

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) and German company Qualitätswein, GmbH (registered office and place of business of Mainz).

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 are 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.”

“All disputes arising from the present contract and/or in connection with it shall be finally decided with the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic according to its Rules by three arbitrators in accordance with the Rules of that Arbitration Court.”

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 French companies (i.e. applicability test).
2. Analyze the progress of the contracting process, comment on the personal meeting in July. Specify as precisely as possible when the contract was concluded.
3. Assess whether the seller's offer is irrevocable.
4. Analyze whether the seller's terms and conditions have become part of the contract. The terms and conditions were drawn up in English.
5. Analyze whether the terms and conditions would become part of the contract in the following modified situations:
 - a. the terms and conditions attached were in French;
 - b. the French company has attached its terms and conditions without reference (incorporation clauses);
 - c. the French company did not attach its terms and conditions but incorporated a link to its website where the terms and conditions were available in French and had to be searched.
 - d. the French company did not attach its terms and conditions but incorporated a hyperlink that referred directly to the text of the terms and conditions.
6. The Czech company ultimately refused to pay the purchase price. Determine:
 - a. how and where the dispute will be resolved, state the basic characteristics of this dispute resolution method and the importance of the venue;
 - b. whether this dispute is arbitrable and under which law you will consider the arbitrability it;
 - c. whether the arbitration clause is valid and under which law;
 - d. whether it is an arbitration proceeding before a permanent arbitration court or whether it will be an ad hoc proceeding)

7. Would your answer to any point from the previous question change if the contract included the following clause: *All disputes arising out of or in connection with this contract shall be finally settled under the Arbitration Rules of the International Chamber of Commerce by three arbitrators appointed in accordance with these Rules. The place of arbitration will be Prague.*

B – 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. This contract shall be governed by the Czech Law"*. 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 went silent and did not respond.

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?

C – Irish company

In 2022, the Czech company expanded its activities to include the import of Irish whiskey. Cooperation with the Irish company Best Blend takes place based on a framework agreement and subsequent partial purchase agreements. The framework contract was concluded in November 2022. Part of the contract is not only the purchase of bottles of whiskey, which the Czech company further sells directly, but also the commitment to distribution (the Czech company received authorization for the exclusive distribution of wines in Moravia and Silesia). The framework agreement includes, among others, the following provisions:

"This contract and subsequent purchase contracts are governed by Czech law."

"All disputes arising from this contract or subsequent purchase contracts or in connection with these contracts shall be settled in arbitration in the Czech Republic."

1. Qualify and determine the legal regime of the relationship between the Czech and Irish companies.
2. In the event of a dispute between the parties, determine:
 - a) how and where the dispute will be resolved;
 - b) whether this dispute is arbitrable and under which law;
 - c) whether the arbitration clause is valid and under which law;
 - d) whether it is an arbitration proceeding before a permanent arbitration court or whether it will be an ad hoc proceeding)
3. Would your answer to the previous question change if the framework agreement included the provision: *"Dispute resolution: arbitration."*