Inside 2Q2016

ACC Association of Corporate Counsel
MOUNTAIN WEST

FOCUS

President's Message

By TJ Fund, OpenEdge, General Counsel

Two of my children have been studying Tae Kwon Do at a local martial arts school for the last 5½ years. Over the years, the school has grown, opening additional locations and remodeling to accommodate the ever increasing enrollment. Recently, the school decided to move the location where my boys attend to a larger building. Although the school is clearly a private commercial venture (evidenced by what I consider to be not-insignificant monthly payments, tournament fees, testing fees, sparring gear, uniforms, etc.), the school's call for volunteers to help with the move was met with a resounding response. Many of the students – as well as many of their parents – were willing and eager to pitch in and help move the school's equipment without compensation.

Even with a strong appreciation for the impact the school and the Tae Kwon Do discipline has had in my boys' lives, that experience gave me pause. How did a for-profit venture taking money out of all of our pockets every month inspire a desire to serve without compensation in return? If one of the neighborhood grocery stores decided to move to a different location, would it seem reasonable for the owners to expect and ask their customers to help them move? I think most people would expect the store owners to fund the move out of the profits generated by their business. After all, our exchange of cash for goods is over once we leave the store with our groceries, so why would we owe anything to the store to help them move?

I think a factor behind the Tae Kwon Do school customers' response is that they have come to think of themselves as a community. Parents and siblings often sit in on the training sessions; the instructors form strong bonds with the students and care about their personal lives; the school sponsors annual parties and holiday events; and parents and students alike have a history of volunteering and helping at tournaments and with other school events. This sense of community benefits both the school and its customers. It reassures the customers that the school is not only interested in their money, but also in the full-scope well-being of the students, a public interest. It also benefits the school by engendering a willingness to provide value without compensation – to serve – in the school's community.

So why tell this story? This moment of reflection was a great reminder to me that service opportunities can be found in a multitude of places, and of the value that both the giver and receiver obtain from the community relationship developed through service. Lawyers enjoy a privileged position in our communities by virtue of the licensing requirements needed to practice in our field, and we correspondingly assume an obligation to invest back in the general interest of those communities for the general good. With our recent Save Summer & Serve events in Utah and Idaho, benefitting the Christmas Box House (http://www.thechristmasboxhouse.org/) and Big Brother Big Sisters of Idaho (http://www.bbbsidaho.org/), we looked to provide some avenues for ACC members to invest back in our communities, and we are so grateful for all of you who participate and donate, year after year. Thank you.

Whether or not you had the opportunity to participate in these recent events, my hope is that this message serves as a reminder to all of us to look for opportunities to be part of and give back to, our local communities. Those communities may take virtually any shape or form, religious, educational, geographic, interest group, need-based, professional, and others. Lacking other inspiration, even something as simple as doing an internet search for "Service opportunities in [Utah, Idaho, etc.]" will yield leads for a multitude of opportunities to engage with and invest in a variety of local communities serving the public interest. Finding and taking advantage of these opportunities is a fantastic way to enrich our personal lives while strengthening the communities around us.

Five years after landmark E.U. case, ACC renews European advocacy efforts

By Mary Blatch, Director of Government and Regulatory Affairs

Here's a legal anniversary that seems to have been all but forgotten: Last fall marked five years since the European Court of Justice's decision in *Akzo Nobel Chemicals Limited and Ackros Chemicals Limited v. European Commission*. If you're not familiar with that case, the court held that in-house counsel in the European Union could not assert privilege over their legal advice to company employees in the context of a competition proceeding before the European Commission. While the decision was not a surprise (it confirmed case law from 1982), it was a disappointment to the in-house legal community, which had hoped that changes in the in-house profession might cause the court to take a different view.

While the five-year anniversary of the *Akzo* case has not received much attention in the wider legal industry, at ACC, we remembered the pivotal case by retaining a Brussels-based public affairs consultant to help ACC move the needle on the important issues of in-house counsel role and status and attorney-client privilege in Europe.

Advocacy on attorney-client privilege

The ACC has been heavily focused on advocacy supporting the attorney-client privilege in the corporate context since its inception. In the United States, in-house counsel enjoy the same rights and privileges as their law firm counterparts, but often face a steeper challenge to maintaining privilege over their communication of legal advice than do outside counsel. ACC has intervened in countless cases to protect the ability of in-house counsel to assert attorney-client privilege.

