Problems Concerning Advantage of Seller under Sale of Goods Contract*

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Abstract

In sale of goods contracts, Thai law seems to give the advantage to the seller and so the buyer is not sufficiently protected from damages.

As such, in this investigation, the researcher aims to suggest how provisions in the sale of goods law can be amended such that both parties are treated fairly. Accordingly, we find several problems in the Civil and Commercial Code of Thailand (CCC), problems which can be solved by amending the CCC.

Firstly, problems regarding transfer of ownership and risk occur because the parties do not explicitly express their intentions. Even so, the law will assume that the parties have expressed their intentions to enter into the transfer of ownership of the goods. It is of no concern to the CCC whether or not said seller has the ability to make the goods ready for delivery. By way of contrast, in the United Kingdom (UK), the Sale of Goods Act of the United Kingdom (SGA) requires sellers to perform any action necessary such that the goods are in a deliverable state. Ownership will be transferred when the seller has ensured that the goods are in a deliverable state. Thus, it can be concluded that this UK law appears to contain provisions governing

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the actions of the parties that are reflective of the intent of the parties to enter into the transfer of ownership to a greater extent than is the case with Thai law.

Moreover, if one subscribes to the legal maxim of res per it domino (Latin: “the thing perishes for the owner”), risk is transferred at the same time that the ownership of the goods is transferred. This means that the risks are assumed by the buyer even when the goods are still physically in the possession of the seller. This is unfair to buyers. Thai law should adopt the provision of “deliver the goods” as the seller’s primary obligation according to the United Nations Convention on Contracts for the International Sale of Goods (CISG), i.e., the Vienna Convention effective as of 1 January 1988. In CISG, the risk involving goods shall be transferred upon delivery. Thus, CISG is more objective than a system relying on the subjective expression of intent.

Secondly, considering the problem regarding implicit terms in sales contracts appertaining to the quality of goods, the buyer is insufficiently protected. Thai law has no explicit provisions in sales law concerning quality standards. Thus, in the view of the researcher, Thai law should incorporate provisions similar to what is found in UK law in which the quality of goods as prescribed by law is at higher level of concern than what is found in the CCC.

Consequently, in the view of the researcher, the seller should deliver goods which are of satisfactory quality. The seller has the duty to inform the buyer of the performance purposes of the goods, since it must be required that the user of the goods must be able to execute all the purposes for which goods of its kind can perform in the light of the description and price of the goods. If the goods fail to perform any purpose for which such goods are ordinarily used and the seller had failed to inform the buyer prior to the purchase of this state of affairs, then the seller should be liable for damages.

Therefore, to promote the principle of good faith (Latin: bonāfidē), the law should clearly state that the goods must reflect the genuine conditions of their normal use and price. Thus, the seller should be responsible for informing the buyer

as to the purposes for which the goods are suitable and that the goods are reasonably fit for fulfilling said purposes.

Thirdly, in respect to the problems regarding the form taken by the sale of goods contracts and the enforceability of such contracts, Section 456, paragraph 3 requires that claimants have written evidence or have other evidence-such as an earnest having been paid or the delivery of part of goods being sold-to the end of binding a contract. This kind of evidence would be used to prove to the court the acceptability of the claimant's claim. Otherwise, it would seem unjust if a party who has suffered damages had yet acted in good faith and trust and was bound by the word of mouth of the other party when the sale of goods contract was drawn up by the parties to the contract.

In fact, creation of a contract should be based on the principle of freedom of contract, including the freedom to determine the form of the contract. Regardless of the form used by the parties, it should be acknowledged by law. It is noteworthy that this is not a situation requiring interference in order to prevent unfairness, nor is it a case requiring special control by the State. The law should allow the parties to determine the form of contract as they deem appropriate.

Therefore, Thai law should be amended, inasmuch as the submission of a case should not be barred in the absence of written contract or Thai law should take into consideration other kinds of evidence, such as when earnest is given or part performance occurs.

Finally, apropos the problem regarding the form taken when there are unstated prices in sales contracts, interpretation is rather confusing under Thai law. Actually, even if the price had not been agreed upon and yet the court found that the parties wished to bind themselves to the sale contract, the court could rely on gap filling provisions so as to determine the price for the parties. In other words, when we have such cases, a party can prove the intention had been that the contract had been created in the absence of an explicit price. In this situation, the researcher recommends that the legislation should be amended so as to protect the intent of the parties.

Keywords: sale of goods, advantages of the seller, thai commercial law

1. Background of the research topic

Sale is the contract that has come since ancient times. Because of people need something other than their own, the exchange of goods between two people is occurred. However, it is not easy for both parties to have the same thing that each other need. Human have invented a current medium of exchange which call money and call the contract which exchange between thing and money that sale. Since then, sale is the most frequently used contract in the world.[1]

In the Thai sale law history which is a part of Civil and Commercial Code (CCC), the draft of CCC was begun since the reign of King Rama V in 1908. However, there are many contents which had to establish in CCC, the draft took more than 20 years to complete in the reign of King Rama VI. The sale law had been stated in book 3 of CCC and enacted since April 1, 1929. The prototype of Thai sale law, which is the drafting committee used, is The Sale of Goods Act 1893 from the United Kingdom.[2]

However, The Sale of Goods Act 1893 of the UK had been amended several times. The law was reformed in 1979 and presented The Sale of Goods Act 1979 (SGA) which affected the drafting style and some principle such as the definition of implied term and the exceptions to the rule of *nemod at quod non habit*. After that, SGA had been amended twice in 1994 and 1995.[3] While SGA had been changed from the original law which is the prototype of Thai's sale law, CCC (book 3, title 1, chapter 1) which state about sale of unmovable property is never be amended in a major issue. This can lead the question that whether sale of goods law in CCC should be revised to apply in currently trade.[4]

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[1]Wisanu Kruangam, **Commentary on Civil and Commercial Code: Sale, Exchange, Gift** (Bangkok: Nitibannagarn Publisher, 2001), pp. 7-8.

[2]Surapol Triwat, **The Work of Codification in Siam** (Bangkok: Winyuchon Publication House, 2007), pp. 82-97.

[3]Ibid.

[4]Kumchai Jongjakapun, "Notice of the Thai Supreme Court's judgment on international sale contract's case," **Dulpaha** 47, 2 (May-August 2543): 55-66.

One of the model laws which has been widely accepted to use in currently trade is Convention on International Sale of Goods (CISG). Although CISG is the law that is applied to the international sale of goods, the standard of the law has been widely accepted in personal commercial way. It will be a good model to analyse the problem in sale of goods law.

However, sale of goods law of Thailand had enacted since April 1, 1929 from the moment that Thailand's trade, is not extensive to requires a special commercial protection. Thus, there are many problems when apply the law to the case in current trading. This research set out four main research problem regarding sale of goods law in Thailand which seem to give advantage to the seller. The problem in the transfer of the ownership and the transfer of risk is related with each other. These two problems will be analysed together. Another three problem is the problem on the implied term about the quality in the goods, the problem on the form of sale of goods contract and enforceability by action and the problem on the unstated price in sale contract.

2. The problem regarding the transfer of the ownership and risk in the sale of goods contract

Ownership is the right over properties or “property right” where the right holder has a full power over such properties and it is the highest right at the maximum degree comparing to other rights.[5] The individual who has the ownership can exercise the right as he or she prefer including the right to enjoy, dispose, and destruct the properties.[6]

The ownership, which is call the property under the UK law, can be transferred via the juristic acts especially through the sales contract which the seller’s main purpose is the transfer of property to the buyer for the buyer to pay the price in

[5]Seni Pramoj, **Property Law Commentary on Civil and Commercial Code** (Bangkok: Chairiksh Press, 1954), p. 218.

