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International Business Transactions

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Introduction

This textbook is primarily intended for non-native speakers of English. It consists of seven chapters. In the first chapter basic legal concepts are explained, which are necessary for non-law students or junior law students to understand international business law. This is followed by the examination of the United Nations Convention on Contracts for the International Sale of Goods' main provisions. The third chapter introduces International Commercial Terms (INCOTERMS) of the International Chamber of Commerce, which are written usages frequently agreed upon by the parties to an international sale of goods contract. The next chapter deals with other (than international sale of goods contract) independent contracts, like the contract for the construction of industrial works. The last three chapters discuss so-called accessory contracts which are necessary to fulfill the main contract, and which are related to the marketing of the goods, transport of goods and financing international trade.

At the end of each chapter there is a reading related to the topic, and a glossary, explaining some of the most important words used in the chapter.[1] This is followed by questions related to the materia. And finally, there are some useful internet sources.

[1] For this the following sources are used: Cambridge Dictionary (https://dictionary.cambridge.org), Oxford Reference (www.oxfordreference.com), Merriam-Webster Dictionary (www.merriam-webster.com), Collins Dictionary (www.collinsdictionary.com), The Free Dictionary by Farlex (www.thefreedictionary.com).

Chapter I
Introduction to the law of international business transactions

The scarcity of certain goods in some regions and surplus of the same in other regions resulted in exchange of goods between people. Trade and later international trade have evolved relatively early during human history. In the 18th century economists discovered that division of labor between different nations can improve efficiency in the production of goods. David Ricardo elaborated this idea to the comparative advantage theory. According to this theory a sovereign country has a comparative advantage in production of a good if it has lower *opportunity cost* in producing this good compared to another country (it can produce it more efficiently).[2] Therefore, it should concentrate its resources to produce such products.

The liberalization of international trade following the Second World War gave a new impulse, and it does not have to be emphasized how important is international trade nowadays. And as generally human interactions in the society are regulated, this flourishing trade is also regulated. On the one hand, international trade is regulated among sovereign countries (*dismantling* trade barriers), what is the so-called public law part of international trade law. On the other hand, business relationships among the private parties, i.e. participants of transactions, are also regulated, because in practice lot of things can go wrong related to an international

[2] Oxford Reference (https://www.oxfordreference.com/search?q=comparative+advantage&searchBtn=Search&isQuickSearch=true).

business transaction: it can turn out that the buyer will not pay for the goods once they are shipped or he cannot pay (goes insolvent), or it can happen that the seller *dispatches* low quality goods, or the parties are late with payment or shipping the goods. Rules regulating these issues between private parties form the so-called private law part of international trade law. In this chapter the difference between public and private law will be explained.

However, before doing that, let us start with the basics, and see what is law. **Law** can be defined as a rule of *conduct enforced* (sanctioned) by the state. If there is no state sanction, for a rule of conduct, it is only a social rule not a law.

Now that we defined law, let us see the **sources of law**. In nation states the highest source of law is usually the constitution. This is usually followed by ratified international *treaties* (conventions). And under these treaties are national laws (statues or acts), and governmental or other decrees. The hierarchy of the legal sources is important, because lower legal sources may not contradict to higher sources. These sources of law are usually the same for each branch of law.

This is the same for the law of international business transactions, the highest legal source is the (1) constitution, more precisely, certain provisions of a national constitution (like “our economic system is based on market economy and freedom of enterprise”, or that “*good faith* in international relations should be respected by our country” or similar general provisions). However, just because there are so very general provisions, in practice lower legal acts are relevant.

Legal theory enumerates among primary sources of the law of international business transactions (2) principles of international public law (like good faith, etc.). It means that courts or arbitral tribunals should take into account these principles when try a case related to and international business transaction.

This is followed by (3) bi- and multilateral international treaties (conventions) concluded by sovereign states. Usually, international treaties after the signing by the representative of the national state should be also ratified. Ratification means that the signed treaty is approved by the legislative body of the state. There are three types of international treaties:
(i) Those of public law character – sovereign states conclude them and they are obliged by these conventions. Such is for example the Marrakesh Treaty establishing the WTO. In this treaty signatory states obliged themselves to reduce customs tariffs. These commitments are implemented by amending national customs codes[3], which are public law acts.
(ii) Those of mixed character - states conclude these treaties, but rights and obligations resulting from these treaties will affect both states and legal (natural) persons from the contracting countries. Such treaties are typically investment protection agreements. For example, states agree that in case of a dispute with the other state's citizen or company

[3] It should be mentioned here that the European Union, being a customs union, has its own customs code. This is Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02013R0952-20200101).

who invested to the country, they will waive their sovereign immunity and resolve the matter in front of an international arbitral tribunal.
(iii) Those of private law character - in which contracting states agree to introduce into their legal systems legal norms which will grant rights and obligations to legal and natural persons, when these persons have their places of business in different contracting states and they do business with each other (like the CISG, what is discussed in the third chapter). The law of international business transactions basically deals with these norms.

(4) National laws (also called statutes (US) or acts (UK)) are also sources of the law of international business transactions. They are important for two reasons. First, as already mentioned, international treaties are incorporated into national legal systems, usually by ratification, and thus, they become national laws. Second, if some issue is not regulated by international treaties, national substantive laws should be applied to a business transaction related dispute if foreign element is involved. Each (almost each) country has its own conflict of laws rules (it is also called private international law rules). These rules will help the judge seized with the dispute to determine the substantive law of which country is to be applied in private law legal relationship (international sale contract for example) that involves a foreign person, property or right (foreign element), when the laws of different states would be applicable, and the parties did not agree on the applicable *substantive law*. These rules will also determine which court has *jurisdiction*.

At the same time, parties to a commercial agreement can always agree about the applicable substantive law and the

forum in case of dispute. However, in practice, once there is a dispute between the contracting parties, the experience tells us that it is very difficult to agree about these issues. Therefore, a prudent party should agree on these issues before the dispute arise.

(5) Decrees (and other lower legal acts) of the government, ministers in national legal systems. They can be also important, as for example, some export subsidy, licence, etc. might be regulated by such decrees.

Besides the above-mentioned legal sources, there are other **sources that are formally not laws**, but are relevant and important in legal sense.

(1) Contract is the most important of these, as the majority of private law legal relationships come into existence with a contract.[4] Generally, in national contract laws parties have the autonomy to agree if they want to enter into a contractual relationship with each other, and if yes, under what terms. However, they should respect mandatory rules of the law (for example, they may not conclude a contract for the sale of hard drugs, human organs, etc.).

(2) International commercial custom is any practice or method of dealing having such regularity of observation in a place or trade as to justify an expectation that it will be observed with respect to the transaction in question.[5] International commercial customs are usually taken into

[4] However, there are other possibilities for the creation of a legal relationship, like *tort*. For tort see the Glossary.
[5] UCC.

consideration by courts and arbitral tribunals in international trade disputes.

(3) Written usages are systematized and published rules of large international ports, warehouses, commercial associations, exchanges. The International Commercial Terms (INCOTERMS) of the International Chamber of Commerce are also such written usages. However, they will be taken into consideration by courts only if they were expressly agreed upon by the contracting parties.

(4) Unique business practices between the contracting parties (e.g. special way of delivery or packaging) are also lot of times considered by courts.

(5) Practice of international commercial arbitration is also considered as a source that is formally not law in international business transactions. However, in practice, the problem is that it is not always accessible and lot of times it is not consistent.

(6) Lex mercatoria or law of merchants are the before-mentioned international commercial custom and the practice of international arbitral tribunals.

With the intense development of international trade at the beginning of the 20th century, sovereign countries realized that it would be more efficient to have uniform laws for international business transactions. Thus, the unification of international rules related to international trade also started. This is basically the process of standardization of laws. Just imagine, with the same legal rules for business transactions worldwide, businesspeople would not worry what to expect

in case of dispute, in addition, they would not need local legal experts, translation services and so on.

There are two ways of standardization: elaborating model laws, which are later used by sovereign states when drafting laws, or having international treaties. Thus, international rules might apply to international business transactions. However, only if the issue is regulated on supranational level. If not, still the conflict of law rules of the forum will help the court to decide which national law to apply to the case. Here we should mention that in theory, having uniform conflict of law rules will lead to the same result, that is to say, to the application of the same substantive law.

As already mentioned above, the materia of international economic relations can be divided into two parts: public law part and private law part. Before discussing the two parts, we should explain in general what is public law. **Public law** is part of law which governs the relationship between the state and natural (humans) and legal persons (e.g. companies). This relationship is always asymmetric, natural and legal persons are subordinated to the state in this relationship, this is because the state represents the public interest, it has the authorization of the society to do it. Tax law and criminal law are typical branches of public law. Natural and legal persons have to follow the rules laid down in these laws, otherwise the state is authorized to enforce it. Public international law governs the relationship between sovereign states.[6]

[6] And sometimes international organizations.

Private law deals with relationships between natural and legal persons, and sometimes between natural and legal persons and the state (states can have private acts, like doing business through state companies), where the state is of equal rank with the former in front of the law and courts. Example for private law is contract law.

