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Remedial Measures relating to Unfair Competition

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Abstract

Today's tough economic environment encourages the competitors to obtain and retain market share in the consumer market is more competitive than ever. This environment gives rise to claims that competitor has crossed the line from honest competition to unfair competition through the means of unfair trade practices. Most States have statutes that address for unfair competition. In most cases, (for unfair commercial practices) the first step is to seek injunctive relief. Most specific laws for unfair competition provide for special sanctions usually which take the form of civil and criminal measures. According to Article 10*ter* of the Paris Convention for the Protection of Industry Property, the countries of the Union undertake to assure to nationals of the other countries of the Union appropriate legal remedies to repress all the acts of unfair competition as referred to in Article 10*bis*. In the Competition Law of Myanmar, which has promulgated in 24 February, 2014, and the remedy for unfair competition are enacted in Chapter 11 and 12 of the Law. I would like to study the remedy for unfair competition of some countries and the Competition Law of Myanmar in this research.

Key words: remedy, civil sanction, injunction, damages, criminal sanction, administrative sanction.

Introduction

Article 10*ter* (2) of the Paris Convention for the Protection of Industry Property provided that the Parties of the Paris Union shall permit the federations and association representing interested industrialists, producers, or merchants to take action in the courts or before the administrative authorities to claim for protection. Remedy for unfair competition is given not only to the competitors who damaged from the unfair acts of other competitors but for the consumers who risk by the dishonest competitors. Normally, injunction may be awarded by the Court to the infringed person. However, some of the countries give the fine to the undertaking which engaged in the unfair commercial practices. There are three kinds of remedial measures relating to unfair competition. They are civil measure, criminal measure and the administrative measure which is give by the Competition Commission of the country.

Materials and Methods

- studying on relating ASEAN Regional Guidelines and National Laws of some ASEAN Countries
- remedies given under the Competition Law of Myanmar, 2015
- studying on cases and published articles

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Civil Measures relating to Unfair Competition

In legal measure, injunction and damages can be claimed by the plaintiff under the unfair competition law. Apart from the injunction and damages, another measure available in most countries is by means of publication of the judgment awarded against the defendant or order to rectification. Civil remedy under the most practices claim by the plaintiff are injunction, damages and the other forms; such as public disclosure or apology.

In practice, the most important sanction is injunctive relief, which can be final but frequently takes the form of a preliminary injunction. This sanction is preferred by the complainant, as the infringing act can be stopped, although the actual damage may then not be easy to prove. In most cases injunctions restrain, in that they order the defendant to refrain immediately from performing a certain act of unfair competition. Injunctions require neither proof of intent or bad faith nor proof of damage. Once a unfair act has been committed, the likelihood of continuation is usually presumed unless the defendant has formally undertake to refrain from further infringing acts.²

According to Article 9 of the Paris Convention, parties to the Paris Union shall be liable to all goods unlawfully bearing a trademark or trade name shall be seized on importation or prohibition of importation or seizure inside the country. If the legislation of the Parties neither enacted seized importation nor seizure nor prohibition, then, until such time as the legislation is modified accordingly, these measures shall be replaced by the actions and remedies available in such cases to national under the law of such country.

Interim orders or injunctions also provides in Chapter XI of the Model Law on Competition. It is states that sanctions could include: interim orders or injunctions and it may be permanent or long term orders to cease and desist.

Regarding to injunction Article 44 of the TRIPS Agreement stated that the judicial authorities shall have the authority to order a party to desist from an infringement.

According to Article 11 (2) of the Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market of the European Union (The Unfair Commercial Practices Directive) Member States are obliged to introduce an action for injunction, be it to put an end to existing unfair commercial

² *Protection against Unfair Competition*, International Bureau of the World Intellectual Property Organization, Geneva, 2004, p.70.

practices or to prevent their realization. Traders are strictly responsible for unfair commercial practices and have to cease them independent of fault and damage.

According to Chapter 6 of the Regional Guidelines of ASEAN, the AMSs provide, in their domestic competition law, for interim measures or injunctions to prevent the unfair commercial practices of the competitors.

