

FORMAL REQUIREMENTS FOR INTERNATIONAL COMMERCIAL CONTRACTS: COMPARATIVE STUDY BETWEEN THAI AND FOREIGN LAWS*

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ABSTRACT

At present, it is important that business transactions conform with formal requirements as to writing or written evidence as required by laws appropriate to certain contracts. Such requirements aim to protect the contracting parties from fraudulent actions and to ensure peace in business relations. Despite their significances, formal written requirements appear to be losing importance for international transactions when modern convenient means of communication are used to conclude contracts in trade. Under the “Freedom from Forms Requirements” concept, no formalities are required for international commercial transactions. Any type of evidence is allowed to demonstrate the existence or content of the contract.

However, in the Thai context, problems exist in terms of formal requirements for contracts for international sale of goods. Paragraph 3 of Section 456 of the Thai Civil and Commercial Code (CCC) is commonly used by the courts to determine trade disputes. For enforcement of the law, written evidence signed by the contracting parties is required. This provision obviously does not offer a satisfactory remedy or enable enforcement for injured parties who lack documentary evidence. The study of the United Nations Convention on Contracts for the International Sale of Goods (the “CISG”), the uniform law for international sale of goods contracts,

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shows that Article 11 of this international instrument requires no formalities for conclusion of a contract. Moreover, other international instruments, such as the Principles of European Contracts Law and UNIDROIT Principles of International Commercial Contracts 2010, incorporate similar concepts as the CISG. They declare that commercial contracts can be formed without formalities unlike Section 456 Paragraph 3 of the CCC.

Since Thailand has retained formal requirements for conclusion or enforceability of contracts of sale including contracts for international sale of goods, the solution to this problem is to amend Paragraph 3 of Section 456 of the CCC by adding a new paragraph for application particularly to contracts for international sale of goods. This new paragraph should specify that the formal requirement embodied in Paragraph 3 shall not be applicable to international sale of goods contracts. In addition, for the long-term development of international trade in Thailand, ratifying the CISG would be advantageous in making Thai international trade more acceptable from foreign trade partners' perspective.

Keywords: Formal Requirements, International Commercial Contracts, Contracts for the International Sale of Goods (CISG), Freedom from Forms Requirements, Statute of Frauds

บทคัดย่อ

ในปัจจุบัน เป็นสิ่งสำคัญที่ธุรกรรมทางธุรกิจต่างๆ ต้องอยู่ภายใต้บังคับข้อกำหนดเกี่ยวกับแบบอย่างเช่น หนังสือ หรือ หลักฐานเป็นหนังสือซึ่งกฎหมายกำหนดให้ต้องมีเพื่อความเหมาะสมกับสัญญาลักษณะต่างๆ ข้อกำหนดเหล่านี้มีจุดประสงค์เพื่อคุ้มครองคู่สัญญาจากพฤติกรรมฉ้อฉลต่างๆ และเพื่อให้เกิดความสงบสุขในความสัมพันธ์ทางธุรกิจ แม้ว่าจะมีความสำคัญก็ตาม ข้อกำหนดเกี่ยวกับแบบเริ่มจะหมดความสำคัญลงสำหรับการทำธุรกรรมระหว่างประเทศเมื่อวิธีการที่ทันสมัยและสะดวกสบายในการติดต่อสื่อสารถูกนำมาใช้ในการทำสัญญาในการค้าระหว่างประเทศ ภายใต้แนวคิด "การปราศจากข้อกำหนดเกี่ยวกับแบบ" แบบของสัญญาเป็นสิ่งที่ไม่จำเป็นในการทำธุรกรรมเชิงพาณิชย์ระหว่างประเทศ พยานหลักฐานทุกรูปแบบสามารถนำมาใช้ในการพิสูจน์ความมีอยู่หรือเนื้อหาของสัญญา

