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International Law of Sales, Contracts, and Arbitration

The Statute of Frauds and the Parol Evidence rule, found in the Civil Code of the Philippines, (Art. 1403) and Rules of Court, in the absence of contractual stipulations, bar the application of the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Uniform Law on International Sales (ULIS).

Oral contracts are valid under the ULF and the ULIS, regardless of the amounts involved. Art. 3 of the ULF provides: "An offer or an acceptance need not be in writing, and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses." Art. 15 of the ULIS provides: "A contract of Sale need not be evidenced by writing, and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses."

The non-ratification of either of the foregoing international laws by the Philippines, or the failure to agree on the national law or the venue, applicable to a legal dispute, and the existence of divergent national laws in foreign trade applicable to the international sale of goods, have given rise to many difficulties to persons and firms engaged in the export-import trade. They have caused misunderstanding, uncertainty, confusion and in certain cases injustice, and the failure of the exporter-trader-or-merchant to seek relief.

The Hague Conventions of 1955 and 1964, and the creation by the United Nations of the Commission of International Trade law (UNICITRAL) on Jan. 1, 1968, have not substantially produced desired results—especially that advanced countries or seller nations, and the devel-

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oping countries or buyer nations, have been unable to thresh out some "difficulties" in the deliberations of the working groups.

As a result, today one finds oneself constrained to use the complicated traditional system where inevitably the *lex fori, lex contractus, lex loci celebrationis,* and the *renvoi* have to come in, in cases of unresolved disputes or conflicts.

The Fine Prints

For exporters and importers, the use of the printed forms in the buying and selling of goods has been necessary even to this day, because in many situations no one document called a contract duly signed by the parties exists. There is only an exchange of forms between the parties. The buyer sends the seller his printed purchase order, on which are a number of clauses protective and beneficial to the buyer; and the seller responds either with a printed acknowledgement form which contains clauses most beneficial to the seller or exporter, or what the busy exporter does is to stamp on the copy of the purchase order the words "Accepted subject to our standard terms and conditions of sale," and attaches thereto a copy of his terms and conditions and forwards both documents to the buyer-importer.

The terms are normally in conflict, especially if it is the first order or transaction, and the question is which set of terms—the importer's or the exporter's—shall govern the transaction. In both the civil and common law, there is no contract or meeting of the minds, unless one has acquiesced or given in expressly or impliedly, and the transaction has been consummated and executed, for the Statute of Frauds and the Parol Evidence Rule do not apply to executed contracts.

Even them and even if executed or consummated, there would still be conflicts or disputes in the interpretation of the different sets of clauses. In Common-Law countries, at this stage, merchants (exporters and importers) would be wary, for there is simply a mere offer and counter-offer, and a great deal of time and money would be wasted just to reach agreement.

Although lack of space prevents deeper analysis, this discussion is for the benefit of exporters, in the sense that they should be aware of the necessity of determining the point of delivery (deliverance), and whether the exporter can safely assume that the importer has already assumed the risk of the goods.

International Commercial Terms

As the cargo sways on the ropes or in its containers if the shipment is

containerized, from the end of a derrick, or is being pushed, as far as exporters are concerned, as a general rule, "delivery" is consummated normally when the goods cross the ship's rails.

However, it is necessary to go into a discussion of international commercial terms, otherwise known as INCOTERMS. The *Incoterms* have been drawn up at a meeting of the International Chamber of Commerce held in Paris, France, in 1936, and these have been adopted by both Western and Eastern Countries, capitalist or socialist or peoples' democracies. China—the People's Republic of China—has adopted and uses INCOTERMS since the start of its foreign trade in 1949. The text of the Incoterms in 1936 was revised to some extent in Vienna, Austria, in 1953. The Incoterms 1953 give uniform interpretation to at least nine terms of delivery, notably:

> 1-ex works or factory; 2-FOR (free on rail); 3-FOT (Free on Truck); 4-Freight or Carriage paid to; 5-FAS (free alongside ship); 6-FOB (Free on board); 7-CIF (cost, insurance & freight); 8-C&F (Cost and Freight); and 9-Ex ship or ex quay (Ke).
>
> Besides these usages, the following terms are also used:
> 1-CIFC (Cost, insurance, freight, commission); 2-CIFI (cost, insurance, freight, commission, interest). Under the Incoterms, terms of delivery and risk coincide with all terms of delivery except CIF, C & F, and freight or carriage paid to.

