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Editorial Board

Copyright Infringement and Its Consequences in Society

Khin Thandar Tin[1], Su Wai Myo[2]

Abstract

This paper focuses on the subject matter of committing copyright infringement which effects on financial loss of the copyright owner. An infringement by one person may occur on the real owner who has been commercially harmed even if such person has no intention of profit. Because unauthorized copy does decrease the works of copyright holders who endeavor their creations of mind including the spending time and specified acts for such works. Thus, preventing the copyright infringement is an important protection for encouraging the interests of copyright owners on the one hand and supporting the national industries and economic development on the other hand.

Key words: copyright, copyright infringement, copyright owner, copyright holder, works

Introduction

Generally, it is noted that copyright is a kind of intellectual property which includes literary and artistic creations of the mind. They can be seen as novels, poems and plays, films, musical works, drawings, paintings, photographs and sculptures, and architectural designs etc. While all of them are created for the use in commerce, the profits will flow to the copyright owners because their exclusive rights allow them control over derivate works. Thus, the law grants protection for their creations and prevents the other from using the copyrighted works without the permission of the real owner. However, unauthorized uses of works or copyright infringements are found by the people who are accessed in reproducing or performance or displaying etc. of the real owners' works. Its consequence causes to the losses of financial gain for the owner and decreases economic development in society. Hence, to protect from the copyright infringement, both statutory requirements of the copyright owner and legal proceeding are necessary arrangements.

Materials and Methods

In this research paper, the data were collected from the materials relating to the copyright infringement, relevant documents, facts, primary and secondary resources from library resources and database by utilizing both descriptive and interpretive methodologies.

Findings

Copyright infringement is a theft and it decreases the profit and earning income of the real owner although the infringer commits it with innocent or the acting has no harm to the owner's benefit. Therefore, it can fully understand that any unauthorized exercise of any of the exclusive rights of creators/owners includes "copyright infringement". From the side of the real owners or copyright holders, they can protect their works with three important conditions such as 'originality', 'expression' and 'fixed' form. If they can prove their works have been infringed with three circumstantial evidences such as 'access', 'copying' and 'substantial similarity', it is actionable by civil and criminal litigation in the court under the law which are the main processes for protection and prevention the infringement to reach the deterrence goal.

Discussion

Copyright Infringement and Its Consequences in Society

Definition of Copyright

According to Article 2 (1) of the Provisions of the Bern Convention for the Protection of Literary and Artistic Works (1886), it is provided that ""The expression "literary and artistic

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works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works related to geography, topography, architecture or science".[1] It means that copyright is generally refers to as "works". The "literary and artistic works" may categorize, first, "written works" such as novels, books, poems, stories, magazine and newspaper articles, text books, web pages, text books, web pages, advertisements and dance notations. Second, it is "musical works" which includes musical compositions, lyrics, songs and ring tones, in all types of formats such as sheet music, CDs, MP3 files, so on. The third category is "artistic works" which involves drawings, paintings, photographs, comics, sculptures, architectural works, and maps. In the fourth, "dramatic and choreographic works" such as plays, operas and dance etc. are also provided. Next category is "films and multimedia products". They are movies, video games, TV programs, and cartoons. "Computer programs" is a kind of copyright categories which consists of human (source code) and machine (object code) computer programming language.[2] One of the important notices is that copyright does protect "expression" only and it does not protect "ideas" itself. It means the copyrightable work will become from the same idea so far as it may be similar work of another. However, such similar work does not appear from copies of another's work.[3] For example, in the case of **Designers Guild Ltd v. Russell Williams (Textiles) Ltd,**[4] the defendant produced a dress fabric which is a very similar design of the plaintiff's employee. The original design by the plaintiff's employee is expressed with vertical stripes in which flowers and leaves scattered between the stripes. The defendant argued that it did not have the copy of 'expression' and it is the copied of 'ideas' only. However, the plaintiff sued the defendant for copyright infringement successfully.

Types of Rights and Duration under Copyright

When copyright holder has an exclusive right automatically after creating a work, according to the Article 6bis of the Berne Convention (1886), two types of rights are provided as economic rights and moral rights. The economic rights grant the copyright holder who can control derivative works such as reproducing, translation, adaptation, exhibition or performance in public, distribution and broadcasting to the public. Under the moral rights, copyright holder covers the right of paternity and the right of integrity.[5] It means that copyright holder can claim authorship and the right to prevent to alteration and changes of his/her works from the unauthorized users.[6] Generally, while the economic rights grant the ability of copyright holders who can launch his/her works in the market and can control others from illegal using, moral rights grant the status of honor and reputation.[7]

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[1] Article 2 (1) of the Provisions of the Bern Convention for the Protection of Literary and Artistic Works (1886).
[2] Learn from the Past, Create the Future: The Arts and Copyright, WIPO Publication No. 935, 2007, P.17.
[3] Lee Wilson, The Copyright Guide: A Friendly Handbook To Protecting and Profiting from Copyrights, 3rd Edition, 2003, p.7.
[4] [2000] 1 W.L.R. 2416 (U.K.: House of Lords).
[5] Learn from the Past, Create the Future: The Arts and Copyright, WIPO Publication No. 935, 2007, p.25-27.
[6] David I. Bainbridge, Intellectual Property, 8th Edition, 2010, p.120.
[7] Graham Dutfield and Uma Suthersanen, Global Intellectual Property Law, 2008, p.76.

According to the Article 7 (2) of The Berne Convention (1886) and Article 12 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994), the duration of a work is life of the author plus 50 years generally. However, some countries have different term of duration. For example, in the United States, the term of duration is life of the author plus 70 years. When the duration expires, a work will fall into 'public domain' and everyone can use it freely.

Copyright Infringement

According to the Black's Law Dictionary, copyright infringement means "The act of violating any of a copyright owner's exclusive rights granted by the federal Copyright Act."[1] Under the description of World Intellectual Property Organization (WIPO), "Infringement takes place when a copyrighted work is used (reproduced, translated, adapted, exhibited or performed in public, distributed, broadcast, or communicated to the public) without the permission of the right holders or under a limitation to copyright."[2] It can be seen that unauthorized using a work without the permission of a copyright owner constitutes an infringement because of violation of the exclusive rights of owner. Generally, the kinds of infringement found as making illegal copies of the original work for financial gain, utilizing original tune in a song with changing the lyrics, illegal using the computer software created by copyright holder, modifying the original work such as book or play that is changed for a particular purpose to movie or CD-ROM and entirely used the original authorized work as a plagiarism etc.[3] Moreover, performing, showing, playing, producing and broadcasting of works works in public will be fallen into the committing of infringement because it communicates to the public by ways of launching in an on-demand or other influencing industry.[4] Additionally, if an employee copies a confidential report without the permission of his/her copyright employer and gives it to the other competitor, the act of his/her copying will be regarded as an infringement because it is a breach of completely secret which meant to be kept.[5] Furthermore, Furthermore, if someone else creates a work as his/her own which includes a little combination with some parts of original work, without permission of original owner, it will be an infringement because his/her taking some parts is not regarded as a new work. In the case of **Alexander v. Mackenzie,**[6] the plaintiff is a Scottish lawyer who drafted and published a set of of documents in favor of buying, selling and showing land. The defendant is a Scottish law society which prepared some particular improvement designs to the forms and gave away copies of these forms to other lawyers without the permission of the plaintiff. The court held that the society infringed the copyright of the lawyer although there were any improvements.

If someone commits a direct infringement, it means who knew that the material was a copyrighted work and made copies or plagiaristic of the work without permission, it is called primary infringement.[7] If someone involves 'dealing' with unauthorized copies, it means providing or making or performance a copyrighted work for the intention of making infringing copies, it is said as a secondary infringement.[8] There is also a contributory infringement in which someone is liable when he/she directly contributes to another's infringement. It means

[1] Bryan A. Garner, Black's Law Dictionary, 8th Edition, 2004, p.796.
[2] Learn from the Past, Create the future: The Arts and Copyright, WIPO Publication No. 935, 2007, p.48.
[3] Richard Stim, Patent, Copyright and Trademark, 9th Edition, 2007, p.220.
[4] Tina Hart, Linda Fazzani and Simon Clark, Intellectual Property Law, 4th Edition, 2006, p.186.
[5] David I. Bainbridge, Intellectual Property, 8th Edition, 2010, p.36.
[6] [1847] 9 Sess. Cas. 748 (Scotland).
[7] Jeremy Philpott and Adam Jolly, A handbook of Intellectual Property Management : Protecting, Developing and Exploiting Your IP Assets, 2004, p.181.
[8] David I. Bainbridge, Intellectual Property, 8th Edition, 2010, p.176.

"claims of authorizing infringement or joint infringement".[1] If someone involves by using right and ability into the supervision the infringing activity and such activities includes with a direct profit gain, it will provide as a vicarious infringement. If someone willfully reproduces or distribute on many copies of work as a large scale, it will be a crime or criminal copyright infringement although money is not being made.[2] Such unauthorized activity dealt with profitable production in copied materials is known as "piracy."[3]

Conditions to Examine Copyright Infringement

In order to prevent copyright infringement, generally, two conditions are needed to examine whether the copyright work is infringed or not. They are originality and fixed form. First examination is that a work must meet 'originality'. It means a work cannot be found out a copy of existing work and it must be a new creation. Second examination is that a work must make 'a fixed form' before it is defended. It means a work is made with printed a paper or painted on canvas or recorded on video or fixed in any other form. These conditions can completely be prevented from copyright infringement. [4]

Some countries, for example, in United States, three conditions are required to examine for copyright protection. Firstly, the work must have 'original' sense in which copied of another existing work cannot be found. Specifically, any work, such as literary, dramatic, musical or artistic work, must originally be created. [5] The work can be regarded to the creation of author or right holder with artistic effort and intellectual independently. [6] In the case of **Interlego AG v Tyco Industries Inc**,[7] it cannot be said that there was an original artistic work by producing a good copy of a painting or an enlarged photograph from a negative although it would need 'great skill, judgment and labor' for a work of copyright. The court held that it could not appear as a new original work of copyright because the court found that it was a simply copy of an existing work, even if skill and labor utilized for its producing and making.

Secondly, the work must compose of 'expression' of the right holder and it must not be 'idea' only. In the case of **Merchandising Corp of America v Harpbond**,[8] painting is a material form and it is not an idea. Nevertheless, literary, dramatic and musical works can clearly subsist without any object form. It means that a person may write and memorize a poem without having noted it down. Hence, in United Kingdom, the Copyright, Designs and Patents Act 1988 declares that copyright does not exist as created works if they are not recorded in any writing or other material form.

Thirdly, the work must make a 'fixed' form with some touchable medium of expression.[9] For example, a song can be recorded its music and lyrics on a cassette or can be reduced its musical notation including with lyrics as a 'fixed' form. Additionally, a videotape can keep any

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1 Ibid, p.174.
2 Mark Miller, Copyright Infringement, p.25, 26 and 28, http://www.google.com.mm/?gws_rd=cr&ei=hEU1U7nXHIXArAezyYDYDQ#q=Mark+Miller%2C+Copyright+Infringement%2C
3 WIPO Intellectual Property Handbook: Policy, Law and Use, WIPO Publication No. 489 (E), 2nd Edition, 2004, 2004, p.51.
4 Learn from the Past, Create the future: The Arts and Copyright, WIPO Publication. No. 935, 2007, p.20.
5 Davaid I. Bainbridge, Intellectual Property, 8th Edition, 2010, p.44.
6 Mark A. Glick, Lara A. Reymann, Richard Hoffman, Intellectual Property Damages: Guidelines and Analysis, 2003, p.221.
7 [1989] 1 AC 217 at 262.
8 [1983] FSR 32.
9 Lee Wilson, The Copyright Guide: A Friendly Handbook To Protecting and Profiting from Copyrights, 3rd Edition, 2003, p.8,9.

piece of choreography in which the movements of dancers or written notation are recorded as a 'fixed' form.[1]

Evidence Tests for Copyright Infringement

In order to decide correctly whether a work has been infringed, the three circumstantial evidences can be tested for it. They are 'access', 'copying' and 'substantial similarly'. 'Access' is the first element to test for copyright infringement. It can be seen that the infringer would have access to the works because the works are good enough to steal in which the creators or right holders are in position to exploit their works by attempting to sell as good documentations as such novel, song or screen play.[2] On the other hand, the copyright holder must prove that the infringer had access to his/her work. It means that the infringer had the opportunity to look at it. Sometimes, a work will be infringed by a third person, for instance, an editor who had a copy of his/her document in ownership and the infringer had a contact with a third person.[3] In **Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.,**[4] the owners of copyright in famous children's characters proved access in which there was a visiting of the representatives of a fast-food chain at their headquarters and discussion with regard to the use of the characters in commercials.