Expropriation is a good example for explaining the difference between public and private law. Let us say you own a house next to the governmental tax office. The tax office needs more space, and they want to rent your house. This relationship will be based on a lease agreement between you, as a private party, and the tax office, as a state institution. Lease agreements are regulated by private law (contract law). So, if you do not want to rent out your house to the tax office (state) you do not have to, as one of the basic principles of contract law is the autonomy of the will of the parties. They are free to decide under what conditions they are willing to enter into a contractual relationship, if they want to do it at all. If you rent it out to the tax office, and there is a legal dispute between you and the tax office (state), the court should treat you as equal parties. This is the essence of private law.

However, let us say that you own a house on the trace of a new highway the government wants to build. Building a highway is of public interest. Administrative law, branch of public law, allows the state to expropriate private property for public interest if compensation is paid. So, in this case, you cannot decide if you want to enter into a legal relationship with the state, that is to say, sell your property, but you will have to do it if there is public interest (because public law obliges you). So, in this case you are not in equal

position with the state, but you are subordinated to the state representing the public interest.

Explaining the difference in general between private and public law helps us to understand the difference between the two parts of the law of international economic relations.

Public law part of the law of international economic relations deals with the legal materia created by the above-mentioned public law character international treaties. These rules are not directly applicable to the subjects of national law (natural and legal persons), first they have to be implemented into the relevant administrative acts, like customs code or laws regulating export or import licensing and similar. Once this is done, these administrative rules will oblige natural and legal persons in that country when they want to engage in an international business transaction. Thus, the rights and obligations stemming from these international treaties affect directly the signatory states.

Private law part of the law of international economic relations deals with international business transactions, which are usually a commercial contract entered into between two or more private parties who have their principal place of business in different countries. The most common of these is a sales transaction where a seller in one country enters into a sales contract with a buyer in another country. These rules will have direct effect on the parties in the transaction, meaning they can refer to them directly in a court procedure (like the provisions of the CISG) provided these treaties are ratified.

This book deals with this private law part of the law of international economic relations, which is called also international business law or the law of international business transactions. Among others, we are going to see how is international sale of goods contract regulated, or financing of international trade, transport of goods, and so on.

To be more precise, we can group contracts in the law of international business transactions into two groups:
(1) independent contracts (for example, international contract of sale, technology transfer, leasing)
(2) accessory contracts (their role is to help the fulfilment of independent contracts), and they can be grouped into:
(i) contracts related to marketing (agency, etc.),
(ii) contracts related to transport of goods,
(iii) contracts related to international payments.

Reading

Regulation (EE) no 593/2008 on the law applicable to contractual obligations[7]

First of all, it should be mentioned, that European Union *regulations* are directly applicable in all EU member states. This specific Regulation applies when there is a dispute related to contractual obligations in civil and commercial matters, and the court has to decide what law to apply (there

[7] Regulation (EE) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), EUR-Lex (https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593).

is a conflict of laws). The Regulation itself contains a list of issues that are excluded from its material scope.[8]

The basic principle is that the parties to a contract have the freedom of choice, that is to say, a contract should be governed by the law expressly chosen by the parties.[9]

In the absence of the parties' choice the Regulation determines the applicable law to the parties' contract. Thus, a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence. A contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence. A contract relating to a *right in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated.[10] A franchise contract shall be governed by the law of the country where the franchisee has his habitual residence. A distribution contract shall be governed by the law of the country where the distributor has his habitual residence. And a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined.

In cases which are not covered by the before-said, or where the elements of the contract would be covered by more than

[8] Art. 1.

[9] Art. 3(1).

[10] A tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country.

one before-said rule, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. Actually, if we examine the rules of the previous paragraph, the same is true: in the case of international sale contract the characteristic performance is providing the goods (there is nothing specific about providing the money, one either has it or not), what is done by the seller, thus, the contract is governed by the law of the country where the seller has his habitual residence.

However, there is an exception to the above-mentioned rules, that is to say, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in the previous two paragraphs, the law of that other country shall apply.

If the law applicable cannot be determined pursuant to the before-mentioned rules, the contract shall be governed by the law of the country with which it is most closely connected.[11]

There are also rules regarding contracts of carriage of goods[12], which say that the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country

[11] Art. 4.

[12] Art. 5; Law applicable to the carriage of passengers is also regulated, however, we do not deal with it here.

where the place of delivery as agreed by the parties is situated shall apply.

The law applicable to consumer contracts,[13] insurance contract[14] and individual employment contracts[15] are also regulated in this Regulation.

Glossary

opportunity cost - the value of the action that you do not choose, when choosing between two possible options
dismantle – to tear down
dispatch – to send to a specific destination
conduct – behaviour
enforce – to impose by force; to make people obey a law
treaty - international agreement in writing among states
in good faith - done in an honest and sincere way
sovereign immunity - an exemption that precludes bringing a suit against the sovereign state without its consent
seize – to take control of
tort - a wrong that is committed by someone who is legally obligated to provide a certain amount of carefulness in behavior to another and that causes injury to that person, who may seek compensation in a civil suit for damages
regulation - a legal instrument of the European Union that is binding in its entirety and directly applicable in all EU member states without the need for national implementing legislation

[13] Art. 6.
[14] Art. 7.
[15] Art. 8.

habitual residence - the geographical place considered "home" for a reasonably significant period of time
right in rem - a right that should be respected by other people generally, such as ownership of property
substantive law - a set of rules determining the rights and obligations of the parties
jurisdiction - the right of a court to hear a particular case

Questions and exercises

I.1. Please, choose the correct answer:
We can define law as:
A. sanctioned conduct enforced by the state
B. rules of conduct enforced by the state
C. rule of law enforced by the state
D. rules of sanction enforced by the state
I.2. Please, arrange sources of law starting with the highest in the hierarchy to the lowest:
A. ratified international conventions
B. decree
C. constitution
D. law (statute)
I.3. Please, fill in the blank: Conflict of laws (choice of law or private international law) rules help the parties and the court to determine the applicable law in private law legal relationships (like business transactions) that involve a _____ _____ like person or property, when the laws of different states would be applicable.
I.4. In private law (*e.g.* in a contractual relationship):
A. the state and private parties are on equal footing
B. the state is superior to private parties
C. the state is superior to private parties only in front of courts

D. the state is superior to private parties only in renting properties from private parties

I.5. Please, fill in:

Contract for…	*connecting factor…*
sale of goods	
provision of services	
tenancy of immovable property	
franchise contract	

Useful sources

Introduction to Law, Basic Concepts of Law:
http://kretschmer.cc/pdf/introduction_1.pdf
How laws are made in the UK:
https://www.youtube.com/watch?v=iM4CKYCrW7Y
Separation of Powers explained:
https://www.youtube.com/watch?v=e1cN5KuB5s0

Chapter II
Contract for the international sale of goods

Contracts in the law of international business transactions can be grouped into two groups as already mentioned in Chapter I: (1) independent contracts (like contracts for the international sale of goods), and so-called (2) accessory contracts, which basically serve the coming into existence and execution of the independent contract. There are three main groups of such accessory contracts. It is easy to remember them if we think about what is necessary for the execution of a sale contract. First of all, buyer (or seller) should be found for the goods. (i) Contracts related to the marketing of goods (like agency contract) will help in this. Once the goods are sold, they have to be transferred to the buyer, in this (ii) contracts related to transport of goods will help the parties. And finally, the buyer will have to pay for the goods, in which (iii) contracts related to international payments will be helpful.

The most important of independent contracts in international trade is the contracts for the international sale of goods, which is discussed in this chapter.

The United Nations Convention on Contracts for the International Sale of Goods

In international business transaction parties want legal security and predictability. Among others, it means that they want to know what law will be applicable to their transaction, because potentially several national laws can be applicable. The best solution for this problem is to have a universally applicable substantive law. We have already

talked about standardization. If you have the same rules for all international sale contracts, it means that you will know what rules will be applicable to your business transaction, you will not need a foreign legal counsel, translation services, and so on. Simply said, you know what to expect. This has been partly achieved by the United Nations Convention on Contracts for the International Sale of Goods (the abbreviation used for it is CISG)[16]. I said partly, because unfortunately it does not deal with all legal issues that can be relevant related to an international sale contract. Basically, it deals with two fields (art. 4, 5):
(1) formation of the sale contract,
(2) rights and obligations of the parties.

The CISG is not concerned with other issues, like the validity of the contract and so on. Substantive law applicable to those issues is determined by the court seized based on the private international law rules (conflict of law rules) of the forum. That is to say, it is very difficult to predict what law will be applicable to those issues.

More than 80 states have ratified the CISG, among them the most important trading nations like China, the United States of America or Germany. We are going to follow the structure of the Convention, and start with the sphere of application and general provisions. This will be followed by the part on formation of the sale contract, rights and obligations of the parties, remedies for the breach of contract, and final provisions.

[16] It is sometimes called “Vienna Convention”.

Like national laws, the CISG has also material, personal and territorial **scope**. Material scope (art. 1, 2) reflects that the contract is about sale of goods. If the transaction is not about sale of goods, the Convention does not apply. Therefore, we should examine what is considered "goods" under the Convention. The CISG does not define goods, it gives only a negative definition, that is to say, art. 2 tells us what is not considered goods, what is excluded from the scope of the Convention. These things can be divided into two categories.

First, because of the nature of the transaction are excluded:
- goods bought for personal, household use (the reason might be that in lot of countries there are special rules for consumer protection, that is to say, consumers are better protected than experienced merchants),
- goods bought on auction, and
- goods bought on execution (buying on auction and execution is usually specially regulated).

