48 No. 4 UCC L. J. ART 2

UCC Law Journal | January 2019

Volume 48, Issue 4
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Uniform Commercial Code Law Journal
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VLM Food Trading International, Inc. v. Illinois Trading Company, an Exercise on the Battle of the Forms Under the CISG and the UCC

In VLM Food Trading International, Inc. v. Illinois Trading Company, the Seventh Circuit considered a recent and important battle of the forms problem. It held that the CISG, not the U.C.C., applied to a sales contract between a Canadian seller and an Illinois buyer. It also held that a clause added in a trailing invoice did not become part of the contract under the CISG. This article describes the case and the issues raised and offers advice to lawyers faced with similar situations.

I. Introduction

The battle of the forms has long been one of the most vexing issues in the law of sales transactions. Whether the battle of the forms arises in the domestic version of U.C.C. § 2-207 or in the transnational version of the CISG Articles 18 and 19, the conflict between forms prepared for buyers and sellers probably causes more confusion among practitioners than any provision in sales law.

The Court of Appeals for the Seventh Circuit dealt with the battle of the forms in VLM Food Trading Intern., Inc. v. Illinois Trading Co., 748 F.3d 780, 83 U.C.C. Rep. Serv. 2d 450 (7th Cir. 2014), known as *VLM I,* and VLM Food Trading Intern., Inc. v. Illinois Trading Co., 811 F.3d 247 (7th Cir. 2016), known as *VLM II*. Because the seller was Canadian and the buyer American, the first issue was whether the battle of the forms under the United Nations Convention on Contracts for the Sale of Goods(CISG) applied to the deal or whether the Uniform Commercial Code applied. The second issue was whether, under whichever law applied, a provision concerning interest to be paid for late payments and "fee-shifting" was a part of the parties' contract. This second issue presented a classic battle of the forms problem.

The case began in the United States District Court for the Northern District of Illinois in 2012 and continued through two appeals from the District Court to the Seventh Circuit and one remand back to the District Court until the final decision, *VLM II,* was issued in 2016.

The article will describe the history of the transaction and the litigation and offer an opinion of the analysis under the CISG. Finally, it will offer suggestions to American counsel for sellers and buyers of goods who regularly contract with Canadian partners or indeed partners in other countries that have ratified the CISG.

II. The Background

The seller was VLM Food Trading International, Inc., a wholesale food supplier based near Montreal, Quebec, Canada. The buyer was Illinois Trading Company, a buyer of food who resold to others in the chain of distribution.[1] Beginning in June, 2012, VLM began shipping frozen potatoes to Illinois Trading, for which the buyer paid. There were nine successful transactions before Illinois Trading encountered financial difficulties and failed to pay for the next nine transactions.

The parties entered into each contract the same way. Illinois Trading sent a purchase order specifying what it wanted, including quantity, price, and the place of delivery. VLM sent an e-mail confirming that order and the terms of the sale. VLM then shipped the order of potatoes, and Illinois Trading accepted the potatoes. Finally, VLM then mailed an invoice to Illinois Trading, from which Illinois Trading was to remit payment.

Each invoice, called a "trailing invoice," added a clause not present in the exchange of the purchase order and email confirmation: a provision requiring Illinois Trading to pay for VLM's "collection-related attorney's fees" and interest to be paid on late payments if Illinois Trading breached the contract and VLM sued it.

On October 10, 2012, VLM filed suit in the United States District Court for the Northern District of Illinois to recover the amounts owed plus attorney's fees. VLM sued under a federal statute, the Perishable Agricultural Commodities Act, known as PACA.[2] Therefore, the court assumed jurisdiction under the federal question doctrine. The litigation continued in the district court and the United States Court of Appeals for the Seventh Circuit until the Court of Appeals rendered a final decision on February 12, 2016 *(VLM II)*.

Although there were several issues unrelated to the CISG and the U.C.C. in the litigation, the two most important sales transactions issues were

First, did the CISG or the U.C.C. govern the transaction (the issue in *VLM I*); and

Second, did the contract between the parties allow VLM to demand that Illinois Trading pay the costs of collection, including attorney's fees and interest (the issue in *VLM II*)?

