),¹⁸² the Outer House heard legal arguments centred on the effectiveness of collateral warranties assigned to a sub-tenant. The court was asked to decide whether or not the collateral warranty issued by the granters was legally enforceable. The court decided that the party who originally provided the collateral warranty was legally bound to the obligations.

The purpose of a collateral warranty is “to ensure that the party who suffers loss has a right of action against any contractor or member of the professional team who has provided defective work.”¹⁸³ Specifically, the fundamental purpose of a collateral warranty is to “provide a right of action to a person who is liable to suffer loss as a result of defective performance of a building contract or a contract for professional services in connection with a building project.”¹⁸⁴ Collateral warranties are legally binding because

“there is no reason that any person who becomes liable for the cost of repairing a defect in a building should not be entitled to sue for the cost provided that he is the beneficiary of a collateral warranty granted by the person responsible for the defect.”¹⁸⁵

Collateral warranties as a contract

The Scottish courts have analysed collateral warranties using a contractual analysis. In the *Scottish Widows* case, the court explained that a collateral warranty constitutes a separate contract between the person who gives the warranty and the beneficiary. By providing a collateral warranty,

“the granter undertakes that it will perform specified works to a standard of competent workmanship (in the case of a contractor), or will provide specified services and observe proper professional standards of skill and care (in the case of an architect or engineer).”¹⁸⁶

If the party who provides a collateral warranty fails to perform its duties to the required standard, “the grantee can raise an action to compel such performance; that

¹⁸² 2010 SLT 1102.

¹⁸³ *Ibid* at para 1 per Lord Drummond Young; cf *Friends Provident Life Assurance Ltd v Sir Robert Mcalpine Limited* [2014] CSOH 74 at para 22.

¹⁸⁴ *Ibid* at para 18 per Lord Drummond Young.

¹⁸⁵ *Ibid* at para 17 per Lord Drummond Young.

¹⁸⁶ *Ibid*.

applies in any case where an action of specific implement is competent.”¹⁸⁷ Alternatively, “if the grantee suffers financial loss as a result of the defective performance, it may raise proceedings against the granter in order to recover the amount of that loss.”¹⁸⁸ In such a case, “the primary loss resulting from defective performance is a physical defect in the building.”¹⁸⁹ Both in *Royal Bank of Scotland v Halcrow Waterman Ltd*¹⁹⁰ and *Friends Provident Life Assurance Ltd v Sir Robert McAlpine Ltd*¹⁹¹, the courts referred to a collateral warranty as a “collateral warranty agreement”¹⁹², suggesting that it is contractual in nature. Most recently, in *Kier Construction Ltd v WM Saunders Partnership LLP*¹⁹³, the court, again, applied a contractual analysis to collateral warranty. The fact in this case is that Dumfries & Galloway Council appointed the pursuer as the principal contractor for its construction project. The pursuer undertook to provide a collateral warranty in favour of the Council from all the design consultants and sub-contractors it employed for the construction. The pursuer and the defender, who was employed as a consultant, signed an appointment contract dated 31 October and 1 November 2006. Under the appointment contract, the defender undertook, inter alia, to provide “a signed collateral warranty in favour of the Council within 14 days of a formal request”¹⁹⁴ from the pursuer. However, the pursuer did not make such a formal request until early 2015. The court was tasked with assessing whether the pursuer and the defender had reached an agreement in March 2015, when there had been a series of written exchanges between them related to the defender’s obligation to provide the said collateral warranty.

Collateral warranties as a promise

Scottish scholars argue that the term “warranty” is not exclusively used in the context of a contractual obligation. For example, Hogg suggests that a warranty, in a broad

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ [2013] CSOH 173 at paras 2, 38, 39, 42.

¹⁹¹ [2014] CSOH 74.

¹⁹² *Ibid* at paras 4-5.

¹⁹³ [OH] 22.01.16 (Unreported) - [2016] CSOH 17.

¹⁹⁴ *Ibid* at para 4.

sense, can be characterised as a unilateral promise.¹⁹⁵ He states: “[t]he fact that *some* collateral undertakings have been analysed as contractual in nature ... does not entail that *all* collateral undertakings must be contractual in nature.”¹⁹⁶ Hogg’s view is supported by Christie, who argues that a warranty need not necessarily be a term of contract.¹⁹⁷ Although these commentators do not directly argue that a collateral warranty in construction is a unilateral obligation, their explanations suggest that a warranty in Scots law can be viewed as being either contractual or promissory in nature. Therefore, it is possible to treat a collateral warranty in construction as a unilateral promise, especially since the nature of a collateral warranty is compatible with that of a unilateral promise. By providing a collateral warranty, the grantor of a collateral warranty promises the beneficiary that he/she will provide repairs in the case of a defect during construction. A Scottish practitioner explicitly suggests that collateral warranties have the same characteristics as unilateral obligations.¹⁹⁸ This is because “[collateral] warranties need not require the beneficiary to make reciprocal obligations to the contractor or consultant.”¹⁹⁹ Similarly, in response to the English court’s decision that a collateral warranty is a construction contract in its own right, as to be fully discussed below, an English practitioner argues that a beneficiary of a collateral warranty “is simply the recipient of a unilateral undertaking, collateral (the clue’s in the name) to the primary contract...”²⁰⁰ This is compatible with the notion of a unilateral obligation in Scots law.

Moreover, by using a promissory analysis, a contractor cannot deny a party the right to bring a claim of loss for defects where there is an entitlement under a collateral warranty. The obligation of a collateral warranty takes effect once a grantor provides

¹⁹⁵ M Hogg, *Promises, Assurances, and Collateral Warranties: New Judicial Observations*, available at <http://www.obligations.law.ed.ac.uk/2013/09/17/promises-assurances-and-collateral-warranties-new-judicial-observations/>.

¹⁹⁶ *Ibid.*

¹⁹⁷ D Christie, *Collateral Warranty – A Scottish Viewpoint*, available at http://www.thenbs.com/topics/contractsLaw/articles/Collateral-Warranty_A-Scottish-viewpoint.asp.

¹⁹⁸ Turcan Connell, *Collateral Warranties – Do You Have Yours in Place?*, available at <http://www.turcanconnell.com/media/blog/2014/02/collateral-warranties-%E2%80%93-do-you-have-yours-in-place>.

¹⁹⁹ *Ibid.*

²⁰⁰ J H D’Aethhttp, *Collateral warranties and the Construction Act – a Nasty Surprise*, available at <http://www.blplaw.com/expert-legal-insights/articles/collateral-warranties-and-the-construction-act-a-nasty-surprise/>.

a collateral warranty to the grantee. Acceptance by the other party is not necessary. In *Kier Construction Ltd v WM Saunders Partnership LLP* earlier mentioned, if the court had applied a promissory analysis to the case, it would not have been necessary for it to consider whether the letters exchanged between the parties in March 2015 amounted to an offer and an acceptance. The court could have simply regarded the defender's undertaking to produce a signed collateral warranty in favour of the Council in the appointment contract in 2006 as a unilateral obligation to provide a collateral warranty.

Again, adopting a promissory approach would represent an improved framework for case analysis. Additionally, a court will not have any difficulty establishing the existence of an obligation because all collateral warranties are made in the course of business. Thus, a written document is not required.²⁰¹

Furthermore, another benefit of considering collateral warranties as unilateral obligations may be observed by making reference to an English case where the English courts held that a collateral warranty amounted to a construction contract under the Housing Grants, Construction and Regeneration Act 1996 (the HGCRA Act). In *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd*²⁰², although the court observed that not all collateral warranties would automatically fall within the scope of the HGCRA Act, it was held that the collateral warranty in this case was a construction contract in its own right. The HGCRA Act defines a construction contract as “an agreement with a person for any of the following— (a) the carrying out of construction operations...”²⁰³ The document of collateral warranty between the parties stated that the party giving the warranty “warrants, acknowledges and undertakes that... it has carried out and shall carry out and complete the Works in accordance with the Contract...”²⁰⁴ The court reasoned that in interpreting whether or not a collateral warranty in this case was a contract, “ordinary contractual

²⁰¹ Requirements of Writing (Scotland) Act 1995, ss 1(2)(a)(ii), 2(1).

²⁰² [2013] EWHC 2665 (TCC).

²⁰³ Housing Grants, Construction and Regeneration Act 1996, s 104.

²⁰⁴ [2013] EWHC 2665 (TCC).

interpretation principles”²⁰⁵ must be used for such interpretation. The court explained that the terms “warrants, acknowledges and undertakes” were understood by the parties in three different ways. The court explained that “[a]n undertaking often involves an obligation to do something.”²⁰⁶ Hence, it fell within the scope of the definition of a construction contract under the HGCRA Act.

The foregoing decision has attracted a number of critics, especially among those who are practitioners. For example, critics claim that, as the court’s decision suggests that the beneficiary of a collateral warranty is not excluded from adjudicating disputes with the contractor, it would cause an increase in the tendency for the grantee of a collateral warranty to seek damages by using this claim.²⁰⁷ This is not the kind of approach that the grantor of a collateral warranty would desire.²⁰⁸ In addition, the decision gives rise to unwelcome uncertainties.²⁰⁹ It does not provide a settlement for construction disputes. Nor does it benefit construction procurement.²¹⁰ Moreover, it has been argued that the court’s decision is not correct because it does not reflect the actual purpose of a collateral warranty. It was doubtful, and indeed arguable, why a beneficiary of a collateral warranty, who has no control or power over the instructions of the construction, could be deemed to be a contracting party of a construction contract.²¹¹ Moreover, it is argued that the payment provisions of the HGCRA Act cannot reasonably apply to collateral warranties.²¹² This is because a beneficiary of a collateral warranty does not have an obligation to make a payment, “other than perhaps a nominal consideration (in this case £1)”.²¹³

²⁰⁵ *Ibid* at para 22.

²⁰⁶ *Ibid* at para 27(d).

²⁰⁷ M Balen, “Collateral Warranties and Construction Contracts Parkwood Leisure Ltd v Laing O’Rourke Wales and West Ltd [2013] EWHC 2665 (TCC)” (Case Comment) (2014) 18(1) *Landlord & Tenant Review* 20 at 22.

²⁰⁸ *Ibid*.

²⁰⁹ http://www.nelsonslaw.co.uk/site/news/blogs/litigation_blog/parkwood_v_laingorourke.html

²¹⁰ C Hoar, “A Judicial Surprise” (Case Comment) (2013) *Construction Newsletter*, Sep/Oct, 3 at 4.

²¹¹ C Hoar, *Ibid*; M Balen, *Ibid*. Mills & Reeve, *Why Collateral Warranties aren’t Construction Contracts*, available at <http://www.mills-reeve.com/collateral-warranties/>

²¹² J H D’Aeth, *Collateral warranties and the Construction Act – a Nasty Surprise*, available at <http://www.blplaw.com/expert-legal-insights/articles/collateral-warranties-and-the-construction-act-a-nasty-surprise/>.

²¹³ *Ibid*.

The fact that a collateral warranty is held to be a construction contract has caused consternation among English practitioners. A promissory analysis of collateral warranties in Scots law can be practically useful. This is because it can help to avoid a collateral warranty from falling within the scope of a construction contract under the HGCRA Act. Had the *Parkwood* case arisen in Scotland, the Scottish courts could apply the unilateral approach to the collateral warranty. This would exclude a warranty from being a construction contract under the HGCRA Act, simply because a warranty is not a contract but a promise. The outcome would suit the actual purpose of a collateral warranty.

(b) Thai law

There appears to be no evidence of the use of collateral warranties²¹⁴ in Thailand.²¹⁵ Instead, in construction it is more common to have insurance which covers damages occurring from the construction. For instance, the Viriya Insurance offers a “Contractor’s All-risk Insurance Plan” for contractors or owners of construction projects.²¹⁶ The insurance covers “liabilities of contracted work, such as construction work, civil engineering work, and machinery installation work... and legal liabilities

²¹⁴ It is worth noting that Thailand has now introduced the Business Collateral Act 2015 (B.E. 2558), which came into force in November 2015. The Business Collateral Act 2015 contains a new type of contract called “a collateral contract”. However, this is different from the collateral warranties used in construction projects, which are discussed in this chapter. According to the Business Collateral Act 2015, a business collateral contract is “a contract whereby one party, “a security provider”, grants a security over property to another party, “a security receiver”, in order to guarantee the performance of an obligation without the need to deliver the property to the security receiver.” Business Collateral Act 2015, §5 para 1 (Author’s translation).

²¹⁵ In October 2012, Lyne Andrews, Senior Associate at Herbert Smith Freehills (Thailand) Ltd observed that “[u]nlike HKG [Hong Kong] and the UK where collateral warranties are popular I have yet to come across them in Thailand. This is surprising as I have advised some of the largest, privately listed developers, in Thailand.” Personal email from L Andrews (Lyle.Andrews@hsf.com) to author 9 October 2012; Meanwhile, Ratinan Choochaimangkhalala, Associate (Foreign Law), WongPartnership (Singapore) and former Junior Associate, Baker & McKenzie Ltd (Thailand) also observed in an email dated May 2016 (ratinan.choochaimangkhalala@wongpartnership.com) that collateral warranties have not been used in Thailand. Personal email from R Choochaimangkhalala (ratinan.choochaimangkhalala@wongpartnership.com) to author 21 May 2016; Neither are collateral warranties mentioned in leading textbooks on surety (e.g. S Visruthpich (n 166).

²¹⁶ Viriya Insurance, *Contractor’s All Risks Insurance*, available at <http://www.viriyah.co.th/en/customer-product-business.php?id=46#.VqSIEfl97IU>.

to a third party as a result of the contracted work.”²¹⁷ Thai law considers insurance as a contract.²¹⁸

The fact that collateral warranty is not used in Thailand perhaps stems from the fact that, under Thai law of delict, an aggrieved party is not prohibited from claiming damages for pure economic loss. In other words, the insurer will compensate any losses that are caused, including pure economic losses, to the insured construction, as long as they fall within the scope of the terms of the construction insurance. This is different from the situation in the United Kingdom where it was established that the recovery of damages through pure economic loss was not permitted,²¹⁹ which led to the use of collateral warranties, as already noted.

Nonetheless Thai insurers usually exclude their liabilities in certain circumstances. For instance, Muang Thai Insurance excludes liabilities on its construction insurances in a number of circumstances. Examples of these exclusions include loss or damage due to:

“[f]aulty or defective design materials or workmanship inherent vice latent defect gradual deterioration deformation or distortion or wear and tear; [i]nterruption of the water supply gas electricity or fuel systems or failure of the effluent disposal systems to and from the premises; and [c]ollapse or cracking of buildings...”²²⁰

This suggests that it is likely to be less difficult to claim remedies from a collateral warranty than from construction insurance.²²¹ Therefore, it may be possible that the use of collateral warranties will be introduced to construction projects in Thailand,

²¹⁷ *Ibid.*

²¹⁸ Thai Code, §861.

²¹⁹ *Murphy v Brentwood DC* [1991] 1 AC 398; cf *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd* (1998) 14 Const LJ 189; *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9; *Broster v Galliard Docklands Ltd* [2011] EWHC 1722 (TCC).

²²⁰ Muang Thai Insurance, *Accidental Damage (Property) Insurance*, available at <http://www.muangthaiinsurance.com/files/jacket/%E0%B8%97%E0%B8%A3%E0%B8%B1%E0%B8%9E%E0%B8%A2%E0%B9%8C%E0%B8%AA%E0%B8%B4%E0%B8%99%E0%B9%81%E0%B8%A5%E0%B8%B0%E0%B8%AD%E0%B8%B7%E0%B9%88%E0%B8%99%E0%B9%86/Jacket-IAR-%E0%B8%AB%E0%B8%A1%E0%B8%A7%E0%B8%94%E0%B8%AB%E0%B8%A5%E0%B8%B1%E0%B8%81-in-Eng.pdf>.

²²¹ Collateral warranties may be more suitable for claims in a short term construction project since they tend to be limited in nature and are granted over a short period of time.

especially those involving international construction teams, contractors, or buyers. For instance, Mayer Brown JSM, an international law firm with a branch in Bangkok, states on its advertisement regarding “Real Estate and Construction in Thailand” that it offers “to advise companies on all construction and pre-construction matters ... assist in the preparation of ancillary project documentation such as bonds, collateral warranties and guarantees...”²²² Therefore, if the concept of collateral warranties is adopted in Thailand, a promissory analysis could be helpful in conceptualising this transaction. As indicated in the discussion of Scots law, the nature of this transaction is more compatible with a unilateral obligation, and the beneficiary is better protected under a promissory analysis.

(c) Conclusion

Collateral warranties have benefited persons involved with construction projects in the United Kingdom. They create legal duties which would not otherwise exist between the relevant parties. Although the Scottish courts have characterised their legal status as contracts, they can also be viewed as promissory in nature. This thesis argues that their characteristics suit unilateral promises. Again, a promissory analysis improves the capacity to evaluate cases as well as providing more protection to the beneficiaries.

The author has been unable to find evidence of the usage of collateral warranty in Thailand. A constructor/builder/contractor commonly takes out insurance to cover damage which would arise from the construction. This is likely to be because Thai law does not prohibit an insured from claiming damages for pure economic loss. Nonetheless, it is possible that collateral warranties may be used in Thailand as an alternative way to claim remedies arising from losses incurred in construction projects, apart from insurance. The use of collateral warranties in Scotland provides an illustration that unilateral obligations can be useful in a commercial transaction.

²²² Mayer Brown JSM, *Real Estate and Construction in Thailand*, available at <https://www.mayerbrown.com/Files/Publication/7db0666b-65b1-4b07-8d73-c254032ca891/Presentation/PublicationAttachment/076cb712-59a9-4786-b496-1bfb553e9c5d/9708.PDF>.

Thus, if Thai law were to develop an independent idea of promise, a promissory analysis could be applied to similar commercial situations.

E. USING PROMISES TO ALTER/WAIVE OBLIGATIONS

(1) Promises to waive contractual right

(a) Scots law

Hogg suggests that where a creditor undertakes to a debtor that he/she would not enforce an obligation, or not do so for a specific time, this undertaking could be classified as a unilateral binding declaration.²²³ According to the binding nature of promises, the creditor's proposal constitutes a unilateral obligation, taking effect once it is made, not requiring acceptance by the debtor.

In comparison with the waiver of contract approach, the debtor (in a promissory approach) benefits more than the creditor because his/her acceptance is not required. Thus, the creditor is not able to change his/her mind once he/she makes a promise. By contrast, under a contractual approach, the creditor's offer can be withdrawn any time before the debtor accepts it.