Second, because of the nature of the object of the transaction the following is excluded:
- negotiable instruments, stock, shares, money (these are under a special regime of regulation in sovereign states),
- ship, aircraft (these things have to be registered, that is to say, they are treated like quasi-immovables),
- electricity (it is a special kind of product, because it cannot be stored (only negligible part), and therefore electricity produced has to be used up almost simultaneously; thus, it is very difficult to foretell how much will be used (sold) in a given period; therefore, in international trade of energy the settlement of accounts is done posteriorly).

All other movables fall under the material scope of the Convention.

Personal scope (art. 1, 10) reflects that it is about international sale of goods, that is to say, between parties whose places of business are in different states. However, the parties should know about this when concluding the contract. For example, two Spanish speaking businessmen meet in Madrid and conclude a contract of sale, and later it turns out that one of them is from Colombia and he did not tell it to his business partner during the conclusion of the contract. Although, both countries adopted the CISG, the Convention is not applicable, because the Spanish businessman did not know about the fact that the place of business of his counterparty is not in Spain.

Talking about the place of business, it should be mentioned here that if one of the parties has more than one place of business, the one which has the closest relationship to the contract and its performance has to be taken into consideration.

And finally, territorial scope (art. 1) means that (1) either their places of business are in contracting states or (2) rules of private international law lead to the application of the law of a contracting state.

From the introductory provisions of the Convention article 6 is very important in political sense. It says that the parties are free to exclude the application of the Convention. This provision helped lot of governments to convince trade lobbies not to oppose the ratification of the CISG. However, if the parties to an international contract of sale do not exclude

the Convention expressly, it is applicable *ex officio*, that is to say, the parties do not have to refer to its application in front of courts, they will apply it automatically. The reason for this is that with the ratification the Convention becomes part of the body of national laws. However, it should be mentioned that some US courts do not agree with this view.

The general provisions start with the issue of interpretation of the Convention (art. 7), and provides that when interpreting the provisions of the Convention, the following three principles should be respected:
(1) the international character of the Convention,
(2) the need to promote uniformity in its application,
(3) and the principle of good faith.

These are actually guidelines for judges and arbitrators who apply the Convention. However, in practice it is very difficult to expect judges and arbitrators to uniformly apply the Convention's provisions, as they socialize professionally in different legal systems and sub-systems, and usually only few of them have dealt specifically with the CISG and its application before hearing a case related to it. At the same time, there are more and more initiatives to promote uniformity in its application. For example, the Pace Law School has created a very useful database on the CISG, or the CISG Advisory Council has been established as a private initiative in Paris in 2001 to help to promote uniformity when interpreting the Convention's provisions. You will find these links among useful sources.

Article 8 of the Convention deals with the issue of interpretation of the statements of the parties. Paragraph 1 is based on the "subjective" approach: statements should be

interpreted based on the intent of the party making the statement, but only where the other party knew or could not have been unaware of the speaker's intent. However, in practice it is very difficult to prove what was the intent of the speaker and if the other party was aware of it. Therefore, paragraph 2 of the article is important, which is based on the "objective" approach: statements made by a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

The general part deals also with written usages and provides that if the parties did not exclude them expressly, they are applicable to their contract. However, there are three conditions for this:
(1) the parties knew or ought to have known about these usages,
(2) they are widely known in international trade, and
(3) regularly observed in the particular trade concerned.

The next part of the Convention sets forth the **formation of the contract** (art. 14-19). The rule is that the contract is concluded with the acceptance of the offer. However, there are conditions for a valid offer, which has to be (art. 14):
(1) addressed to one or more specific persons,
(2) with the intention to conclude the contract, and
(3) sufficiently definite (if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price).

The acceptance of an offer can be express statement or performance of an act (art. 18). Silence or inactivity is not acceptance. Any substantial alteration of the offer is

considered a counter-offer. For example, if the seller offers 10.000 gadgets, each for 1 dollar, and the buyer accepts this, but with the condition that he will need only 8.000, this will be already a counter-offer, which has to be confirmed (accepted) by the seller. However, if the buyer accepts the offer with the condition that he or she needs only 9.990, that will not be a substantial alteration, and the contract will come into existence without the confirmation of the seller.

The contract is concluded when the acceptance reaches the offeror, and under the CISG there is no formal requirement (art. 11), thus international sale contract can be also concluded orally. However, signatory countries of the Convention may make declaration that they require sale contracts to be in writing. (art. 12, 96).

The part of the Convention which deals with the rights and obligations of the parties first provides for the **obligations of the seller**. According to this, the seller should deliver the goods required by the contract (art. 30, 35). He should also transfer the property in the goods (under *lex causae*, as this issue is not regulated under the Convention), and hand over documents related to the goods.

Regarding the place of delivery (art. 31), the Convention respects the autonomy of the parties, that is to say, they can agree on this. However, if they do not agree, the Convention provides, that it is the seller's place of business at the time of the conclusion of the contract. It is easy to remember, the seller provides the characteristic performance, while the buyer provides money in exchange. However, if the contract involves carriage of goods, then it is the place of handing over to the first carrier.

As to the time of performance (art. 33), if it is a fixed date in the contract, then performance happens on this date, if not, but there is a period of time defined, the seller can perform any time during this period, and finally, if there is no such, it should be done within a reasonable time.

It has been already mentioned that the goods delivered by the seller should be in accordance with the contract. This issue, the conformity of the goods, is regulated in art. 35. According to this provision, the seller must deliver goods which are of the quantity, quality, description, package required by the contract. However, if the parties missed to define it in the contract, the goods should be:
(1) fit for the purpose for which goods of the same description would ordinarily be used,
(2) fit for particular purpose that was made known to the seller,
(3) and have the same qualities as the sample had, if there was a sample provided by the buyer.
If there is no conformity, legal consequence is breach of contract, regulated in art. 45. The conformity should exist at the moment of passing of risk.

Now, let us see the **obligations of the buyer**. The buyer has two main obligations:
(1) to take the delivery (art. 60), which means, that the buyer has to
(i) do all the acts which could reasonably be expected of him in order to enable the seller to make delivery,
(ii) and to take over the goods, during which the buyer has the right and obligation to examine the goods (within as short a period as is practicable in the circumstances) (art. 38);

and have to give a notice within a reasonable time (subjective deadline, but there is two years objective deadline as well) if the goods are not conforming.
(2) to pay the price (art. 54). Here, we should devote a few words to the issue of determining the price. Usually, it is determined in the contract. However, the contract is still valid if the parties provided in the contract at least the way of determining it. For example, the parties can conclude a contract on March 1st for the sale of 1000 tons of corn, in which they agree that the price will be the corn price on June 1st at the Minneapolis Grain Exchange. The Convention is so very flexible regarding the price, that even if they miss it, article 55 can help, as it provides that, if otherwise the contract is valid, the parties are considered, to have implicitly[17] made reference to the price generally charged:
(i) at the time of the conclusion of the contract,
(ii) for such goods sold under comparable circumstances,
(iii) in the trade concerned.

Regarding the place of payment (art. 57), it is the seller's place of business. The time of payment (art. 58) is when the goods or the documents are handed over, of course, the parties can agree otherwise. It is important to mention that the buyer does not have to pay until he or she examines the goods.

The Convention regulates also the issue of the **breach of contract**. Breach of contract basically means that the agreement is not honored, the violation of contractual obligations. The Convention has introduced the institution of fundamental breach. Fundamental breach means a very

[17] See supra discussion of art. 14.

serious breach of the contractual obligations which entitles the other party to avoid the contract with one-sided statement immediately. The Convention gives a definition in art. 25: it is a breach which results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. With the second part of the definition the Convention tries to mitigate the liability of the party in breach, that is to say, it is not a fundamental breach, if the breaching party, or a reasonable third party, could have not foreseen the result of the breach. But once again, the legal consequence of fundamental breach is that the party not in breach may avoid the contract with one-sided statement immediately or may require substitute goods (art. 46(2)).

If the breach is not fundamental, it is called ordinary, and the consequences of this are less serious. In this case the main rule is price reduction (art. 50) or repair of the goods (art. 46(3)). Avoidance is only exceptional (if there is no delivery of the goods, and the additional deadline is without result) (art. 49, 64).

In practice, the court or arbitral tribunal will determine if the breach was fundamental or not, following these steps:
first, determining if there is a contract in force between the parties,
if yes:
is there breach of contract?
if yes:
is it fundamental or ordinary?
if fundamental: avoidance of the contract and damages

if ordinary: price reduction or repair.

If a party to the contract suffers **damages** due to the breach of the contract by the other party, he or she is entitled to damages (art. 74). Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. But such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract. So, the Convention limits damages to foreseeable damages, foreseeable by the breaching party at the time of the conclusion of the contract. Actually, for a bad seller, and usually the seller is in breach, because he or she has to provide the characteristic performance, this is a very good provision, as there are so many circumstances related to the goods you want to sell which cannot be foreseen. For example, you agree to sell products produced during the next month, but you do not deliver on time. Under the Convention, if you can prove that it is due to the fault of your supplier that the product is not ready, and you could not purchase the component of your product from another supplier, you are not liable. With the buyer, it is more difficult to invoke this excuse, as the buyer provides money, and it is easier to have control over the money than over the goods.

And finally, let us see what the Convention tells us about **passing of risk** related to the goods (art. 66). If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods

over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk. For goods in transit: when/where the contract is concluded, in any other case: where/when the buyer takes over the goods. Unless otherwise agreed, loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price (unless it is due to an act or omission of the seller).