The Competition Act of Singapore uses the injunction by way of alternative relief for the remedy of unfair competition. According to Section 86 (8) (a) of the Competition Act, the court may grant to the plaintiff who suffers loss or damage directly as a result of anti-competitive practices relief by way of injunction or declaration.

There is no provision for injunctive relief under the Vietnam Competition Law. Injunction for unfair competition infringement is not enacted in the Competition Law, 2015 of Myanmar. However, in the Chapter (11) of the Competition Law of Myanmar which states the administrative sanction and appeal provide relating to injunction.

Mostly, injunction will be given when the case is relating to Trademark infringement or consumer protection. When the consumer or the competitors damaged from the unfair competition acts of the other competitors, the court will reward the injunction order by the submission of the competitor.

Compensation for damages is available in every country. Unlike the application for an injunction, however, a common requirement determining compensation for damages is proof of fault or intent or at least negligence or recklessness on the part of defendant.³

Usually, damages as a result of unfair competition are purely monetary in character but under certain circumstances, for example following defamatory publications or infringements of publicity rights, similar compensation for moral or immaterial damages may be available in some countries. In any case, sufficient evidence of actual, and somehow assessable, financial loss must be furnished in order to substantiate the claim of damage.⁴

Under Article 45 of the TRIPS Agreement the judicial authorities shall have the authority to order the infringer to pay the right holder adequate to compensate for the injury the right holder has suffered because of an infringement of that person's

³ *Protection against Unfair Competition*, op.cit, p.71.

⁴ *Protection against Unfair Competition*, op.cit, p.72.

intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

Chapter XIII of the Model Law on Competition provides the action for damages to who suffer a loss during unfair competition. To afford a person, or the State on behalf of the person who, or an enterprise which, suffers loss or damages by an act or omission of any enterprise or individual in contravention of the provisions of the law, to be entitled to recover the amount of the loss or damage (including costs and interest) by legal action before the appropriate judicial authorities.

According to Article 13 of the Unfair Commercial Directive, Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive. From the context of Article 13 it is clear that Member States must provide for a procedure which allows the execution of an injunction order sentenced by the court. As this provision Member States can introduce collection actions for damages.

The Regional Guidelines of ASEAN provide for the action for damages in Provision 6.11: which AMSs will implement in their respective domestic law.

Section 8 of the Vietnam Law on Competition (VLC) is dealing with breaches of Laws on Competition. Article 117 of the VCL provided forms of penalties to be imposed for breaches of Laws on competition and measures for remedying consequences. Article 117 (1) stated that “for each practice in breach of the laws on competition, the individual or organization in breach must be subject to one of the following main forms of penalty:

- (a) A warning;
- (b) A fine.”

According to Section 86 (8) of the Competition Act of the Singapore; the Court may grant to the plaintiff in an action under subsection (1) all or any of the following reliefs:

- (a) Relief by way of injunction or declaration;
- (b) Damages; and
- (c) Such other relief as the court thinks fit.

Another sanction available in most countries is an order for rectification or for publication of the judgment awarded against the defendant. In some Asian countries, a specific form of rectification may involve of letter of apology in daily newspapers.

Another frequently used kind of rectification is corrective advertising. A rectification order is usually granted in cases of misleading or discrediting, but can also be appropriate for other methods of unfair advertising. In some countries publication of the judgment can also be ordered by the court at the expense of the defendant. Both sanctions may be claimed in addition to restraining injunctions, and in most countries apart from compensation for actual damage.⁵

Criminal Measures relating to Unfair Competition

Another sanction available in most countries is an order for rectification or for publication of the judgment awarded against the defendant. In some Asian countries, a specific form of rectification may involve of letter of apology in daily newspapers. Another frequently used kind of rectification is corrective advertising. A rectification order is usually granted in cases of misleading or discrediting, but can also be appropriate for other methods of unfair advertising. In some countries publication of the judgment can also be ordered by the court at the expense of the defendant. Both sanctions may be claimed in addition to restraining injunctions, and in most countries apart from compensation for actual damage.⁶