Ultimately, the Court of Appeals concluded that the CISG governed the transaction, the position taken by Illinois Trading. It also concluded that under the CISG the costs of collection, including attorney's fees and interest, were not part of the contract between the parties. The arguments advanced by both parties and the discussions in the opinions show that these were not simple issues. They are almost certain to arise again because businesses in the United States frequently buy from and sell to businesses in other countries, notably Canada. Moreover, sellers regularly sent trailing invoices after shipping the goods, and some of those invoices contain clauses not in the exchange of documents that created the contract.

III. First issue: did the CISG or the U.C.C. govern the transaction?

The United Nations Convention on Contracts for the International Sales of Goods became effective on January 1, 1988.[3] Article 1 of the CISG reads in relevant part:

> (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different states:
>
> (a) when the States are Contracting States …

(15 U.S.C.A. App. Art. 1(a).)

The District Court to which the case was assigned concluded that the CISG did not apply to the transaction.[4] Judge Harry D. Leinenweber wrote,

> The ITC Defendants argue that the CISG governs the transactions at issue because VLM Vice President Witold Filemonowicz testified that "the communications concerning the transaction[s] at issue …[were] done out of the Montreal office [and] the invoices were sent by the Montreal office." Defs.' Trial Brief at 5. The Court does not find this evidence sufficient to conclude that the CISG trumps the Uniform Commercial Code (the "UCC") and PACA.[5]

The Court considered it important that the seller's PACA license gave a New Jersey address. It concluded that this was sufficient to hold that VLM had an office in the United States, as well as in Canada, and therefore was not doing business from a "place of business" in a "Contracting State" under the CISG.

> In this case, it is undeniable that the VLM has an office in Canada. *See* Amend. Compl. at 1. However, VLM's PACA license expressly provides a business address in Jersey City, New Jersey. *See* ECF No. Sec. 4-1. The Court finds this evidence persuasive in determining that VLM has "a place of business"

> in the United States, and was "contracting" in the United States for the transactions at issue. *See* 15 U.S.C.A. App. Art. 1(a). The Court rejects defendants' argument that the place of negotiations and the place where the invoices were sent are dispositive. Thus, the Court concludes PACA and the UCC control.[6]

On appeal, the Court of Appeals for the Seventh Circuit reversed (*VLM I*) and held that the CISG governed the transactions. The Court said that the only reason VLM had a place of business in New Jersey was because PACA required a United States address before VLM could do business in the United States. The *real* place of business for VLM was always Montreal. As the Court said,

> Most of VLM's business is conducted from its headquarters near Montreal, including its performance of the contract with Illinois Trading. VLM's only connection to the United States is a single office in New Jersey that appears to exist primarily to allow the company to maintain a PACA license. The district court thought that the New Jersey office sufficed to make VLM's place of business the United States.[7]

Then the Court dealt with how one interpreted the "place of business" requirement for the CISG in a case where a party's principal place of business is in one Contracting State, but it also maintains a presence in the Contracting State of the other party. The Court resolved the issue by turning to Article 10 of the CISG:

> But Article 10(a) of the Convention provides that "if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance." As we've noted, it's undisputed that VLM conducts most of its business in Canada, and the New Jersey office had no relationship to the performance of VLM's contracts with Illinois Trading. Accordingly, VLM's place of business is clearly Canada, and the Convention controls.[8]

The Court remanded the case to the District Court for a decision on the costs of collection issue, usually referred to as the "fee-shifting" or "attorney's fees" issue. The issue of VLM's charging interest for late payments seems to have been combined with the fee-shifting/attorney's fees issue.

It is difficult to gainsay the Seventh Circuit's decision that the CISG applied to the transactions because the potatoes were shipped from Montreal to Illinois and all of the exchanges between the parties also emanated from Montreal or Illinois. One has to wonder, however, what the Seventh Circuit would have said if the Montreal office had shipped the potatoes to its office in New Jersey, which in turn had shipped them to Illinois. Shipping decisions, including from where to ship goods and how to ship goods, are purely business decisions. It might have been a good business decision to ship them from Montreal to New Jersey, a shorter distance than from Montreal to Illinois. Then the New Jersey office might have been able to secure a more favorable transportation contract to Illinois using purely domestic carriers.