Reading

United Technologies International Inc. Pratt and Whitney Commercial Engine Business v. Magyar Légi Közlekedési Vállalat (Malév Hungarian Airlines)[18] case

Malev Hungarian Airlines planned to buy two jumbo jet aircraft, either from Boeing Aircraft Co. or Airbus of France. The engines for those aircraft were to be purchased separately. The Plaintiff, United Technologies International, Pratt & Whitney, filed a declaratory judgment action in the Metropolitan Court of Budapest for a determination that Pratt & Whitney and Malev had a valid contract for the sale of the jet engines needed by Malev. The Metropolitan Court of Budapest ruled for the Plaintiff and cross-appeals were

[18] September 25, 1992, Supreme Court of Hungary. Source: CISG Database of the Pace Law School (http://cisgw3.law.pace.edu/cases/920925h1.html) (Certain parts of the the original text has been edited with educational intent to make it easier to understand.)

filed. [So, the following is the ruling of the Supre Court of Hungary on those appeals.]

From the fall of 1990 negotiations had been conducted by the parties to the suit and the American VALSAN Co., on the one hand, about the conditions given which the Plaintiff would replace the ineffective engines on the Defendant's Soviet made Tupolyev TU-154 aircrafts with PRATT JT 8D-219 engines, manufactured by the Plaintiff (engine replacement), and on the other hand, about the Plaintiff supplying the PW 4000 series engines for the wide bodied aircrafts, to be purchased by the Defendant. On December 4, 1990 the parties signed a Letter of Intention about their negotiations on the replacement of the engines on the Defendant's already existing Soviet made aircrafts. They expressed their intention - without undertaking any obligations whatsoever - to sign a final agreement in the future in accordance with those contained in the declaration. In the above-mentioned Letter of Intention the Plaintiff stipulated a condition, among others, according to which the signing of the final agreement depended on Defendant's acceptance of Plaintiff's support offer for the purchase of PW 4000 series engines from Plaintiff by Defendant for the wide bodied aircrafts to be purchased.

Plaintiff submitted two purchase-support offers, dated December 14, 1990, to Defendant with the aim of aiding the purchase of two aircrafts, supplied with Plaintiff's engines, whose order was finalized, another one with an option to buy, furthermore, the purchase of one spare engine with a finalized order, and another one with an option to buy. These support offers replaced the one dated November 9, 1990, making that null and void. Both offers made a reference to

the Appendix containing the PW 4000 series engines' Guarantee Plan. One of the offers was made in case the Defendant decided to purchase a 767-200 ER aircraft assembled with PW 4056 engines, the other in case Defendant purchased a 310-300 aircraft equipped with the new PW 4152 or 4156 jet engine systems. At this time Defendant was negotiating with two aircraft manufacturers and had not yet come to a decision about the type of the aircraft to be bought and the company to purchase from. The support offers involved financial assistance (lending), engine warranties, product maintenance and repair services in order to select the engines or jet engine systems produced by Plaintiff.

The offers were kept open by Plaintiff until December 21, 1990 on condition that the validity of Defendant's declaration of acceptance depends on the appropriate provisions to be made by the Government of Hungary and that of the United States. Point Y of both support offers contained the purchase agreements. The place where the Defendant was to sign the support offers in case of acceptance was clearly marked on the document. Defendant did not sign either support offers, but in the presence of Plaintiff's proxy, who at this time extended the offer to include the PW 4060 engine, as well, and on the basis of the discussions carried out with him/her, composed a letter together with him/ her, which was sent to the Vice-President of Plaintiff's company by telex, notifying him/her that -- based on the evaluation of technical data and efficiency, furthermore taking the financial assistance also into consideration -- they had selected the PW 4000 engine for the new wide bodied fleet of aircrafts. Defendant also informed Plaintiff that it is looking forward to the cooperation with PW, especially with respect to the

replacement of the TU-154 aircraft engines, furthermore that the present declaration of acceptance is wholly based on the conditions included in the PW engine offer, dated December 14, 1990. In the meantime Defendant asked Plaintiff to keep this information strictly confidential until they were ready to make a joint public announcement.

Later, in the beginning of February, 1991, the Parties had a verbal discussion, with reference to which Plaintiff addressed a letter to Defendant on February 11, 1991. In this letter Plaintiff declared that an advertising budget of USD 65,000.00 "will be added" to the premium for signing, and offered assistance in selecting a partner for engine maintenance and cooperation in the creation of a spare-parts pool for the maintenance of the line. It was also said that Plaintiff would come to Budapest to continue the discussions on the replacement of the TU154 aircrafts' engines and to finalize the PW 4000 contract.

Following that Defendant notified Plaintiff in writing that Defendant would not choose PW 4000 series engines for the Boeing 767 aircraft. In response to that, still on the same day Plaintiff stated its standpoint, according to which Defendant had definitely and irrevocably committed itself to purchase the new 767 aircraft with PW 4000 engines, asked Defendant to meet its obligations without delay, notify Boeing about its selection of PW 4000 engines and make a public announcement about it. Defendant, on account of its different standpoint, refused to do so.

Plaintiff initiated a suit on July 23, 1991 asking the court to declare that the contract between the Parties legally came to force on December 21, 1990, that its provisions were violated

by Defendant, that Defendant was to meet its contractual obligations, and also asked for the allowance of the legal costs. Plaintiff claimed that Defendant, with its declaration, dated on December 21, 1990, accepted Plaintiff's contractual offer, dated on December 14, 1990, thus a valid, and legally binding contract was made for the sale and purchase of PW 4056 engines and spare engines. According to Plaintiff's position, the December 14,1990 offer fully complies with the content of Paragraph 1, Section 14 of the United Nations Agreement on international sales contracts, dated in Vienna on April 11, 1980 (hereinafter the 'Agreement'), and therefore with the acceptance of the offer the contract had legally come to force. For the offer clearly states the product, its quantity and contains data on the basis of which the price can be determined precisely. The circumstance that Defendant talked about PW 4000 series engines in its declaration of acceptance is insignificant, since the engines listed in the offer all belong to this series, furthermore, the offer indicated the engines' number within the series, as well. The extension of the December 14,1990 offer to include the PW 4060 engine and the modification of the engine's maintenance and cost warranty plans by the Plaintiff's business representative were precisely in response to Defendant's request. The offer provided an opportunity for Defendant to choose the type of the aircraft from the two alternatives and, accordingly, that offer should be deemed accepted, which corresponded to the type of the selected aircraft. The quantity could also be defined on the basis of the offer, since it depended upon the Defendant purchasing two or three planes. The price was also defined, since it could be arrived at by calculating the costs. Defendant knew the technical characteristics of the engines involved in the suit, had received the engine's specifications and additional

necessary documentation to which Defendant referred in its declaration of acceptance.

Defendant asked for the dismissal of the suit. Defendant did not acknowledge entering into a contract with Plaintiff about the engines involved in the suit. According to Defendant's position, Plaintiff's December 14, 1990 offers could not be regarded as a contractual offer, for they did not contain the data stipulated by Paragraph 1, Section 14 of the Agreement. The support offers, dated December 14, 1990, did not properly identify the goods, i.e. any one of the actual engines, that could be the subject of the contract and should be delivered by the Plaintiff. Neither did the definition of quantity comply with the provisions of Paragraph 1, Section 14 of the Agreement and the document did not indicate the price of the engines to be installed at all. For the price of the PW 4056 series spare engine is not identical with the price of the PW 4056 engine, neither is the price of the PW 4056 series engine identical with the price of the PW 4000. The so called pricing formula could only be applied if the base price of the given engines would have been defined at the time of making the contract. According to the data supplied by Plaintiff the base price would also have to be calculated, however, the data were not even sufficient for that, since Plaintiff did not indicate its own price index. Engines do not have general market prices, therefore, general market prices cannot be used for guidelines. Since the aircraft manufacturer would be paid by Defendant, while Plaintiff would be paid by the aircraft manufacturer for the engines, the precise knowledge of the price is absolutely necessary, for it is to be harmonized with the financial conditions and the terms of payment given by the aircraft manufacturer. According to Defendant's position the debated offer involved

in the lawsuit does not qualify as an offer, if the cited Section of the Agreement is interpreted correctly, for it does not express Plaintiff's intention to regard itself to be under contractual obligation in case of acceptance. This is also proven by the fact that in its letter of February 11, 1991, Plaintiff still writes about the finalization of the contract and did not transfer the 1 million US dollar premium for signing either. This is the buyer's contractual premium, in case the offer is accepted within its deadline.

Defendant also referred to the fact that Plaintiff tied the validation of the contract to conditions, and the declaration of acceptance was not signed either by the United States or the Hungarian government.

According to the Defendant's position, even if Plaintiff's offer had complied with the stipulations set by the Agreement, the contract would not have been established, for Defendant's December 21, 1990 letter cannot be regarded as acceptance. This letter refers to the engine family in general terms only, and stipulated a condition that could qualify as a brand new counter-offer, when Defendant based its declaration on the replacement of the TU-154 fleet's engines.

The court of first instance passed a partial judgment and stated that, based on the Plaintiff's December 14, 1990 offers, the Defendant's December 21, 1990 declaration of acceptance, and on the negotiations conducted between December 16 and December 21, 1990, furthermore on the attached documents, the contract was established.

