

Take home exam - IBT

Deadline: June 10th (the sooner you answer the sooner we will send you the results)

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Facts

A Czech buyer contacts an American seller for the purchase of replacement parts for heavy industrial production equipment in the buyer's factory. As part of the negotiations, the seller sent a team of engineers and business officials to the Czech Republic for several weeks to get an understanding of the intended uses of the parts by the buyer. They visited the buyer's headquarters, examined the buyer's factory, and reviewed the buyer's business operations. After several more weeks of negotiations, the buyer sends the seller a purchase order for the parts for a total price of \$1 million with delivery in the Czech Republic by October 10 and payment against documents by confirmed irrevocable letter of credit. The purchase order is a single one-page printed form. On the page in large bold letters is a printed clause stating, Seller will be responsible for damages caused by any defects in the replacement parts, including consequential damages." The seller replies with a standard order acknowledgment form confirming the quantity of engines, price, delivery, and payment terms. The seller's form is also a short one page form On the front of the seller's order acknowledgment form is a handwritten clause in large bold letters stating, Seller will repair or replace any defective parts, but Seiler is in no event liable for any other damages including consequential damages." The seller ships the parts, which arrive in the Czech Republic by October 10. The buyer pays the price against documents while the parts are en route to the Czech Republic. By November 1, the parts have been installed in the buyer's but a malfunction in the parts causes serious damage to the buyer's production facilities requiring total replacement of all of the production equipment The buyer also misses several big production orders, is facing several irate customers who are threatening to sue, and now faces bankruptcy The buyer brings an action against the seller in the Czech Republic for recovery of the purchase price of \$1 million plus \$10 million in damages. Assume that, under Czech law, consequential damages are an available remedy. The seller argues that the buyer is limited to replacement costs. What is the result under the CISG?

Suppose that the seller's counsel, an experienced U.S. commercial lawyer was able to convince the Czech buyer to opt out of the CISG and have the dispute governed by U.S. law. How would the issues be resolved using the UCC (*hint 2-207*)? Is the seller better off under the CISG or the UCC?

Note: this case is not about consequential damages but for those who want to go deeper, see UCC article 2-715 here:

<http://www.law.cornell.edu/ucc/2/article2.htm#s2-715>

Sample take home exam question (you know this one from the last lesson) with answers (use it as a pattern for the way you argue for the solution in your case, it does not have to be long, think of the possible solutions and argue, link the facts with the law, use IRAC structure etc.)

Sample Question

Industra-Sharp Corporation, an Illinois corporation doing business in Illinois, sells power tools, such as power drills and power saws. The president of Industra-Sharp recently met the president of Reyes Tools, a company based in Nuevo Leon, Mexico. The two had met in Chicago at a trade fair, where they began negotiations for the sale of power tools. After returning to Mexico, the president of Reyes Tools continued discussions by phone and by email.

During one phone call, the president of Reyes Tools asked, “Can you send me 450 power drills and 500 power saws CIF Monterrey, Mexico for \$19,600?” The president of Industra-Sharp answered, “I can do it for \$22,000.” The Reyes president said, “You sure drive a hard bargain. If you throw in extra parts for the drills we will have a deal.”

The president of Industra-Sharp then sent this message by email: “As you requested, we have included extra spare drill parts and will ship via truck tomorrow morning.” The president of Reyes Tools then telephoned and left the following message on the answering machine: “I got your email and that sounds great.”

Industra-Sharp sent the tools to Monterrey, but Reyes Tools refused to accept delivery, stating that it never entered into a written contract to buy the tools. Industra-Sharp, recognizing that there was in fact no written document that contained an arbitration clause, found itself forced into litigation and filed suit for breach of contract. Reyes Tools filed an appearance in the case and moved to dismiss the suit on the basis of the Illinois statute of frauds, which Reyes Tools says requires a writing for any sale of goods valued at more than \$500. They say that the contract is governed by this Illinois statute because the contract negotiations began in Chicago at a trade fair. The full text of the statute they are citing provides as follows:

Formal Requirements; Statute of Frauds.

- (1) Except as otherwise provided in this Section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some 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 or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
- (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 2-606).

How will the court rule on the motion to dismiss filed by Reyes Tools?

Question 2 answer:

The issue is whether a contract for sale of goods exists and is enforceable where two parties, merchants, from different states negotiate (starting in Illinois) a sale of goods valued at more than 500\$ by means of electronic and telephone communication.

1. Law applicable to the transaction (RULE)

The parties negotiated a sale of power tools valued at 22,000\$. Parties did not choose any law to govern their contract. Reyes Tools claim the parties started the negotiation in Chicago at a trade fair and therefore the contract is governed by the Illinois state law. Under Illinois statute of frauds a writing for any sale of goods valued at more than 500\$ is needed to be enforceable. Power tools are considered goods under UCC. Reyner Tools' place of business is in Mexico and Industria-Sharp Corporation place of business is in Illinois, the U.S. Their contract on the sale of goods is therefore a contract for the international sale of goods.

The key criterion for determination of law applicable to such contract is the place of business of the respective parties. Mexico and the U.S. are both parties to the United Nations Convention on Contracts for the International Sale of Goods (1980, hereinafter CISG). Under the article 1 (1)(a), the CISG applies to contracts of sale of goods between parties whose places of business are in different states when the states are contracting

states. Article 6 of CISG states that the parties may exclude the application of the convention or derogate from or vary the effect of any of its provisions. CISG as a self-executing treaty ratified by both states applies directly within its contracting states without the need for domestic implementing legislation. Any contracts for international sale of goods concluded between parties from contracting states thus fall under CISG's scope unless the parties expressly exclude its application. The convention does not apply to sales of goods bought for personal, family or household use (article 2 (a)). The present contract does not fall under this exception, neither the parties expressly excluded the application of CISG. Consequently, the CISG and not the Illinois law will govern the disputed contract as well as its formation.

2. Contract formation under CISG (RULE + ANALYSIS)

A) Writing requirement

Under article 11 a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses. The contracting states may however limit application of this provision pursuant article 12 by declaration under article 96. Neither Mexico nor the U.S. limited the application by such declaration.

B) Offer and acceptance

An offer must be sufficiently definite and indicate the intention to be bound. When it indicates the goods and expressly or implicitly fixes the quantity and the price it is sufficiently definite (article 14). This requirement was fulfilled by the parties as they agreed on both quantity and price and indicated the goods. An oral offer must be accepted immediately unless the circumstances indicate otherwise. The telephone conversation between seller and buyer finished by "throw in extra part for drills and we have a deal". The sellers response by email can be considered as immediate. Even if in doubt, the circumstances indicate that the seller actually was given a little time to think it over and by responding quickly via email he effectively accepted. Moreover, the message from the buyer confirming the email also shows his intent to be bound by the contract. Similarly, under article 8, statements or conduct made by a party are to be interpreted according to his intent where the other party knew or could not have been unaware what the intent was. From the previous negotiation it must have been obvious to the buyer that the seller considered the contract made after he accepted the buyers' condition as to extra drill parts.

The buyer's voice message clearly represented a final confirmation of what was previously negotiated.

A contract is concluded when acceptance of an offer becomes effective, that is when it reaches the offeror. An offer, declaration of acceptance or any other indication of intention reaches the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address (articles 18, 23, 24).

All communications in this case reached its addressee in accordance with above mentioned provisions and thus became effective.

There is a valid contract and, absent a derogation under article 96 by Mexico or the U.S., the contract is enforceable even if not concluded in writing. The motion to dismiss should be denied. **(Conclusion)**