

CASE NOTE: THAILAND

CASE CITATION:

No. 3046/2537 (1994)¹ (Sale of Movable Property (Section 456 of the Civil & Commercial Code))

NAME AND LEVEL OF COURT:
Supreme Court

PLAINTIFF:

Woodhouse Drake and Carrey SA

DEFENDANT:

Thaimapan Trading Co., Ltd., et al

SUPREME COURT JUDGES:

Judge Pramot Chapanont, Judge Ura Wangaom-krang, and Judge Preecha Chaleamwanich

Summary

The plaintiff, a Swiss company, entered into an agreement for the sale of Thai parboiled rice under a F.O.B. contract with the Thaimapans, a group of Thai suppliers. Both parties communicated with each other regarding the transaction through the exchange of telexes. Woodhouse agreed to receive the parboiled rice at the Bangkok Port where Thaimapans' office was located. Apparently, Thaimapans breached the sales contract by refusing to deliver the goods once Woodhouse's vessel arrived at the Bangkok Port. As a consequence, Woodhouse filed a complaint with the court for damages caused by Thaimapans' failure to deliver the goods. Strategically, Thaimapans' position was they neither knew of nor had ever transacted with Woodhouse.

The First Instance Court, Appellate Court and Supreme Court all dismissed Woodhouse's case. The court accepted the submission that a sales contract could have been created while negotiating the terms of the contract via telex communications. However, to enforce the sale of movable assets, section 456 Paragraph two of the Civil and Commercial Code ("CCC") stated that a contract that involved the sale of goods for 500 THB² or more requires written evidence signed by the liable party or the liable party provides a deposit or partial payment. In this matter, although Thaimapans failed to deliver the parboiled rice, the sales contract could not be enforced due to the lack of partial payment, deposit and the lack of a signature by Thaimapan.

Facts

According to the Woodhouse's Plaintiff and its amendment, Woodhouse and Thaimapan agreed to buy and sell Thai parboiled rice (5%) under a F.O.B. contract.

The shipment was contracted to be made from the Bangkok Port to the West African Coast Port. Woodhouse's vessel would receive the goods at the Bangkok Port. The transfer of the purchase price of the goods was to be made to the Bangkok Bank, as Thaimapans' correspondent bank in Thailand, by Woodhouse through its Indosuez Bank. Woodhouse performed as agreed, by sending a Letter of Credit to the Bangkok Bank in accordance with the terms of the sales contract, and informed the defendants that Woodhouse's vessel was on the way to accept the goods at the Bangkok Port. Thaimapans were instructed to arrange for delivery of the goods. However, Thaimapans notified Woodhouse in writing of their refusal to deliver the goods. Accordingly, Woodhouse gave a termination notice to Thaimapans. As a result of the breach of contract, Woodhouse could not deliver the rice to Société Générale Africaine SA. Woodhouse also had to pay a penalty for unused freight booking and expenses caused by sending its staff to accept the delivery in Bangkok. All of the damages had been acknowledged by Thaimapans on the date of execution. Woodhouse claimed that all the defendants must jointly pay Woodhouse for damages in the sum of THB 18,381,132.48, including interest.

According to the first Defendant's Answer and its amendment, the first defendant never agreed to sell, engage with or be assigned by the second defendant to sell Thai parboiled rice to Woodhouse. Additionally, the first defendant never received any payment under the Letter of Credit as claimed by Woodhouse. In essence, it was claimed that the contract for parboiled rice never existed. Moreover, the first defendant never sent a telex to Woodhouse. Woodhouse must have sent a vessel to the Bangkok Port to accept rice from the other seller. The first defendant never knew to whom the rice would be resold abroad, and could not foresee or should not

¹ *The Dika, or Supreme Court, Judgment No. 3046/2547 was originally published in Thai by the Office of the Commission for Supporting Judicial Works. In the original version, Judge Kamjad*

Pongsawad summarized the facts of this matter.
² *Section 456 Paragraph two of the CCC was amended in 2005 and the revised provision states that "A contract that involves the sale of goods for*

20,000 THB or more requires written evidence signed by the liable party or the liable party provides a deposit or partial payment."

have foreseen that Woodhouse would claim damages from anyone as alleged. Therefore, the first defendant was not liable for any damages caused by these extraordinary circumstances. Woodhouse never paid any penalty to the ship owner, and thus was not eligible to demand the claimed operating expenses from the first defendant. The Plaintiff should be dismissed.

