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International contracts—Things to think about

By Lynne R. Ostfeld

When you are advising your clients about international contracts, remind them to pay attention to how s/he writes agreements when it comes to dates and amounts. Americans, when writing numbers for dates, put the month before the day before the year (1/2/12) to write in shorthand January 2, 2012, while Europeans write the day before the month before the year (2/1/12). What to do with computers which often write the year first, then the month and day (12/01/02)? The suggestion is to either write everything in words or write the dates with both numbers and words.

With amounts, it is essential to know whether you are writing in the American system, which separates the whole number from a tenth or hundredth by a period, in contrast to the French system of using a comma to separate these amounts. Again, this behooves the writer to write the amount in words, as well as in numbers.

Less well-known are approaches to contract drafting which arise from not only the legal system of a particular country but from treaties between and among countries.

The United Nations Convention on Contracts for the International Sale of Goods ("CISG") went into force in 1988. It applies to all international sales of goods unless a party specifically opts out. U. S. courts increasingly do not hesitate to apply its provisions when appropriate, although they may refer to case law found in the Uniform Commercial Code ("UCC") for guidance.

A contract which is not in writing can be enforced more consistently than in the U.S. which finds that oral contracts in certain cases are not binding. A signatory state can opt out of this provision. If one signatory state accepts the provision and another signatory state does not, a court where the first lawsuit is filed will have to determine which country's law applies.

Course of dealing between parties is given greater enforceability under the CISG than under the law of many countries. Thus, if the parties have a consignment contract, and one party argues for the first time that it need not pay for a product until used, the selling party may successfully argue that their prior dealings established a pattern which require the receiving party to pay for the product.

Force Majeure can be interpreted differently in different countries, and according to different concepts. In a case concerning shipment of steel from a port in St. Petersburg, one party argued that the freezing of the port was force majeure for non-delivery according to the agreed schedule. The other side said that the freezing was foreseeable. It was a fact question to be submitted to a jury and not decided as a matter of law.

In France, the Civil Code does not give a definition of force majeure. Pursuant to Article 1148, there are no damages where a debtor was prevented from being able to act. Strikes may or may not be force majeure. A strike may not be force majeure where other means to accomplish the task are available, but it might be if it lasts longer than a month. Tension in the Middle East has been held to not be force majeure, in order to cancel holidays in Morocco.

The drafter of the contract should try to avoid these potential problems by inserting a very specific and unambiguous clause of exoneration where s/he defines the criteria. In Canada, the drafters need to look at how a court might allocate the risks between the

parties and take that into account.

A particularly interesting aspect to contract negotiations is the importance of good faith in the discussions prior to signing the contract. This is particularly significant between common law and civil law legal systems. In the U. S., negotiations are generally never a part of the final contract, but the lawyers will confirm this in the contract itself, for certainty. In France, Germany, Austria and Switzerland, a party can be liable for breaking off negotiations. In Greece, Italy and Serbia, there may be liability for abandoning negotiations without justification.

In the U.S., rules of parole evidence generally require that nothing outside of the written contract can be used when there is a problem, particularly of interpretation. In other countries, particularly civil law countries, particularly in the Nordic areas, judges and arbitrators will take those discussions into consideration to interpret the contract and problems.

Of course, in the U.S., courts look to case law, the UCC, and statute as gap fillers. In civil law countries, the codes are the gap fillers and decisions of other courts are not mandatory, if they are looked to for guidance at all. ■

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