IV. Second Issue: How did Articles 18 and 19 of the CISG decide whether the disputed clause became part of the contract?

The CISG is a compromise between the European civil law system and the common law system. Articles 18 and 19 reflect that compromise, perhaps with a view towards giving more effect to the "mirror image rule" that still dominates the civil law system and that used to be the feature of the common law system.[9]

The provision in question in the VLM-Illinois Trading contract concerned attorney's fees incurred in the collection of payments. The relevant part of the provision reads:

> The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5c of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C.A. Sec. 499e(c)). The seller of these commodities retains a trust claim over these commodities until full payment is received. Interest shall accrue on any past-due account balance at the rate of 1.5% per month (18% per annum). Buyer agrees to pay all costs of collection, including attorney's fees.[10]

The Seventh Circuit said in *VLM II* that under the CISG VLM would have to show that "its contracts with Illinois Trading *expressly* made Illinois Trading liable for VLM's attorney's fees in the event of a breach."[11] The formation

of contracts provisions of the CISG are substantially similar to those of the U.C.C.[12] However, when it comes to terms in an acceptance that differ from the terms in an offer, the CISG, especially in Art. 19, differs somewhat from U.C.C. § 2-207(1) and (2).[13]

VLM II essentially summed up the Court's view in the 2014 opinion, *VLM I*. Each contract was formed when VLM received Illinois Trading's purchase order form, which was the offer, and VLM sent a confirmation of that offer, which was the acceptance. The trailing invoices were not part of this exchange of offer and acceptance. As the Court noted,

> The attorney's fees provision was *not* part of the agreement described in the purchase orders and the e-mail confirmations; that term first appeared in the trailing invoices that were mailed to Illinois Trading *after* VLM delivered the produce.[14] The Court said that the only way parties can modify a CISG contract is through Article 29(1), *i.e.,* by "agreement of the parties" and that a party cannot accept an offer (including one for modification) by silence or inactivity, *id.* art. 18(a). Rather, a party can only accept an offer through statements or conduct (if the parties' course of dealings allow for it.) *Id.*[15]

How, then, could the parties show that they mutually agreed upon the interest and attorney's fees provision if VLM had to pursue a collection action against Illinois Trading? It is well-known that sellers and buyers rarely read forms other than to determine the quantity term and price term. The parties never discussed the provision in question during negotiations, nor was there a course of dealing between the parties regarding a course of dealing.[16] The Court conceded that some of Illinois Trading's contracts with other sellers contained a form of "fee-shifting" or attorney's fees provisions. However, that practice with some other sellers did not rise to the level of a usage of trade within the industry.

> Nothing in the Convention indicates that common industry practices are automatically grafted onto contracts; rather, the content of each contract must be analyzed independently.[17]

In the end Illinois Trading prevailed. It won because first, the CISG applied, not the U.C.C., and second, because under the CISG a contract was formed (and was being performed) before the attorney's fees provision was introduced as a possible term of the contract. Effectively, the Seventh Circuit interpreted the word "agreement" in CISG Art. 29(1) in much the same way it would interpret the battle of the forms provisions in CISG Articles 18 and 19. However, is that correct? Article 29(1) says

> A contract may be modified or terminated by the mere agreement of the parties.[18]

It is unclear why the CISG refers to "mere agreement" for a modification, while it refers to a more elaborate scheme for forming terms at the offer and acceptance stage when a contract is created. Why the drafters of the CISG chose different approaches between contract formation and modification is unclear. However, in *VLM v. Illinois Trading,* the Seventh Circuit has established a high standard for "agreement" in a modification under the CISG.

V. What would have been the result under the Uniform Commercial Code?

Because *VLM II* decided the case under the CISG, there was no need to address the battle of the forms and modification provisions under the Uniform Commercial Code. However, it is possible that future courts will hold that some sales of goods cases fall under the U.C.C., not under the CISG. Indeed, Judge Leinenweber originally held that the U.C.C., not the CISG, applied to the transaction between VLM and Illinois Trading, while the Court of Appeals that held that the CISG applied. Therefore, it is advisable to analyze how a court might decide a case under the U.C.C. The relevant provisions are U.C.C. § 2-207 *Additional Terms in Acceptance or Confirmation*[19] and U.C.C. § 2-209 *Modification, Rescission and Waiver.*[20] The opinions in the *VLM* litigation give us a hint as to how the District Court and the Seventh Circuit might have analyzed the case under the U.C.C. When Judge Leinenweber said in his opinion that the U.C.C. would govern the transaction,[21] he analyzed the transaction under the U.C.C.[22] Judge Leinenweber discussed prior case law on PACA and said that he was persuaded that Illinois Trading had known of and never objected to the attorney's fees provision on the invoices. He said that Illinois Trading's former bookkeeper testified that she received the invoices from VLM and noticed the fee provision on each and every invoice VLM sent to ITC. She also admitted that she never objected to the provision and was unaware of anyone else from VLM (sic) who did.[23] Judge Leinenweber also noted that the text of PACA itself "permits the recovery of attorneys' fees and interest where the parties have contemplated for such terms."[24] Of course, PACA's provision