อย่างไรก็ตาม ในประเทศไทย ปัญหาเรื่องข้อกำหนดเกี่ยวกับแบบในสัญญาซื้อขายสินค้าระหว่างประเทศยังคงมีอยู่ มาตรา 456 วรรค 3 แห่งประมวลกฎหมายแพ่งและพาณิชย์ของประเทศไทย ถูกใช้โดยศาลในการตัดสินคดี สำหรับการฟ้องร้องบังคับคดี กฎหมายกำหนดให้ต้องแสดงหลักฐานเป็นหนังสือลงลายมือชื่อคู่สัญญาฝ่ายที่ต้องรับผิดชอบ บทบัญญัตินี้ไม่ได้ทำให้คู่สัญญาที่ได้รับความเสียหายเพราะขาดหลักฐานเป็นหนังสือได้รับการเยียวยาหรือบังคับให้เป็นไปตามสัญญาได้อย่างน่าพึงพอใจ การศึกษาอนุสัญญาสหประชาชาติว่าด้วยสัญญาซื้อขายสินค้าระหว่างประเทศ (CISG) อันเป็นกฎหมายเอกรูปสำหรับการซื้อขายสินค้าระหว่างประเทศแสดงให้เห็นว่ามาตรา 11 ของอนุสัญญานี้ ไม่ได้วางข้อกำหนดเกี่ยวกับแบบในการทำสัญญาไว้ นอกจากนี้กฎเกณฑ์ระหว่างประเทศอื่น ๆ เช่น Principles of European Contracts Law และ UNIDROIT Principles of International Commercial Contracts 2010 มีแนวคิดเช่นเดียวกับหลักเกณฑ์ของ CISG ทั้งนี้โดยกำหนดว่า สัญญาทางพาณิชย์สามารถทำขึ้นได้โดยไม่ต้องมีข้อกำหนดเรื่องแบบดังเช่นมาตรา 456 วรรค 3 ของประมวลกฎหมายแพ่งและพาณิชย์

เนื่องจากประเทศไทยยังคงใช้ข้อกำหนดเกี่ยวกับแบบในการจัดทำหรือฟ้องร้องบังคับคดีสัญญาซื้อขายรวมทั้งสัญญาซื้อขายสินค้าระหว่างประเทศ วิธีแก้ไขปัญหานี้คือแก้ไขมาตรา 456 วรรค 3 ของประมวลกฎหมายแพ่งและพาณิชย์โดยการเพิ่มวรรคใหม่สำหรับการปรับใช้กับสัญญาซื้อขายสินค้าระหว่างประเทศ โดยเฉพาะ วรรคใหม่นี้ควรระบุว่าข้อกำหนดเกี่ยวกับแบบที่ปรากฏอยู่ในวรรค 3 ของมาตรานี้มิให้ใช้บังคับแก่สัญญาซื้อขายสินค้าระหว่างประเทศ นอกจากนี้ สำหรับการพัฒนาการค้าระหว่างประเทศในประเทศไทยในระยะยาว การให้สัตยาบัน CISG จะเป็นประโยชน์ในการทำให้การค้าระหว่างประเทศของไทยได้รับการยอมรับมากขึ้นจากมุมมองของบรรดาประเทศคู่ค้าต่างๆ

คำสำคัญ: ข้อกำหนดเกี่ยวกับแบบ, สัญญาทางพาณิชย์ระหว่างประเทศ, สัญญาซื้อขายสินค้าระหว่างประเทศ, หลักการปราศจากข้อกำหนดเกี่ยวกับแบบ, บทกฎหมายเกี่ยวกับการฉ้อฉล

Introduction

Provisions regarding formal requirements for contracts play a significant role in commercial transactions in many societies. Such formalities are required by law to be complied with¹ in order to prevent fraud and to be used as documentary evidence in disputes

¹ Arthur L. Corbin, **Corbin on Contracts, One Volume Edition** 8 (1952).

when lawsuits are filed.² Many countries have laws governing these formal requirements: some in the form of written evidence required by law in civil cases, while others do not impose formal requirements for the completion of commercial contracts. Nevertheless, it is clear that provisions of formal requirements are widely used in business transactions around the world including Thailand, which has formal requirements applying to commercial contracts.

In Thailand, formal requirements are applied in commercial transactions, especially sale of goods contracts, while foreign trading countries may not make use of such provisions for commercial transactions. Thus, concepts regarding formal requirements for the sale of goods contracts between Thai and foreign laws are clearly different. Foreign trading partners make use of international instruments, particularly Article 11 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) which provides that contracts can be made without written stipulations. This provision helps to establish sale of goods contracts between parties in different countries more conveniently. On the other hand, Thailand uses paragraph 3 of Section 456 of the Civil and Commercial Code (CCC) to apply in both domestic and international sale of goods contracts which requires written evidence signed by the contracting parties to enforce compliance with the contract on the party in breach. However, provision of formal requirements for sale of goods contracts under paragraph 3 of Section 456 of the CCC is not appropriate in international sale of goods contracts. This domestic legal requirement obstructs the development of international trade in Thailand.

To resolve problems as have occurred in trade cases and to prevent such difficulties in the future, this article suggests amending the CCC, Section 456, by adding an exception to apply specifically in international sale of goods contracts. In addition to this proposed

² Ingeborg Schwenzer, Pascal Hachem & Christopher Kee, **Global Sales and Contract Law** 265 (2012).

solution, in order to encourage long term development of international trade in Thailand, ratification of the CISG is recommended.