It is worth referring to the doctrine of waiver, which may apply in the case of a proposal to waive contractual rights if the requirements of waiver are satisfied. In this case, a creditor's proposal to waive contractual rights would not be regarded as a type of voluntary obligation, but rather a unilateral declaratory act.²²⁴ In the case of express waiver, there is no requirement of reliance by the party benefiting from the waiver (namely, the debtor in the issue under discussion).²²⁵ Neither is the conduct of affairs on the basis of waiver required.²²⁶ However, in the case of implied waiver, case law suggests that the party benefiting from waiver is required to have conducted

²²³ Hogg, *Obligations* 78.

²²⁴ Hogg, *Promises* 435.

²²⁵ McBryde, *Contract* para 25-15.

²²⁶ *Ibid.*

affairs on the basis of waiver.²²⁷ This leads to the question of why the requirement of implied waiver should be different from that of express waiver.²²⁸ This then advances the idea that promise can be helpful in characterising a creditor's proposal to waive contractual rights because the action of the debtor (the promisee) would not be required under a promissory analysis.

(b) Thai law

A promise to waive contractual rights is viewed as a promise to make a gift. Under Thai law, a creditor's undertaking to waive a contractual right is deemed by law as a gift.²²⁹ The law states, "A gift may be made by granting to the donee the release of an obligation or by performing an obligation due from the donee."²³⁰

The law requires promises of a gift to be made in writing and to be registered by the competent official, otherwise they are unenforceable. This rule applies to all circumstances of promises of a gift, including a promise to waive a contractual right.²³¹ However, as discussed, this principle is impractical and inefficient.²³² In practice it is less likely that the parties who wish to make a promise of a gift would make such promises in writing and register it with the relevant official. Amendments to the Thai Code are therefore required.

(c) Conclusion

The approaches that Scots and Thai law take when dealing with a creditor's proposal not to enforce the debtor's obligation are different. In Scots law, it can be analysed

²²⁷ *Armia Ltd v Daejan Developments Ltd* 1979 SC (HL) 56 (as observed by McBryde in *Ibid* at para 25-16).

²²⁸ McBryde, *Contract* para 25-17.

²²⁹ P Sumawong, คำบรรยายลักษณะวิชากฎหมายแพ่งและพาณิชย์ ว่าด้วยซื้อขาย แลกเปลี่ยน ให้ (Commentary on the Civil and Commercial Code: Sale, Exchange and Gift) (1889) 3.

²³⁰ Thai Code, §522.

²³¹ Thai Code, §526.

²³² See Chapter IV, C. PROMISES TO ENTER INTO CONTRACT, (2) Promise of a gift (§526), (c) Problems with, and analysis of, promise of a gift.

using either a contractual or a unilateral promissory approach. A promissory approach enhances case analysis and is more advantageous to the debtor.

Under Thai law this juristic act is deemed to be a promise to make a gift, which requires to be made in writing and to be registered. However, this rule has almost never been applied in reality. As will be proposed in the Conclusion Chapter, this thesis suggests that under Thai law a gratuitous promise of a gift is unenforceable by an action unless there is some written evidence signed by the promisor.²³³ This proposed approach would be more efficient than the current approach because it would suit the actual practice of parties.

G. CONCLUSIONS

(1) Promises in commercial practice

As illustrated in earlier sections, a number of commercial transactions can be characterised as promises. This may contrast with what most people think. Non-lawyers perhaps tend to think that it is not common for business people to promise anything gratuitously. This, however, is not necessarily true. Business transactions are often structured using a number of connected contracts or obligations. While one obligation looks gratuitous when it is considered in isolation, when it is placed in its context within the transaction as a whole it is not gratuitous. This suggests that a unilateral promise is not always gratuitous, which is compatible with what this thesis has argued in Chapter V.

Moreover, it can be observed from the Requirements of Writing (Scotland) Act 1995 that there is no requirement for promises undertaken in the course of business to be in writing.²³⁴ This suggests that it is not unusual for business people to make promises, and for their promises to have legal consequences. This is why the law does not require their promises to be made in writing. Also, the Scottish Law

²³³ See Chapter VIII, C. WHAT CAN BE LEARNED FROM THAI LAW?, (4) Suggestions for Thai law, (f) Promise to waive contractual rights.

²³⁴ Requirements of Writing (Scotland) Act 1995, ss 1(2)(a)(ii), 2(1).

Commission²³⁵ and Scots legal scholars²³⁶ suggest that the doctrine of unilateral promise should be applied to business transactions. Additionally, promises can be seen to be commonly used in commercial practice in a number of cases in which the Scottish courts have enforced promises made in the course of business.²³⁷

Furthermore, business people often develop new ways of working for which there was no specific legal analysis dealing with them before. The legal analysis has to be created afterwards to help explain the practice. For instance, when letters of credit were developed by bankers and merchants to use in international trade, the law had to develop a new legal theory to deal with them by treating them as an independent transactions from the underlying contract. Examples of letters of credit support the useful function of the doctrine of promise in Scots law. While other jurisdictions have found it difficult to deal with the legal characteristic of letters of credit because the law of contract could not properly address the legal relationship between the bank and the beneficiary, Scots law could simply characterise this kind of relationship using a promissory analysis. The Scots promissory approach of letters of credit is also compatible with the approach of the independence of letters of credit adopted by other jurisdictions and legal models. Likewise, collateral warranties were created in order to establish legal relationships between parties which would not otherwise exist. Then they can be characterised, according to the preferred approach in this thesis, as unilateral obligations which have legal effects.

²³⁵ Report on *the Requirements of Writing* (Scot Law Com No 112, 1988) 11.

²³⁶ Hogg, *Obligations* 76-78; MacQueen, *Constitution and Proof* 4.

²³⁷ Examples of promises to keep offers open can be found in *Marshall & M'Kell v Blackwood of Pitreavie*, 12th Nov 1747 (Elch Sale); *Littlejohn v Hadwen* (1882) 20 SLR 5; *Paterson v Highland Railway Co* 1927 SC (HL) 32; Examples of commercial leases containing options to buy property can be found in *Sichi v Biagi*, , 1946 SN 66; *Scott v Morrison* 1979 SLT (Notes) 65; *Stone v MacDonald* 1979 SC 363; An example of letters of obligation (which has been replaced by a system of advanced notices) can be found in *Mason v A & R Robertson* 1993 SLT 773.

(2) Practical advantages of unilateral promise in Scots law

The study in this chapter shows that unilateral promise is a very useful concept, playing an essential role in practice. This is particularly the case in legal business, notably in Scotland. There are four main kinds of practical situations that can be characterised as promissory obligations, as summarised below.

Firstly, there are certain commercial situations in which the doctrine of promise is the most appropriate approach because their characteristics are outside the scope of a bilateral analysis. Obvious examples are offers specifying a period of acceptance and invitations to tender containing a condition that the invitor will accept the highest bid. They cannot be binding under a contractual analysis because there is no contractual obligation yet between the parties. Under a promissory analysis, an offeror and an invitor of tenders are bound to keep his/her offer open for a specified period and to accept the highest bid, respectively. Also, in the case of letters of credit, although it may be possible to regard them as contracts, it has been argued in this thesis that they are unilateral in nature. This is on the basis that the bank cannot refuse the acceptance of the beneficiary, i.e. a letter of credit is binding prior to acceptance.

Secondly, there are situations in which there appears to be no certain way of characterising the obligations. However, most authorities are of the view that they are promissory in nature. These transactions are options to purchase property at some point in the future, product or service guarantees, and advertisements of rewards. In the case of reward Scottish academics suggest that it should be analysed using a unilateral approach, whereas the Scottish courts tend to apply a contractual analysis. Nevertheless, it has been argued in this thesis that the promissory obligation facilitates case analysis to a greater extent. This is essentially because a promise is a unilateral obligation which is binding without acceptance. A promissory analysis therefore avoids any complexity that may arise from an analysis at the acceptance stage. By the same token, a greater level of protection is provided to the grantees of an option, the promisees in advertisements of reward, and customers who are given a

guarantee related to a product or service than the acceptance requirement found in a contractual analysis.

Thirdly, the legal natures of some transactions are debatable. However, it is more common for them to be characterised as contracts. Examples include cautionary obligations, collateral warranties, and a creditor's proposal to alter/waive contractual rights. Nevertheless, the study in this thesis shows that these transactions can also be created either by an offer or a unilateral undertaking. This makes two important points. First, the unilateral approach of promise can be an alternative approach other than contract in characterising them. Second, the main advantage of viewing these transactions as promises is that it provides better protection to a promisee. Moreover, the fact that promise is a unilateral obligation means that the promisee naturally has no duty to perform an obligation. Therefore, in the case of cautionary obligations, a creditor, who is viewed as the promisee, will not have a heavy duty to act in good faith. In the case of collateral warranties, a promissory analysis would make a collateral warranty fall outwith the scope of construction contracts under the HGCR Act. This outcome suits the purpose of the collateral warranty.

Fourthly, there appears to be no clear approach towards characterising some transactions. Examples are marketing offers, prize competitions and IOUs. A promissory analysis is helpful in the case of marketing offers, such as a promise to guarantee the best price. This is because it clearly explains how the obligation is binding on the part of the person making the offer. A contractual analysis cannot explain how a contract is concluded if an offeror can provide the best price for the customer, since there would be no contract in this case. In the case of prize competitions, a promissory analysis is helpful because it provides a just result to both parties. The promisor in prize competitions will not be able to alter or change the condition of a promise once the contestant has entered the contest or has been chosen as the winner, whereas an offeror under a contractual analysis can still do so. As for IOUs, the Scottish courts hold that they are grounds for an action in their own right, but does not explain their juristic nature. The fact that an IOU is an acknowledgement of a debt suggests that the grantor acknowledges that he/she owes

the money to the grantee and is willing to repay it. Due to the nature of the relationship between the grantor and the grantee of an IOU, the latter will generally want his/her money back and therefore the need for an acceptance of the IOU would appear superfluous. This shows that IOUs are well suited to being unilateral in nature. Nevertheless, although IOUs can be viewed as unilaterally binding undertakings, it is argued in this thesis that they are not unilateral promises on the grounds that they do not relate to future affairs. As a result, it is proposed in this thesis that IOUs should be regarded as an independent right, which shares some of the characteristics of promise but also has special features.

Moreover, the study in this thesis has shown that promise allows unilateral undertakings to be legally enforceable without going through the artificial process of establishing a contract. An obvious example is the case of a tendering process which can be simply analysed as a binding promise in Scots law. This is particularly obvious when compared with the equivalent English concept. Although the English unilateral contractual analysis provides the same result, the English analysis is overly complex. In fact, there are flaws in analysing the tendering process as a unilateral contract because the nature of the transaction is not contractual. Also, the unilateral analysis helps to clarify the actual nature of letters of credit which are controversial in the Common Law jurisdictions. These examples reflect the fact that the concept of promise is a useful legal tool. It enables the courts to be flexible when dealing with an undertaking which a contractual analysis cannot appropriately deal with.

Furthermore, the fact that a promise does not require an acceptance means that it cannot be revoked once it becomes effective. Thus, where revocation is at issue, a promisee in a promissory analysis is generally better protected in comparison with an offeree in a contractual one. This is particularly helpful for transactions related to consumers, in which the law provides more protection to customers than to businesses. Also, the courts can especially benefit from a promissory analysis when it wants to provide more protection to a less powerful party, which is normally the promisee.

(3) Practical advantages of unilateral promise in Thai law

Not only in its theoretical analysis could Thai law learn from Scots law, but there are also practical applications of promise in Scots law which could benefit practical usages and commercial practice in Thailand.

Firstly, although the unilateral obligation is not a free standing legal entity under Thai law, the legal characteristics of some transactions are genuine unilateral obligations already. They are obligations which are binding without acceptance. An example is the advertisement of reward in which a promisee who can claim the reward does not need to know about its existence. Also, prize competitions are viewed as unilateral obligations similar to rewards. Additionally, a promissory analysis helps to resolve the legal issues within the contractual framework. This is most obvious when considering an offer specifying a period of acceptance. The binding nature of promises helps to explain why an offeror is bound to keep his/her offer open for a specified period. Also, a promise to lease is not recognised by the Code. The Thai courts nevertheless enforce its legal effects. Furthermore, hire purchase can be described using the notion of option, i.e. the hirer has an option but not an obligation to purchase the property hired. Both a promise to lease and hire purchase are unilateral obligations which are binding on the part of the lessor/owner of the property prior to the acceptance of the lessee/hirer. These examples show that unilateral promise has a substantive role to play in governing certain transactions in Thai law already.

Secondly, a promissory analysis could help to characterise some transactions as unilateral undertakings. For example, the promissory idea enhances the analysis of tenders. Recall that an agreement between the invitor of tenders and the highest bidder is regarded as a tender contract. The final contract must be in writing. This reflects a gap in Thai law allowing contracting parties to deny liability although a tender contract has been concluded. By applying a promissory analysis, an offeror calling for bids is bound both to accept the highest bid and to enter into the final contract in writing. Similarly, a promise to waive a contractual right can be regarded

as a unilateral promise. This would be more practically useful than the current Thai approach, which requires a creditor's proposal to waive a contractual right to be in writing and be registered.

Thirdly, there are circumstances in which Thai law has no specific legal principles to apply. Although they can be analysed as contracts, these transactions would be treated as unilateral obligations if the idea of a promissory obligation were developed as a free-standing legal obligation under Thai law. This would include guarantees of product/service to non-consumers, marketing offers and suretyship. Like Scots law, a promissory approach represents an improved framework for case analysis and the promisee is better protected.

Fourthly, the idea of a promise is more convincing than the contractual approach to explain the nature of some transactions. For instance, Thai law has no specific provision dealing with letters of credit. Thus, they have to be analysed by the Thai courts within the contractual framework. However, the characteristics of letters of credit do not fit within the scope of contract under Thai law. Although legal writers do not refer to a letter of credit as a contract, they fail to provide a satisfactory explanation in terms of its actual legal nature. However, if promise were to be developed as a standalone obligation, Thai legal commentators would benefit by adopting the concept of a promise when explaining the legal nature of this commercial transaction. A promissory analysis would explain the juristic nature of letters of credit more convincingly than a contractual approach.

Finally, there are practical measures that have never been used in Thailand, such as a collateral warranty. Thailand could benefit from this kind of commercial practice. It affords better protection to buyers in construction projects than construction insurance, particularly if it is viewed as a unilateral obligation. This is because the beneficiary (promisee) is placed in a better position than being regarded as a contractual party.

(4) Concluding remarks

The analysis and discussion in this chapter indicate that the doctrine of unilateral promise is a highly useful legal doctrine which can be used to conceptualise practical circumstances and commercial transactions. The idea of promise can be applied and used in several different ways. It governs the pre-contractual stage of an obligation. A promise itself confers a unilateral obligation. It has been used as a means of enticement. In other circumstances, it can be used to guarantee an obligation which already exists. A creditor's proposal to alter/waive a contractual obligation can also be analysed using the notion of promise. These reflect the fact that the doctrine of promise is a valuable doctrine which should be preserved (in Scots law), and indeed should be developed and applied by both academics and the courts (both in Scots and Thai law).

Chapter VIII Conclusion

A. WHAT HAS THIS THESIS DISCOVERED AND CONTRIBUTED?

This comparative analysis of promise in Scots law and Thai law shows that recognising the independence of promise from contract would make an important contribution to the theoretical structure of the law of obligations. This thesis argues that the Scots promissory approach presents a more efficient structure of the law of obligations than the Thai approach. It encounters fewer problems than Thai law because a promise is deemed to be a standalone obligation. This thesis further analyses the practical applications of promise, arguing that a promissory analysis is useful in conceptualising practical circumstances. Adopting a promissory approach is beneficial, making doctrinal analysis clearer in comparison with the offer and acceptance approach. It is concluded that the Scots approach of regarding a promise as an independent obligation separate from contract could be adapted to Thai law. There are certain resemblances between Scots and Thai law in promissory theories and the obligational nature of a promise. Therefore, Thai law is not unfamiliar with the notion that a declaration of wills can unilaterally create an obligation. The proposed approach provides a number of advantages e.g. eradicating an overlap between a promise and an offer; clarifying the legal status of promise; and making the legal status of a promise to make a contract compatible with a promise of reward. In particular, this thesis postulates that promise has a substantive role to play in governing an offer specifying a period of acceptance. This particular observation has, to date, not been made in relation to Thai law. What this thesis has discovered and contributed can be summarised as follows;

(1) The historical development of promise and the distinction between promise and contract

The general legal enforcement of promissory obligations was first recognised by the canonists. They took a different path from Roman jurists by enforcing promises as a general principle. The canonists' view influenced contract and promissory law in

modern legal systems because their promissory account was followed by both the late scholastics and leading Natural Law commentators.

Promises and contracts have a complex relationship because they originate from the same root. There is a theory, commonly believed amongst Anglo-American contract theorists, that a promise is a contract. Nonetheless, it has been argued in this thesis that a promise should be treated as being different from a contract based on the grounds that the requirements of a promise are different from those of a contract.

Firstly, a promise is a unilateral obligation because it can be created by the will of one party, whereas a contract is a bilateral obligation which must be created by two wills. Secondly, a promise must relate to a future commitment, whereas a contract can be a statement confirming a present state of affairs. Thirdly, from an historical point of view, the canonists made a distinction between unilateral and bilateral promises. Likewise, there was a distinction between contracts and promises in the late scholastic tradition (which was subject to debate). Also, although they did not generally enforce unilateral promises, Roman jurists saw a *pollicitatio* as a unilateral undertaking distinguished from an agreement which is a contract/covenant. As a result, this thesis concludes that promise should be regarded as being distinctive from contract, particularly in jurisdictions in which the idea that a unilateral declaration of will can create a binding obligation exists. Both Scots and Thai law fall within the scope of such jurisdictions.

(2) A comparative analysis between the two mixed jurisdictions

It is widely accepted that Scotland is a mixed jurisdiction because the Scottish legal system is influenced by both the Civil Law and the Common Law. This thesis argues that the legal system of Thailand is mixed because its modern legal system has been influenced by both the Civilian and Common Law traditions and traditional Thai law still exists in particular areas such as family law.