In case of legal disputes, based on the agreeing declarations of the Parties, the provisions of the United Nations

Agreement on international sales contracts, dated in Vienna, on April 11, 1980, was applied. Considering Paragraph 1, Section 14 of this Agreement the Court stated that Plaintiff's December 14, 1990 offers are defined, for they have indicated the product and essentially determined the quantity and the price, as well. In respect of defining the product, the court of first instance refers to the fact that with the decision being made about the type of the aircraft (December 29, 1990) the type, that forms the subject of the contract, became unambiguously identified from the ones listed. The quantity of the product can also be determined knowing how many planes will be bought by the Defendant. Prices are stated for all the types in the offer. The circumstance that Defendant could select the engine based on the offer itself, depending on the selection of the aircraft, meant a 'unilateral power' for Defendant.

Defendant's December 21, 1990 declaration was regarded as the offer's acceptance by the court of first instance. The reasoning was that the declaration was entirely based upon the December 21, 1990 P & W engine offer. The Court did not accept Defendant's reference to Paragraph 1, Section 19 of the Agreement, for, according to the Court's position, Defendant's declaration contains no such date, that is determined by Paragraph 1 of this Section of the Agreement. The stipulation of the offer, according to which the validity of Defendant's declaration depends on the proper approval of the governments of the United States and Hungary, is without significance, according to the position of the court of first instance, for the Agreement contains no such qualified stipulations. Otherwise, Defendant is an independent company that brings its own decisions, which do not depend on the approval of the founding organizations. According to

the proper interpretation of the debated stipulation Plaintiff did not make Defendant's declaration of acceptance dependent upon the cited condition, rather Plaintiff's fulfillment was made conditional, therefore, the stipulation shall be regarded as a 'condition of termination'.

In respect of the passage of Plaintiff's letter, dated February 11, 1991, concerning the replacement of the TU-154 aircrafts' engines and the finalization of the PW 4000 contract, the Court expressed its view, according to which there could be no doubt that, interpreting the entire content of the letter, Plaintiff writes about a later addition to the contract.

Defendant appealed against the above partial judgment and primarily asked for the reversal of the partial judgment of the court of first instance and the nonsuit of the Plaintiff. Secondly, in case the evidences were to be supplemented, asked the court of the second instance to annul the partial judgment of the first instance and to order the court of first instance to retrial the suit and to pass a new judgment.

On December 14, 1990 plaintiff made two different offers in case Defendant selects Boeing or in case it selects Airbus. These offers annulled the November 9, 1990 offers and replaced them. In the December 14, 1990 purchase-support offer for the Boeing scenario Plaintiff indicated two engines, taking the modification also into consideration, the PW 4056 and the PW 4060, from which, according to Point Y.l of the offer Defendant was to choose and to notify the aircraft manufacturer about its choice. In Point Y.2 Plaintiff undertook to sell the engines to Defendant on the basis of a separate agreement with the manufacturer. In this offer

Plaintiff indicated the price of the new PW 4056 engine to be USD 5,847,675, which could increase according to the stability of value calculations from December, 1989. The modified offer does not contain the base price of the PW 4060 engine and spare engine.

The other offer, dated on the same day and intended for the Airbus scenario, among the PW 4000 series engines indicated two engines, PW 4152 or PW 4156, a jet engine system and a spare engine, from which Defendant was to make its selection according to Point Y.l and Y.2 of the offer, and upon acceptance of the offer to notify the aircraft manufacturer immediately. According to Point Y.2 Plaintiff undertook to sell the jet engine systems, the number of which was indicated, on the basis of a separate contract made with the aircraft manufacturer. In this offer Plaintiff indicated the price of the new PW 4152 spare engine base unit to be USD 5,552,675, and the price of the new PW 4156/A spare engine to be USD 5,847,675, with stabilizing their values starting from December, 1989.

According to Point Y.4 of both offers, with the acceptance of the offer Defendant was to send a finalized and unconditional order for the spare engines indicated in the offers.

In case of the offer for the Airbus scenario, the indicated jet engine system includes the engine, other parts and the gondola as well, while 'engine' means the motor only, therefore the price of the jet engine system is not identical with the price of the engine (motor). The offer contained the price of neither jet engine systems.

According to Paragraph 1, Section 14 of the Agreement a proposal to enter into a contract, addressed to one or more persons, qualifies as a bid if it is properly defined and indicates the bidder's intention to regard itself to be under obligation in case of acceptance. A bid is properly defined if it indicates the product, expressly or in essence defines the quantity and the price, or contains directions as to how they can be defined. This means that the Agreement regards the definition of the subject of the service (product), its quantity and its price to be an essential element of a bid.

It can be determined on the basis of the given evidences and the Parties' declarations, that Plaintiff made two parallel offers for the same deal on December 14, 1990, depending on Defendant's choice of the Boeing or the Airbus aircraft. In case Boeing was selected, within the respective offer two separate engines (PW 4056 and PW 4060) were indicated. This offer did not contain the base price of the PW 4060 engine.

In case Airbus was selected, within the respective offer two different jet engine systems (PW 4152 and PW 4156), belonging to the same series, and two different spare engines (PW 4152 and PW 4156/A) were indicated. The base price of the jet engine systems is not included in the offer, only that of the spare engines, in spite of the fact that these two elements are not identical either technically or in respect of price. In case there is no base price, value stability calculations have no importance. The price cannot be determined according to Section 55 of the Agreement either, as jet engine systems have no market prices.

The court of appeals did not accept Plaintiff's position, according to which it did not have to make an offer in respect of the jet engine systems' price, for these would have been billed to the aircraft manufacturer, who includes it in the price of the airplane. For according to the offers (Point Y.2) the engines, the jet engine systems and the spare engines would have been purchased by Defendant from Plaintiff, therefore Plaintiff would have established a contractual relationship with Defendant, as the buyer. That is, the two offers, involved in the suit, related not only to the sales of the spare engines, but also to the engines to be built in and the jet engine systems. Therefore, according to Section 14 of the Agreement, Plaintiff would have had to provide the price of all the products, engines and jet engine systems in its parallel or alternative offer involved in the suit, or the directions for the determination of the price thereof, to the Defendant.

It clearly follows from the above, that none of Plaintiff's offer, neither the one for the Boeing aircraft's engines, nor the one for the Airbus aircraft's jet engine systems, complied with the requirements stipulated in Paragraph 1, Section 14 of the Agreement, for it did not indicate the price of the services or it could not have been determined.

Plaintiff's parallel and alternative contractual offers should be interpreted, according to the noticeable intention of the offer's wording and following common sense, so, that Plaintiff wished to provide an opportunity to Defendant to select one of the engine types defined in the offer at the time of the acceptance of the offer.

For according to the wording of Section Y of the offers:

- Defendant, following the acceptance of the proposal, immediately notifies the aircraft manufacturer about the selection of one of the numerically defined engines (jet engine systems) for use on the wide bodied aircrafts;
- Plaintiff sells the selected engine (jet engine system) to Defendant according to a separate agreement made with the aircraft manufacturer;
- Thereby (that is, with the acceptance of the proposal) Defendant sends a final and unconditional purchase order to Plaintiff for the delivery of the spare engines of the determined type.

In addition to grammatical interpretation, the assumption of Plaintiff granting "power" to Defendant, made by the court of first instance, essentially entitling Defendant to make its selection until some undetermined point of time or even during performance from the services offered alternatively, goes against economic reasoning as well. For the legal consequences of this would be that Plaintiff should manufacture the quantity, stipulated in the contract, of all four types -- two engines and two jet engine systems -- and prepared with its services wait for Defendant to exercise its right to make its selection with no deadline.

It follows from this all that Plaintiff provided an opportunity to choose a certain type of engine or jet engine system at the time of the acceptance of its offer.

Plaintiff's offers were alternative, therefore Defendant should have determined which engine or jet engine system, listed in the offers, it chose. There was no declaration made, on behalf of Defendant, in which Defendant would have indicated the subject of the service, the concrete type of the

engine or jet engine system, listed in the offers, as an essential condition of the contract. Defendant's declaration, that it had chosen the PW 4000 series engine, expresses merely Defendant's intention to close the contract, which is insufficient for the establishment of the contract.

Therefore, the court of first instance was mistaken when it found that with Defendant's December 21, 1990 declaration the contract was established with the "power" -- or, more precisely stipulation -- according to which Defendant was entitled to select from the indicated four types (PW 4056 or PW 4060 engine and spare engine, PW 4152 or PW 4156 jet engine system and spare engine) with a unilateral declaration later, after the contract had been closed. The opportunity to choose after closing the contract does not follow from the offer. If perhaps such a further condition would have been intended by Defendant, then this should have been regarded as a new offer on its behalf.

Lacking an appropriately explicit offer from Plaintiff and not having a clear indication as to the subject of the service in Defendant's declaration of acceptance, no sales contract has been established between the Parties.

