HANCOCK & ESTABROOK, LLP
COUNSELORS AT LAW

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"Buyer Beware. Seller Too."

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Introduction

Consider a normal transaction for the purchase and sale of goods.

Buyer, a manufacturer located in New York, purchases component parts from Seller, a supplier located in China. The sales are made pursuant to Buyer's standard purchase orders, which contain, among other things, the following clause: "This Purchase Order shall be governed by the laws of the State of New York".

The parties maintain a profitable relationship for several months, but eventually the situation devolves into a classic dispute. Buyer complains that a batch of goods is defective and refuses payment. Seller stops shipment on all previously unpaid purchase orders. Both parties contact their respective lawyers to determine their rights and remedies.

Buyer's lawyer reads the purchase order and confidently informs her client that New York law, specifically Article 2 of the Uniform Commercial Code (the "UCC"), applies to this dispute. Buyer is happy to hear that it will have home court advantage and proceeds to exercise its remedies under the purchase order and the UCC.

Unfortunately for Buyer, its lawyer has made a blunder. The UCC does not govern the dispute between Buyer and Seller. Rather, a body of international law, known as the United Nations Convention on the International Sale of Goods of 1980 (the "CISG"), governs the parties' relationship and their dispute.

History

In 1980, the United Nations adopted the CISG at the recommendation of its Commission on International Trade Law ("UNCITRAL"). The CISG came into effect on January 1, 1988, after being ratified by eleven countries, including the United States. To date virtually all of the U.S.'s major trading partners, including Canada, China and Mexico, have ratified the CISG.

The CISG's purpose is to provide buyers and sellers of goods located in different countries with a uniform body of law. It applies to every contract for the sale of goods between parties whose places of business are located in different ratifying countries.

Application

The CISG applies to international sales contracts unless the parties to the contract *specifically exclude* its application. As a result, U.S. courts have held that it is not enough to simply choose a state's law. Parties must take the extra step of either (a) expressly excluding the CISG; or (b) choosing a specific body of law, such as the UCC, to apply to their contract.

The practical consequences of failing to exclude the CISG could be slight or drastic, depending on the nature of the dispute. For example, the CISG and UCC are very similar in terms of remedies and standards of commercial reasonableness. Accordingly, U.S. courts have used the UCC to interpret the CISG. So, in the example above, the actual effect of the lawyer's blunder is slight because Buyer's remedies under the CISG and UCC are similar.

Suppose, however, that Seller sues Buyer claiming that Buyer orally agreed to a price increase prior to submitting its latest purchase orders. Under these circumstances, Buyer's blunder takes on greater significance. In contrast to the UCC, the CISG does not require a contract to be in writing. Moreover, a contract may be proven by any evidence, including witness testimony. This means that a "contract" under the CISG is a far more nebulous concept than under the UCC. It also means that proving in court what the parties did or did not agree to becomes substantially more time consuming and expensive. Indeed, the mere prospect of protracted litigation on this issue could force smaller buyers or sellers to settle meritorious claims for pennies on the dollar.

Returning to the example, Buyer is looking at years of federal litigation to prove that the price increase was not part of its agreement. Obviously, Buyer now wishes that it had known about the CISG and excluded its application.

Conclusion

As globalization continues unchecked, businesses of all sizes are entering the international market. Local buyers and sellers of goods should be aware that the CISG will apply to their transaction unless they specifically exclude its application. They should also be aware that, while the CISG has some similarities to the UCC, it differs in other important respects. For this reason, parties should exclude application of the CISG where possible. This can be done quite simply by adding the following line to purchase orders, invoices, supply contracts

or other agreements: "This Agreement shall be governed by the laws of the State of New York. The parties agree that the United Nations Convention on the International Sale of Goods of 1980 shall have no application to this Agreement."

Does Your Contract Comply with New York's New Power of Attorney Law?

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New York recently enacted a new power of attorney statute, effective September 1, 2009. Powers of attorney executed in New York prior to the effective date of the new statute continue to retain their validity. Going forward, however, all newly executed powers of attorney fall under the expansive scope of the new law, and must comply with its stringent requirements. Specifically, the document:

1. must be typed or printed in at least twelve-point font;
2. must be signed and dated by a principal with capacity and acknowledged before a notary public;
3. must be signed and dated by the agent and acknowledged before a notary public; and
4. must contain the exact wording of the "Caution to the Principal" language and the "Important Information for the Agent" language set out in the statute.

The new law broadly defines a power of attorney as "a written document by which a principal with capacity designates an agent to act on his or her behalf." The language and intent of the new law is geared toward the traditional estate-planning variety of powers of attorney, and does not apply to powers of attorney executed by a "person other than an individual" (*i.e.*, a business entity). However, the broad definition encompasses powers of attorney that are executed by individuals in many types of business and commercial transactions. For instance, powers of attorney are frequently used in loan transactions between a commercial bank and an individual borrower. They are also often used in limited partnership agreements and limited liability company agreements as a way to grant the managing partner or member the necessary authority to operate the business. The new law does not provide an exception for powers of attorney granted in those and other business contexts. Moreover, there are several aspects of the new law that could potentially create major glitches in business relationships.

The most troubling aspect of the new law is a provision stating that execution of a new power of attorney automatically revokes all prior powers of attorney that were executed by the principal, unless the principal expressly provides otherwise. This occurs even where the newly executed power of attorney is for a different purpose than and/or wholly unrelated to the older power of attorney. For example, if a principal first executes a power of attorney in favor of her managing partner in a limited partnership agreement, then executes a power of attorney in favor of her bank as part of a personal loan transaction, the power of attorney in favor of the bank would revoke the power of attorney in favor of the managing partner unless the principal expressly provides otherwise in the power of attorney executed in favor of her bank.

Other aspects of the new law, while less troubling, are cumbersome and inappropriate in the context of commercial transactions. For instance, it sets out standards of care and fiduciary duties. One such duty is "[t]o act according to any instructions from the principal or, where there are no instructions, in the best interest of the principal, and to avoid conflicts of interest." This statutorily imposed duty is wholly inconsistent with the purpose of granting a power of attorney for the benefit of a bank in a lending transaction. The statutorily required "Caution to the Principal" and "Important Information for the Agent" language is also at odds with the nature of powers of attorney granted in commercial transactions. Additionally, complying with the notarization requirement with respect to powers of attorney granted in all commercial transactions could prove to be quite burdensome for commercial entities.

A technical corrections bill addressing some of these issues has been pending in the New York State Legislature for several months now. If passed, the bill would do away with the automatic revocation of prior powers of attorney upon execution of a new one. The principal would instead be required to provide written notice to the agent of the previously executed power of attorney if she in fact wished to revoke it.

It is unclear when – or if – the technical corrections bill will be adopted. In the meantime, powers of attorney executed in the context of a commercial transaction should expressly state that they do not revoke any prior powers of attorney unless it is the intent of the principal to actually do so. Further, all powers of attorney should conform to the current requirements of the statute.

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