In respect of *ex works* or *ex factory,* the risk falls on the seller up to the time when he separates the goods individually, and transfers them to the buyer within the stipulated period. The seller bears the risk and the cost insurance in the case of

> FOR—until the goods are handed over to the railroad (or ship);
> FOB—until the goods pass the rail of the ship;
> Freight or carriage paid to—until the goods are transferred by the seller, within the stipulated term, to the first carrier;
> FAS—until the goods are unloaded alongside the ship, on the quay;
> CIF—until the goods pass the rails of the ship;
> *ex ship*—the seller bears all expenses and risk until the port of destination is reached; and
> *ex quay*—the seller bears all expenses, risk and the cost of unloading, until the goods are delivered on the quay of the port of destination.

These incoterms, one must bear in mind, may only be applied if their application has been stipulated by the parties. However, although they are only a drafting guidance and not international legal rules, nevertheless, civil courts and arbitration commissions are guided by them on disputed matters, even if not invoked in the contract, which in both civil and common law is the law between the parties, and is logically the starting point of the legal dispute.

Russia is considered as both a civil-law and a common-law country.

Although it has oftentimes been said by commentators in the West that the USSR, in the field of international or foreign-trade law, is more inclined to administrative regulation law, it may be added that, with Russia's adherence to arbitration agreements and in most cases, the USSR state trading corporations stipulate that venue shall be in the residence of the defendant; whether or not the USSR is a civil or common or quasi-administrative-law country, becomes immaterial, for good faith of the parties is what is generally controlling.

Arbitration

The voluminous and numerous cases overloading Philippine court dockets, which delay adjudication of cases, have led exporters and importers to agree on arbitration as a means of settling disputes. The Courts and lawyers as well as businessmen of the United States of America have been the early advocates of arbitration. The USSR and the People's Republic of China have created arbitration bodies or commissions in both Maritime and Foreign Trade, in their respective USSR Chambers of Commerce, and the China Council for the Promotion of International Trade.

The Philippines is, frankly speaking, not far behind, although there is an urgent need for the creation of an arbitration committee or commission within the Chamber of Commerce of the Philippines and the Philippine Chamber of Industries. The substantive law is there—Articles 2042 to 2046 in relation to Articles 2028 to 2041 of the Civil Code (R.A, 386). In this connection, the Bar Association, upon its integration under the leadership of Justice Fred Ruiz Castro, should initiate steps toward the organization of the National (Domestic) and Foreign Trade Arbitration Committees and the Maritime Arbitration Commission in the Chambers of Commerce, and of Industry in cooperation with the Integrated Bar, so that even cases among businessmen, industrialists and bankers may be expeditiously settled in arbitration. Then the parties may help prevent or solve court congestion, by making reciprocal concessions under the guidance of able arbitrators skilled in law, thus avoiding litigation or putting an end to it if already commenced.

The Expanding Frontiers of International Trade

In respect to foreign trade sales, the general rules regulating the formal validity of foreign trade transactions are to be applied. While, as a rule, contracts need be in writing, they may be made or concluded by exchange of telegrams, telex, or telephone, provided that in the case of telephonic transactions, they are confirmed by something in writing.

Requisites for a Valid Contract

The sale in writing may be concluded in the form of a deed, a contract-note or offer and its acceptance, and in the placing of an order and its confirmation, respectively. It is a requirement essential to validity of the contract of sale, that the parties shall be in agreement at least on the goods to be delivered, on their quantity and price. In addition, the contract usually contains the terms of delivery, stipulations concerning packing and the mode and term of payment.

