



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

**BY**

**MR. ATIT CHANSAWANG**

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS  
IN BUSINESS LAW (ENGLISH PROGRAM)**

**FACULTY OF LAW**

**THAMMASAT UNIVERSITY**

**ACADEMIC YEAR 2015**

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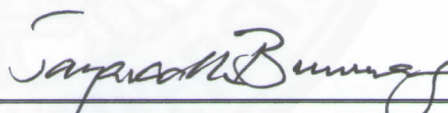
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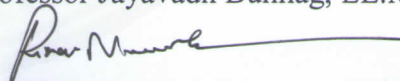
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|--------------------------------|--|
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## **ABSTRACT**

At present, formal requirements are significant to business transactions. They are formalities as to writing or written evidence required by laws for certain contracts. They aim to protect contracting parties from fraudulent actions conducted by the other parties and ensure peace in society. Despite such significance, formal requirements have appeared to lose merits in international transactions in view of modern and convenient means for conclusion of contracts by trading parties. Under the “Freedom from Forms Requirements” concept, no formalities are required for international commercial transactions. Any type of evidence is allowed to prove the existence or the content of the contract.

However, in Thailand, the problem exists in formal requirements for contract for international sale of goods. Section 456 Paragraph 3 of the Civil and Commercial Code (CCC) of Thailand is commonly used by the courts to decide cases. For enforcement, it requires the presence of written evidence signed by liable parties. This provision does not offer a satisfactory remedy or enforcement to the injured parties who lack written evidence. The study of the United Nations Convention on Contracts for the International Sale of Goods (CISG), the uniform law for international sale of

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

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

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

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Mr. Atit Chansawang  
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Year 2015

## TABLE OF CONTENTS

|   | Page |
|---|------|
| ABSTRACT  | (1)  |
| ACKNOWLEDGEMENTS  | (3)  |
| LIST OF ABBREVIATIONS   | (8)  |
| CHAPTER 1 INTRODUCTION  |      |
| 1.1 Backgrounds and Problems  | 1    |
| 1.2 Hypothesis  | 5    |
| 1.3 Objectives of Study   | 5    |
| 1.4 Scope of Study  | 6    |
| 1.5 Methodology   | 7    |
| 1.6 Expected Results  | 7    |
| CHAPTER 2 BACKGROUNDS OF THE FORMAL REQUIREMENTS AND PROVISIONS OF FORMAL REQUIREMENTS FOR INTERNATIONAL COMMERCIAL CONTRACTS |      |
| 2.1 Significance of Formal Requirement in Transactions  | 10   |
| 2.2 History and Development of Formal Requirements  | 12   |
| 2.2.1 Formal Requirements in Roman law  | 13   |
| 2.2.2 Development of Formal Requirements in Common Law System   | 18   |
| 2.2.3 Development of Formal Requirements in Civil Law System  | 20   |
| 2.3 Formal Requirements for International Commercial Contracts  | 21   |

|  |    |
|--|----|
| 2.3.1 The United Nations Convention on Contracts for<br>the International Sale of Goods (The CISG) | 21 |
| 2.3.2 UNIDROIT Principles of International Commercial<br>Contracts 2010 (PICC)                     | 25 |
| 2.3.3 Principles of European Contract Law (PECL)   | 27 |
| 2.3.4 Principles of European Law on Sale (PEL S)   | 29 |
| 2.4 Summary of Formal Requirements Review  | 30 |

### CHAPTER 3 FORMAL REQUIREMENTS FOR THE SALE OF GOODS CONTRACTS IN FOREIGN COUNTRIES

|  |    |
|--|----|
| 3.1 Formal Requirements for the Sale of Goods Contracts in the U.S.                | 33 |
| 3.1.1 Formal Requirements for Domestic Sale of Goods<br>Contracts in the U.S.      | 34 |
| 3.1.2 Formal Requirements for International Sale of Goods<br>Contracts in the U.S. | 36 |
| 3.1.3 Comparative analysis between Thai and U.S. Laws                              | 38 |
| 3.2 Formal Requirements for the Sale of Goods Contracts in the UK                  | 38 |
| 3.2.1 Formal Requirements for Domestic Sale of Goods<br>Contracts in the UK        | 38 |
| 3.2.2 Formal Requirements for International Sale of Goods<br>Contracts in the UK   | 42 |
| 3.2.3 Comparative analysis between Thai and UK Laws                                | 44 |
| 3.3 Formal Requirements for the Sale of Goods Contracts in Germany                 | 45 |
| 3.3.1 Formal Requirements for Domestic Sale of Goods<br>Contracts in Germany       | 46 |
| 3.3.2 Formal Requirements for International Sale of Goods<br>Contracts in Germany  | 48 |
| 3.3.3 Comparative analysis between Thai and German Laws                            | 49 |



CHAPTER 4 ANALYSIS OF THE PROBLEM WITH REGARD TO  
THE FORMAL REQUIREMENT FOR SALE OF GOODS CONTRACTS  
IN THAILAND

|  |    |
|--|----|
| 4.1 Formal Requirements for the Sale of Goods Contracts in Thailand  | 52 |
| 4.2 Problem of Provision of Formal Requirement for<br>the Sale of Goods Contracts in Thailand  | 55 |
| 4.3 Analysis of the Problem  | 59 |
| 4.3.1 Effects of the Enactment of Electronic Transactions Act<br>B.E. 2544 on Formal Requirements for<br>Sale of Goods Contracts                   | 60 |
| 4.3.2 The Agreement between the parties to incorporate<br>the exception of Formal Requirement to the International<br>Sale of Goods Contracts      | 65 |
| 4.3.3 Effects of No Formal Requirement for International<br>Sale of Goods Contracts in Thailand  | 67 |
| 4.3.3.1 Concept of Parol Evidence Rule in relation to the<br>Provision of Formal Requirement for Sale of Goods Contracts                           | 67 |
| 4.3.3.2 International Sale of Goods Practices with regard to<br>the Provision of No Formal Requirement and the Exclusion<br>of Parol Evidence Rule | 70 |
| 4.3.3.3 Tools to Support the Application of<br>No Formal Requirement for Sale of Goods Contracts   | 75 |
| 4.4 Proposed Solutions to the Problem  | 78 |
| 4.4.1 The Amendment of Civil and Commercial Code   | 79 |
| 4.4.2 The Specific Law on International Sale of Goods Contracts:<br>Draft of the Commercial Sale of Goods Act B.E. ....                            | 82 |
| 4.4.3 The Ratification of the CISG   | 84 |
| 4.4.3.1 Advantages of the Ratification of the CISG in Thailand   | 85 |
| 4.4.3.2 Disadvantages of the Ratification of the CISG in Thailand  | 86 |

CHAPTER 5 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion 90

5.2 Recommendations 94

REFERENCES 97

BIOGRAPHY 108



## LIST OF ABBREVIATIONS

| <b>Symbols/Abbreviations</b> | <b>Terms</b>   |
|------------------------------|--|
| BE                           | Buddist Era  |
| BGB                          | Bürgerliches Gesetzbuch<br>(The German Civil Code)                       |
| CCC                          | Civil and Commercial Code  |
| CISG                         | United Nation Convention on Contracts<br>for International Sale of Goods |
| ETA                          | Electronic Transaction Act B.E. 2544                                     |
| HGB                          | Handelsgesetzbuch<br>(The German Commercial Code)                        |
| PECL                         | Principle of European Contracts Law                                      |
| PEL S                        | Principle of European law on Sale  |
| PICC                         | Unidroit Principles of International<br>Commercial Contracts             |
| SGA                          | The Sale of Goods Act 1979   |
| UCC                          | The Uniform Commercial Code  |
| UK                           | United Kingdom   |
| US                           | United States  |

# CHAPTER 1

## INTRODUCTION

### 1.1 Backgrounds and Problems

At present, provisions of formal requirements for commercial contracts play a significant role in societies. Many countries around the world have their own governing laws of the formal requirements. “Formal requirement” are formats or formalities of contracts which the parties are required by law to conclude<sup>1</sup> in order to prevent them from the frauds or use it as evidence to support their allegations when the lawsuits occur.<sup>2</sup> They are important to the commercial activities, because when the parties agreed to enter into a contract, some documents could be used as evidences binding them to perform their obligations. Some countries do have provision in which written evidence is required as formal requirements, whilst some countries do not. Anyhow, it appears that provisions of formal requirements are widely used for business transactions around the world, including Thailand and many developed countries.

Generally, there are many types of formal requirements. They can be used to various kinds of contracts. In this thesis, the study of formal requirements will focus on the sale of goods contracts because there is a problem on provision of formal requirement for the sale of goods contracts which does not harmonize with the international sale of goods contracts practices. It makes international trade in Thailand not be developed as well as it can achieve.

In Thai law, provision of formal requirements is significant to the commercial transactions, particularly sale of goods contracts. As prescribed in Section 456 of the Civil and Commercial Code (CCC), formal requirements for sale of goods contracts are divided into three main types, as follows:

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

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

First, form for sale of goods contract, Paragraph 1, provided that “A sale of immovable property is void unless it is made in writing and registered by the component official. The same rule applies to ships or vessels of five tons and over, including floating houses and to beasts of burden”. This provision requires written form for contract of sales when agreement is made, for such agreement to be completed. In the case that there is no written agreement as required, the sale contract will be deemed void.<sup>3</sup>

Second, Paragraph 2 of Section 456 stated that “An agreement to sale or to buy or the promise to sale or to buy as mentioned in the first paragraph is not enforceable by action unless there is some written evidence signed by the party liable or deposited or paid a part of some debts”. This is a provision regarding evidences used to enforce the liable party under Thai laws concerning sale agreement. This provision regulates conditions for enforcement of liable party in the sale agreement under Thai laws. Although the agreement is completed, written evidence is still required in order that the injured party can enforce the liable party.<sup>4</sup> This provision is used for the sale or purchase agreement of properties and other assets mentioned in Paragraph 1 of Section 456.

Section 456 Paragraph 3 of CCC stated that “The provision of the foregoing paragraph shall be applied to a contract of sale of movable property where the agreed price is twenty-thousand bath or upwards”. It is clear that sale agreement of any movable property in an agreed price of twenty-thousand Bath or more also requires such evidences as in Paragraph 2.

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<sup>3</sup> Chullathida Chullapushpa, “Forms and Acts which cause Binding Effect in The Contract of Sale”, (thesis, Thammasart University, 2006). (จุลหิธิดา จุลละบุษปะ, แบบและการกระทำที่ก่อให้เกิดความผูกพันในสัญญาซื้อขาย, (วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต, มหาวิทยาลัยธรรมศาสตร์, 2549), 9.)

<sup>4</sup> Pajjit Punyapant and Prapont Sataman, **Text book on Civil and Commercial Code: Sales 63** (7th ed. 2008). (ไพจิตร ปุญญพันธุ์ และ ประพนธ์ ศาตะมาน, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ลักษณะซื้อขาย 63 (กรุงเทพฯ: สำนักพิมพ์นิติบรรณการ 2551)).

Provision of formal requirement for sale of goods contracts plays a significant role in commercial transactions of Thailand. The law requires the forms made between the parties when agreement to purchase or sell some things is done. In Thailand, Section 456 of the CCC is the provision of the formalities for sale of goods contracts. As previous paragraphs clearly described, there are many kinds of Formal Requirement depending on the law that asks the parties to perform. Therefore, the keyword “formal requirement” for the sale of goods contracts in this study includes forms required by law, and written evidences required when the sale of goods contract was formed in order to enforce the liable party.

On the other hand, in the international aspects, the formal requirements are not significant for their transactions. Any agreements can be made without creating the written requirements. Many international laws for the commercial contracts have provisions clearly stating that these international instruments, for example, UNIDROIT Principles, The Principles of European Contract Law (PECL), and Principles of European Law on Sale (PELS) do not need such written requirements when a contract was made, especially the sale of goods contract. In addition, Article 11 of the United Nations Convention on Contracts For The international Sale of Goods (the “CISG”) stipulated that “a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”

Comparing these provisions regarding sale of goods contracts with the provision of formal requirement, Section 456 Paragraph 3, in Thailand, there is a conflict between them. Provision of formal requirement for sale of goods contract in Thailand is not at all similar to the international commercial contract laws. When the international trade disputes occur in Thailand, the court applies the provision of formal requirement for sale of goods contracts from Civil and Commercial Code to the disputes. According to the previous judgment of Supreme Court of Thailand, the Court applied Paragraph 3 of Section 456 to the cases referring that the plaintiff could not enforce the defendant to transfer the ownership of goods back to him since there is

no evidence made in writing signed by the liable party, deposited or perform the obligation partially.<sup>5</sup>

Moreover, there is another case from the Supreme Court of Thailand that has the same result as the Judgment of Supreme Court no. 3046/2537. In Judgment of Supreme Court no. 3651/2537,<sup>6</sup> there is a sale of rice contract that the Defendant, the liable party who breached the contract, did not complete the written evidence, give the earnest, or perform the obligation partially. The Court therefore decided that the Plaintiff could not enforce the Defendant to perform any obligations according to the contract since there is no required written evidence to make such contract enforceable. The results of these applications are not suitable enough to give justice to the injured party and unacceptable by the views of the oversea traders.

Comparing provision of formal requirement for sale of goods contracts in Thai laws and international laws, there are some differences between them, for example, the Article 11 of the CISG provides that a contract can be made without writing. It helps the parties who live in different countries to have more convenience in entering into sale of goods contracts. On the contrary, Section 456 Paragraph 3 of the CCC requires the written evidence signed by the liable party in order to enforce the party who breaches the sale of goods contract. Therefore, provision of formal requirement for sale of goods contracts under Section 456 Paragraph 3 of the CCC is not suitable to applying with the international sale of goods contracts disputes. This problem obstructs the development of international trade in Thailand.

To resolve the problem arisen from these previous Supreme Court Decisions and other cases that may occur again in the future, the amendment of the CCC, Section 456, by adding an exception that Section 456 paragraph 3 is not applied in the international trade disputes, is an appropriate way to loosen the limitation of the disadvantaged parties to be enforceable since the CCC required the written evidence

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<sup>5</sup> Supreme Court Judgment No. 3046/2537.

<sup>6</sup> Information Technology and Communication Center, Supreme Court of Thailand, “*Supreme Court Judgment No. 3651/2537*”, <http://deka2007.supremecourt.or.th/deka/web/printlaw.jsp>, (Apr. 9, 2016).

signed by the liable party. In addition to this proposed solution, in order to create long term developments to the Thai sales law, the ratification of the CISG is one of the positive solutions to solve the problem.

## **1.2 Hypothesis**

Section 456 Paragraph 3 of the CCC, the provision of formal requirement for sale of goods contracts in Thailand, is still inappropriate to apply in the international sale of goods activities which need flow and flexibility of communications. There are conflicts between formal requirement for Thai sale of goods contracts and provisions of formal requirements for the international commercial contracts. Section 456 Paragraph 3 is useful for domestic sale of goods contracts, but it is unsuitable to applying to the international sale of goods contracts. In order to solve this unsuitable provision, the amendment of the CCC, and the ratification of the CISG would be the proper solutions.

## **1.3 Objectives of Study**

- a. To study the provisions of formal requirements for international commercial contracts focusing on the sale of goods contracts under Article 1.2 of UNIDROIT Principles (PICC), Article 2:101 (2) of PECL, Principles of European Law on Sale (PEL S), and Article 11 of the CISG to remedy the problem in Section 456 Paragraph 3 of the CCC.
- b. To study the application of No Formal Requirements under Article 11 of the CISG which is the well-known convention on the international sale of goods contracts in comparison with Section 456 Paragraph 3 of the CCC that apparently has flaw in applying to the international cases.
- c. To study the provisions of formal requirements related to the form for the sale of goods contract in foreign countries including UK, U.S.A. and Germany to understand the usage of their provisions in the cases and compare to the



provision of the form for sale of goods contract in Thailand to find appropriate means to remedy the problems.

- d. To analyze the existing problem concerning provision of formal requirement for sale of goods contracts, particularly, the written evidence for contracts signed by the liable parties to be enforceable in the sale of goods transactions under Section 456 Paragraph 3 and provide appropriate solutions to resolve it.
- e. To encourage the solutions to implement the CISG in Thailand or identify other ways to remedy the problem of the form for sale of goods in Thailand.

#### **1.4 Scope of Study**

The concept of “formal requirement” provided in this thesis will be the provisions of formal requirement that are separated into two types which are (1) formal requirement of the contracts which needs to be concluded, otherwise an agreement is void, and (2) formal requirement of contracts which has to be concluded as the written evidence in order to enforce the liable party. The study of formal requirement will solely focus on the form requirements for sale of goods contracts.

The comparative study between the CCC Section 456 Paragraph 3 and formal requirements for sale of goods contracts from the foreign countries will be presented. The Uniform laws used to study, namely Article 1.2 of UNIDROIT Principles 2010 (PICC), Article 2:101 of Principle of European Contract Law (PECL), Principles of European Law (PEL S) and Article 11 of the CISG. Furthermore, this study will compare formal requirements for sale of goods contracts between Thai law and the laws on developed countries, i.e. the United Kingdom (“UK”), the United States (“US”), and Germany. These will be analyzed to find the appropriate solutions to resolve the flaw in the provision of formal requirement for sale of goods contracts in Thailand which has remained the problem.

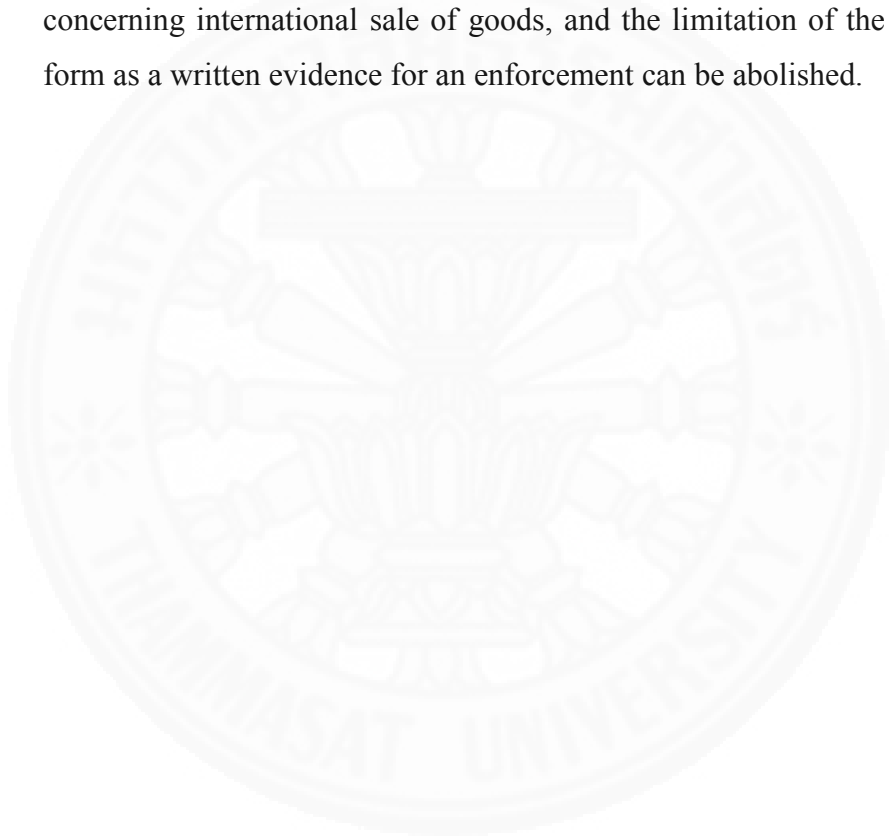
## **1.5 Methodology**

This thesis mainly based on the study of documentations. This study will use both Thai and international articles in order to support the comparative study between Thai law and international laws over the provision of formal requirement for the sale of goods contracts, especially the written evidence. The other types of documents, for instance, textbooks on international commercial contracts, text books on Thai sale of goods and other relevant documents appeared online, will also be used. These materials are related to the provisions of formal requirement for the sale of goods contracts. They are the essential documents used to reach the solutions to the problem of Section 456 Paragraph 3 of the CCC.

## **1.6 Expected Result**

- a. To understand the formal requirements for sale of goods contract in the international aspects and find solutions that can help formal requirements for contract of sale in Thailand to be developed, and acceptable in the view of international trade.
- b. To separate the type of “formal requirements” which consists of (1) form that needs to be made, otherwise an agreement is void, and (2) the format that requires writing evidence from the liable party, otherwise the enforcement cannot be taken into action.
- c. To understand the formal requirements for sale of goods contract in foreign countries, i.e. the UK, the U.S., and Germany and apply it to resolve problem in the formal requirements for sale of goods contract in Thailand, that still requires some written evidences, which is not suitable and needs to be improved.

- d. The problem in the CCC of Thailand Section 456 Paragraph 3 can be resolved by using the studying of formal requirements for international sale of goods contracts and formal requirements for sale of goods contracts from the foreign countries and the result of this remedy can create long term benefits to international sale of goods in Thailand.
- e. The CISG or The United Nations Convention on Contracts for the international sale of goods will be promoted in order to apply with Thai law concerning international sale of goods, and the limitation of the provision of form as a written evidence for an enforcement can be abolished.