In Europe, where the attorney-client privilege is often called the legal professional privilege (LPP), ACC has been active on the issue since the early 2000s, when European Commissioner Mario Monti began a campaign of aggressive dawn raids in competition investigations that did not respect LPP for in-house counsel communications of legal advice. Even leaving aside the in-house counsel issue, the contours of the LPP vary widely in Europe, but ACC has consistently advocated that whatever level of protection is afforded communications with outside counsel should also be afforded communications for legal advice with in-house counsel.

When *Akzo Nobel Chemicals Limited and Ackros Chemicals Limited v. European Commission* raised the in-house privilege issue before the European Court of Justice, ACC and ACC Europe intervened in the case in support of the company's assertion of privilege. When the ECJ issued its opinion in September 2010, confirming its position that in-house counsel legal advice was not privileged (even though the in-house counsel in *Akzo* was licensed), many were worried that the ECJ's decision would lead to a gradual erosion of the LPP that would extend beyond European Commission competition proceedings.

Developments since *Akzo* encouraging?

In contrast to post-*Akzo* fear, what has happened in the five years since the *Akzo* decision could be considered encouraging, especially with respect to developments at the national level within Europe:

- In Netherlands, where in-house counsel may assert privilege if they are members of the bar, the Supreme Court of the Netherlands issued a ruling in 2013 refusing to follow the *Akzo* rule and allowing for the assertion of privilege by properly licensed in-house counsel.
- In Belgium, where there is a separate bar that in-house counsel may join and gain the right to assert privilege, the highest court rejected the Belgian Competition Authority's attempt to rely on the *Akzo* decision to discover in-house counsel communications.
- In Germany, where a 2014 decision by the Federal Social Court (pension court) had called into question the ability of in-house counsel to join the German bar associations, legislation was passed in December 2015 confirming the ability of in-house counsel to join the bar and assert LPP under certain circumstances.
- In Switzerland, there are continued attempts to introduce a legislative proposal to extend LPP to Swiss in-house counsel. Although the latest initiative was voted down in March, the committee examining the proposal recognized the need to address the issue.

These developments overall are positive, but the majority of in-house counsel in Europe are still without the ability to become licensed by a bar association or to assert LPP over their legal advice to their employer-client. Moreover, in-house counsel who are licensed and may assert LPP in their countries are still unable to do so in E.U. competition proceedings. Over the next several years, ACC will be working to raise the profile of this issue in Europe and hopefully move the needle so that more jurisdictions, and ultimately the European Union recognize in-house counsel on equal terms to outside attorneys.

ACC's public affairs consultant has been meeting with representatives of European bar associations as well as European business associations to introduce them to ACC and the importance of LPP in the business world. ACC is highlighting the advantages that LPP offers in terms of encouraging robust corporate compliance, as well as the disadvantages that European companies suffer from lack of in-house privilege when they are litigating against companies that can assert privilege over in-house legal advice. We see the LPP as a key issue, not only to our European members, but to any member whose practice involves the European Union.

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Foreign privilege – U.S. problem

U.S. attorneys are sometimes surprised to learn of the unequal status many of their European counterparts are subject to under E.U. and national European laws. They may be even more surprised if they learn of this unequal status in the midst of an international dispute where their European in-house colleagues have provided written advice that is now subject to discovery in U.S. courts.

Such disclosure of legal advice from foreign in-house counsel is not just a theoretical possibility. For example, in *Anwar v. Fairfield Greenwich Ltd*, No. 09 Civ. 118 (S.D.N.Y. July 8, 2013), plaintiffs deposed defendant's Dutch in-house lawyer, and defendant's counsel instructed the Dutch lawyer not to answer certain questions on the basis of attorney-client privilege. On a motion to compel the answers, the court held that because the Dutch lawyer was not licensed in the Netherlands, he was not entitled to assert attorney-client privilege. In the case of *Veleron Holding, B.V. v. BNP Paribas SA*, 2014 WL 4184806 (S.D.N.Y. Aug. 22, 2014), defendant Morgan Stanley was able to compel disclosure of plaintiff's communications with in-house counsel in the Netherlands and Russia, because neither lawyer was licensed or able to assert a privilege in their home jurisdictions.