[6]Arnon Mamout, **Ownership** (Bangkok: Thammasat University, 2018), pp. 86-89.

return. Therefore, the transfer of property (ownership) is one of the key components of the sales contract.[7] However, there is the problem regarding when will the property (ownership) be transferred from the seller to the buyer?

Risks mean the risks occurring to property that is for sales. Such property may incur loss or damage from force majeure or from third party, which is not the fault of the buyer or the seller.[8] If the goods are damaged while the risk is with the seller, then the seller may not claim for payment from the buyer.[9] However, if the damage occurs when the risks are with the buyer, the seller is entitled to request the buyer to pay for property price, even though, in fact, the buyer has not received such property yet.[10] One considerably important thing in making sales contract that both parties shall acknowledge is where the risks transfer point from the seller to the buyer is. If the action is not taken to such point, the risks shall be with the seller. If the action is taken to pass the point, the risks will be with the buyer.

The transfer of risks under SGA and CCC uses the same theory, that is "res per it domino", or "the owner bears the risks". This means the point of risks transfer from the seller to the buyer is the same point where the ownership being transferred to the buyer.[11] Therefore, SGA and CCC will focus on the time of the ownership transfer. If the sales contract is made, but the ownership has not been transferred for no matter what legal reasons, it is deemed that the ownership is still with the

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[7]Marco Torsello, "Transfer of ownership and the 1980 Vienna Sales Convention: a regretful la ckofuniform regulation?," **International Business Law Journal** (2000): 939-951.

[8]F. Enderlein and D. Maskow, **International Sales Law** (Oceana Publications, 1992), p. 261 [Online], available URL: https://www.cisg.law.pace.edu/cisg/biblio/enderlein.html#art66, 2019 (January, 20).

[9]Fitt v Cassanet (1842) LR 7.

[10]Peter Schlechtriem and Petra Butler, **UN Law on International Sales** (Heidelberg: Springer, 2009), pp. 164-165.

[11]Zoi Valioti, **Passing of Risk in international sale contracts: A comparative examinationof the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000, (2003)** [Online], available URL: https://www.cisg.law.pace.edu/cisg/biblio/valioti1.html, 2019 (January, 20).

seller. When ownership is with the seller, the risks are also with the seller as well. Once the ownership is transferred to the buyer, the risks will be with the buyer as well.

Under the CISG, the "res per it domino" theory is not adopted for risks transfer as under the SGA or CCC, since the CISG does not state when the property (ownership) shall be transferred from the seller to the buyer. However, CISG defines the transfer of risks, which means the risks transfer under CISG is not subject to the transfer of the property (ownership). The legal owner may not be the person incurring risks.

CISG has adopted "hand over the goods" theory, which presents the idea that whom the risks are with depends on whom the goods are with physically.[12] The person owning such goods shall bear the risk from the damages occurred. In this theory, the risk is transferred from the seller to the buyer only if the seller has delivered the goods to the buyer already. Risk transfer point depends on the physical delivery of goods rather than the transfer by considering solely at the intention of both parties.

In Thai law Section 458 of CCC, once the seller and the buyer agree to form the sales contract, the ownership in such goods will be immediately transferred from the seller to the buyer.[13] However, in Section 459, if there is a condition in the contract in connection to the transfer of ownership, the ownership will not transfer until the condition has been satisfied.[14]

In unascertained goods, the process in making the goods to become the ascertained goods is that there must be the selection of goods. However, Thai law specified in Section 198 of CCC that the creditor or the buyer has to be the selector and there is no requirement regarding the consent of seller. Therefore, the ownership

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[12]Sylvain Bollée, **The Theory of Risks in the 1980 Vienna Sale of Goods Convention**, (1999-2000) pp. 245-290 [Online], available URL: http://cisgw3.law.pace.edu/cisg/biblio/bollee.html, 2019 (January, 20).

[13]Monticha Pakdeekong, **Civil and Commercial Code: Sale Exchange Gift** (Bangkok: Ramkhamhaeng University Press, 2017), pp. 71-73.

[14]Sanankorn Sotthibandhu, **Commentary on Sale Exchange Gift** (Bangkok: Winyuchon Publication House, 2013), pp. 142-146.

will be transferred when there is a selection of goods although there is no consent from the seller.[15]

In SGA, the transfer of property (ownership) of the specific goods will occur when the parties enter into the sales contract and the sales contract is unconditional in a deliverable state which means that when the contract is formed, the property (ownership) will be transferred. According to Section 18 of SGA. There are two conditions to be met with regard to the aforementioned issue. First, the contract does not define any condition regarding the transfer of property (ownership). If there is a condition in order to delay the transfer of property (ownership), such condition needs to be satisfied first, and then the property (ownership) will be transferred from the seller to the buyer.[16] Second, the goods have to be in the deliverable state which means that the goods are in the condition as specified in the contract.[17]

In addition, SGA further defines that if the contract mentions that the seller have to perform some acts in order to put the goods into a deliverable state, the seller must completely perform such duties specified in the contract and inform the buyer regarding the completion of such duties in order for the property (ownership) to be transferred from the seller to the buyer. For example, if the contract has a condition regarding the "free on rail", the seller has a duty to load the goods into the train and inform the buyer regarding the completion of the loading of goods into the train in order for the property (ownership) to be transferred to the buyer.[18]

SGA defines the general rule in Section 18 Rule 5 as that if there is a trading of the unascertained goods, there must be the process to make the goods unconditionally

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[15]Jitti Tingsapat, **Civil and Commercial Code Book 3 Section 453-536** (Bangkok: Thammasat University, 2015), pp. 37-39.

[16]Michae U. E. Herington and Christian Kessel, "Retention of titlein Englishlaw," **International Company and Commercial Law Review** (1994): 335-340.

[17]Underwoods Ltd v Burgh Castle Brick & Cement Syndicate [1922] 1 KB 343.

[18]Underwoods Ltd v Burgh Castle Brick & Cement Syndicate [1922] 1 KB 343.

appropriated to the contract.[19] The process to make the goods unconditionally appropriated to the contract is to irrevocable select the goods and both parties have to give consents regarding the selection.[20]

Furthermore, beside the selection of the goods with the consent from both parties, the UK law also specified the two processes to implicitly make the goods unconditionally appropriated to the contract as follows:

First, if the seller delivers the goods to the buyer and the buyer accepts the goods or the seller delivers the goods to the carrier, it can be implied that the goods are unconditionally appropriated to the contract. It can be seen that if the seller hands over the goods to the buyer, it is implicitly equal to the acceptance of the goods by the buyer and the property (ownership) will be transferred when the goods are delivered or if the seller delivers the goods to the carrier, there is no changing with regard to the goods and the goods will be unconditionally appropriated to the contract and the ownership will be transferred to the buyer without being informed by the seller.[21]

Second, the process of making the goods unconditionally appropriated to the contract by exhaustion. In this case, there is the trading of unascertained goods where the goods are parts of bulk and the bulk is identified in the contract or if the bulk has not been identified in the contract, later, there is the agreement to identify the bulk. If the goods in the bulk have decreased to the amount that the buyer agrees to buy, the property (ownership) of the goods will be immediately transferred from the seller to the buyer without the need to be informed by the seller or to receive any acceptance from the buyer.[22]

The trading of some types of goods or movable properties is controlled by the law and required to be registered in order for the sales contract to take effect.

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[19]P. S. Atiyah, John N. Adams and Hector MacQueen, **Atiyah's Sale of Goods** (Essex: Pearson, 2010), pp. 332-335.