## CHAPTER 2

### BACKGROUNDS OF THE FORMAL REQUIREMENTS AND PROVISIONS OF FORMAL REQUIREMENTS FOR INTERNATIONAL COMMERCIAL CONTRACTS

This chapter is the study of the backgrounds of formal requirements applied for the commercial transactions. According to the study on many types of sources, such as text books and journals; formal requirements have been developed since the Roman time. Before the trade parties have provision of formal requirements for commercial contracts in these days, these provisions have been developing constantly for a long period of time. Many concepts had been created to improve formal requirements. They came from the concept of the forms required for the parties to conduct otherwise the contracts will deem void. Until this concept has been changed and applied into the concept of “freedom of form”<sup>7</sup> providing no requirements of formalities for commercial contracts in the international trade.

This study will point out that formal requirements are important to business activities. It is necessary that contracting parties must comply with formal requirements when such business transactions are agreed. Nonetheless, because of the world’s development, it makes the communications among the contracting parties can be created more easily. Business transactions can be made by an agreement between the parties that live in two or more different countries. Formal requirements are not the essential part for the international commercial contracts. No formal requirement thus replaces domestic formal requirement applied for each countries. This concept is established to create uniformity and harmonization to the international commercial contracts and support the development of the world’s limitless communications which makes the international commercial contracts can be created by oral agreements or the implied conducts between the parties.

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<sup>7</sup> The concept of freedom of form is the ability of the parties to agree to perform the formal requirements. They can agree to impose the provision of formal requirements in their contracts, including international commercial contracts; *see also* Ingeborg Schwenzer, Pascal Hachem & Christopher Kee, **Global Sales and Contract Law** 270 (2012).

## 2.1 Significance of Formal Requirements in Transactions

Provisions of Formal Requirement are significant to the developments of the societies around the world, especially the development of business transactions in developing countries. In many transactions, people make an agreement and conclude it into writing under the provisions of formal requirement. For example, the sale of land contracts, the sale of goods contracts, or the hire of immovable property contracts. The parties, who have intent to make these agreements, are required by laws to conclude them into writing. These are the formalities of contracts which bind the parties to perform their obligations agreed in the written agreements, otherwise the contracts are void or the injured parties lost from the breach of contract cannot have the right to enforce the liable parties to perform their obligations.

Normally, *Formal Requirement* means the formalities of contracts required by provisions of law that the contracting parties need to perform. Formal requirement is used as the evidence of the terms and agreements made by the parties.<sup>8</sup> It can be documents that warn the parties<sup>9</sup> to perform some duties in order to complete their obligations. These formalities can include the framework which the parties agreed to perform their actions.<sup>10</sup> In addition, formal requirements are one of legal instruments created to protect the weaker contracting party by increasing the chance of them to impose their rights agreed in the contract.<sup>11</sup> Failure to perform the formal requirements will result in various outcomes;<sup>12</sup> voided contract, inability to enforce the liable party, inability to enforce the rights by one party, or enforcement of the liable party by the court's consideration.<sup>13</sup>

These general descriptions of formal requirement provide clear meaning and purposes of this significant element of the contracts. The study explains that formal requirement is an important instrument for the contracting parties, because it can

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<sup>8</sup> A. G. Guest, *Chitty on Contracts, General Principles* 263 (27th ed., 1994)

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 264.

<sup>13</sup> *Id.*

protect the party's rights and has the strict legal effects which force the parties to comply.

Many commercial transactions are governed by provision of formal requirement. Most of them are important commercial transactions, such as sale of land contracts which require the parties to make the forms, the loan agreements which require the parties to make the written evidence, the sale of goods contracts which require the parties to make the written evidence. These contracts prove the fact that provisions of formal requirement for commercial contracts is indeed important to business transactions. Provisions of formal requirement for commercial contracts in business transactions can be divided into two types consisted of form for commercial contracts required by law, and written evidence required for suing the liable party. Both of them are significant to the commercial transactions and because of the development of society, they become more significant to commercial activities of people.<sup>14</sup>

In Thailand, provision of formal requirement is an important part of commercial transactions. According to the development of Thai society, it makes the formal requirement become more important to their business transactions.<sup>15</sup> Because the laws are developed to be in line with the society, when the Civil and Commercial Code (the "CCC") is promulgated, provisions of formal requirements are clearly significant to the commercial contracts.<sup>16</sup> Likewise, in view of the international perspectives, provision of formal requirements used among the foreign trade countries plays a significant role to support the making of commercial contracts even though their provisions are different from Thailand. Provisions of formal requirement in the international commercial contracts do not require any formalities to make the contracts be valid.

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<sup>14</sup> Chullapushpa, *supra* note 3 at 9.

<sup>15</sup> Sudarat Phattranurukkul, "*Legal Problem Relating to the form and registration: A Case Study on the Sale of Immovable Property Contract*", (thesis, Chulalongkorn University, 2008). (สุดารัตน์ ภัทรานุรักษ์กุล, "ปัญหาความสัมพันธ์ระหว่างระบบแบบและระบบทะเบียน: ศึกษากรณีสัญญาซื้อขายอสังหาริมทรัพย์," (วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต, จุฬาลงกรณ์มหาวิทยาลัย, 2551), 9).

<sup>16</sup> *Id.*

Their provisions do not concern the conclusions of formalities. Most uniform laws in foreign countries help the parties make commercial agreements fast and easily when they live in the different places of business. Formal requirements for international commercial contracts are significant to business transactions that they have influence on provisions of formal requirements for commercial contract in many countries around the world. They also have very long period of development. The development of formal requirements began in the Roman time and has been continuously developing to be the provisions of formal requirements in Common law and Civil law systems.

## **2.2 History and Development of Formal Requirements**

Formal Requirements have been developing for long period of time. Their developments began in the Roman time. The formal requirements were the various types of formalities required by laws that the parties must perform when they made their business transactions. In this era, the performances imposed by laws, such as oral agreements between parties, conduct between parties under the ceremonies or some strict provisions to transfer the ownership of the property are widely used by Roman citizens for completion of commercial transactions. Since then, because of the change of the era, the significant concepts of Roman law have constituted in the fundamental basis for the legal systems around the world.<sup>17</sup> Similarly, provisions of formal requirement, which have different types of methods, have been developed to be an essential part of the contracts laws in many foreign counties around the world. In the legal system, such as Civil law system, one of the important legal systems of the world, also have the concept of formal requirements developed from the Roman time.<sup>18</sup>

Consequently, provisions of formal requirement have loosened their strict rules which require the formalities or written evidence for commercial contracts,

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<sup>17</sup> Andrew Borkowski & Paul du Pessis, **Textbook on Roman Law** 355 (3rd ed., 2005)

<sup>18</sup> Schwenger, Hachem, & Kee, *supra* note 2 at 8.

otherwise they are not valid or not enforceable in the international commercial transactions. In the international trade, provision of formal requirements is not applied. This concept has been developed from the result of the intention of the international institutions that wish to create the uniform laws used for the international trade.<sup>19</sup> In order to develop the provision of formal requirements to conform to the nature of international trade which are the activities that need flow and flexibility of communications between the parties that live in two or more different countries, these formal requirements were eventually ignored. Since then, there are no provisions of formal requirements for the international commercial contracts. These developments are the foundation of the concept “freedom from formal requirements”<sup>20</sup> of the international instruments which makes the international trade grow constantly and efficiently.

This study will provide the background of formal requirements, which are the significant instruments for the contracting parties in the commercial transactions. Formal Requirements were first found in the Roman age. These provisions were considered as the various types of contracts that the laws imposed on the parties to perform.<sup>21</sup> In this regard, it describes that formal requirements in Roman law have strict regulations. They were created to protect the rights of the parties and control the society. The study of various types of formalities in Roman times will be discussed in order to explain their development and historical backgrounds which then have been developed and changed into many concepts of the formal requirements recently used in both domestic and international commercial transactions.

### **2.2.1 Formal Requirements in Roman law**

Roman law is an origin of the development of many systems of laws around the world. Many concepts used in the Roman era have been developed to be a

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<sup>19</sup> *Id.* at 33.

<sup>20</sup> See UNCITRAL, *Digest of case law on the United Nations Convention on the International Sale of Goods (2012)* art. 11, (Jun. 5, 2016) [hereinafter *Digest (2012)* art.11], <https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>.

<sup>21</sup> Andrew M. Riggsby, **Roman Law and the legal World of the Romans** 121 (2010)



fundamental basis of many recent provisions in the world. Likewise, provisions of formal requirement were found in the Roman's contract law, which is an important part of the sources of obligation.<sup>22</sup> The contracts in Roman time have many various types which can be classified in many different ways.<sup>23</sup> However, there was the idea of classification of the contracts which came from the well-known philosopher "Gaius", and the Emperor "Justinian."<sup>24</sup> They are divided into four types, namely the verbal contracts, the consensual contracts, the contracts *litteris*, and the contracts *re*.<sup>25</sup>

This study provides that the classification of contracts in Roman law made the people in Roman understand types of contracts easily. Each of them was the significant models of contracts that have been the grounds of many specific contracts which the traders and merchants used to complete their commercial transactions. This classification can be described as the formal requirement in Roman contracts, because in order to conduct each type of contracts, the parties needed to perform their actions required by law.

Formal requirement for Roman Contracts Law which was classified into four types had its development. This is not the certain pattern of classification for Roman Contracts Law.<sup>26</sup> Before they were classified in accordance with the source of obligation in the Justinian' time, they had been developed from the contracts which the small Roman community perform to complete their transactions until the contracts were developed to the formalities that people in Roman city used for trading with other countries. This study will focus on the developments of formal requirements in Roman laws, because it will support the significance of formal requirement in commercial transactions.

In Roman law, formal requirements were not described in term of the written documents only, even the communications between the parties can be the formality of

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<sup>22</sup> Borkowski & Plessis, *supra* note 17 at 253.

<sup>23</sup> Riggsby, *supra* note 20 at 122.

<sup>24</sup> Borkowski & Plessis, *supra* note 17 at 254.

<sup>25</sup> Peter Birks, **The Roman Law of Obligations** 31 (2014).

<sup>26</sup> Borkowski & Plessis, *supra* note 17 at 254.

the contracts.<sup>27</sup> This is called “*stipulatio*”. It is a formal requirement for the contracts in an ancient Roman time.<sup>28</sup> This performance required the interaction between the parties which consisted of question and answer.<sup>29</sup> The question is provided from one side of party which offered a promise to the other party. Then, the answer from that another party is needed to response to accept the promise. The congruent expressions between both parties are required to initiate the contracts. Although there are some discussions about the requirement of stipulatory words when the parties were making the contracts, lastly there were no specific words required for a *stipulatio*.<sup>30</sup>

This is one of the most significant types of formal requirements in Roman contracts law,<sup>31</sup> because the transactions could be made by performing appropriate stipulation which is oral communication conducted between the parties. There is no conclusion of documents required for making the contracts in this age. The official forms or written evidences for commercial contracts were unnecessary for this performance. Despite an agreement being made by expression of the parties without such official form or written evidence, the contract was still valid, because it was allowed by law. This is a formality of Roman contracts that the commercial transactions were created by verbal agreement or a word of mouth.<sup>32</sup> This type of formal requirements required the clear formal question from the promisee and also the formal answer from the promisor.<sup>33</sup> Moreover, if the parties, who have to answer the questions asked by the stipulators, answered in contrast or expressed a different promise to the questions, a contract *stipulatio* is void.<sup>34</sup>

In addition to the form “*stipulatio*”, there were other formalities of commercial contracts which are interesting, and represented the strictness of formal requirement in Roman law. It is a performance that the parties must perform in order that the contract

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<sup>27</sup> Riggsby, *supra* note 20 at 122.

<sup>28</sup> Birks, *supra* note 24 at 53.

<sup>29</sup> Riggsby, *supra* note 20 at 122.

<sup>30</sup> Barry Nicholas, “*Verbal Forms in Roman Law*,” 66 *Tul. L. Rev.* 1605, 3 (1992).

<sup>31</sup> Borkowski & Plessis, *supra* note 17 at 291.

<sup>32</sup> Birks, *supra* note 24 at 52.

<sup>33</sup> Borkowski & Plessis, *supra* note 17 at 292.

<sup>34</sup> See Birks, *supra* note 24 at 56.

could be formed under the provisions of formal requirements. The provision of formal requirement such as “*Macipatio*” was a kind of form in Roman law that the party used when they transferred the ownership of goods.<sup>35</sup> This is considered as a form required by Roman law which is not in writing. *Macipatio* used the performances of the party in order to transfer the ownership of goods to another party. This performance could be a ceremony that needed participation of people in order to help the parties to complete their performance of transfer the ownership of goods.

The contracts which had not required the forms could be created by an expression of the intentions to enter into contracts.<sup>36</sup> There was an oldest contract that does not require any formality which was called “*re*” which is the contract related to property.<sup>37</sup> This contract did not concern the forms and could be valid by an agreement between the parties.

Considering the aforementioned types of formal requirements in Roman law, it shows that provisions of formal requirements have been used for a long period of time. They are important to Roman society as they are used as reliable forms for an agreement between parties. Formal requirements in Roman law have developed continuously. They had categorized formal requirements into various types<sup>38</sup> which each other had more appropriate regulations to apply for different types of contracts than those mere strict requirements, such as *stipulatio* and *macipatio*, in the past time of the Roman era.<sup>39</sup>

Later, they had requirements for commercial contracts which make the contracts be valid by the conclusion of the written forms prescribed by law. This requirement “*litteris*” was found from the classification of contracts in Gaius, and Justinian period.<sup>40</sup> It is a formality of contracts that the parties made to use as

<sup>35</sup> Kraisor Barameeouychai, “*The Form of Juristic Acts*”, (thesis, Chulalongkorn University, 1979). (ไกรสร บารมีอวยชัย, “แบบพหุนิติกรรม,” (วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต, จุฬาลงกรณ์มหาวิทยาลัย, 2522), 231).

<sup>36</sup> See Birks, *supra* note 24 at 34.

<sup>37</sup> Borkowski & Plessis, *supra* note 17 at 297.

<sup>38</sup> See *Id.* at 254.

<sup>39</sup> See Birks, *supra* note 24 at 31.

<sup>40</sup> See Borkowski & Plessis, *supra* note 17 at 254.

evidence of their agreements.<sup>41</sup> After that, many new provisions of forms have been developed to use with commercial transactions between the parties. In the new era, the concept of formal requirements has been significantly changed. The validity of contract is focused on the intentions between parties and freedom of contract.<sup>42</sup>

Then, because the developments of the world's communications, it makes business transactions can be done by the parties living in different area of region. Many modern tools and communication device are created to help the making of the international sale of goods contracts between two or more different countries being more convenience by not concerning any written forms.<sup>43</sup> This makes the provisions of formal requirement more flexible, because the international sales of goods contracts have not been made in written forms or subject to any requirements of forms. Finally it creates the concept of *freedom of forms requirements* which the trade parties have freedom from any requirements of the contracts of sales' formalities.<sup>44</sup>

The study of formal requirements for the commercial transactions in Roman time shows that the "formal requirements" had not been recognized only in the written forms required by law that the parties need to conclude as they are well-known in recent daily life. They consisted of many different types that imposed the Roman citizens to perform; otherwise those commercial contracts were void. Although they were almost extinct by the changes of the new era, their legal concepts have eventually survived<sup>45</sup> and later they are the foundation of the formalities requirements for the commercial contracts among the systems of laws around the world.<sup>46</sup>

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<sup>41</sup> See Birks, *supra* note 25 at 38.

<sup>42</sup> See Aleksanda Goldstajn, "Reflection on the Structure of the Modern Law of International Trade," in **International Contracts and Conflicts of Laws: A Collection of Essays** 14, 27 (Petar Sarcevic ed., 1990).

<sup>43</sup> Secretariat Commentary, "Text of Secretariat Commentary on article 10 of the 1978 Draft, [*draft counterpart of CISG article 11*] [*Form of contract*]," cmt. 2 (June 8, 2004), <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-11.html>.

<sup>44</sup> *Digest (2012)* art.11, *supra* note 20 at 73.

<sup>45</sup> See Schwenger, Hachem, & Kee, *supra* note 2 at 8.

<sup>46</sup> Barameeouychai, *supra* note 35 at 230.

### 2.2.2 Development of Formal Requirements in Common Law System

Common law system is the law system widely used in group of countries such as United Kingdom, and other countries which had been influenced by the UK, for instance, U.S.A and Australia. Common law system is the system of law that has developed from the original law of Roman. Thus, the provision of forms or formal requirement in Common law system is developed from concepts of forms for commercial contract of Roman. The main content that will be focused in this thesis is the concept that comes from the law of United Kingdom, which is the country well-known for its Common Law system. Common Law system used in the UK also influences the system of law of other countries which have been in relationship with the UK. The development of formal requirement comes from the Roman law, and then further develops to be the Common law system.

The provision of formal requirement that will explain in this study is the concept of *the Statute of frauds*. It is the concept of formal requirement in common law systems that requires the parties to make the contract in writing which is deemed as an evidence that an agreement between these parties is formed.<sup>47</sup> Statute of frauds is the provision of forms that is developed from the formal requirements in Roman law.

Established in the U.K., Statute of frauds is a type of act that describes the concept of formal requirements in the Common Law system. It was created in order to prevent any performances that tend to be fraud.<sup>48</sup> It requires the party to have evidence concluded in writing. The evidence that the parties agreed to make in writing must be signed by liable party in order that such parties who suffer from the breach of contract can use this evidence to enforce the wrongful parties, and bring action to the court.<sup>49</sup> Statute of frauds is a provision applied in many types of contract in the U.K.

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<sup>47</sup> Chullapushpa, *supra* note 3, at 115.

<sup>48</sup> *Id.*

<sup>49</sup> Michael Furmston, **The Law of Contract** 531 (3rd ed., 2007)

To be more specific, there are six types of contracts for which statute of frauds apply.<sup>50</sup> These six kinds of contracts are also important contracts that British people usually use in daily life and commercial transactions, for example, contract related to the marriage, will, sale of goods contract, and sale of land agreement.

Statute of frauds protects the parties from breach of contracts which may be conducted by the fraudulent party or fraudulent claims conducted by the other third parties.<sup>51</sup> It required a signature of the liable party in order that the injured party can enforce the liable party to perform his obligation when the breach of contract is conducted by him.<sup>52</sup> If the parties do not sign the signature required by statute of frauds, the injured party will not be able to enforce the liable party to perform his obligation but the contract which both parties enter into is not void. It is completed from the first time when the agreement is made.<sup>53</sup> The injured party cannot enforce that fraudulent party to be liable for their breach of contract.<sup>54</sup> Immovable property, goods or cash that were transferred to the fraud party cannot be recovered back, because there is no the written evidence signed by the liable party which is required by law.<sup>55</sup> This provision has been considered as the concept of estopped that the injured parties cannot claimed any compensations if they do not have a written evidence required by law.<sup>56</sup>

From this study, the statute of fraud is a significant law for the U.K. It influenced many laws which have been established after the usage of statute of fraud. It represents the core concept of formal requirements in Common law system which is very severe. At present, it has been changed due to the fact that it is not very useful in

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<sup>50</sup> G.H.Treitel, **The Law of Contract** 166 (9th ed., 1995)

<sup>51</sup> Guest, *supra* note 8, at 265

<sup>52</sup> Treitel, *supra* note 23, at 169.

<sup>53</sup> *Id.* at 170.

<sup>54</sup> Furmston, *supra* note 22, at 531

<sup>55</sup> Treitel, *supra* note 23, at 170

<sup>56</sup> Elizabeth Cooke, "Guarantees, Estoppel and the Statute of Frauds", **62 Cambridge L. J.** 551, 551-553 (2003)

practice.<sup>57</sup> Its concept has been applied in new law of property in U.K. which is used to apply for all types of sale contracts.<sup>58</sup>

### 2.2.3 Development of Formal requirements in Civil law system

The concept of formal requirements has developed into the new era. In the Civil law system, formal requirements also play significant roles in commercial transactions. Many laws codified in Civil law system are mostly inspired by Roman law, especially the law of Justinian.<sup>59</sup> The Roman law is not only used as a model for development of Common law system, but it is also considered as a concept of Civil law system. There are many well-known countries which use Civil law system, such as Germany, France, Italy, and Japan. They use the code of laws which is the codification of the laws in writing. The concept of formal requirements in Roman law influences in the codification of laws.<sup>60</sup>

From the study of formal requirements for contract in Roman law, it appears that provisions of formal requirement are important to the Roman citizens' activities. In order to make such commercial transactions in business activity, they cannot ignore the conclusions of formal requirements. Failure to conduct the formal requirements required by law will result in the voidable of contracts.<sup>61</sup> These concepts are used to develop the provision of formals requirements in Civil law system. Provisions of formal requirements in many counties are developed by applying many concepts of previous laws which have been enacted.<sup>62</sup> In Roman law, it concerned the forms for contract. If the parties fail to perform in accordance with the forms, their contract will be void. As well as provision of form in many countries with civil law system, the contract will be void if the parties neglect to follow the provision of forms.

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<sup>57</sup> Guest, *supra* note 8, at 265

<sup>58</sup> *Id.*

<sup>59</sup> See Borkowski & Plessis, *supra* note 17 at 373.

<sup>60</sup> Barameeouchai, *supra* note 35, at 230.

<sup>61</sup> *Id.* at 232.