Comments and questions

The main issue in this case was whether there was an international sale contract formed between the parties. The seller of the engines (the plaintiff) claimed that there was, however, the defendant (the Hungarian buyer) claimed that there was no contract formed. The main argument of the defendant was that the proposal for concluding a contract addressed to the defendant was not an offer because it was

not sufficiently definite as required by article 14 (1) of the CISG. The first instance court awarded for the plaintiff, that is to say, for the seller. However, the defendant appealed the decision. The second instance court was the Supreme Court of Hungary, which had to decide first if the CISG was applicable at all. It decided that it is not about the sale of aircrafts (what is excluded from the material scope of the CISG by article 2), but only part to aircrafts, aircraft engines. Following this, the Supreme Court had to decide how to interpret the statements of the parties under article 8 of the CISG, and if there was a valid offer and acceptance of offer. The Court stated that „Plaintiff's offers were alternative, therefore Defendant should have determined which engine or jet engine system, listed in the offers, it chose." However, „Defendant's declaration, that it had chosen the PW 4000 series engine, expresses merely Defendant's intention to close the contract, which is insufficient for the establishment of the contract." The defendant did not name the exact model within these series.

Based on the facts of the case you read, and the relevant articles of the CISG do you think that the Hungarian Supreme Court's decision was well-founded?

After having all the information and accepting the offer of the seller was not the intention of the Hungarian party to authorize the plaintiff to choose from the two models, and deliver the one which is the most adequate for the Hungrian party's aircraft?

In this case why did not use art. 55 the Supreme Court to determine the price?

Can you find illogical arguments in the opinion of the Supreme Court?

Glossary

substantive law - law that creates or defines rights, duties, obligations, and causes of action that can be enforced by law
ratification - the act or process of formal confirmation of a treaty by the legislature
forum - the court
execution - the process of enforcing a judgment (as against a debtor)
negotiable instrument - a transferable instrument (as a note, check, or draft) containing an unconditional promise or order to pay to a holder or to the order of a holder upon issue, possession, demand, or at a specified time
performance of a contract - the fulfillment of a contract
ex officio - because of your job, office, or position (by official duty)
good faith - honesty or lawfulness of purpose, honesty in dealing with other people
reasonable person - a fictional person with an ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion, or expectation in relation to a particular circumstance or fact is used as an objective standard by which to measure or determine something (as the existence of negligence)
alteration - the process of changing something
counter-offer - an offer that is made in response to another and that has additional or differing terms
lex causae - in conflict of laws, is the law chosen by the forum court from the relevant legal systems when it judges an international or interjurisdictional case.
grain exchange - an organized market or center for trading in commodities like grain
fundamental - of central importance

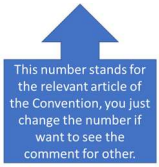
damages - the money awarded to a party in a civil suit as reparation for the loss or injury for which another is liable

Questions and exercises

II.1. Accessory contracts in international business law are (which one is the odd):
A. contracts related to marketing
B. contracts related to transport of goods
C. contracts related to sale of goods
D. contracts related to international payments
II.2. The places of business of seller and buyer are in states A and B, both of which are parties to the Vienna Convention. A contract of sale was signed by representatives of seller and buyer in state C (not party to the Convention). The contract provided that seller would deliver the goods to buyer in state C. The contract had no provision designating the applicable law. What law is applicable to the contract and why?
II.3. An Austrian student of economics buys on the internet a bottle of Rioja Gran Reserva from Spain. Is the Vienna Convention applicable for this transaction?
II.4. What are the conditions for a valid offer under the Vienna Convention?
II.5. Please, find the odd, wrong answers: Under the Vienna Convention, acceptance of offer can be:
A. silence
B. express statement
C. performance of an act
D. inactivity
II.6. What are the steps under the Vienna Convention of determining if there was a breach of contract and how serious was it?

Useful sources

CISG Advisory Council https://www.cisgac.com/
Elisabeth Haub School of Law at Pace University http://www.cisg.law.pace.edu/cisg/text/cisg-toc.html
John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed. (1999), Kluwer Law International, The Hague http://www.cisg.law.pace.edu/cisg/biblio/ho1.html



Chapter III
INCOTERMS

INCOTERMS stands for „international commercial terms", which are international written usages published by the International Chamber of Commerce (ICC) Paris. The newest version is from 2020. As it is the case with other international written usages, they are applicable only if expressly agreed by the parties in an international contract (e.g. INCOTERMS 2020 FOB Szeged International Port Dock IV, March 10, 2023, 10:00)

INCOTERMS regulate three things:
(1) the place and time of handing over/taking over the goods,
(2) bearing of costs, and
(3) the passage of risk.

The INCOTERMS rules do NOT deal with the following matters:[19] whether there is a contract of sale at all; the *specifications* of the goods sold; the time, place, method or currency of payment of the price; the *remedies* which can be sought for breach of the contract of sale; most consequences of delay and other breaches in the performance of contractual obligations; the effect of sanctions; the imposition of tariffs; export or import prohibitions; force majeure or hardship; intellectual property rights; or the method, venue, or law of dispute resolution in case of such breach.

These issues are regulated by the law applicable to the contract, what is lot of times the CISG (or substantive

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national law determined by conflict of law rules of the forum).

In the following we are going to present each term with a short explanation based on the INCOTERMS official description.[20]

EXW Ex Works The seller/exporter makes the goods available to the buyer in its own warehouse, and is only responsible for packing the goods. The buyer/importer therefore bears all of the costs and responsibilities from the moment the goods cross the warehouse prior to loading. Insurance is not mandatory, but should it be required, it would be taken out by the buyer, as the buyer bears the risk.

FCA Free Carrier The seller delivers the goods to an agreed place and bears the costs and risks up to the point of delivery of those goods at the agreed place, including the cost of export clearance. The seller is responsible for inland transport and export *customs clearance*, unless the designated place is the seller's premises (FCA warehouse), in which case the goods are delivered there and loaded onto the means of transport arranged by the buyer at the buyer's expense. The buyer bears the costs from loading on board to unloading, including insurance, if taken out, because he bears the risk when the goods are loaded onto the first means of transport.

[20] INCOTERMS 2020 by the International Chamber of Commerce (ICC), Tiba Group (https://www.tibagroup.com/blog/incoterms-2020)

FAS Free Alongside Ship The seller delivers the goods to the port of origin loading dock, and bears the costs up to delivery, as well as being responsible for export customs procedures. The buyer is responsible for loading on board, *stowage*, *freight* and other costs up to delivery at destination, including import clearance and insurance, if taken out, as it is not mandatory. The buyer also bears the risk once the goods are in the loading dock prior to being loaded onto the ship.

FOB Free On Board The seller bears the costs until the goods are loaded onto the ship, at which point the risks are transferred as well as responsibility for export clearance and costs at origin. The seller also arranges the transport although the buyer bears the cost. The buyer is responsible for the cost of freight, unloading, import clearance and delivery at destination as well as insurance should he take it out. The transfer of risk occurs when the goods are on board.

CFR Cost and Freight The seller is responsible for all costs until the goods arrive at the destination port, including export clearance, costs at origin, freight and usually unloading costs. The buyer is responsible for import procedures and transport to destination. He also bears the risks from the moment the goods are on board, hence, although it is not mandatory, the buyer usually takes out insurance.

CIF Cost, Insurance and Freight As with CFR the seller bears all the costs up to arrival at the destination port, including export clearance, costs at origin, freight and usually unloading. However, unlike CFR, the seller must also arrange insurance even though the risks transfer to the buyer once

the goods are loaded on board. The buyer bears the import and transport to destination costs.

CPT Carriage Paid To The seller bears the costs until the goods are delivered to an agreed place, i.e., they are responsible for all of the costs at origin, export clearance, the main transport and usually, costs at destination. The buyer is responsible for import procedures and insurance if taken out as it is not mandatory. The risk is transferred to the buyer once the goods are loaded onto the first means of transport arranged by the seller.

CIP Carriage and Insurance Paid to The seller bears the costs up to delivery at an agreed place at destination, i.e., the costs at origin, export clearance, freight and also insurance which is mandatory. The importer is responsible for import clearance and delivery at destination and takes on the risk when the goods are loaded onto the first means of transport.

DPU Delivered at Place Unloaded The seller bears the costs and risks arising at origin, packing, loading, export clearance, freight, unloading at destination and delivery at the agreed point. The buyer is responsible for import clearance procedures.

DAP Delivered At Place The seller bears all the costs and risks of the operation apart from import clearance and unloading at destination, i.e., all costs at origin, freight and inland transport. The buyer is only responsible for import clearance and unloading.

DDP Delivered Duty Paid The seller bears all costs and risks from packing and checking in their warehouses to delivery at

final destination, including export and import clearance, freight and insurance, if taken out. The buyer only has to receive the goods and usually unloads them, although this can also be done by the seller.

The following table might help you to better understand INCOTERMS:

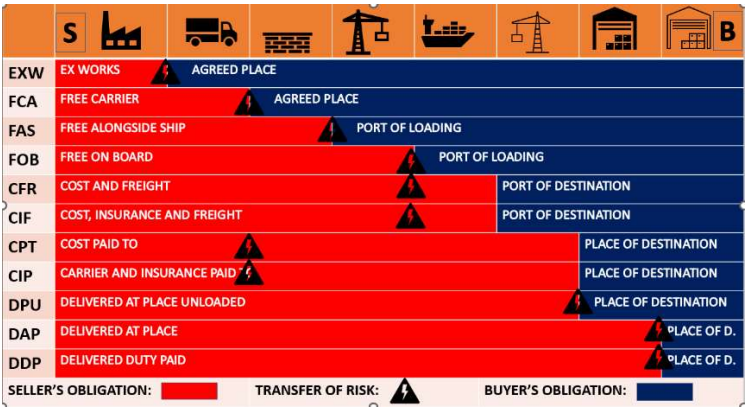

Fig. 1[21]

[21] Prepared by the author.