With the promulgation of Executive Order No. 384 to guide the establishment of trade with Socialist countries, there might be some question as to validity, Congress not having repealed R.A. 4109, with respect to importations. Further to vest near control of importation in a corporation created, not by an act of Congress specifically, but by the general corporation law (Act 1459) is anomalous or abnormal.

The National Export Trading Corporation (NETRACOR) is a private corporation, vested with public powers of regulating foreign trade transactions between the Philippines and the Socialist nations. A private person or corporation cannot exercise such public functions, which can be exercised only by public corporations or public officers, created or designated by Congress, such as the Department of Commerce and Industry.

In our case, Republic Act 4109 prohibits importation of goods made in communist nations, on the mere ground that no trade agreement or diplomatic relations exist between the Philippines and the socialist nations, except Rumania and Yugoslavia; but the prohibition is eliminated if the Philippine government enters into a trade agreement or establishes diplomatic relations. In that case, there is no need for the repeal of R.A. 4109, especially so that the Customs Commissioner, upon direction of the President, has lifted all barriers to trade between the Philippines and the Socialist countries.

However, the existence of the NETRACOR, a Philippine State Trading Corporation, is obviously anomalous within a free enterprise, capitalist country, especially if importation has to be routed thru it. The NETRACOR is a pseudo-socialist state trading corporation in a free enterprise country. Without socialist disciplines, government controlled "private" corporations will enrich only a few. A mere private corporation cannot become a super corporation exercising powers over its fellow private corporations.

The Export Procedure

The following is the simplified procedure on export: A-Exporter regis-

ters with the Securities and Exchange Commission or the Bureau of Commerce; A1-Export is ready for shipment; Bb-Export license is issued by the authorized agent bank.

The Export License or permit is given to the Bureau of Customs.

C-Exporter pays the *arrastre* and submits triplicate export entry to Customs Inspector for cargo verification; C1-Customs inspector authorizes loading.

A certificate of origin (under the General System of Preferences otherwise known as the GSP) is issued to the exporter and importer, especially for exports to EEC or European Economic Community, or Common Market Countries, and Japan.

These certificates of origin may be issued by the Chamber of Commerce in the province, or provincial capital, or in Manila, or by the Bureau of Customs.

To quote the president of the Philippines Chamber of Commerce.

"Whatever we can do to promote our exports in the next several months (or next few years), will have a significant impact on the development of our economy during the decade of the 70's. In the case of Japan or Great Britain (or even in the case of the U. S.), they have to export or perish. In the case of the Philippines we have to export (something more than just the raw materials we export now), because we need the foreign exchange to buy the machinery to build more factories and create more jobs. Exports are necessary if we have to sustain our development effort and raise (the pitiful) standard of living of our people."

Excerpts of the Meeting of Premier Chou En Lai with the Philippine Delegation in the Great Hall of the People, Peking, on May 8, 1971 from 6 to 7:15 p.m.

Q—(Eugenio Villaneuva, Jr.). "Mr. Premier, I am the author of the paper on International Law which Mr. Eduado Escobar, chairman of our group in the Philippine delegation, delivered to Your Excellency earlier. The name is Eugenio Villanueva, Jr."

A—(Premier Chou En Lai). "Please give the gentleman the microphone."