<sup>62</sup> *Id.*



## **2.3 Formal Requirements for International Commercial Contracts**

Formal requirements have developed into the provision of international commercial contract. The provision of forms for international commercial contracts has different concept from provisions of forms for commercial contracts in Roman time, Common law and Civil law systems. In the aforementioned periods, the forms are compulsory when the parties agreed to make such commercial contracts. However, provision of forms for international commercial contracts would not concern the forms for contract between the parties. There are conflicts between the formal requirements of Roman law, Common law and Civil law systems, and formal requirement of international commercial contract. In the international commercial contracts, they also have the provision of form. Nevertheless, provision of form for international contract does not concern written evidence. The forms are unnecessary in this provision since any performances made between the parties can be the evidences that the commercial contracts occurred.

Formal requirement for international commercial contract provided in this thesis will be the provision of formal requirements from many important international commercial contracts, including Article 11 of the CISG, Article 1.2 of UNIDROIT Principles 2010, Article 2:101 of Principles of European Contract Law (PECL), and provisions from Principles of European Law (PEL S).

### **2.3.1 The United Nations Convention on Contracts for the International Sale of Goods (The CISG)**

This is a very well known uniform law which is widely used in the international sales of goods contracts. The parties live in different places of business can use provisions from the CISG to agree in their commercial transaction that is the sale of goods in which the ownership of goods is transferred from one country to another country. It is a significant instrument for international trade parties to use in commercial activities. The CISG has Article 11 which is related to formal requirement. Under this article, sale of goods contract can be made informally. It



cannot be concluded in writing. Oral communications can be conducted in order to create such contracts.<sup>63</sup> This article helps the international trade parties to make sale of goods agreement without concluding the evidence into writing. It can be called “freedom from forms requirements”. Sale of goods agreement does not need any written evidences. The existence of agreement can be proved by various means.<sup>64</sup>

In the international sale of goods, most of associated parties live in different areas which have a long distance; it is difficult for them to have such written contracts signed by liable parties. Therefore, they use Article 11 of the CISG to support their international trades. Sale of goods contract which the parties has entered into does not concerned the forms. This is a principle of freedom from form requirements; the parties have freedom to make such agreements in written forms. It is included in Article 11 of the CISG.<sup>65</sup> However, this article is not the strict provision that all associated parties must follow. The contracting states can make a reservation to use their domestic laws which concern the formal requirements instead of Article 11 of the CISG.<sup>66</sup> Then the contracting stage will not consider Article 11 of the CISG. They can make sale of goods agreement under provision of form in their countries.

Freedom from form requirements is one of the interesting principles that this thesis will provide. It describes the provision of forms that is different from the previous provisions of forms for contract which came from Roman law, Common law system and Civil law system. The concept of freedom from forms, which is explained in this study, will be used to show that it is unnecessary for every contract to concern the forms concluded in writing. It would be more reasonable if contracts could be made without having the written evidence. Freedom from forms requirements included in Article 11 of the CISG is made to support international trade parties who have different places of business. Also, this Article might be useful to use as an

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<sup>63</sup> *Digest (2012)* art.11, *supra* note 20 at 73.

<sup>64</sup> *Id.* at 3.

<sup>65</sup> Peter Schlechtriem & Petra Butler, **UN Law on International Sales, The UN Convention on the International Sale of goods** 61 (2009)

<sup>66</sup> *Id.* at 62.

instrument to compare with Section 456 Paragraph 3 of the CCC, and analyze the conflicts between them.

Freedom from form requirements in Article 11 of the CISG explains that sale of goods contract can be made without having any written evidences. The contracts which the parties enter into can be proved by any means, including witnesses. This article shows that the forms for sale of goods contracts are not significant when the parties made such agreements from different countries. Article 11 of the CISG eliminates the requirement of forms in the international sale of goods. This article provides the concept of freedom from forms which any forms for sale of goods contracts can be made informally.<sup>67</sup> Such contracts can be proved by any means, thus the contracts can be made in many different ways, such as agreement made by oral conversation.<sup>68</sup> When there is a lawsuit taken into the court at the state where the CISG is applicable, every type of evidence related to the formation of international sale of goods contract are allowed to use in order to prove the existence of the contracts that the parties have entered into.<sup>69</sup>

In addition to Article 11, the CISG has Article 13 that provides the extension of the written requirements. This article stated that the term “writing” also includes telegram and telex.<sup>70</sup> It means that the telegrams and telexes are categorized in the writing requirements for international commercial contracts.<sup>71</sup> Thus, sale of goods contracts made between parties from two different states do no need to be concluded in or evidenced by writing, including telegram and telex. The courts can prove the existence of the sale of goods contracts by evidence of communication through

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<sup>67</sup> Jutawut Chobchuen, *Actio Quanti Minoris in International Sale of Goods*, (thesis, Thammasat University, 2013).

<sup>68</sup> *Id.* at 25.

<sup>69</sup> Schlechtriem & Butler, *supra* note 38, at 62.

<sup>70</sup> CISG art. 13:

[F]or the purposes of this Convention “writing” includes telegram and telex.

<sup>71</sup> Jerzi Rajski, “*Article 13*,” (May. 22, 2016), <http://www.cisg.law.pace.edu/cisg/biblio/rajski-bb13.html>.

telegram or telex, because Article 11 and 13 of the CISG do not require the parties to create written contracts as an evidence of their existence.<sup>72</sup>

The concept of freedom from form requirements is useful for the international sale of goods<sup>73</sup> as it helps the parties who live in different countries make sale of goods agreements without concluding the written evidence. In international sale of goods, the forms for sale of goods contracts are not significant to the international trade parties. Article 11 of the CISG is a provision that helps the parties, who entered into an agreement with the other party from different state, to be more convenient. When an international trade disputes related to the forms for sale of goods contracts occurs, the court can apply Article 11 of the CISG in the case. It is unnecessary to examine the domestic law in those countries where the international trade disputes take action.<sup>74</sup>

The study of Article 11 of the CISG and its related article can explain that these articles give more convenience to the international trade parties by ignoring the form of sale of goods contract when they agreed to make the sale of goods agreements. However, the CISG allows the parties who live in the contracting states to make a reservation that they will not use Article 11 of the CISG to apply in the international trade disputes related to the forms for international sale of goods contracts. They will use their domestic law to apply in the cases instead of Article 11 of the CISG. This article gives right to the contracting states to disregard the principle of freedom from forms by making a declaration called “reservation” which is prescribed in Article 96 of this Convention.<sup>75</sup>

The CISG is an important law for the international sale of goods. It has been developed for a long time. It is a reliable convention that the parties living in different

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<sup>72</sup> John O. Honnold, **Uniform Law for International Sales under the 1980 United Nations Convention** 130 (2nd ed. 1991)

<sup>73</sup> Peter Schlechtriem, **Commentary on the UN Convention on the International Sale of Goods (CISG)** 85 (2nd ed., 1998).

<sup>74</sup> *Id.* at 24.

<sup>75</sup> Schlechtriem & Butler, *supra* note 38, at 62.

countries usually apply it to their sale of goods agreements. The CISG has Article 11 which is the principle of freedom from forms requirements. The parties who agreed to use this Convention as the governing law do not need to have any evidences concluded in writing when they entered into the sale of good contract. This article gives freedom to the international trade parties to make sale of goods contract since the forms are not compulsory. For example, an agreement made from oral conversation is allowed by law. When there is a lawsuit in the courts, any types for creating the sale of goods contracts including witnesses can be used to prove their existence.

This article supports the international trade. It is useful to the parties who live in different states and it makes commercial transactions in the international trade more flexible and faster. However, it depends on the contracting state that they will use this article or not. If they prefer their domestic laws which consider the formalities of contract which require the written forms than Article 11 of the CISG, they can make reservation in order not to apply Article 11 in their disputes.<sup>76</sup>

### **2.2.2 UNIDROIT Principles of International Commercial Contracts 2010**

This is one of the significant legal instruments for international commercial contract laws. UNIDROIT Principles of International Commercial Contracts 2010 is significant to the international commercial agreements. It has long history of legislation. It is a uniform law which uses to support the CISG. UNIDROIT Principles is the general laws for the international commercial contracts which, unlike the CISG, have no specific provisions of sale of goods.<sup>77</sup> This principle has been amended for many times by the order of the committees to include some adjustments to build efficiency of the law. UNIDROIT principles of International Commercial Contracts were created in year 1994. It was amended back in 1994 and recently in 2010.

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<sup>76</sup> CISG art. 96.

<sup>77</sup> Siriphan Kongkeaw, Interpretation of Contract under the UNIDROIT Principles of International Commercial Contract as compared with Thai Law (Apr. 25, 2007) (unpublished LL.M. dissertation, Thammasat university) (on file with Libraries, Thammasat university). (สิริพรรณ กองแก้ว, การตีความสัญญา: วิเคราะห์จากหลักเกณฑ์ของ UNIDROIT เปรียบเทียบกับกฎหมายไทย, (สารนิพนธ์นิติศาสตร์มหาบัณฑิต, มหาวิทยาลัยธรรมศาสตร์, 2550), 21).

UNIDROIT Principles of International Commercial Contracts 2010 also has provision of form. It was set in Article 1.2 of Chapter 1, general provision. Article 1.2 states that “Nothing in these Principles requires a contract, statement or any other act to be made or evidence by a particular form. It may be proved by any means, including witness.” This article is the provision of forms for international commercial contract that does not need the formal requirements.

This principle was mentioned in Article 1.2. It is a provision of the formal requirements for international commercial contracts. In the international contracts, the agreements are made without any specific forms. This article is created to support such concept of international commercial contracts, because business transactions at the moment are made through the fast communications such as an oral agreement, telexes, and internet communication.<sup>78</sup> There are no forms required for the parties to sign when the commercial contracts were created.

In this article, the first statement covers the formalities that are required by law when the contracts were created, and the written evidences which depend on the intention of the parties. The second statement of this article explained that the evidence can be used to prove the existences of the contracts which have no fixed forms. Some evidences such as oral communication between the parties can prove the existence of the contracts.<sup>79</sup> This article is not considered strict to the parties. The other agreements can be made in order to create the form of the contract, terminate the contract, or modify other provisions to the contract.

Article 1.2 of UNIDROIT Principles of International Commercial Contracts 2010 explains the forms for international commercial contract. It is a preferable way for the parties to choose to enter into contract by using this provision. This article can be applied to all types of the commercial contracts. It is broader than Article 11 of the

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<sup>78</sup> Unidroit, “*Comment on Article 1.2 (No form required) of Unidroit principles 2010*” (November 16, 2015), <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/414-chapter-1-general-provisions/864-article-1-2-no-form-required>

<sup>79</sup> *Id.*

CISG that can apply to the international sale of goods contracts only. It is also useful in the international trade that the parties negotiate the commercial agreements across the countries and the communications between them are very fast.

### **2.3.3 Principles of European Contract Law (PECL)**

This is a law that uses for international commercial contracts. Principles of European Contract Law or “PECL” is widely used in Europe. It is one of the comparative laws that plays essential role in Europe. Comparing with other important international instruments, such as the CISG and UNIDROIT Principles of International Commercial Contracts 2010, PECL is not different from these international commercial laws. They have similar approaches to develop the system of laws in the world and to apply in the international trade and commercial contracts that needs flows and flexibility in the negotiation of such trade across the countries.

PECL is a main international comparative law in Europe, because its provision can apply to all of countries with both Civil law and Common law systems. This provision is also applied in the courts and arbitrations as one of the factors to help deciding the international commercial disputes.<sup>80</sup> PECL is important for the development of legal systems in many countries from all over the world, especially in Europe. However, it is not usually used as an applicable law in the contracts between the commercial parties; PECL is commonly used by the courts when the international disputes occur. The court use PECL to support their decision. In addition to the application by the court, PECL is used as a comparative law to adjust the international contracts in many countries in Europe.

Principles of European Contract law (the “PECL”) also have provision of formal requirement. This study will focus on the formal requirements or formalities for international commercial contracts. The provision of formal requirements for contract in PECL is provided in Article 2: 101 (2) which states that “A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as

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<sup>80</sup> Ole Lando. “*European Contract Law*,” **International Contracts and Conflicts of Laws**.7 (1990).

to form. The contract may be proved by any means, including witnesses.” This article shows that principle of formal requirements for applying in the European commercial contracts does not concern the conclusion of forms or evidence requirements. The conclusions of international commercial contracts can be conducted by verbal agreements, writing contents, or an electronic communications between the parties.<sup>81</sup>

Under Article 2: 101 (2), it is the principle related to the forms that the parties do not need any formal requirements when they agreed to enter into contracts. Normally, the contract can be made by an agreement between two or more persons, and requires the forms for the validity of contract or needs to have the written evidences otherwise the suffered party cannot enforce the liable party. In contrast, Article 2: 101 (2) of PECL has no requirements for the formalities of contracts. Any actions made between the parties in order to create the international commercial contracts, such as an agreement to enter into contracts, an adjustment of contracts or an agreement to terminate the contracts, are valid. There is no need for any formal requirements from the parties.<sup>82</sup> When there are the intentions of the parties to be legally bound and reach the sufficient agreements, the contracts are concluded without any further requirements.<sup>83</sup>

This article is useful for the development of legal system in Europe, because it is used as model law which influences the systems of law both in Civil law and Common law. It is also used by the court and the arbitrations in order to support their decision.

The study of PECL revealed that its provision of formal requirements for contracts does not need the formal requirement when the contracts were made. Article 2: 101 (2) of PECL supports the international trade which communications and negotiations between the parties can occur very fast. It is also similar to Article 11 of

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<sup>81</sup> María del Pilar Perales Viscasillas, “*The Formation of Contracts & The Principles of European Contract law*,” 13 **Pace Int’l L. Rev.** 371, 373 (2001).

<sup>82</sup> The Commission of European Contract law, **Principles of European Contract Law Parts I and II**, 138 (2000).

<sup>83</sup> Pilar Perales Viscasillas, *supra* note 74 at 374.



the CISG<sup>84</sup>, and Article 1.2 of UNIDROIT Principles of International Commercial Contracts (PICC) that do not strict the parties to create the written forms for contracts. The differences are that PECL is not used as the uniform law on sale of goods in the international trade practices like the CISG.<sup>85</sup> It is used as an international instrument to support the interpretation of Article 11 in some specific types of contracts.<sup>86</sup> In the international trade, Article 11 of the CISG and article 1.2 of UNIDROIT Principles of International Commercial Contracts 2010 are more widely applied for sale of goods contracts cases.

### 2.3.4 Principle of European Law on Sale (PEL S)

This is the principle of sale of goods law in Europe. It is the sale of goods that include more types of goods such as production of goods and manufacture of goods.<sup>87</sup> Sale of goods contracts under this principle are described as general sale of goods contract in which there is a transfer of the ownership when the contracts were agreed and those parties who received the goods pay in return. This principle is useful to the sale of goods. Many concepts of sale of goods in this principle are general, but their scope is broad and can cover the various sales of goods transactions. PEL S is also related to the PECL. Comparing with PECL, the PEL S is more specific. Many general provisions from PECL are used to apply in the sale of goods that normally use the PEL S.<sup>88</sup>

In PEL S, there are no specific provisions of formal requirements. Most of Articles in PEL S are related to the sale of goods transactions. The article that can be used for an agreement of forms is Article 1: 201 which is a relation between PEL S and PECL. It states that “Except where otherwise provided, the Principles of

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<sup>84</sup> Allison E. Butler, “*Comparative Editorial Article 11 CISG and PECL article 2:101 (2)*,” (May. 21, 2016), <http://www.cisg.law.pace.edu/cisg/text/peclcomp11.html#er>.

<sup>85</sup> John Felemegas, **An International Approach to the interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law**. 30 (2007).

<sup>86</sup> See Butler *supra* note 77.

<sup>87</sup> Ewoud Hondius, Viola Heutger, Christoph Jeloschek, Hanna Sivesand & Aneta Wiewiorowska, **Principle of European Law, Study group on a European Civil Code Sales (PEL S)** 101 (2008).

<sup>88</sup> *Id.*



European Contract Law apply to any contract within the scope of application of these Principles” It shows that PEL S is the uniform law of sale of goods in Europe. It is specific uniform law that still depends on some general provision from PECL. The general provision from PECL is not explained in PEL S, because it has this article to use general provisions from PECL to apply in the PEL S.<sup>89</sup>

Therefore, formal requirements for sale of goods contracts governed by PEL S use Article 2: 101 (1) from PECL to apply. This provision is the formal requirement of general international commercial contracts which does not need any forms for an agreement between the trade parties. Any means can use to prove the validity of contract, including witnesses. It is used to apply in the sale of goods agreed by PEL S. Thus, under the scope of the application of PEL S, there is no requirement for the formalities of contracts.

#### **2.4 Summary of Formal Requirements Review**

The study of formal requirements from the background to the recent provisions applied for the international commercial contracts explains the development of the law that they are deeply significant for the traders and merchants when they decided to create business transactions. Formal requirements have a significant role in society in every period of time. Because these provisions are useful to transactions, they exist until present day. The formal requirements were found in the Roman time which it is the strict instrument required by law that the parties need to perform due to their provisions. Then, they have been developed to use as the concept in many system of laws.

The study of the formal requirements form the Common Law and Civil Law system shows that formal requirements remain essential to the modern world citizens. Formal requirements not only have an objective to control the society, but also they purpose to be used as tooled to prevent the weak parties from frauds. Moreover, the development of formal requirements is not finished with only embodying in the

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<sup>89</sup> *Id.* at 142.

principle of Common Law system or codifying in the Civil law system, they further develop to have No requirement of formalities in the international commercial contracts.

Due to the unstoppable development of the world, international commercial transactions conducted between parties can be created between two or more countries. Because of this matter, there is no time for the trade parties or the merchant to comply with the formal requirements. It leads to the concept of formal requirements for international commercial contracts with no requirement of forms or written evidence. The commercial contracts, especially a contract of sale can be proved by any types of evidence, such as prior agreements between trade parties which describe the common grounds of their conduct and expressions<sup>90</sup>, performances between the parties, or the other relevant evidence. In the international commercial contracts, it does not require the trade parties to make the formal requirements when they create the contracts. Under the concept “Freedom of form”, the parties do not have to concern the formalities of the contracts.

The International instruments explained from the above issues play an important part in the consideration of the formal requirements for international commercial contracts. The concept used with the formality of international commercial contracts is different from the original foundation of formal requirements in Roman era, Common Law and Civil law system. There are no requirements of formalities for any types of commercial contracts and this principle is not in line with the concept of “Parol Evidence Rule” which requires the submission of documentary evidence. Various kinds of evidence are admissible by the courts in international contracts disputes.<sup>91</sup> This concept is useful and acceptable in the international practice as many trade countries around the world have started using these international instruments to make the requirements of forms for international commercial contracts are informal.

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<sup>90</sup> Larry A. Dimatteo, “*An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*,” 23 *Syracuse J. Int’l L. & Com.* 67, 70 (1997).

<sup>91</sup> *Id.*

In foreign countries, they divide the provision of formal requirements used for domestic commercial contracts and international commercial contracts separately. The study of their arrangements is helpful to create the developments of formal requirement for specific contracts in Thailand and the solution to the problem in this thesis.



## **CHAPTER 3**

### **FORMAL REQUIREMENTS FOR THE SALE OF GOODS CONTRACTS IN FOREIGN COUNTRIES**

In this chapter, the study will provide explanation for provisions of formal requirements for commercial contracts in the foreign countries which include the US, the UK and Germany. In order to make the result of this study give most advantages to Thailand, the study of formal requirements from these countries will explain the application of these provisions both in domestic and international commercial contracts. This study chooses these three countries to do a comparative analysis with Thai law because their laws have been historically developed for a long period of time. All these countries are the developed countries which have modernized legal instruments which are useful to analyze the problem of Thai law, especially formal requirements in relation to commercial contracts.

Furthermore, the study in this chapter will focus on the sale of goods contracts because they can be compared with the problem in this thesis closely and would help Thailand creating ways to remedy the problem of formal requirements which is not appropriate to apply in the international sale of goods contracts disputes. In order to find the solution to the problem more efficiently, the studies of formal requirements for sale of goods contracts in the modernized countries need to be discussed.

#### **3.1 Formal Requirements for the Sale of Goods Contracts in the U.S.**

In the first part of the comparative studies, the study of formal requirements will explain the provisions used in the United State of America. In U.S.A, the provisions of formal requirements for sale of goods contracts are clearly separated. They have very efficient domestic laws on sale which is embodied in *The Uniform Commercial Code*. This Code has comprehensive contents of laws for businesses and trading<sup>92</sup> and is used in many states around the U.S.A. The provision of formal

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<sup>92</sup> Schwenzler, Hachem & Kee, *supra* note 2 at 12.

requirement for their domestic contracts is provided in Section 2-201. This rule has the concept of a statute of frauds, which is a significant concept of formal requirement in Common law. It also consists of content of the written contracts where the contracts are protected by the *Parol Evidence Rule*.<sup>93</sup>

Meanwhile, in the international commercial contracts' views, the U.S. ratified the CISG to be their law on international commercial contracts, especially the sale of goods contracts. Thus, they can solve the problem of the provision of formal requirements for sale of goods contracts because Article 11 of the CISG does not concern the formalities of the contracts of sales. It offers the American trade parties a choice to apply this article of the CISG to their international sale of goods contracts. The following issues will discuss their formal requirements for domestic and international sale of goods contracts.

