CASE TRANSLATION: JAPAN

CASE CITATION:
Showa 33 (Wa) No.681, 10 November 1962

NAME AND LEVEL OF COURT:
Kobe District Court, 5th Civil Division

DATE OF DECISION:
10 November 1962

MEMBERS OF THE COURT:
Judges Taniguti Teruo, Okumura Nagaoand and Sakakibara Kyoko

Formation of contract; expressions of intent by letter and telex; cancellation of contract; liability

(Reference source, Kakyu Saibansho Minji Saiban Shu 13 Kan 11 Gou page 2293; Hanrei Jiho 302 Gou page 4)

Kobe District Court, 5th Civil Division, Judgment, Showa 33 (Wa) No.681, 10 November 1962

Damages claim

Admitted partly, dismissed partly

Plaintiff: Fawlty & Co. Ltd.

Defendant: Matsui-Shoten K. K.

Judgment:

The defendant to pay £1,691.0.2d and interest at 6 per cent for delay from 17 July Showa 33nen (1958).

Other claims by the plaintiff will be dismissed.

The defendant should pay the costs of the plaintiff.

Facts:

The attorney of the plaintiff claimed that, "the defendant paid £1,691.0.2d and interest at 6 per cent for delay from 17 July Showa 33nen (1958). Where the defendant cannot pay the amount in UK currency, the defendant should pay it in Japanese yen at the exchange rate of the day of payment. The defendant should pay the litigation costs of the plaintiff." The attorney expressed the cause of action as follows:

"The plaintiff is a limited company for the trading of meat established by the Company Law of New Zealand. The defendant is a joint stock company for the trading of foods established by the Japanese Commercial Law. The plaintiff offered a C & F contract of frozen beef from New Zealand by sending telexes and letters by air mail dated 5 June and 10 June 1957, and the defendant accepted the plaintiff's offering by sending telexes and letters by air mail dated 7 June and 14 June 1957, the plaintiff and defendant had concluded the C & F contract as follows":

"(1) Object 600 quarters of the GAQ rank frozen meat of bull cut equally from forelimbs to rear limbs. However it is acceptable for about 10 per cent FAQ rank frozen meat to be mixed.

(2) Payment to be made at the port of Kobe as the unloading port, the price at 1 shilling and 7½ pence a pound. However the defendant is liable as a purchaser where additional charges are incurred for shipping.

(3) Condition of Payment: the defendant as the purchaser will open an irrevocable banker's credit for a D/D [demand draft] that the plaintiff is a beneficiary at the New Zealand Bank in Auckland.

(4) Object shipment period: to ship the meat in Auckland, in the *Port Towns Bill* or on the first available ship."

"The plaintiff sent notice to the defendant that the meat would be shipped on the *Argentinian Lifa* by telex dated 1 August 1957 and also sent notice that the estimated weight was 108,854 pounds by telex dated 8 August."

"After the conclusion of the contract, the defendant requested the cancellation of the contract and refused to open a letter of credit that was the condition of payment and had not opened it even in September 1957 after the period of shipment."

"However, the contract is, in nature, a fixed term purchase contract that should be invalid without shipment of the object of the contract within the shipment period,

and considering that the opening of a line of credit is a prior condition to the shipment, the contract should be cancelled when defendant failed to open a line of credit and passed the shipment period subject to the Article 525 of the Japanese Company Law."

"Because of the cancellation by the defendant, the plaintiff had to sell the frozen beef of 600 quarters to others. The plaintiff suffered damaged to the amount of £1,691.0.2, as the difference between £6,381.8.0, the estimated plaintiff's benefit in case of non cancelation, and £5,330.17.7, the plaintiff's actual benefit."

"The plaintiff claimed the damages by certified postal mail that arrived with the defendant on 16 September 1958."

"Based on these facts, the plaintiff claims the payment of damages and damages for delay rated at 6 per cent of the commercial interest from the day after the date of the claim to the defendant by mail to the actual date of payment. If the defendant cannot pay the damages in UK currency, he should pay the damage in Japanese currency by the rate at the day of payment of the damage subject to Article 403 of Japanese Civil Code."

The attorney of the defendant requested the court, "The claim by plaintiff should be rejected. The litigation cost should be borne by the plaintiff", and objected to the cause of the claim by the plaintiff as follows:

"The defendant admits the facts as expressed by the plaintiff, that both the plaintiff and the defendant are commercial companies as expressed by the plaintiff, that the plaintiff and the defendant exchanged telexes and letters by air mail dated 5, 7, 10 and 14 June 1957, that the defendant did not open a line of credit as requested by the plaintiff, even after September, and that damages are the amount expressed by the plaintiff. However, the defendant objects to the fact that the contract had not been concluded between the plaintiff and the defendant through the exchange of the telexes and letters by air mail.

The telex dated 5 June 1957 sent by the plaintiff to the defendant was an offer conditional on the acceptance by the defendant that should arrive by Friday 10 am. However, the notice of acceptance by the defendant by telex dated 7 June had not arrived within the period stipulated.