simply *allows* the parties to provide for attorney's fees if the parties so wish. Finally, he rejected Illinois Trading's claim that the attorney's fees provision "added a material term to the parties' established contract."[25] He noted that VLM's practice of including this provision on its invoices is standard practice in the produce supplier industry. Because of this conclusion, the ITC Defendants cannot claim that such a provision was a material alteration that caused an unreasonable surprise.[26]

The issue of what constitutes a "material alteration" under U.C.C. § 2-207(2)(b) is the subject of three comments to that section, Official Comments 3, 4, and 5. The key phrase is "surprise or hardship."[27] Judge Leinenweber's conclusion was that under Illinois law, an attorney's fees clause would be a material alteration if "the addition constitutes unreasonable surprise to one of the bargaining parties."[28] Judge Leinenweber concluded that the testimony of both parties suggested that such attorney's fees clauses were common in the trade and that Illinois Trading had seen such clauses before; therefore, these clauses in the VLM trailing invoices were neither a surprise nor a hardship.[29] It is difficult to disagree with the District Court's analysis if one accepts that what was at issue was the battle of the forms under U.C.C. § 2-207. Fee-shifting/attorney's fees, costs of collection, and interest provisions are apparently common in certain trades although not as common in other trades. Moreover, practices change over the years, even in one trade. As trade practices change, what may have been a "surprise" at one time would not be a surprise at a later time because merchants would have become used to dealing with such provisions.

There are a few cases discussing whether interest provisions and "cost of collection, including attorney's fees" provisions are material alterations under U.C.C. § 2-207(2)(b). The key to whether a clause would be a material alteration is whether it would "result in surprise or hardship if incorporated without express awareness by the other party."[30] Because the material alteration provision applies only when both the seller and the buyer are merchants, it is clear that both parties should be "aware" of what is usual or unusual in their trade and in their course of dealing.

There are at least three cases concerning whether "interest" would be a material alteration. All of them have held that imposing interest would *not* impose surprise or hardship and therefore would not be a material alteration. The deciding factor here is Comment 5 to U.C.C. § 2-207, which lists the types of clauses that would *not* be a material alteration; one of those clauses is "a clause providing for interest on overdue invoices." All three cases relied upon Comment 5 in holding such clauses to be immaterial, and we can assume that future courts will do the same.[31]

Fee shifting clauses, often in the form of "costs of collection, including attorney's fees", are a different matter. At least three cases have dealt with these clauses separately from interest clauses. Two of them have held that the clauses in question, based on the facts of those cases, constituted material alterations, while one held that the clause, based on the facts of that case, did *not* constitute a material alteration.

Herzog Oil Field Service, Inc. v. Otto Torpedo Company[32] contains the most extensive discussion. After holding that the clause charging interest on late payments was not a material alteration, the court said,

> In contrast, however, we find that the provision calling for the addition of an attorney's fee of 25% of the balance due is a material alteration and, therefore, did not become part of the agreement. We come to this conclusion for a few reasons. First, in common experience an attorney's fee provision is considerably less common than an interest rate provision; thus, it would not be as readily expected or anticipated. Secondly, when found, such clauses are usually less than 25% of the balance, often 10 or 15%, thus bringing the reasonableness of this particular clause into question. Thirdly, a lump sum addition of 25% changes the obligor's financial obligation under the contract to, what must be considered, a material degree. Fourthly, we choose to follow the precedent of Johnson Tire Service, Inc. v. Thorn, Inc., 613 P.2d 521, 529, 29 U.C.C. Rep. Serv. 774 (Utah 1980), where this conclusion was also reached.[33]

The other case holding an attorney's fees clause to be a material alteration is *Food Team, International, Ltd., v. Unilink, LLC.*[34] In this case, the clause called for the buyer to pay "all attorney's fees" incurred by the seller in collecting amounts owed. Potentially, this could have added even more to the amount the buyer would owe the seller than was the case in *Herzog Field Service.* Therefore, the Court held this attorney's fees clause to be a material alteration.[35]