Overview of Formal Requirements for Sale of Goods Contracts

1. Development of Formal Requirements

Formal requirements of contracts have evolved since ancient times. Their origins began in the Roman era. They are the various formalities required by law that parties have to comply with when entering into commercial contracts. Many significant concepts of Roman law, including provisions for formal requirements of contracts, have been incorporated into the fundamental principles of several legal systems around the world.³ Jurisdictions using Common law and Civil law systems, which include most of the important legal systems in practice in the world today, incorporate such provisions ultimately influenced by legal concepts of Roman law.⁴

Significantly, strictness of provisions of formal requirements has loosened with respect to the rules of commercial contracts which require the conclusion of documentary forms to be valid or enforceable. These provisions began to change when they were used in international commercial transactions such that, for international trade, in order to develop provisions of formal requirements that conform to the nature of international trade which demands flow and flexibility of communications among parties in two or more countries, formal requirements are typically ignored and not applied. Thus, the alternative “no formal requirements” concept has been implemented in respect of international commercial contracts instead of formal requirements. This has come about as a result of the attempts by international trade institutions that wish to create uniform

³ Andrew Borkowski & Paul du Pessis, **Textbook on Roman Law** 355 (3rd ed., 2005)

⁴ Schwenzer, Hachem, & Kee, *supra* note 2 at 8.

laws of international trade⁵ and encourage uniformity of standards among international trade partners.

Thus, in the modern period, there have been no provisions for formal requirements for international commercial contracts. These developments are the foundation of the “freedom from forms requirements”⁶ concept applicable to the international instruments which have facilitated the growth of international trade.

2. Formal Requirements for International Commercial Contracts

The fact that in international trade, commercial contracts do not require contractual formalities is a significant distinction between modern legal requirements and those in Roman law, Common law and Civil law systems. In international commercial contracts, the concept of no formal requirements is effective and sufficient to control international transactions. The provisions derived from “no formal requirements” provide that contracts do not require specific written form or written evidence. Contract formalities are unnecessary because any actions taken by parties in commerce are recognized as evidence that a commercial contract exists.

Therefore, this study will focus on the concept of no formal requirements which is embodied in the international instruments applicable to international commercial contracts, including Article 11 of the CISG, Article 1.2 of UNIDROIT Principles of International Commercial Contracts 2010 (PICC), Article 2:101 (2) of Principles of European Contract Law (PECL), and provisions from the Principles of European Law on Sale (PEL S) all of which are used to

⁵ *Id.* at 33.

⁶ See UNCITRAL, *Digest of case law on the United Nations Convention on the International Sale of Goods (2012)* art. 11, (Jun. 5, 2016) [hereinafter *Digest (2012)* art.11], <https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>.

apply to international commercial contracts. In order to facilitate international trade, contracts need to be convenient with a minimum of formalities required for their conclusion. Various alternative kinds of evidence are admissible to demonstrate facts in international trade disputes.⁷

Formal Contract Requirements in Foreign Countries

1. Formal Requirements for the Sale of Goods Contracts in the U.S.

Provisions of formal requirements for sale of goods contracts in the United States are separated clearly. The US has effective domestic laws governing sales embodied in the Uniform Commercial Code (hereinafter “UCC”). This Code has comprehensive legal requirements for businesses and trade⁸ and is used in many states around the U.S. The provision of formal requirements for domestic sale contracts is provided in Section 2-201. This rule was developed from the concept of *statute of frauds*, which is a significant concept from the Common law tradition used to protect parties against fraudulent actions. It consists of the central concept of the *parole evidence rule* where written contracts are protected from proof of other kinds of evidence.⁹

The U.S. ratified and adopted the CISG for use as their specific law on international commercial contracts (sale of goods contracts). Thus, domestic sale laws are considered inappropriate for application to international trade because Article 11 of the CISG does not require the formalities of sale contracts in international

⁷ Larry A. Dimatteo, “An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability,” 23 **Syracuse J. Int’l L. & Com.** 67, 70 (1997).

⁸ Schwenzer, Hachem & Kee, *supra* note 2 at 12.

⁹ E. Allan Farnsworth, **Contracts** 402 (7th ed., 1982).

transactions. As a result, American trade parties apply this (CISG) article to international sale of goods transactions.