'Copying' is an obvious evidence to test for infringement because most of the infringements are evidenced with making copies of works. An example is making a photocopy of pages in a book or a recording of music.[5] In the works of artistic, literary, dramatic and musical works, 'copying' means reproduction in any material form by the way of storing in any medium and by electronic means, for instance, the copies of scanned images or digitized sound.[6] In the case of **Ibcos Computers Ltd v. Barclays Mercantile Highland Finance Ltd**,[7] **Ltd**,[7] copying was an evidence to prove the existence of marked and unexplained similarities between the claimant's and the defendant's code, i.e., spelling mistakes and unused lines of code.

The next evidence is to test whether there is a copy which includes 'substantially similar' or not. Although a copy is not closely similar with the original work, it can be judged as an illegal use because substantial similarity is proved that the infringement existed.[8] Even though a small part of the work is found out in the copied work, it can regard an infringement because it is a substantial part of the work of right holder. A work is judged by qualitatively which values substantiality and quantitative does not have value of substantiality.[9] It can be said that an infringement occurs when small portion was a little changed in a work even if such changes is not so substantial and a substantial part of the original has not been stolen.[10] In the case of **Hawkes & Son (London) Ltd v. Paramount Film Service Ltd**,[11] the court held that a reproduction of twenty eight bars of a musical piece can be regarded an infringement because those twenty eight bars were so recognized as a substantial part of the musical piece.

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1 Ibid, p.10.
2 Lee Wilson, The Copyright Guide: A Friendly Handbook To Protecting and Profiting from Copyrights, 3rd Edition, 2003, p.80.
3 Stephen Fishman, The Copyright Handbook: How to Protect and Use Written Works, 6th Edition, 2002, p.12/4.
4 562 F.2d 1157 (9th Cir. 1977).
5 Davaid I. Bainbridge, Intellectual Property, 8th Edition, 2010, p.148.
6 Tina Hart, Linda Fazzani and Simon Clark, Intellectual Property Law, 4th Edition, 2006, p.183.
7 [1994] FSR 275.
8 Learn from the Past, Create the future: The Arts and Copyright, WIPO Publication No. 935, 2007, p.49.
9 Tina Hart, Linda Fazzani and Simon Clark, Intellectual Property Law, 4th Edition, 2006, p.181.
10 Graham Dutfield and Uma Suthersanen, Global Intellectual Property Law, 2008, p.92.
11 [1934] Ch 593.

Subject Matters of Committing Copyright Infringement

The reason to commit copyright infringement in the society is, firstly, individuals who obtained free copy believe that their copying is not a theft because it does not have financial gain. Moreover, they accept that their free copy does not decrease the profits of the copyright owner. Actually, their acting is a kind of stealing of intangibles which is owned by the right holder although making free copy without financial gain by someone does not mean that the copyright holder has been damaged in commercial.[1] However, no intention of profit by someone who received the free copy may be regarded as an infringement.[2] In **Auckland Medical Aid Trust v. Commissioner of Police**,[3] the police officers seized medical records from a clinic by a search warrant and were needed to return the originals after finished the case. Nevertheless, it is found that they handed over to it and the clinic sued them for copyright infringement because the medical records are as original literary works. Although the police argued that their using is for the investigating of possible crimes, the prosecution of possible offenders and there is no commercial acting which is not an infringement, the court held that such copying concluded an infringement of copyright in the records copied of the plaintiff, clinic. The Court judged that the photocopying was a specific exception in the New Zealand Copyright Act considering particular governmental purposes.

Another reason is that individuals who copies freely another's works with intention or motive was innocent. They did not think that their behaviors were wrong. On the other hand, it is not possible to obtain the consent of the right owner for them. Even if an infringer cannot bring himself within an exception defined in the Copyright Act or some other statute, it can be regarded that such behavior constitutes an infringement because the works is kept to the copyright holder.[4] Although the owner is not harmed by or may have profited, therefore, the unauthorized act may be established an infringement.[5] In the case of the **Bishop v. Stevens**,[6] it it is concerned that the appellant made ephemeral recording for technical reasons and no intention of being reproduced though, the court found that it is an infringement because it is not authorized by the copyright holder. Even no harm to the copyright holder yet, it does not mean that the copyright holder has no profits in whether or not the recordings are made. Concerning with the consent, in **Hawkes & Son (London) Ltd v. Paramount Film Service Ltd**,[7] the defendant was sued for the film which included schoolboys parading before the Prince of Wales a band playing the march. Small part of such musical march was copyrighted by the plaintiff. The defendant argued that they could not request the consent of the copyright owner in prior because their using was small portion of the music which will not be caused to the plaintiff who was harmed. However, the court did not agree and decided that it was infringement.

Next committing includes sometimes someone who benefits from committed the works such as song or book or painting under his/her supervision or management may also be an infringer. [8] It is because there is an effort to steal the successful features of that works and

[1] Lydia Pallas Loren, Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and The Important of the Willfulness Requirement, Washington University Law Quarterly, Vol. 77, 1999, p 860.
[2] David Vaver, Principles of Copyright: Cases and Materials, (WIPO) Geneva, 2002, p.140.
[3] [1976] 1 N.Z.L.R. 485 (New Zealand: Supreme Court).
[4] David Vaver, Principles of Copyright: Cases and Materials, (WIPO) Geneva, 2002, p.139.
[5] Ibid, p.141.
[6] [1990] 2 S.C.R. 467 (Canada: Supreme Court).
[7] [1934] Ch. 593 (U.K.: Court of Appeal).
[8] David Vaver, Principles of Copyright: Cases and Materials, WIPO, 2002, p.154.

finance from them. [1] The plaintiff sued Napster for infringements committed by its users. The court determined that Napster finances from the copyrighted works on its system. While Napster had the right and capability to control its system, it did not exercise that right to prohibit the exchange of copyrighted thing. It is showed that Napster commercially finances from enduring accessibility of infringing files on its system which will be held to the obligation of vicarious liability.

Consequences of Copyright Infringement

If there is no deterrence the infringement by the others for their personal use, on the one hand, copyright owners do not carry on their creation for investment. On the other hand, the benefits of society and national policy for copyright will be directly spoiled by the infringers and its infringements. [2] The selfish intention of infringers for personal used will cause to the copyright holder who can be injury because their action is morally unacceptable using.[3]

Moreover, the personal used of infringers with selfish intention may result the injury to copyright holder because it removes the legal right of holder and it makes as an act in dishonest way on the holder. The interest of copyright holders depends on their copyrighted materials and they will suffer some decree of dispossession when their works are used or reproduced without their authorization. [4]

As a consequence of copyright infringement, the copyright holders do not continue to create new works because their possibilities of earning income decreases as well as their incentive reduces to low level which will harm to the people who enjoy the works in society. [5]

It is impossible to permit unauthorized using of infringers in society because their freely copy is from without creation by themselves and their selling copied items are cheaper than original one in which the investment of copyright holder is existed. [6] While people enjoy the works of individual expressions and the taste or fashion of artistic or literary, the protection and the promotion are needed to provide for thought, opinion, or concept of human and exploitation of the works economically. Without protection, unauthorized copying and using will grow gradually which will take the trouble to create the original and will cause the lack of new creation and incentive so that tastes differ between people and a period of time.[7]

Conclusion

Copyright infringement is a theft and it decreases the profit and earning income of the real owner although the infringer commits it with innocence or the acting has no harm to the owner's benefit. Therefore, it can be fully understood that any unauthorized exercise of any of the exclusive rights of creators/owners includes "copyright infringement". It can be said that a copy makes either the whole work or a substantial part of the work is an infringement, whether it was made directly or indirectly. As long as there has been reproduction of a substantial part of it, it is proved that the work has been reproduced. Three conditions such as 'original', 'expression' and 'fixed' are necessary tools to check the copyright infringement. It is because the judge can well determine by examining such conditions whether the work is an effort of

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1 Lee Wilson, The Copyright Guide: A Friendly Handbook To Protecting and Profiting from Copyrights, 3rd Edition, 2003, p.79.

2 Geraldine Szott Moohr, The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm and Criminal Theory, Boston University Law Review, Vol. 83, 2003, p. 752,753. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323915

3 Ibid, p. 765.

4 Ibid, p.763,765.

5 Learn from the Past, Create the future: The Arts and Copyright, WIPO Publication No. 935, 2007, p.48.

6 Davaid I. Bainbridge, Intellectual Property, 8th Edition, 2010, p.33.

7 Laikwan Pang, Cultural Control and Globalization in Asia: Copyright, Piracy and Cinema, 2006, p.18.

right owner or copied from the other. By recognizing the creation and invention of the literary works in the society, the copyright gives the interests of the creators/owners as well as the profits from their works, and their creations and products can support the national industries and economic development in a country. However, the consequences of copyright infringements makes, on the one hand, the right holders who do not continue their works, suffer injury and deprivation of legal right and take the trouble to create the original work. On the other hand, it can be seen that the consequences become the direct spoil to national policy and community's interest, reduce the authors' earning income and harm the new incentives and creations that the people can all enjoy. Therefore, in order to prevent unauthorized copying or copyright infringement, it is necessary to take civil and criminal litigation which are fully given by the law for protection in a country respectively. Under civil litigation, the right owners can claim compensation for economic injury suffered from the infringer. Under criminal litigation, the government must prove the infringers' guilty and will punish those who commit illegal acts or copying or unauthorized activities for commercial purposes willfully.

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Prevention of Corruption in Myanmar

Khaing Zin Latt[1], Than Than Htwe[2]

Abstract

Corruption is a crime that the abuse of entrusted power for personal gain. Corruption undermines justice in many parts of the world. Corruption is not only a local matter but also a transnational character. There are many links between the corruption and other forms of crime. These features of corruption are addressed by global and regional anti-corruption conventions which provide a framework for strengthening preventive and punitive measures. The corruption cases may be settled by International Convention, such as United Nations Convention against Corruption (UNCAC), 2003 and ASEAN Treaty on Mutual Assistance in Criminal Matters, 2004. Corruption cases in Myanmar may be investigated by the Bureau of Special Investigation, Myanmar Police Force and Anti-Corruption Commission and taken action by the Anti-Corruption Law. In Myanmar, to be more successful anti-corruption nation, the government should establish major changes for the strengthening of ethics and integrity and national development policies in the sectors of political, administrative, economic and social.

Key words: Anti-Corruption, Bureau of Special Investigation (BSI), Corruption, United Nations Convention against Corruption

Introduction

Corruption is a serious problem that affects everybody and that occurs at all levels of society. Corruption undermines political and economic development, the environment, people's health and etc. It may also obstruct and hinder State development.

There are many different definitions of corruption and diverse forms of corruption. Bribery is a specific form of corruption that can be defined as giving something of value to influence the performance of official duty. Internationally, corruption is broadly defined as offences committed not only by the public servant but also by private sectors and public international organizations. Therefore, it can be generally defined as the abuse of power for a personal gain. Therefore, corruption is not only a local matter but also a transnational character. These features of corruption are addressed by global and regional anti-corruption conventions which provide a framework for strengthening preventive and punitive measures.

In Myanmar, traditionally, the Suppression of Corruption Act, 1948 was enacted as the main law for taking action against corruption and relevant provisions to the Penal Code of 1861 and the Criminal Procedure Code, 1898. For more effective implementation of the anti-corruption, Myanmar signed the UNCAC in December, 2005 and ratified in January, 2012 which provided for Myanmar with a comprehensive framework to fight corruption through preventive measures, law enforcement and international cooperation. After the ratification of the UNCAC, the new Anti-Corruption Law was enacted in August, 2013 and Anti-Corruption Commission was formed to fight corruption and bribery in Myanmar. Therefore, Myanmar enacted the Anti-Corruption Law aiming to eliminate graft through a transparent government, to protect the public from loss by corruption, to take effective action against the offenders and to improve the country's economic development.

Materials and Methods

In this paper, the materials used for all data were collected from the principles of Anti-Corruption Law, Penal Code, Books, Articles and International Conventions.

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Findings

In order to eliminate corruption, preventive measures should be taken at the same time in different areas or fields of the nation. Now, Myanmar is trying to protect the corruption in the country in line with the provisions of the United Nations Convention Against Corruption and other States practices. Therefore, the definition of petty corruption should be added for small offences that can be complained to the relevant department for departmental action in the existing law. Moreover, to be in line with UNCAC, it should raise the individual participation in the anti-corruption measures, the public awareness measures and strengthening the regional and international cooperation for effective prevention and prosecution of corruption cases.