According to the second Defendant's Answer, the second defendant never knew or dealt with Woodhouse. Also, the second defendant never engaged with or assigned the first defendant to sell Thai parboiled rice to Woodhouse. Woodhouse never gave notice or a demand letter to the defendant prior to the filing date of the Plaintiff. The Plaintiff should be dismissed.

Decisions

The Court of First Instance dismissed the Plaintiff. Woodhouse appealed to the Court of Appeals. The Court of Appeals upheld the decision of the Court of First Instance. Woodhouse appealed to the Supreme Court.

The Supreme Court decision:

"It is convinced that there has been a negotiation for sales of Thai parboiled rice between the Plaintiff and the first Defendant via telexes, as shown in Document J5 to J9. The Plaintiff has opened and sent a letter of credit for price payment to Bangkok Bank as agreed in the referred telexes. However, the first Defendant was unable to deliver the goods to the Plaintiff due to the first Defendant's inability to comply with the conditions stipulated in the letter of credit.

"The issue raised by the Plaintiff in the Appeal is whether a sales contract for Thai parboiled rice between the Plaintiff and the Defendants has come into existence according to the law. It is held that the contract has come into existence at the time when the negotiation via the telexes is finalized.

"However, under Section 456 Paragraph two of the Civil and Commercial Code, a contract of sale of movable property where the agreed price is 500 Baht or more, or an agreement to sell or to buy or a promise of sale of property where the agreed price is 500 Baht or more is not enforceable by action unless

there is some written evidence signed by the party liable, or unless an earnest is given, or there is part performance.

"According to the telexes, there is no evidence of part performance or earnest or signatures of the Defendants as the liable party. Therefore, the Plaintiff cannot enforce the sales contract on the Defendants by legal action.

"Regarding the Plaintiff's appeal that there are crosses affixed in the telexes, it is held that this has not been raised in the Court of First Instance and actually there are no cross affixed in the telexes as claimed.

"Held that the sales contract for Thai parboiled rice between the Plaintiff and the first Defendant is not enforceable by action. Accordingly, other issues raised in the Appeal need not to be further decided. The Plaintiff's Appeal is held groundless."

The Supreme Court upheld the decision of the Court of Appeals.

Commentary

This case relates to four main legal issues resulting in the court's dismissal of the claims. In the first issue, the court reasoned that the telex communications between the disputing parties created the contract because the negotiation finished through the telexes. The court applied section 361 of the CCC;³ a contract between persons at a distance comes into existence at the time when the notice of acceptance reaches the offeror.

The second issue involved the enforceability of the contract in this matter. In the court's consideration, although contract was valid, its enforceability was based upon one of three conditions: partial payment, giving a deposit, and the signatures of the liable persons.⁴ In other words, the Court accepted the telexes as evidence. Nevertheless, the evidence did not prove any of the required conditions, which resulted in the unenforceability of the sales contract according to section 456 Paragraph two of the CCC.

The third issue in the plaintiff's appeal to the Supreme Court was that there was "a cross" ("X

³ Section 361 of the CCC states that "A contract between persons at a distance comes into existence at the time when the notice of acceptance reaches the offeror."

Paragraph two "If according to the declared intention of the offeror or to ordinary usage no notice of acceptance is necessary, the contract

comes into existence at the time of the occurrence of the fact which is to be considered as a declaration of intention to accept."

⁴ Section 456(2) of the CCC, (Bluebook) "An agreement to sell or to buy any of the movable 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.

Paragraph three, "The provisions of the foregoing paragraph shall apply to a contract of sale of movable property where the agreed price is five hundred baht or upwards."

mark”)⁵ in the telexes, which should be considered as a signature. However, this argument was not accepted by the court, as it reasoned that this fact was never raised in the First Instance Court before.⁶ Additionally, the Court found no cross in the telexes as claimed.⁷ As a consequence, the plaintiff’s appeal was dismissed as the Thai parboiled rice contract was not enforceable.