2. Formal Requirements for the Sale of Goods Contracts in the UK

In the UK, the application of formal requirements for sale of goods contracts is different from the aforesaid applications in the U.S. as UK law does not differentiate formal requirements between domestic sale of goods contracts and international commercial contracts. This is because UK domestic laws are sufficient to control sale of goods transactions in both cases. Section 4 of the Sale of Goods Act 1979 (hereinafter “SGA”)¹⁰ applies to commercial transactions. This provision widely covers many types of formalities including both documentary records and oral communications or conduct between parties to contracts of sale. Since Section 4 of the SGA is adequate to govern trade transactions in the UK, there is no need to develop other formal requirements for international sale of goods contracts nor is there any concern to adopt the CISG or other soft laws to trade cases.

In fact, to date, the UK has not ratified the CISG¹¹ and there appears to be no further intention to adopt the Convention for use in international trade.¹² In addition, due to the fact that trade parties can agree to vary or exclude provisions of the CISG from their

¹⁰ M.G. Bridge FBA, **The Sale of Goods** 11(3rd ed., 2014).

¹¹ See Nathalie Hofmann, “*Interpretation Rules and Good Faith as Obstacles to the UK’s Ratification of the Harmonization of the CISG and to the Harmonization of Contract Law in Europe,*” 22 **Pace Int. law Rev.** 145, 147 (2010).

¹² Ahmad Azzouni, “*The adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom,*” (May. 5, 2016), <http://www.cisg.law.pace.edu/cisg/biblio/azzouni/html#iaa>.

international agreements¹³, the ratification of the CISG is not a priority for UK based traders. Non-ratification of the CISG in the UK shows that it is unnecessary to adopt the entire Convention in order to apply some selected articles to sale of goods contracts if existing domestic sale laws are suitable to deal with both domestic and international sales transactions.

3. Formal Requirements for the Sale of Goods Contracts in Germany

In Germany, formal requirements have been divided into two spheres: formal requirements applied to domestic sale of goods and international sale of goods contracts. Germany has a Civil law system which already contains many codes applied in business transactions, in both civil cases, for which the German Civil Code or “BGB”¹⁴ applies, and in commercial cases, for which the German Commercial Code or “HGB”¹⁵ is used to deal with various types of contracts. Generally, special provisions governing contracts of sale are embodied in §§ 433-515, Title I, Section 8, Book 2 of the BGB.¹⁶ However, trading parties must apply §§ 373-382 of the HGB to contracts of sale if sale transactions are contracted between merchants.¹⁷ Formal requirements in this study will focus on the provisions in the BGB.

German domestic laws, as exemplified in the BGB, are reliable because they have been codified and developed over a long period of time. Likewise, their domestic formal requirements for a contract of sale are reliable rules to control sales transactions within the country. They do not require formalities of contract of sale to be

¹³ *Id.*

¹⁴ *Id.* at 18.

¹⁵ Schwenzer, Hachem&Kee, *supra* note 2 at 18.

¹⁶ Manfred Pieck, “A Study of the Significant Aspects of German Contract Law,” 3 *Ann. Surv.Int’l& Comp. L.* 111, 134 (1996).

¹⁷ *Id.*

evidenced in written forms. Furthermore, with respect to international trade, Germany has adopted the CISG as specific law on the international sale of goods contracts.¹⁸ This adoption separates their formal requirements for a contract of sale into two different operations. The existing concept is used to apply to domestic sale of goods contracts whereas the concept of “freedom from forms requirements”¹⁹, Article 11 of the CISG, has been adopted to apply to international commercial contracts. Under this article, no formal written requirements are imposed on the trade parties when making contracts of sale. These implementations have facilitated German sales law with respect to other developed countries.

Problems Arising from Formal Requirements in Thailand

1. Formal Requirements for Sale of Goods Contracts in Thailand

Formal documentation requirements for sale of goods contracts in Thailand are prescribed by law to protect parties to contracts. This study will focus on written documentation required to enforce contracts for sales of movables valued 20,000 baht (US\$600) or more, as specified in paragraph 3 of Section 456 of the CCC. This paragraph states that a sale of movable goods at an agreed price is not enforceable unless it is supported by written evidence signed by the liable party or deposit was given, or partial payment of debt was made.²⁰

The written evidence for sale of goods contracts is necessary in cases where an injured party wishes to enforce his claim against

¹⁸ [cisg.law.pace.edu, CISG: Table of contracting States,](http://www.cisg.law.pace.edu/cisg/countries/countries-Germany.html)
[http://www.cisg.law.pace.edu/cisg/countries/](http://www.cisg.law.pace.edu/cisg/countries/countries-Germany.html)
[cntries-Germany.html](http://www.cisg.law.pace.edu/cisg/countries/countries-Germany.html) (last visited May 14, 2016).

