เรื่องเสร็จที่ ๘๖/๒๔๗๘

ที่ ศ.๔๓๕/๒๒๗๘ คณะกรรมการกฤษฎีกา

๖ พฤศจิกายน ๒๔๗๘

เรื่อง แบบลูกสูบดีเซล ซึ่งกรมรถไฟจะประกาศเรียกประมูล

จาก เลขาธิการคณะกรรมการกฤษฎีกา

ถึง รัฐมนตรีว่าการกระทรวงเศรษฐการ

ตามหนังสือถึงประธานคณะกรรมการกฤษฎีกาที่ ๒๒๖๓/๒๔๗๘ ลงวันที่ ๕ กันยายน ศกนี้ หารือคณะกรรมการกฤษฎีกาในปัญหาเกี่ยวกับกฎหมายเปเตนต์ ว่ากรมรถไฟจะมีสิทธิเอาแบบลูกสูบรถดีเซล ซึ่งบริษัทฟริกซ์เป็นผู้ทำไปเรียกประมูลโดยมิได้รับอนุญาตจากผู้ออกแบบได้หรือไม่นั้น

บัดนี้ กรรมการร่างกฎหมายได้ประชุมตรวจพิจารณาเรื่องที่กล่าวข้างต้นนั้นเสร็จแล้ว มีความเห็นว่าถึงแม้ในเวลานี้ประเทศสยามจะยังไม่มีกฎหมายเปเตนต์ก็ดี แต่ถ้ากรมรถไฟจะเรียกประมูลการทำแบบลูกสูบดั่งว่านี้ในประเทศสยามแล้ว บริษัทฟริกซ์ซึ่งเป็นเจ้าของแบบน่าจะฟ้องกรมรถไฟได้ โดยอาศัยสัญญาทางพระราชไมตรีระหว่างกรุงสยามกับกรุงเดนมาร์ก พ.ศ. ๒๔๖๘ และประมวลกฎหมายแพ่งและพาณิชย์มาตรา ๔๒๐ ความพิสดารปรากฏตามบันทึกของกรรมการร่างกฎหมาย ดั่งได้เสนอมาพร้อมกับหนังสือนี้ ๑ ฉบับ

ขอแสดงความนับถืออย่างยิ่ง
(ลงนาม) เดือน บุนนาค
(นายเดือน บุนนาค)
เลขาธิการ

Note
on the purchase of Diesel locomotives cylinders
by the Railways Department

1. The Ministry of Economics has requested the opinion of the Krisdika is order to know if the Railways Department, having to purchase 36 Diesel locomotives cylinders Design 628 C. may, instead of purchasing them from the Danish Frichs Company (inventor) or Diesel Company, call tenders for the fabrication of the said cylinders, without obtaining permission of the designer.

2. The question must be considered in law from the points of view of the Patents law and of the general commercial law.

3. As far as the Patents law is concerned, there is no such law in Siam for the time being. Siam has only to comply with the engagement taken in the Treaty with France (1925) to issue a legislation in harmony with the International Conventions concerning Patents. This is under consideration, but not completed as yet. In the present conditions, the nationals and foreigners are exactly in the same positions there is no legal organization for claiming deposits of patents and the protection of the same. This makes unnecessary to enquire if the inventor of Frichs Cylinders has obtained or not a patent in his own country or in any other one.

4. The legal question is consequently outside the question of Patents itself.[1]* The legal question is to know whether the calling of tenders which is referred to by the Railways Department is permitted by the provisions of the Treaty of by the provisions of statutory law other than those concerning patents.

5. Being a Danish subject, the inventor frichs may prevail himself from the provisions of the Treaty with Denmark (1925) which contains the following articles:

Article 2, parag. two: In all that relates to their commercial, shipping, industrial and agricultural pursuits, and to callings and professings; as well as with regard to the acquisitions, possession and disposition of property-rights of every description the subjects of either of the High Contraction Parties shall throughout the whole extent of the territory of the other be placed in all respects on the same footing as the subjects of citizens of the most favored nation.

Article 18: The subjects of each of the High Contracting Parties shall

[1] The Patnets Laws, it is reminded, provides always, at least partly, for criminal liability.

enjoy in the territory of the other, upon fulfillment of the formalities prescribed by law, the same protection as native subjects, of the subjects or citizens of the nation most favored in these respects, in regard to patents, trademarks, trade-names, designs, and copyrights.

6. From the provisions of the Treaty with Denmark, it is clear that the Danish subjects are not without protection when their commercial, industrial or professional rights are infringed. Their property rights of every description are also protected in the same way. The protection goes to place the Danish subjects in all respects in the same conditions as the subjects or citizens of the most favored nations. The clausesprotaction the commercial, industrial, professional rights and the rights of property in other Treaties, especially with Great Britain and France, are at least as strong and detailed as the provisions of the Danish Treaties. The consequence is that if a Danish subject enters a civil claim in a Siamese Court, on the ground that a property right of his own has been violated, the Court would probably decide:

a) that the wide wording of the Treaty with Denmark (article 2) means that the property right deriving from any invention is one of these property rights of every description which cannot be impaired by unfair competition:

b) that the Danish subject must enjoy the protection of the commercial law as it exists in this country, even independently of any question of patents, if his right is violated.

It may be added that the decision of the Court will be carefully watched not only by the Danish subjects, but also by the other foreign countries, on account of the clauses of the most favored nation which makes that all countries have joint interests in the respect of clauses protection commercial and industrial matters.

7. As far as the statutory commercial law of Siam is concerned, it is, under Section 420 Civil and Commercial Code, that A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.

8. Section 420 has to be interpreted by the Courts as similar provisions in matter of torts (wrongful acts) are interpreted in the foreign law.

By the application of the legislation on torts, it is admitted:

in the French law, that legislation of torts, rather similar to Section 420 C.c.c., gives action to an injured person when something is made which may impair the benefit that he may prospect from his invention (Pouillet, Patents, No. 330 bis); the legislation of torts forbids any appropriation of the work of another person, and any way Who divert customers from a firm. This applies to foreigners as well, even

if not protected by law or by reciprocity in Treaties. It comes from the right which acerues to any alien to trade in the country, and consequently to sue in Court when he is injured in the welfare and safety of his trade (Re ″pertoire Droit International Prive″ Delit de concurrence de'loyale, No. 80). All this is termed unfair competition, and the trader or inventor is protected against them even if they cannot resort to a specific law because they would have omitted to comply with its formalities (Bry, Lsa proprie'te' industrial)

In English law, says Addison (Law on Torts, 8th. edition) .... The law recognizes the right of every person to endeavor to acquire property by carrying on any lawful occupation; and every interference with this right without lawful excuse is a tort.

Interference with a man's trade by fair competition is no actionably.a man's occupation, profession or way of getting a livelihood, there an action lies in all cases.

Says A. Curti (Manuel de droit commercial anglais): Even the trade-marks not deposited are protected by the law against deceiving and unfair dealing. (Voll II. p. 30)

9. In conclusion, should the Railways Department call tenders for the fabrication of Frichs Cylinders in Siam, it is not unlikely, should such cylinders be fabricated upon their request and purchased by them, that they would be sued by the inventor jointly with the makers: not by virtue of the Patents law, but for unfair competition and injury to their commercial and industrial rights as protected by the Treaties. To call tenders is obviously an incitement to fabricate goods, and is quite different from buying goods from an imitator when the latter has himself fabricated already of his own accord. And it is not sure at all that the Law Court would not entertain a claim of the plaintiff against the Railways Department. It belongs to the Railways Department the decide if they will run the chance, but the Committee cannot advise them to do it.

23rd October 1935