### **3.1.1 Formal Requirements for Domestic Sale of Goods Contracts in the U.S.**

The U.S. has their own sale of goods laws that are codified in Article 2 of The Uniform Commercial Code or the UCC.<sup>94</sup> It represents the distinctive appearances from the English common law and their Sale of Goods Acts; furthermore, some classic concepts from civil law are applied to the Code.<sup>95</sup> This is a model law that every states can use by enacting this Code to their states. Currently, most of the states in the U.S.A. have adopted The Uniform Commercial Code.<sup>96</sup> Because of its well-known reputation and widespread use in U.S.A., this issue will provide the explanations of this Uniform Code with regard to formal requirements for domestic sale of goods contracts.

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<sup>93</sup> E. Allan Farnsworth, *Contracts* 402 (7th ed. 1982).

<sup>94</sup> Schwenger, Hachem & Kee, *supra* note 2 at 12.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 88.

Uniform Commercial Code has provision of formal requirements for sale of goods contract prescribed in Section 2-201, subsection (1),<sup>97</sup> which mainly states that sale of goods contract which the agreed prices are five hundred dollars or more, the parties must have evidence concluded in the writing duly signed by the liable parties or their representatives, unless it cannot be enforceable.<sup>98</sup> This section is applied to domestic sale of goods contract in the U.S.

Generally, when the parties enter into sale of goods contract and the negotiated prices of goods are five hundred dollars or upwards, the agreement between parties must be record in writing as evidence. This provision regulates the parties to conclude the evidence of their agreements into writing. Such memorandum of their negotiations is not sufficient enough to satisfy the law.<sup>99</sup> It applies to the goods and all of the movable things.<sup>100</sup>

Furthermore, this section emphasizes the signature of the liable parties. The signature can appear in anywhere of the documents which the liable parties have subscribed.<sup>101</sup> The documents, that the parties agreed to use as the written evidence, can be signed by only one side of parties, but these parties must be the ones whom the enforcement is taken against.<sup>102</sup> It can be made in any time before the actions will be brought to the courts.<sup>103</sup> Failure to complete the written evidence under Section 2-201 of the UCC results in unenforceable actions of the contracts of sales.<sup>104</sup>

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<sup>97</sup> UCC § 2-201 (1).Formal Requirements; Statute of Frauds.“Except as otherwise provided in this section a contract for the sale of goods for the prices of \$500 or more is not enforce by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.”

<sup>98</sup> Ronald A. Anderson and others, **Business law; UCC Comprehensive Volume** 450 (1987)

<sup>99</sup> Jeanette K. Brooks, “*Parol Modification and the Statute of Frauds: Fitting the Pieces together under the Uniform Commercial Code,*” 21 **Campbell L. Rev.** 307, 308 (1999).

<sup>100</sup> Farnsworth, *supra* note 84, at 404.

<sup>101</sup> *Id.* at 414.

<sup>102</sup> *Id.* at 415.

<sup>103</sup> Brooks, *supra* note 90, at 308.

<sup>104</sup> *Id.* at 426.

This provision is formal requirements for the sale of goods contract in domestic law of the U.S. that is an efficient instrument for many states. Because of its strict condition and reliable courts' precedent, it controls domestic sale of goods transaction of American citizens effectively.

### **3.1.2 Formal Requirements for International Sale of Goods Contracts in the U.S.**

As for the formal requirements for sale of goods contracts in international sale of goods of U.S.A., Article 11 of the CISG is used to apply in the disputes. Since the U.S.A. has ratified the CISG<sup>105</sup>, they use it as one of the international instruments for dealing with the international sale of goods activities. By ratification of the CISG, U.S.A. separates provisions of formal requirement for sale of goods contracts into two types which are formal requirement for domestic sale of goods using Section 2-201 of the UCC, and formal requirement for international sale of goods using Article 11 of the CISG. These two provisions have different concepts.

Section 2-201 of the UCC requires the parties to make the written contracts. This written agreement is the documentary evidence used to proof the facts of the disputes when a lawsuit is taken. The agreements in the contracts are protected by the Parol Evidence Rule which is one of the concepts in common law and the UCC.<sup>106</sup> The agreements in the written contracts shall not be contradicted with any prior agreements or of an oral agreement of the parties.<sup>107</sup> These concepts are used for domestic formal requirement for sale of goods contracts.

On the other hand, Formal requirements for international sale of goods contracts are governed by principle of *freedom from form requirements* under Article 11 of this Convention which does not concern the formalities of the contracts. It

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<sup>105</sup> [cisg.law.pace.edu, CISG: Table of contracting States, http://www.cisg.law.pace.edu/cisg/countries/Cntries-United.html](http://www.cisg.law.pace.edu/cisg/countries/Cntries-United.html) (last visited April 27, 2016)

<sup>106</sup> Dimatteo, *supra* note 81, at 83.

<sup>107</sup> *See Id.*

removes the requirements of writings used as evidence of the sale agreements.<sup>108</sup> When the trade parties from the U.S. create sale of goods contracts with the other parties from different countries, they have the rights to make agreement without making any records in writing. This Article does not concern any mandatory provisions that require the written evidence for the contract to be enforceable as in domestic formal requirements.<sup>109</sup> In addition, any statements made in the contracts' negotiations before signing the contracts are allowed to be considered as evidence.<sup>110</sup> Even such prior oral expressions regarding to the quality and the performance of a contract of sale could be used to enforce the breached parties.<sup>111</sup>

Moreover, the international courts are not strict to the Parol Evidence Rule that requires submissions of documentary evidence when the lawsuit is taken. This concept is not applied to the sale of goods contracts governed by the CISG.<sup>112</sup> It has Article 8 (3) which allows the courts to consider all relevant circumstances of the cases. Any types of evidence which relate, contradict or vary to the issue of the written contracts are admissible to proof the contracts or the terms of the contracts.<sup>113</sup>

Since the U.S. has ratified the CISG, they can use these Articles to applying with formal requirements for international sale of goods contracts. These articles support them to conduct trade activities more easily. They do not have to concern the awkward requirements for making the contracts. The concept of Freedom of form under Article 11 of the CISG is distinct from Section 2-201 of the UCC, but both of them are effective provisions that are applied separately for domestic and international sale of goods contracts in U.S.A. There are no conflicts between the uses of these two laws, because the CISG will be automatically applied to the contracts of

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<sup>108</sup> Henry D. Gabriel, "A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code," 7 *Ind. Int'l & Comp. L. Rev.* 279, 280 (1997).

<sup>109</sup> *Id.*

<sup>110</sup> Dimatteo, *supra* note 81, at 83.

<sup>111</sup> *Id.*

<sup>112</sup> Christopher C. Kokoruda, "The UN Convention on Contracts for the International Sale of Goods -- It's not your Father's Uniform Commercial Code," 85-*JUN Fla. B.J.* 103, 104 (2011).

<sup>113</sup> *See Id.*



sale when the parties come from two or more different countries. However, the UCC, domestic sale of goods law of the U.S., shall not apply for this matter.<sup>114</sup>

### **3.1.3 Comparative Analysis between Thai and U.S. Laws**

The previous explanations are about the provisions of formal requirements for sale of goods contracts in the U.S. The studies show their effective applications of formal requirements to their domestic and international sale of goods cases. They have divided their provisions separately in order to apply in their states and international commercial contracts. The concepts of each provision are differentiated by the purpose of use. Formal requirements for international sale of goods contracts applied in the U.S. are the preferable way to make the trade activities flow. No formal requirements support the movement of international trade.

Compared to Thai sale of goods law, the sale of goods laws in the U.S. has more development than Thai's existing law that still applies only Paragraph 3, Section 456 of the CCC for both domestic and international sale of goods. Provisions for formal requirement for international sale of goods contract do not concern the formalities of contracts. It can be used to improve existing Thai provision which force the parties to create the written evidence. This comparative view shows that formal requirements for sale of goods contract in Thailand is not suitable enough for applying in international trade. It needs to be developed to reach higher standards like international standard as in the U.S.

### **3.2 Formal Requirements for the Sale of Goods Contracts in the UK**

In the UK, the applications of formal requirements for sale of goods contracts are different from the U.S. They do not separate the laws to be to two types which are formal requirements for domestic sale of goods contracts and No formal requirements for international commercial contracts, because their domestic law is sufficient enough to control sale of goods transactions both in domestic and international cases.

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<sup>114</sup> *See Id.* at 103.

It has Section 4 of the Sale of Goods Act 1979<sup>115</sup> to apply with these cases. This provision widely covers many types of formalities. They are not limited to the requirement of writing only. The oral expressions or the conducts between parties can form a contract of sale. Since the UK has Section 4 of Sale of Goods Act 1979, there is no need to improve formal requirements to use with international sale of goods contracts by considering the ratification of the uniform laws or application of the other soft laws to the cases.

Until now, the UK has not confirmed to ratify the CISG.<sup>116</sup> It seems to be no further progress in bringing this Convention to use as the specific law on international sale of goods contracts.<sup>117</sup> They deem that their formal requirements are effective enough to handle with international sale of goods contracts. In addition, due to the fact that the parties can agree to vary or exclude provisions from the CISG to their international agreements<sup>118</sup>, it thus makes the ratification of the CISG become less significant to their considerations. Non-ratification of the CISG in the UK shows that it is unnecessary to adopt the entire Convention to apply certain Articles to the sale of goods contracts cases, if the legal requirements for a contract of sale in domestic sales law are suitable enough to handle both domestic and international area of sales activities.

The study in this part will discuss how formal requirements for sale of goods contracts in UK are effective to cover all conditions of the sales of goods contracts transactions, and why they still have not yet decided to adopt the CISG to support the developments of their international trade activities, especially formal requirements part.

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<sup>115</sup> M.G. Bridge FBA, *The Sale of Goods* 11(3rd ed., 2014)

<sup>116</sup> See Nathalie Hofmann, "Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the Harmonization of the CISG and to the Harmonization of Contract Law in Europe," 22 *Pace Int. Law Rev.* 145, 147 (2010).

<sup>117</sup> Ahmad Azzouni, "The adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom," (May. 5, 2016), <http://www.cisg.law.pace.edu/cisg/biblio/azzouni/html#iaa>.

<sup>118</sup> *Id.*

### 3.2.1 Formal Requirements for Domestic Sale of Goods Contracts in the UK

Considering provisions of the sale of goods contracts in U.K, the law they apply for sale of goods transactions is “The Sale of Goods Act 1979”. This act has been developed for a long period of time in the U.K. history. It comes from the improvement of the previous sale of goods act named *The Sale of Goods Act 1893*,<sup>119</sup> which had been adopted in the British jurisdictions and their colonies.<sup>120</sup> The previous history of the Sale of Goods Act shows long term developments of the U.K.’s sale law. It makes the Sale of Goods Act 1979 become significant to this issue to study their formal requirements, because this act contains developed rules and regulations that control the sale of goods transactions in U.K. Therefore, formal requirements in this act are also the effective legal instrument used for their sale transactions. Sale of Goods Act 1979 is the reliable law<sup>121</sup> to use as a model law on Sale to study the formal requirements. They will be discussed to make comparative study to formal requirements for sale of goods contracts in Thailand.

Recently, Sale of Goods Act 1979 is used in the UK. The section related to formal requirements for sale of goods contracts is Section 4,<sup>122</sup> it states that:

“(1) Subject to this and any other Act, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.”<sup>123</sup>

The sale of goods agreements can be concluded in every kind of formalities, including writing (with sealing or without sealing), oral communication or some part in writing and some part in oral communication, or an acting of the parties. This

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<sup>119</sup> W.J.M. Ricquier, “*United Kingdom Sale of Goods Act 1979 and Its Applicability in Singapore*,” 22 **Mal. L. R.** 145, 145 (1980).

<sup>120</sup> Schwenger, Hachem, and Kee, *supra* note 2 at 88.

<sup>121</sup> Jan M. Smits, **Contract Law, A Comparative Introduction** 24 (2014).

<sup>122</sup> Bridge FBA, *supra* note 106, at 11.

<sup>123</sup> The National Archives. “*Sale of Goods Act 1979*.” <http://www.legislation.gov.uk/ukpga/1979/54>, (May 6, 2016).

section shows that formal requirements for a contract of sale of UK are useful for the parties to make the sale agreements, because it allows them to make contracts in many types. The various types of contracts can prove the party's agreement.<sup>124</sup>

This provision is the current status of formal requirements applied for U.K. sale of goods contracts. It had been a legal requirement in the past that the sale of goods contracts which the agreed prices exceeded 10 pounds must have the written evidence which is a note or memorandum of agreements signed by the liable party, unless it is not enforceable.<sup>125</sup> It came from the development of formal requirements from the Statute of Fraud 1677 in which it has Section 4 and 17<sup>126</sup> mentioning the written requirements used to enforce the liable parties. The Sale of Goods Act 1893 was then enacted to be enforced in England. It had Section 4 that still provided the brief requirements for the written form to enforce the liable party.<sup>127</sup> Nonetheless, until 1954, the written requirements for their contract of sale were abolished by the enactment of Law.<sup>128</sup> This revision changes formal requirements for sale of goods contracts in UK to the no "formal requirements" concept.<sup>129</sup>

Section 4 of the Sale of Goods Act 1979 is more flexible than the previous legal requirements for a contract of sale in the past. According to their continuous developments for a decade, it makes this provision effectively change to be more modern and suitable. Comparing with the U.S., domestic formal requirements for sale of goods contracts in U.K. are different from the U.S. It is not strict for the parties to conduct formal written evidence like the Section 2-201 of the UCC. In addition, this section can be applied in domestic and even international sale of goods contracts,

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 10.

<sup>126</sup> L. F. Cussen, "Section 4 of the Sale of Goods Act., Has Section 4 of the Sale of Goods Act made Change in the Law?," 13 *L. Q. Rev.* 298, 298 (1897).

<sup>127</sup> SGA (1893), § 4 (1):

[A] contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

<sup>128</sup> *Id.* at 11.

<sup>129</sup> *Id.*

because the international trade does not concern the making of formal requirements. The U.K. can use Section 4 to the international sale of goods contracts. This effective provision is the reason why the UK does not have to concern with the CISG. Moreover, there are some unfinished arguments which make UK decide not to ratify this Convention<sup>130</sup> to support the application of formal requirements and harmonize their international sale of goods practices with the other trade countries. They still have Section 4 of the SGA for applying in international sale of goods transactions.

### 3.2.2 Formal Requirements for International Sale of Goods Contracts in the UK

In the international sale of goods aspects, United Kingdom has not ratified the CISG yet.<sup>131</sup> They still apply their domestic formal requirements to the international sale of goods contracts cases. The Sale of Goods Act 1979 or the “SGA” remains the law applied for a contract of sale in the UK. They use Section 4 to apply with the issues regarding formalities of international sale of goods contracts. Although they did not ignore to consider the ratification of the CISG since this Convention is a legal instrument widely used by many trade nations around the world.<sup>132</sup> The UK, however, still has concerns on ratifying this Convention. There are also arguments against this adoption which makes the UK remain non-contracting party of the CISG.<sup>133</sup>

This implementation explains that the UK also considered the CISG as a significant convention for them in order to gain more beneficial advantages from the international trade. This legal instrument can help them to improve their domestic sale of goods law. In addition, the ratification will increase globalization of their sale of goods and more opportunities to their international trade.<sup>134</sup> Although the UK has been considering ratifying the CISG, they have also been applying Section 4 of The

<sup>130</sup> See Angelo Forte, “*The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom*,” 26 **U. Balt L. Rev.** 51, 53 (1997).

<sup>131</sup> [cisg.law.pace.edu](http://www.cisg.law.pace.edu), CISG: Table of contracting States, <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last visited May 5, 2015)

<sup>132</sup> Michael Bridge, “*A Law for International Sale of Goods*,” 37 **Hong Kong L.J.** 17, 17 (2007).

<sup>133</sup> Anna Rogowska, “*Some considerations on the desirability of accession to the CISG by the UK*,” **European Journal of Commercial Contract Law** 31, 31 (2013).

<sup>134</sup> Elizabeth Simos, “*The CISG: A Lost Cause in the UK?*,” 16 **VJ** 251, 252 (2012).

SGA in the international sale of goods contracts. They have been using their domestic provision to the sale of goods transactions for a long period of time. Due to the fact that English laws and its court system have been useful for the international trade parties and the sale of goods, the UK thus is not very keen to adopt the CISG.<sup>135</sup> Moreover, even though, the UK has not been the Contracting party of the CISG, the trade parties have the rights to incorporate or refuse to apply its provision to their agreements.<sup>136</sup>

Therefore Ratification of the CISG may not be an appropriate way for the UK to support their international trade, provisions of formal requirements like the other developed Nations, such as the U.S. However, they still pay attention to this Convention continuously in order to create long term developments to their international trades.<sup>137</sup>

At the moment, their domestic law, the Sale of Good Act 1979, is used as their governing law for both domestic and international sale of goods contracts.<sup>138</sup> It explains that without the adoption of the CISG, the U.K. can apply their domestic formal requirements for the international commercial contracts. In addition, their existing case law supports the application of the SGA.<sup>139</sup> These suitability make domestic sale of goods contracts law of UK be reliable to apply in international sale of goods cases.<sup>140</sup> Moreover, considering their domestic provision, Section 4 of the SGA has no specific requirements of formalities for the sale of goods contracts. Formal requirements from the Sale of Good Act 1979 are suitable enough to be used in the international commercial contracts.

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<sup>135</sup> See Rogowska, *supra* note 124, at 35.

<sup>136</sup> Azzouni, *supra* note 108.

<sup>137</sup> See Alastair Mullis, "Twenty-Five Years On – The United Kingdom, Damages and the Vienna Sale Convention," 71 *Rechtszeitschrift für ausländisches und internationales Privatrecht* 35, 38 (2007).

<sup>138</sup> Rogowska, *supra* note 124 at 37.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

### 3.2.3 Comparative Analysis between Thai and UK Laws

The explanations from the issues discussed above are formal requirements for the sale of goods contracts in the U.K. The study shows that not every nation has to adopt the CISG to make formal requirements abolish and become the freedom of form like the U.S. The CISG may not be the best solution to support the application of formal requirements if domestic formal requirements in such countries are more reasonable and suitable to use in international sale of goods contracts. Comparing Section 4 of the SGA to the formal requirements for sale of goods contract in Thailand, the U.K. law accepts more types of formalities than Thai law. Without the ratification of the CISG, the U.K. domestic law is suitable enough for governing sale of goods transactions both inside and outside of their country.

In view of Thai law, formal requirements for sale of goods contracts in Thailand does not accept other types of formalities except the formats which required by law, the written evidence signed by the liable party. This narrow provision makes Thai law, Section 456 Paragraph 3, not suitable enough to apply in the international sale of goods cases that the contracts are negotiated between parties from different countries with the fast and flexible communications. The trade parties make the contract base on free from the written requirements. They have no time to concern the formalities of the contracts. The sale of goods contracts can be made by oral agreements or the conducts between parties, any means can be brought to prove the contracts.<sup>141</sup>

After the studies of formal requirements for the sale of goods contracts in the U.S. and UK, the countries of the common law system, they show the different aspects of the application of formal requirements in the cases. They can be used as the models to analyze problem of Section 456 Paragraph 3 of the CCC in Thailand, which is not suitable for international sale of goods transactions. In order to gain more beneficial results from this analysis, the study of formal requirements for the sale of goods contract in Germany, one of the most powerful countries with system of laws

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<sup>141</sup> See Dimatteo, *supra* note at 73.



developed from the Civil law system, will be provided to support the solution to the problem, since the system of law in German is considered very close to the system of laws in Thailand.

### 3.3 Formal Requirements for the Sale of Goods Contracts in Germany

In Germany, they have separated the formal requirements into two ways which are formal requirements applied for domestic sale of goods, and for international sale of goods contracts. Germany is the country that uses Civil law system. Their sources of law mainly rely on the civil codes.<sup>142</sup> They have many Codes used for business transactions, such as in civil cases, they have the German Civil Code or “BGB”<sup>143</sup> and in commercial cases, they have the German Commercial Code or “HGB”<sup>144</sup> to deal with the various types of contracts. Generally, the special provisions governing the contracts of sales are embodied in §§ 433-515, Title I, Section 8, Book 2 of the BGB.<sup>145</sup> However, the trade parties have to apply §§ 373-382 of the HGB to the contracts of sales if such sale transactions are between merchants.<sup>146</sup> In this regard, the study of formal requirements in this part is focus on provision of formal requirements which is provided in the BGB.

German domestic laws have many reliable laws because they have been classified in the Codes which have been developed for long period of time. Likewise, their domestic formal requirements for a contract of sale are reliable rules to control sale transactions in their countries. They do not concern the formalities of the contracts of sales whether the requirements of the written forms or the written evidence. Furthermore, in the international trade, Germany has adopted the CISG as their specific law on international sale of goods contracts.<sup>147</sup> This separates their formal requirements for contracts of sale into different operations. They have their

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<sup>142</sup> Smits, *supra* note 121, at 25.

<sup>143</sup> *Id.* at 18.

<sup>144</sup> Schwenger, Hachem & Kee, *supra* note 2 at 18.

