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INTERNATIONAL TRADING OF GOODS

June 11 Agreements for the International Trading of Goods

Introduction:
The Basics

Formation of International Transaction

The Traditional Analysis: Choice of Law

Genuine International Law: C.I.S.G.

Advising clients

We appreciate the additional measure of complexity presented in the classic “battle of the forms” when contracting across borders. In this problem the forum court will likely use its own Choice of Law rules to determine the applicable law to the issue of formation. We consider the Restatement 2d approach likely to be applied if the forum is in the U.S. If the court concludes the appropriate choice is Kansas law, then U.C.C. will determine. If forum is U.K., then the Rome Regulation. You should be able to work your way through any complex set of acts to arrive at a reasonable conclusion. Remember, rules of law which, in a wholly domestic setting are mandatory, can be viewed as elective in a multi-jurisdictional setting.

If parties are doing business in signatory State, then C.I.S.G. would apply unless parties have effectively opted out. Remember the Convention itself provides the relevant rules of law, and therefore should be used to determine the effectiveness of an “opt-out”.

Commercial Terms, Bills of Lading and Insurance
Part A: The Role of Commercial terms

Part B: The Basics of Carrier Liability: We are introduced to INCOTERMS and their impact in the transnational commercial context. You should clearly understand how the use of FOB, CIF, FAS, etc. operate to allocate duties between the parties, as well as the risk of loss.

You should understand the functions of the Bill of Lading, both negotiable and non-negotiable, as document of title and contract of carriage. Recognize also the position of the carrier in the event of loss or damage, and need for adequate insurance given the limits on carrier liability.

Consider the case of the “The Julia” as the decision places limits on parties’ ability to characterize contract as CIF or FOB, in the face of contradictory facts. The swing factor here seems to have been the Seller’s retention of title in a contract he had sought to characterize as CIF.

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Force Majeure

Part A. Comparative look at Force Majeure and Frustration

Part B. Consulting with Client During Drafting.
“Know your client’s business.”

We discuss the Suez Canal closing cases as an introduction to Force Majeure as excuse for failure to perform under the contract. You should understand the need to understand every aspect of client’s business so that you can draft with adequate specificity. Consider not only legal, but cultural, political, commercial issues as well. Clearly, if “passage via Suez” had been included in the contract of sale, seller’s failure to perform would have been excused.

Remember, no global uniformity regarding force majeure. The standard may vary from jurisdiction to jurisdiction, so choose and prepare carefully.

In the current global situation it is essential to consider global politics as we provide guidance on what is advisable or permissible to our clients.

The Bill of Lading

Part A: Forgeries, endorsements and mis-deliveries

Part B. Misdemeanors and Disclaimers

Part C: Forged Bills of Lading

A cash sales transaction that does not include a letter of credit, but uses a negotiable bill of lading and a series of collecting banks acting as agents for the seller. You should understand the carrier's obligation of delivery to holder of a negotiable bill of lading, inbound under UCC, and outbound under the Federal Bills of Lading Act.

In the event of misdescriptions the carrier may be liable unless appropriate disclaimers have been set forth. You understand the function of terms such as "said to contain", and "shipper load, weight and count".

Remember the Federal Bill of Lading Act creates certain statutory warranties by transferors of bills of lading, "Unless a contrary intent appears". In this case, the carrier did not issue the bill of lading, and therefore should not be held liable for the forgery, unless found culpable in allowing the forgery to take place. Perhaps advisable for carrier to take greater care in maintaining its BOL's.

June 13 FINANCING INTERNATIONAL SALE OF GOODS

A. The Letter of Credit

The seller requests that the buyer obtain a letter of credit, issued by his bank, payable to the seller. Thus, the issuing bank assumes obligation of payment against seller's performance, which will likely consist of tender of required documents. Remember, the L/C is irrevocable so long as there is strict compliance with the terms of the L/C. As is true with the enforcement of so many "standards", the term "strict compliance" can vary from court to court.

Remember also that the L/C is independent of the underlying transaction, so that if there are discrepancies, it is the underlying contract that must conform itself to the L/C rather than vice-versa. So the bank must honor the demand for payment if documents are in compliance with its instructions.

B. Enjoining Payment for Fraud

If the documents are in strict compliance, the bank must pay money, unless the buyer can get court to enjoin payment on ground of fraud. Remember, a breach of the

underlying contract is not a breach of the L/C contract so long as documents conform. The *Sztejn v. Schroeder* case carves out a narrow possibility of injunctive relief in the event of fraud.

Remember the UCP contains no controlling provisions in the event of fraud. You should understand UCC Section 5-109 and its impact on this situation. Further understand there are requirements for the issuance of the equitable remedy we call injunctive relief. You must show inadequacy of the legal remedy by demonstrating irreparable harm. Of course, standards for fraud vary from jurisdiction to jurisdiction.

C. Standby (Suicide) Letters of Credit

The case of *American Bell* demonstrates the application of U.S. law (UCC) domestically. In that case the court concluded the Plaintiff had assumed the risk of loss by doing business in the middle east, and had to bear the consequences. You will recall our admonition to carefully consider political issues when you advise clients; the possibility of revolution, expropriation and repudiation of contracts was clearly foreseeable.

Further, as demonstrated by the *SpaceCom* problem, it is advisable to counsel your client to require a "time draft" rather than a "sight draft" to provide adequate opportunity for investigation into claims of non-performance.

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