The privilege laws of other countries can have quite an impact on the legal interests of U.S. companies and their in-house counsel, especially when it comes to litigation involving foreign subsidiaries. This is because when dealing with issues of attorney-client privilege and foreign attorneys, U.S. courts will follow a foreign country's privilege rules if the communication at issue "touches base" with that country – i.e., the foreign country has the most direct and compelling interest in determining whether the communication is privileged. This analysis often results in foreign privilege rules applying to communications advising on foreign legal issues. When the foreign jurisdiction's rules for in-house counsel differ from the U.S. rules, disclosure often is the result.

Towards uniformity

One of the reasons cited by the *Akzo* decision for not recognizing LPP for in-house counsel was that lack of privilege for in-house counsel was the dominant national practice among E.U. member states. Thus, the lack of in-house LPP at the E.U. level is connected to the lack of in-house LPP at the national level in Europe. ACC is pursuing a strategy to raise the profile of the LPP issue at the E.U. level while also supporting national-level efforts to improve the status of in-house counsel

and extend LPP to them. This will be a long-term advocacy and education effort, but one of utmost importance to the in-house profession globally.

As legal systems in developing economies continue to evolve, the issue of in-house counsel privilege may begin to be reconsidered outside of Europe as well. If there is a preference among more developed economies for allowing in-house counsel to assert LPP, that may lead to more jurisdictions choosing to follow the practice as well. The more jurisdictions that recognize the value of in-house counsel legal advice and protect it accordingly, the better for the in-house legal profession worldwide.

If you have a story about how international legal privilege rules have affected your practice or your company, we'd love to hear from you. Please contact Mary Blatch, ACC's director of government and regulatory affairs at m.blatch@acc.com.

ACC News

ACC Annual Meeting: Exclusively for In-house Counsel

Attend the ACC Annual Meeting (October 16-19, San Francisco, CA), the largest gathering of in-house counsel and an unparalleled value in legal education. In less than three days you can choose from over 100 substantive sessions to fulfill your annual CLE/CPD requirements, meet leading legal service providers and network with your in-house peers from around the world. This meeting is the event that you cannot afford to miss. Register today for best selection of programs. Visit *am.acc.com.*

Mind Your Business

To become a trusted advisor for business executives, it's imperative for in-house counsel to understand the business operations of your company. Attend these business education courses offered by ACC and the Boston University Questrom School of Business to learn critical business disciplines and earn valuable CLE credits:

- Mini MBA for In-house Counsel, September 13-15, November 2-4
- Project Management for the In-house Law Department, November 7-8

Learn more and register at *www.acc.com/businessedu*.

New to In-house? Are you prepared?

The ACC Corporate Counsel University® (June 12–14, San Diego, CA), combines practical fundamentals with career building opportunities, which will help you excel in your in-house role. Come to this unrivaled event to gain valuable insights from experienced in-house counsel, earn CLE/CPD credits (including ethics credits and specialty credits) and build relationships and expand your network of peers. Register at *ccu.acc.com*.

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Share the Wealth

When your in-house peers join ACC, you create opportunities to engage with colleagues, expand your professional network, and share ideas and expertise. When you recruit a new ACC member, you are automatically entered into a monthly drawing to win a US$200 gift card! As an added bonus, your new recruit is automatically entered into a drawing to win a US$100 gift card when they join! Contest ends September 30. Visit *http://www.acc.com/membership/recruit.cfm* for more information.

ACC Alliance Partner Jordan Lawrence has introduced a Vendor Risk Assessment℠ service that defensibly automates and organizes the third-party vendor diligence and risk management process. Jordan Lawrence leverages proven technology to slash the time and cost required to ensure your company is protected from one of your most vulnerable risk areas: third-party vendors. For more information, visit *www.jordanlawrence.com*.

Wolters Kluwer Legal & Regulatory U.S. offers comprehensive legal resources and tools so you and your team can efficiently find the information you need to provide confident answers. Designed by in-house counsel, ***General Counsel* NAVIGATOR™ (GCN)** allows you to pinpoint practical answers across a wide-range of topics within a single platform. ACC Members can choose a complimentary add-on product when you purchase a base GCN subscription. For more information, visit *www.wolterskluwerlb.com/gcn* or call **1-877-347-6108**.