<sup>145</sup> Manfred Pieck, “A Study of the Significant Aspects of German Contract Law,” 3 *Ann. Surv.Int’l & Comp. L.* 111, 134 (1996).

<sup>146</sup> *Id.*

<sup>147</sup> [cisg.law.pace.edu](http://www.cisg.law.pace.edu), CISG: Table of contracting States, <http://www.cisg.law.pace.edu/cisg/countries/countries-Germany.html> (last visited May 14, 2016).



existing concept applied to domestic sale of goods contracts whereas their formal requirements for international commercial contracts have been developed more under the concept *freedom from forms*<sup>148</sup>, Article 11 of the CISG. There are no any forms requirements imposed to be provided when they create a contract of sale among the trade parties. These implementations make German law more developed than Thai law.

The study of formal requirements for sale of goods contracts both in domestic and international aspects will be useful to provide comparative analysis with the existing provision of Thailand, Section 456 Paragraph 3 of the CCC that needs some solutions to develop the requirements of form to be more effective and flexible for applying in the international trade.

### **3.3.1 Formal Requirements for Domestic Sale of Goods Contracts in Germany**

Germany has their own domestic laws for handling with the sale of goods transactions which are codified in the BGB, the significant Civil Code of Germany. Many provisions of the BGB, including provisions for sale of goods contracts, are always reformed to be modernized with the world's developments.<sup>149</sup> Nonetheless, their concept of formal requirements for domestic sale of goods transactions remains unchanged. There is, still, no statutory requirements demanding the parties to conclude the written forms when an agreement of sale of movable things is taken.

Normally, their general contracts are valid by an agreement between the parties. Formal requirements are not required for German contracts, unless there are some special provisions needed the conclusion of formalities to be valid.<sup>150</sup> Even an oral agreement can make the contracts valid and such contracts may be proved by

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<sup>148</sup> Peter Schlechtriem, "Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany," *JuridiskTidskrift* 1, 16 (1991-1992).

<sup>149</sup> See Volkhard Hente, "The Recent German Law, Implementing a Modernisation of German Contract Law," *Int'l Bus. L.J.* 359, 359 (2005).

<sup>150</sup> Gerhard Robbers, *An Introduction to German law* 158, (5th ed., 2012)

various kinds of evidence, if there are no provisions imposing the party to provide forms.<sup>151</sup> For their domestic laws, when the parties enter into the sale agreements, they do not need to conduct the formal requirements because the law does not require.<sup>152</sup>

There is no any type of formal requirements which the parties have to concern. The parties in the sale of goods contracts do not require making the form requirements in writing.<sup>153</sup> Failure to create the writing requirements does not make the contract void. In addition, German sales of goods parties do not have to create the written evidence signed by the liable parties in order to enforce them when the breach of contracts occur because there are no provisions of written evidence for sale of goods contracts included in the BGB that requires them to perform.<sup>154</sup> The contracts of sales can be made by an oral expression between the parties and such contracts can be proved by any kinds of evidence.<sup>155</sup> The German law on sale allows the court to widely consider the evidence and determine whether the contracts were made or not.<sup>156</sup> This is a normal condition of German law because many types of German contracts do not impose the parties to make the written form which has the liable parties' handwritten signature.<sup>157</sup>

However, not every type of formal requirements that do not require the formalities for its completion, the sale of land or some immovable property contracts imposed by the BGB that the parties have to follow the formalities required by law to make the contracts be valid.<sup>158</sup> When the sale contracts are made for land or the rights of succession, the German law requires the forms requirements performed by the parties, otherwise the contracts are void.<sup>159</sup> The type of sale contracts, such as the sale

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<sup>151</sup> Pieck, *supra* note 136, at 115.

<sup>152</sup> Robbers, *supra* note 141 at 173.

<sup>153</sup> See Smits, *supra* note 112 at 107.

<sup>154</sup> See Pieck, *supra* note 136, at 115.

<sup>155</sup> *Id.*

<sup>156</sup> Smits, *supra* note 112, at 109.

<sup>157</sup> See Christopher Kuner & Anja Miedbrodt, "Written Signature Requirements and Electronic Authentication: A Comparative Perspective," 6 *EDI L. Rev.* 143, 146 (1999).

<sup>158</sup> Smits, *supra* note 112, at 104.

<sup>159</sup> Robbers, *supra* note 141 at 173.

of land contracts<sup>160</sup> or the sale of separated ownership of land contracts<sup>161</sup> required the parties to make the formal requirements; the formality signed by the parties and approved by a notary (*Beurkundung*)<sup>162</sup>, to be valid.

The study of formal requirements for domestic sale of goods contracts shows that Germany has effective law to handle with the sale of goods transactions in their country. Because of its long period of development, their law on sale becomes the important sale instruments among the parties. Their formal requirements are also one of the provisions that create satisfied result to the sale of goods parties. Since they have no statutory requirement for the parties to create the written evidence, it makes sale of goods transactions proceed with flow and flexible negotiation. Comparing it with formal requirements for sale of goods contracts in Thailand, the law of Germany is more flexible than Thai provision which requires the written evidence signed by liable parties in order to enforce their breached contracts.

Formal requirements for a contract of sale in Thai are quite severe. In order to apply this Thai provision to the international sale of goods contracts, it needs more flexibility to make the activities among the trade parties flow. The study of German domestic formal requirements shows that it is possible to reduce the strict requirements by amending them to be more flexible.

### **3.3.2 Formal Requirements for International Sale of Goods Contracts in Germany**

In view of the international sale of goods contracts, Germany ratified the CISG, therefore, they are one of the state members which can use this convention in the international trade activities. Germany adopts the CISG to be their specific law for dealing with trade parties in the international sale of goods contracts. The CISG has influenced Germany's international sale of goods contracts, because it is accepted in

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<sup>160</sup> BGB sec. 311b.

<sup>161</sup> BGB sec. 925.

<sup>162</sup> Kuner & Miedbrodt *supra* note 148, at 147-148.

German international commercial transactions and many organizations in Germany mostly allow the application of the CISG in the international trade disputes.<sup>163</sup>

German courts use the CISG to consider the international commercial contracts disputes. There are many decisions of German courts that this convention was applied to the cases.<sup>164</sup> Although the courts remain facing the problem of the conflict between the application of their domestic sale of goods law and international sale of goods law in the dispute,<sup>165</sup> the CISG is, still, the most important law for Germany to decide the international trade cases.

Germany has their own domestic law related to the sale of goods for using in their country, and the CISG for applying in the international trade. However, for the formal requirements of the contract of sale, they have domestic law applied to the international sale of goods contracts as well. Therefore, when the German courts have to consider international sale of goods cases, they chose CISG which is more efficient. Hence Article 11 is applied in the lawsuits.

### **3.3.3 Comparative Analysis between Thai and German Laws**

From the study of formal requirements for the sale of goods contract in Germany, their arrangements of laws can be the model to solve the problem of formal requirements for Thai sale of goods contracts. When comparing those with formal requirements for sale of goods contracts in Thailand, Section 456 Paragraph 3 of the CCC needs to be more developed in order to apply to the international sale of goods disputes. In Germany, their system of law is very well developed. They have domestic law and the CISG. Their domestic laws also have separated rules for handling types of form of the sale of goods contract. From the separated systems of German laws related to the formal requirements for sale of goods contracts, it can be a model for Thai sale of goods law which creates an example solution for resolving our existing

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<sup>163</sup> See Schlechtriem, *supra* note 139, at 3-4.

<sup>164</sup> *Id.* at 3

<sup>165</sup> See *Id.* at 4

problem, i.e., having specific rules used for international sale of goods can be a preferable way for the laws in Thailand.

In this chapter, the study provides the law from foreign countries. The countries this study has selected to discuss are the powerful countries which influence the development of the international trade activities in the international communities and have been developing their laws for a long time. The provision of formal requirement for the commercial transactions, particularly the sale of goods contract is mainly focused in this chapter. The study provides many aspects of the application of the formal requirement. Some of them can be used to resolve the problems in Thai law, and point out the loophole of problems that Thailand cannot identify.

## **CHAPTER 4**

### **ANALYSIS OF THE PROBLEM WITH REGARD TO THE FORMAL REQUIREMENT FOR SALE OF GOODS CONTRACTS IN THAILAND**

The study of provisions of formal requirement for the sale of goods contracts from the foreign countries provided in Chapter 3 explains the development of their governing laws and types of laws applying in domestic and international sale of goods contracts disputes. Comparing them with Section 456 of the CCC, especially in Paragraph 3, the differences between them are clearly identified. In view of Thai law, Section 456 Paragraph 3 is the provision of formal requirement for the sale of goods contracts applied both in domestic and international transactions. In actual situation, the courts use this provision to apply in the international trade disputes with regard to a contract of sale.

In this chapter, the study will focus on formal requirement for international sale of goods contracts in Thailand, Section 456 Paragraph 3, which requires evidence concluded in writing signed by the liable party, because this section is unsuitable to apply in the international goods contracts disputes and obstacle to the development of Thai international trades. Due to the study of Chapter 2 and 3, the foreign trade countries do not require formal requirements when they conduct sale of goods transactions and separate formal requirements differently for use with domestic and international cases. These make their international trade develop continuously without any obstacles. The written evidence in this study is required by law to enforce the liable party. This section applies to sales of goods contracts in which the prices of goods are twenty thousand bath or more.<sup>166</sup> In the international trade perspectives, especially sale of goods contracts disputes, this section is considered a problem.

Since Thailand has not adopted the CISG as their specific law for international sale of goods contracts, it causes the problem to the trade parties who suffered from

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<sup>166</sup> Civil and Commercial Code sec. 456 paragraph 3.

the performances of the liable parties. When the international sales of goods disputes are brought into action in Thai courts, Section 456 Paragraph 3 of the CCC is still used to apply in the cases.<sup>167</sup> The result of the disputes did not satisfy the injured parties. Provision of formal requirement for sale of goods contracts in Thailand needs to be analyzed to find an appropriate solution to remedy, and make it more reliable and acceptable from the view of foreign trade parties.

The application of Section 456 Paragraph 3 of the CCC to the international sale of goods disputes may cause problems. There are previous Supreme Court decisions regarding the international sales of goods contracts, no. 3046/2537<sup>168</sup> and 3651/2537<sup>169</sup> that indicates the problem of this section. After the courts applied Section 456 Paragraph 3 to these cases, the results are unfair to the plaintiff, who suffered from the disputes and wanted to enforce the defendant to be liable for his obligation. Provision of formal requirement for sale of goods contract is unsuitable to use in the international sale of goods contracts disputes. The analysis of the problem will be provided in this chapter.

#### **4.1 Formal Requirements for the Sale of Goods Contracts in Thailand**

Due to the discussions on the analysis of the problem of formal requirement, Section 456 Paragraph 3 of CCC will explain, this chapter will provide the study of formal requirement for sale of goods contracts of Thailand. Formal requirement for sale of goods contracts in Thailand are used as the forms prescribed by law that the parties need to comply, and the written evidence used to enforce the liable party. In this chapter, provision of formal requirement in Section 456 of the CCC will focus on written evidence for a contract of sale made for a sale of immovable properties where

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<sup>167</sup> Parcharida Vechosotsakda, Reservation under the United Nations Convention on Contracts for the International Sale of Goods for Thailand (Jun. 10, 2011) (unpublished LL.M. thesis, Thammasat University) (on file with Libraries, Thammasat University). (พัชริดาเวช โอสถศักดิ์ดา, “การตั้งข้อสงวนของอนุสัญญา

สหประชาชาติว่าด้วยสัญญาซื้อขายสินค้าระหว่างประเทศสำหรับประเทศไทย”, วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต, มหาวิทยาลัยธรรมศาสตร์, 2554, 87)

<sup>168</sup> Salin Thewphaingam, The Unification of International Sale Laws: Uniform Interpretation of The United Nations Convention on Contracts for The International Sale of Goods (CISG) (Aug. 9, 2012) (unpublished LL.M. thesis, Thammasat University) (on file with Libraries, Thammasat University).

<sup>169</sup> Information Technology and Communication Center, Supreme Court of Thailand, *supra* note 4.



the agreed price is at twenty-thousand Baht or more because Thai courts use this section to apply in the disputes both sale of goods contract conducted in country and outside of country, which is an international sale of goods. The section that the study will focus in order to analysis the problem is Section 456 Paragraph 3.

Before Section 456 Paragraph 3 of CCC is discussed, the origin of Section 456 which sets out the formal requirements for contract of sale in Thailand will be explained. Section 456 is embodied in Book 3, a specific contracts, of CCC. This Book was influenced from many principles of laws from the foreign countries, particularly German and Japanese codes.<sup>170</sup> Nonetheless, Section 456 is mainly influenced from the UK.<sup>171</sup> The law which is the model for Section 456 is the Sale of Goods Act 1893.<sup>172</sup> This Act influenced some part of this Section because it is applied for the sale of goods only. Paragraph 1 of Section 456 which is concerned with the forms required by law, with which failure to observe results in voidness of contracts, is influenced from the old Thai law drafted before an enactment of CCC.<sup>173</sup> Paragraph 2 and 3 of this Section, which concerned with the written evidence required for the parties to enforce the contract against the other party, each other are also influenced from the old Thai law and then changed to be harmonized with the UK law.<sup>174</sup>

The foreign models from the German and UK laws were finally amended and developed to harmonize with the nature of their sale of goods transactions. They do not set forth formal requirements for the sale of goods contracts. The written evidence is not required for them when the parties concluded sale of goods agreements. They can enforce the contract against each other where breach of contract is committed. These changes in the foreign models indeed provide a robust support for putting fourth amendment to Section 456 of the CCC in the direction of subjecting contacts of sale to no formal requirements.

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<sup>170</sup> Wirapong Pisantanawat, “*Contracts with Written Evidence*”, (thesis, Chulalongkorn University, 1999). (ระพีพงษ์ ไพศาลธนวัฒน์, “สัญญาที่ต้องมีหลักฐานเป็นหนังสือ,” (วิทยานิพนธ์นิติศาสตรมหาบัณฑิต, จุฬาลงกรณ์มหาวิทยาลัย, 2542), 5).

<sup>171</sup> Phattranurukul, *supra* note 15, at 24.

<sup>172</sup> *Id* at 25.

<sup>173</sup> *Id*.

<sup>174</sup> Pisantanawat, *supra* note 170, at 22.



Paragraph 3 of Section 456 regulates that the provision of formal requirement for sale of goods contract from Paragraph 2 also applies for the sale of goods contracts with agreed prices of twenty-thousand Baht or more. Section 456 Paragraph 2 provides that an agreement to sale or to buy the property under the first paragraph cannot enforce the liable party unless some written evidence signed by the liable party or deposited, or partial payment of debt is existed.<sup>175</sup>

After the explanations concerning formal requirements for the sale of goods contract are provided, it appears that these sections are used in both domestic and international sale of goods disputes. The scope which this study focuses is the written evidence signed by the party liable. It is the formality of the sale of goods contracts that give right to the parties who have these forms in their possessions. They can enforce the liable parties who have executed in the forms.<sup>176</sup>

In Thailand, formality of the sale of goods contracts which are considered as evidence must be concluded in writing and signed by the liable party. It is the written evidence that represents the specific liability of the signed party.<sup>177</sup> The liable party is the party who bears obligation to perform in accordance with the agreement. Thus, the liable party can be the parties form both side of the agreement which they have signed in this contract. If the party has not signed in the contract, he will not be liable for the obligations.<sup>178</sup>

Therefore, the written evidence for the sale of goods contracts is significant for Thai society because it is the evidence that the injured party who suffered from the breach of contracts conducted by the other party can claim his right. The injured party will have a right to enforce the liable party who execute in the contract which they have concluded in writing. In addition, the evidence concluded in writing is also used for the sale of movable property that the parties agreed the prices of the goods at two-

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<sup>175</sup> Civil and Commercial Code sec. 456 paragraph 3.

<sup>176</sup> Wissanu Krea-Ngam, **Textbook on Sale, Exchange and Gift** 143 (10th ed. 2006). (วิชญ์ เครื่องงาม, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ซื้อขาย, แลกเปลี่ยน, ใ้ 143 (พิมพ์ครั้งที่ 10 กรุงเทพฯ: สำนักพิมพ์นิติบรรณการ 2549)).

<sup>177</sup> *Id.* at 146.

<sup>178</sup> *Id.*

thousand Baht or more. If the agreed price is lower than two-thousand Baht, then there is no need for written evidence signed by the liable party.<sup>179</sup>

From the explanation of formal requirements of the sale of goods contracts, there is more evidence than the written evidence signed by the liable party which the parties can use to enforce the liable party. Section 456 of the CCC provides (1) deposit which is valuable thing paid as a security that the party will perform his obligation, and (2) partial payment of the debt. Both of them can be the evidence for the suffered party to enforce the liable party. However, this chapter focuses on the written evidence signed by the liable party only because it is the evidence made between the parties and when compare with the provisions of formal requirements applied in the international commercial contracts, it has a conflict between them which causes the problem.

In Thai law, it has strict rule of formal requirement for the sale of goods contracts whereas in the international commercial contracts, provisions from the CISG, PICC, PECL, and PEL S studied from the Chapter 2, have more flexible concepts and corresponding to the nature of the international trade activities. Therefore, this study will compare the difference between formal requirements for the sale of goods contracts in Thailand and foreign countries to give the clear point of the problem that the law related to the formality of a contract of sale in Thailand is not sufficient enough to apply in the international sale of goods contracts disputes.

#### **4.2 Problem of the Provision of Formal Requirement for the Sale of Goods Contracts in Thailand**

After the discussions of the provision of formal requirements for sale of goods contracts in Thailand are provided. In this issue, problem of formal requirement of the contracts of sale in Thailand will be discussed. Provision of the formality of sale of goods contracts, Section 456 Paragraph 3 of CCC, is used as domestic law which

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<sup>179</sup> *Id.* at 158.

controls sale of goods transactions in Thailand. Moreover, the courts use this provision to apply in the international sale of goods contracts disputes.

In this view, the problem has occurred. Section 456 Paragraph 3 with regard to formal requirement for the sale of goods contracts is different from provisions of formal requirements applied for the international commercial contracts, Article 11 of the CISG, Article 1.2 of the PICC, Article 2: 101 (2) of the PCEL, and PEL S, which the contracts have no requirements of forms. The sale of goods contract in Thailand which have agreed priced at 20,000 Baht or more must have written evidence in order to enforce the liable party who breach the sale of goods contract.<sup>180</sup> Whereas the sale of goods contracts from those of provisions do not need the evidence concluded in writing when the party lived in different countries made the sale agreements, any types of evidence can prove, including the witness.

The difference between Thai and international commercial contracts laws cause problem since the CISG is the uniform convention applied for international trade especially the sale of goods contracts between different countries that has flexible rules and fast decision making.<sup>181</sup> There is no need for strict regulations about the formality of the contracts. Any types of performances can make the contracts because the CISG has the Article 11 and the applicable laws from the international instruments that allow the courts to prove the existent or contents of the sale of goods contracts by any means.

In view of Thai sale of goods law, Section 456 paragraph 3 of Civil and Commercial Code is applied for domestic sale of goods contracts which happens in Thailand and the international sale of goods contracts conducted with the foreign countries. The strict rule, such as the sale agreement of the goods with agreed prices at 20,000 Baht or more must have written evidence signed by the liable party in order to enforce its action, is inappropriate to the international sale of goods practice.<sup>182</sup>

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<sup>180</sup> CCC section 456 paragraph 3.

<sup>181</sup> Thewphaingam, *supra* note 168, at 77.

<sup>182</sup> *Id.*

In this view, there is a prototype case from the Supreme Court Judgment No.3046/2537<sup>183</sup> which is the international case that the lawsuit took action in Thai court and provision of the sale of goods contracts from the CCC is applied in the case by Thai court.

The fact from the case is that the Plaintiff who is the party from the other countries called Woodhouse Drek and Carrey S.A. is the buyer who orders goods, which is Thai parboiled rice, from the Defendant who is the seller located in Thailand called Thaimapan Trading Limited Co., Ltd. The agreement is made through the teletype. The Plaintiff then opened the letter of credit for paying money to the seller and provided ship from its country to Thailand to receive the agreed parboiled rice. However, the defendant refused to follow the payment from the Plaintiff and refuse to take action of delivering, to the Plaintiff, the parboiled rice. The Plaintiff therefore filed a lawsuit to Thai court.

Thai court, after long consideration of the case, made the decision that sale of goods contracts had occurred when an agreement was made through the teletype but there are no any evidences concluded in writing signed by the liable party or deposit or partial payment of debts. Therefore, the Plaintiff has no right to enforce the Defendant to deliver the parboiled rice to the Plaintiff.<sup>184</sup>

In addition, there is another Supreme Court Decision that the courts use Section 456 Paragraph 3 to consider the disputes. In Supreme Court Judgment No. 3651/2537, the dispute in the case occurs in the same situation as the aforementioned Supreme Court case. It was a dispute in relation to the provision of Formal

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<sup>183</sup> Kumchai Jongjakapun, “*Indication of The Supreme Decision in the international sale of goods cases,*” 2 Dullapaha, 55 (2000). (กำชัย จงจักรพันธ์, “ข้อสังเกตคำพิพากษาศาลฎีกาศักดิ์สัญญาซื้อขายสินค้าระหว่างประเทศ,” ดุลพาห, เล่ม 2, (พฤศจิกายน-สิงหาคม 2543) ปีที่ 47 หน้า 55).

