

### Conformity of the goods. Examination of the goods. Fundamental breach. CISG. Arbitration proceedings

#### Preparation for the seminar

- Carefully read the relevant articles of the CISG, Articles 35 to 52, 61 to 73.
- learn to work with INCOTERMS 2020 and INCOTERMS 2010 clauses
- PMO cast - CISG can help you to prepare: <https://www.youtube.com/watch?v=dq1Zd9IUC-g>

#### Case study

Douha (established under Czech law, registered office, and place of business in the Czech Republic) is a manufacturer of pumps. On November 19, 2020, Douha received an email from Komahir (incorporated under Ukrainian law, place, and registered office in Lvov). The companies have traded together several times in the past for supply of pumps. This time the order was made for 1000 pieces of pumps; pump specifications incl. the prices were made by reference to the Douha catalog, delivery was requested in five deliveries of 200 pieces - February 2021, April 2021, June 2021, August 2021, and October 2021. Douha responded on 1 December 2020 that it will deliver the ordered goods within the specified months. Douha attached its terms and conditions in a separate PDF file, which was not linked to in the body of the email. The terms and conditions contained there, which are relevant to us, were

- *DDP buyer's registered office*
- *The seller guarantees to the buyer that the goods will have the agreed specifications (incl. power consumption) for a period of 4 years from delivery. For submersible pumps, the pump retains its specifications up to an immersion depth of 15 meters.*
- *In case of delay in payment of the purchase price, the seller is entitled to charge interest on arrears in the amount of 4% p.a. without special request from the due date of the purchase price until payment of the purchase price.*
- *This contract is governed by the Principles of European Contract Law.*
- *Disputes arising from this contract or arising in connection with it will be resolved in arbitration proceedings that will take place in the Czech Republic*

Komahir immediately replied that it agreed.

1. Qualify and determine the legal regime of the contract, including the legal regime of the gaps (loopholes) of the potentially applied direct norms. Does the fact that Ukraine has a reservation under Article 96 CISG have any bearing on the contract concluded?
2. Indicate the stages of the contracting process and specify as precisely as possible the time at which the contract was concluded. Would the answer have changed if Komahir had not explicitly replied that it agreed, but had paid the purchase price after receiving a reply from Douha? Also analyze the incorporation of business terms conditions. Have they become part of the contract? (Whatever answer you come up with, assume for your further analysis that the terms and conditions have become part of the contract).
3. Analyze the delivery condition, explain the place of passing of risk. Does this condition have any defects? If so, how can these defects be resolved?
4. There is a contractual guarantee in the terms and conditions. Explain what the differences are between the liability for non-conformity under the CISG and the contractual guarantee.
5. The first delivery was delivered to the buyer's headquarters on February 12, 2021. The buyer duly took over the delivery. Since he intended to sell the pumps to customers only in the spring, he stored the pumps in a warehouse. On March 20, 2021, he unpacked the pumps and found that five pumps were missing (195 were delivered). The defects were reported by telephone the same day and described to the seller. Qualify the defects, determine who is responsible for