(a) The reception of the Civil Law and the Common Law in Scotland and its relevance to the law of promise

The reception of Roman law in Scotland did not have a significant impact on the historical development of Scots promissory law because the latter was not derived from Roman sources. This thesis therefore assesses the connection between the reception of Roman law and the development of promissory law from other perspectives. Since there is no consensus amongst legal historians regarding the century in which Roman law was first received into Scotland, all proposed centuries are considered by assessing whether the reception of Roman law in each of them had any impact on the course of development of the law of promise.¹

Firstly, this thesis points out that Roman law may have had influence on promise in the early period of Scots law, namely between the thirteenth and fifteenth century. This is based on the assumption that, at that time, Scots law did not appear to enforce promises. Therefore, the position of Scots promissory law in that period is similar to that of Roman law, where promises were not regarded as a general principle. Secondly, the reception of Roman law in Scotland during the sixteenth and seventeenth centuries is observed from the perspective of an attempt to codify Scots private law. This thesis concludes that the failure of codification had no direct impact on the historical development of promise based on the assumption that Scots law would still have regarded promise as a standalone obligation irrespective of the success of codification. The Commission for Revising the Law that was appointed for drafting the Code was to revise and consider existing law in Scotland (1649). It is clear that promises were being enforced by the Scottish courts during that time. Also, given that Stair was a member of this commission, it is likely that promise would have been recognised under the completed Code.

Nor did the reception of English law in Scotland have a significant impact on the historical development of the law of promise because Scots law did not derive its

¹ See Chapter II, B. SCOTS LAW: A CLASSICAL MIXED LEGAL SYSTEM, (1) Reception of the Civil Law and the Common Law in Scotland, (a) Reception of the Civil Law.

promissory law from the English sources. This thesis therefore examines the influence of English law on promise through the attempt to unify the law between Scotland and England proposed by King James VI and I. The successful unification of Scots and English law could have altered the position of promise in Scotland due to the powerful role of English law in Great Britain. Given that English law does not generally enforce unilateral promise, it is highly unlikely that any unified law would have regarded promise as a main source of obligation.²

Nevertheless, the influence of English law on Scots promissory law appears to have increased from the eighteenth century. It appears that Institutional writers who came after Stair and Scottish commentators did not focus on analysing the law of promise.³ One possible reason for this is the increase of commerce between Scotland and England. Given that English law was such a powerful legal system, especially in commercial practice, these writers may have thought that the concept of promise was not useful since English law did not recognise this concept. Also, it appears that the Scottish courts sometimes are reluctant to enforce promissory obligation, again possibly because of the influence of English law. This is observable from a number of cases in which the Scottish courts adopted a bilateral approach when characterising the juristic nature of legal transactions. For instance, the court appears to follow the English approach in analysing reward using a contractual analysis.⁴ Also, there are circumstances in which the nature of the instrument is compatible with a unilateral obligation, such as collateral warranties⁵ and letters of credit⁶, but the courts analyse it within contract, often without acknowledging promise as an alternative. In addition, it is clear from the literature and the courts in the past perceived either an offer or a promise to constitute a cautionary obligations.

² See *Ibid* at sub-heading (b) Reception of English Law.

³ See Chapter III, B. LATER INSTITUTIONAL WRITERS and Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (2) Promissory theory as explained by Institutional and contemporary writers, Later Institutional writers.

⁴ See Chapter VII Part II, C. USING PROMISES AS ENTICEMENTS, (1) Advertisements of reward.

⁵ See Chapter VII Part II, D. USING PROMISES TO GUARANTEE EXISTING OBLIGATIONS, (3) Collateral warranties.

⁶ See Chapter VII Part I, B. USING PROMISE TO CREATE OBLIGATIONS, (3) Letters of credit.

However, in contemporary case law, they tend to exclusively refer to this obligation as a kind of contract.⁷

(b) The reception of the Civil Law and the Common Law in Thailand and its relevance to the law of promise

There is no controversy regarding the exact period when the Civil Law and English law were first implemented in Thailand. It is clear that the reception of English law preceded the reception of the Civil Law. English law initially appeared to be the most important foreign legal source in the reformation of the Thai legal system.⁸ Thai lawyers were sent to study in England. When they returned to Thailand, they established the first Thai law school, where English legal principles were taught. The Thai courts also employed English law in cases where there was no applicable Thai law. Had Thailand not codified its law, English law would have continued to be the main source of legal influence in the Thai legal system. Thailand is likely to have borrowed all of its legal rules from England, in which case, the modern position of Thai contract law would have been similar to that of English law in that unilateral promise would not be legally binding.

Nonetheless, the fact that Thailand adopted a codified system changed the course of historical development of the law of promise. Codification reduced the influence of English law in the Thai legal system.⁹ Moreover, the shift of the Thai Code from the French model (the 1923 Code) to the German model (the 1925 Code) is an important point of the historical development of the law of promise in the Thai legal system.¹⁰ This is because some fundamental concepts of the French and German law of obligations, and especially the law of promise, are different. If the 1923 Code was still in force, the notion of a promise in the Thai Code would have been a promise in

⁷ See Chapter VII Part II, D. USING PROMISES TO GUARANTEE EXISTING OBLIGATIONS, (2) Cautionary obligations/Suretyship

⁸ See Chapter II, B. SCOTS LAW: A CLASSICAL MIXED LEGAL SYSTEM, (1) Reception of the Civil Law and the Common Law in Scotland, (b) Reception of English Law.

⁹ See Chapter II, C. THAILAND: A NEWLY DISCOVERED MIXED LEGAL SYSTEM?, (2) Reception of foreign laws in Thailand, (d) Effects on the Thai promissory law as a result of the codification, (i) Effects of the change from the Common Law to the Civilian tradition.

¹⁰ See *Ibid* at sub-heading (ii) Effects of the change from French to German models for the Thai Code.

a contractual sense, i.e. a promise requiring acceptance. However, according to the German concept of juristic act, a promise can be classed as a unilateral juristic act, which is distinct from the bilateral juristic act of contract. More importantly, Thai law borrowed a number of promissory legal principles from German law, such as promise of reward, promise of sale, and promise of a gift, each of which is a genuine unilateral obligation. Thai law is therefore familiar with the notion that a unilateral declaration of will can, in some cases, create an obligation.

Moreover, two examples of traditional Thai law, namely *Utthalum* (prohibiting a person from taking a case against his/her own ascendants) and duties of children to maintain parents, are considered in this thesis to support the claim that Thailand is a mixed legal system.¹¹ These two concepts had been influenced by Buddhist belief, and became traditional Thai customs. Therefore, the characteristics of Thai law suit the requirements of a mixed legal system. Modern Thai law is constituted of three legal traditions, namely the Civil Law, the Common Law and traditional Thai law.

(c) Mixed systems but different outcome

Mixed jurisdictions do not necessarily have the same mixture of the Civil and Common Law, nor do they have more general substantive laws. Much depends on, inter alia, the timing of the mixture and the way in which they were influenced. This can be observed from the mixed characteristics of Scots and Thai law and the law of promise in each system. Scots law and Thai law are similar in that they have been influenced both by the Civilian and English legal traditions. Also, their promissory laws originated in part in the Civilian tradition (or, more accurately, the *ius commune* in the case of Scots law). However, Scots law regards a promise as a standalone obligation, whereas Thai law does not. This difference stems from the fact that, inter alia, when the law of promise was developed in each system, the role of promise within the obligational framework in the *ius commune* (in the case of Scots law)/ amongst the Civilian systems (in the case of Thai law) is different.

¹¹ See Chapter II, C. THAILAND: A NEWLY DISCOVERED MIXED LEGAL SYSTEM?, (3) Traditional Thai law.

When the law of promise was developed in Scotland, the binding force of a promise was strongly debated within the *ius commune*. There were two competing views of whether a promise requires the acceptance of the promisee.¹² The view that a promise is binding without acceptance was adopted in Scotland.¹³ By the time that promissory law was developed in Thailand, the role of a promise was already well established in the Civil Law systems consulted by the Thai drafters (e.g. France, Germany and Switzerland). Since no Continental European system adopted the approach that a promise is an independent obligation separate from contract, the notion of a standalone promise was never introduced into Thailand.

Moreover, when the law of promise was developed in Scotland, there was a strong influence from the Canon Law. Stair was heavily influenced by the canonist approach that a promise is binding in its own right.¹⁴ Scots law then regards promise as a free standing legal institution outwith contract. By contrast, Thai law, either the law in general or the law of promise, was never directly influenced by the Canon Law. Therefore, Thai lawyers were never inspired by the canonist rule that a promise is binding as a source of obligation.

Furthermore, Scots promissory law was not influenced by English law (as the origin of the doctrine). Although English influence increased later, it was after the law of promise had been well established. Thus, English influence does not affect the understanding that a promise is a unilateral obligation in Scots law. In the case of Thai law, there was influence from English law, as the origin of the promissory doctrine.¹⁵ Although the Thai Code was mainly drafted on the lines of German law, the Thai drafters used the term “promise” both in the sense of a unilateral obligation (similar to German law) and a contractual promise (similar to English law). This

¹² See Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (3) The late scholastics and (4) Northern Natural Law jurists; See also Chapter III, A. STAIR AND THE DOCTRINE OF PROMISE, (2) *ius commune*, (a) Debate on the binding force of promise.

¹³ See *Ibid.*

¹⁴ See Chapter III, A. STAIR AND THE DOCTRINE OF PROMISE, (1) Canon Law.

¹⁵ See Chapter II, C. THAILAND: A NEWLY DISCOVERED MIXED LEGAL SYSTEM?, (2) Reception of foreign laws in Thailand, (a) Reception of English law.

illustrates that the influence of English law on Thai promissory law affected the underlying basis of the “unilateral nature” of a promise in Thai law.

In short, although the law of promise in Scots law and Thai law originated in part in the Civilian tradition, the role of promise in the obligational framework of each system is different due to the timing of the mixture and the way in which they were influenced. In addition, Thai promissory law was partly influenced by English law, as the origin of the doctrine, whereas Scots promissory law was not. Therefore, it is important to take fundamental differences between Scots law and Thai law into consideration because their different underlying basis may render the Scots promissory model not entirely suitable for Thai law.¹⁶

(d) Advantages of regarding Thailand as a mixed legal system

This thesis points out that the concept of a mixed legal system is not widely recognised amongst Thai lawyers and that they generally consider Thailand to be a Civil Law system.¹⁷ Therefore, the demonstration in this thesis that Thailand is a mixed jurisdiction could promote the notion of mixed legal systems in Thai legal academia. Moreover, it is important for Thai lawyers to understand the actual characteristics of their legal system, as well as the fundamental basis of each legal concept, so that the application of those legal concepts can be appropriately applied. The fact that Thailand is viewed as a Civilian system may cause Thai lawyers to rely on a Civilian approach when facing difficulties with the application of legal doctrine. However, some legal concepts were borrowed from English law. Some are the product of the mixture of the Civilian and the Common Law traditions. Therefore, the Civilian model may not be able to resolve the legal problems in Thai law if the underlying basis of the law does not have a Civilian root and vice versa.

¹⁶ This is later discussed in section (4) Promise from a comparative perspective, (b) Different theories and doctrines that relate to promissory obligation.

¹⁷ See Chapter II, C. THAILAND: A NEWLY DISCOVERED MIXED LEGAL SYSTEM?, (4) Thailand as a mixed legal system?

It is also advantageous for Thailand to be regarded as a mixed jurisdiction. In this way, it could draw on the general body of research on mixed jurisdictions. This could benefit Thai law in terms of comparative legal study of other mixed jurisdictions. In Thailand, the typical comparative approach is to compare Thai law with the Civil Law and/or the Common Law.¹⁸ A comparative study of Thai law with other mixed legal systems is therefore a novel legal analysis in the Thai context.

Particularly, this discovery may support the comparative study of Thai law and Scots law. This thesis introduces the Scottish legal system to Thai legal academics and vice versa. More importantly, this thesis has proved that there are many advantages of a comparative analysis of promise between Scots law and Thai law. Therefore, a comparative analysis of Thai and Scots law could be an interesting option for Thai and Scots legal scholars wanting to conduct a comparative study between two mixed jurisdictions in other areas of law.

(3) Promise from an historical perspective

(a) Scots law

Stair was inspired by both the Canon Law and the late scholastic tradition in claiming that a unilateral promise is enforceable. There was a lively debate within the *ius commune* as to whether a promise requires acceptance in order to be binding during his time.¹⁹ Stair, under the influence of Molina, supported the view that a promise is binding without acceptance. The other school of thought, of which Grotius was a member, proposed a counter argument.²⁰ Grotius' account was followed by Pothier, whose work was used as the main reference when drafting the

¹⁸ For example, in *Good Faith & Supervening Events*, the author of the book compares the doctrine of good faith applied in supervening events between German, French, Anglo-American and Thai law. In *Comparative Thai law with foreign Civil Codes*, the author of the book compares the approach of Thai law with a number of foreign civil codes, namely Germany, France, Switzerland, Spain, Italy, Russia, Japan, China, Canada, Egypt and Mexico.

¹⁹ As discussed in Chapter III, A. STAIR AND THE DOCTRINE OF PROMISE, (2) *ius commune*, (a) Debate on the binding force of promise.

²⁰ As discussed in Chapter III, A. STAIR AND THE DOCTRINE OF PROMISE, (2) *ius commune*, (b) Was Stair correct on his promissory account?

Code civil.²¹ Therefore, the influence of Grotius on the *Code civil* was not direct, but through Pothier's work. This explains why, traditionally, under French law a promise (e.g. a promise of sale) is created by the wills of two parties.²² Also, French law does not generally recognise the notion that a promise can be unilaterally created (e.g. a promise of reward and a promise of a gift are not recognised under the *Code civil*).²³ Other European systems have followed French law due to the influence of the Code Napoleon. There is an exception in German law, and other systems which adopted the German approach, whereby the idea of a unilateral binding obligation was later developed.²⁴ The recognition of a unilateral obligation under German law, however, appears to be an exceptional rule, not a main source of obligation. Scotland was never influenced by Grotius in this area of the law, since his promissory account was clearly rejected by Stair and was never followed by the Scottish courts and contemporary writers.²⁵ Although David Hume and Adam Smith explained that acceptance is required for the constitution of a promise, which is similar to Grotius' claim, their theories regarding the acceptance of a promise never prevailed in Scotland.²⁶ Therefore, it is postulated in this thesis that the divergence between Scotland and the rest of Europe regarding the position of promise within the obligational framework stems from the fact that Stair and Grotius took a different view in relation to the acceptance of promise.²⁷

²¹ As discussed in Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (4) Northern Natural Law jurists, (b) Grotius' influence on French law.

²² *Code civil*, Art 1589.

²³ It is worth noting that France reformed its law of contract in February 2016, and this included a change to the breach of a unilateral promise. As a result of this reform, the parties cannot revoke a unilateral promise to enter into a contract. This means that even if one party revokes it, the other party can still enforce the contract in which the unilateral promise was made. Nonetheless, there has been no change in the juristic nature of a unilateral promise to enter into a contract. As discussed, under French law, unilateral promises to contract are made by the agreement of both parties. Therefore, a unilateral promise to enter into a contract is not a genuine unilateral obligation under French law. Official report can be found at Legifrance, *Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004939&categorieLien=i> d.

²⁴ This is observed in Chapter II, C. THAILAND: A NEWLY DISCOVERED MIXED LEGAL SYSTEM?, (2) Reception of foreign laws in Thailand, (d) Effects on the Thai promissory law as a result of the codifications, (ii) Effects of the change from French to German models for the Thai Code.

²⁵ See Chapter III, B. LATER INSTITUTIONAL WRITERS; and D. CASE LAW.

²⁶ See Chapter III, C. SCOTTISH MORAL PHILOSOPHERS, (2) Adam Smith and (3) David Hume.

²⁷ See Chapter III, A. STAIR AND THE DOCTRINE OF PROMISE, (3) The divergence between Scots law and other European systems.

This thesis observes that neither Institutional writers after Stair nor early contemporary commentators paid much attention to the law of promise. Hence, no promissory theories that are helpful for the application of the law of promise can be obtained from their works.²⁸ However, in the twentieth century TB Smith played an important role in the development of the law of promise. He emphasised the value of this doctrine by suggesting that it could be applied in a number of practical circumstances e.g. rewards, offers specifying a period for acceptance and third party rights.²⁹ It appears that Smith influenced a number of modern writers (e.g. McBryde, MacQueen and Hogg) who favour the doctrine of promise. Therefore, Smith is the writer who reinstated the recognition of a promise in Scots law after it had been well established by Stair. The promissory doctrine tended to be ignored by later Institutional writers and writers before Smith, but writers after him tend to re-emphasise the value of the doctrine.

(b) Thai law

Promissory principles under the Thai Code were derived from both Civilian³⁰ and English sources. This makes the usage of promissory language confusing. The Thai drafters used promissory language both in the sense of a unilateral obligation and the sense of a contract.³¹ The former can be found in the case of promise of reward³² and promise to make a contract.³³ The latter can be found in the case of a promise to pay remuneration. This is despite the fact that the provision of promise to pay

²⁸ See Chapter V, (2) Promissory theory as explained by Institutional and contemporary writers, (b) Later Institutional writers and (c) Contemporary writers, (i) Gloag.

²⁹ See Chapter V, (2) Promissory theory as explained by Institutional and contemporary writers, (c) Contemporary writers, (ii) TB Smith.

³⁰ It is later argued in this thesis that, although the promissory principles under Thai law were borrowed from Civilian sources rather than the Canon Law, the root of this concept is the canonical principle to keep one's word, which led to the enforcement of unilateral obligations in Europe. This makes the mixed nature of Thai promissory law similar to that of Scots law, although Thai law has never been directly influenced by the Canon Law. See section C. WHAT CAN BE LEARNED FROM THAI LAW?, (3) Could the Scots approach be adapted for Thai law?

³¹ See Chapter IV, F. CONCLUSION (1) The mixture of the Civilian and Common Law traditions; and (2) Flaws in promissory provisions,

³² See Chapter IV, B. PROMISE UNDER THE THAI CODE, (1) Promise without a specific promisee.

³³ See Chapter IV, C. PROMISE TO ENTER INTO A CONTRACT.

remuneration was borrowed from German and Swiss law, which do not contain promissory language.³⁴

Moreover, this thesis argues that the Thai drafters did not acknowledge the different attitude towards a unilateral promise of French and German law.³⁵ Some promissory provisions were derived from both sources, and this caused a great deal of confusion. This is seen from the example of promise of sale. The concept was derived from the provisions of promise of sale of both French and German traditions (the latter is through Japanese law). The drafters appeared not to understand the obligational status of a promise of sale during the period of the drafting, whether it was a contract or a unilateral obligation.³⁶ In another example, they placed the concept of promise of reward (which is a unilateral obligation) in the part related to the formation of a contract under the Code.³⁷ Moreover, in the case of a promise to pay a penalty for not performing an obligation, the drafters translated the term “promise” as “สัญญา” but the word literally means contracts.³⁸ Also, a “promissory note” is translated as “ตั๋วสัญญาใช้เงิน”, which literally means “a contractual note to pay a sum”.³⁹ This thesis therefore concludes that the flaws in promissory provisions under the Thai Code stems from the fact that, *inter alia*, the drafters did not understand the difference between unilateral and bilateral obligations.

