

News & Types: Commercial, Competition & Trade Update

# Case Again Illustrates Importance of Terms and Conditions Especially Choice of Law – Seller May Lose Chance to Claim Interest and Attorneys' Fees

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Practices: Commercial, Competition & Trade, Litigation

VLM Food Trading International, Inc. (VLM) was a Canadian agricultural supplier. One of its customers was Illinois Trading Company (Illinois Trading) which purchased frozen potatoes from VLM for resale. Illinois Trading encountered financial difficulty. VLM sued Illinois Trading in Illinois in October, 2012 for an outstanding balance of \$184,000. VLM also claimed interest and attorneys' fees. But what seemed a straightforward collection case foundered on VLM's inability to show that it was entitled to interest and attorneys' fees. (VLM Food Trading International, Inc. v. Illinois Trading Company, 7th Circuit Court of Appeals, No. 13-1799 and 13-1697, April 10, 2014)

Illinois Trading sent purchase orders to VLM specifying the item, quantity, price, and place of delivery. VLM responded to each purchase order with an e-mail confirming the terms of the order. VLM then shipped the potatoes. It then sent invoices that included terms and conditions, including terms which granted VLM interest on unpaid amounts and attorneys' fees if VLM retained attorneys for collection. The district (lower) court analyzed the situation based on Illinois law, specifically Article 2 of the Uniform Commercial Code and UCC Article 2-207 "battle of the forms" provisions. On appeal, Judge Sykes of the 7th Circuit Court of Appeals took a much different position.

As noted, VLM was a Canadian company and Illinois Trading an Illinois company. Both the United States and Canada are parties to the United Nations Convention for the International Sale of Goods, an international convention that establishes default terms and conditions for transnational sales of goods transactions. As such, it performs a similar role as Article 2 of the UCC, when U.S. companies buy and sell goods.

But does the UCC, as adopted in Illinois, apply or does the Convention apply? In many cases, the result would be the same, but not in this case. The Convention and UCC Article 2-207 contain some subtle, but significant, differences as it applied to this situation.

The legal question was whether VLM's interest and attorneys' fees provision became part of the contract between VLM and International Trading. Judge Sykes first analyzed the case under UCC Article 2-207, which the district court also did. The district court treated the attorneys' fees and interest provision as "additional terms" and determined whether, under UCC Article 2-207, the additional terms should become part of the contract.

"Additional terms" become part of the contract subject to three exceptions – 1) the offer limits acceptance to the terms of the offer, 2) the additional terms "materially alter" the contract, or 3) the offering party (here, Illinois Trading) objects to the additional terms. In this case, only the second exception could possibly apply. Illinois Trading did not limit acceptance of its offer to the terms of the offer, nor did it object to the attorneys' fees and interest provision. The district court found that the attorneys' fees and interest provision did not "materially alter" the contract. So, the district court decided, VLM would be entitled to its interest and attorneys' fees.

The Convention's comparable "battle of the forms" provision is different. Article 19 of the Convention did not address additional terms in a written confirmation. Judge Sykes determined that VLM's invoices, which contained the critical attorneys' fees and interest provision, were confirmations under the Convention. Under Article 19, a reply to an offer which purports to be an acceptance, but contains additions, limitations or other modifications is a rejection of the offer. But, like UCC Article 2-207, the Convention's Article 19 permits an acceptance which does not materially alter the terms of the offer.

But Article 19 contains a critical provision not found in UCC Article 2-207:

"Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially." (emphasis added)

So VLM's effort to collect attorneys' fees and interest could fail on two grounds. First, Judge Sykes noted the contract could have been formed before VLM even sent its invoices with the attorneys' fees and interest provision. VLM responded to Illinois Trading's purchase order with an e-mail confirming the terms of the order. The contract may have been formed at that point and, if so, the attorneys' fees and interest provision would be a proposed modification, not part of the contract.

Second, Judge Sykes noted that attorneys' fees and interest would appear to be a material addition, as it relates to the extent of one party's liability to the other and to settlement of disputes. So, under the Convention, the attorneys' fees and interest provision would not appear to have become part of the contract.

After noting these differences, Judge Sykes then determined that the Convention should apply. The Convention, if it applied, superseded Illinois' version of the UCC. The Convention applies to contracts of sale of goods between parties whose places of business are in different countries. VLM's place of business was Canada, with headquarters in Montreal. Illinois Trading was in the United States. So Judge Sykes held that VLM's claim for attorneys' fees and interest would be decided according to the Convention, not the UCC, as adopted in Illinois. Judge Sykes sent the case back to the district court for analysis under the Convention. Based on Judge Sykes' opinion, VLM's chances for attorneys' fees and interest seem remote.

So what are the lessons to learn from VLM's apparent misfortune?

Of course, the ideal from a legal perspective is a single integrated agreement signed by both parties which include the terms and conditions to which they have agreed. But this ideal gets trickier when the parties are in different countries. There is a risk that the parties could be covered by the Convention, even without such an intention. But the Convention permits parties to explicitly exclude the Convention from their agreement. In fact, most standard terms and conditions contain such a provision excluding the Convention, so that the Convention does not inadvertently apply.

The ideal is not always possible or practical. Parties want to start doing business right away and skip the legal formalities. The size of the transaction may not justify the time and expense of negotiation. Maybe these considerations were part of VLM's thinking. But VLM's mistake was in not including its favorable terms in every communication with Illinois Trading (including the e-mail confirmation which could have created the contract). Although not specifically discussed in Judge Sykes' opinion, VLM could also have erred in not clearly establishing which law would apply and, assuming it was VLM's intention, in not excluding the Convention.

So even without a single, integrated agreement, a party which buys or sells can have favorable terms and conditions and use these at every opportunity. In this way, it will at least have a chance to apply terms and conditions favorable to it.