Discussion

Prevention of Corruption in Myanmar

Corruption is a serious crime, which hinders the development of democracy and rule of law. The term "corruption" comes from the Latin word corruption which means "moral decay, wicked behavior, putridity or rottenness".[1]The control of corruption is one of the indispensable points to implement clean government and good governance. As a significant step forward for implementing the effective anti-corruption regime, the Republic of the Union of Myanmar accessions the United Nations Convention against Transnational Organized Crime (UNTOC) on 30 March 2004.And also Myanmar is a signatory to the United Nations Convention against Corruption (UNCAC) on December, 2005 and became the 165th State Party to (UNCAC) framework on 20 December 2012. After the ratification on UNCAC, Myanmar enacted the new Anti-Corruption Law on 7th August 2013 and the Suppression of Corruption Act, 1948 was repealed by this new law. And Myanmar set up the "Action Committee against Bribery" on 8th January, 2013 to help in building of good governance and a clean government.

Previous Implementation of Anti-Corruption

In Myanmar, regarding the anti-corruption legal framework, Myanmar promulgated the laws to combat corruption in the domestic area. Among of them, "the Suppression of Corruption Act, 1948" is the main law for the prevention of corruption. It was enacted in 1948 with relevant provisions to the Penal Code, 1861 and the Code of Criminal Procedure, 1898. The remaining laws cover the respective areas prescribing offences and penalties related thereto.

In Section 4 (1) of this Act, a public servant is said to commit the offence of criminal misconduct in the discharge of his duties:

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward, within the contemplation of Section 161 of the Penal Code; or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for an inadequate consideration from any person whom he knows to have been or to be, or to be likely to be, concerned in any proceeding before him or likely to be before him, or business transacted or about to be transacted by him, or from any person having any connection with the official functions either of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested or related to the person so concerned; or

[3] International Council on Human Rights Policy, Corruption and Human Right, 2009, p.15.

(c) if he by corrupt or illegal means or by abuse of his office as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(d) if he commits any fraud to the detriment of public interest or commits in respect of public property entrusted to him, either an act of misappropriation.

According to Section 4(2), such offenders shall be punished with imprisonment for a term which may extend to seven years and all the gains found to have been derived by the accused, by the commission of that offence shall be liable to be forfeited to the State.[1]

The Penal Code, **1861**

The Penal Code provides the offences committed by or related to public servants in Sections 161 to 165. They are as follows:

Section 161- whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or for bearing to do any official act or for showing or for bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person with the Union Parliament or the Government or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 162- whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, nay gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Union Parliament or the Government or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend of three years, or with fine, or with both.

Section 163- whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Union Parliament or the government or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Section 164-whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 165- whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be

[1] Section 4(2) of the Suppression of Corruption Act, 1948.

punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.[1]

Laws Relating to Anti-Corruption

In Myanmar, there are 23 Laws which contain provisions relating to anti-corruption and can penalize for corruption under these Laws. They are as follows:

- The Penal Code, 1861
- The Code of Criminal Procedure, 1898
- The Myanmar Official Secrets Act, 1923
- The Public Property Protection Act, 1947
- The Criminal Law Amendment Act, 1951
- The Special Investigation Administrative Board and the Bureau of Special Investigation Act, 1951
- The Defense Services Act, 1959
- The Protection of Public Properties Law, 1963
- The Income Tax Law, 1974
- The Law Taking Action against the Ownership of Sale of Property Obtained by Illegal Means, 1986
- The Commercial Tax Law, 1990
- The Financial Institutions of Myanmar Law, 1990
- The Saving Banks Law, 1992
- The Forest Law, 1992
- The Law Amending the Law relating to the Fishing Rights of the Foreign Fishing Vessels, 1993
- The Law Amending the Myanmar Marine Fisheries Law, 1993
- The Narcotic Drugs and Psychotropic Substances Law, 1993
- The Myanmar Police Force Maintenance of Discipline Law, 1995
- The Anti-Trafficking in Persons Law, 2005
- The Pyithu Hluttaw Election Law, 2010
- The Central Bank of Myanmar Law, 2013
- The Anti-Money Laundering Law, 2014
- The Myanmar Fire Services Law, 2015.[2]

The Role of the Bureau of Special Investigation

In Myanmar, corruption cases are cognizable case under the provisions of the Code of Criminal Procedure. Therefore those cases may be investigated by the Bureau of Special Investigation officers or Police Officers.

[1] Section 161 to 165 of the Penal Code in Myanmar, 1861.
[2] Myanmar Law Journal, Volume (7), N0. (2), December, 2006, p.47.

Being a cognizable case, BSI Officers and Police Officers may book case against the accused at the respective police station, request for sanction to prosecute the accused from the relevant Ministry, arrest the offender, examine the accused and witnesses, seize the exhibits, construct the case, ask for expert opinions on the exhibits if necessary, ask for legal advice from the Attorney General Office or various Law Offices for sound construction of the case and file the case before a competent and relevant Court. Usually, the Bureau investigates serious corruption cases and refers other corruption cases to Myanmar Police Force for investigation. If the case is not strong enough for sending up to the Court, and it is necessary to take some other action, such corruption case is referred to the Government department concerned for taking departmental action.[1]

Current Implementation of Anti-Corruption

In Myanmar, new Anti-Corruption Law was enacted in August 2013 in line with the United Nations Convention Against Corruption and it was entered into force on 17 September, 2013. The new law has provided the objectives to implement the effective taken action against the corruption and to safeguard the interests of the State and citizens. According to the new Law, the Anti-Corruption Commission is formed to suppress corruption effectively and authorize the fully investigated power.

The President of the Union, the Speaker of the Pyithu Hluttaw and the Speaker of Amyotha Hluttaw shall select each five members who are fulfill with the prescribed qualifications.[2] The Commission and its term shall be the same as that of the President's.[3] Each Commission member shall be Myanmar citizen,of the age between 45 years and 70 years and the person whom to be selected by the President, Pyithu Hluttaw speaker or Amyotha Hluttaw speaker is deemed to be integrity.[4] Besides, the person who is assigned duty as a member of the Commission shall not be the one who is receiving government salary, allowance or any kind of honorarium or performing any duty.[5] The Commission members shall make a list of currency, property, liability and assets with their values owned by the family under their direction shall furnish to the President.[6] Rights and duties of the Commission are-: forming and assigning the duties of Preliminary Scrutiny Board and Investigation Board, if necessary, guiding and supervising such board, forming the working committees and working group to implement the provisions of this law ; laying down the appropriate plans for being participate the public in which the prevention on the corruption, the elevation of the honesty spirit of the Competent Authorities exceedingly; scrutinizing and accepting the complaints, rejecting the complaints found that they are false complaints, taking action against the false complainant under the law; assigning duty to the Investigation Board and Inspectors to carry out in accord with the stipulations related to entering, inspecting into any place of building and searching, seizing as the exhibit in respect of corruption; co-operating with the International Organizations, Regional Organizations, and foreign countries in the matter of anti-corruption and carrying out other duties assigned by the President, Chairperson of Pyidaungsu Hluttaw, Speaker of Pyithu Hluttaw, or Speaker of Amyotha Hluttaw.[7]

[1] http://www.unafei.or.jp.
[2] Section 5 of the Anti-Corruption Law in Myanmar, 2013.
[3] Section 8 (a), Ibid.
[4] Section 9, Ibid.
[5] Section 11, Ibid.
[6] Section 13, Ibid.
[7] Section 16 of the Anti-Corruption Law in Myanmar, 2013.

Preliminary Scrutiny Board

The Commission shall form the Preliminary Scrutiny Board with the appropriate person on case by case for the purpose of scrutinizing and submitting in respect of seizing if it is obtained the credible evidence that the currencies and properties are possessed by enrichment by corruption truly either according with the report of investigation or other information.[1]

So, this board carries out the investigation task upon the finding report and information received in concerning with the monies and properties of the investigated person.

Investigation Board

The Commission may make investigation or to be made the investigation in respect of the following matters to take action in accord with law:

(a) assigning duty to investigate and submit by the President;

(b) assigning duty to investigate and submit in respect of submitting the proposal according with law by the Hluttaw representatives to take action against any person who possess the political post under sub-section (b) of section 43 by the relevant Hluttaw Speaker;

(c) to taking action upon the offender who commits the corruption according to law, the aggrieved person:

(i) complaining to the Commission;

(ii) complaining to any working committee, working group, Preliminary Scrutiny Board and Investigation Board formed by this Law;

(iii) transferring such complaint to the Commission in respect of complaining to any relevant Government department and Government organization.[2]

The investigation board shall submit the report of investigated findings to the chairman of Commission after investigation. The chairman of Commission shall be held the Commission session within 30 days after receiving the investigation board's report, to discuss and resolve in respect of that investigation.[3] According to the report of investigated finding, the Commission may dismiss the charge of the complaint if it is assumed that no credible evidence arisen relating to the charge; and if it is found that any person is enriched by the corruption after scrutinizing the report of findings; shall submit the report of scrutiny after forming and assigning the Preliminary Scrutiny Board in accord with the provision of this Law.[4]

And the Commission shall send its report to the Union Government Office and shall co-ordinate with the Union Attorney General's Office to take action against the Authorized Person; if it is determined that charges shall be pressed against the Authorized Person, the Commission's report shall be sent to the President in accordance with the provisions of this law, the relevant Hluttaw speaker assigned in accordance with the provisions of this law and to the sufferer who lodged the complaint. And upon the investigation, the Commission shall inform the relevant head of the department, if action shall be taken against the accused person under civil service regulations.[5]

[1] Section 19, Ibid.
[2] Section 21, Ibid.
[3] Section 27, Ibid.
[4] Section 28, Ibid.
[5] Section 30, of the Anti-Corruption Law in Myanmar, 2013.

If the Commission determines that it is necessary to investigate any offence committed under this law, it may confer the rights to the investigation body or any Investigator to investigate the bank accounts related to the accused.[1]

The above provision is the tasks of the Commission to prosecute the Authorized Person by sending its report to the President and relevant Hluttaw speaker and also to the Union Attorney General's Office to take action against the accused person. The corruption offences occur in every sector in different forms and ways.

The aggrieved person due to the corruption may send information and complaints to the Commission or Office of the Commission or working committee, working group, Preliminary Scrutiny Board and any Investigation Board formed by this Law or any relevant Government department, organization in accordance with the stipulations in respect of corruption or any competent authority that is enriched by corruption. These organizations which obtained the information or complaint need to submit to the Commission as soon as possible in accordance with the stipulations for enabling to give the necessary guidance to carry out effectively in respect of the said information or complaint. [2]

According to the report of investigation or other credible information facts, the Commission shall instruct the Head of Investigation Board or Inspector General to sue any Competent Authority who commits the corruption, to the High Court of the Region or the State and to sue any other person except the Competent Authority who commits the corruption, to the relevant Court.[3]

If any Political Post Holder is convicted for committing corruption, he or she shall be punished with imprisonment for a term of not exceeding 15 years and with a fine.[4]Other than the political post holder, if any other authorized person is convicted for committing corruption; he shall be punished with imprisonment for a term of not exceeding 10 years and with a fine.[5]And other than the political post holder and the authorized person, if any person is convicted for committing corruption, he shall be punished with imprisonment for a term of not more than 7 years and with a fine.[6] Any person conceals or obliterates or alters or transfers the currencies and properties related to any offence contained in this Law for not being taken action against them, on conviction, he shall be punished with imprisonment for a term not exceeding 5 years, and with a fine.[7] Therefore, a political post person or authorized person or other person who committed the corruption offence shall be punished with imprisonment.

Other Measures of Anti-Corruption in Myanmar

In Myanmar, there should be more effective internal administrative policies to identify and to establish investigation policies for detecting and taking action against the person who commits corruption.

The President of the new government delivered his presidential address and affirmed that the government must be a clean government and good governance to achieve a prosperous future for the nation. He did highlight that combating corruption and bribery, which tarnish the image of the nation and the people. He also pointed out that nobody should abuse the mandate in the interest of friends or relatives. It was the new government has shown its political will to

[1] Section 32, Ibid.
[2] Sections 44 and 45, Ibid.
[3] Section 18(a,b), Ibid.
[4] Section 55, Ibid.
[5] Section 56 Ibid.
[6] Section 57, Ibid.
[7] Section 58, Ibid.

fight corruption. Moreover, people's representatives of the Hluttaw can disclose, in the interest of the people, unlawful practices including corruption of the responsible personnel.[1]

In order to have transparency, the President of the new Government stated that the media is the fourth pillar of the society of Myanmar. This statement encourages journalists to write or speak about acts of corruption and to reveal occurrences of same. Also, the Ministries call for public cooperation in realizing "Good Governance and Clean Government" as guided by the President. At the same time, to uplift the morale of the public servants, government departments and organizations will honour and reward employees who abide by the directions, rules and regulations and who are duty-bound.[2]

Myanmar President Office had formed an Action Committee Against Bribery, in order to eliminate bribery as national duty to strive for the eradication of bribery and corruption in public organizations to create good governance and clean government, to upgrade integrity and accountability in public administration, to take effective action of corrupted offenders and administrative sector to be transparent and to sustain economic development by domestic and foreign investment. The Ministry of Home Affairs has declared rapidly in daily newspapers that any victims can complaint to the Ministry in order to be a clean government and to eliminate the bribery and corruption of public servants by the cooperation of public.[3]

The corruption cases can be reported to the relevant departments by individual or group wide. After scrutinizing, the complaint letters required to take departmental actions are transferred to the relevant departments. The letters of which no action is needed are filed. The letters for which legal action is required are investigated in line with the provisions of laws with the approval of higher authority.