³⁴ See Chapter IV, B. PROMISE UNDER THE THAI CODE, (2) Promise with a specific promisee, (c) Promise to pay remuneration.

³⁵ See Chapter IV, F. CONCLUSION (3) Different attitudes on unilateral promises between French and German law and their effects on the Thai Code.

³⁶ See Chapter IV, C. PROMISE TO ENTER INTO A CONTRACT, (1) Promises of sale (§454).

³⁷ See Chapter IV, B. PROMISE UNDER THE THAI CODE, (1) Promise without a specific promisee,

³⁸ See Chapter IV, B. PROMISE UNDER THE THAI CODE, (2) Promise with a specific promisee, (a) Promise to pay a penalty for not performing an obligation.

³⁹ See Chapter IV, B. PROMISE UNDER THE THAI CODE, (2) Promise with a specific promisee, (b) Promissory notes.

(4) Promise from a comparative perspective

(a) Similar underlying basis of promissory law

This thesis argues that not only are the Scots and Thai law similar in the mixed nature of their legal systems, but also in the similarity of the underlying basis of promissory law.

Firstly, the notion of a juristic act is recognised in both systems and the definition of a juristic act appears to be similar in both systems (but the general theory of juristic acts in Thai law is clearer than it is in Scots law).⁴⁰ Moreover, in both systems juristic acts can be distinguished based on, *inter alia*, their unilateral and bilateral nature. Most importantly, a promise is classified as a unilateral juristic act, whereas a contract is a bilateral juristic in both systems.

Secondly, the idea of the unilateral nature of obligations can be seen in two different senses, namely (i) the obligation can be created by one party and (ii) only one party is obliged to perform it. Both senses are compatible with the nature of a promise in both systems. This suggests that the perception of the nature of a promise is similar in both systems.⁴¹ This is different from jurisdictions in which the nature of a promise is understood in a different sense. Two obvious examples are English and French law. In English law, a unilateral promise is generally not binding.⁴² In French law, traditionally a promise cannot be created by one party, but rather requires an agreement of two parties.⁴³ Therefore, the nature of a promise in English and French law is incompatible with the unilateral nature of an obligation in the first sense.

⁴⁰ See Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (1) The notion of a juristic act; and B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (1) The notion of a juristic act.

⁴¹ See Chapter V, C. THEORETICAL FRAMEWORK OF PROMISE IN SCOTS LAW AND THAI LAW: COMPARISON, (2) Unilateral nature of a promise.

⁴² This is observed throughout this thesis. See, for example, Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (1) Scots law, (c) Binding characteristics of a promise.

⁴³ See Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (4) Northern Natural Law jurists, (b) Grotius' influence on French law.

Thirdly, will theory plays an important role in the law of promise in the studied systems. This stems from the fact that, in Scots law, Stair was influenced by the Natural Law tradition.⁴⁴ As for Thai law, the idea of voluntary obligation was influenced by the Civilian tradition.⁴⁵ Additionally, in both systems, specific implement/performance is the primary remedy for breach of obligations in the sense that it is the primary right of the creditor. The role of will theory from the perspective of remedies in both systems is therefore similar: the law of promise lends itself to criticism for only being about compensating the aggrieved promisee.⁴⁶

Fourthly, the courts in both systems use the objective theory of obligation to determine whether a person intends to create a legal obligation of promise.⁴⁷ This, again, is different from jurisdictions such as France, where the subjective theory of obligation is generally preferred.⁴⁸

Finally, a promise can be distinguished from an offer and other expressions which are not obligatory by referring to the degree to which the person who makes those expressions desires to bind him/herself.⁴⁹ One might argue that the aforesaid theory distinguishes the effects after the event, rather than the nature of the promises/offers themselves. Nonetheless, it has been argued in this thesis that the theory under discussion is satisfactory based on the fact that a promisor intends his/her undertaking to be binding immediately, i.e. a promise is irrevocable having become effective and without acceptance. An offeror does not intend to be immediately bound since he/she can still withdraw the offer as long as it has not been accepted. The difference between Thai and Scots law is that the former recognises the idea of

⁴⁴ See Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (4) Will theory in Scots law.

⁴⁵ See Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (4) Will theory in Thai law.

⁴⁶ See Chapter V, C. THEORETICAL FRAMEWORK OF PROMISE IN SCOTS LAW AND THAI LAW: COMPARISON, (3) The role of will theory.

⁴⁷ See Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (3) Comparison, (a) Words used for promissory liability and an objective test of promise.

⁴⁸ See Chapter I, C. NATURE AND REQUIREMENTS OF PROMISE, (3) The intentions of the promisor, (b) How to measure seriousness of intention?

⁴⁹ As discussed in Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (3) Comparison, (b) Promise as distinguished from other types of expression.

overture.⁵⁰ However, this difference is insignificant because, like an invitation to treat, an overture cannot be accepted and does not confer any legal effect. Thus, the attitudes towards the degree to which a promisor, an offeror and a person who makes an invitation to treat intend to be bound in Scots and Thai law are similar.

To conclude, there are certain resemblances between Scots and Thai law in relation to promissory theories and the obligational nature of a promise, which suggests that the underlying basis of the promissory obligation in the two systems is similar.

(b) Different theories and doctrines that relate to promissory obligation

It is important to consider the different theories and doctrines that relate to a promissory obligation between the two systems. This is to determine if there are some essential differences in each system that may cause their underlying basis to differ, making the Scots model inappropriate for Thai law.

The first difference concerns the role of a promise in third party rights. While in Scots law, traditionally the constitution of third party rights is analysed using a promissory analysis⁵¹, under Thai law this doctrine has no connection with a promissory analysis.⁵² Therefore, the moment when the right of the beneficiary in third party rights exists in each system is different. However, this difference is not essential and should not prevent Thai law from borrowing the promissory model from Scots law. The approach of regarding promises as standalone obligations would not affect the understanding or underlying basis of third party rights under Thai law. It is clear that they are viewed as contracts and the rights of the beneficiary come into existence when he/she informs the debtor. Hence, the idea that a promise comes into existence when it is communicated to the promisee would have no effect on the concept of the third party right. In fact, there is a theory in modern Scots law that

⁵⁰ See Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (2) Thai law, (a) Promise as distinguished from other types of expressions.

⁵¹ See Chapter V, A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (5) The doctrine of third party rights.

⁵² See Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (5) The doctrine of third party rights.

proposes that third party rights should be viewed as an independent obligation. This suggests that a promissory analysis may not be entirely appropriate for an analysis of third party rights. It is worth noting that the Scottish Law Commission is at the point of publishing its proposals for law reform, including a proposed Bill⁵³ to put the law of third party rights onto a statutory footing. The current draft of the foregoing Bill does not use promissory language for the right of a third party beneficiary.⁵⁴ Therefore, the Scots and Thai approaches to third party rights and the role of a promise are not as different as it initially appears.

Secondly, the constitution of a promissory obligation in Scots law is subject to the required form.⁵⁵ However, there is no unified rule regarding constitution or proof of a promise in Thai law.⁵⁶ Thus, it is important for Thai law to consider the issue regarding the required form of the constitution of a promise because this rule does exist in Scots law. Otherwise, if there is no rule governing the constitution or proof of the obligation, the scope of the unilateral obligation under Thai law (if it were regarded as a main source of obligation) would be much wider than in Scots law (after which it could be modelled). This issue regarding the requirement for constitution or proof of a promise will be particularly discussed under the heading of “suggestions for Thai law”. It is briefly mentioned here to illustrate that this difference between Scots and Thai law is acknowledged in this thesis, and that an appropriate solution will be offered for Thai law.

(c) Scots law and a more workable promissory approach

The Scottish promissory approach to the application of this doctrine is more efficient. It encounters fewer problems than Thai law because of the fact that, inter alia, in Scots law promise is deemed to be a free standing legal institution. It therefore avoids the theoretical issue of distinguishing between an offer and a promise. This is

⁵³ Scottish Law Commission, Review of Contract Law, *Discussion Paper on Third Party Rights in Contract*, available at http://www.scotlawcom.gov.uk/files/8013/9592/4224/DP_TSO.pdf.

⁵⁴ The draft Bill can be found at http://www.scotlawcom.gov.uk/files/6514/5252/9147/A9_provisions_2015-12-29.pdf.

⁵⁵ See Chapter III, E. CONSTITUTION AND PROOF OF PROMISE.

⁵⁶ See Chapter IV, E. CONSTITUTION AND PROOF OF PROMISE.

a major issue within Thai contract law. The distinction could be simply made by using the theory that a promise is binding without acceptance, whereas an offer requires acceptance. In addition, Thai law has a theory that the extent to which a promisor desires to bind him/herself is stronger than that of an offeror.⁵⁷ This concept is useful from a theoretical perspective, since a promise can be distinguished from an offer based on the extent to which the promisor and offeror intend to be bound. However, the value of the foregoing theory is damaged by another theory, which is commonly understood amongst Thai lawyers, that a promise to make a contract is per se an offer. It is therefore extremely difficult to make a distinction between promise to make a contract and offer, neither at a theoretical nor practical level, since they are considered to be the same thing.⁵⁸ As a matter of principle, in Scots law the degree to which a promisor intends his/her intention to be bound is stronger than that of an offeror. The difference is that a promise to make a contract is deemed to be a distinctive juristic act in Scots law, i.e. not as per se an offer. Thus, a distinction can be made between a promise and an offer under Scots law. Therefore, if Thai law recognised a promise as a free standing legal entity, it would help to differentiate a promise from an offer. Such a distinction could be made by using the approach that an offer requires acceptance, whereas a promise does not. Also, the distinction could be made by using the theory that the extent to which a promisor intends his/her intention to be bound is stronger than an offeror, which already exists in Thai law.

Moreover, Scots law has a clear approach to deal with the legal effects of a promise. It is clear that a promise does not lapse as a result of the death of the promisor. The Thai court applies the rule of offer to the case of a promise, whereby an offer lapses as a result of the death of the offeror.⁵⁹ However, this rule is incompatible with the nature of a promise, given that the extent to which a promisor intends to be bound is stronger than that of an offeror. Also, Scots law has a clear rule to deal with the

⁵⁷ See Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (3) Comparison, (b) Promise as distinguished from other types of expression, (i) The extent to which a person who makes an expression intends to be bound.

⁵⁸ See Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (3) Comparison, (b) Promise as distinguished from other types of expression, (ii) Problems of the Thai approach.

⁵⁹ As discussed in Chapter VI, D. LEGAL EFFECTS OF A PROMISE.

prescription of a promise. In contrast, a promise binds the promisor forever in Thai law, even if the general rule of prescriptive period of obligation has passed. In other words, under Thai law there is no prescriptive period applicable to promises, which is strange, given that a promise is an obligation.

Furthermore, Scots law clearly justifies why an offeror who specifies a period for acceptance is bound to keep his/her offer open for that specified period, even if there is no contractual relationship between the parties yet. This is because of the binding force of promissory obligations.⁶⁰ In contrast, Thai legal commentators are not able to explain why an offer containing a time limit of acceptance binds the offeror. By tracing the origins of the relevant provision in German law, the model of the Thai provision, it has been found that the obligation in this case is promissory, rather than contractual.⁶¹ This is an example of how a unilateral declaration of will can create an obligation under German law. This discovery that the actual basis of the binding characteristic of an irrevocable offer under Thai law is a promissory obligation is a new contribution to Thai law.

(d) Some uncertainties of the law of promise

There are some areas of promissory law in both systems that are uncertain, and thus need clarification. Firstly, it is unclear whether the communication of a promise to the promisee is required. Two rival theories are considered in this thesis in order to determine which of them is the most satisfactory.⁶² Reference is also made to the DCFR, which has a clear approach to deal with this point.⁶³ This thesis supports the theory that communication of a promise to the promisee is required. One of the justifications is that the internal intention of a person has to be express in some way which one can objectively observe.

⁶⁰ As discussed in Chapter VI, E. PROMISES TO KEEP AN OFFER OPEN.

⁶¹ As discussed in Chapter VI, E. PROMISES TO KEEP AN OFFER OPEN, (2) Thai law, (b) Origin of the Thai principle.

⁶² As discussed in Chapter VI, B. COMMUNICATION OF A PROMISE. (1) Scots law and (2) Thai law.

⁶³ As discussed in Chapter VI, B. COMMUNICATION OF A PROMISE, (3) Comparison.

Secondly, in Scots law it is unclear if a promise is always gratuitous or if non-gratuitous promises exist.⁶⁴ The latter concept is supported in this thesis. A promise is often used to form part of a wider series of transactions in which the promisor intends to make some gain if the promise is enforced.⁶⁵ Thus, the nature of the obligation is not necessarily gratuitous. Additionally, the theory that a promise is not always gratuitous provides flexibility for the application of a promise. If a promise is not always gratuitous, there is no need to make non-gratuitous promises, which are not undertaken in the course of business, in writing.⁶⁶ In Thai law, the idea of gratuitousness is discussed within the framework of juristic acts, which can apply to the case of promise. Thai law does not determine the gratuitous nature of the obligation at the time it is constituted, but from its actual nature. Under gratuitous obligations, only one party gains benefits, whereas non-gratuitous obligations occur when both parties gain benefits. Therefore, this thesis suggests that a promise is not always gratuitous in Thai law.⁶⁷

(5) Some practical advantages of promises

In Chapter VII, this thesis analyses the practical applications of promise in order to establish whether such a concept is in fact a useful legal tool within a legal system. It has been discovered that a promissory analysis is very useful in conceptualising practical circumstances and day-to-day legal transactions, notably within the Scottish jurisdiction.

This thesis has gathered similar practical usages of promise under the same heading so that they can be easily observed. First, promises can create a pre-contractual obligation, as can be seen from the examples of promises to keep offers open and promises about the tendering process. Second, some promises per se confer unilateral obligations, e.g. options to purchase a property, letters of credit and IOUs. Third,

⁶⁴ As discussed in Chapter VI A. THEORIES AND DOCTRINES RELATING TO PROMISE IN SCOTS LAW, (6) Gratuitousness of promise.

⁶⁵ Examples of these transactions can be found in Chapter VII.

⁶⁶ Requirements of Writing (Scotland) Act 1995, ss 1(2)(a)(ii).

⁶⁷ As discussed in Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (5) Gratuitousness of promise.

they can be used as enticements, of which the common examples are advertisements of rewards, prize competitions and marketing offers. Fourth, a guarantee of existing obligations can be alternatively explained through a promissory lens, for example, in the case of product or service guarantees, cautionary obligations/surety and collateral warranties. Finally, they can be used to alter/waive contractual obligations.

(a) Scots law

A promissory approach represents an improved framework for case analysis of the types of transaction studied. Adopting a promissory approach is beneficial, making doctrinal analysis clearer in comparison with the offer and acceptance approach adopted in a contractual analysis. It avoids problems regarding the acceptance of the other party. This suits the nature of several practical transactions in which a person intends his/her undertaking to be binding without acceptance. Additionally, generally a promisee under a promissory analysis benefits more in comparison with an offeree under a contractual analysis. This is because a promise is irrevocable once it has become effective but an offer can be revoked at any time as long as a contract has not been concluded. This is particularly useful when it concerns transactions related to customers where the law wishes to provide more protection to customers or less powerful parties.

This thesis has made an original scholarly contribution to Scots private law by grouping together similar practical transactions under the promissory umbrella for the first time. There are several situations which can be rationalised under a promissory analysis. This includes some examples that are commonly discussed in literature and some that are not. Firstly, transactions that are commonly discussed in Scottish legal literature include promises to keep an offer open⁶⁸, advertisements of reward⁶⁹, options to purchase property⁷⁰, cautionary obligations⁷¹ and product/service

⁶⁸ See Chapter VII Part I, B. USING PROMISE TO CREATE OBLIGATIONS, (1) Promises to keep offers open.

⁶⁹ See Chapter VII Part II, C. USING PROMISES AS ENTICEMENTS, (1) Advertisements of reward.

⁷⁰ See Chapter VII Part I, B. USING PROMISE TO CREATE OBLIGATIONS, (2) Options.

guarantees.⁷² Although these transactions are commonly discussed, an original contribution is made by this thesis with the account of a clear doctrinal comparison between a promissory and a contractual analysis and an assessment of which approach makes better sense doctrinally and produces a fairer result. Specifically, in the case of a cautionary obligation, it is pointed out that modern literature and courts tend to refer to this undertaking as a contract. However, it is clear from case law that a caution can arise either by an offer or a unilateral undertaking.⁷³ In the case of options, not only are a promissory and a contractual approach compared in this thesis, but reference is also made to the firm offer approach. It is clearly shown that the promissory approach is the most workable, because it avoids problems in the exercise of an option. This suits the actual nature of an option, i.e. a person who is granted an option has the option to purchase the property without being required to renegotiate with the grantor.⁷⁴

Secondly, some transactions are not commonly analysed in Scottish legal literature, these being letters of credit, collateral warranties, prize competitions, marketing offers, and IOUs. Therefore, original contributions are made to Scottish legal thought in this thesis by providing a doctrinal analysis of their legal characteristics. Specially, in the case of letters of credit, this thesis postulates that a promissory analysis of letters of credit is compatible with the theory that regards letters of credit as independent transactions from the underlying contract between the importer and exporter. The adoption of a promissory approach is particularly useful because it resolves some practical problems. This is the case in which the courts applied the concept of substantial compliance to letters of credit, making it difficult for the bank to examine the underlying transaction between the exporter/importer.⁷⁵ Also, in the case of collateral warranties, this thesis postulates that a promissory analysis would

⁷¹ See Chapter VII, Part II, D. USING PROMISES TO GUARANTEE EXISTING OBLIGATIONS, (2) Cautionary obligations/Suretyship.

⁷² See Chapter VII, Part II, D. USING PROMISES TO GUARANTEE EXISTING OBLIGATIONS, (1) Product or service guarantees.

⁷³ See Chapter VII, Part II, D. USING PROMISES TO GUARANTEE EXISTING OBLIGATIONS, (2) Cautionary obligations/Suretyship, (a) Scots law.

⁷⁴ See Chapter VII Part I, B. USING PROMISE TO CREATE OBLIGATIONS (1) Options.

