

## Abstract

“Analysis of Problems Relation to the Article 9’s Application and Interpretation of the Unfair Contract Terms Act, B.E. 2540”.

The Article 9 of the unfair contract terms Act, B.E. 2540 is the provision relating to an injured person’s consents. It is relevance to the principle of “no injury is done to one who consents”; or the principle of “Volenti non fit injuria”. It is the general law that the Court accepts the defendant’s justification to refuse the tort, himself, by a consent of an injured person.

However, an improvement the principle of Volenti non fit injuria has provided 3 categories of explanation, as follows:

First category, the lawyers show notion that the principle of Volenti non fit injuria showed be adjusted as well as the principle of the German Law.

The lawyers have considered the Volenti non fit injuria will make some composition of the law of tort waived, therefore, the wrongful action according with the consent becomes a legal one, not a tortious act.

And because of an informed consent of an injured person is allowed for waiving the illegal act. It should be considered that the objective of consent of an injured person, used for alleviating the law to protect any specific issue. If it aims is to protect the injured persons, themselves. They could give the consent to that action, i.e. in the case for making the consent for the tort of property right, etc. But, the purpose of the law is not only to protect the injured person himself but also to protect the community or other people as well. The only consent of the injured one could not alleviating the unlawful action in order to promote a legal action. In addition, if any consent established to protect the public order and public moral of community, it also can not be accepted.

Second category, the other lawyers have an opinion that the principle of Volenti non fit injuria should be improved as the Volenti non fit injuria in French law.

The counsellor in this group had an opinion that *Volenti non fit injuria* will cause the disappearance of composition of the liability of tort for damage. When there is no damage, personal who gives a consent, do not have the right to claim for a compensation. Regardless, the consent of the injured person will affect against the public order or good public moral in the community. One who gives a consent does not pertain the right to claim for compensation, without considering the consent of an injured person will or will not act against the public order or public moral of the people. Only the person who gives a consent can understand the effects occurs following the consent. However, the study of explanation in text of the French law that the French lawyers explain in accordance with adjusted principle of the consent of an injured person; that is not the tort of court. But it is carefully used, not in general. That is in the cases of boxing under the rule, car racing and sport racing, by the danger pertaining, itself and only the tradition allowed for the accepted rule.

Third category, the group who considers that the principle *Volenti non fit injuria* should be adjusted as the *Volenti non fit injuria* in the English law.

This opinion is accepted to use by Thai's Court in consideration of the lawsuit. By the law court had considered that Principle of *Volenti non fit injuria* did not cause the missing of some fault in the law of in tort. Although, principle *Volenti non fit injuria* will be an issue raised by defendant to avoid tortious liability in compensation for the damage to the injured person. This objection is allowed by the law court to use in each case, regardless, considering the public peace and public moral of community. This is opposite to the innocent consent of the injured person in criminal case.

From the Thai court's judicial decision, the adaptation of consent as unwrongful act, it is widely adjusted by unlimitation. For example, the English court only in some case had adjusted principle of consent as untort, especially in same fact occurred. Moreover, the change of social situation promote the more authorized person in economics than the injured person can partially use as an compulsion to give a consent of tort. There are the rules and limited boundary of using consent of an injured person to clearly ordain in the "Unfair Contract terms Act 1997, which are brought as the precursor of statutory provision of the Article 9 Act as Unfair Contract terms, B.E. 2540. In order to limit the boundary of the

use the principle consent of an injured person corresponding to the rule, i.e. the consent for damages in the civil wrong, should consider not to oppose to the public order or good moral of people. Such in accordance to the consent of an injured person in the German law, as the main form for the bill of fort law in Thai legislation.

However, the issue of problem is : are there any overlapping between the adjusted content of the Article 9 and the Article 420, civil and commercial law?

From studying, the overlapping between the 2 Articles is not observed. Since the composition of liability in fort appearing in Article 420, the stated "the illegal action" could be widely interpreted. Not only means that the fault to status but also the wrongful action that they are unwritten law. These faults are an act opposing the public order or good moral of people in the Article 9.

Therefore the detail in Article 9 and 420 can be interpreted in the same direction, i.e. the consent of an injured person if is illegal to legislation, contrary to public order or good moral of the people, can not raise as the defence for refusing liability in case of fort.

The other issue of problem is, whether or not the Article 9 will delete the principle of *Volenti non fit injuria*, previously containing in civil law of court.

Studying the details of the Article 9, the principle *Volenti non fit injuria* does not abolish issue. But this Article 9 is the principle of the civil law using for adjustment the principle *Volenti non fit injuria* of civil law of the court for properly use as the principle of the Article 240.

Additionally, problem relating a voluntary quarrel that has adjusted for using the consent of an injured person is not a fort. Therefore, a claim for damage can not perform. The study has shown that, the case is the principle *Ex turpi causa non oritur actio*, not the principle *Volenti non fit injuria*. Since a voluntary quarrel is a wrongful act and immoral, it is not a cause for the prosecution of claim court.