[20]N. R. Campbell, "Passing of property in contracts for the sale of unascertained goods," **Journal of Business Law** (1996): 199-205.

[21]Healy v Howlett & Sons [1917] 1 KB 337.

[22]P. S. Atiyah, John N. Adams and Hector MacQueen, op. cit., pp. 332-334.

If there is no registration, the sales contract will be void.[23] These types of goods either in Thailand or the UK are based on the registration because if there is no registration, the contract cannot be formed and the property (ownership) in the goods will not transferred to the buyer.

Under CISG, there is no provision stated about the ownership in the goods. The law only state about the transfer of risk. The risks under Article 69 will be transferred from the seller to the buyer under two circumstances if the seller is not obligated in the agreement to make contract for goods carriage. The first circumstances, if both parties agree that the buyer will obtain the goods at the seller's place of business, the risks are transferred only if the buyer takes over the goods.[24] It can be seen that although the intention of goods transfer is presented, but the seller is still the holder of such goods physically. Thus, the seller shall still be liable for the risks of such property unless the goods are delivered to the buyer, and the buyer possesses the goods physically, then the buyer shall be the person liable for the risks at that time. This case includes the hiring of carrier by the buyer to receive the goods from the seller. The carrier hired by the buyer represents the buyer possession of the goods. Once the carrier receives the goods, the risks shall be transferred from the seller to the buyer at that time.

The second circumstance is the case stating that the buyer will obtain goods at other place outside the seller's place of business. The seller is still responsible for bringing the goods out of his/her own place of business to the appointed destination with the buyer on the date of appointment. The risks will be transferred from the seller to the buyer only if the seller performs the duty of delivering goods to the appointed destination and informs the seller for acknowledgement that the goods are ready for delivery.[25]

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[23]Pathichit Akejariyakorn, **Commentary on Sale, Exchange, Gift Law** (Bangkok: Winyuchon Publication House, 2013), pp. 108-110.

[24]Peter Schlechtriem, op. cit., pp. 90-91.

[25]Ibid.

In the event that the contract specifies that the seller has the obligation regarding the transportation which means the contract defines that the seller has the responsibility with regard to the transportation including finding the carrier, enter into the contract with the carrier and make a payment to the carrier without negotiating about the transfer of risks whether when will the risks are transferred. If the sales contract is under the CISG, the risks will be transferred to the buyer once the seller hands the goods to the first carrier.[26] The seller has a duty to prepare the goods and hire the carrier to transport the goods to the buyer and when the hired carrier receives the goods from the seller, the risks will be transferred to the buyer. It can be seen that the transfer of risks is related to the physically delivery of the goods which the seller has to deliver the goods to the carrier and the goods are physically under the care of the carrier, then the risks will be transfer from the seller to the buyer. Thus, as long as the goods are still with the seller, the seller will be the one who bears the risks.

The sales of the ascertained goods which are in the middle of the transportation, CISG defines that the risks are transferred since the date of the contract because the goods are not physically in the possession of the seller and the seller has no obligation with regard to the goods.[27]

Analysis on the system of transfer of the ownership

The ownership is the intangible right that an individual has over the properties, thus, the individual cannot physically hand over such right to one another. However, although the ownership is intangible, but the law allows it to be appropriated. The appropriation of such right does not mean the physical possession of the right yet the individual can claim such right and use it against other people.[28] Therefore, if a

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[26] John O. Honnold, **Uniform Law for International Sales under the 1980 United Nations Convention** (The Hague: Kluwer Law International,1999), pp. 398-408 [Online], available URL: https://www.cisg.law.pace.edu/cisg/biblio/ho67.html, 2019 (January, 15).

[27] Jacob S. Ziegel, **Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods**, (1981) [Online], available URL: https://www.cisg.law.pace.edu/cisg/text/ziegel68.html, 2019 (January, 19).

[28] Arnon Mamout, op. cit., pp. 86-89.

person does not have an intention to appropriate the ownership of the goods, that person has the intention to transfer the appropriate to another person. The transferee can appropriate the goods as soon as there is the expression of the intention to transfer the ownership without the need to physically deliver the goods.[29] As a result, the person who appropriate the goods does not need to be the one who has the ownership. That person might be the agent or the carrier of goods who possesses the goods on behalf of others. One must look at the law in order to determine that who has the ownership over the goods and not only focus on the physical possession.

From the aforementioned principle, the ownership should be transfer by the intention of the parties. Although, there is no explicit provision in the sale law stated that the ownership will transfer from the seller to the buyer by the intention of both parties like in Section 17 of SGA, it can be implied Section 458 of CCC to know that Thai law provide the ownership to transfer by intention. Moreover, the court of Thailand, such as the decision of the Supreme Court of Thailand no. 1504/2526,determine the issue about the transfer of the ownership in the sale of goods that the ownership will transfer when the seller and the buyer intent to conclude the sale of goods contract. The seller has not to deliver the goods to make the ownership in the goods to transfer.[30]

Therefore, there is nothing to add or change the provision about the system to transfer of the ownership in the goods in CCC.

Analysis on the transfer of the ownership in sale of specific goods which the parties do not make their intention clear

As mentioned above that the ownership is intangible, the transfer of ownership can be done through the expression of the intention. However, there is a question regarding how to figure out the intention of the parties if they do not express it? The answer is to determine the action of the parties. If the law defines the strong relation

[29]Hugo Grotius, **The Right of War and Peace Book II** (Indiana: Liberty Fund, 2005), pp. 745-749.

[30]The decision of the Supreme Court of Thailand no. 1504/2526.

between the action of the parties and the intention to transfer the ownership, it might be fairer for the parties.

However, Thai law does not define the strong relation between the action of the parties and the intention to transfer the ownership. In Section 458 of CCC, The law allows the ownership of the specific goods to be transferred easily. The ownership of the specific goods will be immediately transferred as soon as the parties conclude the sale contract even though the goods are not ready for the buyer to take it.

To compare with the SGA, Section 18 Rule 1 and Rule 2 require the goods to be already in the deliverable state and the ownership will pass to the buyer. This means that if the goods are not ready to for the buyer to take it, the seller has to do something to make a goods ready and the ownership will transfer to the buyer.

In Kulkarni v Manor Credit Ltd, the fact that, the buyer is a consumer and want to buy a car to use, is required the seller to make the car which the buyer had bought ready to use. The court held that the car which did not have its registration plates attached to it is not in a deliverable state. If this case was happened in Thailand, the result of the court decision would be changed. In the decision of the Supreme Court of Thailand no. 1025/2522, the seller wrote a letter to the buyer offering to sell a car (has already specify the car) at a price of THB 300,000 and the buyer made the acceptance via a letter and the seller has received such acceptance, thus, the sale contract of the car is formed. Once the contract is formed, the ownership of the car will be immediately transferred from the seller to the buyer.

In reality, in the commercial way, the agreement between the parties, where the parties acknowledge that car without registration plates cannot be delivered, can be deemed as the agreement that the parties have not had the intention to let the buyer be the owner of the car at the time of the contract. As the parties have not had the intention to transfer the ownership in the car, the ownership in the car cannot be considered as already transferred. Therefore, the transfer of property (ownership) which based on the commercial practice might correlate with the intention to transfer the ownership more than just to consider the formation of the contract.

Moreover, the transfer of the ownership in Thailand cause the risk of loss and damage in the goods are transferred. If the ownership of goods can be transferred easily, the risk of loss and damage in the goods are also transferred easily. The buyer will be liable in the goods, which are lost or damaged by nature disaster or the conduct of the third party, as soon as the contract is concluded even though the goods are not ready for the buyer to take and are in the physical possession of the seller. This is the advantage of the seller and do not fair for the buyer to liable.