The one case holding that an attorney's fees clause was *not* a material alteration is *Rocheaux International of New Jersey, Inc. v. U.S. Merchants Financial Group, Inc.*[36] Here the fee was, as in *Herzog Field Service, Inc.,* "25% of the outstanding balance."[37] In an exhaustive discussion of the cases on material alteration over the years, the Court concluded that, although there was a split of authority on the nature of a material alteration, the course of dealings between these two parties resulted in there being no element of surprise in the imposition of attorney's fees. Because there was no surprise, there was also no element of hardship and thus no material alteration.[38]

There is a dearth of cases discussing interest charges and fee shifting clauses as material alterations under the CISG, Articles 18 and 19. Presumably, the case law has not developed in that area as much as it has in the United States. Perhaps there are different practices between parties in transnational deals.

However, material alteration issues relate to the battle of the forms, not to modifications under U.C.C. § 2-209(1). That section simply removes the requirement of "new consideration" when the parties wish to modify the terms of their contract. It simply requires that the parties be in good faith when they modify their contract.[39] What would constitute a "material alteration" under U.C.C. § 2-207 seems to play no role in the modification process. If, as the Seventh Circuit indicates, the contract between VLM and Illinois Trading was formed upon the exchange of the purchase order and the e-mail acceptance, then the trailing invoices were simply requests for a modification of the already-formed contract.

VI. Conclusion—advice for American lawyers

More and more American businesses engage in transactions with businesses in other countries. Many of those businesses have their place of business in countries where the CISG is in effect, as it is in the United States. Unless the American business partner wishes to opt out of the CISG on a regular basis, then it is clear that the American businesses will have to adjust to CISG provisions.[40]

Because most businesspeople do not read "fine print" on their form contracts, much less any trailing invoices, it behooves them to re-consider which provisions they have put into these forms. In *VLM Food Trading International, Inc. v. Illinois Trading Company,* the parties became embroiled in a dispute over a provision that they had not negotiated. Whether the parties had actually read the clause or not, they had certainly not discussed it or expressly agreed to it. The lawyer for an American business would do well to review the typical paper exchanges of his or her clients. For example, if a seller truly wants to make a fee-shifting clause part of the contract, that clause should be in the e-mail confirmation sent in response to and acceptance of the purchase order sent by the buyer. After the contract is formed, it will be difficult to maintain that the parties truly intended to agree to such a clause.

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Footnotes

[*] The author thanks Victor M. Salas of The Biro Law Library of The John Marshall Law School for his assistance. She also thanks two colleagues who read earlier drafts of the article and made valuable suggestions: Harry H. Dikranian of LAPOINTE ROSENSTEIN MARCHAND MELANCON, L.L.P./S.E.N.C.R.L. in Montreal, Quebec, Canada; and Roxanne Khazarian of RKHAZARIAN & ASSOCIATES PLLC, in Stratford, Connecticut.

[1] This history is taken from the opinion in VLM II at 811 F.3d 247 at 250.

[2] 7 U.S.C.A. Sec. 499a et seq., which regulates the buying and selling of both fresh and frozen fruits and vegetables.

[3] See U.S.C.A. App. at 332 (1998).

[4] *VLM Food Trading International, Inc., v. Illinois Trading Co.,* Case No. 12 C 8154 at page 10 of the unpublished opinion issued March 5, 2013.

[5] VLM Food Trading International, Inc. v. Illinois Trading Co. Case No. 12 C 8154 at page 10 of the unpublished opinion issued March 5, 2013.

[6] *VLM Trading Company, International, Inc. v. Illinois Trading Company*, Case No. 12 C 8154 at page 11 of the unpublished opinion issued March 5, 2013.

[7] VLM Food Trading Intern., Inc. v. Illinois Trading Co., 748 F.3d 780, 787, 83 U.C.C. Rep. Serv. 2d 450 (7th Cir. 2014).

[8] VLM Food Trading Intern., Inc. v. Illinois Trading Co., 748 F.3d 780, 787, 83 U.C.C. Rep. Serv. 2d 450 (7th Cir. 2014).

[9] Articles 18 and 19 of the CISG read:

Article18.

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article19.

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) 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.

[10] Quoted in unpublished opinion of the United States District Court, Case No. 12 C 8154 issued March 5, 2013.