In some countries criminal sanctions are available against certain specific acts of unfair competition, frequently alongside civil sanctions, but sometimes exclusively, as in some cases of consumer protection. Such criminal sanctions are often provided for in respect of severe cases of unfair practice and misuse of trade secrets, but also in special areas of consumer protection like the omission or the misleading use of indications, particularly for beverages and food. Most criminal sanctions range from a fine, sometimes without any statutory maximum, to imprisonment, usually for up to two or three years. However, where civil remedies can be obtained quickly and effectively, criminal sanctions generally play a less important role in practice. One major principle of criminal law is that only a particular, precisely defined act is punishable, and so general provisions of unfair competition can only be backed by civil law sanctions.⁷

⁵ *Protection against Unfair Competition*, op.cit, p.73.

⁶ *Ibid.*

⁷ *Ibid*, p.78.

Chapter XI of the Model Law on Competition provides that sanction could include fines and imprisonment for in case of major violations involving flagrant and international breach of the law, or of an enforcement decree, by a natural person.

The power to impose fines on enterprises and individuals may be vested either in the Administering Authority, or in the judicial authority, or it may be divided between the two. Fines may also vary according to the type of infringement, or according to whether the infringement was committed willfully or negligently, or they may be expressed in terms of a specific figure and/or in terms of the minimum or reference salary, and/or they may be calculated in relation to the profits made as a result of the infringement.⁸

Regard to the criminal sanctions, the Regional Guidelines of ASEAN don't provide for detail facts. However, in 6.7.4.4 of the Regional Guidelines states "criminal sanctions" refers to fines or imprisonment as a result of application of criminal law of by a judicial authority.

There is no criminal sanction in the Vietnam Law on Competition and the Competition Act of Singapore. However, in the Competition Law of Myanmar, Chapter (12) provides the punishment for unfair competition acts. According to Ss 39 to 43, anyone who infringed the provisions of the Law punished for fine or imprisonment or both. The degree of fine and imprisonment may be changed from the infringement of the defendant.

Many laws provide for administrative sanctions, which may be additional to the civil and/or criminal sanctions already available under unfair competition law. Governmental intervention may be necessary to repress certain undesirable practices if competitors are unlikely to object to them and consumers are not in a position to take action. Thus coexistence of different types of sanction ensures that all legitimate interest receive the required protection. Administrative sanctions may, however, be restricted to some specific acts of unfair competition that are particularly prejudicial to the public interest.⁹

Article 119 of the VLC provided the authority to impose fines and deal with breaches of laws on competition. In April 2008, Vietnam Air Petrol Company

⁸ Model Law on Competition, UNCTAD Series on Issues in Competition Law and Policy, United Nations, 2007, p. 72.

⁹ *Protection against Unfair Competition*, op.cit, p.79.

(Vinapco), an affiliate of the State-owned company Vietnam Airlines, stopped supplying aircraft fuel to Jetstar Pacific Airline (JPA), causing a number of JPA flights to be delayed and cancelled.

After a preliminary investigation that showed the likelihood of an abuse by Vinapco, the Vietnam Competition Administration Department opened an official investigation and submitted a case report to the Vietnam Competition Council.

The decision related to a refusal to supply by Vietnam Air Petrol Company (Vinapco), which is the sole supplier of aviation fuel in Vietnam and a subsidiary of Vietnam Airlines- a state-owned airline company holding a dominant position in the domestic airlines market. Due to a dispute over fuel pumping fees in which Vinapco was alleged to discriminate against Pacific Airlines by charging that carrier higher fees than it charged Vietnam Airlines, Vinapco, on 1 April 2008, unilaterally suspended the supply of fuel to Pacific Airlines. This refusal resulted in the delaying of some of Pacific Airlines' flights, affecting more than 5000 passengers. The Prime Minister of Vietnam then ordered Vinapco to resume its supply to Pacific Airlines, and the VCAD, on its own initiative, decided to investigate the case under the Vietnam Competition Law. On 14 April 2009, the CCHC decided that Vinapco had abused its monopoly position in the aviation fuel market in Vietnam by unilaterally cancelling its supply agreement with Pacific Airlines without legitimate justification and by imposing disadvantageous conditions on its customer, which violated respectively Article 14.3 and 14.2 of the Competition Law. The Council fined Vinapco 3.37 billion Vietnamese dong (around 200,000 US dollars) and petitioned the Vietnamese government to sever the relationship between Vietnam Airlines and Vinapco and allow other companies to supply aviation fuel in the Vietnamese market.