For the reason mention above, the law on the transfer of the ownership in sale of specific goods, which the parties do not make their intention clear, has to be amended to reflect the actual intent of the parties. The buyer will not intent to take the goods which is not ready to take. Thus, the law should contain that the ownership of the goods will transfer only if the goods are in a deliverable state.

Analysis on the transfer of the ownership in sale of unascertained goods

The ownership is a legal fiction which require the property to be the object of right. In the case that the seller and the buyer do not know the exact goods that will be transferred, the ownership which is the right in the property should not be transfer. Section 460 of the CCC states follow this principle. The law state that “the ownership in unascertained property is not transferred until the property has been numbered, counted, weighed, measured or selected, or its identity has been otherwise rendered certain”.

However, the process to choose the goods to be a specific goods is not clear. The sale law does not define that which parties, seller or buyer, have right to select the goods. From this reason, we have to find the person who has right to select the goods under the obligation law Section 195 paragraph 2 of CCC. This section give right to buyer who is the creditor in this obligation.

Nevertheless, the ownership should be transfer from the intention of the both parties. The law should not empower individuals, only one party. Therefore, in this case which the law, it seems to be wrong. From this problem, the law should provide the process to select the goods by the consent of both parties under the principle of the ownership.

Analysis on the transfer of risk of loss and damage in the sale of goods

In Thailand, the transfer of risks under CCC uses the theory of "res per it domino," or "the owner bears the risks." In Section 370, the buyer who is a creditor will liable for the loss or damage of a specific goods if the sale contract is created. This means the point of risks transfer from the seller to the buyer is the same point where the ownership being transferred to the buyer. In the United Kingdom, SGA Section 20 (1) also apply this theory.

In the decision of the Supreme Court of Thailand no. 2607/2531, the buyer bought oil in the delivered truck of the seller amount 12,000 liters which mean that the goods are specific. If the some oil had lost during the transportation, the buyer was liable to pay full price.

However, theory of "res pe rit domino" is not fair for the buyer since the regulations specified that the risks are transferred with the expression of intention which means that only the buyer agrees to buy or express the intention to trade, the risks will be with the buyer even when the goods are still, physically, in the possession of the seller. As a consequence, if there are any damages occur to the goods where the seller cannot be blamed, the buyer has to be responsible for such damages without the chance to protect the goods. Therefore, the buyer would feel that the law was unfair.

In CISG, the theory of "hand over the good" is applied., the idea of giving the justice to the buyer was formed with the principle that the party who has the possession of the goods will be able to protect them from damages or losses, thus, such party who is at the best position that can protect the goods is the one who has to bear the risks if there is any damages. This theory regarding the transfer of risks which means that the one who has the goods will be the person who bear the risks in such goods. This principle focuses on the physical possession, thus, even the parties have the intention to transfer the goods but as long as the goods are in the physical possession of the seller and the seller has not yet delivered the goods to the carrier or the buyer, the seller will have to bear the risks and have to take

responsibility regarding the goods.[31] As a result, CISG does not specify about the case where the buyer has to be responsible with the damages of the goods which are in the possession of the seller which is in contrast with "res per it domino" principle that was adopted by SGA and CCC. Therefore, the "hand over the goods" principle which is accepted by CISG is fairer to the buyer than "res per it domino" which is used by SGA and CCC.

Article 69 of CISG states that the seller shall still be liable for the risks of such property unless the goods are delivered to the buyer. Or, in the case stating that the buyer will obtain goods at other places outside the seller's place of business, the seller is still responsible for bringing the goods out of his/her own place of business to the appointed destination with the buyer on the date of appointment. In the event that the contract specifies that the seller has the obligation regarding the transportation in Article 67 which means the contract defines that the seller has the responsibility with regard to the transportation including finding the carrier, enter into the contract with the carrier and make a payment to the carrier without negotiating about the transfer of risks whether when will the risks are transferred. If the sales contract is under the CISG, the risks will be transferred to the buyer once the seller hands the goods to the first carrier.[32]

Furthermore, the transfer of risks under CISG which defines that the risks will be transferred when the seller hands over the goods to the buyer or the carrier is to physically specify the point of risks transfer than to focus on the intention of the parties as defined in SGA and CCC. Thus, the parties can easily realise the point when the risks will transfer to the buyer because of the delivery of the goods which is more tangible and certain than the expression of intention.

In addition, the specification of the risks transfer point under CISG is correlated with the transfer of risks in the commercial practice. The transfer of risk under CISG

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[31] Sylvain Bollée, op. cit., pp. 245-290.

[32] John O. Honnold, **Uniform Law for International Sales under the 1980 United Nations Convention** (The Hague: Kluwer Law International, 1999), pp. 398-408 [Online], available URL: https://www.cisg.law.pace.edu/cisg/biblio/ho67.html, 2019 (January, 15).

can be easily compared with the risks transfer in the Incoterm. For example, in the general case where the seller does not need to make the transportation agreement, the transfer of risks will be similar to the formation of FCA term in the Incoterm 2010.[33] If the seller has the duty to enter into the transportation agreement, the transferred of risks will be the same as term CPT in the Incoterm 2010 which is different from SGA and CCC which cannot be compared with the transfer of risks in Incoterm.[34] Therefore, it means that the transfer of risks in CISG is correlated with the commercial practice more than SGA and CCC. It can be concluded that the transfer of risks in CISG is fairer to the buyer than in SGA and CCC and also closer to the commercial custom and practice than SGA and CCC.

For the unfair problem, Although the risks transfer theory is adopted in the UK is res per it domino, UK law defines the risks transfer in case of the buyer being a consumer separately. The risks in the goods which are for sell are transferred to the buyer, who is a consumer under Consumer Right Act 2015 Chapter 2 Section 29, only if the seller has delivered such goods to the buyer already.[35] Therefore, the risks and the ownership, in case of the buyer being a consumer, will be transferred at different time. The risks transfer theory is adopted in the case that the buyer who is a consumer is not “res per it domino” but “hand over the goods. In comparison with Thai Laws, this topic has not been provided in CCC or the Consumer Protection Act yet, as a result, the risks of goods under Thai Law shall always be transferred along with the ownership regardless that the buyer is Consumer.

For this reason, the theory of “hand over the good” seems to be fairer than the theory of “res per it domino” which use in Thai law. The sale of goods law of Thailand should add specific provision related to the transfer of risk and the law should take into account of the physical possession in the goods. The buyer should

[33]**Incoterms 2010 ICC rules for the use of domestic and international trade terms** (Paris: ICC Publication, 2010), pp. 24-26.

[34]Ibid.

[35]Patrick S. Atiyah, John N. Adams and Hector MacQueen, op. cit., pp. 342-343.

not have any liability when the goods are lost or damaged in the physical possession of the seller.

In conclusion, the laws about the transfer of the ownership and risk in the sale of goods contract in Thailand have to be reformed. Section 458-460of CCC should be reordered. Section 458 should be stated about the system of the transfer of the ownership. The law could be stated explicitly that the ownership will transfer by the intention of the parties. Moreover, the parties can agree to delay the transfer of the ownership by specify the conditions or time of the transfer of the ownership in the contract. In Section 459, the law should be stated about the transfer of the ownership in sale of specific goods which the parties do not make their intention clear. The ownership will transfer when the contract is formed and the goods are in a deliverable state. Section 460 should be stated about the sale of unascertained goods. The ownership will transfer when the goods has been numbered, counted, weighed, measured or selected, or its identity has been otherwise rendered certain by the consent of the parties. Finally, the law should add the specific provision which is stated about the transfer of risk of loss in the sale of goods contract. The transfer of risk should follow the theory of “hand over the good.”This mean that if the goods are in the physical possession, the risk will be still with the seller even though the ownership in the goods is already transfer to the buyer.

