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Tres Journées Louis Lorvellec (3-4 déc. 2009)
La production et la commercialisation des denrées alimentaires
et le droit du marché

AGRICULTURE AND CONTRACT LAW *

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In the United States, there are several possible contract rules that might apply when an agricultural product is involved. This brief review will focus on sales of agricultural products as commercial goods, while recognizing the many other transactions involving agriculture, such as sales on commodities exchanges and the important role of derivatives and other sophisticated financial transactions involving agriculture.

General contract law falls within the jurisdiction of the fifty states and the District of Columbia. Each has enacted its statutory rules for contracts that apply in general, including to contracts involving agricultural products. However, when a sale is involved, it is more likely that a state's Uniform Commercial Code (UCC) is the applicable law.

Each state and the District of Columbia have enacted special statutory provisions that apply to the sale of goods. (*See, e.g.*, DC ST § 28:2-103 *et seq*) These rules are based on Article 2 of the Uniform Commercial Code (UCC), which was drafted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws as a model law for the states. Article 2 of the UCC addresses many of the same issues as the U.N. Convention on the International Sale of Goods (CISG), including formation (secs. 2-201-209), price and payment (secs. 2-304-305, 310, 325, 511), obligations of the buyer and seller (sec. 2-301), warranties (secs. 2-312-318), delivery (secs. 2-307-309, 319-324), risk (sec. 2-509-510), breach and repudiation (secs. 2-601-610), excuse (sec. 2-615) and remedies (secs. 2-701-725), among other provisions. Negotiable instruments such as drafts that might be used for payment issues and security such as collateral used to underpin transactions are regulated by UCC Articles 3 and 9, respectively. Article 7 regulates warehouse receipts, bills of lading and other documents of title.

However, these state rules about the sale of goods may be supplanted by the rules of the CISG, most frequently when the buyer and seller have their places of business in different CISG contracting states. (Art. 1) The United States is a contracting state. The scope of the CISG extends to rules concerning the formation of the contract (Arts. 14-24), obligations of the seller (Arts. 30-34) and the buyer (Arts. 53-59),

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Ires Journées Louis Lorvellec (3-4 déc. 2009)
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et le droit du marché

conformity of the goods (Arts. 35-41), third party claims (e.g., trademarks Art. 41-44), remedies for the seller's breach (Arts. 45-52) and buyer's breach (Arts. 61-65), delivery (Art. 60), passing of risk (Arts. 66-70), remedies and damages (Arts. 25, 49, 74-78, 81-84), and exemptions (Art. 79), among other provisions.

Federal law, especially some regulations of the U.S. Department of Agriculture (USDA), may also apply to contracts concerning the private sale of agricultural products. For example, under the Perishable Agricultural Commodities Act of 1930 or PACA (7 U.S.C. 499a *et seq*) the U.S. Department of Agriculture oversees certain contract terms in fruit and vegetable contracts using a system of licenses and license withdrawals for firms that fail to pay or otherwise to meet contractual commitments. "The PACA protects businesses dealing in fresh and frozen fruits and vegetables by establishing and enforcing a code of fair business practices and by helping companies resolve business disputes. The PACA Branch is responsible for administering the PACA and offers many services to the industry. PACA Branch experts receive hundreds of telephone calls each week from companies requesting assistance on problems unique to the industry such as interpretation of inspection certificates, advice on contract disputes, and bankruptcy payments." <http://www.ams.usda.gov/> USDA procurement rules apply to the Department's purchase of commodities for the federal school lunch program and for other domestic and international food and nutrition assistance programs. USDA's Agricultural Marketing Service, which also oversees PACA and the Organic Standards Program, is responsible for purchases under the National School Lunch Program, the School Breakfast Program, the Summer Food Service Program, and the Food Distribution Program on Indian Reservations, the Commodity Supplemental Food Program and The Emergency Food Assistance Program. It also makes emergency food purchases for distribution to victims of natural disasters. A separate USDA agency – the Foreign Agricultural Service or FAS – is responsible for international food programs. Each agency uses its own contract forms and rules.

Two of the many contract issues that can be problematic when agricultural products are concerned are, first, the role of usage of trade (UCC sec. 1-303(1)(c)) or trade usage (CISG Art. 9(2) and second the impact of governmental regulations in the buyer's jurisdiction. Many of the growing number of private food standards for safety and quality are likely usages of trade, even when they are embodied in private contracts. (*See*, U.S. APRONS, Inc. v R-FIVE, Inc, 2010 WL 489540 (D.Neb.)). And as many governments tighten their food safety rules, their impact on sellers' obligations might extend beyond the limited circumstances applied to date.

Trade Usage Under the UCC, a usage of trade is "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts." This concept has been objected to by many developing countries and their companies, which were concerned that usages that are unknown to them (perhaps they do not regularly participate in a vocation or trade) might affect contract rights. A comment by two of the most often cited UCC scholars notes "The agreement of the parties includes that part of their bargain that may be found in ...usage of trade.... These sources are relevant not only to the interpretation of express contract terms, but may themselves constitute contract terms." (James J. Wright & Robert S. Summers, Uniform Commercial Code § 3-3) (5th ed. 2009) (footnotes omitted). The UCC's Official Comment also illustrates the issue,



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3. The Uniform Commercial Code deals with “usage of trade” as a factor in reaching the commercial meaning of the agreement that the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade. ...

4. A usage of trade ... must have the “regularity of observance” specified. The ancient English tests for “custom” are abandoned in this connection. Therefore, it is not required that a usage of trade be “ancient or immemorial,” “universal,” or the like. Under the requirement of subsection (c) full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage agreed upon by merchants in trade codes.”

Governmental Rules in the Importing Jurisdiction Under the CISG’s Article 35, as well as under the UCC, a seller is rarely held to supply goods that comply with the public laws and regulations at the place of import, as decided by arbitrators and a U.S. court in disputes involving Medical Marketing International. (1999 WL 311945). The three exceptions are if the public laws and regulations are identical at the buyer’s and seller’s places, if the buyer informed the seller about them, or if due to special circumstances (such as a seller’s branch office at the place of import) the seller knew or should have known about the regulation. In that dispute the seller was aware or should have been aware. It is this exception which might gain more significance as rules and concerns about food safety become more pronounced.

In conclusion, there are many contractual provisions that might apply to contracts involving agricultural products in the United States. The UCC and CISG are clearly the most important. Among the many issues that might be problematic are the interpretation of the rules regarding trade usages and the seller’s obligation regarding the goods compliance with public laws and regulations in the country of importation.