<sup>184</sup> Tithiphan Chuerboonchai, “*International Sale Law: CISG and Thailand*” in 8 year The Dean of The Faculty of law Chulalongkorn University 199, 207 (Tithiphan Chuerboonchai ed., 2009). (ติทิพันธ์ เชื้อบุญชัย, “International Sale Law: CISG and Thailand” 207 (2552) (8 ปี คณบดีนิติศาสตร์จุฬาลงกรณ์มหาวิทยาลัย)).

requirement of the sale of goods contracts.<sup>185</sup> The Plaintiff brought the lawsuit to the Defendant claiming that the Defendants breached the contract of sale by not performing their obligations to deliver the rice to the Plaintiff. The Plaintiff lost from the Defendants' breach of contract and demanded the compensation from them. This case is the sale of goods contracts dispute. The court considered the provision of formal requirement for sale of goods contracts to apply in the case. In the fact, there was no the written evidence signed by the Defendant who is the liable party, the earnest given from the Defendant and partial payment of debts, therefore the Plaintiff has no right to enforce the defendant.

According to these cases, it appears that Thai courts used the CCC related to formal requirement for the sale of goods contracts in Section 456 Paragraph 3 to apply to the cases which is the international trade of the delivery of goods, rice, between two countries. In fact, the court did not found any evidence concluded in writing as specified in Section 456 Paragraph 3 of CCC. Thus, the Plaintiff cannot enforce the Defendant to perform his obligation under Thai law. From this case, it was a case which received opposite outcome from the international trade practice.<sup>186</sup> In the international trade, the fast communications are necessary between the parties. It can be seen that many communication devices are invented in order to use for international trade, such as teletype, which was used in this case, fax, and electronic mail.<sup>187</sup> There is no time for form of an agreement made between the parties to get signed by the liable parties.<sup>188</sup>

Therefore, the CISG, that has been used as the uniform law for international trade and accepted from many countries around the world, has principle of freedom from forms which is suitable for applying in the international sale of goods contracts disputes. Article 11 of the CISG provides that there is no need of evidence or any conclusion in writing for the sale of goods contract, the existence of such contract can be proved by any means, including the witnesses. Provision related to the formality of

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<sup>185</sup> Supreme Court Judgment No. 3651/2537.

<sup>186</sup> Thewphaingam, *supra* note 75, at 78.

<sup>187</sup> Jongjakapun, *supra* note 173 at 59.

<sup>188</sup> *Id.*

the sale of goods contracts in Section 456 Paragraph 3 is unsuitable to apply in the international sale of goods disputes. This problem needs to be resolved because if the laws of Thailand are still undeveloped, the other countries will find Thai laws untrustworthy when they have lawsuit of similar case with this Supreme Court Decision mentioned. Applying the existing law in the case may not give the satisfying result to the party who suffered from the liable party.

#### **4.3 Analysis of the Problem**

In order to resolve the problem of the application of Section 456 Paragraph 3 of CCC in the international sale of goods disputes, the study of the concept freedom from forms applied for formal requirements for international commercial contracts, especially Article 11 of the CISG is used to point out that provision of formal requirement for sale of goods contracts in Thailand is different from provisions of formal requirements for international sale of goods contracts. It needs to be resolved before applying in other disputes which may occur again in the future.

After the comparative study of formal requirements for sale of goods contracts between Thailand and the modernized countries which are the U.S., the UK and Germany, it is apparent that our law needs to be remedied. Many solutions these powerful countries use to manage their sale of goods transactions, both in their countries and international trade can be used to analyze the loophole of Section 456 Paragraph 3 of CCC and help finding the solutions to resolve this existing problem.

The study shows that most of them prefer to ratify the CISG. Some of them commonly use CISG for applying in the international trade whereas their domestic sales of goods laws concerning the formal requirement are applied in domestic cases, for instance the U.S. and Germany. Since some countries, such as the UK has specific laws as the Sale of Goods Act 1979, it is unnecessary to ratify the CISG because their laws cover the sale of goods transactions both inside and outside their countries.

Germany is the country that can handle the sale of goods transactions both locally and internationally because they have their own code and the specific law on the international sale of goods contracts. They also ratified the CISG for using with the international trade. The study provides the way that Thailand should develop the provision of formal requirement to be more useful for both domestic and international sale of goods disputes.

However, although the study of these Supreme Court Decisions shows the problem of formal requirement for sale of goods contracts in Thailand, there are some issues that may affect the analysis of this problem. It is because the development of many new laws in order to help the business transactions conducting between the trade parties be flexible and harmonized with the international trade and investment. Some instruments can help Thailand to develop the formal requirement and they may already solve this existing problem. There are some effects that may obstruct the analysis of the problem, because some solutions have been created to resolve the problem of formal requirement for international sale of goods contracts.

#### **4.3.1 Effects of the Enactment of Electronic Transaction Act B.E. 2544 on Formal Requirement for Sale of Goods Contracts**

Due to the fact that the Electronic Transactions Act B.E. 2544 (hereinafter “ETA”) has been enacted in Thailand in order to resolve the problems which may occur in the international trade transactions, such as international communications between the trade parties, international agreements between two or more different trade countries and the international payment between two or more different countries relating to business trading, this act may solve the problem that had occurred in Supreme Court Decision No. 3046/2537 and 3651/2537.



It is because the “ETA” has provisions that cover the definition of “the written evidence”<sup>189</sup> which is the formal requirement for Thai sale of goods contracts, and accept “the electronic signature”<sup>190</sup> created by the trade parties communicating through the internet. This Act is one of the effective instruments that can help Thailand resolving the problem of business transactions in which the parties have no time to create such evidence in order to sue one of the parties who may breach the contracts.

At present, Thailand already has the Judgment of Supreme Court that the court uses the “ETA” to consider the fact. According to the Supreme Court Decision No. 8089/2556, the court considers that the Plaintiff has a right to enforce the Defendant to be liable for his unpaid cash from their loan agreement because he has the written evidence conducted by the Defendant through the electronic transaction.<sup>191</sup>

The fact in the case is that the Defendant made the loan transaction though the automatic withdrawal machine. His conduct is the electronic transaction that can be accessed and bring back to use again. It is the written evidence under Section 8 of the ETA. Moreover, the Defendant entered his password which is the conduct that can be identified as the Defendant’s performance. It can be apply to the signature under the Section 9 Paragraph 1, sub section (1) of the ETA.

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<sup>189</sup> Chavalit Uttasart, **Commentary on Law of International Trade: Laws of International sale of goods and payments of goods** 92 (3th ed. 2013). (ชวลิต อุตตาศาสตร์, คำอธิบายกฎหมายการค้าระหว่างประเทศ (กฎหมายเกี่ยวกับการซื้อขายระหว่างประเทศและการชำระเงินค่าสินค้าระหว่างประเทศ) 98 (กรุงเทพฯ: สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2556)).

<sup>190</sup> Electronic transaction Act § 9

In the case where a person is to enter a signature in any writing, it shall be deemed that a data message in question bears a signature if:

- (1) a method is used which is capable of identifying the signatory and indicating that the signatory has approved the information contained in the data message as being his own; and
- (2) such method is as reliable as was appropriate for the purpose for which the data message was generated or sent, having regard to surrounding circumstances or an agreement between the parties

<sup>191</sup> Information Technology and Communication Center, Supreme Court of Thailand, “*Supreme Court Judgment No. 8089/2556*”, <http://deka2007.supremecourt.or.th/deka/web/printlaw.jsp>, (May. 21, 2016).



This Supreme Court Decision shows that the ETA is an effective instrument to control the electronic transactions.<sup>192</sup> It can be applied in the real situation that the formal requirement for a loan contract can be created through the electronic transactions.

The enactment of the ETA and its use in the real case provided that it is now available to resolve the problem of formal requirement, especially written evidence required for the international sale of goods contracts. It has reliable provisions and gives reasonable aspect to solve the problem of the written evidence, which is not signed by the liable party, and has been applied in real dispute. The consequences of its enactment may already solve the problem of the study because the written evidence and the signature created through the electronic transactions can be accepted as the formal requirement to enforce the liable party.

However, the ETA is not the appropriate instrument to solve the problem of formal requirements for international sale of goods contract in Thailand. This thesis is conducted to find the solution to release the provision of formal requirement, Section 456 Paragraph 3 of CCC, which is obstacle to the development of international trade in Thailand. Solutions that this study finds to solve the problem are the way to create the exception in order to remove this provision for applying in international sale of goods contracts disputes.

The sale of goods contracts which are developed for corresponding with the nature of international trade should be a contract that is available to create in terms of verbal agreements, conduct between parties, or communications between the parties living where their place of business are located in different countries. These performances created contracts of sales no need to conclude the written evidence. Thus, provision of formal requirement will not apply for international trade disputes.

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<sup>192</sup> Uttasart, *supra* note 186 at 29.

The ETA is not sufficient enough to solve this problem. This act is useful for considering other types of transactions which are conducted through the electronic communication to be the written evidence and had the signature. It is not useful enough to solve the problem of the provision of formal requirement which is obstacle to the development of international sale of goods contracts in Thailand.

In addition, although the ETA is used to consider in the real cases, the significant provisions, which describe the definition of the written evidence and the signature, remain inappropriate. Comparing with the international model laws on electronic transactions and signature, these sections still need to be developed. Section 8 of the ETA which extends the scope of “the written evidence” is still unsuitable. This unsuitability comes from its unclear words.<sup>193</sup> Some part of this section does not correspond to the international model law, so it still needs to be amended to be more effective in applying in real cases.<sup>194</sup>

In addition to the Section 8, there is a provision regarding the acceptance of the signature which is made in the electronic types. If the parties in the international trade conduct sale of goods contracts which had electronic signature signed by the liable parties, the problem of the written evidence signed by liable party may be solved. This provision is made in order to give the clear result that Section 9 of the ETA can solve the problem of formal requirement for sale of goods contracts in Thailand.

In both aforementioned Supreme Court Decisions, which have the problems of Section 456 paragraph 3 of CCC, there are no signature signed by the liable party in

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<sup>193</sup> Electronic transaction Act § 8

Subject to the provision of section 9, in the case where the law requires that any transaction be made in writing or evidenced by writing or supported by a document which must be produced, if the information is generated in the form of a data message which is accessible and usable for subsequent reference without its meaning being altered, it shall be deemed that such information is already made in writing, evidenced by writing or supported by the produced document.

<sup>194</sup> Pinai Nanakorn, “An Appropriate Approach to the Amendment of Electronic Transactions Law in Thailand” 65 (2558) (Final Research submitted to the Research promotion Committee, Faculty of Law, Thammasat University)

the Teleflex where the involving parties negotiate the sale of goods agreements, if the situations change by adding the high technology of the communication devices, which can create the electronic signature and send it via the internet, the problem may be resolved because Section 9 Paragraph 1 of the ETA accepts the data which signed by electronic signature.<sup>195</sup>

Nonetheless, in fact, this provision is still unclear. Some parts of this section are still incomplete. They need to be amended in order to be in accordance with the Model law of UNCITRAL related to electronic communication and signatures.<sup>196</sup> Because this section still need to be revised by comparing with the international Model laws, it may not be suitable to apply it in recent situations.

The study of the effects of ETA gives the result that the problem of formal requirement for international sale of goods contracts in Thailand still needs to be resolved, because the problem occurred in the facts is the limitation of formal requirements which are obstacle to the development of international sale of goods transactions.

Electronic Transaction Act B.E. 2544 may be one of the useful instruments for solving the problems of making “the written evidence” or “the signature” through the electronic tools for international trade, but it is still inappropriate to solve the problem of formal requirement applying for international sale of goods contracts. The desirable solution would be the abolishment of the written requirements that makes sale of goods contract create by oral agreements or even any actions implied between the parties. The problem of Section 456 Paragraph 3 of the CCC still persists<sup>197</sup> and needs more effective tools to resolve in order to create the harmonization to the international trade activities.

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<sup>195</sup> Uttasart, *supra* note 186 at 99.

<sup>196</sup> Nanakorn, *supra* note 191 at 77.

<sup>197</sup> Thewphaingam, *supra* note 75, at 112.

### 4.3.2 The Agreement between the Parties to Incorporate the Exception of Formal Requirement to the International Sale of Goods Contracts

Normally, in general concept of the law of contract, the parties can make the agreements into the contracts. Under the Thai jurisdiction, the law the parties shall rely on is Thai laws. In order to create such contracts, the parties can create any agreements in order to bind them to perform their obligations. Because the law of general contracts in Thailand has the concept of “the freedom of contract”<sup>198</sup>, it means that the parties can make any agreements upon the considerations between them if these agreements are not contradictory to Section 151 of CCC.<sup>199</sup> Therefore, in the international sale of goods contracts in Thailand, the parties can make a contracts of sale by prescribing any provisions or conditions into their contracts if they are not against the law of public order or goods moral.

In the view of international commercial contracts, the governing law that the parties choose to apply to the contracts can be any laws which they desire.<sup>200</sup> It is possible for the trade parties to agree to only Article 11 of the CISG or other relevant articles in their sale of goods contracts. As the result of the incorporating of other provisions of international sale of goods instead of applying Section 456 Paragraph 3 of CCC, The problem of formal requirement for international sale of goods contract may be resolved. Thailand may not find the other solutions to release the limitations of sale of goods contracts formality rather than just incorporate Article 11 of the CISG or relevant provisions.

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<sup>198</sup> Sanunkorn Sothibandhu, **Commentary on Jurist Act and Contract** 84 (15th ed. 2011). (ศันันท์กรณ (จำปี) โสติพันธ์, คำอธิบายนิติกรรม-สัญญา 84 (พิมพ์ครั้งที่ 15 กรุงเทพฯ: สำนักพิมพ์วิญญูชน 2553)).

<sup>199</sup> Civil and Commercial Code §151

An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good moral.

<sup>200</sup> Jumphot Saisontorn, **English for Lawyers: Contract Drafting** 74 (8th ed. 2012). (จุมพต สายสุนทร, การร่างสัญญาภาษาอังกฤษสำหรับนักกฎหมาย 74 (กรุงเทพฯ: สำนักพิมพ์วิญญูชน 2555)).

However, the solution may be unsuitable under the general concept of the contracts laws. The provision of formal requirement is the law related to public order or goods moral because this provision is created in order to protect the right of the third parties.<sup>201</sup> Formal requirement is significant to business transaction. It is used to prevent the parties from the fraudulent behaviors of the other parties. This provision is not used for the one or more than one parties only. It is related to general public because it controls the manners of all business parties not to be fraud.<sup>202</sup>

In view of the international sale of goods contracts, Section 456 Paragraph 3 of CCC is the law related to public order or goods moral. The parties cannot argue in applying this provision by adding other relevant articles of international law instead of this section. Due to the fact that Section 456 of CCC is the provision of formal requirement for sale of goods contracts which is used by the general public. It is a tool or evidence used by the parties in order to enforce the others to perform their obligations when they may breach the contract in the future.<sup>203</sup> An agreement between the parties to incorporate Article 11 of the CISG or the other relevant provisions into their contracts is not allowed and shall be void, because this incorporation is result to the exception of applying Section 456 Paragraph 3 which is the law related to public order.

In addition, in order to create long term development to the international sale of goods contracts in Thailand, the implementation of the CISG need to be concerned. The international sale of goods contracts are the agreements created between two or more than two different countries. In view of Thai traders, when they are interested to conduct the international trade with the foreign traders, they shall need such international instruments to make them reliable. Only creating an agreement to use such articles from the CISG in the contracts may not the desirable way to bring the view of acceptability from those international traders.

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<sup>201</sup> Soththibandhu, *supra* note 195, at 30.

<sup>202</sup> *Id.*

<sup>203</sup> Chullapushpa, *supra* note 3, at 19

Moreover, Thailand is still seen as developing country in the view of the foreign countries, it is difficult to attract them to become trade parties in Thailand if sale of goods law in Thailand remains undeveloped. Incorporating some articles of the CISG can solve the problem of undeveloped provision of Thai sale law, but it cannot create the long term remedy to the law of Thailand for conducting international sale of goods with the foreign traders. Hence, adopting the entire convention by the ratification the CISG will be one proposed solution that gives Thailand more benefits in relation to the view of acceptance from foreign countries and the reliability of international sale of goods laws in long term.

#### **4.3.3 Effects of No Formal Requirement for International Sale of Goods Contracts in Thailand**

The analysis of the problem in applying Section 456 Paragraph 3 of CCC in the international sale of goods contracts disputes taken in Thai court shows that this provision obstructs the development of international trade in Thailand. It makes the activities related to international trade not as developed as they should be. In order to create the sale of goods agreements with the foreign countries, provision of formal requirement for sale of goods contracts needs to be amended or removed to be more in accordance to the practices of foreign traders. However, under the concept of No Formal Requirement for international sale of goods contracts, it may cause the problem in methods of proving the evidence in Civil Procedure of Thai courts.

##### **4.3.3.1 Concept of the Parol Evidence Rule in relation to the Provision of Formal Requirement for Sale of Goods Contracts**

Under the general practice of proving the evidence based on the documentary, when the courts begin to prove the fact of the sale of goods contracts, Section 94 of the Civil Procedural Code<sup>204</sup> is used to apply in the cases. This Section is the concept

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<sup>204</sup> Civil Procedure Code §94

of proving the documentary evidence like “Parol Evidence Rule” in Common Law system. It is the theory that the courts use to consider the documentary evidence. Any extrinsic evidence or any other types of evidence are not allowed for the consideration.<sup>205</sup>

In Thai law, Section 94 of Civil Procedural Code states that “*Where the submission of documentary evidence is required by law, no oral evidence shall be admissible instead.*”. The courts then shall apply this Section to the disputes related to the sale of goods contracts because in order to take the civil actions to enforce the liable party to perform his obligations, it needs the written evidence signed by liable party. Where Section 456 Paragraph 3 required the written evidence submitted to the court, the parties shall not bring such witnesses to prove the documents.<sup>206</sup> This section is one of reliable provisions of the law of evidence in Thailand. The courts always use it to prove the documentary evidence in the civil litigation for a long period of time and the parties shall follow it strictly.

If Section 456 Paragraph 3 of the CCC is not applied to the international sale of goods contracts, then the parties does not need to submit the documentary evidence to the courts. In this regard, if Thai courts allow the parties to bring any types of evidence such as oral agreements between the parties to prove the contents of sale of goods contracts, it can cause problem that the procedure to prove the facts in the cases that normally requires the submission of documents is affected by the change of the way of proof by allowing any means. The confusion in terms of proving the facts may occur because there are many kinds of evidence more than document to prove the

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Where the submission of documentary evidence is required by law, no oral evidence shall be admissible instead, even with the consent of another party, in any of the following circumstances:

- (a) oral evidence is sought to be produced instead of documentary evidence in the case that the document cannot possibly be produced;
- (b) after the submission of a document, oral evidence is sought to be produced in corroboration of any allegation to add to, subtract from, or to vary its contents.

<sup>205</sup> See CISG Advisory Council, *CISG-AC Opinion no. 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, subpara. 1.2.1 (2004) [hereinafter *CISG-AC Opinion no.3*].

<sup>206</sup> Supreme Court Judgment No 8504/2538.



facts. The result of No Formal Requirement may cause more problem than solve the existing problem.

However, when there is No Formal Requirement for the international sale of goods contracts in Thailand, the problem of proving evidence may not be created because the procedure of proving the evidence is arranged in the way that the submission of documentary evidence is unnecessary. The amendment of Section 456 Paragraph 3 will create the new direction for the trade parties to prove the evidence of the facts. This amendment will make the civil procedure of international sale of goods contracts disputes not rely on Section 94 of Civil and Procedure Code. In this case, the law does not require the submission of documentary evidence, any kinds of evidence can be used to prove the contracts. This amendment will correspond to the international trade practice, that the sale of goods contracts need not be made in or evidenced by writing. The contracts can be proved by any types of evidence.<sup>207</sup>

In the aspect of the international trade between the foreign countries, there are no problems of No Formal Requirement for international commercial contracts. The international sale of goods practices regarding provisions of formal requirements have Article 11 of the CISG and other exact provisions related to formalities of contracts from the international instruments, PICC, PECL, which provide that the contracts are not subject to any other requirements as to forms. Performances between the parties, such as oral agreements, or conducts can create the contract.<sup>208</sup> The trade parties do not need to make the written evidence. Any types of evidence can be used to prove the contracts, including the witnesses.

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<sup>207</sup> CISG art. 11.

<sup>208</sup> Peter Schlechtriem, "Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods," (Mar. 20, 2016), <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-11.html>

#### 4.3.3.2 International Sale of Goods Practices with regard to the Provision of No Formal Requirement and the Exclusion of the Parol Evidence Rule

Provisions of No formal requirement for international commercial contracts, such as Article 11 of the CISG, are helpful to the international trade parties because it releases them from their domestic formal requirements that obstruct the right to enforce the liable parties who breach the contracts of sales.<sup>209</sup> In this matter, there are no problems in the process of Civil Procedure because when the disputes regarding formal requirements for the sale of goods contracts made between the trade parties occur, they are not required by law to submit the documentary evidence in order to bring the lawsuit to the court, and the courts will not concern the proving of formal requirements which are the documentary evidence. The parties can bring any evidence to prove the existences or the contents of the sale of goods contracts.