All civil service personnel in Myanmar are responsible to abide by the Fundamental Rules and Supplementary Rules. Those Rules prescribe that a government servant shall not accept directly or indirectly, on his or her own behalf or on behalf of any other person, or permit any member of his or her family to accept any gift, gratuity or reward.[4]

The Commission received total of 10,004 complaints during the period in 2018 and 2019. Among these, 9,394 complaints have been received in 2019, from January to December and 610 complaints that are under scrutiny in 2018. There have been taken actions are 6173 cases, cannot taken action are 2,787 cases and 1,044 cases are under scrutiny. [5]

In the International and regional cooperation, the International Association of Anti-Corruption Authorities (IAACA) was formed on 22October 2006 in order to implement the United Nations Convention against Corruption (UNCAC).The senior officials from Union Attorney General Office and Bureau of Special Investigation have regularly attended the IAACA's annual meetings. Myanmar delegation including three members of Legal Drafting Committee of the Parliament, have attended the 6th annual meeting of the (IAACA) held in 2012, in Malaysia.[6]

To be in line with the United Nations Convention against Corruption, Myanmar is putting its best efforts to combat corruption and is implementing various forms of preventive

[1] http://www.unafei.or.jp.
[2] Ibid.
[3] United Nations Asia and Far East Institute (UNAFEI), Resource Material Series No.92, Fuchu,Tokyo, Japan,p.255-256.
[4] Myanmar Law Journal, Volume (9), No (1), December, 2009, p. 193.
[5] Myanmar Anti-Corruption Commission, Annual Report, 2019, p.90.
[6] http://www.unafei.or.jp.

measures, not only by legislation and criminal justice measures but also by administrative measures. Therefore, concerning detection and investigation of criminal offences, including corruption, Myanmar has strong legal framework and practice to be followed by the government agencies.

Conclusion

The new Anti-Corruption Law of Myanmar has provided the objectives to implement the effective actions against the corruption and it covers the provisions of the UNCAC. Taking into consideration of the laws, Myanmar has much legislation to combat corruption in different areas. Since 1861, Myanmar is taking action for the corruption offences by enacting the Penal Code and the Code of Criminal Procedure. In 1948, the Suppression of Corruption Act was established as special law for taking action against corruption. Besides, the laws above mentioned were embodied for the taking action against the public servants who were committing the corruption. Therefore, these laws are sufficient for combating and suppression of corruption and the previous implementation of anti-corruption measures are effective actions.

To fight against corruption, it needs to be taken on several fronts. Both the demands for acts of corruption and the supply of such acts would need to be reduced. The causes of corruption vary from one State to another and definitions of corruption are also different from each country in accordance with cultural, legal or other factors and the nature of problem as it appears in each country. For a nation to fight corruption in all spheres of work establishments, just a way of enacting appropriate laws alone is not sufficient to gain success. It needs to define the comprehensive meaning for cover of the corruption offences.

Now, Myanmar is trying to protect the corruption in the country in line with the provisions of the United Nations Convention Against Corruption and other States practices. In the existing law of Myanmar, however, there is no meaning of petty corruption whereas this has been specifically defined in other countries, for instance, in Cambodia, the petty corruption shall meet the criteria committed for daily survival, petty manner and is not harmful to society. If the offence is determined within the scope of petty corruption, the punishment should be less than the normal corruption offence and it may be departmental action. Similarly, in the previous law of Myanmar, it was enacted as the proviso clause of Section (3), in which it had been mentioned that it should not be considered as the corruption by the Court if the gratification is thought to be so slight. It is clear that this proviso clause had authorized the discretionary power to the Court in order to determine the case.

In addition, according to Section 44 of the existing law, it has been stated that any person who has suffered from corruption can complain to the anti-corruption bodies formed under this law or relevant government department or organization. Therefore, it can be assumed that small offences can be complained to the relevant department and they can take action departmentally by removing or demoting the corrupters. Thus, the terms of “petty corruption” for small offences and “the departmental actions” for the penalty for these offences need to be added in the Anti-corruption Law.

In the provisions contained in Myanmar Laws, bribery not only means receiving money or things but also means performing the tasks regarding the superiors or not performing, favoring someone and misusing or leaking the confidential information of the government. Besides, stealing or misusing State property and a breach of trust or confidence are defined as bribery.

Since many years ago, there are four types of agati (partiality unfairness) that the societies in Myanmar have been practising. They are (a) chandagati meaning partiality out of

love (b) dosagati meaning bias on account of hatred (c) bhayagati meaning bias due to fear and (d) mohagati meaning bias due to ignorance.

Such kinds of partiality are regarded as bad deeds and people should avoid them. It has been taught in national school curriculum and at Buddhist monastic education centers or in some other religions that partiality is bad and it is something that should always be avoided. These four types of partiality are deep in meaning and usually depend on one's intelligence and wisdom. It is believed that avoiding such partiality will make one to do his tasks dutifully and lead him to a clean and peaceful life not only in the present but also in the next existences.

Therefore, to build a clean government and provide good governance, preventive and suppressive measures need to be efficient and effective. Besides, according to Article 13 of UNCAC, the participation of society such as individuals and civil society, non-governmental organizations and community-based organizations has been provided in order to prevent and combat corruption. Moreover, it should raise the individual participation in the anti-corruption measures, the public awareness measures and strengthening the regional and international cooperation for effective prevention and prosecution of corruption cases.

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Corporate Social Responsibility in Myanmar

Kay Zin Htike[1], Nu Ei Chaw[2]

Abstract

This research work deals with the responsibility of the corporate under Ruggie Framework or United Nations Guiding Principles on Business and Human Rights (UNGPs), 2011.The Corporate Social Responsibilities of the enterprises in the world have been developed by the UNGPs on Business and Human Rights. The Four-Part Model of Corporate Social Responsibility are Economic responsibility, Legal responsibility, Ethical responsibility and Philanthropic responsibility. The responsibility got top priority is relied on the developed and developing countries. CSR is not always a legal necessity, increasingly it is an obligation. However a company has to be socially responsible even though it is not a legal obligation which is one of the most important characteristics of CSR.

Key words: responsibility, legal rules, ethical codes of conduct

Introduction

When the economic enterprises start their business operation, in order to get the rights in accordance with law, they must obey the law under the provisions. Businesses must act with due diligence to avoid infringing on the rights of others and to address any negative impacts. The United Nations Guiding Principles on Business and Human Rights UNGPs, 2011 hold that companies have the power to affect virtually all of the internationally recognized rights. Bilateral investment treaties give guarantees to investors but do not normally address obligations of investors.However, some bilateral investment treaties provide the responsibility of investors in accordance with host state law. There is a responsibility of investor on the impacts of his investment such as environmental and social impacts.

Materials and Methods

In this research paper, the materials used for data are collected from Myanmar Investment Law, Directorate of Investment and Company Administration, Books, Articles, International Convention, Regional Laws and Guidelines.

Findings

The corporate world has always had some rules, standards and norms for doing business. However these are generally changing with some social and cultural basis which can be different country by country. When the company applied these standards or norms as a part of their responsibility, it can be called an ethical code of conduct of business.

Discussion

Corporate Social Responsibility in Myanmar

Historical Background of Corporate Social Responsibility

United Nations Human Rights Council endorsed the “Guiding Principles on Business and Human Rights” to implementing the United Nations Protect, Respect and Remedy Framework in 2011. These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

Corporate responsibility to respect human rights is second pillar of Ruggie Framework or United Nations Guiding Principles on Business and Human Rights (UNGPs), 2011. The

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responsibility of business enterprises to respect human rights refers to internationally recognized human rights-understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.[1]

Foreign businesses are expected to be a major player in the development of the country. There is a real opportunity for investors to bring in international standards and set a model of good corporate behavior that not only builds wealth and creates jobs, but acts as a steward for protecting the surrounding environment and human resources. Such an approach can take many forms, beyond the baseline 'responsibility to respect': training and education, community based projects such as providing clean water or improved roads, provision of medical supplies, assistance to support the growth of a local supply chain, or income generation opportunities for excluded groups.[2]

Definition of Corporate Social Responsibility

In Issue 1 at February 2007, innovation briefs of United Nations Sustainable Development, CSR can be defined as the overall contribution of business to sustainable development.[3]

The broadest definition of corporate social responsibility is concerned with what is /or should be the relationship between global corporations, governments of countries and individual citizens. More locally the definition is concerned with the relationship between a corporation and the local society in which it resides or operates. Another definition is concerned with the relationship between a corporation and its stakeholders.[4]

Corporate social responsibility (CSR) is a business approach that contributes to sustainable development by delivering economic, social and environmental benefits for all stakeholders.[5] The European Commission has previously defined Corporate Social Responsibility (CSR) as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".[6]

CSR is a concept with many definitions and practices. The way it is understood and implemented differs greatly for each company and country. Moreover, CSR is a very broad concept that addresses many and various topics such as human rights, corporate governance, health and safety, environmental effects, working conditions and contribution to economic development. Whatever the definition is, the purpose of CSR is to drive change towards sustainability.

Because of the uncertainty surrounding the nature of CSR activity, it is difficult to define CSR and to be certain about any such activity. It is therefore imperative to be able to identify such activity and we take the view that there are three basic principles which together comprise all CSR activity. These are sustainability; accountability; and transparency.

Sustainability is concerned with the effect which action taken in the present has upon the options available in the future.[7] Accountability is concerned with an organization

[1] Article12, United Nations Guiding Principles on Business and Human Rights, 2011
[2] www.Myanmar-and-CSR-Creating-and-Implementing-Successful-Strategy-News
[3] United Nations, Sustainable Development Innovation Briefs, February 2007
[4] Ibid, p-10
[5] www.lexicon.com
[6] European Commission, Brussels, 25.10.2011,COM(2011) 681 final
[7] David Crowther and Güler Aras, Corporate Social Responsibility, David Crowther, Güler Aras and Ventus Publishing, 2008, p-14

recognizing that its actions affect the external environment, and therefore assuming responsibility for the effects of its actions.[1] Transparency, as a principle, means that the external impact of the actions of the organization can be ascertained from that organization's reporting and pertinent facts are not disguised within that reporting.[2] CSR is a broad subject which leads to a variety of opinions and can be considered in a number of different ways.[3]

CSR is not always a legal necessity, increasingly it is an obligation. However a company has to be socially responsible even though it is not a legal obligation which is one of the most important characteristics of CSR.[4]

Model of Corporate Social Responsibility

The corporate world has always had some rules, standards and norms for doing business. However these are generally changing with some social and cultural basis which can be different country by country. When the company applied these standards or norms as a part of their responsibility, it can be called an ethical code of conduct of business. Moreover ethics is also inevitable part of business responsibility. Corporate behavior should be ethical and responsible. Corporate behavior is important for company success both financially and concerning the relationship between corporate and business interests. Corporate behavior involves legal rules, ethical codes of conduct and social responsibility principles. In other words corporate behavior is based on all of these components and involves law, ethics and corporate social responsibility (CSR).[5]

It is the 'Four-Part Model of Corporate Social Responsibility' (Carroll, 1979). Corporate social responsibility encompasses the economic, legal, ethical, and philanthropic expectations placed on organizations by society at a given point in time.[6]

Economic responsibility means companies have shareholders who demand a reasonable return on their investments, they have employees who want safe and fairly paid jobs, they have customers who demand good quality products at a fair price etc.

The legal responsibility of corporations demands that businesses abide by the law and 'play by the rules of the game'.

Ethical responsibilities oblige corporations to do what is right, just and fair even when they are not compelled to do so by the legal framework.

The Last one is the philanthropic responsibilities of corporations. This aspect of CSR addresses a great variety of issues, including matters such as charitable donations, the building of recreation facilities for employees and their families, support for local schools, or sponsoring of art and sports events.[7]

Enforcement of Corporate Social Responsibility

CSR is often viewed as social responsibility that goes beyond the requirements of the law. In other works CSR is to do "more than the law requires". The law is not part of the CSR

[1] Ibid, p-15
[2] Ibid, p-16
[3] Ibid, p-17
[4] David Crowther and Güler Aras, Corporate Social Responsibility, David Crowther, Güler Aras and Ventus Publishing, 2008, p-60
[5] David Crowther and Güler Aras, Corporate Social Responsibility, David Crowther, Güler Aras and Ventus Publishing, 2008, p-54
[6] Manfred Pohl and Nick Tolhurst, Institute for Corporate Culture Affairs Judith Hennigfeld, The ICCA Handbook on Corporate Social Responsibility, p-9
[7] Ibid, p-9

equation, but rather defines the boundaries or limits of CSR. The Law serves to facilitate and encourage CSR by creating favourable conditions such as by setting incentives for corporations to adopt responsible business practices. Therefore, the role of law for CSR is seen as passive. The Law does not direct intervene and enforce CSR, but rather provides indirect frame for respective initiatives. Nowadays, there are many policy and principles for the enforcement of environmental responsibility. It indicates a move towards a more active role for the law in CSR.