Teach an Old UCC Dog New Tricks

*An overview of the U.N. Convention on the International Sale of Goods**

By Christine E. Nicholas, Moffatt, Thomas, Barrett, Rock & Fields, Chtd.

In 1996, as in-house counsel for a multinational agribusiness, I was asked to negotiate and draft an agreement to purchase an ammonia plant located in Italy to be disassembled and shipped to Houston for refurbishment, then shipped to Canada and reassembled. I was quick to strike the seller-provided choice of law clause that incorporated the United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "Convention"). I struck it mostly because we were in a rush to get the deal done, and I simply did not have time to undertake a review of this treaty with which I was unfamiliar and that seemed to modify in significant measure how the UCC would treat the deal. Today when I work on international agreements for the sale of goods, I'm not so quick to exclude application of the Convention, and I suggest you give consideration to its application to your clients' international purchase or sale of goods.

The CISG:

- governs only international sales
- applies only to the commercial sale of goods
- may be excluded or varied by agreement of the parties
- excludes coverage of sales to consumers
- excludes securities transactions (including negotiable instruments) and sales of ships, aircraft, and electricity

The United States ratified the Convention in 1986, and it became effective among 11 nations in 1988. Today, the CISG is the uniform international sales law of countries that account for two-thirds (2/3) of all world trade. The purpose of the Convention was to adopt uniform rules to remove legal barriers in international trade, to promote the development of international trade, and to reduce misunderstandings and controversies that may arise when one law governs the seller and a different law governs the buyer.

A sale is international if the parties to the contract have their places of business in different contracting states (i.e., countries that have adopted the CISG). Where a party has places of business in more than one country, the relevant place of business is the one most closely connected to the subject sales transaction.

The Convention does not apply to sales in which labor or other services constitute a "preponderant part" of the transaction and manufacturing contracts where the buyer supplies a substantial portion of the materials. Parties are free to exclude the application of the Convention or to derogate from or vary the effect of any of its provisions. Counsel preparing contracts therefore have the latitude to include clauses in their contracts modifying or eliminating provisions that the Convention would otherwise mandate.

Most, but not all, of the United States' important trade partners have adopted the Convention, and as of July 1, 2008, 70 countries were parties to the CISG. A number of countries when ratifying the Convention provided for reservations that exclude the application of certain Convention provisions. You can find a current list of signatory nations and any reservations here:

www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

**A work of the author published in Business Law Today, Vol. 18, No. 1, Sept./Oct. 2008. In recognition of such published article, the author received a Burton Award for Legal Excellence. These materials are designed to provide general information prepared by professionals in regard to the subject matter covered. These materials should not be utilized as a substitute for professional service in specific situations.*

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Since international treaties are the supreme law of the United States, such treaties will be construed as part of the law of a particular state. If the parties to a contract concerning the international sale of goods include a choice of law clause such as "The rights and obligations of the parties under this contract shall be governed by and construed in accordance with the laws of the state of Idaho," such choice of law clause likely **includes** the CISG. If the parties desire to effectively exclude application of the Convention, the exclusion should be explicit and state the alternative applicable law, such as, "The rights and obligations of the parties under this contract shall not be governed by the United Nations Convention on Contracts for the International Sale of Goods, but instead shall be governed by the laws of the state of Idaho without regard to principles of conflict of law, and the United Nations Convention on Contracts for the International Sale of Goods is specifically **disclaimed and excluded**."

American lawyers familiar with the Uniform Commercial Code will find some surprises in the Convention's rules:

Issues Relating to "Offer." The UCC adopts the common-law "mail box rule" and the Convention adopts a "receipt" rule. Under the UCC, acceptance of an offer is effective when mailed; acceptance under the Convention is effective when it reaches the offeror. The Convention adopts the general principle that a party may withdraw or modify a communication by a second communication that overtakes the first. With respect to "late" acceptances, the Convention provides that an acceptance that reaches the offeree after a stated time for acceptance may nonetheless be effective in two circumstances: (i) the offeror having received the late acceptance promptly informs the offeree that the late acceptance is effective, or (ii) the late acceptance demonstrates that it had been sent timely but that outside circumstances caused the delay in receipt, in which case the burden is on the offeror having received a late acceptance to immediately inform the offeree that the acceptance arrived too late to be effective.