Provision of No Formal Requirement for international commercial contracts is effective in the practices. In *Korea Trade Ins. Corp. v. Oved Apparel Corp.* (“*Korea Trade*”), it is the dispute related to the payment for purchasing the goods. The Plaintiff “Korea Trade” who is the insurance company brought the lawsuit against the Defendant “Oved”, the wholesaler company who sells apparel. The concept of No Formal Requirement is used by the court and there is no dispute over the issue of the existence of the sale of goods contracts between the parties. The question regarding the documentary evidence required the injured party to submit to the court in order to bring the lawsuit to the Defendant is not concerned.

The issue of fact is the payment methods, because the Defendant has not performed its obligation completely by paying the prices of the goods “sportwear” to Samjin Weaver Co., Ltd. (“Samjin”) who assigned its rights to taking lawsuit to *Korea Trade*. In order to prove the facts which are related to the contents of the contract, there is no need of the submission of the documentary evidence. Article 11 of the CISG used by the court to exclude the Parol Evidence Rule that concerns the

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<sup>209</sup> John O. Honnold, “*Inapplicability of Domestic Requirement that the Contract be in Writing,*” (Mar. 20, 2016), <http://www.cisg.law.pace.edu/cisg/biblio/ho11.html#i5>

documentary evidence and allows all relevant information related to the evidence although they may contradict to the written evidence. In this case, the Plaintiff uses the invoices as evidence to prove the performance of the Defendant who did not perform its obligation. The court allows these invoices to prove the fact in the case, and the parties have the rights to disagree them with their reasonable disputes.<sup>210</sup>

In *TeeVeeToons, Inc. (d/b/a TVT Records) & Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH (“TVT”)*, the concept of No Formal Requirement is also useful for the court to consider the facts of the dispute. Written evidence is not the evidence require by the law or the court in order to enforce the Defendant (“Schubert”) who is a company that has a duty to develop TeeVeeToons, Inc. and Steve Gottlieb, Inc.’s products and deliver to them.

In order to prove the evidence of the facts, any kinds of evidence can be used to prove a sale of goods contract. In this case, the statements which is the oral conversations between the parties are considered to decide the “Terms and Conditions” of their contracts even though their prior oral agreements may be in contradiction to the written “Terms and Conditions”. However, although the court allows the oral conversations between the parties as evidence to prove a contract of sale, they are not only evidence that the court use to decide the case. The court also cited the CISG Advisory Council opinion No. 3 that explains the excluding of the concept “Parol Evidence Rule” which concerns the submission of documentary evidence from the proving of issues of facts, and then considered the Merger Clause created between the parties.

The CISG Advisory Council explains that the Merger Clause agreed by the parties will extinguish all prior oral agreements made between them and the relevant facts and circumstances are concerned in order to interpret the intention of the parties to make such clauses. The court used these rules to consider an issue of the fact and

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<sup>210</sup> Korea Trade Insurance Corporation v. Oved Apparel Corporation (*Korea Trade*), 2015 WL 1345812 (S.D.N.Y. 2015), (Mar. 26, 1016), available at <http://cisgw3.law.pace.edu/cases/150323u1.html>.

found that there are the parties' intentions to create the "Terms and Conditions" and a Merger Clause into their contracts. It makes the Plaintiff "TVT" cannot claim the compensation under the relevant provisions of warranty in Article 35(2)(a)-(b) from Schubert. The Defendant "Schubert" who is beneficiary from the argument raised this issue to against TVT's allegation by denying that they agreed together in terms and conditions of the contract to disclaim all relevant warranties in Article 35 of the CISG.<sup>211</sup>

After the study of the above two cases which are the international sale of goods disputes, it explains how the courts use provision of No Formal Requirement to decide the case and how this provision is used to consider the various types of evidence which are relevant in the facts. The aforementioned cases are taken in the United States which is the country that uses the Common law system and has the effective tools to handle the disputes. In Addition to these international sales of goods cases, the next case study this thesis will provide is the case that a lawsuit was brought an action in Germany where is the country of Civil law system.

In *Netherlands v. Germany*, it is a case that was decided by Oberlandesgericht [Court of Appeals].<sup>212</sup> The dispute in the case is related to the breach of sale of goods contracts which was conducted by the buyer "Germany". The Seller "Netherlands" who is the Plaintiff of the case who brought the lawsuit to the court claiming the price of the delivery of the goods 'truck' and the price of the additional services from the buyer. The court used Article 11 of the CISG which is the concept of No Formal Requirement to consider the existence of the sale of goods contracts by evaluating the witness's statements as evidence.

In this case the statements of the witness are significant for the court to prove the facts. The testimony of the witness is allowed by the court to prove the contents of

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<sup>211</sup> TeeVeeToons, Inc. (d/b/a TVT Records) & Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH (*TVT*), 2006 WL 2463537 (S.D.N.Y. 2006), (Mar. 27, 2016), available at <http://cisgw3.law.pace.edu/cases/060823u1.html>.

<sup>212</sup> Oberlandesgericht [OLG][Court of Appeal] Rostock, Oct. 27, 2003, (Mar. 27, 2016), 3 U 205/02 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/031027g1.html>.

the contracts of sales. However, although statement of witness can be used to prove the contract of sale, the Defendant who is not satisfied with the result may appeal this issue to the higher courts. This German case shows the effective performances of the court to use the concept of No Formal Requirement to the sale of goods contracts and that it is possible to allow the witness to prove the contents of the contracts if its statement provides the relevant information to their issues.

The study of the practices of international sale of goods contracts focusing on the formal requirements explains that the courts consider the disputes in the case by using the concept of no formal requirements. The courts always use it to support their consideration when the parties brought the lawsuit to the court. This concept does not cause any problems in the international litigation because when the injured party did not submit the written evidence to the court, it does not affect their right to enforce the party who breached the contract of sale.

Due to the fact that there are no laws requiring the submission of the documentary evidence to the court, the lawsuit can be brought against the liable party in order to claim the compensations. In addition, the process of proving evidence is taken by the courts. They allow any types of evidence to prove the existences or the contents of a contract of sale which are related to the disputes. In addition, the parties can make arguments to deny their presumed faults claimed by the injured party.

The concept of No Formal Requirement applied for international commercial contracts will not cause the problem in Thai Civil Procedure in case of proving the evidence, because when the application of No Formal Requirement is taken in Thailand, the courts can use the practices of the international sale of goods contracts and the relevant provisions from international commercial contracts to support their considerations.

In the Civil Procedure of Thailand, proof of the documentary evidence normally requires the consideration of provisions of substantive laws. If the provisions of substantive laws require the submission of documentary evidence, the

court shall not allow the oral evidence to be admissible.<sup>213</sup> In this regard, problem in proof of the documentary evidence with regard to the sale of goods contracts may arise and create confusion to the courts and the parties if Section 456 Paragraph 3 of CCC is removed in order to correspond to international practice, because the oral evidence will be allowed to prove the issue of facts instead of the documentary evidence and to corroborate the allegations of the parties in order to add, subtract from, or to vary the contents of a contract of sale.

Nonetheless, these confusions will be disappeared when the concept of No Formal Requirement is applied in the disputes instead of Section 456 Paragraph 3 of CCC. The court can apply any provisions in relation to formal requirement for international sale of goods contracts to consider the disputes. The parties do not need to submit the documentary evidence because the law does not require. Any kinds of evidence, including oral statements will be admissible to prove the existence or the content of the contracts.

In addition, the effective results of the application of concept of No Formal Requirement to the disputes from international sale of goods practices can apply in Thailand in order to increase the reliability of Civil Procedure with regard to the international sale of goods contracts in Thailand. If the international sale of goods contracts in Thailand can be created under the concept of No Formal Requirement, Thai courts can follow the concept of proving the evidence from the international trade practices. Finally, they will have the concept of No Formal Requirement and the supportive provisions from the practices of international commercial contracts to handle the international sale of goods contracts disputes regarding formal requirement which may occur again in Thailand.

If Thailand can amend provision of formal requirement applied for international sale of goods contracts, which is obstacle to the development of the international trade in Thailand, by adding an exception to Section 456 Paragraph 3 of CCC that this Paragraph shall not apply to the international sale of goods contracts,

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<sup>213</sup> Civil Procedure Code sec. 94

problem of formal requirement will be solved and it will not cause the problem of proving the evidence. The parties will not need to make the written evidence signed by the liable party when they create the sale of goods contracts. There is no need to prove the documentary evidence, because the law of the international sale of goods contracts does not require the submission of documentary evidence to the court. The parties can bring any evidence to prove the fact occurred in the sale of goods agreement in order to increase more reliability in their points of fact to the court.

#### **4.3.3.3 Tools to Support the Application of No Formal Requirement for Sale of Goods Contracts in Thailand**

The study of the concept of No Formal Requirement for international sale of goods contracts provides that this concept is useful for the international trade and should be applied in Thailand. It will create the better result to the international sale of goods contracts in Thailand. There will be no formal requirement required by law that the parties shall submit the documentary evidence to the court. Any types of evidence can be used to prove a contract of sale, such as the witnesses and the other relevant evidence.

Moreover, proving of the various types of evidence, such as oral evidence or conduct between the parties would not be the problem to Thai Civil Procedure. It will not create confusions to the court and the parties because Thai courts can apply the practices of the international sale of goods to the facts. These practices have been used for international trade among many foreign countries for a long period of time. They have many reasonable standards to consider the cases. The result of this application will support the development of international trade in Thailand. It will have separated provisions of formal requirement applied for domestic and international sale of goods contracts disputes. Thailand will have the modernized provision correspond to the nature of international trade and practices that needs fast communications and agreements between two or more different countries.



In addition to the concept of No Formal Requirement, the study of the CISG and the international practices provides that there are the other international instruments which are used to support the application of the concept of No Formal Requirement. The international courts use these relevant provisions to support their consideration and interpret the issues of facts which related to formality of a contract of sale.

In case of using the CISG as the applicable law, there is the relevant article the international courts use to support their consideration when they prove the evidence which is related to the issues of facts in the disputes. The courts use this article to allow the extrinsic evidence which is relevant to the facts to support their consideration. Under the application Article 11 of the CISG, the Parol Evidence Rule that requires the submission of documentary evidence is not included. The parties can bring any evidence to prove the existence of the sale of goods contracts, and the courts can apply Article 8 of the CISG to consider other information and circumstances which is relevant to the issues of a contract of sale.<sup>214</sup>

The significant part of Article 8, which the courts use to permit extrinsic evidence to support their decision, is on subsection 3 which states that “*In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties*”. It is used to overrule the Parol Evidence Rule that is applied in domestic sale of goods disputes. The application is that the courts can have due consideration in order to concern all related circumstances of the cases to consider the intention between the parties.<sup>215</sup> This article is used to consider the case *MCC- Marble Ceramic Center Inc. v. Ceramica Nuova D’Agostino S.p.A.*<sup>216</sup> which provides a clear understanding that the parol evidence rule shall not apply to international sale of goods contracts disputes.<sup>217</sup>

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<sup>214</sup> CISG-AC Opinion no. 3, *supra* note 106 at 2.1.

<sup>215</sup> Thewphaingam, *supra* note 74, at 54

<sup>216</sup> *MCC-Marble*, 144 F.3d 1384.

<sup>217</sup> Thewphaingam, *supra* note 74, at 54

The CISG has another rule to apply for international sale of goods contracts in case of proving the evidence. The study shows that in foreign countries, they have very well developed system of laws. The laws used to prove the evidence of terms or effects of the sale of goods contracts are separated into two different ways which are the Parol Evidence Rule for the domestic law and freedom from form requirements, Article 11 and 8 (3) the CISG, for the international sale of goods law.

The study of the relevant tools for supporting formal requirements for international commercial contracts shows that not only the concept of No Formal Requirement is used to apply for international sale of goods contracts, but also the courts use Article 8 (3) to interpret the contracts and support their considerations. When proving of evidence in the issues of facts is taken, the courts can use this Article to consider the other relevant facts and circumstances. The evidence used to prove the facts with regard to the contents or the effects of the contracts of sales is not limited to only the oral agreements. This is the additional tools used to support the disputes with regard to the Formal Requirement. They make the international trade litigation more reliable because they have many effective tools to make the fair result to the trade parties.

The problem of proving the documentary evidence in the international sale of goods contracts disputes would be resolved. The study of many concepts for considering the disputes of formal requirement results in the application of No Formal Requirement. Such result will not create the confusions to the trade parties and the court in terms of proving the oral evidence instead of the requirement of proving the documentary evidence, because the court can apply the other supportive provisions from the CISG to the cases. Moreover, the court can find a way to implement these provisions to the dispute by following the international sale of goods practices that the international courts have made through their disputes for a long time. These tools will help the courts making satisfied result to the injured parties and support the way to solve the problem of Section 456 Paragraph 3 for the harmonization of the international trade.

Nonetheless, applying these provisions to the international sale of goods contracts in Thailand may take long duration to make everything completed. Because Thailand has never used these provisions to decide the disputes before, it needs to have enough time for them to adapt in Thai Civil Litigation. The application of No Formal Requirement may create some problem during the beginning period of application. However, it will give long term benefits to Thailand in case of developing the law to be acceptable and reliable for international standard.

In addition, in order to create long term development to the international trade of Thailand, ratification of the CISG needs to be concerned because it will make sustainable developments to the trade activities between Thailand and the foreign countries. If the ratification of the CISG is completed in Thailand, the problem of the proving the international sale of goods contracts can be entirely resolved.

#### **4.4 Proposed Solutions to the Problem**

To analyze the solutions to the problem of provision of formal requirement applied for the international sale of goods contracts in Thailand, there are many possible ways to make the problem be relieved. After the analysis of the problem from the previous studies, it provides that problem of Section 456 Paragraph 3 still persists and affects the development of international trade activities in Thailand. Although there are many desirable remedies used to solve this problem, they are not the most suitable choices to make most benefits and great development to the international trade in Thailand.

Nonetheless, the study of problem shows that provision of formal requirement for sale of goods contracts, Section 456 Paragraph 3 of CCC needs an urgent solution to remedy because it is obstacle to the international trade of Thailand. Thailand will not gain more benefits from international trade if provision of formal requirement for sale of goods contracts is still ineffective to applying with the sale of goods contracts made between the international trade parties.

This part of Section 456 is the most significant problem that this thesis needs to find the suitable way to solve it. Only Section 456 Paragraph 3 of CCC is the main problem of this thesis which needs the remedy in order to release the ineffective part of law that obstructs developments of the sale of goods contracts. Therefore, this study will provide the analysis of possible solutions that can help Thailand to solve the problem of Section 456 Paragraph 3 of CCC, including the situation that each solution is going to create.

#### **4.4.1 The Amendment of Civil and Commercial Code**

The first solution of this study is that Thailand should amend Section 456 Paragraph 3 of the CCC. It is the possible way to solve the problem of formal requirement for sale of goods contracts. Since Section 456 Paragraph 3 is only one section that obstructs the international trade conducting between Thailand and foreign countries, this solution may be an appropriate way to resolve this problem. If provision of formal requirement for sale of goods contracts is not applied to the international sale of goods contracts, the problem of this thesis will then be relieved. There will be no formal requirements for international sale of goods contracts. Comparing it with the provisions of formal requirements applied for the international commercial contracts in foreign countries, they have clearly mentioned that a contract of sale has not required to be made in writing. Thailand therefore needs to provide a clear statement of No Formal Requirement to Section 456 Paragraph 3 of CCC.

The proposed amendment of Section 456 Paragraph 3 of CCC is adding the possible contents that harmonize Thai law to international sale of goods practices. In order to have such provision which is used to apply for both domestic and international sale of goods contracts, the exception should be added to the fourth paragraph of Section 456 of CCC by providing the statements that ‘Section 456 Paragraph 3 shall not apply to an international sale of goods contracts’.

Formal Requirement for sale of goods contracts will then not apply to international sale of goods contracts. This amendment can solve the problem of the

formal requirement for sale of good contracts that obstructs the development of international trade and does not harmonize with the practice of international sale of contracts that has no need of the formal requirement. Amendment of Section 456 Paragraph 3 of CCC is the possible way to create the possible outcome to the international trade in Thailand.

However, this solution also has some disadvantages. It is because amendment of such provisions of CCC is not easy. It takes a long duration until the proposed amendment is accepted by the Committees. The disadvantages of the amendment are that it takes a long time to proceed. Section 456 Paragraph 3 of CCC has been promulgated for a long time. It is very useful for the domestic sale of good contracts. In order to propose the amendment to the Committee, the amendment group needs to take a lot of time to discuss and review the law before submitting to the Committee because they need to think about the result of the amendment which may affect the other general provisions of contracts in the CCC, which are related to Section 456 Paragraph 3, such as the laws of Juristic acts and Obligations under Book I and Book II.<sup>218</sup> This change may result in the amendment of some provisions in Book I and Book II respectively.<sup>219</sup>

In addition, the long period of discussions may not give beneficial advantages to the international trade in Thailand, because while the law was discussed and sent for approval, it may have some international sale of goods contracts disputes brought the lawsuit into Thai courts and the courts still need to use the existing law of formal requirement, Section 456 Paragraph 3 of the CCC to consider the cases. Moreover, according to the globalization of the world, the laws and regulations of international commercial contracts can be changed and developed by the foreigners all the time in order to create the harmonized and effective instruments for the worlds' trades. Long period of continuous amendment of law in Thailand may not give a good result to have a modernized law because the country cannot follow its fast development of foreign laws.

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<sup>218</sup> Chuerboonchai, *supra* note 181, at 208.

<sup>219</sup> Chobchuen, *supra* note 67, at 108.

In addition to the time spent on the amendment, this solution may cause the confusion to the courts when they handle the international sale of goods cases, because after this section is changed to harmonize with the concept of No Formal Requirement for international commercial contracts by adding an exception below Section 456 Paragraph 3 of the CCC, the disputes of international sale of goods contracts have no need to submit the documentary evidence, which is the written evidence signed by the liable party, to the courts. It may cause the problem to Thai courts as they need to consider more complicated cases. The result of the amendment can create the increasing of the amount of cases brought to the courts.

Nonetheless, the study of the thesis with regard to the result of No Formal Requirement provides that Thai courts can apply other effective tools from the international trade practices to consider the disputes. With many tools adapted from the international trade practices, Thai courts will be able to handle the disputes of international sale of goods contracts effectively. This change may create the problem of workload to the court at first after the amendment is completed, but it will make long term benefits to the Thai courts because they have an appropriate way to solve the problem of the international trade disputes with the concept that is acceptable from the eyes of the foreigners.

Moreover, because of the increase in amount of international trade activities conducting in Thailand, this amendment may be suitable to solve the problem which may occur in the near future. Due to this amount of increase, Thailand needs to improve the laws to be more reliable in order to deal with the international trade parties. Thai courts may not be concerned about the problem of workloads occurring from the provision of No Formal Requirement, because they will have the effective tools to analyze the facts before they consider the disputes.

Although, the large amounts of international sale of goods cases can be brought into action in Thai court, the courts have the provisions adapted from the international trade practice to reduce the time spending to consider each case and

finish the cases in duly short time. The study of this solution gives the various views in order to solve the problem. It may be the suitable way to solve the problem.

#### **4.4.2 The Specific Law on International Sale of Goods Contracts: Draft of the Commercial Sale of Goods Act B.E. ....**

The second solution which this thesis will suggest is having a specific law for the international sale of goods contracts in Thailand. This solution is not a new solution created for solving the problem of provision of formal requirements. An idea to have a specific law has been considered for ten years. There is a subcommittee created for conducting a research to develop sale of goods laws of Thailand to have specific law called “Commercial sale of Goods Act”<sup>220</sup> which, as of now, this act has no progress and the draft is still at the Council of State. At the moment, it is just a positive idea that needs some support groups to promote it to be proceed.

There is an alternative idea for the developments of Thai sale of goods laws that Thailand should have its own specific law for international sale of goods contracts. The problem that leads to this idea is that many existing provisions of sale of goods contracts in Book III of the CCC cannot give the satisfied results to the injured plaintiffs and it is not standardized to the international trade practices.<sup>221</sup> Thus, the way to make these problems remedied is by drafting a specific law for the international sale of goods contracts.

This idea was significantly considerable, because it came from the Prime Minister’s order which has the purposes to separate the Commercial laws from the Civil laws. Then, they focus on the sale of goods laws in the Book III of CCC which are not too difficult to handle with. Finally, the research project is created to draft this specific law for the commercial sale of goods contracts used in both domestic and

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<sup>220</sup> Kumchai Jongjakapun, “*The Draft act on Contracts for the Commercial Sale of Goods: Consideration on principles and legal provisions*,” 62 **Bar Law Journal** 1, 2 (2007). (กำชัย จงจักรพันธ์, “ร่างพระราชบัญญัติสัญญาซื้อขายสินค้าทางพาณิชย์: ข้อพิพาทในหลักการและบทบัญญัติของกฎหมาย (ตอนที่ 1),” บทบัณฑิตย์, เล่ม 63, (1 มีนาคม 2550) หน้า 54).