3. The problem regarding the implied term about the quality of the goods in sale contract

In general, when contracting parties have expressed their intention to enter into a sale of goods, and the description of goods so purchased is specified in the contract, the seller shall deliver the goods that match the condition and description, including quality, as specified in the contract. On the other hand, if only the description or type of the goods, excluding the quality, is set forth in the contract, it does not mean that the seller is entitled to deliver the goods which are of any quality as the seller deems appropriate. In case the contract is silent on the quality of goods, it

shall be deemed that the contracting parties have agreed to the delivery of goods which are of the quality specified by law. In other words, in case the contract does not contain a term relating to the quality of the goods, it shall be deemed that the contracting parties have implicitly agreed to the quality of the goods as prescribed by law.[36]

The quality of goods as prescribed by law can be interpreted as a minimum standard which must be followed by the seller when handing the goods over; the quality must be at least equivalent to or better than the standard prescribed by law, regardless of whether such quality standard is set forth in the contract. According to the law, such standard is part of the agreement whereby the seller shall adhere to. Failure to comply with such standard, the seller will be in breach of the sale agreement.

When talk about the implied term about the quality of the goods, there is only Section 472 of CCC which the parties will concern. This Section imply that the seller has to deliver the goods without defect. If the defect results in the depreciation of value, or effecting the normal use or intended purpose per agreement, the seller is liable. The sale law does not concern about the quality of the goods which the buyer will be use. The word "defect" means a fault in the goods. This mean that if the goods do not appear any fault when the seller deliver, the buyer is not protected from this Section even though the buyer cannot use goods for the objection that he or she want.[37]

There is a Section 195 in the obligation law to determine the quality of the goods that the buyer has to deliver. The law state that the debtor, which mean the seller, must deliver a thing of medium quality when the thing which forms the subject of an obligation is described only in kind.[38] Thus, the seller does not have to

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[36]W. C. H. Ervine, "Satisfactory Quality: what does it mean?," **Journal of Business Law** (2004): 684-703.

[37]Sanankorn Sotthibandhu, **Commentary on Sale Exchange Gift** (Bangkok: Winyuchon Publication House, 2013), p. 199.

[38]Sopon Rattanakorn, **Commentary on Obligation Law** (Bangkok: Nitibannagarn, 2002), pp. 65-67.

hand over to the buyer the goods which are of the best quality, but the seller cannot hand over to the buyer the worst quality goods; they must be of medium quality.

However, this Section is not applied only for the sale of goods contract but also for other contracts. This does not seem to be fair that the law provides the quality of all contract in the same level. The buyer who pay the price should be protect for better standard of quality in the goods than the donee who give nothing to receive the property. Moreover, the law does not have any detail to determine what is medium quality.

To compare with SGA, standard of the quality is required to be the implied term in Section 14 (2). The standard was shifted from "merchantable quality" to "satisfactory quality" in the amendment of 1995. When considering the satisfactory quality of goods, from legal viewpoint, it is necessary to consider whether a person of ordinary prudence, who is in the same situation of the buyer, would be satisfied with the goods delivered by the seller, taking into consideration of the description and price of the goods. In addition, the goods must be fit for all the purposes for which goods of the kind are commonly supplied. As such, the interpretation of 'satisfactory quality' substantially deviated from 'merchantable quality'; the seller is now obligated to deliver the goods which are fit for all purposes for which goods of the kind are commonly supplied. The goods can no longer be fit for one particular purpose but all purposes for which goods of the kind are commonly supplied. If goods cannot ordinarily be used by the buyer for any reasons, the seller shall be liable.[39]

In general, the seller is the best party to know the quality or efficiency of goods. Since Roman times, a seller wishing to sell beast of burden or slave in the market was required by the market owner to disclose facts relating to the beast of burden or slave. Failure to make such disclosure, and the buyer found that the

[39]P. S. Atiyah, John N. Adams and Hector MacQueen, **Atiyah's Sale of Goods** (Essex: Pearson, 2010), pp. 158-160.

beast or slave had any flaws, it shall be deemed that the seller sold the goods in bad faith, and therefore, the seller shall be liable. Application of this principle was later extended to the sale of other goods.[40]

It can be seen that good faith or honesty is the main principle which must be followed by the seller. The good faith is considered by looking into the act of the seller. In some circumstances, although the seller does not make any misleading statements, bad faith might occur if the seller, in hope of selling the goods, withholds any information that should be notified to the buyer. In this case, the seller should be liable for bad faith.[41]

With regard to the principle of good faith, the UK law is efficient in term of granting the buyer the protection and recognizing the principle of good faith. In some circumstances, although the seller does not make any misleading statements, bad faith might occur if the seller, in hope of selling the goods, withholds any information that should be notified to the buyer. In this case, the seller should be liable for bad faith.

The UK law assumes that the seller has better knowledge of the goods than the buyer, and thus, the seller is required to deliver the goods of which the buyer must satisfy, when making the comparison of the goods with its description and price. Besides, the seller shall disclose the quality of goods to the buyer, as well as informing the buyer how the goods can be used. Failure to make such disclosure, and the goods could not satisfactorily perform the purposes when they are ordinarily used, the seller shall be liable. On the other hand, the buyer, despite being notified by the seller, insists on buying the goods, the seller shall not be liable.

As mentioned above, the UK law seems to be fairer for the buyer than Thai law. The standard for the quality of goods which the law requires from the seller at the time of delivery under the SGA, the obligations of the seller under Thai law are

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[40]Sanankorn Sotthibandhu, **Introduction to Roman's Private Law** (Bangkok: Winyuchon Publication House, 2016), pp. 213-216.

[41]William Warwick Buckland, **A Text-Book of Roman Law from Augustus to Justinian** (Cambridge: Cambridge University Press, 1950), pp. 411-415.

found to be much less stringent. In case the contract is silent on any particular purpose which the buyer intends to use the goods for, Thai law does not obligate the seller to reveal how the goods can be used, nor does it require the seller to inform the circumstances the goods would be unfit for use. After purchasing the goods, if the buyer cannot use the goods as anticipated, the seller shall not be liable as long as the seller has supplied the goods which are of medium quality and not defective. Unlike the Thai law, under the UK law, the seller is required to disclose how the goods can be used. After the goods are purchased, if they do not perform any ordinary purpose, the seller will be liable.

For example, a buyer bought a 'kitchen knife' from a seller. After purchasing the knife, the buyer found that it was unfit for cutting some types of meat, and thus, the buyer made a claim against the seller. Under Thai law, the seller shall not be liable due to the fact that the knife was of medium quality and not defective at the time of delivery. Unlike Thai law, under the UK law, the knife must be fit for all purposes for which it could ordinarily be used. The knife that was sold by the seller was a kitchen knife; it must be fit for all kinds of cooking. The seller would not be liable if, at the time of entering into the sale, he had informed the buyer the specifications of the knife, e.g. the knife was fit for cutting vegetables and chicken but not for cutting sticky or bone-in meat. Had the seller notified the buyer of this fact, the seller would not be liable. Failure to notify the buyer, it shall be deemed that the knife must be fit for all kinds of cooking. Since the knife was not for cutting certain types of meat, it was not of satisfactory quality. The seller shall be liable to the buyer.