⁷⁵ As discussed in Chapter VII Part I, B. USING PROMISE TO CREATE OBLIGATIONS, (3) Letters of credit (a) Scots law, (iii) Benefits of regarding letters of credit as unilateral obligations.

make a collateral warranty fall outwith the scope of construction contracts under the HGCR Act.⁷⁶ This outcome suits the actual purpose of the collateral warranty. In fact, there appears to be no authority, either in case law or literature, to deal with the obligational nature of some transactions at all. This thesis therefore contains an original contribution by analysing the legal characterisation for these transactions. This is obviously the case with IOUs. The Scottish courts held that they create an obligation to pay back the money without classifying which class of voluntary obligation they belong to. It is argued in this thesis that, while IOUs bear some characteristics of promise, they are not pure promises on the basis that they do not relate to a future event. Therefore, they should be regarded as an independent right which has special features, but also shares some similarities to promises.⁷⁷ There is also no clear approach to deal with the legal characteristic of prize competitions. The Anglo-American approach is analysed in this thesis. It has been found that the Scottish promissory approach offers a more satisfactory outcome. In the Anglo-American approach, a party holding a prize competition who reserves the right to withdraw/alter the competition is permitted to withdraw from the contest or alter the value of the prize, even if the winner has been chosen. This problem would not arise under a promissory analysis.⁷⁸ As for marketing offers, examples of buy one get one free and best price guaranteed are provided in this thesis. Also, this thesis shows that a promissory analysis provides a more satisfactory result, both in terms of the legal characterisation of the transactions and the protections of customers.⁷⁹ In short, this thesis emphasises how valuable promissory analysis is at a practical level in Scotland. It shows that a promissory analysis is alive and well, and is still useful in a modern legal system.

(b) Thai law

In Thai law some practical circumstances have already been characterised using a promissory analysis. Firstly, under the influence of German law, advertisements of

⁷⁶ As discussed in Chapter VII Part II, D. USING PROMISES TO GUARANTEE EXISTING OBLIGATIONS, (3) Collateral warranties.

⁷⁷ As discussed in Chapter VII Part I, B. USING PROMISE TO CREATE OBLIGATIONS, (4) IOUs.

⁷⁸ See Chapter VII Part II, C. USING PROMISES AS ENTICEMENTS, (2) Prize competitions.

⁷⁹ See *Ibid* at section (3) Marketing offers.

reward and prize competitions are regarded as unilateral obligations.⁸⁰ Secondly, there is evidence of the usage of promises to lease in legal practice. This practice is useful for present purposes because it is an actual practice of individuals which is not recognised under the Code. The juristic nature of a promise to lease is similar to that of a promise of sale, namely a unilateral obligation. The court, however, does not describe it using a promissory analysis because promise is not the main route for the creation of voluntary obligations. Therefore, the approach of regarding a promise as a standalone obligation would be helpful because it assists the courts by explaining the nature of the transaction using the correct legal analysis.⁸¹ Additionally, hire purchase can be viewed as an option. This is compatible with its characteristics because the hirer has an option, not an obligation, to purchase the property.⁸²

Moreover, there could be more situations which could be analysed using promissory reasoning. Firstly, a promissory analysis could resolve some of the issues in Thai contract law. This is obviously the case with tendering processes, where the Thai courts cannot enforce a final contract, even though there is a tendering contract between the parties.⁸³ Also, promises to waive contractual rights can be characterised as unilateral obligations, which would not be required to be registered with a competent official.⁸⁴ Secondly, promise provides Thai lawyers with a more convincing and appropriate analysis for certain legal problems, as can be seen from the example of letters of credit. Their nature is neither compatible with contract nor third party rights. A promissory analysis is appropriate for their legal nature, as well as being compatible with the explanation of letters of credit given by Thai lawyers.⁸⁵ Thirdly, some practical circumstances in which Thai law has no specific legal principles could also be characterised as promissory in nature. Examples include

⁸⁰ As discussed in *Ibid* at section (1) Advertisements of reward and (2) Prize competitions.

⁸¹ As discussed in Chapter VII Part I, B. USING PROMISE TO CREATE OBLIGATIONS, (1) Options, (b) Thai law, (ii) Promise to lease.

⁸² As discussed in *Ibid* at sub-heading (i) Hire purchase.

⁸³ As discussed in Chapter VII Part I, A. PRE-CONTRACTUAL PROMISES, (2) Promises about the tendering process, (b) Thai law.

⁸⁴ See Chapter VII Part II, E. USING PROMISE TO ALTER/WAIVE OBLIGATIONS, (1) Promises to waive contractual right.

⁸⁵ As discussed in Chapter VII Part I, B. USING PROMISE TO CREATE OBLIGATIONS, (3) Letters of credit (b) Thai law

guarantees of products/services to non-consumers⁸⁶ and marketing offers⁸⁷. Finally, some Scottish commercial practices could form useful models in Thai law e.g. collateral warranties.⁸⁸ These examples also support what has been proposed in this thesis: that promise should be recognised separately from contract under Thai law.

(6) Promissory case law and the role of the courts in the application of promise

(a) Scots law

The digest of case law presented in Chapter III and the discussion of case law in Chapters V and VI show that promise has been used in Scots law in various forms. This ranges from the simple promises used in daily life (e.g. a promise of a gift or to give money) to the complex promises used in commercial practice (e.g. an option to purchase property contained in a lease). The statistics⁸⁹ show that the volume of case law relating to promise has increased in the past decade. Since 2005, there have been more than ten cases in which promissory grounds were relied on by the pursuers/petitioners and/or in which the judge discussed promise. This differs from the period between 1995 and 2004, when, according to statistics⁹⁰, there were fewer than five cases relating to promise. This suggests that in fact the number of instances in which promise is determinative could have increased if the courts applied promissory doctrine to these transactions. Moreover, there are other transactions which could have been characterised as a promise, but the court analysed them using a contractual analysis. As has been argued in this thesis, a promissory analysis is the most appropriate approach in characterising some transactions such as letters of credit, promises attached to invitation to tenders and IOUs. In addition, some transactions such as cautionary obligations and collateral warranties can arise either from an offer or a unilateral undertaking, but the courts tend to regard them as

⁸⁶ See Chapter VII Part II, D. USING PROMISES TO GUARANTEE EXISTING OBLIGATIONS (1) Product or service guarantees

⁸⁷ See Chapter VII Part II, C. USING PROMISES AS ENTICEMENTS, (3) Marketing offers.

⁸⁸ This is proposed in Chapter VII Part II, D. USING PROMISES TO GUARANTEE EXISTING OBLIGATIONS, (2) Thai law.

⁸⁹ See Chapter III, D. CASE LAW, (4) Case law since 2000.

⁹⁰ See Chapter III D. CASE LAW, (3) Twentieth century case law and (4) Case law since 2000.

contractual in nature. This suggests that in fact the number of instances in which promise is determinative could have increased if the courts applied promissory doctrine to these transactions.

Moreover, the Scottish courts have also played an important role in the application of promissory doctrine. Firstly, the courts have established the rule that an intention to undertake a binding promise must be analysed using an objective approach.⁹¹ Secondly, the courts have developed the approach that the constitution of a promissory obligation must be clearly expressed.⁹² The aforementioned approach enhances the application of promissory doctrine by making it clear that a binding promise must be clearly expressed so that it can be objectively found that the obligation has been created. The lack of such an approach would result in uncertainties when the court determines whether a promissory relationship between the parties exists or not. Also, a person may easily be faced with liability even if no promissory relationship exists.

(b) Thai law

While the case law concerning promises of reward is scarce, there is a large amount of case law concerning promises to enter into a contract. This shows that it is more common for Thai people to make promises to a specific promisee, rather than to the public. However, the legal nature and effect of a promise to make a contract remains unclear, as can be seen from the discussion throughout this thesis. Therefore, it is necessary to clarify the ambiguities so that applications of the doctrine can be made more appropriately. However, the role of the Thai courts in the application of promises is not as helpful as in the case of the Scottish courts. Although there are several uncertainties in the law of promise which provide the Thai courts with an opportunity to clarify these uncertainties, the promissory rules established by the Thai courts offer a rather unsatisfactory outcome. For instance, the Thai courts have not clarified that the actual juristic nature of a promise to make a contract is a

⁹¹ See Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (1) Scots law, (a) Promise as distinguished from other types of expressions (i) Expressions which have no legal effects.

⁹² See *Ibid* at sub-heading (b) Words used for promissory liability.

unilateral juristic act.⁹³ Also, the courts' position that a promise lapses as a result of the death of the promisor and a promise binds the promisor forever are not satisfactory.⁹⁴

(7) Promise from the perspective of the DCFR

The notion of a unilateral undertaking in the DCFR illustrates that the most recent model rules of European private law recognise the importance of a unilateral obligation.⁹⁵ This recognises that there are certain situations in which a person unilaterally intends his/her undertaking to be bound without acceptance. The notion of a contract cannot appropriately deal with this kind of situation, since it requires the acceptance of the other party. The difficulty of a contractual analysis can be identified from the discussion throughout this thesis when referring to jurisdictions in which the idea of unilateral obligation does not exist as a general rule. For instance, the English courts have faced problems when dealing with promises attached to an invitation to treat.⁹⁶ The courts wanted such an invitation to be binding in order to provide a fair result so they had to apply the concept of unilateral contract to deal with the case. However, promises attached to an invitation to treat cannot be appropriately characterised as unilateral contracts. This resulted in criticism that the court failed to apply the appropriate legal doctrine.

Moreover, the DCFR offers a clear approach to deal with promissory obligations. For instance, it provides that a unilateral juristic act, including a promise, must be communicated to the person to whom it is addressed. This is useful for both Scots and Thai law, since whether a promise is required to be communicated is uncertain in both systems. Also, like Scots law, the DCFR has the rule that the promisee has a right to reject the promise. This rule is useful for Thai law. Under Thai law, it is

⁹³ As observed in Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW (1) The notion of a juristic act and (2) Promissory theory as explained by Thai writers.

⁹⁴ As discussed in Chapter VI, D. LEGAL EFFECTS OF A PROMISE, (2) Thai law.

⁹⁵ See Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (3) Comparison.

⁹⁶ As discussed in Chapter VII Part I, A. PRE-CONTRACTUAL PROMISES, (2) Promises about the tendering process, A. PRE-CONTRACTUAL PROMISES, (2) Promises about the tendering process, (a) Scots law, (i) The English unilateral contract approach.

uncertain whether a promisee can reject a promise or not. In addition, the DCFR also uses an objective approach, which is compatible with both Scots and Thai law. This reinforces the argument made in this thesis that the objective approach provides a fairer outcome.

Furthermore, the recognition of unilateral undertakings in the DCFR shows that promise now has an important role to play in the most recent model of European private law. . The enforceability of promise originated under the influence of the Canon Law.⁹⁷ It was then used as the core of the explanation of voluntary obligations by the late scholastic jurists. This thesis argues that the Grotian tradition ended the binding force of a unilateral promise (for most of Europe).⁹⁸ The fact that the DCFR recognises a unilateral obligation suggests that the idea of a unilateral promise, as a source of obligations, is an important concept in the theoretical structure of the law of obligation.

(8) The binding force of unilateral promise in English law

This thesis considers the binding force of a promise in English law from the perspective of the doctrines of promissory and proprietary estoppel. It has been shown that the English courts have changed their attitude towards the binding force of a unilateral promise in this situation. Historically, promissory and proprietary estoppels could only be used as a defence. However, recent case law suggests that they can be used as the basis of a cause of action. In addition, it appears that the English courts have adopted a holistic approach when dealing with estoppel in recent cases.⁹⁹ All of these factors reinforce the importance of unilateral promise in the obligational framework. This is because even the courts in England, where it is most difficult to enforce a unilateral promise, have adopted a more flexible approach to enforcement of a unilateral promise.

⁹⁷ See Chapter I, A. THE LEGAL OBLIGATION OF PROMISE, (2) Canon.

⁹⁸ See Chapter III, A. STAIR AND THE DOCTRINE OF PROMISE, (3) The divergence between Scots law and other European systems.

⁹⁹ As discussed in Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (1) Scots law, (c) Binding characteristics of a promise, (i) A promise is binding without acceptance.

B. WHAT CAN BE LEARNED FROM SCOTS LAW?

(1) Restrictions of the doctrine of promise

The recognition of a unilateral obligation in Scots law is wider than in jurisdictions where a unilateral declaration of will can only create an obligation in certain limited circumstances (e.g. Germany) and where a unilateral promise must be accepted in order to be binding (e.g. France). Thus, in theory the binding force of a unilateral promise in Scots law is more flexible compared to other Civilian systems. However, the theoretical status of the enforceability of a promise in Scots law is limited by some factors.

Firstly, in Scots law, the circumstances in which unilateral obligations can be created and proved have been restricted since 1771, when the court ruled¹⁰⁰ that a promise could only be proved by writ or oath of the promisor, and not by witness. This is different from proof of promise under the Canon Law, where the substance of obligations is more important than formalities.¹⁰¹ This shows that Scots law adopted the canonical approach whereby bare promises are legally enforceable, albeit with stricter requirements of proof. Although these rules were abolished later, the law continues to control the constitutive requirement of promissory obligations. A gratuitous unilateral obligation needs to be in writing, with some exceptions such as a promise that is undertaken in the course of business and statutory personal bar. The restrictive rules on the proof and constitution of a unilateral obligation illustrate that the theoretical status of a promise as a binding obligation is limited by these rules.¹⁰²

Secondly, the Scottish courts have developed the approach that a promise must be expressed in clear terms.¹⁰³ The development of the court regarding clear terms shows similarities to the restrictive rules regarding the proof of a promise that existed within the ecclesiastical jurisdiction. Recall that the canonists reasoned that promises

¹⁰⁰ *Millar v Tremamondo* (1771) Mor 12395; cf *Smith v Oliver* 1911 SC 103.

¹⁰¹ McBryde, *Promises* 61.

¹⁰² See Chapter III, E. CONSTITUTION AND PROOF OF PROMISE.

¹⁰³ See Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (1) Scots law, (b) Words used for promissory liability.

should be legally binding irrespective of the necessary formalities. However, they were concerned that this could lead to unlimited claims in the Church's courts. It was therefore established that the Church had jurisdiction solely in cases where the promise had been accompanied by an oath. What can be learned from the restrictive rules regarding the proof of a promise and the court's approach regarding clear words may be that there have always been attempts to limit the scope of unilateral obligations. This may stem from the fear that the application of the obligation may go too far. If there is no restriction regarding the proof of a unilateral obligation, or a requirement for its constitution that it must be in writing or clearly expressed, a person may too easily be faced with liability. The law therefore has to find a balance between protecting an aggrieved promisee and the party who is alleged to have broken the promise.

Nonetheless, it is not suggested in this thesis that the binding force of a promise is substantially limited by the restrictive rules discussed above. Firstly, the requirement of writing only applies to "gratuitous unilateral obligations". Therefore, according to the preferred approach of this thesis, promises that are not gratuitous are not restricted by the writing formality. Secondly, there is also an exception for promises "undertaken in the course of business" not to be made in writing.¹⁰⁴ The discussion in this thesis shows that in Scots law there are a number of business transactions that can be analysed using a promissory analysis. Finally, the requirements of writing are waived for promises that fall within the scope of the statutory personal bar (ss 1(3) and (4) of the Requirements of Writing (Scotland) Act 1995).¹⁰⁵ It is true that the criteria set out in s 1 (4) create a burden for the person who seeks to enforce such promises.¹⁰⁶ Nonetheless, there will certainly be circumstances in which these

¹⁰⁴ Requirements of Writing (Scotland) Act 1995, ss 1(2)(a)(ii).

¹⁰⁵ Requirements of Writing (Scotland) Act 1995, ss 1(3) and (4).

¹⁰⁶ (4)The condition referred to in subsection (3) above is that the position of the first person—
 (a) as a result of acting or refraining from acting as mentioned in that subsection has been affected to a material extent; and
 (b) as a result of such a withdrawal as is mentioned in that subsection would be adversely affected to a material extent.

criteria are met.¹⁰⁷ Therefore, these leave much space for the doctrine of promise in practical terms.

(2) Suggestions for Scots law

It is noteworthy, in a jurisdiction where unilateral promise is recognised and has been developed very well at a conceptual level, that the preferred approach, in some cases, is contractual. The preference for a contractual analysis may be rooted in the fact that Scotland is a mixed legal system. Although the reception of the Canon Law and the *ius commune* in Scotland facilitated the development of a promissory analysis, English law, where unilateral promise is generally not binding, remains an important influence. This illustrates that, although promise originated in part in the Civilian tradition, there has still been a strong influence from English contract law. However, the adoption of a contractual analysis of a unilateral undertaking is inappropriate in jurisdictions in which a unilateral obligation is regarded as being independent. If a person intends his/her expression to be legally binding without acceptance, the court should apply a unilateral promissory analysis to his/her expression.

Moreover, a conceptual analysis involving unilateral obligations is very useful in practice. There are several practical circumstances which can be conceptualised under a promissory analysis in order to provide more satisfactory results.¹⁰⁸ According to the discussion in this thesis, a promissory analysis provides more flexibility for case analysis than a contractual analysis. This is because the latter cannot appropriately deal with a situation in which a person intends his/her undertaking to be binding without acceptance. In addition, a promissory analysis provides better protection to the promisee than the offeree in a contractual analysis because a unilateral obligation is binding once it has been made and cannot be revoked afterwards.

¹⁰⁷ An example of where s 1 (4) of the Requirements of Writing (Scotland) Act 1995 can be found is the case of promises to store goods without charge. For a detailed account see Gordley, *Promises* 118, 136-137.

¹⁰⁸ As discussed in Chapter VII.

Nevertheless, while promise is well developed at a theoretical level, its use in practice is weaker than it might be. It often offers a more workable legal solution in practice than specifying a contract. Particularly, in commercial contexts, as observed, specific promises, e.g. pre-contractual undertakings, firm offers, options, and collateral warranties, are used by business parties in situations where they intend to make some gain. A promissory analysis provides a wider scope in dealing with transactions and can fulfil business functions. The courts and those in legal practice should therefore be more aware of the existence of promise as a possible solution to commercial problems, particularly because promises given in commercial contexts do not require to be constituted in writing.