An offeror under the Convention may withdraw an offer before it reaches the offeree, and an offeror may revoke an offer after it reaches the offeree unless the offer indicates it is irrevocable or the offeree has acted on the offer. The Convention provides that an offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable. UCC § 2 205 states that an offer is not revocable if "by its terms [it] gives assurance that it will be held open." While the UCC places a three-month time limit on the irrevocability of "firm" offers given without consideration by a merchant, the Convention does not resolve the question of how long an irrevocable offer remains open, stating that when no time for acceptance is fixed, acceptance must occur within a "reasonable time" taking due account of the circumstances. If you include in your offer appropriate language reserving the right to revoke or specifically fixing the time for acceptance, application of the Convention will be modified.

Battle of the Forms. "Battle of the Forms" disputes reach a different result under the Convention than under the UCC. Most international goods purchases are evidenced by a buyer's purchase order with fine-print, boiler-plate standard terms on the reverse side, and a seller's form acknowledgment of receipt of the buyer's order, with the seller's preprinted terms and conditions of sale on the back of the seller's form. Before the advent of the UCC, most American jurisdictions followed the "mirror image rule," which provides that if the terms of acknowledgment varied from the terms of the initial purchase order, the varied acknowledgment became not an acceptance but a counteroffer. As long as the parties did not actually perform, no contract was formed and either party could walk away from the arrangement. Typically, however, in spite of the conflicting terms, the seller delivered and the buyer received the goods, and the transaction was completed by performance. The common law assumed that a contract had been formed and the terms of the contract generally consisted of the terms of the original offer, subject to the modifications contained in the acceptance.

The UCC alters the common-law mirror image rule. UCC § 2 207 creates a default provision whereby a final form that is not intended specifically as a counteroffer will act as an acceptance, even though it contains different or additional terms to those contained in the prior form. The additional terms are considered as proposals for additions to the contract and, as between merchants, become part of the contract unless (i) the offer expressly limits acceptance to the terms of the offer, (ii) the additional terms materially alter the offer, or (iii) notification of objection to the additional terms already has been given or is given within a reasonable time after notice has been received. The normal result under the UCC is to reverse the common-law presumption that the last form governs and to replace it with the result that the penultimate form usually governs.

The CISG is consistent with the old common law mirror image rule. Under the CISG, a reply to an offer that purports to be an acceptance but contains material additions, limitations, or other modifications is a rejection and constitutes a counteroffer. Thus, prior to performance either party may be able to claim successfully that no enforceable contract exists under the CISG. After delivery and acceptance, however, a contract will undoubtedly be deemed to have existed and the CISG generally favors the last party to submit materially different terms.

When the CISG applies to your client's international sales of goods, it is best to avoid preprinted purchase order forms altogether in favor of a negotiated purchase and sale agreement that contains all of the terms to which the parties agree for all shipments. If you can't convince your client to abandon purchase order and acknowledgment forms, though, get your client to be the party that fires the last shot in the battle of the forms, such as a seller sending an acknowledgment form in response to a buyer's purchase order (or a buyer sending a confirmation of receipt of seller's acknowledgment, etc.).

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Statute of Frauds. The Convention lacks a statute of frauds. Article 11 of the Convention specifically provides that "a contract of sale need not be concluded in or evidenced by a writing . . . . It may be proved by any means, including witnesses." UCC § 2 201 provides that a contract for the sale of goods for the price of $500 or more is not enforceable unless there is a writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought. Additionally under the UCC, any amendment or modification to a contract must be in writing if the underlying contract is required to be in writing. A number of countries that ratified the Convention made a reservation eliminating this provision and requiring a writing according to their domestic laws. In order to avoid having significant issues arise without the benefit of written documentation, parties to a contract covered by the CISG can incorporate their own writing requirement in their contract.

Parol Evidence. The Convention provides that a contract may be proved by any means, including witnesses, and the Convention demonstrates an underlying willingness to endorse oral contracts. By its language, the CISG favors a liberal approach to contract interpretation that permits testimony even if it contradicts or varies from the terms of a written contract. In MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., the Eleventh Circuit applied CISG principles to hold that parol evidence of subjective intent of the parties must be considered to interpret the parties' preprinted forms, which did not contain a merger clause. Whether a merger clause in a contract governed by the Convention would preclude parol evidence remains an open question under U.S. case law dealing with the CISG.