- them and analyze the complaint process, ie pay attention to whether the defects were reported properly in form and on time. Can there be any problems with verbally reported defects?
6. The second delivery was delivered and taken over by the buyer on April 9, 2021. By an unfortunate accident on the same day, the sanitary offices ordered all employees at Komahir to undergo a mandatory 14-day quarantine. After returning to work (Monday, April 26, 2021), the authorized employees inspected the delivery of the pumps and found during the inspection that some pumps had different dimensions than ordered. These defects were notified to the seller in writing the following day. Analyze the situation from the point of view of both the seller and the buyer, with the support of the CISG.
  7. Let's modify the situation in the previous question. Assume that the goods were delivered on April 9, 2021 and had the specified defects in size. Defects were notified in writing to the seller on the fourth day after delivery. The seller offered to correct the error and deliver pumps of the correct dimensions within 5 working days. Is such a procedure possible within the scope of the CISG?
  8. Komahir took over the third delivery in June 2021. After experience with previous deliveries, the company inspected the number, color and parameters of the pumps and performed 10 technological tests (regarding performance, draft, etc.). As the inspection did not reveal any defects, the company sold the pumps to its customers. However, after about 3 months, some customers started complaining about the pumps. After short-term use, the submersible pumps could not be started or stopped, which was caused by a defect in the foot valve and by a leaking diaphragm of the pressure vessel - defects not covered by the contractual warranty. Qualify the nature of the defects and assess the defect notification if the company reported the defects in October 2021.
  9. Shortly after the fourth delivery (August 2021), the seller was approached by a lawyer from the Ukrainian company Cholodno, stating that the same design and technical solution for the pumps supplied by the Czech company was protected by patents granted by the Ukrainian Industrial Property Office. For this reason, Komahir cannot resell the pumps to end customers in Ukraine. Komahir reported these defects to Douha in early September. Qualify the nature of the defects and analyze the complaint process - make arguments in favor of the seller and in favor of the buyer.
  10. In view of the problems, the Ukrainian company withdrew from the contract and sought damages. However, Czech society refuses to pay. In the event of this dispute, analyze the method and place of dispute resolution and how the number of arbitrators shall be determined.
  11. Assess the course of the arbitration proceedings. Where and how is it regulated in Czech law? What are the sources for the arbitration procedure? How is the arbitration proceedings initiated? Can the parties themselves agree on the procedure to be followed? Analyze from the perspective of *ad hoc* arbitration and permanent arbitral tribunals.
  12. The Czech company supplies pumps to various countries. The contract was also concluded in September 2021 with the Slovak company Čerxo (headquarters and place of business in Bratislava). The goods were delivered to the buyer's headquarters in accordance with the delivery condition on October 1, 2021. The Slovak company learned that the Slovak technical safety requirements of the pumps, which result from the relevant EU directives for all Member States, are not met. The Slovak company reported the defect to the Czech company. The Czech company refused to deal with the complaint on the grounds that it was not obliged to ascertain the public law standards and regulations of the country to which it supplies goods. Analyze this argument.

### Questions on claims for breach of contract (a.k.a. "click" to the 5<sup>th</sup> seminar)

13. Assume that the notification of non-conformity for the first delivery was proper and timely. Analyze what claims the buyer in this situation has (a situation in which 195 pumps were delivered instead of 200 pumps).
14. Assume that the third delivery claim was proper and timely. Analyze what claims the buyer in this situation has in the case of irreparable defects. Consider further the possibility for Komahir to withdraw from the contract in this situation if out of the 200 pumps delivered, Douha is not able to return about half of the units, as end customers have not yet complained about these units and therefore Komahir does not have them at its disposal.
15. The Ukrainian company withdrew from the contract and claims damages. The buyer wants to assert his claim in arbitration proceedings in accordance with the arbitration clause. The seller claims that he is not obliged to pay damages if there has already been a withdrawal from the

- contract. At the same time, he claims that the arbitration clause has expired. Deal with both seller's objections and analyze them.
16. Analyze what claims the buyer may require in the event of a legal defect described in question ad 9.
  17. Analyze the seller's claims if the buyer has paid only EUR 80 000 by the specified date instead of the purchase price of EUR 90 000.
  18. Douha's terms and conditions included interest rate. Is it possible to claim the interests at the same time as damages? Argue with the help of CISG.
  19. In situation ad 12, the goods were to be delivered by 1 October 2021. The goods were not delivered on that day. Indicate the conditions under which the Slovak company could withdraw from the contract. Would the situation change if the goods were to be delivered on October 1, 2021 FIX?
  20. In situation ad 12, the contract was eventually withdrawn. However, the Slovak company needed the pumps, so it decided to buy them from another Slovak company, Pompa (headquarters and place of business in Trnava). It did so two weeks after the withdrawal, even though Pompa sells pumps at a higher price than the original seller (by 12%). The Slovak company demands a difference in the purchase price as compensation for damage from the original seller (Czech companies). Qualify the situation, state whether all the conditions are met for the Slovak company to be able to claim the difference in price from the Czech company