Framework of Corporate Social Responsibility

The CSR strategy focuses on contributing to the development of the country in a meaningful way in addition to running a successful and responsible business. The corporate CSR framework is divided into internal and external components. Internal component relates to anti-corruption procedure, environment, health & safety policy, human rights policy, employment policy, etc. and forms part of internal corporate governance. External component relates to the greater society which includes projects of philanthropic nature that help with community development.

When an organization undertakes an activity which impacts upon the external environment then this affects that environment in ways which are not reflected in the traditional accounting of that organization. The environment can be affected either positively, through for example a landscaping project, or negatively, through for example the creation of heaps of waste from a mining operation. These actions of an organization impose costs and benefits upon the external environment. These costs and benefits are imposed by the organization without consultation, and in reality form part of the operational activities of the organization. These actions are however excluded from traditional accounting of the firm, and by implication from its area of responsibility.[1]

Regional Network for Corporate Social Responsibility

The ASEAN Foundation has catalyzed the formation of a regional network for CSR ("ASEAN CSR Network") to address the lack of regional cooperation and information on Corporate Social Responsibility and in line with the actions called for in the Blueprint for ASEAN Socio-Cultural Community (2008-2015). The Network aims to support the Blueprint for ASEAN Socio-Cultural Community, which includes as part of its strategic objectives ensuring that corporate social responsibility is incorporated in the corporate agenda and contributes towards sustainable socio-economic development in ASEAN Member States.[2]

Development of model public policies on CSR or legal instruments for reference of ASEAN Member States by 2010 are-

- Engage the private sector to support the activities of sectoral bodies and the ASEAN Foundation, in the field of corporate social responsibility
- Encourage adoption and implementation of international standards on social responsibility
- Increase awareness of Corporate Social Responsibility in ASEAN towards sustainable relations between commercial activities and communities where they are located, in particular supporting community based development.

[1] David Crowther and Güler Aras, Corporate Social Responsibility, David Crowther, Güler Aras and Ventus Publishing, 2008, p-22

[2] http://www.asean-csr-network.org

Responsibilities for environmental and social impact have been provided in the National Legal Framework. If the investors do not obey the enacted law or host state law, they will be punished under such law.

CSR Activities in Myanmar

The corporate social responsibilities are not provided in the enacted law. But it may be made by the agreement before the operation of the businesses, for example, agreement to pay 2% of net profit in Latpadaung copper mine project. The recent renegotiation of the Letpadaung copper mine investment resulted in the inclusion of a legally binding clause of 2% of net profits going towards CSR with a focus on immediate communities. Some government advisers comment this should become standard practice for mining, and we would not be surprised if this requirement were extended to oil and gas companies. But it is obvious that copper mine project will damage on environment. If the impact of investment project does not obvious, it may be difficult to get the agreement to participate the CSR activities.

Similarly, business enterprises which have many rights such as exemption and relief should perform the CSR activities more than the others. Before starting a business project, they must agree that they must participate in the CSR activities. The State obligations are to be strengthening the policies and laws and to perform the Corporate Responsibilities in accordance with the International standards. Present in Myanmar, CSR activities are very weak because of CSR policy. Firstly, Myanmar government needs to adopt the national laws and policy and then, to consider how to perform the CSR with due diligence.

Economic Enterprises which invested in Myanmar, there should be CSR strategy which entails the due diligence for corporate conduct in the economic enterprises. This strategy should be started at the risk assessment, socio-economic problems, impacted people, compensation process for materials damage suffered, consultation practices, prior and informed consents and policy commitments. Some CSR activities in Myanmar are as follows.

Social Responsibility activities by Serge Pun & Associates (Myanmar) Co., Ltd (SPA), First Myanmar Investment Co. Ltd (FMI-A Public Company) and Yoma Strategic Holdings Ltd are sample activities in Myanmar.[1]

FMI and the larger SPA Group were actively involved in providing relief to those affected by the 2015 floods in Myanmar.

Administrator of Pun Hlaing Siloam Hospital (PHSH) traveled to Sittwe where he met with health officials at Kyaut Taw clinic to assess the medical needs of the township. Kyaut Taw township has nearly 100 villages and a population of around 200,000.

Pun Hlaing Golf Estate has been selling t-shirts and baked goods to raise funds for flood victims. The funds raised are being channeled back into the Group's relief efforts in and around the Sittwe area.

FMI Air has been flying emergency aid to Sittwe in Rakhine State. This area is one of the worst affected by the floods. Aid relief items have been unloaded and are being distributed to the surrounding areas.

"Balloons over Bagan" has been active on the ground providing supplies to flood victims. The Balloons Over Bagan team traveled by boat to Kyet Sher village, Pakokku Township, where they donated rice, oil, canned fish, water, t-shirts, and hats to 360 families. The team was the first to reach the village.

[1] fmi.com.mm/corporate-social-responsibility

The Myanmar Employer Awards congratulates the 2019 Winner for Best Corporate Social Responsibility Engagement program from Unilever. It is also honoured to recognize Best CSR of the year finalist companies; who shared their visions towards raising the bar in innovating and implementing effective HR best practices in Myanmar, which the ultimate goal and core value of this platform. The finalist companies of the year 2019 are City Mark Holdings Limited, Coca-Cola, DKSH Myanmar and Myanmar Brewery Limited. This program is hosted by Unilever. National Award program is not implemented yet.

The Myanmar Investment Commission (MIC) now asks for information about CSR, and in some sectors makes an environmental and social impact assessment (ESIA) a prerequisite for obtaining MIC approval.

CSR Activities in Other Countries

Fewer countries can boast a diverse range of corporate social responsibility (CSR) activities as Thailand. Thailand is a great example of successful implementation of corporate social responsibility. Regular businesses allocate budget and schedule CSR activities throughout the year. Government Hospitals and community buildings always need volunteers who newly paint, decorate or refurbish public spaces.[1]

Cannon supports Thailand's cultural heritage “The Traditional Thai Puppet performance ("Joe Louis")”. Since the beginning of 2010, Canon has been one of the supporters of the theatrical puppetry to help reviving and assuring the survival of the art of traditional Thai puppetry.[2]

In Vietnam, CSR is a relatively new matter in Vietnam. Nevertheless, recently, with the environmental disasters and the negative consequences on the society caused by enterprises, the social responsibility has become urgent. In Vietnam, the implementation of CSR is fully in conformity with targets of sustainable development strategy. In order to the enterprise in Vietnam to implement CSR, it is urgent to propagate, educate social responsibility and complete the legal framework to implement the CSR.[3]

In some countries, Government is hosting the National Corporate Social Responsibility Awards Program. These Awards aim to promote good CSR practices carried out by companies, to recognize their responsible practices and to contribute the sustainable economic development of their country.

As the integration of CSR into Human Resource Development, UNDP should promote the approach of CSR as a human resource development tool, because not only CSR will help minimize business risks and enhance staff morale and loyalty to the companies, but it also makes business become an important constituency in empowering their employees to become good human capital for the society. Corporate volunteering is a good way to develop the capacity of the employees. The world is facing social and environmental complexity, and in many European countries, such as in UK, CSR becomes obligatory for businesses to follow. UNDP should work with supporting organizations to acquire CSR as a regulatory mechanism in enforcing companies to practice CSR more. Notwithstanding; it is advised that

[1] https://www.linkedin.com/pulse/thailand-csr-corporate-social-responsibility-vitamins-william-kuipers
[2] http://www.canon.co.th/personal/web/company/about/csr?languageCode=EN
[3] European Journal of Business and Social Sciences, Vol. 4, No. 09, December 2015
URL: http://www.ejbss.com/recent.aspx-/ ISSN: 2235 -767X

advocating regulations, UNDP should be cautious that companies should not abuse its enforcement effectiveness.[1]

Conclusion

As summation, every investment businesses contain investors, host states and persons who accomplished the investment projects such as governing body, professionals and workmen. Every Investment businesses must follow governing International and Regional agreements, laws of the host states, rules, principles and guidelines. Investment can enhance the development of host state's economy, living standard as well as the profit of investors. In addition, investment may cause damage the host state's environment and local people or businesses in many ways. To enhance positive result and to reduce negative result, related Government should follow International legal framework and adopt principles in accordance with International legal framework. On the other hand, investors should obey the principles and serve their corporate social responsibility on the environmental and social impact of their investment projects.

With respect to the responsibility of Investor in investment, ASEAN member states follow the International and Regional agreements, Guiding Principles and they enact the related laws as National Laws and adopt the principles and guidelines. The contribution, participation for CSR activities in Thailand is the first position among ASEAN Countries according to World Bank report. Although MOECAF has recently promulgated the EIA Rules and Regulations (2013) under the National Environmental Conservation Law in Myanmar, there are no specific guidelines on the methodology to be used in the EIA process and, there are no prescribed limits or standards for environmental quality. If Myanmar enthusiastically contributes in a regional network for CSR (ASEAN CSR Network) and if Myanmar adopts effective principles, it can mitigate the environmental and social impact caused by various investment projects and also promote sustainable development. Furthermore, Myanmar Investment Commission should prescribe the exact ratio of net profit to serve the CSR. And Myanmar Government should bestow the awards of CSR contest for recognition for practices and contributions to the sustainable economic development of the business enterprises.

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Legal Rights of Diplomatic Agents in Diplomatic Relations

Tin Myo Myo Swe[1], Thu Mon Soe[2]

Abstract

Diplomatic Agents are entitled legal rights, such as, some privileges and immunities. The rules of international law governing diplomatic relations were the product of long-established sate practice. Diplomatic Relations have traditionally general statement for humanitarian principles but also the guideline for the existing rules of international law. Diplomatic Agents are ambassadors residing in a foreign country as representatives of the States by whom they are dispatched. Regulations relating to the classification of diplomatic agents were first adopted at the Congress of Vienna in 1815. The Vienna Convention on the Diplomatic Relations (1961) is the main international instrument.

Key words: Diplomatic Relations, Diplomatic Agents, Legal Rights, Vienna Convention.

Introduction

Diplomacy is the communication of conducting negotiations between representatives of groups or states. It usually refers to international diplomacy, the conduct of international relations through the intercession of professional diplomats with regard to issues of peace-making, trade, war, economics, culture, environment, and human rights.

With the emergence of States, economic, political and subsequently, cultural relations developed between them. The organs of States for foreign relations, and also diplomats, have always served the interests of the ruling classes. The science of International Law customarily divides organs of the States for their foreign relations into two groups: (a) internal (Heads of State, government, institutions of foreign affairs and foreign trade) and (b) external (embassies, missions, trade missions and consulates).

Materials and Methods

In this research paper, the material uses all of data from the principles of Diplomatic Immunity, Customary International Law, Books, Articles ,International Conventions, Leading Cases and Internet Links .

Findings

Modern diplomatic immunity was codified in the Vienna Convention on Diplomatic Relations (1961) which has been ratified by all but a handful of nations. The ideas and usage of diplomatic immunity date back thousands of years. Many principles of diplomatic immunity are now considered as the parts of Customary International Law.

Historical Development of Diplomatic Relations

With the emergence of States and the development of their foreign relations, organs by which States implement their mutual economic, political and legal links grow up. These are termed organs of the States for their international relations.

The development of special diplomatic institutions forming part of the state apparatus was even slower. It began with the appointment of special secretaries to monarchs who carried

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out diplomatic assignments. Such posts, or permanent secretary-ships, were established in the 13th century by the rules of Spain and France, and England subsequently followed suit.[1]

Establishment of Diplomatic Relations

Diplomatic relations are established by "mutual consent" between the two States concerned (the sending State and the receiving State). A diplomatic mission accredited by the sending State to the receiving State usually include a "head of the mission" (who normally has the title of ambassador), and the member of the mission. The receiving State's consent is required for the selection of the head of the mission.[2]

Every sovereign State possesses the right of legation. But opening of diplomatic relations between States is a matter of agreement between the government concerned. The actual agreement between the two States expressing their willingness to enter into diplomatic relations may be in the form of a solemn treaty. It may be also be more informal, that is, in the form of an exchange of notes between foreign ministers of between ambassadors posted in a third State.[3]

Classes of Diplomatic Agents

The Congress of Vienna, 1815, classified diplomatic representatives into three classes, to which the Congress of Aix-la-chapelle, 1818, added a fourth. They are as below in order of seniority of rank.[4]

(1) Ambassadors - They are the representatives of the person and dignity of the sovereign or Head of the State accrediting them and as such enjoy special honors. On their arrival at the foreign capital when they present a sealed letter of credence conferring on them their official character, they are entitled to public audience from the Head of the State to whom they are accredited. They have also the privilege of negotiating with the Head of State personally. They are entitled to the title of "Excellency". Only States enjoying royal honors can send ambassadors.