The final issue pertained to the existing law, i.e. the requirements for evidence to be in writing or the liable person’s *signature*⁸ seemed to be an obstacle to international trade using new communication tools for assisting and facilitating their business transactions. As the plaintiff appealed that the cross created by the defendants would be equivalent to the “signature” under Section 9 of the CCC, it required either two handwriting signatures of the two witnesses to certify the cross, or the affixing of the cross must be done before the competent authorities.⁹

The exiting law creates great difficulty when applying these legal conditions to the current situation of international trade. Regarding this judgment, several Thai academics have criticized this decision.¹⁰ Note that when this matter was decided, Thailand had not yet passed the Electronic Transaction Act B.E. 2544 (2001) (“the E.T. Act”) which became effective in 2002. If this situation occurred in Thailand today, the judgment should be different. This is because section 4 of the E.T. Act defines “electronic signature” as “the letter, character, number, sound or any other symbol *created in electronic form* and affixed to a data message in order to establish the purpose of identifying the signatory who involves in such data message and showing that the signatory approves the information contained in

such data or processing.”¹¹ In fact, a cross or mark in a telex or information on a facsimile is certainly not created in an electronic format and in actuality is produced on the paper through printing or typing before being sent electronically.

The E.T. Act provides for an electronic signature in an e-mail, and also accepts transactions on paper and sent electronically via telex or facsimile transmission. This is because the E.T. is intended to apply to all civil and commercial transactions performed by using a *data message*,¹² except the transaction prescribed by a Royal Decree¹³ to be excluded from this Act wholly or partly. Importantly, the “data message” term is defined that “information generated, sent, received, stored or processed by electronic means, such as electronic data interchange (EDI), electronic mail, telegram, telex or facsimile.”¹⁴ Therefore, the transaction through telexes, such as the case report set out above, should be enforceable if it can be proved that there was a cross or mark used as the defendant’s electronic signature as, set out by the E.T. Act.¹⁵

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⁵ Section 9 of the CCC provides that “Whenever writing is required by law, it is not necessary that it be written by the person from whom it is required, but it must bear his handwriting signature.”

Paragraph two, “A finger print, cross, seal or other such mark affixed to a document is equivalent to a signature if it is certified by the signature of two witnesses.”

Paragraph three, “The provisions of paragraph two shall not apply to a finger print, cross, seal or other such mark affixed to a document before the competent authorities.”

⁶ Section 225 of the Civil Procedure Code states that, “A question of fact or of law can be relied upon by the parties presenting appeal only if such question has been expressly stated in the appeal and has arisen in the Court of First Instance, and it shall be the essential matter of the case so as to worthy of a decision.”

⁷ Under Section 9 of the CCC, a finger print, cross, seal or other such mark alone cannot be equivalent to the handwriting signature unless such mark is certified by the signature of two witnesses. For example, in the Supreme Court Judgment No.

2550/2524 (1981), the Court ruled that the Plaintiff stamped his fingerprint but there was no witness to certify according to section 9 of the CCC. As a consequence, the Court deemed the Plaintiff did not affix his signature to the evidence of repayment. The Defendant could not claim that document as evidence that the Plaintiff received the Defendant’s payment.

⁸ Emphasized by the author.

⁹ *Ibid.* n. 6. “A finger print, cross, seal or other such mark affixed to a document is equivalent to a signature if it is certified by the signature of two witnesses.”

¹⁰ Auraphan Panuspatana, “Today and Future of E-Commerce Law of Thailand” Visited August 18, 2006, on-line at http://www.law.chula.ac.th/th/B_K_MA/law_b4.htm and Chauwalit Attasattra et al., *Cyber Law, Provision, Bangkok, 2004.*

¹¹ Emphasized by the author.

¹² Emphasized by the author. The “data message” term is defined in section 4 of the Electronic Transaction Act 2001.

¹³ Accordingly to the Royal Decree dated March 3, 2006, the transactions regarding the family and

succession related matters are excepted from the application of the Electronic Transaction 2001.

¹⁴ Section 4 of the Electronic Transaction Act 2001.

¹⁵ Section 26 provides that “An electronic signature is considered to be a reliable electronic signature if it meets the following requirements:

(1) the signature creation data are, within the context in which they are used, linked to the signatory and to no other person;
(2) the signature creation data were, at the time of signing, under the control of the signatory and of no other person;
(3) any alteration to the electronic signature, made after the time of signing, is detectable; and
(4) where a purpose of the legal requirement for a signature is to provide assurance as to the completeness and integrity of the information and any alteration made to that information after the time of signing is dateable.

Paragraph two, The provision of paragraph one does not limit that there is no other way to prove the reliability of an electronic signature or the adducing of the evidence of the non-reliability of an electronic signature.”