The plaintiff's telex and letters sent by air mail dated 10 June was an inducement of an offer of a contract, and the defendant's telex and letter sent to the plaintiff by air mail dated 14 June was the offer to enter the contract. The defendant retracted the offer by telex dated 22 June, but the plaintiff did not accept the offer before the offer was retracted.

Regarding to the fact that the contract in this case is an international sales contract dealing with large quantities and expensive goods, and the fact that the signature and the exchange drafts of the contract by the parties are a condition of the conclusion of the contract, the defendant had neither signed the draft nor sent it to the plaintiff.

Therefore the contract had not been concluded, contradicting the plaintiff's assertion.

If the contract had been concluded, the defendant will object to the plaintiffs assertions that the contract is a sales contract with fixed term and that the opening of the letter of credit is a precondition to the shipment of the goods.

According to these reasons, the contract is not subject to the provisions of Article 525 of the Commercial Law and has not been cancelled."

The attorney of plaintiff opposed, "even if the contract had been concluded and the defendant did not execute the requirement to open the letter of credit based on the contract as in the plaintiff's opinion, because the obligation of the defendant and the obligation of the plaintiff to ship and present the materials of the shipment should be obliged coincidently, where the obligation of the plaintiff had been neither executed nor performed, the performance of the defendant had never been delayed. Therefore the defendant is not liable for the damages of the plaintiff."

Against the objection by defendant, the attorney of the plaintiff expressed, "the plaintiff admits the fact that the plaintiff did not ship or present the goods of the shipment based on the sales contract, as stated before, the defendant's obligation to open the letter of credit should be performed prior to the obligation to ship the goods, this means that these obligations are not performed coincidently." (The list of evidence is omitted.)

Reason:

The plaintiff and defendant are commercial companies as expressed by the plaintiff, neither of them contest, and admitted the existence of telexes dated 5, 7, 10 and 14 June 1957. Therefore we have to decide whether there is a contract between the plaintiff and the defendant as expressed by the plaintiff by the exchange of the telexes and letters sent by air mail.

First, based on the evidence No. 2, No. 4, No. 30.1 and No. 30.2 and the testimony of the witness Mr. Horiuchi, we found the following facts:

(1) The plaintiff and defendant negotiated to trade New Zealand frozen beef, introduced by the legation of New Zealand in Tokyo, first by the plaintiff's telex dated 7 May 1957 and by other telexes and letters sent by air mail, and confirmed by the end of the month that they adopted a C & F sales contact and that, for the payment by the defendant as a purchaser, the defendant opened the irrevocable banker's credit for a D/D with the plaintiff as a beneficiary at the New Zealand Bank in Auckland. Telexes and letters sent by air mail dated after 5 July were exchanged on the assumption that the confirmation existed.

(2) In summary, the plaintiff's telex dated 5 June indicated that the plaintiff offered to sell to the defendant 600 quarters of GAQ rank frozen meat of bull cut equally from forelimbs to rear limbs at the Kobe port at the price of 1 shilling 7½ pence per pound, with the proviso that the reply by the defendant had to arrive before Friday 10 am, that a ship could be arranged and that shipment by the *Port Towns Bill* through September.

(3) By telex dated 7 June sent by the defendant, the defendant confirmed the order for the goods, the amount of payment and the period of shipment indicated by the plaintiff's telex dated 5 June. However, the defendant's telex had arrived on Saturday morning.

(4) The plaintiff's letter sent by air mail and a telex dated 10 June is summarized as follows: that the defendant's telex dated 7 June had arrived after the period of acceptance, but because of the plaintiff's eagerness to trade with the defendant, the plaintiff requested a change in the conditions in accordance with terms set out below.

The terms are to ship by the *Port Towns Bill* or any ship that could be arranged sooner, to accept mixture about 10 per cent FAQ rank frozen meat and to bear the additional cost of shipment if the cost had changed at or before shipment. The defendant would send a telex to the plaintiff to confirm the sale if these terms are agreeable to the defendant.

(5) The defendant's telex and letter sent by air mail dated 14 June is summarized: that the defendant would like to put on notice when the plaintiff agreed to the terms contained in the telex and letter sent by air mail dated 10 June and the name of the ship and estimated weight of the goods.

Telexes or letters sent by air mail exchanged between the plaintiff and the defendant between 5 and 14 June demonstrate and set out expressions that they intended to conclude the sales contract. The plaintiff's letter sent by air mail dated 10 June should especially be considered not as an inducement of an offer but as the definite offer of a contract.

Based on the evidence, which is not contested, Otsu No.1 and the testimony by witness Mr. Horiuti Haruo, these facts are recognized: the plaintiff sent to the defendant the confirmation letter dated 15 June, but the defendant neither signed it nor sent it back to the plaintiff. An international sales contract is an informal and consensual contract unless there is a particular expression or a custom. Confirmation letters, usually exchanged between contractual parties, are made for the purpose of confirming the contents of the concluded contract, for the purpose of the smooth performance of the contract and of preserving evidence in the event of a potential dispute, and the exchange of the letters is not a condition of the conclusion of a contract. In this case we cannot find that there are any special expressions or customs.