(2) Ministers Plenipotentiary and Envoys Extraordinary - They are not the personal representatives of the sovereigns or Heads of their State, though they are, no doubt, accredited to them. They have private audience from the Head of the State when on their arrival at foreign capital they present the letter of credence. They have also no audience as of right with a Head of State personally and receive the title of "Excellency" by courtesy only.

(3) Ministers Resident - They are accredited to sovereigns and rank below the Ministers Plenipotentiary and envoys extraordinary. They do not enjoy the title" Excellency" even by courtesy. This class was added in 1818.

(4) **Charges d'Affairs** - They are accredited not by a Head of State to another Head of State but by a Minister of Foreign Affairs to a Minister of Foreign Affairs. On arrival at the foreign capital they present their letter of credence to the Minister of Foreign Affairs.

According to the Vienna Convention on Diplomatic Relations, 1961, heads of mission divided into three classes, such as;

(a) that of ambassadors or nuncios accredited to Heads of State, and to the head of mission of equivalent rank;

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1 Academy of Sciences of the U.S.S.R. Institute of State and Law, International Law, Foreign Languages Publishing House Moscow, Soviet, 1960, p-84.

2 Vienna Convention on Diplomatic Relations, 1961, Article- 2.

3 Oppenheim, "International Law", Vol .I, 8th edition, 1955, p-774.

4 M.P Tandon, " Public International Law", 10th edition,1965, p-201.

(b) that of envoys, minister and internuncios accredited to Heads of State: and

(c) that of charge d' affairs accredited to Ministers for foreign Affairs.[1]

Among the three classes of Heads of mission, those ranking the highest are ambassadors. Their equals are Papal nuncios who are first class envoys accredited by the Holy See. Ambassadors are recognized to be personal representatives of the Heads of their States, and enjoy special honors. Their chief privilege is that of negotiating with the Head of the State personally. But this has little value today because all States have to a certain extent; constitutional Governments and all the important business go through the hands of a Foreign Secretary.

Ambassadors can also claim the title of "Excellency". Besides it is asserted that they have also the right to ask for an audience from the Head of the State to whom they are accredited.

The second class, Envoy Extraordinary and Minister Plenipotentiary, to which also belong the Papal internuncios, are not considered to be personal representatives of the Heads of their States. Therefore they do not enjoy all the honors of the Ambassadors. They have not the privilege of meeting with the Head of the State personally. But otherwise there is no difference between the two classes except that Ministers Plenipotentiary receive the title of "Excellency" by courtesy only and not by right.

The third class, charges d' affairs, differs chiefly in one point from the first and second classes. They are accredited from Foreign Office to Foreign office, where as the other classes are accredited from Head of state to Head of State, Charge's d'affaries do not enjoy, therefore, so many honors as other diplomatic envoys.[2]

Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class. The distinction between the different classes of diplomatic agents is purely ceremonial for all of them enjoy the same diplomatic immunities. Moreover even the privilege of ambassadors to negotiate with a Head of State personally is of little use as most of the important business is attended to by the Minister Foreign Affairs.[3]

Besides the above there are High Commissioners accredited to a member of the Commonwealth by another, the delegates of different member-States to the UN and the Judges of the International Court of Justice who enjoy diplomatic immunities.

Immunities and Privileges for Diplomatic Agents

Diplomatic immunity is a form of legal immunity held between state governments that ensure that diplomats are given safe passage and are considered not susceptible to lawsuit or prosecution under the host country's laws, although they can still be extradited. It was agreed as international law in the Vienna Convention on Diplomatic Relations (1961), though the concept and custom have a much longer history. Many principles of diplomatic immunity are now considered as the sources of international customary law.

Originally, the immunities of Diplomatic were granted on a *bilateral, ad hoc basis,* which led to misunderstandings and conflict, pressure on weaker states, and an inability for other states to judge which party was at fault. One of international instruments known as the Vienna Conventions codified the rules and agreements, providing standards and privileges to all countries. The Purpose of granting immunities and privileges to diplomats is to enable them

[1] M.P Tandon, " Public International Law", 10th edition,1965, p-202.
[2] Oppenheim, "International Law", Vol .I, 8th edition, 1955, p-776.
[3] M.P Tandon, " Public International Law", 10th edition,1965, p-202.

to carry out their functions effectively. Although personal immunities and privileges of a diplomatic agent apply directly, in fact, they are awarded to the sending state and the individual diplomat enjoys them only in his or her capacity as an agent of the state.[1]

US Diplomatic and Consular Staff in Iran Case

On 4 November 1979, Iranian students seized the US Embassy in Tehran and a number of consulates in outlying cities. The Iranian authorities failed to protect the Embassy and later appeared to adopt the students' actions. Over 50 US nationals (mostly diplomatic and consular staff) were held for 444 days. The US sought a declaration, inter alia, that Iran had violated the two Vienna Conventions, and calling for the release of the hostages and the vacation of the Embassy and consulates. The Court considered whether the initial attack by the students could be attributed the Iranian Government, the conduct of Iran at that time and subsequently, and whether Iran was therefore in violation of its international obligations.[2]

Immunity from Criminal Jurisdiction

Immunity from criminal jurisdiction is the most important consequence of the personal inviolability of a diplomat. This immunity is absolute and he cannot, under any circumstances, be tried or punished by the local criminal courts of the State to, which he is accredited. This complete exemption of a diplomat from criminal jurisdiction is fully justified by the requirement of his functions otherwise the 'inviolability of his person could hardly be guaranteed. The authorities on international law appear to be unanimous on this questions: According to Article 31(1), "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State"[3] .This immunity from criminal Jurisdiction is absolute and a diplomatic agent cannot under any circumstances, be tried or punished by the local criminal courts of the state to which he is accredited.[4]

It is true that a diplomat is not under the jurisdiction of the receiving State. It does not mean that he must have a right to do what he likes in fact; he is under an obligation to respect the laws of the receiving State. In respect of this situation, Article 41'(1) provided that "without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a responsibility not to interfere in the internal affairs of other State".[5]

In case a diplomat acts and behaves otherwise, and disturbs the internal order, of the State, the latter will certainly request his recall, or send him back at once. The basic principle is that a diplomat is completely immune from the local criminal jurisdiction. If such case: there will be two alternative courses to be pursued.

Firstly: although exemption from the jurisdiction of the receiving State, a diplomat remains subject to the jurisdiction of his own State in the classic judgment of remains subject to the jurisdiction of his own State in the case of *"Dickinson v. Del Solar, 1930, 1KB, 376."*

"Diplomatic privilege does not import immunity from legal responsibility, but only exemption from local jurisdiction:"

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1 www.en.wikipendia.org/wiki/Diplomatic-immunity.
2 US V Tehran, ICJ Report, 1980.
3 Article- 31(1) of the Vienna Convention on Diplomatic Relations, 1961.
4 Abdul Ghsfur Hamid @ U Khin Maung Sein, Public International Law: A practical Approach. 3rd edition, 2011, p-170.
5 Article- 41(1) of the Vienna Convention on Diplomatic Relations, 1961.

In this regard, the Vienna Convention expresses, in Article 31(4), as follows: "The immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt from the jurisdiction of the sending State".

Therefore, it is possible for an aggrieved plaintiff to carry the battle to it forum where the defendant cannot claim any special status, that is, a court of the sending State: But there may be many practical and often some legal, obstacles.

The second alternative is some common. The aggrieved citizen first writes to the diplomat concerned. If he fails to obtain redress, the citizen may then address himself to the head of the mission. At that stage he may also try to persuade the foreign ministry of his country to take up the matter. Normally the latter will be reluctant to intervene on the ground that their action may be harmful to friendly relations between the two States. If the ministry is prepared to pursue: the claim it may either seek to obtain an admission of Liability and payment of any sums due, or waiver of the Immunity so that the case may be settled by the competent court.[1]

If the negotiations through diplomatic channels do not succeed, the receiving State may possibly declare the diplomat persona non grata.

Immunity from Civil and Administrative Jurisdiction

According to Article 31(1) of the Vienna Convention, a diplomatic agent shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of

(a) a real action relating to private immovable property situated in the territory of the receiving State; unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

In Article 31(2), a diplomatic agent is not obliged to give evidence as a witness.

Under Article 31(3), no measures of execution may be taken in respect of a diplomatic agent except is the cases coming under sub-paragraphs(a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence."[2]

Therefore, it is clear that with regard to civil and administrative jurisdiction, diplomatic agents can not enjoy absolute immunity. Their immunity is subject to three limited exceptions.

In principle, a diplomatic agent is employed for that purpose and no other. To safeguard this principle the Vienna Convention expressly provides that:

"A diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity".[3]

It is clear that such professional and commercial activities are entirely inconsistent with the position of a diplomatic agent and consequently he would be declared persona non grata.

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[1] Oppenheim, "International Law", Vol .I, 8th edition, 1955, p-790.
[2] Article- 31of the Vienna Convention on Diplomatic Relations, 1961.
[3] Article- 42 of the Vienna Convention on Diplomatic Relations, 1961.

Therefore, it is a surprise to incorporate exception(c) in Article 31. "The explanation is that the prohibition of professional and commercial activities, in Article 42 extends only to diplomats and not to other staff or their respective families. Thus the family of a diplomat would have complete exemption in respect of their professional or commercial activities if this exception were not included.

The occasions for civil action against a diplomat may arise in a number of circumstances such as no-payment of debts or tradesman's bills for articles supplied for his consumption, non-payment of rent or violation of the conditions of a lease, recovery or hire charges or repair bills and compensation for loss or injury caused to a person or property due to motor car accidents. Since these types of case, will not be covered by the exceptions mentioned in the Vienna Convention, no suit can be maintained in local courts in respect of such claims.

The usual procedure which is adopted is for the aggrieved person to approach the Protocol Division of the Ministry of Foreign Affairs with the full particulars of the claims. If the Ministry is satisfied with the genuineness of the claim, it will approach the head of the mission of the diplomat concerned for settlement of the claim any diplomatic agent who is anxious to maintain the reputation of his country will not be slow to respond to such a request. In extreme cases, however, when a diplomat persists in abuse of his position by non-payment of his debts or just dues and by taking shelter behind his diplomatic immunity, the government of the receiving state may request his recall.[1]

A diplomatic agent cannot be compelled to appear as a witness and to give testimony in respect of any proceeding before the courts, civil or criminal, or the administrative tribunals of the receiving state. But if he seeks the protection of the local laws, for example, by invoking the jurisdiction of the court, he must comply with the requirements thereof. Otherwise, his action would be dismissed for want of evidence.

Immunity from Taxation

Fiscal immunities of a diplomatic mission may be divided into four branches. The first relates to the exemption from dues and taxes in respect of premises. The sending state and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased: other than such as represent payment for specific services rendered under Article 23.[2]

The second deals with the fees and charges levied by a mission for venous services such as granting of visas, authentication of documents and other notarial acts. The universally accepted rule is that all such fees and charges are exempt from local taxation since they belong to the sending state itself and on the principle that par *in parem non habet imperium*. This rule is recognized in Article 28.[3]

The third one concerns with personal emoluments of a diplomatic agent according to Article 34. In this Article, a diplomatic agent shall be exempt from all dues-and taxes, personal or real national, regional or municipal, except;

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

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1 Oppenheim, "International Law", Vol .I, 8th edition, 1955, p-798.
2 Article 23 of the Vienna Convention on Diplomatic Relations, 1961.
3 Article 30 of the Vienna Convention on Diplomatic Relations, 1961.

(c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;

(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Other Privileges for Diplomatic Agents

The mission and its head shall, have the right to use the flag and emblem of the sending state on the premises of the mission, including the residence of the head of the mission and on his means of transport.

A diplomatic agent shall, with respect to services rendered for the sending state be exempt from social security provisions which may be in force in the receiving state. The receiving state shall exempt diplomatic agents from all personal services, from all public service of any kind whatever, and from military obligations such as those connected with requisitioning, military contributions and billeting.[1]

Diplomatic immunity is a long-standing principle of international law which provides that diplomats and certain other foreign government officials are not subject to the jurisdiction of local courts and other authorities. The privileges and immunities granted to diplomats are not meant to benefit individuals personally, but to ensure that diplomatic personnel are able to perform their duties with freedom, independence and security without interference from the host government.