¹⁹ Peter Schlechtriem, “*Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany*,” *JuridiskTidskrift* 1, 16 (1991-1992).

²⁰ Civil and Commercial Code sec. 456 paragraph 3.

the liable party who executed the contract. No written contract is required for enforcement of transactions valued below twenty thousand Thai baht.²¹

2. Problems Arising in Contracts under Section 456 Paragraph 3 of the Civil and Commercial Code

Section 456, Paragraph 3 of the CCC, is a domestic law used to control sale of goods transactions in Thailand. Thai courts also apply this section to international trade disputes from which various difficulties may arise. The provision in paragraph 3 of Section 456 is not in accordance with formal requirements applicable to international commercial contracts as stipulated in Article 11 of the CISG, Article 1.2 of the PICC, Article 2: 101 (2) of the PECL, and PEL S, which do not require contracts to conform to specific written forms. In Thailand, sale of goods contracts valued twenty-thousand baht or more must be accompanied by written evidence in order to be enforceable whereas sale of goods contracts in the aforementioned international laws do not need such written evidence. International parties to sale agreements may make use of any type of evidence to prove the existence of a contract, including *parole* evidence.

This obviously may lead to problems since, especially for sale of goods contracts, international trade partners rely on the CISG which is more flexible in use with contracts made with high-speed communications.²² Such contracts can use any type of performance for contract enforcement as stipulated in article 11 of the CISG.

²¹ Wissanu Krea-Engam, **Textbook on Sale, Exchange and Gift** 143 (10th ed. 2006). (วิชญ์ เครืองาม, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ซื้อขาย, แลกเปลี่ยน, ให้ 158 (พิมพ์ครั้งที่ 10 กรุงเทพฯ: สำนักพิมพ์นิติบรรณาการ 2549)).

²² Salin Thewphaingam, *The Unification of International Sale Laws: Uniform Interpretation of The United Nations Convention on Contracts for The International Sale of Goods (CISG)* (Aug. 9, 2012) (unpublished LL.M. thesis, Thammasat University) (on file with Libraries, Thammasat University).

Thus, Thai sales contract law (Section 456 Paragraph 3 of CCC) applying to both domestic and international sale of goods contracts conducted in Thailand and international sale of goods contracts conducted outside Thailand is in conflict with international sale of goods contracts as currently used.²³

Conclusion and Recommendations

Sale of goods contracts are business transactions used by traders within and between countries for sales of goods. As such, they must be governed by laws to protect liabilities of trade. Provisions important to contracting parties include formal contractual requirements designed to have parties adhere to their obligations which would otherwise be void or unenforceable. Internationally, different formal requirements have been created for use depending on the area of business and suitability to facilitate trade relations. In Thailand, Section 456 paragraph 3 of the CCC requires parties to sales contracts to conclude written documentation in order to have a right to bring lawsuits in cases of breach of contract.

Internationally, instruments used in trade disputes, such as the United Nations Convention on Contracts for the International Sale of Goods(CISG), UNIDROIT Principles of International Commercial Contracts 2010 (PICC), or the Principles of European Contract Law (PECL) are all available but particularly important is article 11 of the CISG which provides that sale of goods contracts do not need to be evidenced in documentation or concluded in writing; any kind of evidence may demonstrate the existence of contracts, including witnesses. This article is implemented for international sale of goods practices under the concept of “freedom from forms requirements”.²⁴ Based on this principle, any type of evidence may be used to show a

²³ *Id.*, at 77.

²⁴ Peter Schlechtriem & Petra Butler, **UN Law on International Sales, The UN Convention on the International Sale of goods** 61 (2009).

contract exists, such as oral communication, prior transaction between the parties, telex and electronic mail. This provides for flexibility and flow of communications among traders.

As section 456 paragraph 3 of the Thai CCC is inapplicable in international sale of goods contracts disputes, it is clear this is in need of amendment to be brought in accordance with the concept of “no formal requirements” as commonly used elsewhere to facilitate trade. As such, the following recommendations are provided:

(1) Thailand should amend Section 456 paragraph 3 of the Civil and Commercial Code as it is currently not suitable for use in international sale of goods contracts disputes. The proposed amendment must provide for a greater number of means to demonstrate the existence of contracts for international sale of goods.

(2) Thailand should consider the possibility of ratifying the CISG which currently governs foreign trade outside of Thailand. Ratification of the CISG would minimize conflicts between Thai and international sale of goods laws to address sale of goods contract disputes. In addition, ratification would increase the reliability of Thai contract law in the eyes of international trade partners.

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