Reading

In the following you can find a short excerpt from Juana Coetzee's article "The interplay between INCOTERMS and the CISG". Please, read it carefully and answer the questions related to the text.

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ARTICLES

THE INTERPLAY BETWEEN INCOTERMS® AND THE CISG

Juana Coetzee

[…]

The provisions of the CISG are drafted as default rules. This means that the Convention places a high premium on the principle of party autonomy.[13] Article 6 of the CISG grants parties the freedom to "derogate from or vary the effect of any of its provisions" or even to exclude the application of the CISG altogether by means of contractual agreement. It is therefore permissible to depart from the provisions of the CISG to varying degrees. Parties can either deviate from the effect of a particular rule or they can totally exclude a provision and replace it by their own regulation.[14] Hence, it is a matter of interpretation to establish whether the CISG's

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[13] All the provisions of the Convention are non-mandatory and can be replaced by party agreement. *Accord id.* at arts. 6, 12.

[14] Ingeborg Schwenzer & Pascal Hachem, *Article 6*, *in* SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 3, at 102, 103; Michael Joachim Bonell, *Article 6*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW § 2.1 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 74 (Harry M. Flechtner ed., 4th ed. 2009).

provisions apply in a particular case. Guidelines for determining the intention of the parties are provided in article 8 of the Convention.

Once parties have agreed on an INCOTERMS® rule, the entire definition of the rule is incorporated into the contract on the basis of article 6 CISG.[15] Alternatively, the rule may apply as a contractual trade usage on which the parties agree by virtue of article 9(1) of the CISG.[16] In the absence of express incorporation, INCOTERMS® may apply on the basis of article 9(2) of the CISG as widely-observed international trade usages of which the parties knew or ought to have known.[17]

Where there is express agreement on the incorporation of INCOTERMS®, they will prevail over the Convention's default law on delivery[18] and the passing of risk.[19] However, courts and arbitral tribunals sometimes differ on whether INCOTERMS® replace the CISG's rules on delivery. Some judicial decisions have held that contracts concluded on F- or C-terms are still regulated by article 31(a) of the CISG in so far as the delivery obligations are concerned;[20] that the incorporation of a trade term

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[15] UNCITRAL, *supra* note 2, at 315; LOOKOFSKY, *supra* note 3, at 100–01.

[16] Martin Schmidt-Kessel, *Article 9*, *in* SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 3, at 182, 185; HONNOLD, *supra* note 14, § 114.

[17] *See* Perales Viscassillas, *supra* note 3, at 290; St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH, No. 00 Civ. 9344 (SHS), 2002 WL 465312 (S.D.N.Y. Mar. 26, 2002), *aff'd*, 53 Fed. Appx. 173 (2d. Cir.); B.P. Oil Int'l Ltd. v. Empresa Estatal Petroleos De Ecuador, 332 F.3d 333 (5th Cir. 2003). *But see* Jan Ramberg, *CISG and INCOTERMS 2000 in Connection with International Commercial Transactions*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 394, 403 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008); Schmidt-Kessel, *supra* note 16, at 187, 196; HONNOLD, *supra* note 14, § 118.

[18] Burghard Piltz, *INCOTERMS and the UN Convention on the International Sale of Goods*, CISG ONLINE 20 YEARS CONFERENCE, http://www.20jahre.cisg-library.org/piltz_intro.html (last visited Nov. 6, 2013); UNCITRAL, *supra* note 2, at 130. *See also generally* Henry Deeb Gabriel, *General Provisions, Obligations of the Seller, and Remedies for Breach of Contract by the Seller*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE UN SALES CONVENTION, *supra* note 3, at 336, 346–48; Alejandro M. Garro, *Cases, Analyses and Unresolved Issues in Articles 25–34, 45–52*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE UN SALES CONVENTION, *supra* note 3, at 362, 372.

[19] Schwenzer & Hachem, *supra* note 14, at 109; Berman & Ladd, *supra* note 6, at 423–24, 430; HONNOLD, *supra* note 14, § 363; Goodfriend, *supra* note 3, at 578; LOOKOFSKY, *supra* note 3, at 101; Jan Ramberg, *To What Extent Do INCOTERMS 2000 Vary Articles 67(2), 68 and 69?*, 25 J.L. & COM. 219 (2005); Ramberg, *supra* note 17, at 400. *See also* UNCITRAL, *supra* note 2, at 315.

[20] *See* UNCITRAL, Case Law on UNICTRAL Texts (CLOUT), 1999, at 2, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/24 [S.A.P. Cordoba, Oct. 31, 1997 (R.G.D., No. 648) (Spain)].

does not modify the place of performance as indicated in article 31 of the CISG;[21] or that it only regulates the allocation of costs and does not regulate the place of delivery,[22] whilst others have stated the direct opposite.[23] Often the matter will be decided by the circumstances of the particular case.[24] According to the ICC, the point where delivery takes place should not be separated from that where the risk transfers.[25] In the interest of legal certainty this viewpoint is to be supported.

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[21] *E.g.*, UNCITRAL, Case Law on UNICTRAL Texts (CLOUT), 1999, at 3–4, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/23 (discussing Cour d'appel [CA] [regional court of appeal] Paris, Mar. 4, 1998, D. 1998 Somm. 279, obs. B. Audit (Fr.)); *id.* at 4–5 (discussing Cour d'appel [CA] [regional court of appeal] Paris, Mar. 18, 1998, D. 1998 Somm. 279, obs. B. Audit (Fr.)); UNCITRAL, Case Law on UNICTRAL Texts (CLOUT), 2000, at 6, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/28 (discussing Oberlandesgericht Köln [OLG Köln] [Civil Court of Appeal] Aug. 1, 1997, RECHTSPRECHUNG DER OBERLANDESGERICHTE IN ZIVILSACHEN [OLGZ] 27 U 58/96 (Ger.)) [hereinafter UNCITRAL, CLOUT Case No. 311]; UNCITRAL, Case Law on UNICTRAL Texts (CLOUT), 2000, at 10–11, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/31 (discussing Oberlandesgericht Oldenburg [OLG Oldenburg] [higher regional court] Sept. 22, 1998, OBERLANDESGERICHTS-RECHTSPRECHUNGSREPORT OLDENBURG 26, 2000 (Ger.)).

[22] UNCITRAL, Case Law on UNICTRAL Texts (CLOUT), 1999, at 2, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/23 (discussing Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 12, 1996, 134 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 201, 1997 (Ger.)).

[23] *E.g.*, UNCITRAL, CLOUT Case No. 311, *supra* note 21; UNCITRAL, Case Law on UNICTRAL Texts (CLOUT), 2000, at 3, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/30 (discussing Oberlandesgericht Karlsruhe [OLG Karlsruhe] [Civil Court of Appeal] Nov. 20, 1992, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1316, 1993 (Ger.)). *See also* INT'L CHAMBER OF COMMERCE (ICC), Note on Delivery, *available at* http://www.scribd.com/doc/88068794/Incoterms-Note-on-Delivery (last visited Nov. 6, 2013); ICC, *supra* note 10, at 9.

[24] UNCITRAL, *supra* note 2, at 133.

[25] *See* ICC, *Note on Delivery*, *supra* note 23; ICC, *supra* note 10, at 10.

Comments and questions

Glossary

specification - a detailed description of the goods
currency - the money in use in a particular country
(legal) remedy - a way of solving a problem or ordering someone to make a payment for harm or damage they have caused, using a decision made in a law court
customs clearance - official permission to bring goods into or take goods out of a country
stowage - space for storing things on a boat
freight - goods that are transported from one place to another by ship, aircraft, train, or truck; cargo

default rule - a rule of law that can be overridden by the agreement of the parties
derogate - deviate
prevail – dominate over something

Questions and exercises

III.1. Which statement is correct:
A. INCOTERMS are applicable to all international sale contracts because they are international usages
B. INCOTERMS are applicable to international sale contracts only if the parties agreed to apply them
C. INCOTERMS are applicable only to international sale contracts regulated by the Vienna Convention
D. INCOTERMS are applicable to international sale contracts concluded under the auspices of the ICC
III.2. Please, complete: INCOTERMS regulate the following issues:
A. place and time of handing over/taking over the goods
B. bearing of costs
C. …..
III.3. What INCOTERM rule is the following: „seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. the seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination."
A. DAP
B. CPT
C. CFR
D. DCC
III.4. What INCOTERMS is the most favorable for the buyer?
III.5. What does INCOTERMS stand for?

Useful sources

International Chamber of Commerce Paris
https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020/

Chapter IV
Other independent contracts

The contract for the international sale of goods is not the only independent contract, there are others as well. In this chapter some of the most common are presented.

One of these is the **contract for the construction of industrial works.** There are several specific types of this contract, like construction contracts, design, build and operate contracts, contract for construction of building and engineering works, contract for design-build and turnkey. They are usually framework contracts for a very complex project, with several stages, like planning, building, installation of the equipment, training of the personnel, and providing spare parts later if necessary.

The UNCITRAL has elaborated its Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, but the FIDIC Suite of Contracts is also often used in practice in relation to these contracts. You will find links to these texts among useful sources. These guides and models can help you to draft international construction contracts, or to check an already drafted contract by the other party.