By the time of the Congress of Westphalia in 1648, permanent legations were accepted as the normal way of conducting international business among sovereign States, and over the next century detailed rules emerged in relation to the immunity of ambassadors and their accompanying families and staff from civil as well as criminal proceedings, the inviolability of their embassy premises and their exemption from customs duties and from taxes. These rules of customary international law were described in detail by early writers such as Grotius (1625), Bynkershoek (1721) and Vattel (1758). The first international instrument to codify any aspect of diplomatic law was the Regulation adopted by the Congress of Vienna in 1815.

The Vienna Convention provides a complete framework for the establishment, maintenance and termination of diplomatic relations on a basis of consent between independent sovereign States. It specifies the functions of diplomatic missions, the formal rules regulating appointments, declarations of persona non grata of a diplomat who has in some way given offence, and precedence among heads of mission. It sets out the special rules privileges and immunities which enable diplomatic missions to act without fear of coercion or harassment through enforcement of local laws and to communicate securely with their sending Governments.[2]

Article 22 confirms the inviolability of mission premises barring any right of entry by law enforcement officers of the receiving State and imposing on the receiving State a special duty to protect the premises against intrusion, damage, disturbance of the peace or

[1] Oppenheim, "International Law", Vol .I, 8th edition, 1955, p-802.

[2] Eileen Denza, Vienna Convention on Diplomatic Relations, United Nations Audiovisual Library of International Law, 2009, United Nations, p-1.

infringement of dignity. Even in response to abuse of this inviolability or emergency, the premises may not be entered without the consent of the head of mission. Article 24 ensures the inviolability of mission archives and documents even outside mission premises so that the receiving State may not seize or inspect them or permit their use in legal proceedings.

Article 27 guarantees free communication between a mission and it's sending State by all appropriate means, and ensures that the diplomatic bag carrying such communications may not be opened or detained even on suspicion of abuse. Given the purposes of diplomatic missions, secure communication for information and instructions is probably the most essential of all immunities.

Article 29 provides inviolability for the person of diplomats and Article 31 establishes their immunity from civil and criminal jurisdiction with precise exceptions to immunity from civil jurisdiction where previous State practice had varied. Immunity from jurisdiction like other immunities and privileges may be waived by the sending State, and Article 32 specifies the rules on waiver. Article 34 sets out the tax exemption accorded to diplomats along with detailed exceptions in respect of matters unrelated to their official duties or to ordinary life in the receiving State. Article 36 provides for exemption from customs duties on diplomatic imports throughout a diplomat's posting.

Article 37 sets out a complex code for the treatment of families and junior staff, whereas pointing out above previous practice was varied and negotiation of a compromise difficult. Article 38 bars from all privileges and immunities, except for immunity for their official acts, nationals and permanent residents of the receiving State.

The Convention has established itself as a cornerstone of modern international relations. Despite the need for implementing national legislation in a number of States, it came into force following 22 ratifications only three years from its adoption and almost all States in the world are now parties. The Convention has proved resilient to attack on its fundamental principles. This came during the 1980s from those alarmed at the opportunities it provided for abuse as demonstrated in particular when following the murder of a policewoman by shooting from the premises of the Libyan diplomatic mission in London the United Kingdom broke diplomatic relations and all those within the mission left England under the shield of immunity[1].

The International Court upheld that concerning Armed Activities on the Territory of the Congo,Congolese soldiers had occupied the Ugandan diplomatic mission in Kinshasa and violated Article 29 of the Convention[2].

Diplomatic immunity is a form of legal immunity that ensures diplomats are given safe passage and are considered not susceptible to lawsuit or prosecution under the host country's laws, although they may still be expelled. Diplomatic immunity was developed to allow for the maintenance of government relations, including during periods of difficulties and armed conflict. When receiving diplomats, who formally represent the sovereign, the receiving head of state grants certain privileges and immunities to ensure they may effectively carry out their duties, on the understanding that these are provided on a reciprocal basis.[3]

Originally, these privileges and immunities were granted on a bilateral, ad hoc basis, which led to misunderstandings and conflict, pressure on weaker states, and an inability for

[1] Eileen Denza, Vienna Convention on Diplomatic Relations, United Nations Audiovisual Library of International Law, 2009, United Nations, p-4.
[2] Democratic Republic of the Congo v. Uganda, ICJ. Reports, 2005.
[3] www.en.wikipedia.org/wiki/Diplomatic_immunity

other states to judge which party was at fault. An international agreement known as the Vienna Convention codified the rules and agreements, providing standards and privileges to all states.[1]

It is possible for the official's home country to waive immunity; this tends to happen only when the individual has committed a serious crime, unconnected with their diplomatic role (as opposed to, for example, allegations of spying), or has witnessed such a crime. However, many countries refuse to waive immunity as a matter of course; individuals have no authority to waive their own immunity (except perhaps in cases of defection). Alternatively, the home country may prosecute the individual. If the immunity is waived by a government so that a diplomat (or their family members) can be prosecuted, it must be because there is a case to answer and it is in the public interest to prosecute them. For instance, in 2002, a Colombian diplomat in London was prosecuted for manslaughter, once diplomatic immunity was waived by the Colombian government.[2]

In reality, most diplomats are representatives of nations with a tradition of professional civil service, and are expected to obey regulations governing their behavior and they suffer severe disciplinary action if they flout local laws. In many nations, a professional diplomat's career may be compromised if they (or members of their family) disobey the local authorities or cause serious embarrassment, and such cases are, at any rate, a violation of the spirit of the Vienna Conventions.

The Vienna Convention is explicit that "without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State." Nevertheless, on some occasions, diplomatic immunity leads to some unfortunate results; protected diplomats have violated laws (including those that would be violations at home as well) of the host country and that country has been essentially limited to informing the diplomat's nation that the diplomat is no longer welcome *persona non-grata*. Diplomatic agents are not, however, exempt from the jurisdiction of their home state, and hence prosecution may be undertaken by the sending state. For minor violations of the law, the sending state may impose administrative procedures specific to the Foreign Service or Diplomatic Mission.[3]

The violation of the law by diplomats has included espionage, smuggling, child custody law violations, money laundering, tax evasion, making terrorist threats, slavery, preying on children over the Internet for sex, and murder.

Conclusion

Rules regulating the various aspects of diplomatic relations constitute one of the earliest expressions of international law. Diplomacy as a method of communication between various parties, including negotiations between recognized agents, is an ancient institution and international legal provisions governing its manifestations are the result of centuries of state practice. The special privileges and immunities related to diplomatic agents as a consequence of sovereign immunity and the independence and equality of states, and partly as an essential requirement of an international system.

It can be seen that the law of diplomatic immunities is one of the most important areas of international law according to the decisions of ICJ in the above leading cases.

[1] www.en.wikipedia.org/wiki/Diplomatic_immunity
[2] www.en.wikipedia.org/wiki/Diplomatic_immunity
[3] www.en.wikipedia.org/wiki/Diplomatic_immunity

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Basic Facts about the Contract Law

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Abstract

Contract law is to make and enforce agreements. A contract is an agreement that a party can enforce before the court when an agreement has been broken. An agreement becomes a promise when a proposal is accepted. A contract is constituted by acceptance of a proposal. In order to be valid contract, the parties in the contract must apply the provisions of essential points of contract law. There are two distinct parts to constitute a contract. First of all, there must be an agreement and secondly, such an agreement must be enforceable by law.

Key words: Agreement, A Valid Contract

Introduction

According to Section 2 (h) of the Contract Act states " (an agreement enforceable by law is a contract)" a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable. In order to a valid contract, an agreement shall consist of essential elements such as proposal, acceptance, consideration and free consent. In proposal, an offer may be general or specific. The party makes a proposal with a view to get the assent of another. When communication of acceptance becomes complete, an agreement becomes a promise. There are three periods in a consideration such as past, present and future consideration. In a valid contract, the agreement must be made with free consent of the parties. This paper highlights the essential facts in a valid contract.

There are essential elements of a valid contract as follows:

Proposal

Section 2 (a) of the Contract Act provides that 'by the time one party shows to another his assent to do or to abstain from doing anything, with intention of getting the willingness to such act or abstinence, it is called a proposal.'[4] A proposal for an agreement that another party may accept upon receipt to form a legally binding contract. In addition, an offer that specifically details exactly what will be provided.

Proposal may be made to specific and general. In *Taylor v Laird* (1856) the master of a ship gave up his command during a voyage, but helped to sail the ship home. The plaintiff could not recover. Because the defendant have never had the option of accepting or refusing the service, since the plaintiff's offer being uncommunication. A valid offer may be communicated in any manner whatsoever, ie in writing, in words, or by conduct.[5] So, communication is an important fact to become a valid contract.

Under the section 4 of the Contract Act, communication of a proposal is complete when it knows the person to whom it is made e.g, U Ba proposes to sell a car to Ko Mya at a certain price by letter. The communication of the proposal is complete when Ko Mya receives the letter.

As against the proposer, when it is put in a course of transmission, so as to be out of the power of the acceptor, communication of an acceptance is complete and when it comes to the

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[2] U, Lecturer, Department of Law, Pyay University.
[3] U, Lecturer, Department of Law, Pyay University.
[4] The Burma Code, Volume- IX, the Contract Act, P-11.
[5] Suff, Marnah, Essential Contract Law, Reprinted 1997, P-3.

knowledge of the proposer, as against the acceptor in accordance with the section 4 of the Contract Act.

For example, Mg Mg accepts proposal of Hla Hla by a letter sent by post. The communication of the acceptance is complete (a) as against Hla Hla, when the letter is posted, and (b) as against Mg Mg, when the letter is received by Hla Hla.[1]

An invitation to treat is an indication that the inviter is willing to enter into negotiations but is not yet prepared to be bound, eg in Gibson v Manchester City Council (1979) the council's letter stated 'we may prepare to sell you'. A response to invitation to treat does not lead to an agreement; the response itself may be an offer.[2]

The following cases are invitations to treat, eg display of goods for sale, 'in Pharmaceutical Society of GB v Boots Ltd (1953) the Court of Appeal held that in a self-service shop, the sale takes place at the checkout counter, when the assistant accepts the customers' offer to buy the goods. The goods on the shelves are mere invitations to treat, that is an invitation to the customer to make an offer for the goods',[3] auctions, tenders, subject to contract, sale of land 'in negotiations for the sale of land the court will examine the wording used carefully.

Electronic contracts as a paper contract

Online contracts have become common as legally valid as a paper contract.

The Indian Contract Act (1872) provided E-contracts. In addition, some sections in Information Technology Act (2000) also adopted for validity of online contract.

In some U.S. states, email exchanges have become binding contracts. New York courts in 2016 held that the principles of real estate contracts to apply equally to electronic communications and electronic signatures, so long as "its contents and subscription meet all requirements of the governing statute" and pursuant to the Electronic Signatures and Records Act (ESRA).[4]

Acceptance

The section 2 (b) of the Contract Act provides that 'When the person to whom the proposal is made signifies his assent thereto, …….., becomes a promise',[5] in acceptance, there must be an unqualified acceptance of all terms of the offer. A qualified acceptance, or an acceptance with a variation or condition is not acceptance at all. An offer once refused is dead and cannot be accepted unless renewed under section 7(1) of the Contract Act.

If the proposer does not prescribe any specific method, the acceptor has to follow usual and reasonable mode under section 7 (2) of the Contract Act. The proposer cannot impose upon the acceptor the penalty that in the event of his silence, he would be deemed to have accepted. Acceptance must be sent to the person who made the offer. As soon as possible it is accepted, it is deemed to be known and understood all the terms of the proposal.

In general, acceptance means communicated acceptance. But the proposer may indicate a manner in which acceptance should be communicated or he may indicate a manner in which acceptance should be communicated or he may invite performance without communication of acceptance under section 8 of the Contract Act. An act done by a person in ignorance of offer does not amount to performance of the condition of the proposal.

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[1] The Burma Code, Volume- IX, the Contract Act, P-12.
[2] Suff, Marnah, Essential Contract Law, Reprinted 1997, P-3.
[3] Ibid, P- 4.
[4] https://www.lawteacher.net/modules/contract-law/
[5] The Burma Code, Volume- IX, the Contract Act, P-11.

Therefore acceptance may be made by;

(a) Oral,

(b) Written and

(c) Conduct or performance of parties.

An offeror may not stipulate that the silence of the offeree will amount to an acceptance.