Furthermore, the Scottish promissory approach can be used as guidance for other jurisdictions such as Thai law. Thai lawyers have found it difficult to apply the law of promise, at both a conceptual and a practical level. As has been argued in this thesis, the adoption of the Scottish approach, which regards a promise as an independent obligation, helps to eradicate the problems under Thai law.¹⁰⁹ Similarly, the DCFR recognises a unilateral obligation as being separate from a contract, which is similar to the Scottish approach. These examples illustrate that the promissory doctrine is a valuable one, which should be preserved and developed within the Scottish jurisdiction.

C. WHAT CAN BE LEARNED FROM THAI LAW?

(1) Lessons from Thai law on the law of promise

This comparative analysis has highlighted some aspects of Thai law which are useful to other jurisdictions. Firstly, Thai promissory law is a mixture of the Civilian and English legal traditions. This results in confusion over the legal nature and application of promise in Thai law. This thesis argues that these flaws occurred because, inter alia, the Thai Code was drafted without any clear understanding of the

¹⁰⁹ See Chapter VI, F. CONCLUSIONS, (2) Advantages of regarding promise as a standalone obligation.

actual nature of promise within the overall framework of obligations.¹¹⁰ The drafters used the term “promise” both in the sense of a unilateral obligation (e.g. promise of reward and promise to make a contract) and in the sense of contractual promise (e.g. promise to pay remuneration). Moreover, during the period of the drafting of the Code, they occasionally used the term “an agreement to buy or to sell” when referring to a “promise of sale”, despite the fact that these two concepts were different juristic acts. Also, in the cases of promise to pay a penalty and promissory notes, the draftsmen translated the word “promise” and “promissory note” as “สัญญา” (which literally means contract) and “ตั๋วสัญญาใช้เงิน” (which literally means “a contractual note to pay a sum”). All these illustrate defects in drafting the promissory provisions under the Thai Code. They also reflect the fact that the draftsmen could not differentiate between the juristic nature of unilateral and bilateral obligations.

Secondly, the fact that the Code was not well drafted causes problems for Thai lawyers in terms of the application of the law of promise. For instance, the provisions of promise of reward (which is a unilateral obligation) are contained in the Section of Formation of Contract. Some therefore regard a promise of reward as a contractual obligation, which it in fact is not. Moreover, the fact that a promise to make a contract requires acceptance leads Thai lawyers to believe that this type of promise is per se an offer. This results in difficulty in distinguishing the two from each other. Furthermore, Thai writers have failed satisfactorily to explain some contractual principles within the legal framework of contract law such as the case of an offer containing a time limit for acceptance that is irrevocable. The draftsmen, again, adopted this rule from German law without acknowledging that the binding effect of this rule stems from its status as a unilateral obligation. These problems reinforce the claim of this thesis that the Thai Code was not well drafted and organised.

What can be learned from the foregoing is that it is important for lawyers to have a full understanding of legal concepts when they adopt foreign legal principles into

¹¹⁰ See Chapter VI, F. CONCLUSIONS, (1) What conclusions can be reached on the Scots/Thai comparative study, (b) Factors causing differences between Scots and Thai law, (ii) Institutional writers/ Drafters of the Thai Code.

their native systems. The lack of such a clear understanding can result in flaws in the reception of foreign law as well as difficulties in its legal application.

(2) Examples of where Scots law could learn from Thai law

Although the concept of promise under Thai law is less clear than that of Scots law, there are examples of where Scots law could learn from Thai law.

Firstly, Thai law categorises expressions of willingness along a spectrum based on the degree to which a person who makes the expressions desires to bind himself/herself.¹¹¹ A similar approach can also be created under Scots law because this categorisation is compatible with the current situation under Scots law. It is clear that a promisor has a stronger desire to be bound by his/her expression in comparison with a person making expressions which are not obligatory. Also, the extent to which the promisor wishes to be bound is stronger than that of an offeror. An offeror can withdraw the offer at any time before it is accepted, whereas a promisor cannot do so. This illustrates that the intention of an offeror to be bound is weaker compared to that of a promisor because the former can change his/her mind as long as his/her offer has not been accepted, whereas the latter cannot. It is also clear that the extent to which an offer wishes his/her intention to be binding is stronger than that of a person who makes an invitation to treat. Nonetheless, there is no need for Scots law to adopt the idea of an overture. This is because, as discussed, an overture and an invitation to treat can be actually classified as the same kind of expression, given that neither of them can be accepted and thus, cannot result in a binding contract.¹¹²

Secondly, Thai law has a general theory of juristic acts. This theory helps to clarify some ambiguities of the law of promise. First, it enhances the understanding of the actual juristic nature of a promise that it is a unilateral juristic act because a promise

¹¹¹ As discussed in Chapter VI, A. THE NATURE AND CHARACTERISTICS OF PROMISE, (2) Thai law, (a) Promise as distinguished from other types of expressions.

¹¹² See *Ibid.*

can be constituted by the will of one party.¹¹³ Second, it provides an answer to the question whether a promise under Thai law is always gratuitous or not. Although this issue has never been discussed by Thai lawyers due to the fact that promise is not a main source of obligation, the concept of the gratuitousness of juristic acts helps us to analyse the claim that a promise is not necessarily gratuitous.¹¹⁴ Although Scots law is familiar with the notion of a juristic act to a certain degree, a general theory of this concept is absent. This may be something that Scots law can learn from Thai law. Under the wider scope of a juristic act, one can understand the actual legal status of promise under Thai law and whether it is always gratuitous or not. Thus, a development of a general theory of juristic acts may be beneficial for Scots law to deal with some uncertainties in the area of promissory law. For instance, if a theory was developed that a unilateral juristic act requires to be communicated to the person to whom it is made, this would help to eradicate uncertainties regarding the communication of a promise in Scots law.

In short, the Thai approach to classifying these expressions helps to illuminate the distinction between promises and other types of expression in Scots law, given that this kind of characterisation has already existed in Scots law but is not clearly presented by Scots lawyers. Also, the unified concept of juristic acts may benefit Scots law in dealing with some legal uncertainties.

(3) Could the Scots approach be adapted for Thai law?

Thailand has borrowed legal principles from both the Civilian and Common Law traditions. The reception of these legal principles results in the mixed nature of its legal systems. Likewise, the Scots legal system is mixed because it has been influenced both by the Civil Law and English Law. The experience of Scots law could inspire changes in Thai law. This type of legal influence has never happened before in Thai private law. As mixed jurisdictions, they may influence one another.

¹¹³ As discussed in Chapter V, B. THEORIES AND DOCTRINES RELATING TO PROMISE IN THAI LAW, (1) The notion of a juristic act.

¹¹⁴ As discussed in *Ibid* at heading (6) Gratuitousness of promise.

Moreover, the underlying basis of the law of obligations and promissory law in both systems shows many similarities to each other. Firstly, both systems recognise the notion of a juristic act. Secondly, in both systems a promise is classified as a unilateral juristic act. Thirdly, the unilateral nature of promise is similar both in the sense that the obligation can be unilaterally created and that only the promisor is obliged to perform the obligation. The second and the third similarities are particularly important because they concern the juristic nature of promise, and Scots law can be very helpful for inspiring Thai law on this point. Although Thai law borrowed the notion of unilateral obligation from German law, the origin of this doctrine is the Canon Law. As has been argued in this thesis, Scots law is the only European jurisdiction that preserves the canonical tradition of enforcing unilateral obligation. The notion of unilateral obligation was largely ended in Continental Europe by the Grotian tradition, which explains that a promise requires acceptance. However, the concept survived in German law in relation to certain kinds of obligations that cannot be characterised as contractual in nature, and the German approach towards unilateral obligation later inspired Thai law. Therefore, the provenance of promissory obligation in both Scots law and Thai law is the same because the concept actually originated in the Canon Law. As a result, Scots law, as the only European jurisdiction that preserves the canonical approach towards unilateral obligation and has a clear concept of the law of promise, can be very helpful in resolving uncertainties of Thai promissory law. Fourthly, promissory law is consistent with the will theory in both systems. Finally, according to the preferred approach of this thesis, a promise in both systems can be either gratuitous or non-gratuitous. Therefore, the new approach of regarding a promise as a standalone obligation would not be a total change for Thai law. This is because the underlying basis of Thai promissory law is fundamentally similar to that of Scots law. Also, Thai law is familiar with the notion that a unilateral declaration of will can create a binding obligation.

Moreover, regarding a promise as an independent obligation would not affect the theoretical concept of contract law because Thai law does not regard a contract as an

exchange of promises, but rather as an agreement. In addition, Scots law acknowledges the distinction between unilateral and bilateral obligations, an approach which has never been acknowledged by Thai lawyers. Furthermore, as noted, there would be a number of obvious advantages if Thai law recognised promise as a free-standing legal entity. Therefore, the Scots approach of regarding promise as a standalone obligation could be adapted for Thai law. The new approach would definitely improve the application of this doctrine within Thai private law.

(4) Suggestions for Thai law

This thesis has proposed the new approach of considering promise as a standalone obligation under Thai law. Under this proposed scheme, promise will be seen as a unilateral juristic act that is separate from contract. Amendments to the Thai Code are therefore required.

Currently, the provisions regarding promise are contained in the Book of Obligations (Book II), Title of Contract and the Book of Specific Contracts (Book III). Accordingly, it is necessary to separate the promissory provisions from the contractual ones. Under the current Code, there are four provisions about promises of reward contained in the part on the formation of contract (§§362-365) in Book II. In order to cause the smallest impact from the amendment, this thesis suggests using these four provisions for the promissory provisions so that the change will not affect the numbering of contractual provisions. Under the current Code, the contractual provisions start from §354 while the provisions which will be used for promise are §§362-365. This thesis suggests using §§354-357 instead of §§362-365 for the promissory provisions, and then the contractual provisions will begin from §358. This will separate promises and contracts. This will cause the smallest impact in terms of the numerical changes within the Code Sections. For reasons of clarity, the portions of texts which are the author's own drafting will appear in italics while those which replicate existing drafting will appear in roman type.

(a) §354 (General provisions)**(i) Text****§354**

A valid unilateral promise is binding on the promisor if it is intended to be legally binding without acceptance.

(ii) Comments¹¹⁵

The most common way of drafting legislation is to begin with general provisions. Therefore, it is appropriate to use §354, which is the first provision on promissory obligations, for the general concept of promise.

This provision is mainly derived from Art II.-1:103(2) of the DCFR, concerning the binding effect of a unilateral undertaking. There is, however, a slight difference between the suggested texts and the DCFR texts in that the latter uses the term “unilateral undertaking”. It is more suitable to use the term “unilateral promise” because Thai law is more familiar with “promise” than with “undertaking” in the context of voluntary obligations. It is also more appropriate to use the term “unilateral promise” rather than “promise” in order to emphasise that it is a unilateral obligation.

Moreover, the term “undertaking” seems to suggest that the concept is wider than “promise”. The Commentary explains that “there is no essential difference between a unilateral ‘promise’ intended to be binding without acceptance and a unilateral ‘undertaking’ intended to be binding without acceptance”.¹¹⁶ Rather, it is merely a linguistic difference.¹¹⁷ The term “promise” is more suitable for contexts such as a promise to pay a reward, whereas the term “undertaking” is naturally appropriate for

¹¹⁵ This is not intended as official comments of the Code. It is merely the author’s comment for the purpose of this thesis.

¹¹⁶ *Commentary on the Draft Common Frame of Reference* 126.

¹¹⁷ *Ibid.*

other contexts, e.g. the assumption of a security obligation.¹¹⁸ Nevertheless, it is suggested in this thesis that the concept of unilateral undertaking could be wide enough to encompass a spontaneous act of donation. However, such an act would not appear to involve any promise. Hence, undertaking is a wider idea than promise, so that it includes but is not limited to promises. Consequently, it is more appropriate to use the term “promise” under the general provision of promissory obligation.

The new §354 expresses the fact that a promise is legally binding as a unilateral obligation which is binding without acceptance. This is more suitable than the view that an acceptance is required. If a promise requires acceptance, it could cause confusion with offer, where the latter always requires an acceptance. This provision is intended to apply in all circumstances which can be analysed using the promissory approach e.g. promises to make a contract, promise to lease, letters of credit, promises about the tendering process and marketing offers.

(b) §355 (Gratuitousness and proof of promise)

(i) Text

A unilateral promise may be gratuitous or non-gratuitous. A gratuitous unilateral promise is a unilateral promise that benefits only the promisee. A non-gratuitous unilateral promise is a unilateral promise under which both promisor and promisee benefit. Benefits may be in the form of payments, properties, interests, services, actions or other performances. In cases where a unilateral promise is attached to, or connected with, another juristic act, it is also deemed to be non-gratuitous if the promisor receives benefits from the attached or connected juristic act.

A gratuitous unilateral promise is not enforceable unless there is some written evidence of the promise signed by the promisor.

¹¹⁸ *Ibid*; The reasons for using the term “undertaking” instead of “promise” is also based on the facts that in European instruments it is more common to use the term “undertaking”, and the rest of the DCFR uses this term. *Commentary on the Draft Common Frame of Reference* 133.

(ii) Comments

Paragraph one is inspired by the experience of Scots law, in which there is a debate over whether promises are always gratuitous. This thesis argues that the more workable theory is that promises are not always gratuitous. Promise is often used to form part of a network of transactions in which the promisor intends to make some gain. The definitions of gratuitous and non-gratuitous promises provided are based on the idea of the gratuitousness of a juristic act under Thai law. The law is determined from the nature of a juristic act or an obligation, rather than from the fact that only one party is bound when the obligation is constituted. If each of the parties receives benefits, the juristic act/obligation will not be considered to be gratuitous.

It is proposed that benefits may occur in the form of payments, properties, interests, services, actions or other performances that are advantageous to the promissory parties. Moreover, where a unilateral promise is attached to, or connected with, another juristic act and a promisor benefits from the attached/connected juristic act, the promise will be deemed to be non-gratuitous. This proposition is significant since it makes the interpretation of gratuitousness compatible with a practical feature of a promise, namely that promisors often use a promise to form part of a wider series of transactions from which they can benefit. There are a number of promissory undertakings in which a promisor may not directly benefit from the promise, but benefits may be obtained from another transaction to which the promise is attached or connected. In these circumstances, promises should be deemed to be non-gratuitous according to their actual nature.

Paragraph two deals with proof of promise. It is inspired by Scots law, in which the binding force of a promise is limited by statutory formalities relating to writing. However, a different approach from that of Scots law is offered in this thesis. Thai law should adopt the idea of “written evidence” rather than “written form” as proof of a promise (and not for the constitution of the obligation).

As discussed, the idea behind the restrictive rules on the circumstances in which a promise can be constituted or proved may stem from the fact that, *inter alia*, the law needs to strike a balance between protecting the aggrieved party and the party alleged to have broken the promise. Since the ground of a promise is based on a unilateral claim, there must be clear evidence that the obligation has actually been created. In Thai law, written evidence illustrates this fact since it has to be signed by the party who is liable. Therefore, the idea of “written evidence” in Thai law appears to be compatible with the idea behind the restrictive rules on the circumstances in which a promise can be constituted or proved in Scots law. Like the case of Scots law, it is proposed in this thesis that the requirement of written evidence only applies in cases of gratuitous promises. In some circumstances, promissory undertakings in which a promisor intends to make some gains are unlikely to contain the signature of the party who is liable. For instance, a seller who offers a product guarantee does not usually sign the guarantee even if it appears in the form of a document. Also, offers from supermarkets of “buy one get one free” products are not usually accompanied by a signature. According to the proposed approach of this thesis, proof of a promise is subject to “written evidence”, i.e. a promise has to be signed by the promisor in order to be enforceable. Hence, it is important to treat transactions, such as product/service guarantees and “buy one get one free offers”, as non-gratuitous and to provide that the requirement of written evidence (for proof of promise) does not apply to non-gratuitous promises.

Moreover, it is proposed in this thesis that Thai law should adopt the Scottish approach regarding an exception to the requirement of formal writing to unilateral obligations “undertaken in the course of business”. Promises made by businesses are usually non-gratuitous. Therefore, in line with the proposed approach of this thesis, they are not required to be made in a written form. Nevertheless, business may sometimes act for charitable reasons, i.e. the promisor does not benefit from making the promise. This suggests that an exception to the requirement of written evidence in relation to promises “undertaken in the course of business”, in some cases, is necessary for Thai law. Thai law is familiar with the usage of transactions

undertaken in the business context.¹¹⁹ Thus, it is not difficult for the Thai courts to determine whether or not a promise was made in a business context.

(c) §356 (Effects of promise)

(i) Text

§356

A unilateral promise comes into existence when the notice of the promise reaches the promisee. If a unilateral promise is made to the public, it comes into existence when the promise is made to the public either by advertisement or by public notice.

A unilateral promise made to a specific person ceases to have effect when it is rejected by the promisee.

A unilateral promise made to the public can be withdrawn by the same means which are used for advertisements or notices, as long as no person has completed the specified act, unless the promisor declared in his¹²⁰ promise that he would not withdraw it. If a unilateral promise cannot be withdrawn by means of the aforesaid, withdrawal may be made by other means, but in such a case the withdrawal of a unilateral promise is valid only against those persons who know of it. If the promisor has fixed a period within which the specified act must be performed, he is presumed to have renounced his right of withdrawal during the specified period.

(ii) Comments

This provision deals with the effects of promise. The first paragraph governs the time when the promise becomes effective. Current Thai law is uncertain over whether a promise requires communication or not. It is therefore necessary to clarify that a

¹¹⁹ For example, §35 bis of the Thai Consumer Protection Act (No 2) 1998 states: “In any business in connection with the sale of any goods or the provision of service if such contract of sale or such contract of service require by law or the custom to be made in writing, the Committee on Contract shall have the power to provide such business to be a controlled business with respect of contract.

¹²⁰ The official translation of the Thai Code uses the personal pronoun in the form “he”, rather than a compound pronoun in the form “he or she”. Therefore, the author follows the style of the Code for reason of consistency.

promise must be communicated, which is the preferred approach of this thesis. This paragraph was inspired by the DCFR provision in relation to the requirement of a unilateral undertaking. The rule covers both promises made to the public and to a specific individual. This thesis suggests that a public promise takes effect when such a promise is made to the public either (i) on publication of the promise; or (ii) notice to the public.

The second paragraph indicates that if a promise is rejected, it ceases to be effective. This approach is inspired by the rule under Scots law that a promise lapses once it is rejected. Additionally, it reflects the policy that a benefitted party has the freedom not to accept rights or benefits conferred by a unilateral promise. This rule is influenced by the policy regarding the freedom to reject rights or benefits arising from unilateral juristic acts under the DCFR (Art II.4:303).¹²¹ An individual should have the freedom not to accept a right or benefit which he/she does not want.¹²² This policy is also consistent with the notion of the autonomy of the will in Thai law.