Warranties and Disclaimers. The Convention and the UCC have comparable warranties but differ with respect to disclaimers. To disclaim an implied warranty of fitness for a particular purpose and other express or implied warranties under the UCC, the contract must contain words of art or expressions in conspicuous writing satisfying UCC § 2 316. The Convention permits disclaimers of warranties as long as the parties "have agreed" in writing or orally.

Rejection of Nonconforming Goods. The UCC recognizes the "perfect tender" rule, under which a buyer is entitled to reject goods under a one-delivery contract of sale that fail in any respect to conform to the contract. Under the perfect tender rule, a buyer may reject goods and cancel the contract, even if a defect in tendered goods is not serious and the buyer would have received substantially the goods for which it bargained. The Convention departs from the perfect tender rule and makes rejection, revocation of acceptance, and cancellation more difficult. Under the Convention, a buyer may "declare the contract voided only if the failure by the seller to deliver conforming goods constitutes 'a fundamental breach' of the contract." A breach of contract is "fundamental" only if it "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract." Even then, a breach will be fundamental only if the seller foresaw or a reasonable party in the seller's position would have foreseen such a result. This approach makes sense when one considers the substantial expense involved in reshipping nonconforming goods around the world.

The Convention provides that a buyer loses the right to rely on a lack of conformity of the goods if the buyer does not give notice to the seller specifying the nature of the nonconformity "within a reasonable time" after the buyer has discovered it or should have discovered it. What is a "reasonable time" depends on the facts and circumstances of the transaction, including the type of goods (for example, notices concerning perishable goods should be given more promptly). Although the analogous UCC provision also requires notice within a "reasonable time," most case law has construed "reasonable time" under the Convention more narrowly. Under the UCC, a buyer is afforded a reasonable opportunity to inspect the goods. However, under the Convention, the buyer must inspect the goods within as short a period as is practicable under the circumstances. Accordingly, reasonable time periods for notices of nonconformity have been construed as quite short under the CISG. The specificity mandated by the CISG is also more restrictive than under the UCC. Effective notice of nonconformity under the CISG should be detailed and sent promptly after receipt of the goods.

Hybrid Transactions. Since the Convention does not apply to contracts where the "preponderant" part of the obligations is the supply of services, the Convention will not ordinarily apply to agreements solely for distribution, development, licensing, leasing, transportation, shipping, insurance and finance. Agreements that cover both the sale of goods and the provision of services present difficult legal issues. CISG Advisory Council Opinion No. 4 provides that when interpreting hybrid transactions under the Convention an "economic value" criterion should be used to determine whether the sale of goods component is preponderant and should be based on an overall assessment of the transaction.

CISG Unilateral Price Reduction. A substantial difference between the UCC and the Convention is the inclusion in the Convention of a buyer's unilateral right to reduce the price owed when nonconforming goods are delivered. Under UCC § 2-601, a buyer can reject any goods that fail to conform to the contract and, under UCC § 2-711, the buyer can cancel the contract and recover monetary damages, such as costs of cover. If a buyer accepts non-conforming goods and fails to properly revoke acceptance, under UCC § 2-714 a buyer can recover damages (including incidental and consequential damages) arising from the non-conformity. Any of these buyer actions would require a lawsuit or negotiated settle-

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ment. The Convention contains a pro-buyer, self-help remedy of proportionate purchase price reduction for seller's delivery of nonconforming goods. Under Article 5 of the CISG, if the goods "do not conform with the contract . . . the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that the conforming goods would have had at that time." This remedy is NOT available if the seller is able to cure nonconformity without causing unreasonable delay or inconvenience to the buyer.