<sup>221</sup> Jongjakapun, *supra* note 180, at 66



international commercial contracts of sales.<sup>222</sup> In order to promote the idea of making this specific law for international sale of goods contracts in Thailand, this solution will analyze the way to support Thailand for having own specific law for international sale of goods contracts.

Due to the fact that the provisions of the sale of goods from the CCC are inappropriate to use in the international trade disputes, the government finds the way to resolve this problem. They created the subcommittee in order to draft a specific law for international sale of goods contracts. Under the idea of the separation between the Commercial and the Civil laws, this draft was made to use for the Commercial sale of goods both in domestic and international commercial sale of goods contracts. In this regard, the draft on commercial sale of goods contracts had been created by having the CISG as the main uniform law to draft this act.<sup>223</sup> Because this act was drafted to use with both domestic and international commercial sale of goods contracts, the main content of the draft is created by adaptation from the CISG as they are not contradicted to the Convention, and the subcommittee also add some provisions to the act in order to apply in domestic commercial sale of goods contracts.<sup>224</sup>

After the study of the draft of the Commercial Sale of Goods Act, it provides that this solution is one of the possible ways to solve the problem of this thesis. This solution gives the advantages to Thailand because this draft was created by the subcommittee, so it can be made in order to support both domestic and international commercial sale of goods contracts. The subcommittee can draft the act to cover the issues that are necessary to international sale of goods contracts for Thailand.<sup>225</sup> However, although this solution may give the beneficial advantages to Thailand for developing provisions used for international sale of goods contracts, the draft remains unclear and unstable to be enacted as specific law.

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<sup>222</sup> Jongjakapun, *supra* note 217, at 2

<sup>223</sup> *Id.* at 4.

<sup>224</sup> *Id.* at 26.

<sup>225</sup> Chuerboonchai, *supra* note 181, at 208.

Recently, there are no any progresses for the drafting the Commercial Sale of Goods Act B.E. .... This draft is now at the Council of State and no any further progresses in relation to the enactment. Moreover, the study of thesis is focused on finding the way to unlock Section 456 Paragraph 3 of the CCC which obstructs the development of the international trade in Thailand. The solution to have the entire specific law for international sale of goods contracts is not the appropriate way to solve this problem that occur from some part of Section 456 of CCC. Thus, this solution may not be the suitable way to resolve the problems.

#### **4.4.3 The Ratification of the CISG**

The third solution provided for solving the problem of formal requirement for contract of sale is ratification of the CISG. It is the solution that Thailand can use to resolve the problem of provision of formal requirement for sale of goods contracts by having the CISG as the international law using for the international trade disputes. At the moment, Thailand has not ratified the CISG yet.<sup>226</sup> In order to have the CISG as the specific law applied for international sale of goods contracts in Thailand, they must become the contracting state of the Convention. This solution is not the new way created to solve the problem of inappropriate sale of goods law in Thailand. It has been studied for a long period of time.

Ratifying the CISG can be a possible way for Thailand to develop the laws on international sale of goods contracts. The CISG is one of the most significant instruments for the foreign traders. In order to find out if the ratification is the appropriate way to solve the problem of formal requirement or not, it needs to analyze pros and cons before having the conclusion of the best solution to remedy the problem.

Before the study will conclude the solutions to solve the problem of formal requirement, the analysis of the advantages and disadvantages of ratification of the CISG in Thailand will be provided. Due to the fact that the ratification of the CISG is

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<sup>226</sup> Chobchuen, *supra* note 67, at 106.

one of the preferable ways to remedy the problem of Section 456 Paragraph 3 of CCC and create long term acceptance from the foreign traders, this issue will explain deeply about the benefits Thailand will have and some disadvantages that would obstruct Thailand for adopting the convention as the international trade law.

#### **4.4.3.1 Advantages of the Ratification of the CISG in Thailand**

The CISG has many advantages to Thailand. First, this convention is accepted by the view of the foreign countries. It was created from the United Nations Commission on International Trade Law or “UNCRITRAL”<sup>227</sup> which is the organization that has a purpose to make the harmonization of the international law to the world. Therefore, this convention is the reliable instrument to applying in the international sale of goods transactions. From large amount of the members of the CISG, it is acceptable in the aspects of foreign traders. This convention will be the useful instruments for Thailand in order to release the problem of Section 456 Paragraph 3 of CCC and make Thai sale law more reliable in the international trade aspects.

Second, Thailand will have more acceptability and bring more foreign traders to conduct trade transaction with Thai parties. If Thailand can ratify the CISG and bring it to implement in its countries, this afford will create the reliability to the foreign traders. They will prefer to conduct international trade in Thailand because it has the international instrument that is recognize by the foreign traders around the world. Thailand will attract more international traders for becoming trade parties with Thai traders. This will make more revenues to Thailand and give economic cycles grow continuously.

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<sup>227</sup> Suthiphon Thaveechaigarn, A Third World Perspective on the UN Convention on Contracts for the International Sale of Goods, *Intell. Prop. & Int'l Trade L.F.* 246, 250 (1999).

Third, because of the ratification of the CISG, Thailand will be accepted by the view of foreign countries.<sup>228</sup> The important thing that will make Thailand develop faster than it is in current situation is getting accepted in the eyes of international trade parties. When Thailand develops something to be more effective, it will build more credibility of Thailand in view of foreign countries. The instrument that Thailand can improve for receiving the foreign acceptance is the developed law.

In this perspective, Thai sale of goods law regarding formal requirement is reliable for applying in the international sale of goods disputes. It cannot build the reliability to the foreign traders because our domestic sale of goods law is unsuitable for the international trade. If Thailand can ratify the CISG to implement in country, it can create more reliability to the provisions of the sale of goods contracts. Due to the fact that the CISG is the international instrument that many foreign trade countries use it to apply in the international trade disputes, Thailand should ratify this convention in order that it will be received the acceptance from the foreign countries.

#### 4.4.3.2 Disadvantages of the Ratification of the CISG in Thailand

Although the CISG is the international convention that gives many benefits to the ratified members, it also has disadvantages. From aspect of Thailand, the ratification of the CISG may cause some problems. It is because many Articles of the CISG are different from the provisions of Civil and Commercial Code, the law which the courts have used to consider the disputes.<sup>229</sup> If Thailand has the CISG as the specific law on the international sale of goods contracts, the application of its provision may cause confusion to the parties, especially Thai traders because at present the courts are using provisions of CCC, such as Book 1 and Book 2 in order to apply in civil cases and commercial cases and these application is different from the international trade practices. The application of the CISG in international trade

<sup>228</sup> Suthiphon Thaveechaiyagarn, *Thailand and Urgent Needs to Develop the Law on International Sale, Intell. Prop. & Int'l Trade L. Forum* 290, 290-323 (2005) (สุทธิพล ทวีชัยการ, ประเทศไทยกับความจำเป็นในการเร่งพัฒนากฎหมายซื้อขายระหว่างประเทศ, วารสารกฎหมายทรัพย์สินทางปัญญาและการค้าระหว่างประเทศ 320, 290-323 (2548)).

<sup>229</sup> Chuerboonchai, *supra* note 181, at 209.

disputes in Thailand may cause the problem of the contradiction between Thai and international business in the beginning after the ratification is succeeded.

In addition, the CISG may be just the instrument that Thailand shall ratify in order to gain only acceptances from the view of the foreign traders.<sup>230</sup> It is because the Articles of the CISG do not cover the provision that give the true recovery to the developing countries and many articles still have problems of the interpretation. The articles of the CISG is created and amended by many foreign traders that the interpretation is made in the way of compromises between international trade parties.<sup>231</sup> It does not create to make the benefit to the developing nations such as Thailand. Thus, the ratification of the CISG in Thailand may not give the development of international trade law; it may only make Thailand reliable from the international trade partners.

Moreover, in order to use the CISG as a specific law on contracts for the international sale of goods in Thailand, it may cause the problem of the translation of the Convention into Thai language.<sup>232</sup> If the translation is not in accordance with the real CISG, it may create the problem that our ratified law is not similar to CISG. It can cause a problem when the courts use this translated act which is unsuitable enough to apply for the international trade activities.

The analysis of the advantages and disadvantages makes the clear result that the ratification of the CISG is important to Thailand. It can solve the problem of the existing law on sale of goods that is not suitable to be used with the international sale of goods contracts. The ratification will then solve the problem of these provisions, including provision of formal requirements for sale of goods contract from CCC and make Thai law regarding international sale of goods contracts get accepted in the eyes of the foreign traders. These advantages create a great long term benefits to Thailand.

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<sup>230</sup> Thaveechaiyagarn, *supra* note 225, at 321.

<sup>231</sup> *Id.*

<sup>232</sup> Chuerboonchai, *supra* note 181, at 209.

For the disadvantages of ratification of the CISG, they are just the problem in the practice that it may cause some difficulties for Thailand to apply this Convention to the cases at first time after ratifying this specific law for international sale of goods contracts is taken. However, Thailand can develop the international sale of goods by learning from the errors that have been occurred. Because Thailand is developing to be the modernized country in the ASEAN, this matter has to succeed in order for Thailand to be the leader in the AEC.

After the analysis of the solution used to solve the problems of formal requirement, the amendment of Civil and Commercial Code, only Section 456 Paragraph 3 may be the best solution for Thailand. It is because this thesis studies only the problem of provision of formal requirement for sale of goods contracts in Thailand which is not suitable to apply in the international trade disputes. There is only Section 456 Paragraph 3 of the CCC which obstructs the development of the international trade made between Thailand and foreign countries.

The appropriate way to remedy this problem is to amend only part of Section 456. There is no need for Thailand to solve the problem by bringing in the whole dimension of the CISG to be a specific sale of goods law in Thailand, because there is only one part from Section 456 that has a problem. It does not affect other parts of Book III which is the sale of goods. Ratification of the CISG cannot give the most benefits to Thailand for solving the problem found in this study. Moreover, creating own specific law on commercial sale of goods also may not the appropriate solution to solve the problem because now this act is not ready to be enacted. It is not the solution to remedy the problem this time. In this regard, amendment of CCC is the preferable way to make formal requirement for the sale of goods contracts in Thailand harmonize with the nature of international trade practices.

The proposed amendment of Section 456 of CCC may be the best way to solve the problem of this thesis that focuses on provision of formal requirement. This amendment will release the problem of the application of Section 456 Paragraph 3 in the international sale of goods disputes. By adding exception to Section 456 that

Section 456 Paragraph 3 will not apply to international sale of goods disputes, the problem then is remedied. This provision then will harmonize with international trade practices. Nonetheless, in order to give the long term development to the international trade in Thailand, the ratification of the CISG is the solution to consider because this will make Thai sale of goods law be accepted in the view of foreign countries and traders.





## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusion

As the discussions of the previous chapters are explained, the results of the studies are that provision of formal requirement for sale of goods contracts is important to daily life of the societies, especially business transactions between the traders or merchants. Nowadays, anyone cannot ignore business transactions, such as the sale of goods contracts that uses formal requirement to make the agreements between parties reliable and bind them to perform the obligations. The sale of goods is the business activity that the traders usually conduct. It can occur in every country with both domestic and international sale of goods.

This activity has the governing law. Provision of formal requirement for sale of goods contracts is important to the parties, because it is used to control the parties to perform their obligation, otherwise the contracts shall be voids or unenforceable the liable party. In Thailand, it has Section 456 Paragraph 3 of the CCC, which is the provision of formal requirement for the sale of goods contracts. It requires the parties to make the written evidence signed by the liable party in order to have a right to bring the lawsuit to the court. This provision concerns the conclusion of written evidence. It is an effective provision, because this provision is used to apply in domestic sale of goods, and even the international sale of goods transactions, which such contracts can occur by oral agreement between parties.

Considering the laws that governed the sale of goods activity conducted between two countries or more, there are many international instruments that use to apply in the cases, such as The United Nations Convention on Contracts for The International Sale of Goods or the CISG, UNIDROIT Principles of International Commercial Contracts (PICC), or Principles of European Contract Law (PECL). These laws have been developed for a long time since the Roman era. They have been

developed and adjusted by the professional committees who came from many powerful countries around the world. The uniform law for international commercial contracts, such as the CISG is the most acceptable instrument for the international sale of goods contracts. At the moment, 83 countries have ratified the CISG to use it as their international trade law with other different countries.<sup>233</sup> In thin aspect, these are the evidence that the uniform laws for commercial contracts are useful for the courts to consider the facts and accepted the foreign trade parties.

In the international commercial contracts practices, the CISG is the uniform law that the international traders or merchants usually consider, because its provision is acceptable as the standards for international trade practice. Many significant articles and the previous cases represent the efficiency of the CISG as one of the most important international instruments used for the international trade. However, many articles from the CISG are clearly different from sale of goods law of Thailand.

Thailand mostly uses provisions of the sale of goods in Book III, title I from Civil and Commercial Code to apply both in the domestic and international sale of goods disputes. The application of these provisions to the international sale of goods disputes may cause the problem, because these sections are mostly used to solve the domestic sale of goods disputes. When the courts applied them to the international trade disputes, they may not be suitable enough to give the satisfied results to the injured parties.

In this regard, some parts of Thai sale of goods laws cannot apply to the international sale of goods disputes because they may not give the fair and reasonable results to the lost parties as well as provisions of international sale of goods contracts which have more efficiency to handle such disputes. They are more developed than the existing sale of goods contracts laws in Thailand. These are the reasons Thailand need to study the international instruments from the foreign countries in order to

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<sup>233</sup> [cisg.law.pace.edu](http://www.cisg.law.pace.edu), CISG: Table of contracting States, <http://www.cisg.law.pace.edu/cisg/countries/entries.html> (last visited May. 13, 2015)

improve its unsuitable provision that does not correspond to international trade practices.

The International trade with regard to the sale of goods contracts is an activity that needs flows of fast communications between two or more countries, and the availability to create the sale of goods transactions immediately in the limited time. Comparing with Thai sale of goods law, there are many sections of sale of goods laws from Civil and Commercial Code that are not suitable to apply to the international sale of goods contracts. In this thesis, the part which the studies discuss are formal requirement for sale of goods contracts, especially Section 456 Paragraph 3, because it occurred in the real cases that the application of this provision is not harmonized with the nature of international trade. Its concept is different from the application of formal requirement for international commercial contracts. It pointed out the problem that provision of formal requirement for the sale of goods contract in Thai law is unsuitable for applying in the international cases.

According to the provision of formal requirement for the sale of goods contracts and the previous cases decided by the Supreme Court of Thailand, Section 456 Paragraph 3 of the CCC regulates that formal requirement for sale of goods contracts must be made in writing which is signed by the party liable in order to enforce the liable parties for his fault performances, and it is used for the sale of the movable properties that have the agreed priced at 20,000 Baht or more.<sup>234</sup> It is different from provisions of formal requirement for international commercial contracts, particularly Article 11 of the CISG which provides that sale of goods contracts do not need to be evidenced or concluded in writing, any kinds of evidence may be proved the contracts, including the witnesses.

This Article is implemented to the international sale of goods practices under the concept of *freedom from forms*<sup>235</sup> which do not require the formality of a contract of sale. It can be made in any types which their existences or contents can be proved,

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<sup>234</sup> CCC section 456 paragraph 3

<sup>235</sup> Schlechtriem & Butler, *supra* note 65, at 61.

such as oral communication, transaction between the parties, telex and electronic mail. Therefore, Article 11 of the CISG is suitable for using with the international sale of goods activity which need flexibility and flow of communications among the traders. In order to use this article, each country needs to ratify the CISG, and then implements the entire convention to their countries.

In Thailand, the ratification of the CISG has not been taken yet.<sup>236</sup> When the international sales of goods disputes are brought into Thai court, Section 456 Paragraph 3 of the CCC, which is the provision of formal requirement for international sale of goods contracts, is used to consider the facts of the disputes, which is where the problem has arisen.

In Supreme Court Decision Nos. 3046/2537 and 3651/2537, the courts consider the facts that the Plaintiffs cannot enforce the Defendants to deliver the agreed goods back to them because there were no any performances required by law to be enforceable which are the written evidence signed the liable party, giving the earnest or partial payment of debts, because the plaintiffs did not complete these performances when the contracts of sales was made. The results of these cases do not give satisfactions to the Plaintiffs who suffered from the disputes. They point out the grounds of problem that Section 456 Paragraph 3 of the CCC is not sufficient enough to applying with the international sale of goods contracts disputes.

The analysis from the previous chapters provided that section 456 Paragraph 3 of the CCC cannot apply to the international sale of goods contracts disputes. The comparative study between Thai and foreign laws with regard to the formal requirement provides that Section 456 Paragraph 3 of Thai sale of goods law is not efficient enough to give the fair and satisfactory results to the injured party who is the foreign trader. This provision needs to be developed in accordance with the concept of formal requirement for international commercial contracts as to the contracts can be made even from verbal agreements or transaction between trade parties, because in the international trade, there are no formal requirements.

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<sup>236</sup> Chuerboonchai, *supra* note 181, at 210

With the concept of *freedom of form*, it supports the international trade practices that need fast communications across two or more countries. Thus, this concept should be used to solve the problem of Section 456 Paragraph 3 of the CCC. In addition, after the analysis of the foreign laws and the scope of problem, there are many ideas that can be used to remedy the problem of this study. There are many solutions which have been provided to solve the problem, but they cannot give the appropriate answer to release the provision of formal requirement which obstruct the development of international trade in Thailand.

For this thesis, the appropriate solutions to the problem of formal requirement are the amendment of Civil and Commercial Code, Section 456 Paragraph 3, and ratification of the CISG for further developments of international sale of goods contracts in Thailand. The amendment of Section 456 is mainly focused because it is the most appropriate way to remedy to the problem of an unsuitable law. While the amendment is done, the ratification of the CISG is also the solution which Thailand should consider, because it can solve the problem of the entire sale of goods law in Thailand and make international trade of Thailand conformed to the international trade practices.

## **5.2 Recommendations**

After the long conclusions analyzed to find the solutions to solve the problem are discussed, this part will provide the recommendations to remedy the provision of formal requirement for sale of goods contracts in Thailand. The result of the analysis shows that the problem still persists. Although Section 456 Paragraph 3 of CCC is significant to domestic sale of goods contracts, it is not suitable to apply in the international sale of goods contracts. This provision contradicts to the provisions of formal requirement for international commercial contracts. It makes international trades of Thailand not as developed as they could be. This thesis will suggest the appropriate ways to remedy the problem of Section 456 Paragraph 3. The recommendations will be provided below as follows:

1) Thailand should amend Section 456 Paragraph 3 of Civil and Commercial Code. It is because the problem in this thesis is that this section is unsuitable to applying with the international sale of goods contracts disputes. The proposed amendment may be the appropriate way to release the limitation of formal requirement which is obstacle to the development of a contract of sale used in the international trade. The amendment for this section should be adding an exception into the fourth Paragraph of Section 456 stating that Section 456 Paragraph 3 shall not apply to the international sale of goods contracts disputes. This is the way to create the development of formal requirement for the sale of goods contracts in Thailand.

Although the amendment may create a problem of its application during the beginning, the courts can apply provisions that the international courts use to support their consideration before they decide the cases. These supporting instruments are useful for applying in the cases. They will help Thai court to solve the problem when section 456 Paragraph 3 of CCC is not applied in the international trade disputes. Thai sale of goods law with regard to the formal requirement will be then be developed to be modernized and acceptable in the view of foreign countries.

In addition, this amendment may not create the problem of workload to Thai courts because Thai courts can use the international instruments to support their considerations. This amendment may cause a lot of work at the beginning after Section 456 is amended, but it will give benefit to them in the long run because Thailand will have modernized law of formal requirement to consider the disputes. It will make satisfied results to the injured parties. Nonetheless, this solution is just the temporary way to solve the problem of formal requirement for sale of goods contracts. This solution will be effective to solve the problem in this thesis, but it is not the best solution to develop the entire scale of the international trade in Thailand. In order to remedy the problems of international sale of goods contracts in the whole dimension, ratification of the CISG is a necessary plan for Thailand to consider.

2) Thailand should consider the possibility to ratify the CISG. It is because this Convention is useful in foreign trade countries. The study of CISG explained that it has many provisions used to consider the international trade disputes and because this Convention is developed by the international scholars and researchers from many countries around the world, each provision is created in order to make the uniformity to international trade and the harmonization to the trade practices around the world.

For making long term developments to Thai sales law, the ratification of the CISG is the preferable way to solve the problem of unsuitable sale of goods provisions, which cannot apply to international sale of goods disputes, in the whole dimensions. In addition, this ratification will increase the reliability of Thai sale of goods laws in view of international traders. When the implementation of the Convention is taken in Thailand, it will support the international trade parties to accept Thailand as one of their trading partners. This effect will help Thailand gaining more abilities to protect its rights in the international trade community.

Nonetheless, for this study, the ratification of the CISG may not be the most appropriate solution to the problem of formal requirement, Section 456 Paragraph 3 of the CCC, which significantly obstructs the trade activities between Thailand and foreign countries, because to ratify the CISG means having this Convention to be the law for international sale of goods contracts of Thailand. Implementation of the entire Convention is not an appropriate way to remedy the problem in this thesis which desires to release Section 456 Paragraph 3 that is obstacle to the development of sale of goods transactions in the international trade. However, this solution remains the way Thailand should consider in the future because it can solve the problem of Thai sales law entirely and being the member of the CISG is an advantage for Thailand to gain benefits from international trade activities.



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