It is not possible for a public promise to be rejected by a specific person because it is not made to anyone in particular. This thesis suggests that a promisor has a right to withdraw his/her promise made to the public, unless stated otherwise. This policy already exists under current Thai law in relation to advertisements of reward. This thesis suggests using this rule for the new §356 dealing with public promises in general. Therefore, the third paragraph (regarding the withdrawal of public promises) can be applied to all types of public promises. It is true that a promise is a standalone obligation (which in theory should be irrevocable once becoming effective) under the new approach. Nonetheless, when a promise made to the public first comes into existence, no specific individual has the right to enforce it. Hence, the promisor is justified in withdrawing the promise as long as the specific act stated in the promise has not been completed. Promisees are also protected because the withdrawal must be made by the same means used for the initial advertisement. If it is undertaken by other means, it is only valid against those who know about it.

¹²¹ *Commentary on the Draft Common Frame of Reference* 343.

¹²² *Ibid.*

(d) §357 (Promise of reward)**(i) Text****§357**¹²³

A person who by advertisement promises that he will give a reward to *a person* ~~whoever~~ *who performs* a certain act is bound to give such reward to *the* ~~any~~ person who ~~does~~ *performs* the act, even if such person did not act with a view to the reward.¹²⁴

If there are several persons who have *performed* ~~done~~ the act specified in the advertisement, only ~~that~~ *the* one who does it first has a right to receive an equal share of the reward. If several persons ~~do~~ *perform* such act at the same time, each one has a right to receive an equal share of the reward. But if the reward is in its nature indivisible, or if by the terms of the promise only one person is to receive the reward, it is decided by lot. The provisions of the foregoing two paragraphs do not apply, if in the advertisement a different intention is declared.¹²⁵

A promise of reward which has a prize competition is valid only if a period of time is fixed in the advertisement. The decision whether any competitor fulfils the conditions of the promise within the period, or which one among several competitors deserves the preference, shall be made by the umpire named in the advertisement, or in the absence of any such umpire, by the promisor of the reward. The decision is binding upon the parties concerned. In case of equality of merit the provisions of *the former paragraph* apply correspondingly. The transfer of ownership of the thing produced may be demanded by the promisor only if he has specified in the advertisement that such transfer shall be made.¹²⁶

¹²³ The texts of this provision are mainly derived from the existing provisions under the Thai Code (see notes 124-126- below for details). However, the author makes a number of changes in terms of grammar and word uses for reasons of grammatical correctness. Texts which are the author's own drafting appear in italics.

¹²⁴ The texts are from §362 under the current Thai Code.

¹²⁵ The texts are from §364 under the current Thai Code.

¹²⁶ The texts are from §365 under the current Thai Code.

(ii) Comments

These three paragraphs replicated the existing provisions of the Code. Although under the new suggested approach the Code has §354 as a general provision of promise, it is still appropriate to keep the provision on promise of reward. This specific provision relates to the general one in the sense that it deals with more specific circumstances of promise of reward.

The first paragraph clarifies that a person who performs the specified act is entitled to the reward even if he/she is not aware of the existence of such promise. This is necessary in order to avoid the question whether a person who completes the act is entitled to receive the reward or not if he/she is not aware of the existence of promise. This also emphasises the fact that a promise is distinct from a contract on the basis that there is no intention to enter into an agreement between parties. The second paragraph governs the situation where more than one person has completed the specific act, and dictates who is entitled to receive the reward. The last paragraph deals with specific details of prize competitions. All paragraphs of this provision replicated the existing provisions of the Code. However, under the new approach they are no longer classified within the general rules on contract. Instead, they are unilateral obligations, which is more appropriate for their actual character.

(e) Promise to enter into a contract

The fact that the Code only makes provision for promises to enter into specific kinds of contracts, namely, promise of sale and promise of a gift, has left it unclear as to whether individuals can promise to enter any other types of contract. This approach also limits promise to specific instances. However, based on the theories of freedom of contract and autonomy of will which play an essential role in Thai contract law, the general idea should be that individuals are permitted to make promises to enter into a contract. This would also provide a wider application of the idea of promise. The suggestions of this thesis, i.e. a general provision on promise and cancellation of the promise of sale, therefore help to eradicate this ambiguity. Under the new

approach, it is certain that individuals can make promises to enter into any type of contract. Such a promise is enforceable if the proposed terms are clear.

(i) Promise of sale

As the new Code has a general provision (i.e. the new §354) which covers all those circumstances which can be analysed using promise, there is no need to keep the existing provisions in relation to promises to make a contract. This is the case with promise of sale (§454). The current §454 should therefore be deleted as this instance can be covered by the new general provision on promise.

~~§454~~

~~A previous promise of sale made by one party has the effect of a sale only when the other party has given notice of his intention to complete the sale and such notice has reached the person who made the promise.~~

~~If no time has been fixed in the promise for such notification, the person who made the promise may fix a reasonable time and notify the other party to give a definite answer within that time whether he will complete the sale or not. If within that time he does not give a definite answer, the previous promise loses its effect.~~

However, in the case of §456 para 2¹²⁷ concerning requirement of written evidence of promise of sale of immovable property, this thesis does not suggest removing the idea of “promise of sale” from the current §456 para 2. This is because this provision is not directly concerned with the legal nature of a promise of sale, which is different from the case of §454.

¹²⁷ “An agreement to sell or to buy any of the aforesaid property [moveable property], or a promise of sale of such property is not enforceable by action unless there is some written evidence signed by the party liable or unless earnest is given, or there is part performance.” Thai Code, §456 para 2.

(ii) Promise of a gift

The existing §526 concerns the formality of a gift and promise of a gift, requiring them both to be in writing and registered. Since a promise of a gift can be covered by the new §355, this thesis suggests removing the current §526. The new §355 contains the rule regarding proof of promise, stipulating there must be written evidence of the promise signed by the promisor. Thus, a promise of a gift under the new approach would be enforceable only if the promisor signs the document. This new approach would be more practical than the current §526. It is unrealistic to expect parties who make a promise of a gift to register their transaction with a competent official. In fact, it is not possible to register any promise of a gift of moveable property because this kind of property is not governed by the registration system.

In addition, although the current §526 governs the remedies concerning a promise of a gift (and provides that the promisee is entitled to claim the delivery of the gift or its value, but he/she is not entitled to any additional compensations), this rule is the same as the general rule of remedies under Thai law.¹²⁸ Hence, it is not necessary to provide this rule. This thesis therefore suggests that it would be better to remove the current §526.

§526

~~If a gift or a promise for a gift has been made in writing and registered by the competent official and the donor does not deliver to the donee the property given, the donee is entitled to claim the delivery of it or its value, but he is not entitled to any additional compensation.~~

(f) Promise to waive contractual rights

Section 522 of the Code states: “A gift may be made by granting to the donee the release of an obligation or by performing an obligation due from the donee.” The current position under Thai law is that a creditor’s proposal to waive a contractual right is deemed to be a promise of a gift, which is required to be made in writing and

¹²⁸ Thai Code, §§213, 215.

registered with a competent official. The current approach is impractical because in reality a creditor who wishes to waive a contractual right to his/her debtor does not register his/her proposal with a competent official. Under the proposed approach of this thesis, proof of promise of a gift is governed by the general rule regarding proof of promises. A gratuitous promise of a gift is unenforceable unless there is some written evidence signed by the promisor. Thus, a promise to waive contractual rights (which is normally gratuitous) will be enforceable only if there is written evidence signed by the promisor. The suggested approach would be more efficient because it would suit the actual practice of parties. Therefore, there is no necessity to make any changes to the current §522.

(g) Promise to pay remuneration

The term “promise” in §576 refers to a contractual promise. The nature of the promise to pay remuneration is, however, contractual, rather than promissory. The law assumes that there is an implied contract between the parties. The employer is bound to pay the remuneration, where it cannot be expected that the employee will do the work gratuitously. Since under the new proposed scheme promise is distinguished from contract, promissory language should not be used in this provision, in which the nature of the obligation is contractual. Accordingly, this thesis suggests removing the word “promise” from the existing §576. It is suggested in this thesis that the term “the obligation to pay remuneration” is used instead of “the promise to pay remuneration”. It reflects the actual relationship between the parties, namely, that the employer is obliged to pay the remuneration to the employee. This obligation, which is not a promise, is implied by the law when the parties have not expressly agreed that the employee would be paid for the work.

§576.

~~The promise to pay a~~The obligation to pay remuneration is implied, if, under the circumstances it cannot be expected that the services are to be rendered gratuitously.

(h) Promise to pay a penalty for not performing an obligation

The Thai drafters translated the term “promise” in the provisions of promise to pay a penalty as “สัญญา” in Thai, but the foregoing term literally means a contract (noun) or to contract (verb). Given that in the new proposed scheme a promise and a contract are different obligations, this thesis suggests changing the term “สัญญา” (contract) in the provisions of promises to pay a penalty for not performing an obligation. In these provisions, the term “promises” is used both as a noun and a verb. The former should be translated as “คำมั่น” (which literally means “promise” as a noun). The latter should be translated as “ให้คำมั่น” (which literally means “promise” as a verb). The new proposal is useful because creditors can enforce a stipulated penalty regardless of whether the contract has been rescinded.

The proposition offered by this thesis is useful because it means that creditors can enforce a stipulated penalty regardless of whether the contract has been rescinded. It will be recalled, Thai scholars explain that a promise to pay a penalty is collateral to an existing contract because of the translation of the term “promise” as “สัญญา” (which literally means contract), in the provisions of promise to pay a penalty. The law states that all contracting parties are restored to their original rights when a contract has been rescinded. Therefore, a promise to pay a penalty, which is collateral to the rescinded contract, no longer exists. However, this seems to be unfair to creditors who have been promised that they would receive stipulated penalty if debtors do not perform their obligations. The unfairness lies in the fact that Thai lawyers propose that a promise to pay a penalty should be enforceable by regarding that a stipulated penalty as being akin to damages. Also, some propose that creditors can enforce the stipulated penalty if they reserved the right to do so before terminating the contract. This suggests that if a promise to pay a penalty for not performing an obligation is characterised as a unilateral obligation, the effect of the promise would not be affected even though the contract has been rescinded. This is particularly true if a promise is viewed as an obligation that is distinct from contract.

(i) Other changes

As has been suggested, under the new proposed scheme, promise will be regarded as an independent source of obligations. It will appear in Book II: Obligations along with other independent sources of obligations, namely contract, delict, *negotiorum gestio* and unjustified enrichment. Specifically, it will appear in Title II “Contract” (where the current §§354-357 belong to). Therefore, it is necessary to change the name of the foregoing title from “Contract” to “Unilateral Promise”. In addition, it is necessary to add a new Title for contractual provisions. The new title in which contractual provisions (§§358-394) belong should appear as “Title III Contract”. Moreover, it is necessary to change the number of title III Management of Affairs without Mandates (*negotiorum gestio*) from Title III to Title IV. Finally, the number of title IV Undue Enrichment should be changed to Title V.

Furthermore, there are still references to promise in some provisions in Book III: Specific Contracts. Examples are §572 (hire purchase), §825 (promises made by a third party to an agent), §848 (promises made by a third person to a broker) and §§982-986 (promissory notes). Also, there are legal requirements for specific types of contracts and promises which appear in Book III e.g. §456 para 2 (requirements of written evidence for an agreement to buy or sell and a promise of sale of immoveable property). Therefore, this thesis suggests changing the name of Book III from “Specific Contracts” to “Specific Obligations”. This is helpful since specific contracts under the current Code such as hire purchase and promissory notes can be characterised as promissory in nature under the new proposed scheme. This is also a way of reflecting the fact that contract is no longer the only or the main route for creating voluntary obligations under Thai law, since unilateral promise is the other type of such obligations.

Appendices

Table 1
Index of sources of promise of reward under Thai law

| Thai Code ¹²⁹ | Japanese Code ¹³⁰ | BGB ¹³¹ |
|--|---|---|
| <p>§362 A person who by advertisement promises that he will give a reward to whoever shall do a certain act is bound to give such reward to any person who does the act, even if such person did not act with a view to the reward.</p> | <p>Art 529 A person who advertises that he will give a certain reward to whoever shall do a certain act is bound to give such reward to any person who does the act.</p> | <p>§657 A person who by public notice announces a reward for the performance of an act, <i>e.g.</i>, for the production of a result, is bound to pay the reward to any person who has performed the act, even if he did not act with a view to the reward.</p> |
| <p>§363 In the case of the foregoing section the promisor may, so long as there is no person who has completed the specified act, withdraw his promise by the same means which he used for advertising, unless he has declared in the advertisement that he would not withdraw it. If a promise cannot be withdrawn by the means aforesaid, withdrawal may be</p> | <p>Art 530 The advertiser may at any time before the specified act has been completed, withdraw his advertisement by the same means which he used for advertising, unless he has declared therein that he would not withdraw it. If the advertisement cannot be withdrawn by the mean aforesaid, withdrawal may be made by other means, but in such case it is valid only as against those persons who</p> | - |

¹²⁹ All the texts of the Thai Code mentioned in this table are from The Council of State, Doc No 79 “การตรวจแก้ร่างประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 และบรรพ 2” (Report of the Revised Drafts of the Civil and Commercial Code Books I and II) (1925).

¹³⁰ All the texts of the Japanese Code mentioned in this table are from L H Lönholm, *The Civil Code of Japan* (1898). Therefore, these provisions are believed to be the genuine original provisions which were used as the model for the Thai provisions.

¹³¹ All the texts of the BGB mentioned in this table are from C H Wang, *The German Civil Code: Translated and Annotated, with an Historical Introduction and Appendices* (1907). Therefore, these provisions are believed to be the genuine original provisions which were used as the model for the Thai provisions.

| | | |
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| <p>made by other means, but in such case it is valid only as against those persons who know of it.</p> <p>If the promisor has fixed a period within which the specified act must be done, he is presumed to have renounced his right of withdrawal.</p> | <p>know of it.</p> <p>If the advertiser has fixed a time within which specified act must be done, he is presumed to have renounced his right of withdrawal.</p> | |
| <p>§364</p> <p>If there are several persons who have done the act specified in the advertisement, only that one who does it first has a right to receive the reward.</p> <p>If several persons do such act at the same time, each one has a right to receive an equal share of the reward. But if the reward is in its nature indivisible, or if by the terms of the promise only one person is to receive the reward, it is decided by lot.</p> <p>The provisions of the foregoing two paragraphs do not apply, if in the advertisement a different intention is declared.</p> | <p>Art 531</p> <p>If several persons do the act specified in the advertisement, only that one who does it first has a right to receive the reward.</p> <p>If several persons do such act at the same time, each one has a right to receive an equal share of the reward. But if the reward is by its nature unsuited to be divided, or if according to the advertisement only one person can receive it, the person to receive it is determined by lot.</p> <p>The foregoing provisions do not apply, if in the advertisement a different intention is expressed.</p> | - |
| <p>§365</p> <p>A promise of reward which has a prize competition for its object is valid only if a period of time is fixed in the advertisement.</p> <p>The decision</p> | - | <p>§661</p> <p>(1) A promise of reward which has as its object a competition for a prize is valid only if a period of time for the competition is fixed in the notice.</p> <p>(2) The decision whether</p> |

| | | |
|--|--|---|
| <p>whether any competitor fulfils the conditions of the promise within the period, or which one among several competitors deserves the preference, shall be made by the umpire named in the advertisement, or in the absence of any such, by the promisor of the reward. The decision is binding upon the parties concerned.</p> <p>In case of equality of merit the provisions of Section 364 paragraph 2 apply correspondingly.</p> <p>The transfer of ownership of the thing produced may be demanded by the promisor only if he has specified in the advertisement that such transfer shall be made.</p> | | <p>any competitor fulfils the conditions of the promise of reward within the period, or which of several competitors deserves the preference, shall be made by the person named in the promise of reward, or in default thereof, by the promisor. The decision is binding upon the parties concerned.</p> <p>(3) In case of equality of merit the provisions of §659 (2) apply to the award of the prize.</p> <p>(4) The transfer of ownership of the work may be demanded by the promisor of the reward only if he has specified in the notice of reward that such transfer shall be made.</p> |
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Table 2
Index of sources of promise to pay a penalty for not performing an obligation under Thai law

| Thai Code ¹³² | BGB ¹³³ |
|---|--|
| <p>§379 If the debtor promises the creditor the payment of a sum of money as penalty in case he does not perform his obligation, or does not perform it in the proper manner, the penalty is forfeited if he is in default. If the performance due consists in a forbearance, the penalty is forfeited as soon as any act in contravention of the obligation is committed.</p> | <p>§339 If the debtor promises the creditor the payment of a sum of money as penalty in case he does not perform his obligation or does not perform it in the proper manner, the penalty is forfeited if he is in default. If the performance due consists in a forbearance, the penalty is forfeited as soon as any act in contravention of the obligation is committed.</p> |
| <p>§380 If the debtor has promised the penalty for the case of his not performing his obligation, the creditor may demand the forfeited penalty in lieu of performance. If the creditor declares to the debtor that he demands the penalty, the claim for performance is barred. If the creditor has a claim for compensation for non-performance, he may demand the forfeited penalty as the minimum amount of the damage. Proof of further damage is admissible.</p> | <p>§340 If the debtor has promised the penalty for the case of his not fulfilling his obligation, the creditor may demand the forfeited penalty in the lieu of fulfilment. If the creditor declares to the debtor that he demands the penalty, his claim for performance is barred. If the creditor has a claim for compensation for non-performance, he may demand the forfeited penalty as the minimum amount of the damage. Proof of further damage is admissible.</p> |
| <p>§381 If the debtor has promised the penalty for the case of his not performing the obligation in the proper manner, such as, not at the fixed time, the creditor may demand the forfeited penalty in addition to the performance. If the creditor has a claim for compensation on account of improper performance, the section 380, paragraph</p> | <p>§341 If the debtor has promised the penalty for the case of his not fulfilling the obligation in the proper manner, e.g., not at the fixed time, the creditor may demand the forfeited penalty in addition to the fulfilment. If the creditor has a claim for compensation on account of improper fulfilment, the provisions of 340, par. 2</p> |

¹³² All the texts of the Thai Code mentioned in this table are from รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 8 October 1925 (B.E. 2468).