To compare with CISG, Article 35 (2) require the the goods which the seller has to deliver, must fit for purposes that such goods are ordinary used. In *Rijn Blend case*, an arbitration case in the Netherlands, the tribunal translate that "the goods are ordinary be used" mean that goods have a standard of "reasonable quality". The tribunal opined that the seller had the duty to hand over the goods which were

of “reasonable quality”.[42] Otherwise, the goods could not ordinarily be used; the seller would be in breach of the sale contract.

When considering whether the goods were of reasonable quality, the tribunal took into consideration two factors; the price, including an idea that goods of a high value must be of reasonable quality taking into consideration the price. Besides, the tribunal would look into the commercial practice of the parties. If there was a previous shipment of goods, it shall be deemed that the seller has guaranteed the quality of goods to be equivalent to the previous shipment. In the following purchase orders, the seller shall deliver the goods which are of the same quality. Accordingly, if the goods do not worth the price charged and are not of reasonable quality based on the commercial practice, the seller will be in breach of the sale contract, and thus, liable to the buyer.[43]

Thai law resembles CISG with respect to the quality of goods; it is not required that the goods must be of the best quality. If the goods are of sufficient quality comparing to the goods of the kind, the goods are deemed to pass the standard prescribed by law. However, Thai law is silent on the question is how to assess whether the goods are of sufficient quality. What reference should be used for comparison? Does it need to compare the goods with goods of the same kind? Does it need to refer to the satisfactory level of a person of ordinary prudence? According to the Thai law, the goods must not be defective at the time of delivery affecting the normal use of the goods. As such, if the goods, which are delivered to the buyer, are of medium quality and not defective at the time of delivery, the contractual obligations will be fully performed. Utilization of the goods by the buyer is an irrelevant factor. Accordingly, it could be said that, when comparing Thai law with CISG, the seller in Thailand will have less obligations.

After comparison of the CCC with SGA and CISG, the buyer in Thailand seem to have the least protection. For this reason, Thai law has to be amended to

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[42] **Netherlands Arbitration Institute Case No. 2319** [Online], available URL: http://cisgw3.law.pace.edu/cases/021015n1.html, 2019 (January, 20).

[43] Ibid.

provide a specific provision about standard of the quality which will be applied as the implied term to protect buyers from being exploited. The law should protect the buyer against the expression of bad faith by the seller who may make any misleading statements or conceal any facts relating to the goods. The seller should be required by law to make a full disclosure of the description or specifications of the goods. Otherwise, the description of the goods made by the seller might be exaggerated. It can be seen that SGA is the legislation which the grants greatest protection to the buyer.

In conclusion, to balance the fairness for the parties in sale of goods contract, Thai law should add a specific provision in the subject of the implied term. The provision should be clearly stated that the goods which the seller has to deliver must be in a satisfactory quality and fit for all the purpose that the goods in the same the kind are ordinarily used.

4. The problem regarding form of sale of goods contract and enforceability by action

The sale of goods law in Thailand was influenced by the Sale of Goods Act 1893 of the UK as a consequence,[44] section 456 of the CCC requires that the sales contract of the movable properties which are worth more than THB 500 needs to have the written evidence with the signature of the liable party in order to be enforceable. Even if in 2005, there was an amendment of the value of the properties from THB 500 to THB 20,000 but the other requirements are still the same.

It means that in Thailand, although there is no required form in establishing the sales contract of the movable properties and the parties can create the sales contract without the written form, nonetheless, the sales contract of the movable properties which are worth more than THB 20,000 is required to have the written evidence with the signature of the liable party or unless earnest is given, or there is

[44]M. G. Bridge, **The Sale of Goods** (Oxford: Oxford University Press, 2014), pp. 10-11.

part performance, otherwise it cannot be enforced in the court.[45] As a result, even though the law does not require the form of the contract but when there is a dispute in court with regard to the contract; the claimant needs to have the written evidenced to prove to the court in order for the court to accept the claim. If there is no written evidence to prove to the court, even if the sales contract is truly formed, the court will not consider and enforce the contract for the claimant. This requirement also covers other type of sales contracts that the parties wish to enforce them as well. Furthermore, the claimant can use the witness to prove that there is the sales contract instead of the written evidence and the court will strictly relies on the information written in such evidence only. If the parties have other agreements besides what written in the evidence, the court will not enforce such agreements for the parties and the parties cannot use the witness to prove those agreements or amend the information written in the evidence as the court is not allowed to hear such witness.[46]

In the case of the Supreme Court of Thailand no. 3046/2527 the seller accepts the buyer to sale parboiled rice but there is not the evidence which has a signature of the seller. The court held that the buyer cannot enforce by action even though the seller does not deliver parboiled rice. This means the buyer cannot claim any damage to the seller just because there is no evidence signed by the seller.

It can be seen that although there is no form for establishing the sales contract but documents are still the important elements in forming the sales contract of the movable properties in Thailand because whether the contract can be enforcedor not is depended on the documents. This seems not to be fair because it can provide some negative impacts for the party who has a good faith and trust to bind the word of mouth of another party in making a sale of goods contract.

To compare with SGA and CISG, the laws do not determine the form of the sales contract; therefore, the parties can freely enter into the contract with any form. The formation of the sales contract can be either made in writing or made by word of mouth or even partially made in writing and partially made by word of mouth

[45]The Decision of The Supreme Court of Thailand number 779/2482.

[46]The Decision of The Supreme Court of Thailand number 6718/2540.

and if the contract is formed, regardless of the procedures, it can be enforced. Although, in CISG, any countries which do not wish to adopt this principle can make a declaration or reservation in accordance with Article 94 and as a result, as mention in Article 12, the contract which one of the parties has the place of business in the country that made the reservation must be governed by the local law of that country and Article 11 of CISG will not apply to this case.[47] If the local law requires the written form or written evidence for the contract to be enforced, the parties must comply by such requirements. Nevertheless, if countries do not make a declaration, the sale of goods contract can be form without formalities.

Actually, when the parties enter into the contract which is not made in writing, it is considered as the formation of the contract based on the freedom of contract which the parties have the freedom to form the contract and such freedom includes the freedom of form of the contract.[48] Therefore, as the parties define the form of the contract as the verbal contract and do not want to make the contract in writing, the law should recognise such contract and should not intervene with the freedom of the parties.

Even though the principle of the freedom of contract has some exceptions which allow the state to intervene with the decision of the parties, nonetheless, such intervention must come from the fact that the state views that the parties are unequal and one might take advantage of another or the state has some procedures with regard to certain types of goods that must be under control of that state.[49] If the intervention of the state is not for the prevention of the taking of advantage by one party or the controlling of goods, the state should not intervene with the freedom of contract. As a result, the state should not intervene with the business

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[47] Peter Schlechtriem, **Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods** (Vienna: Manz, 1986), pp. 44-47.

[48] ReshmaKorde, "Good Faith and Freedom of Contract,"**UCL Jurisprudence Review** (2000): 142-165.

[49] Mark Pettit Jr., Freedom, "freedom of contract and the 'rise and fall',"**Boston University Law Review** (1999): 263-353.

trading between two people who have the equal power in negotiation and should let the trading to be based on the freedom of contract which the parties are allow to choose the form of the contract. Thus, in general, the law should recognise and enforce such contract and if the state prefers to control some certain types of the goods, the state can select to control them separately as case by case.

Although the fact that the law requires the parties to create the contract in writing can help the parties to be more discreet in decision making before forming the contract especially the trading of the high value goods, there must be more caution when entering into the contract with respect to such goods because if the contract can be formed easily, it could lead to the damages. However, this kind of thought might be the consequence of the fact that in the past, there are some difficulties in travelling, communication, and checking the goods and the financial status of the trading parties, thus, the law created some procedures regarding the trading of goods, in particular, the high value goods in order to reconfirm the decisions of the parties. None the less, the aforemention edsituation is not the same with the current situation since, now a days, the information and news can be quickly communicated, the checking of the goods' conditions can be done through the photos or video within a second, and there are technologies assisting in verifying the conditions of the goods or the financial status of the parties, therefore, the decision making with respect to the trading is easier and with more confidence than in the past.