Delivery/No Trade Terms. Article 31 of the CISG provides a gap-filler with respect to place for delivery. If the contract does not state where the seller should deliver the goods, for a contract providing carriage (i.e., requires the seller hand the goods over to a third-party carrier for transmission to the buyer), Article 31 requires delivery to the carrier. If the contract does not involve carriage, the place for delivery is the place where the goods are to be manufactured or to be drawn from specific stock (if so indicated in the contract) or otherwise at the place where the seller had its place of business when the parties contracted. Caution – satisfaction of delivery obligations are distinct from allocation of risk of loss. Under the CISG, risk of loss passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer if the contract involves carriage, and if the contract does not involve carriage, risk of loss passes when the buyer takes or should have taken over the goods. The Convention does not contain trade terms like the UCC does. Parties to a CISG-governed agreement should include their own trade terms, and most parties include trade terms promulgated by the International Chamber of Commerce in Paris, France known as INCOTERMS. The 2000 INCOTERMS include (i) origin terms, such as EXW ("ex works" -- the named place where shipment is available to the buyer, not loaded, and seller does not contract any transportation), (ii) international shipping terms, where the seller may or may not pay carriage, such as FAS ("free alongside ship" -- the seller delivers the goods to the named ocean port of shipment) or CPT ("carriage paid to named port of destination" -- used for containerized shipments), and (iii) destination terms such as DEQ ("delivered ex-quay" -- seller will at its cost deliver the goods to the named port of destination, unloaded, not cleared). Familiarity with INCOTERMS is essential for the practitioner writing agreements for international trade.

Dispute Resolution. The Convention does not specify in what jurisdiction suit must be brought to enforce terms of a CISG-governed contract. Jurisdiction may be controlled by other treaties, but to reduce your risk of an inconvenient forum, you will want to specifically address where a contract dispute will be resolved and provide for a dispute resolution mechanism – for example, arbitration in a specified "neutral" forum under rules of a recognized international organization (such as the International Chamber of Commerce).

Old dogs can learn new tricks, and with the Convention having developed a wider following, U.S. commercial lawyers whose clients are active in the global economy need to get to know the Convention's terms.

For more information:

www.cisg.law.pace.edu – maintained by Pace University School of Law, this site contains annotated text of the Convention, digested CISG cases, official advisory opinions and more, in a user-friendly format

www.uncitral.org/uncitral/en/uncitral_texts/sale_goods.html - site of official texts of international conventions and their status, maintained by the UN Commission on International Trade Law

Honnold, John O., Uniform Law for International Sales under the 1980 United Nations Convention (The Hague, The Netherlands: Kluwer Law International, 1999) – authoritative text analyzing the Convention; authored by University of Pennsylvania Emeritus Professor of Law, former Chief of the UN International Law Branch and Secretary of the UN Commission on International Trade Law.

Christine Nicholas is a Shareholder and President of the Idaho law firm, Moffatt Thomas. The firm has served the Pacific Northwest and Intermountain West since 1954 and has offices in Boise, Pocatello and Idaho Falls. Ms. Nicholas can be reached via telephone at 208.345.2000 or via email: cen@moffatt.com. Moffatt Thomas. We Know Idaho.®

Attitude of Gratitude – Zoo Boise

On April 21, 2016, the ACC Mountain West Chapter hosted our Annual Attitude of Gratitude at the Zoo Boise. This event benefits the Big Brothers Big Sisters organization. We rented the zoo for the evening and provided free entrance to the "Bigs and Littles" to come and enjoy an evening together.

We provided a BBQ, giraffe encounter as well as free carousel rides, popcorn, and cotton candy. Our Idaho members brought donations for the charity as well.

Between our sponsor's guests and our Idaho members, this year, we gathered a large donation of over 25 books, backpacks, gym bags, snacks, games, hygiene products, gift cards totaling over $300 dollars, and shoes.

The event was a success and the "Bigs and Littles" can't wait for next year!

The ACC Mountain West Chapter Executive Board would like to thank our Sponsor, Moffatt Thomas, and our generous Idaho members.

Utah Save Summer Donation Drive

During the week of June 7th, we had a donation drive each day at a different donut shop location to fill the cupboards of The Christmas Box House. The Christmas Box House is a children's shelter and every year our Chapter has been fortunate to donate to this great cause. This year, with the help of our Board Member Michelle Wilson at Modere, we were able to donate over $8,000 in supplies, including museum and park passes, water park and movie passes, gift cards for grocery stores, and a large cash donation made by Nutraceutical Corporation.

We would like to remind you that The Christmas Box is always in need of donations, especially in the fall when school starts. You can go to their website at any time to find out how and what to donate. *http://www.thechristmasboxhouse.org/*

Thank you for another successful year.

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