Of course, we could not accept parts of the testimony of the witnesses Mr. Horiuti Haruo and Akio Matsuyama, who contended that the exchange of the confirmation letter was the condition by which the contract was concluded, because of the lack of any evidential basis.

To summarize the facts, the offer of the sales contract had been expressed based on an exchange of the intention by the parties, and the plaintiff expressed his acceptance of the offering without any condition by telex and letter sent

by air mail dated 14 June, therefore a C & F sales contract for the sale and purchase of New Zealand frozen beef should be perfectly concluded between the plaintiff and the defendant.

Considering the evidence, Kou No. 5 and No. 20 were not contested. We found that the defendant expressed their intention to cancel dated 14 June by telex and letter sent by air mail dated 22 June, after the plaintiff rejected the cancellation because of the conclusion of the contract, that the defendant immediately agreed this expression of the plaintiff, and proceeded with the negotiation in respect of the discount of the price and the shipment, and that the defendant admitted, outside the court, the fact that the contract had been concluded. This fact justifies these findings of fact.

The fact, as accepted by the defendant, is that the plaintiff sent notice to the defendant that the object of the contract would be shipped on the *Argentinian Lifa*, and the estimated weight of the goods was 108,854 pounds and the fact was not disputed that after the end of September, the period of shipment, the defendant had not opened the line of credit as the plaintiff argued.

Next we examine the intention and nature of the contract between the plaintiff and the defendant, and the nature and execution period of the defendant's obligation to open the letter of credit based on the contract.

In general, the period of shipment of the goods is usually provided in the contract, but the period of shipment in the C & F sales contract is decided and provided by the purchaser, taking into account the amount of stocks of goods, state of the market, financial situation, days from shipment to unload and the arrival date of materials of shipment; therefore the special provision is the most important provision of the C & F sales contract and the seller should observe the period. The production of materials for the shipment of goods that had been shipped before or after the period is not a performance of the obligation, and where the seller failed to ship the goods contracted for, and the period had lapsed, the purpose of the contract could not be fulfilled.

The nature of the sales contract that specifically provides for the period of shipment is in nature a fixed term sale, as provided by Article 525 the Commercial Code.

The intention to open the irrevocable banker's credit for a D/D for the payment under the C & F sales contract is not only to enable the seller to discount a bill more simply, but also to ensure the seller can discount the bill shipped and to receive payment of sales before shipment of the goods to the seller in order to confirm the arrangement of the goods and the shipment. If there is a special provision, the purchaser should have the obligation to open the irrevocable banker's credit for a D/D prior to request the shipment of the goods to the seller and at the latest until the end of the period of shipment.

Because the obligation to open the credit is based on the C & F sales contract with the fixed period of shipment and is the prior obligation, the contract could be cancelled if the seller had not opened the credit before the end of the period of the shipment.

The contract between the plaintiff and the defendant could have been cancelled at the end of September without the opening the credit by defendant. The defendant should be responsible for the compensation damages of the plaintiff caused by the time it took to open the credit and cancel the contract.

Although the defendant complains that the obligation to open the credit and the obligation to ship the goods are to be performed simultaneously, and the defendant has delayed performance because the plaintiff has not performed the obligation to ship the goods, we cannot adopt the complaint because the obligation to open the credit is the prior obligation.

The plaintiff and the defendant have not contested the amount of damages caused by the cancellation due to the delay by the defendant, which is 1,691 pounds and 2 pence in UK currency, and the defendant does not contest the fact that the plaintiff claimed damages on the day. We considered that defendant confessed the fact.

As the result, the defendant is obliged to pay damages in UK currency and delay interest at 6 per cent, the commercial interest rate from 17 July 1958, the day the plaintiff claimed damages against the defendant.

As a supplementary matter, we examine that the request by the plaintiff to pay the amount at the exchange rate on the payment day into Japanese currency if the defendant cannot pay in UK currency.

According to Article 403 of Code of Civil, the debtor can

pay in Japanese currency at the rate of exchange in the location of execution if the amount of claim had been indicated by foreign currency. In this case, the claim by the plaintiff of damages against the defendant is indicated by foreign currency. However, the provision permits that the debtor can pay in Japanese currency where he could not pay in foreign currency as the original obligation, but the debtor does not have the right of selecting the currency. Therefore the creditor has the right to claim in foreign currency as the original performance.

According to these reasons, the part of the plaintiff's claim that claims damages in Japanese currency should be rejected.

The cost of litigation should be ordered and the judgment sentence by applying Article 92 the proviso of the Code of Civil Procedure.

Judges:

Taniguti Teruo

Okumura Nagao

Sakakibara Kyoko