The Competition Commission of Singapore (CCS) was established under the Competition Act on 1 January 2005 as a statutory body. Section 6 (1) of the Competition Act set out the following functions and duties of the CCS:

- (a) to maintain and enhance efficient market conduct and promote overall productivity, innovation and competitiveness of markets in Singapore;
- (b) to eliminate or control practices having adverse effect on competition in Singapore;
- (c) to promote and sustain competition market in Singapore;
- (d) to promote a strong competitive culture and environment throughout the economy in Singapore;

- (e) to act internationally as the national body representative of Singapore in respect of competition matters;
- (f) to advise the Government or other public authority on national needs and policies in respect of competition matters generally; and
- (g) to perform such other functions and discharge such other duties as may be conferred on the Commission by or under any other written law.

In discharging the duties, the CCS shall have regard to the following as set out in Section 6 (2) of the Competition Act:

- (a) the differences in the nature of various markets in Singapore;
- (b) the economic, industrial and commercial needs of Singapore; and
- (c) maintaining the efficient functioning of the markets in Singapore.

In line with its stated functions and duties, the mission of the CCS is “championing competition for growth and choice”. Its vision is to promote a vibrant economy with competitive markets and innovative businesses while it becomes a leading competition authority known for its professionalism.¹⁰

To reflect the seriousness of the infringement, and to deter undertakings from engaging in anti-competitive practices, the CCS has imposed any financial penalty. Section 69 of the Competition Act provides that the CCS may impose a financial penalty only if it is satisfied that an undertaking which has committed an infringement of the section 34 prohibition or section 47 prohibitions has done so intentionally or negligently. The financial penalty may not exceed ten (10) per cent of such turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three (3) years.

Price fixing amongst coach operators' case (2009)

In November 2009, a CCS investigation revealed that a number of coach operators, together with the Express Bus Agencies Association (EBAA), had agreed to fix the prices of coach tickets for travelling between Singapore and destinations in Malaysia from 2006 to 2008. Through regular meetings arranged under the auspices of EBAA, the coach operators agreed to fix the coach prices through setting minimum selling prices and imposing fuel & insurance charges (FIC).

¹⁰ Cavinder Bull SC, Lim Chong Kin and Richard Whish, *Competition Law and Policy of Singapore*, Academy Publishing, 2009, p. 15.

It is estimated that the coach operators pocketed over SGD 3.65 million from the sale of the FIC during this period. As a result, the financial penalties levied on the 17 infringing parties totaled SGD 1.69 million. In deciding the appropriate amount of the financial penalty, the CCS took into consideration a number of factors, including the nature and structure of the market, market shares of the parties involved in the infringement and the impact and effect of the infringement. Six of the infringing parties appealed CCS' decision.

In 2011, the Competition Appeal Board (CAB) issued its decision on the appeals. The CAB upheld CCS' findings on liability on all counts. In addition, the CAB found that the appellant had entered into the agreements knowing or ought to have known that the agreements restricted competition. However, the CAB varied the quantum of financial penalties imposed, from \$1,699,133 to \$1,135,170.

Abuse of dominant position in the ticketing services market (2010)

In June 2010, the Competition Commission of Singapore (CCS) issued an infringement decision against SISTIC.com Pte Ltd (SISTIC) for abusing its dominant position under Section 47 of the Competition Act via a series of exclusive agreements. The CCS found that SISTIC is the dominant ticketing service provider in Singapore with a persistent market share of 85-95%, and that the restrictions under the exclusive agreements are harmful to competition by restricting the choices of venue operators, event promoters and ticket buyers. Symptoms of such harmful effects were observed in the market, such as an increase in SISTIC's booking fee for ticket buyers in 2008.