In Felthouse v Bindley (1862) the plaintiff wrote to his nephew offering to buy a horse, and adding, 'If I hear no more…… I will take it that the horse is mine'. The nephew did not reply to this letter, but told the defendant, an auctioneer who was to sell his stock, that this horse was to be kept out of the sale. It was assumed that there was no contract. Acceptance had not been communicated to the offeror. It has been suggested that this does not mean that silence can never amount to acceptance , eg if in Felthouse v Bindley the offeree had relied on the offeror's statement that he needed not communicate his acceptance, the court could interpret that the need for acceptance had been waived by the offeror.[1]

Accepting another party's offer makes a contract complete. The party that accepts the offer must accept it on the same terms as the terms of the original offer. They must make sure that the other side knows they accept it. If they propose different terms, there's no contract. Instead, their terms are a counteroffer. It's then up to the first party to accept the counteroffer or propose another counteroffer.[2]

Consideration

According to section 2 (d) of the Contract Act, there are three different parts as follows: (a) to constitute a consideration for promise there must be a request on the part of the promisor, it is called "at the desire if the promisor in the first place ". An act done voluntarily without the request from the promisor does not constitute a consideration. Secondly, (b) the promisee or any other person; finally (c) a consideration may be past, present and future. The words "has done or abstained from doing" known as "Past Consideration", the words "does or abstains from doing" known as Present Consideration" and the words "promises to do or to abstain from doing" known as " Future Consideration".

A valid contract requires each party to give something up. That's called consideration. For example, in the case of an employment contract, one party agrees to give up money, and the other party agrees to give up labor. A contract is a two-way street with each party giving up something to get something else that they want.

The law on consideration

The classic definition set down by Lush J in Currie v Misa (1875) is as follows:

It is a feature of common law systems of contract, in contrast to civilian systems, that (leaving aside a formal written document which in England is referred to as a deed) an agreement or promise is only binding as a contract if it is supported by consideration. This means that something must be given in exchange for the promise. So take the following three examples:

Example 1

A promises B £1000. B cannot enforce that promise because B has provided no consideration (nothing in exchange) for it.

[1] Suff, Marnah, Essential Contract Law, Reprinted 1997, P-9.
[2] https://legalcareerpath.com/what-is-contract-law/.

Example 2

A promises B £10,000. B relies on that promise to buy a car. B cannot enforce that promise because B has provided no consideration (nothing in exchange) for it.

Example 3

A promises B £20,000 in return for B's promise to transfer his car to A. B makes that promise. B's promise is consideration for A's promise and B can therefore enforce A's promise.

In Myanmar, An agreement without consideration is void except section 25(1), section 25(2), section 25(3), section 28.

However, English law not only insists on consideration but requires it in situations where one might have thought it was unnecessary. In other words, although this has been criticized by the English Law Revision Committee in 1937, the English approach to the doctrine of consideration is a rigid one that allows few exceptions. So it is that first, past consideration is not good consideration; and secondly, part payment of a debt owed is not good consideration for a promise to forgo the rest of the debt. In both respects, Myanmar law differs from that in England.

(a) Past consideration

So in *Re McArdle* [1951] Ch 669, A promised Mrs McArdle £488 for work that Mrs McArdle had already done to A's house. Mrs McArdle could not enforce that promise because the consideration for it was past. Jenkins LJ said, at 678, '[T]he true position was that, as the work had all been done and nothing remained to be done by Mrs Marjorie McArdle at all, the consideration was a wholly past consideration, and, therefore, the …agreement for the repayment to her of the £488 … was *nudum pactum*, a promise with no consideration to support it.'

Other leading cases applying the same rule include *Eastwood v Kenyon* (1840) 11 Ad 7 E 438 and *Roscorla v Thomas* (1842) 3 QB 234.

In contrast in Myanmar, s 25 of the 1872 Act lays down that 'An agreement made without consideration is void unless…(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promiser or something which the promiser was legally compellable to do…'

Two illustrations are given in the Act applying this.

'A finds B's purse and gives it to him. B promises to give A Rs.50. This is a contract.'

'A supports B's infant son. B promises to pay A's expenses in so doing [ie for having done so]. This is a contract.'

One might say that the English law is the more logical in that, if a gratuitous promise in general is not a contract, why should these examples be any different? On the other hand, there seems an added normative reason why such a promise should be enforceable – because the promiser has already been benefited by the promisee - and I would suspect that most people would prefer the approach taken in Myanmar. Certainly that was the preferred view of the Law Revision Committee in 1937 but the recommendations of that body have never been implemented in England and Wales.

(b) Part payment of a debt

In English law, the leading case is *Foakes v Beer* (1884) 9 App Cas 605. In August 1875, the defendant Mrs Beer, had obtained a court judgment against Dr Foakes for £2090 19s.

Mrs Beer was entitled to interest on that sum until paid off. Dr Foakes asked for time to pay off the money and Mrs Beer agreed that, if he paid £500 immediately and £150 on two occasions each year until the whole sum had been paid, then she 'would not take any proceedings whatever on the said judgment'. Dr Foakes paid off the debt in accordance with the terms of that agreement. Mrs Beer then brought an action claiming the interest on the debt. Assuming that the true construction of the agreement was that Mrs Beer had promised to forgo her interest on the debt, the House of Lords nevertheless held that that promise was not binding on her because it was not supported by consideration. She was therefore entitled to the interest on the debt.

A more recent case applying the same rule is *Re Selectmove Ltd* [1995] 1 WLR 474.

In contrast, in Myanmar s 63 of the 1872 Act makes clear that a waiver of the performance owed is binding without the need for fresh consideration. It reads: 'Every promisee may dispense with or remit, wholly or in part; the performance of the promise made to him … or may accept instead of it any satisfaction which he thinks fit.'

Illustration (b) given in the Act precisely applies this to part payment of a debt:

'A owes B 5,000Kyats. A pays it to B, and B accepts, of the whole debt, in satisfaction 2,000 kyats was paid at the time and the at which the 5,000 kyats were payable. The whole debt is discharged.'

Again, the English law has been much criticised. It may be logical – as B is already entitled to the full debt, it may be argued that B is not receiving any new consideration in exchange for the waiver – but, on the other hand, one can also argue that B has the assurance that A is at least paying off some part of the debt owed and that might not otherwise be the case if the full original sum was insisted upon. Again therefore this is an example of the operation of the doctrine of consideration that has been criticised in England and Wales and reform was recommended by the Law Revision Committee. Having said that, there may be dangers of coercion or duress being put on the creditor by the debtor to accept a lesser sum and, subject to development by the courts to embrace the English concept of economic duress, it is not clear to me (and I discuss this further below) that the Myanmar concept of coercion (in s 15 of the 1872 Act) is sufficiently wide to cover the types of illegitimate coercion that might be brought to bear.[1]

Free consent

Section 13 of the Contract Act states that '…….. they agree upon the same thing in the same sense.'[2] In addition, section 14 of Contract Act also provides as follows, 'Consent is said to be free when it is not caused by –

(1) coercion, as defined in section 15, or

(2) undue influence, as defined in section 16, or

(3) fraud, as defined in section 18, or

(4) misrepresentation, as defined in section 17, or

(5) mistake, subject to the provisions of sections 20, 21 and 22.[3]

To establish coercion, there must be

[1] Professor Andrew Burrows QC, FBA, DCL, UNDERSTANDING THE LAW OF CONTRACT IN MYANMAR, P 3-5.
[2] The Burma Code, Volume- IX, the Contract Act, P-14.
[3] The Burma Code, Volume- IX, the Contract Act, P-14.

(1) commit or threat to commit an act forbidden by the Penal Code (or)

(2) there must be an unlawful detention (or)

(3) threat to unlawful detain any property and it must be proved that the consent of the promiser was caused by such conduct under the section 15 of the Contract Act.

It is not essential whether the Penal Code is or is not in force where the coercion is employed.

Illustration

Mya Gyi, on board a Malaysia Ship on the High Seas, caused Mg Hla to enter into an agreement by an act amounting to criminal intimidation under the Penal Code. Mya Gyi afterwards sued Mg Hla for breach of contract at Naypyitaw. Mya Gyi had employed coercion although his act was not an offence by the law of Malaysia, and although Section 506 of the Penal Code was not in force at the time when or where the act was done.

Section 15(1) states the elements of undue influence:

(1) one of the parties must be in a position to dominate the will of the other and

(2) he or she must use that position to obtain an unfair advantage.

Section 15 (2) shows the different forms of influence:

Undue influence is ordinarily presumed in the following relationships:

(1) parent and child

(2) guardian and ward

(3) trustee and beneficiary

(4) solicitor and client

(5) doctor and patient

(6) spiritual adviser and disciple.

But the relation of master and servant, creditor and debtor, husband and wife does not itself raise a presumption of undue influence.

The presumption of undue influence does not apply to a gift by parent to their child.

In the case of Daw Maw Nwee and seven others Vs. L. Ahnin (a) U Par and three others, 1962 B. L. R. (CC), 232., it was contended that the applallants Daw Maw Nwee, wife of the deceased and U Ah Kee and U Ah Lone, who were sons of the deceased used undue influence to make a contract of gift and so that the contract was void.

It was held that even though the deceased U Ah Choine was ill, it could not be considered to be influenced by his wife and sons since he was to be able to bring himself up until to be a rich man. It was also held that since there was no position of influence, it was not necessary to consider whether undue influence was used or not.

Sub- section 3 of the Section 16 throws the burden of proving that the contract was not induced by undue influence on the person who is in a position to dominate the will of the other.

Illustration

Gyi Daw, being in debt to Daw Nu, the money lender of her town, contracts a fresh loan on terms which appear to be unconscionable. It lies on Daw Nu to prove that the contract was not induced by undue influence.

Section 19(a) states an agreement is a voidable contract when consent to an agreement is caused by undue influence.[1]

In fraud, section 17 of the Contract Act requires:-

(1) either an intent to deceive or to induce another to enter into a contract by a false suggestion knowing it to be false or

(2) the active concealment of a fact by one having knowledge or belief of the fact which is his duty to disclose.

Fraud is committed whether one man causes another to act on a false belief by a representation which he does not himself believe to be true.

Mere silence is not fraud unless there is (a) a duty to speak or (b) unless it is equivalent to speech.

There is no general duty to disclose facts which are or might be equally within the knowledge of both parties, but there are special duties of disclosure such as Section 55 of the Transfer of Property Act, 1882.

When consent to an agreement was caused by fraud, the agreement was a contract voidable at the option of the party whose consent was so caused under section 19 of the Contract Act.

Examples

(1) Aye Ko, intending to deceive Bo Bo, false representations that 500 tons of rice are made annually at Aye Ko's factory and thereby induces Bo Bo to buy the factory. The contract is voidable at the option of Bo Bo.

According to section 18 of the Contract Act, misrepresentation is of three kinds as follows:-

(1) an unwarranted positive assertion of what is not true even though he might believe it to be true; or

(2) committing a breach of duty which misleads another to his prejudice or to the prejudice of anyone claiming under him; or

(3) causing a party to the contract to make a mistake as to the subject matter of the agreement.

Section 18 (1) seems to mean that innocent misrepresentation does not give cause for avoiding a contract unless the representation is made without any reasonable ground. An assertion cannot be warranted if it is based upon it were hearsay.

Section 18 (2) prescribes the misrepresentation which includes

(1) a representor owes a duty to the representee in respect of the statement,

(2) the representor makes a statement negligently or fraudulently or innocently,

(3) the representee is misled to his prejudice and

(4) the representor gains an advantage.

[1] The Burma Code, Volume- IX, the Contract Act, P-17.

In the case of Oceanic Steam navigation Co. Vs. Soonderdas Dhurumsey, the defendants in Bombay chartered a ship wholly unknown to them from the plaintiffs. The description of the charter- party represented that being not more than 2800 tonnage register. It turned out that the registered tonnage was 3045 tons. The defendants refused to accept the ship in fulfillment of the charter- party and it was held that they were entitled to avoid the charter-party by reason of the erroneous statement as to tonnage.

As regards to the misrepresentation, the following points must be noted:-

(1) there must be a false representation;

(2) the representation must be a representation of a fact; a mere expression of opinion will not invalidate a contract;

(3) the representation must be made with the intention that it should be acted upon the other party or addressed to the party misled;

(4) the representation must be an including cause of the contract.

According to the provision of Section 19, when consent to an agreement is caused by misrepresentation, the agreement is a voidable contract at the option of the party whose consent was caused.

Therefore, the person whose consent was caused by misrepresentation may insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the misrepresentation made had been true.

Exception of the Section 19 provides that if such consent was so caused by misrepresentation, the contract nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

In order to render a contract void on the ground of mistake, there should exist following three conditions:-

(a) both parties to the contract must be under a mistake; (i. e. mutual mistake)

(b) mistake should be one of fact and not of law;

(c) mistake should be essential to the agreement under the sections 20, 21 and 22 of the Contract Act.

Free Consent is one of the essential facts to become a valid contract. In the explanation of coercion, it is not necessary that Penal Code is not in force in the place where the coercion is employed.

Conclusion

Contract law aims to provide an effective legal framework for contracting parties to resolve their disputes and regulate their contractual obligations. In proposal, when an offer is addressed to a definite person, it is called specific. General offer may be television, radio and social media etc. The acceptance must be absolute and unqualified all the terms of the proposal. The parties of a contract must have consented freely and voluntarily, and must possess the legal capacity to make a contract. Any person with sound mind and over the age of 18 in Myanmar shall be deemed to possess the legal capacity to contract.

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