

Conditions for the application of the CISG. Formation of the contract. Contractual terms and conditions and their incorporation into the contract, battle of forms. Arbitration agreement.

Case study

The company High-quality Wine, s.r.o (headquarters and place of business in Brno) sells quality wines to leading Czech and Slovak wineries and first-class restaurants. The Czech company purchases wine bottles from French company Vin de haute qualité, s.a.r.l (registered office and place of business in Bordeaux), German company Qualitätswein, GmbH (registered office and place of business of Mainz) and Portuguese company Vinho de qualidade, Lda (registered office and place of business in Porto). The formation of contract process with each company was as follows:

A – French company

Mr. Dvořák, CEO of the Czech company, visited the warehouse of the French company during his visit to Bordeaux in July 2020. There, he met in person with the CEO of the French company, Mr. Guillot. Mr. Guillot showed him a catalogue of bottled wines, and Mr. Dvořák explicitly said (in French): *“We will definitely be interested in doing business with you. Please send me an offer.”* On 6 August 2020, the French company sent a proposal by e-mail, namely for 600 Pessac-Léognan 0.75 l bottles for the price of 10000 euros. The proposal included the following arrangements and clauses relevant to this case:

“We are bound by this proposal until 31 August 2020.”

“An integral part of this contract are the seller’s business terms and conditions, which are attached to this proposal for the concluding of the contract.”

The seller’s terms and conditions then contained the following clauses and arrangements:

“This contract is governed by the United Nations Convention on Contracts for the International Sale of Goods.”

“Interest rate is agreed in the amount of 4.4% p. A. from the due date of the purchase price until its payment. The seller is not obliged to send the buyer a special invitation to exercise this right.”

“All disputes arising out of or in connection with this contract shall be settled in accordance with the rules of the International Chamber of Commerce (Paris). The place of arbitration shall be in Prague.”

On 16 August 2020, the Czech company replied via email and agreed to the proposal.

1. Determine the legal regime of the relationship between the Czech and the French company (i.e., do the CISG application test).
2. Consider, why interest rate is an “internal” loophole (gap) of the CISG. Are these internal loopholes regulated anywhere in the CISG? Why is the interest rate amount not directly regulated in the Convention?
3. Internal gaps are addressed in Article 7 (2) of the CISG. These gaps are first addressed by the general principles on which the Convention is based. List such principles.
4. The Czech company did not pay the purchase price for the delivery of wines on time. The French company demanded the agreed interest rate. The Czech company argued that the provision on interest rate was invalid under the Czech law. Assess the validity of this provision of the contract (from the point of view of the Czech courts, do not consider the arbitration clause).
5. The Czech company is a bad business partner and objected to the form of the contract. According to the company, email communication does not constitute a written form under

the CISG. Consider this objection. Use the judgment of the Supreme Court of the Czech Republic to resolve this issue.

6. Analyse the contractual process, comment on the personal meeting in July. Specify as precisely as possible the moment at which the contract was concluded.
7. Assess whether the seller's offer is irrevocable.
8. As soon as the proposal was sent, the managing director of the French company realized that he had made a mistake and wrote EUR 10000 instead of EUR 12000. Consider his chances of withdrawing the proposal.
9. The Czech company further tried to argue that the seller's terms and conditions did not become part of the contract because they were in French, so they did not understand them and did not have the opportunity to become acquainted with them. Assess whether the terms and conditions have become part of the contract (deal with the company's objection and the inclusion clause).
10. The Czech company refused to pay the purchase price. Determine where the French company will be able to sue the Czech company for the payment of the purchase price (determine where and how the dispute will be resolved, whether the dispute is arbitrable, whether the arbitration clause meets the requirements under the Czech law and consider whether it is an arbitration before a permanent arbitration court or it will be an *ad hoc* arbitration).
11. Let's modify our case scenario. There was no arbitration clause in the proposal. The arbitration clause was written on the invoice issued by the seller to the buyer. "*All disputes arising out of or in connection with this contract will be resolved before the arbitral tribunal at the ICA in Geneva.*" The buyer paid the purchase price based on the invoice sent. Analyse the parties' consensus on the arbitration clause included in the invoice. Furthermore, without any regard to your conclusion, assess the validity of this arbitration clause.