Q—"If Your Excellency will kindly read page 3 of that paper which is published in the *Lawyer's Journal edited by one of our foremost trial lawyers, ex-Sen. Vicente Francisco,* the official position of the Philippine government with regard to trade and diplomatic relations with socialist countries, which is restated by Foreign Affairs Undersecretary Jose Ingles, you will perhaps know the reason and the answer to your query as to why Mr. Romulo has been delayed in establishing diplomatic and trade

relations with your country, despite the spirit and the principles enunciated in Bandung in 1955. (Premier Chou En Lai reads the paper.) (Premier Chou En Lai asks: "Where is that official Philippine government position? . . . Premier Chou continuing: "Yes, now I have found it.")
Villanueva continuing.—"Your Excellency must have read that it is not only Foreign Secretary Romulo and President Marcos who formulate foreign policy. *Under our democratic system of government, Congress, which is composed of the Senate and the House of Representatives, has to participate,* and when there are many participants, there is bound to be delay.* Now Your Excellency, the question on my part is this—

"Considering that there will be some delay in the establishment of diplomatic relations between the Philippines and China, is it possible for a Philippine trading company to operate and do business in China although there are no diplomatic relations between your Excellency's country and mine?

"I ask Your Excellency this question because since I arrived I have been asking for copies of your laws, rules, regulations, and decrees on foreign trade, tariff, customs, maritime laws, arbitration, currency, foreign exchange, aviation and other commercial laws but up to now, I have not received any, nor have I been told what these laws and regulations are."

A—(Premier Chou En Lai). "I have read your paper and it is clearly stated and I understand. When I earlier said what your Foreign Secretary Mr. Romulo has done about the spirit of Bandung since 1955, I also meant to say that the diplomatic relations to be established should be subject to the

*On Sept. 22, 1972, Philippine President Marcos issued Proclamation 1081 in his capacity as Commander-in-Chief of the Armed Forces of the Philippines. On January 17, 1973, President and Commander-in-Chief Marcos abolished the Congress of the Republic of the Philippines and has since then instituted a one-man or martial law rule. At the recent opening of the last session of the United Nations General Assembly, similarly situated (dictatorial) countries, through their U.N. representatives, greeted Philippine Foreign Secretary Carlos P. Romulo, a former U.N. General Assembly president, with a boisterous, jubilant greeting: "Welcome to the Club".

President and Commander-in-Chief Marcos continues to authorize Philippine-China trade provided it is coursed through his government-controlled "private" corporation, NETRACOR, but surprisingly, the People's Republic of China has expressed preference for the private sector as represented by the Chamber of Commerce of the Philippines. On December 30, 1973, the legal term or duration of office of President Marcos expires at high noon. Marcos was legally elected President in 1965 for 4 years (1966-1969) and reelected in 1969 for another 4 years (1970-1973), under the Constitution of the Philippines which provides that no person shall serve as President for more than 8 years. However, Marcos abolished the Constitution and issued Proclamations 1102, 1103 and 1104 declaring as ratified, the "new" constitution which allows him to hold-over as President and Prime Minister (the new name for the President) under a martial law regime under a so-called parliamentary system, even after the expiration of his 8-years tenure on Dec. 30, 1973. Under the new constitution, Marcos can change the justices of the Supreme Court, pack them up with his men, and appoint 5 more Justices to make a total of 15 justices.

approval of the organ or organs of State which have something to do with foreign policy. So my request to your delegation is that the readiness of China to establish diplomatic relations with your country be conveyed, not only to Mr. Romulo and President Marcos, but also the members of your Congress.

"Now with regard to your question as to whether a Philippine trading company can be allowed to operate and do business in China, the answer is in the affirmative. You need not do business through third countries to have trade relations with China. You can do that directly. There are precedents already. I can cite to you . . . before Italy had diplomatic relations with China, her private trading companies had trade relations with China for many years. Also . . . .

Pai Tsiang Kuo, foreign trade minister added: "Canada Also. Trade relations preceded diplomatic relations."

Chi Peng Fei, acting foreign minister, added: "Chile. Also Japan. Japan has trade relations with us, but as of now no diplomatic relations yet."

A—(Premier Chou En Lai continuing). "There you are. You can see that trade relations between China and the Philippines can precede diplomatic relations. As to your request for laws, rules, regulations, I am calling upon the China Council for the Promotion of International Trade to confer with you on this matter. You may request copies of the laws you stated."