Furthermore, the trading which is required to be made in writing is resulted from the fact that in the past the trading was not well developed and people were not familiar with the trading as a consequence they defined that in order to prove the existence of the sales contract, it must be made in writing. If the society is developed in term of trading, the people in such society will be familiar with the trading and even if the sales contract is made verbally, the parties are still confident with their contract and willing to be bound and enforced by the contract without the requirement that the contract must be made in writing to reassure that the contract was made. In addition, the process of making a written contract is burdensome and discourages people to enter into the sales contract which is bad for the

development of the economy. Thus, the countries which have the developed trading would not require the form of the sales contract and the sales contract does not need to be made in writing.

Although to have the written evidence in order to enforce the contract in the court can be the initial prove that the case is solid enough for the court to accept the case and to prevent people from being sued without any evidence. However, it can be viewed that the law does not protect another party which is the true victim related to the contract since the businessmen are not lawyers, they might not know how to form the contract. Thus, if the contract is made rightfully and the parties are willing to be bound by the contract even though the contract was not made in writing or do something to be the evidence, it does not mean that the parties do not want to perform the contract or do not get any damaged. If one of the parties get some damage the law should allow he or she to claim such damage in the court.

From this all reason above, the formality of sale of goods contract has to be amended. The sale of goods contract should be in the freedom of form. If the there is a default with regard to the obligation specified in the contract, the law should allow the victim to prove the damages even if there is no written evidence or do something to be the evidence as there could be other types of evidence such as witnesses or materials which can prove the existence of the contract and that there is a default. The law should not reject the chance to prove such damages.

In conclusion, Thai law should not obstruct the victim who has a damage to bring the case to the court. The parties should have the freedom of form to conclude their sale of goods contract. In principle, when the form is not prescribed by law or in absence of any limitations relating to the enforcement by action, the formless contract is enforceable by action. The limitations relating to the enforcement by action of the contract of sale of movable property is in Section 456 paragraph 3. By deleting this paragraph, the contract of sale of movable property will be a formless contract and not be barred to be enforced by action.

5. The problem regarding formation of unstated price of sale contract

Sale of goods contract is a price contract. The buyer has to pay the price to exchange with the ownership in the goods.[50] However, the problem occurs in the sale of goods contract that the buyer wishes to pay the price but the exact price is not explicit in the contract, should the law be applicable to this case?

In Thailand, the Supreme Court in the decision no. 6420/2539 applied the gap-filling provisions which state in 487 and ruled that the sales contract can be formed even though there is no exact price specified in the contract.[51] Nevertheless, the former Supreme Court used the principle that the offer must be clear to determine the formation of the sales contract. Thus, if the offer or has not yet defined the exact price in the offer, the offer has not yet created and even if the offered accepts such offer, such action is not considered as the acceptance and the contract has not yet formed.[52] This mean that the law is still uncertain applying the case. To find the certain way, it has to be compare the problem with SGA and CISG.

To compare with SGA, the unstated price contract is the issue that has been famously brought to the court. The judge in Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery (No. 1) ruled that in the situation that the sales contract which the parties did not state the exact price or define the third party such as the arbitrator to be a person that will specify the price, the court can define the price of goods at the reasonable price.[53] Thus, it can be seen that the UK court does not consider the price of goods as the minimum elements of the creation of the contract. Even if in some case, the parties did not specify the price in the contract, the contract is considered as being formed and can be enforced against the parties. If

[50]M.G. Bridge, op. cit., pp. 46-48.

[51]The Decision of The Supreme Court of Thailand number 6420/2539.

[52]The Decision of The Supreme Court of Thailand number 927/2498.

[53]Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery (No. 1) [2001] EWCA Civ 406.

the parties cannot agree on the price, the parties can ask the court to determine the price of the contract.

Nonetheless, it does not mean that every agreement between two persons which does not specify the price will be considered as the forming of the sales contract. The UK court determines the intention of the parties as whether the parties would like to form the contract or not. If there is a condition in the agreement to negotiate about the price in the future, for example, the parties agree to trade 100 roses and the parties agree to determine the price in the future, the court considers this kind of agreement as the "agreement to agree" which can be assumed that the parties have not yet had the intention to form the contract at the date of the agreement because they still want to negotiate in the future, thus, the contract has not yet formed and the parties cannot enforce such agreement against each other.[54] Nevertheless, even if it is the agreement to agree but the parties have further action which is enough for the court to determine that the parties agree to be bound by the contract such as there is a delivery of the traded goods or a partial performance of the contract, it is clear enough that the parties would like to be bound by the contract, as a consequence, the contract is formed and can be enforced. With regard to the aforementioned scenario, the gap-filling provisions will be applied and the party needs to pay the reasonable price.[55]

It can be seen that the UK court focuses on the intention of the parties whether the parties have the intention to form the contract or not. If the parties' intention is clear that the parties would like to create the contract even though the parties did not state the price in the sales contract, the contract is considered to be formed.

The way to make a decision in the UK seem to be fair for both parties of sale of goods contract. Actually, the sales contract was invented since the Roman era and it was formed because the parties would like to be bound by the contract

[54] May & Butcher Ltd v. The King [1934] 2 KB 17.

[55] Queensland Electricity Generating Board v. New Hope Collieries Pty Ltd [1989] 1 Lloyd's Rep 205.

and on the basis of the consensus and bona fide which means that the intention of the parties is the most important element in forming the contract. Therefore, the interpretation of the creation of the sales contract is based on the intention of the parties. If the parties have the intention or the purpose to form the contract although some elements of the contract such as the price of the properties is not clearly defined, the contract is considered as being formed and both parties can enforce the contract.

The intention of the parties can be determined by the fact that the parties agree to be bound by the contract and there is no further negotiation regarding the important issues required. For example, the parties have already agreed on the properties which will be the subject of the contract and the amount of such properties and do not wish to further negotiate with regard to any other important issues. It can be considered that the parties would like to be bound by the contract even if the parties did not agree upon the price. The gap-filling provisions will be applied and it can be understood that the price will be the reasonable price for both parties.

Nonetheless, if the parties do not have the intention to form the contract such as there is the agreement to agree on the price in the future, it can be seen that the parties would like to negotiate more in the future. This agreement is only the initial agreement which needs to be further negotiated in the future. As a consequence, the parties do not have the intention to form the contract, thus, the contract has not yet formed and such agreement cannot be enforced between the parties.

However, if the case has occurred under CISG jurisdiction, the result of the case will be change from the UK. CISG specifies the minimum elements of the sales contract in Article 14. If the sales contract does not have clear elements as mentioned by the regulation, the contract cannot be formed. The price of the goods is one of the minimum elements which the parties have to agree, thus, if the parties do not specify the price in the contact, the contract has not yet formed.[56] Although CISG

[56]E. Allan Farnsworth, **Formation of Contract** (1984), Ch. 3, pp. 3-1 to 3-18 [Online], available URL: https://www.cisg.law.pace.edu/cisg/biblio/farnsworth1.html, 2019 (January, 12).

has the gap-filling provision with regard to the price in Article 55, however, if the contract has not yet formed in accordance with Article 14, Article 55 cannot apply to such contract.[57]

Regarding the above-mentioned issue, there are some academics that have counter arguments. Some academics hold that even though Article 14 mentions that the contract has to specify the exact price, nonetheless, if the parties did not state the price, Article 55 can be applied and the court can define the price and the contract is formed even if the price has not yet specified.[58] However, the judge in Pratt & Whitney v Malev Hungarian Airlines still used Article 14 as a key principle and did not use Article 55 in determining the issue. The judge focused on the intention of the parties as whether it was clear enough to form the contract and if the parties did not clearly state the price, the contract cannot be formed.[59] However, the court did not consider the real intention of the parties that whether the parties would like to be bound by the agreement or not. This point of view of the court in this case is different from the UK court which the contract can be formed by any form.