¹³³ All the texts of the BGB mentioned in this table are from C H Wang, *The German Civil Code: Translated and Annotated, with an Historical Introduction and Appendices* (1907). Therefore, these provisions are believed to be the genuine original provisions which were used as the model for the Thai provisions.

| | |
|---|---|
| <p>2, apply.</p> <p>If the creditor accepts the performance he may demand the penalty only if on acceptance he reserves the right to do so.</p> | <p>apply.</p> <p>If the creditor accepts the fulfilment, he may demand the penalty only if on acceptance he reserves the right to do so.</p> |
| <p>§382</p> <p>If another performance than the payment of a sum of money is promised as penalty, the provisions of sections 379 to 381 apply; the claim for compensation is barred if the creditor demands the penalty.</p> | <p>§342</p> <p>If another performance other than the payment of a sum of money is promised as penalty, the provisions of 339 to 341 apply; the claim for compensation is barred if the creditor demands the penalty.</p> |
| <p>§383</p> <p>If a forfeited penalty is disproportionately high, it may be reduced to a reasonable amount by the Court. In the determination of reasonableness every legitimate interest of the creditor, not merely his property interest, shall be taken into consideration. After payment of the penalty the claim for reduction is barred.</p> <p>The same rule applies also, apart from the cases provided for by sections 379 and 382, if a person promises a penalty for the case of his doing or forbearing to do some act.</p> | <p>§343</p> <p>If a forfeited penalty is disproportionately high, it may be reduced to a reasonable amount by judicial decree obtained by the debtor. In the determination of reasonableness every legitimate interest of the creditor, not merely his proper interest, shall be taken into consideration. After payment of the penalty the claim of reduction is barred.</p> <p>The same rule applies also, apart from the cases provided for by 339, 342, if a person promises a penalty for the case of his doing or forbearing to do some act.</p> |
| <p>§384</p> <p>If the promises performance is invalid, an agreement made for a penalty for non-performance of the promise is also invalid, even if the parties knew of the invalidity of the promise.</p> | <p>§344</p> <p>If the law declares the promised performance invalid, an agreement made for a penalty for non-fulfilment of the promise is also invalid, even if the parties knew of the invalidity of the promise.</p> |
| <p>§385</p> <p>If the debtor contests the forfeiture of the penalty on the ground of having performed his obligation, he must prove the performance, unless the performance due from him consisted in a forbearance.</p> | <p>§345</p> <p>If the debtor contests the forfeiture of the penalty on the ground of having fulfilled his obligation, he shall prove the fulfilment, unless the performance due from him consisted in a forbearance.</p> |

Table 3
Index of sources of promissory notes under Thai law

| Thai Code¹³⁴ | English Bills of Exchange Act 1882 | Uniform Law¹³⁵ | Swiss Code of Obligations | Others |
|--|---|--|--|---------------|
| §982 Promissory note is a written instrument by which a person, called the maker, promises to pay sum of money to, or to the order of, another person, called the payee. | - | - | - | - |
| §983 A promissory note must contain the following particulars : (1) The designation of it as a promissory note. (2) An unconditional promise to pay a sum certain in money. (3) A day of maturity. (4) The place of payment. | Art 83 Promissory note defined (1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or | Art 77 The following provisions relating to bills of exchange apply to promissory notes so far as they are not inconsistent with the nature of these instruments, viz: Endorsement (Article 11 to 20); Time of payment | Art 1096 The promissory note contains: 1. The term bill as part of its wording expressed in the language in which the note is drawn. 2. An unconditional promise to pay a fixed sum of money. 3. The date of maturity. 4. The place where payment is to be made. 5. The name of | |

¹³⁴ All the texts of the Thai Code mentioned in this table are from K Sandhikshetrin , *The Civil and Commercial Code Books I-VI and Glossary* (2008).

¹³⁵ Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930) The League of Nations, available at <http://www.jus.uio.no/lm/bills.of.exchange.and.promissory.notes.convention.1930/doc.html#302>.

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| <p>(5) The name or trade name of the payee.</p> <p>(6) The date and place where the promissory note is made.</p> <p>(7) The signature of the maker.</p> | <p>to the order of, a specified person or to bearer.</p> <p>(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.</p> <p>(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.</p> <p>(4) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.</p> | <p>(Articles 33 to 37);</p> <p>Payment (Articles 38 to 42);</p> <p>Recourse in case of non-payment (Articles 43 to 50, S2 to 54);</p> <p>Payment by intervention (Articles 55, 59 to 63);</p> <p>Copies (Articles 67 and 68);</p> <p>Alterations (Article 69);</p> <p>Limitation of actions (Articles 70 and 71);</p> <p>Holidays, computation of limits of time and prohibition of days of grace (Articles 72, 73 and 74).</p> <p>The following provisions are also applicable to a promissory note: The provisions concerning a bill of exchange payable at the address of a third party or in a locality other than that of the domicile of the drawee</p> | <p>the person to whom or to whose order payment is to be made.⁷ The date and place of issue of the note.</p> <p>8. The signature of the drawer.</p> | |
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| | | <p>(Articles 4 and 27): stipulation for interest (Article 5); discrepancies as regards the sum payable (Article 6); the consequences of signature under the conditions mentioned in Article 7, the consequences of signature by a person who acts without authority or who exceeds his authority (Article 8); and provisions concerning a bill of exchange in blank (Article 10).</p> <p>The following provisions are also applicable to a promissory note:</p> <p>Provisions relating to guarantee by aval (Articles 30-32); in the case provided for in Article 31, last paragraph, if the aval does not specify on whose behalf it has been</p> | | |
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| | | given, it is deemed to have been given on behalf of the maker of the promissory note. | | |
| <p>§984</p> <p>An instrument in which any of the requirements specified in the foregoing section is wanting, is invalid as a promissory note, except in the following cases :</p> <p>A promissory note in which no time of payment is specified is deemed to be payable at sight.</p> <p>If the place where payment is to be effected is not stated in a promissory note, the domicile of the maker shall be considered to be the place of payment.</p> <p>A</p> | - | <p>Art 78</p> <p>The maker of a promissory note is bound in the same manner as an acceptor of a bill of exchange.</p> <p>Promissory notes payable at a certain time after sight must be presented for the visa of the maker within the limits of time fixed by Article 23. The limit of time runs from the date of which marks the commencement of the period of time after sight.</p> | - | |

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| <p>promissory note which does not specify its place of issue is deemed to have been made at the domicile of the maker.</p> <p>If there is no date of issue, any lawful holder acting in good faith may insert the true date.</p> | | | | |
| <p>§985</p> <p>The following provisions of Chapter II relating to Bills of Exchange apply to Promissory Notes in so far as they are not inconsistent with the nature of this instrument, namely, Sections 911, 913, 916, 917, 919, 920, 922 to 926, 938 to 947, 949, 950, 954 to 959, 967 to 971.</p> <p>In case of</p> | - | - | - | |

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| <p>foreign promissory notes the following provisions shall also apply, namely, Sections 960 to 964, 973, 974.</p> | | | | |
| <p>§986 The maker of a promissory note is bound in the same manner as an acceptor of a bill of exchange.</p> <p>Promissory notes payable at a certain time after sight must be presented for the visa of the maker within the limits of time fixed by Section 928. The limit of time runs from the date of the visa, signed by the maker of the note. The refusal of the maker to give his visa with the date</p> | <p>Art 73 Cheque defined A cheque is a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.</p> | - | <p>Art 1099 The maker of a promissory note is liable in the same manner as the acceptor of a bill of exchange.</p> <p>Promissory notes payable at a fixed period after sight must be presented to the maker for sight within the time limits mentioned in art. 1013. The presentment for sight must be confirmed on the note by the signature of the maker thereof indicating the date. The time limit runs from the date of such confirmation. Refusal by the maker to affix his signature and the date must be</p> | |

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| thereon, must be authenticated by a protest the date of which gives the point of departure for the limit of time from sight. | | | evidenced by a protest (art. 1015): in this case the time limit after sight begins to run from the date of the protest. | |
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Table 4
Index of sources of promise to pay remuneration under Thai law

| Thai Code | German Law | Swiss Law |
|---|---|---|
| <p>§576 The promise to pay remuneration is implied, if, under the circumstances it cannot be expected that the services are to be rendered gratuitously.</p> | <p>1. BGB, §612¹³⁶ Remuneration is deemed to have been tacitly agreed upon if, under the circumstances the performance of the service is to be expected only for remuneration. If the amount of remuneration is not specified, and if there is a tariff, the tariff rate of remuneration, or, if there is no tariff, the usual remuneration is deemed to have been agreed upon.</p> <p>2. German Commercial Code, §59¹³⁷ Any person employed in a mercantile business to perform mercantile services for a remuneration (hereinafter called a mercantile employee) must, in the absence of any special agreements as to the nature and extent of his services or as to his remuneration, perform the services and receive the remuneration usual according to local custom. In default of any local custom the services to be performed must be held to be such as appear reasonable under the circumstances of the case.</p> | <p>Swiss Code of Obligations, Art 320 para 2¹³⁸ It is in particular deemed to have been concluded as soon as the performance of work has been accepted for a certain period of time and which in the circumstances could be expected only in exchange for a salary.</p> |

¹³⁶ The texts are from C H Wang, *The German Civil Code: Translated and Annotated, with an Historical Introduction and Appendices* (1907) 133.

¹³⁷ The texts are from *The German Commercial Code* (translated and briefly annotated by A F Schuster) (1911). Therefore, it is believed to be the genuine original provision which was used as the model for §576 of the Thai Code.

¹³⁸ Author's translation. The French texts can be found in Recueil Des Lois Fédérales No 18 (19 juillet 1911), Loi fédérale complétant le Code civil suisse. (Livre cinquième: Droit des obligations (du 30 mars 1911)).

Table 5
Index of sources of promise to make a specific contract under Thai law

| Thai Civil and Commercial Code | French Law | German Law | Swiss Law | Japanese Law |
|---|--|-------------------|---|--|
| <p>§454¹³⁹ A previous promise of sale made by one party has the effect of a sale only when the other party has given notice of his intention to complete the sale and such notice has reached the person who made the promise.</p> <p>If no time has been fixed in the promise for such notification, the person who made the promise may fix a reasonable time and notify the other party to give a definite answer within that time</p> | <p><i>Code civil</i> Art 1589¹⁴⁰ Promise of sale is as good as sale, where there is the reciprocal consent of parties as to the thing and as to the price.</p> | - | <p>Swiss Code of Obligations Art 22¹⁴¹ A party may by contract bind himself to enter into a future contract. Where the law for the protection of the parties prescribes a certain form for the validity of the future contract, the preliminary contract must also be made in that form</p> | <p>Japanese Code Art 556¹⁴² A promise to buy or sell made by one party has the effect of a sale, as soon as the other party expresses his intention to complete the sale.</p> <p>If no time is fixed for such expression of intention, the promisor may fix a reasonable time and notify the other party to give a</p> |

¹³⁹ The texts are from รายงานการประชุมกรรมการร่างกฎหมาย (Memorandum of the Committee of Codification), 21 May 1924 (B.E. 2467) 1176.

¹⁴⁰ The texts are from B Barrett, *Code Napoleon (verbally translated from the French (1811, Special edition 1983) 326*. Therefore, this provision is believed to be the genuine original provision which was used as the model for the Thai provision.

¹⁴¹ The texts are from S L Goren, *The Swiss Code of Obligations (as of January 1, 1984) (1984) 245*. The French texts of Art 338 of the 1984 edition are the same as those of Art 338 of the 1911 edition. Therefore, it can be inferred this provision was not amended between 1911 and 1987. This thesis therefore uses the English translation from the 1984 edition. It is believed to be the genuine original provision which was used as the model for §454 of the Thai Code.

¹⁴² The texts are from L H Lönholm, *The Civil Code of Japan (1898)146*. Therefore, this provision is believed to be the genuine original provision which was used as the model for the Thai provision.

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| <p>whether he will complete the sale or not. If within that time he does not give a definite answer, the previous promise loses its effect.</p> | | | | <p>definite answer within that time whether he will complete the sale or not. If within that time he does not give any definite answer, the promise loses its effects.</p> |
| <p>§526 If a gift or a promise for a gift has been made in writing and registered by the competent official and the donor does not deliver to the donee the property given, the donee is entitled to claim the delivery of it or its value, but he is not entitled to any additional compensation.</p> | <p><i>Code civil</i> Art 931¹⁴³ All acts of gift shall be passed before notaries, in the ordinary form of contracts; and a minute thereof shall be left, under pain of nullity.</p> | <p>BGB, §518. ¹⁴⁴ For the validity of a contract whereby an act of performance is promised gratuitously, judicial or notarial authentication of the promise is necessary. If a promise of debt or an acknowledgment of debt of the kind</p> | <p>Swiss Code of Obligations, Art 59¹⁴⁵ The promise of a gift to be valid requires a written form. If pieces of land or real rights in such are the subject of the gift, the public authentication thereof is requisite for their validity. If a promise of gift is fulfilled, the situation will be considered as a gift from hand</p> | <p>Japanese Code, Art 550¹⁴⁶ A gift not expressed in writing can be rescinded by either party, except so far as performance has already been made.</p> |

¹⁴³ The texts are from B Barrett, *Code Napoleon (verbally translated from the French (1811, Special edition 1983)* 190. Therefore, this provision is believed to be the genuine original provision which was used as the model for the Thai provision.

¹⁴⁴ The texts are from *The German Civil Code as amended to January 1975* (translated by I S Forrester et al) 112-113.

¹⁴⁵ The texts are from *The Swiss Civil Code of December 10, 1907 (Effective January 1, 1912)*. Translated by R P Shick (1915).

¹⁴⁶ The texts of are from C H Wang, *The German Civil Code: Translated and Annotated, with an Historical Introduction and Appendices (1907)* 145.

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| | | <p>specified in 780, 781, be made gratuitously, the same rule applies to the promise or the declaration of acknowledgment.</p> <p>Any defect of form is cured by the performance of the promise.</p> | to hand. | |
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Table 6
Index of sources of hire purchase under Thai law

| Thai Civil and Commercial Code | English law | German Law | Japanese Law | Others |
|---|---|--|---|--|
| <p>§572 A hire-purchase is a contract whereby an owner of a property lets it out on hire and promises to sell it to, or that it shall become the property of, the hirer, conditionally on his making a certain number of payments.</p> | <p><i>Halsbury's Laws of England</i>¹⁴⁷ The contract of hire-purchase, or, more accurately, the contract of hire with an option to purchase, is one under which an owner of a chattel lets it out on hire and undertakes to sell it to, or that it shall become the property of, the hirer, conditionally on his making a certain number of payments. Until the making, however, of the last payment, no property in the chattel passes.</p> | - | - | - |
| <p>§573 The hirer may at any time terminate the contract by redelivering the property at his own expense to the owner.</p> | <p><i>Halsbury's commentary on The Law of England.</i></p> | <p>(1) BGB §542 If the stipulated use of the lease thing is wholly or in part not given to the lessee in due time, or taken away from him subsequently,</p> | <p>Japanese Code, Art 620 The rescission of a contract of hiring takes effect only as to the future; but this does not</p> | <p>Thai Code, §561 If no written description of the condition of the property hired has been made</p> |

¹⁴⁷ The Earl of Halsbury, *The Laws of England*, 1st edn, Vol 1 (1907) 554 (para 1124).

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| | | <p>the lessee may give notice to terminate the lease without observance of any term of the notice. The notice may not be given until after the lessor has allowed a reasonable period of time fixed by the lessee to elapse without affording any remedy. The fixing of such a period is not necessary if the lessee has no interest in the fulfilment of the contract in consequence of the circumstance justifying the notice.</p> <p>Notice to terminate the lease may be given on account of an insignificant hindering or withholding of the use only if it is justified by a special interest of the lessee.</p> <p>If the lessor contests the permissibility of the notice given on the</p> | <p>affect a claim for damages, where one of the parties has been in fault.</p> | <p>and signed by both parties, the hirer is presumed to have received the property in good state of repair and he must return the property in such condition at the termination or extinction of the contract, unless he can prove that it was out of repair at the time of delivery.</p> |
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| | | <p>ground that the contractor has given the contractor the use of the thing in due time, or has effected the remedy before the expiration of the period, the burden of proof is upon him.</p> <p>§649 The employer may, at any time before the completion of the work, give notice to terminate the contract. If he gives such notice, the contractor is entitled to claim the remuneration agreed upon; the contractor must, however, deduct what he saves in expenses in consequence of the annulment of the contract, or what he acquires or maliciously omits to acquire by a different application of his energy.</p> | | |
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| | | (2) Earnest J Schuster, <i>The Principles of German Civil Law</i> | | |
|---|---|---|----------------|----------------|
| <p>§574</p> <p>The owner may also terminate the contract in case of default of two successive payments, or breach of any material part of the contract; in which case all previous payments are forfeited to the owner who is entitled to resume possession of the property.</p> <p>In case of breach of contract by default of the last payment, the owner is entitled to forfeit previous payment and resume possession of the property only after the expiration of one installment period.</p> | - | Same as above. | Same as above. | Same as above. |

Table 7
Index of sources of third party right under Thai law

| Thai Code ¹⁴⁸ | Japanese Code ¹⁴⁹ |
|--|---|
| <p>§374 If a party by a contract agrees to make a performance to a third person, the latter has a right to claim such performance directly from the debtor. In the case of the foregoing paragraph the right of the third person comes into existence at the time when he declares to the debtor his intention to take the benefit of the contract.</p> | <p>Art 537 If a party by a contract agreed to make a prestation to a third person, the latter has a right to claim such prestation directly from the debtor. In such the right of the third person comes into existence at the time when he expresses to the debtor his intention to take the benefit of the contract.</p> |
| <p>§375 After the right of the third person has come into existence in accordance with the provisions of the foregoing section, it cannot be changed or extinguished by the parties to the contract.</p> | <p>Art 538 After the right of the third person has come into existence in accordance with the provisions of the preceding article, it cannot be changed or extinguished by the parties to the contract.</p> |
| <p>§376 Defences arising from the contract mentioned in Section 374 can be set up by the debtor against the third person who receive the benefit of the contract.</p> | <p>Art 539 Defences based upon the contract mentioned in Art. 537 can be set up by the debtor against the third person in whose favour the contract is made.</p> |

¹⁴⁸ All the texts of the Thai Code mentioned in this table are from The Council of State, Doc No 79 “การตรวจแก้ร่างประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 และบรรพ 2” (Report of the Revised Drafts of the Civil and Commercial Code Books I and II) (1925).

¹⁴⁹ All the texts of the Japanese Code mentioned in this table are from L H Lönholm, *The Civil Code of Japan* (1898) 142. Therefore, these provisions are believed to be the genuine original provisions which were used as the model for the Thai provisions.

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