Ticketing service providers such as SISTIC act as intermediaries between two groups of customers – the event promoters and the ticket buyers – by providing them with a platform to buy and sell tickets. When key venues are required to use SISTIC exclusively, event promoters who wish to hold their events at these venues have no choice but to sell tickets through SISTIC. This, together with other event promoters who are also required to use SISTIC exclusively, leave ticket buyers with no choice but to buy tickets through SISTIC as well. The CCS highlighted that the Competition Act does not prohibit dominant companies obtaining their dominance on merit. Instead, it prohibits a dominant company from using abusive practices that prevent or restrict competitors from competing on the merits. In this case, the CCS cannot accept the restrictions under the exclusive agreements as merit-based practices, as they are unnecessary and anti-competitive.

The CCS directed SISTIC to modify the exclusive agreements with immediate effect, to remove any clause(s) that require SISTIC's contractual partners to use SISTIC exclusively. In addition, the CCS imposed a financial penalty on SISTIC of SGD 989,000 for infringing section 47 of the Act. In fixing the appropriate amount of financial penalty, the CCS took into account the seriousness and duration of the infringement, the turnover of the infringing party, aggravating and mitigating factors amongst other considerations.

SISTIC subsequently filed an appeal against CCS' decision to the CAB. In May 2012, the CAB issued its ruling, which affirmed CCS' decision on liability but scaled down the quantum of penalty to SGD 769,000. CAB also ordered SISTIC to pay CCS 70% of the appeal costs. Post-decision, the ticketing industry in Singapore has become more vibrant and competitive.

There has been a new entrant and existing small ticketing service providers are now able to bid for events held at key venues, which was not previously possible. Some new and innovative services have also been introduced by competitors attempting to differentiate themselves from one another. One such example is leveraging on new distribution channels to give consumers more choice and added convenience. Ultimately, CCS' intervention resulted in a better competitive outcome for the industry to the benefit of consumers.

The functions and duties of the Competition Commission of the Myanmar are providing in the Chapter (5) of the Competition Law of Myanmar. Chapter (11) provides the administrative sanction and appeal. According to Section 34 of the Law, the Committee may reward the following sanctions;

- (a) warning;
- (b) fine;
- (c) Temporary or permanent injunction.

In the administrative proceedings, the authority in charge is usually empowered to institute inquiries against companies suspected of engaging in unfair trade practices, and may issue appropriate orders to cease and desist from the unfair act, or take any other measure necessary to stop such acts.¹¹

The functions and duties of the Competition Commission may differ from one country to another; however, they have the power to investigate suspect company

¹¹ *Protection against Unfair Competition*, op.cit, p.79.

and may issue appropriate order. Some countries used injunction for alternative way to remedy and some didn't provide the criminal measure for remedy. However, most countries provided the remedy for damages.

The Competition Law of the Singapore and the Competition Law of Vietnam are not providing the injunction relief; moreover they are not providing the criminal measure either. The Singapore law and the Vietnam law provide the damages and the administrative measure. They give the authority to the Competition Commission to investigate the unfair commercial practice in the market.

The Competition Law of Myanmar provides the injunctive relief under the functions and duties of the Competition Commission. However, it provides the criminal measure in Sections 39 to 43.

Findings

Unfair competition law is relating with the antitrust law, intellectual property law and consumer protection law, which the common aim is, at first, to protect the honest competitors, but now the same aim of these three laws is to ensure fair competition in the interests of all concerned including the consumers. In Myanmar, the Consumer Protection Law is promulgated in 14th March, 2014 and the Competition Law 24th February, 2015. So, we should *quickly implement the IP Law*.

Competition law of Myanmar fine should be more amounts and imprisonment should be gives in exceptional cases. For example, if the business company infringed the competition law also cause to the death of people amount to the corporate crime.

Conclusion

In legal measure, injunction and damages can be claimed by the plaintiff under the unfair competition law. Apart from the injunction and damages, another measure available in most countries is by means of publication of the judgment awarded against the defendant or order to rectification. Civil remedy under the most practices claim by the plaintiff are injunction, damages and the other forms; such as public disclosure or apology. In most countries practices, criminal measures are not given to the defendant. However, the Competition Commission of the most State gives the administrative sanction to those who infringed the fair competition.

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