B – Spanish company

With the Spanish company *Vino de calidad, SRL* (headquarters and place of business in Burgos, Spain), the implementation of their agreed framework contract and subsequent individual sales contracts has been running smoothly since July 2015. The framework contract includes not only the purchase of wines that the Czech company resells directly, but also the distribution obligations (the Czech company was authorized to exclusively distribute wines in Moravia and Silesia). While they did not agree on a choice of law clause, the arbitration clause has been agreed as follows: "*Dispute Resolution: Arbitration, Czech Republic.*"

1. Qualify and determine the legal regime of the relationship between the Czech and the Spanish company.
2. Would the answer change if the contract was concluded between a Czech company and a Portuguese company *Vinho de qualidade, Lda* (registered office and place of business of Porto)?
3. Assess the validity of the arbitration clause. What are the obligatory requirements for an arbitration clause under the Czech law?

C – German Company

Based on a previous phone call from the German company, the Czech company emailed a proposal to conclude a contract on 14 January 2020. The proposal included a precise specification of bottled wines, including quantity and purchase price, choice of the Czech law, business terms and conditions of the Czech company. The proposal further contained "*We are bound by this proposal until the end of January 2020*". The terms and conditions, which were incorporated into the proposal and were part of the email as an attachment in a PDF file, included the following provisions:

"DAP, Brno, INCOTERMS 2020"

"All disputes arising from this contract will be resolved before the Czech courts."

The German company Qualitätswein, GmbH replied by e-mail the next day (15 January 2020) stating that it was accepting the offer. The German company, however, attached its business conditions to the email, also by linking to the attachment in the PDF file. These terms and conditions included, *inter alia*, provision on "EXW Mainz INCOTERMS 2020" and arbitration clause "All disputes or claims arising out of or in connection with this contract, including disputes concerning its validity, breach, termination or voidness, shall be dealt with in arbitration proceedings before the Deutsche Institution für Schiedsgerichtsbarkeit eVV in Munich by one arbitrator appointed in accordance with the rules of this arbitration tribunal." The Czech company responded to the email the following day (January 16, 2020) saying: "We agree."

1. A dispute has arisen between the parties as to the legal regime of their purchase contract. The German company argued that the legal regime was governed by the UN Convention on Contracts for the International Sale of Goods. The Czech company referred to the clause on the choice of Czech law and argued that the purchase contract is governed by Czech law with regard to the autonomy of the will of the parties. Who is right?
2. Determine the moment and content with which the contract was concluded. Then focus on whether the arbitration clauses have become part of the contract, or which one of them.
3. The companies were interested in resolving the jurisdiction of any of their disputes, therefore they agreed to amend the contract in the form of an addendum containing the following clause: "All disputes arising out of this this contract shall be resolved at the arbitral tribunal of the Deutsche Institution für Schiedsgerichtsbarkeit eVV in Munich or at the general court in the Czech Republic. The specific court will be determined by the plaintiff. Assess the validity of this clause.
4. Irrespective of your answer to the second question, determine whether there would be another solution if the German company:
 - (a) attached its terms and conditions without any reference clause
 - (b) did not attach its terms and conditions but included a link to its website where the terms and conditions were available in German but had to be looked for
 - (c) did not attach its terms and conditions, but incorporated a hyperlink that directly referred to the text of the terms and conditions
5. Let's modify the case. Always assess whether a contract has been concluded. It remains relevant that the offer was sent by email on 14 January 2020 and the offeror is bound by the offer until the end of January.
 - a) the Czech company withdrew the offer on 21 January 2020. The German company insisted on the offer because it relied on the deadline for accepting the offer by the end of January
 - b) the German company immediately rejected the offer on 15 January 2020, however, a week later it decided to accept the offer and sent an e-mail accepting the offer (22 January 2020)
 - c) the German company sent an unconditional acceptance of the offer by email on 1 February 2020
 - d) the German company decided to send the acceptance of the offer by regular mail due to failing Wi-Fi connection at their headquarters. The company sent the acceptance of the offer on 28 January 2020 (according to the date on the postmark), however, because of a three-day strike by the employees of the German Post, the acceptance of the offer reached the Czech company on 1 February 2020.
 - (e) the German company was silent.
6. Is there a provision in the CISG regulating a situation if the offeror does not specify the period for which he/she feels bound by the offer? Until when has the offeree (the recipient) to accept or reject the offer?