[11] VLM Food Trading Intern., Inc. v. Illinois Trading Co., 811 F.3d 247, 251 (7th Cir. 2016).

[12] VLM Food Trading Intern., Inc. v. Illinois Trading Co., 811 F.3d 247, 251 (7th Cir. 2016): "So far so good—these contracts principles are familiar and very similar to those expressed in the UCC."

[13] VLM Food Trading Intern., Inc. v. Illinois Trading Co., 748 F.3d 780, 786, 83 U.C.C. Rep. Serv. 2d 450 (7th Cir. 2014) and VLM Food Trading Intern., Inc. v. Illinois Trading Co., 811 F.3d 247, 251 (7th Cir. 2016).

[14] VLM Food Trading Intern., Inc. v. Illinois Trading Co., 811 F.3d 247, 252 (7th Cir. 2016).

[15] VLM Food Trading Intern., Inc. v. Illinois Trading Co., 811 F.3d 247, 252 (7th Cir. 2016).

[16] VLM Food Trading Intern., Inc. v. Illinois Trading Co., 811 F.3d 247, 253–254 (7th Cir. 2016).

[17] VLM Food Trading Intern., Inc. v. Illinois Trading Co., 811 F.3d 247, 254 (7th Cir. 2016).

[18] 15 U.S.C.A. App. Art. 29(1).

[19] U.C.C. § 2-207 reads:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

[20] U.C.C. § 2-209(1) reads: An agreement modifying a contract within this Article needs no consideration to be binding.

[21] Note 4, *supra,* page 11.

[22] Note 4, *supra,* at pages 11–15.

[23] Note 4, *supra,* at page 13.

[24] Note 4, *supra,* at page 13.

[25] Note 4, *supra*, at 14.

[26] Note 4, *supra,* at 14.

[27] U.C.C. § 2-207, Official Comment 4, reads in part, "Examples of typical clauses which normally 'materially alter' the contract and so result in surprise or hardship if incorporated without express awareness by the other party are …" The list that follows does not include attorney's fees. Comment 5, which lists clauses that would not materially alter the contract, also does not mention attorney's fees.

[28] Note 4, *supra*, at 15.

[29] Note 4, *supra,* at 15.

[30] U.C.C. § 2-207, Comment 4.

[31] Rangen, Inc. v. Valley Trout Farms, Inc., 104 Idaho 284, 658 P.2d 955, 35 U.C.C. Rep. Serv. 1129 (1983); Herzog Oil Field Service, Inc. v. Otto Torpedo Co., 391 Pa. Super. 133, 570 A.2d 549, 11 U.C.C. Rep. Serv. 2d 471 (1990); and Food Team Intern., Ltd. v. Unilink, LLC, 872 F. Supp. 2d 405 (E.D. Pa. 2012).

[32] Note 32, *supra*.

[33] *Herzog Field Service, Inc.*, Note 32, *supra,* at 551–552.

[34] Note 32, *supra.*

[35] *Food Team, International, Ltd.,* Note 32, *supra*, at 421–422.

[36] Rocheux Intern. of N.J., Inc. v. U.S. Merchants Financial Group, Inc., 741 F. Supp. 2d 651, 72 U.C.C. Rep. Serv. 2d 1048 (D.N.J. 2010).

[37] *Herzog Field Service,* Note 32, *supra*, at 680.

[38] *Rocheaux International of New Jersey,* Note 36, at 680–687.

[39] U.C.C. § 2-209, Official Comments 1 and 2.

[40] Neither party in the case raised the issue of Canadian law, *i.e.,* what would have happened if domestic Canadian law had applied to the transaction, instead of the CISG or the U.C.C. According to the division of federal and provincial powers in Sections 92 (13) and 91 (19) of the Constitution Act, 1867, matters relating to property fall within provincial jurisdiction and matters relating to interest fall within federal jurisdiction. Anyone seeking to determine how Canadian law would have decided these issues should consult the Civil Code of Quebec (CCQ) 1991, c. 64, and the Canadian Interest Act (RSC 1985, c. 1-15). The most relevant sections of the CCQ are Sections 1373, 1374, 1565, and 1617. The most relevant provision of the Canadian Interest Act is Section 4. The author is not a Canadian lawyer and therefore expresses no opinion on how the *VLM* case would have been analyzed and decided under the law of Quebec.

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