This does not seem to be fair to the parties who get any damage that the law did not approach to interpretation, relying on an understanding of the actualintent of the party responsible for the statement or conduct. The intention whether the parties would like to be bound by such agreement is the important component in determining whether the contract is being formed. If the parties have the intention

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[57]John E. Murray Jr., An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods, **Journal of Law and Commerce** (1988): 11-51 [Online], available URL: https://www.cisg.law.pace.edu/cisg/biblio/murray.html, 2019 (January, 12).

[58]John O. Honnold, **Uniform Law for International Sales under the 1980 United Nations Convention** (The Hague: Kluwer Law International, 1999), pp. 353-357, Reproduced with permission of the publisher. [Online], available URL: https://www.cisg.law.pace.edu/cisg/biblio/ho55.html, 2019 (January, 5).

[59]Hungary Supreme Court (Pratt & Whitney v. Malev) [Online], available URL: http://cisgw3.law.pace.edu/cases/920925h1.html, 2019 (January, 12).

to be bound even though the price has not yet defined, the contract should be able to be enforced and the gap-filling provisions should be used to determine the price in this case.

Actually, the sales contract was invented since the Roman era and it was formed because the parties would like to be bound by the contract and on the basis of the consensus and bona fide which means that the intention of the parties is the most important element in forming the contract.[60] Therefore, the interpretation of the creation of the sales contract is based on the intention of the parties. If the parties have the intention or the purpose to form the contract although some elements of the contract such as the price of the properties is not clearly defined, the contract is considered as being formed and both parties can enforce the contract.[61]

From all reasons mentioned above, the answer of the question that how the law should enforce with unstated price of sale of goods contract is the law should apply the case of uncertain price of sale of goods contract relying on the actual intention of the parties. CCC must discern the actual intention of the parties to form the contract. The issue related to the interpretation of the unstated price contract, that it will not be considered as an offer; and that the contract has yet to be created, should not be happen. Therefore, the provisions of the CCC are ambiguous on this matter. It is recommended that the legislation should be amended to protect the intention of the parties; when the parties intend to create a sale contract, even in the absence of the price, the contract shall be concluded.

6. Conclusion and Recommendation

In sale of goods contract, Thai law seem to give an advantage to the seller side. The buyer does not have sufficient protection from the damage which will be

[60]Peter Birks, **The Roman Law of Obligations** (Oxford: Oxford University Press, 2014), p. 65.

[61]George Mousourakis, **Roman Law and the Origins of the Civil Law Tradition** (Auckland: Springer, 2015), p. 135.

caused by the sale of goods contract. There are several problems that CCC should be revised.

First, on the problem regarding transfer of ownership and risk, according to the CCC, when the parties enter into the sale contract, the expression of intent of ownership transfer will immediately take place. However, if the parties do not make their intention clear, the law does not define the strong relation between the action of the parties and the intention to transfer the ownership. CCC does not concern whether the goods are ready to deliver or not. Moreover, to follow the theory of res per it domino, the risk in the goods is also transferred at the same time that the ownership is transferred. This mean that the risks can be with the buyer even when the goods are still, physically, in the possession of the seller. This is not fair for the buyer.

Second, on the problem regarding the implied term about the quality of the goods in sale contract, there is not enough protection for the buyer. There is no specific provision in the sale law which state about the implied term about the standard of the quality. The law should follow the principle of good faith and require the seller to deliver the goods which the buyer is satisfy.

Third, on the problem regarding form of sale of goods contract and enforceability by action, Section 456 paragraph 3 require the claimant to have the written evidenced or do something to be the evidence, such as earnest is given or part performance, to prove to the court in order for the court to accept the claim. This seem not to be fair if it has some damage for the party who has a good faith and trust to bind the word of mouth of another party to make a sale of goods contract. It can be viewed that the law does not protect the party which is the true victim related to the contract. Actually, people should have the freedom to form the contract includes the freedom of form of the contract. Thus, Thai law should not obstruct the parties who has a damage to bring the case to the court.

Fourth, on the problem regarding formation of unstated price of sale contract, the law is still uncertain applying the case. There are some case that the court held that if the exact price did not define in the contract, the sale of goods contract had

not yet created. This does not seem to be fair to the parties who get any damage from the sale contract that the law did not interpret relying on an understanding of the actualintent of the party. Therefore, the law should apply the case of uncertain price of sale of goods contract relying on the actual intention of the parties.

From these all reason, sale of goods law in Thailand should be amended to balance the fairness of the parties. The buyer should be more protected.

Recommendation

CCC should be amended in 5 provisions and add more 2 provision as follow,

Section 456

“A sale of immovable property is void unless it is made in writing and registered by the competent official. The same rule applies to ships or vessels of six tons and over, to steam launches or motor boats of five tons and over, to floating houses and to beasts of burden.

An agreement to sell or to buy any of the aforesaid property, or a promise of sale of such property is not enforceable by action unless there is some written evidence signed by the party liable or unless earnest is given, or there is part performance.”

(revoke paragraph 3)

Section 458

“**The ownership of the property is transferred to the buyer at such time as the parties to the contract intend it to be transferred**.

If a contract of sale is subject to a condition or to a time clause', the ownership of the property is not transferred until the condition is fulfilled, or the time has arrived.”

Section 459

“The ownership of the property sold is transferred to the buyer from the moment when the contract of sale is entered into.

In case of sale of moveable property, the ownership shall not pass until the property is in a deliverable state.

In case, according to the contract, the seller shall do any acts necessary to make the goods to be in a deliverable state, the ownership shall not pass until such acts have been performed.”

Section 460

“In case of sale of unascertained property, the ownership is not transferred until the property has been numbered, counted, weighed, measured or selected, or its identity has been otherwise rendered certain **by the consent of the parties**.

In case of sale of specific property, if the seller is bound to count, weigh, measure or do some other act or thing with reference to the property for the purpose of ascertaining the price, the ownership is not transferred to the buyer until such act or thing be done.”

Section 460/1

“Unless otherwise agreed, the person holding the ownership shall bear risk of loss or damage to the property.

In case of sale of moveable property, as long as the property is in possession of the seller, the seller has a risk of loss or damage to the property.

Seller’s duty to take care shall terminate at the moment when the seller has handed the property over to the buyer or the buyer’s representative.

In case there is a carriage of goods contract, seller’s duty to take care shall terminate at the moment when the seller has handed the property over to the carrier unless the buyer is a consumer, seller’s duty to take care shall terminate only under paragraph 3.”

Section 474/1

“In case of a contract of sale of moveable property, unless otherwise agreed, the seller is bound to deliver the goods to the buyer which are of satisfactory quality to a person who is in the same situation of the buyer would expect to receive, comparing to the description and price of the goods.

The property, which is purchased and sold, must perform all purposes for which goods of the kind are ordinarily used, unless the buyer knows at the

moment when the contract is made that the goods cannot perform any particular purpose.”

Section 487

“The price of the property sold may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

When the price is not determined as aforesaid, the buyer must pau a reasonable price.

If the parties wish for the sale contract to be created, the contract shall be created, even in the absence of the price.”

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