Large construction projects several times involve **international transfer of technology contracts** (lot of times it is regulated in the main contract). Technology can be defined as systematic and practical applied technical knowledge which is required or useful for production processes or performance of services. Some technology (invention) is legally protected by industrial property rights (*patent*) for some time. Novelty, inventiveness, industrial applicability of

the invention is the test for patentability. Patent offers protection for certain number of years, on a certain territory. Beside patents, there are also particular industrial property rights (topographies of semiconductors, software, etc.).

The technology transfer can happen either by the assignment of the property rights on the technology by the owner of the protected technical knowledge, or by user's license (when the owner grants right to use the patent). Typical clauses in licensing agreements concerns the scope of application, technical information and guarantee of the licensor for validity of the patent. The applicable law to the transaction is that of the place of protection of the technology.

This field of law on international level is regulated by the Paris Industrial Property Convention 1883. It regulates international patent granting and right of priority (within one year from filing in any member state you can apply in any other). The convention requires national treatment for the applicants of other convention member's citizens, legal persons. World Intellectual Property Organization (WIPO) with its seat in Geneva administers the Convention. There is another international, regional convention in this field, the European Patent Convention, which regulates centralized application. The convention is administered by the European Patent Office, which has its seat in Munich.

Know how should be also mentioned here shortly. It is a secret technical knowledge related to production or services (knowledge not patented), protected only as a „trade secret". It has value, but there is no property right on it.

Leasing[22] is a typical capitalist solution. During the fifties the technological development became very fast, equipment used in agriculture, industrial production became outdated very quickly. However, modernization of equipment for production was costly. Leasing helped both the producers to sell their machines and the users to buy these machines without substantial capital.

There are two types of leasing:
(1) operating leasing and
(2) financial leasing (three parties, two contracts)

We are going to talk about this latter. In financial leasing, there is a leasing contract between the lessor (leasing company, who finances the purchase of the asset and who owns it) and the lessee (who uses the asset and pays periodically for the asset to the lessor). And another supply contract between the supplier (manufacturer) of the asset and the lessor. The lessee specifies the equipment and selects the supplier without relying primarily on the skill and judgment of the lessor. At the end of the term, the lessee usually has the right to purchase the asset at residual value (optional).

Please, examine carefully the next illustration:

[22] Some scholars consider leasing accessory contract which helps the producer to sell the goods.

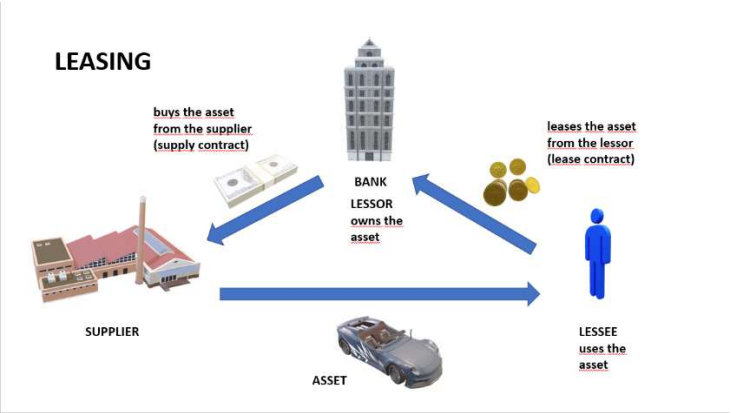

Fig. 2[23]

In legal sense, there is division between legal and economic ownership of the leased asset. Legal ownership stays with the lessor, while the risk, maintenance and rewards related to the asset are on the lessee, but he or she is obliged to proper use of the asset. The lessee will detect the asset in its financial statement. Subject of leasing contract can be also non-consumable goods (property, staff). Duties of the supplier under the supply agreement are also owed to the lessee as if the asset was supplied to him or her.

Leasing is typically regulated in national laws worldwide. There is no EU regulation. Regarding international regulation, the UNIDROIT elaborated a convention, Convention on International Financial Leasing (signed in Ottawa, in 1988). This Convention applies when the lessor and the lessee have their places of business in different states and:

[23] Prepared by the author.

(a) those states and the state in which the supplier has its place of business are contracting states; or
(b) both the supply agreement and the leasing agreement are governed by the law of a contracting state.
Some of the most important provisions of the Conventions are that assets for personal use are not covered by international instruments, and that the lessor has usually priority in case of bankruptcy of the lessee.

Reading

Eco Swiss v Benetton International[24]

[…]

9 On 1 July 1986 Benetton, a company established in Amsterdam, concluded a licensing agreement for a period of eight years with Eco Swiss, established in Kowloon (Hong Kong), and Bulova Watch Company Inc. (`Bulova'), established in Wood Side (New York). Under that agreement, Benetton granted Eco Swiss the right to manufacture watches and clocks bearing the words `Benetton by Bulova', which could then be sold by Eco Swiss and Bulova.

10 Article 26.A of the licensing agreement provides that all disputes or differences arising between the parties are to be settled by arbitration in conformity with the rules of the Nederlands Arbitrage Instituut (Netherlands Institute of

[24] Judgment of the Court of 1 June 1999. - Eco Swiss China Time Ltd v Benetton International NV. - Case C-126/97. (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61997CJ0126).

Arbitrators) and that the arbitrators appointed are to apply Netherlands law.

11 By letter of 24 June 1991, Benetton gave notice of termination of the agreement with effect from 24 September 1991, three years before the end of the period originally provided for. Arbitration proceedings were instituted between Benetton, Eco Swiss and Bulova in relation to the termination of the agreement.

12 In their award of 4 February 1993, entitled `Partial Final Award' (hereinafter `the PFA'), lodged at the registry of the Rechtbank (District Court) te 's-Gravenhage on the same date, the arbitrators directed inter alia that Benetton should compensate Eco Swiss and Bulova for the damage which they had suffered as a result of Benetton's termination of the licensing agreement.

13 When the parties failed to come to agreement on the quantum of damages to be paid by Benetton to Eco Swiss and Bulova, the arbitrators on 23 June 1995 made an award entitled `Final Arbitral Award' (hereinafter `the FAA'), which was lodged at the registry of the Rechtbank on 26 June 1995, ordering Benetton to pay USD 23 750 000 to Eco Swiss and USD 2 800 000 to Bulova by way of compensation for the damage suffered by them. By order of the President of the Rechtbank of 17 July 1995, leave was given to enforce the FAA.

14 On 14 July 1995, Benetton applied to the Rechtbank for annulment of the PFA and the FAA on the ground, inter alia, that those arbitration awards were contrary to public policy by virtue of the nullity of the licensing agreement under

Article 85 of the Treaty, although during the arbitration proceedings neither the parties nor the arbitrators had raised the point that the licensing agreement might be contrary to that provision.

15 The Rechtbank dismissed that application by decision of 2 October 1996, whereupon Benetton appealed to the Gerechtshof (Regional Court of Appeal) te 's-Gravenhage, before which the case is pending.

[…]

19 The Gerechtshof took the view that Article 85 of the Treaty is a provision of public policy within the meaning of Article 1065(1)(e) of the Code of Civil Procedure, infringement of which may result in annulment of an arbitration award.

20 However, the Gerechtshof considered that, in the proceedings before it for stay of enforcement, it was unable to examine whether a partial final award such as the PFA was in conformity with Article 1065(1)(e) of the Code of Civil Procedure, since Benetton had not lodged an application for annulment within three months after the lodging of that award at the registry of the Rechtbank, as required by Article 1064(3) of the Code of Civil Procedure.

21 Nevertheless, the Gerechtshof took the view that it was able to examine the FAA in relation to Article 1065(1)(e), particularly as regards the effect of Article 85(1) and (2) of the Treaty on the assessment of damage, since to award compensation for damage flowing from the wrongful termination of the licensing agreement would amount to

enforcing that agreement, whereas it was, at least in part, void under Article 85(1) and (2) of the Treaty. The agreement in question enabled the parties to operate a market-sharing arrangement, since Eco Swiss could no longer sell watches and clocks in Italy and Bulova could no longer do so in the other countries which were then Member States of the Community. As Benetton and Eco Swiss acknowledge, the licensing agreement was not notified to the Commission and is not covered by a block exemption.

22 The Gerechtshof considered that, in the procedure for annulment, the FAA could be held to be contrary to public policy, and therefore decided to grant the application for a stay in so far as it related to the FAA.

23 Eco Swiss brought proceedings in cassation before the Hoge Raad against the decision of the Gerechtshof and Benetton lodged a cross-appeal.

24 The Hoge Raad observes that an arbitration award is contrary to public policy within the meaning of Article 1065(1)(e) of the Code of Civil Procedure only if its terms or enforcement conflict with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application. It states that, in Netherlands law, the mere fact that, because of the terms or enforcement of an arbitration award, a prohibition laid down in competition law is not applied is not generally regarded as being contrary to public policy.

25 However, referring to the judgment in Joined Cases C-430/93 and C-431/93 Van Schijndel and Van Veen v SPF [1995] ECR I-4705, the Hoge Raad wonders whether the

position is the same where, as in the case now before it, the provision in question is a rule of Community law. The Hoge Raad infers from that judgment that Article 85 of the Treaty is not to be regarded as a mandatory rule which is so fundamental that no restrictions of a procedural nature should prevent it from being observed.

26 Moreover, since it is not disputed that the question whether the licensing agreement might be void under Article 85 of the Treaty was not raised in the course of the arbitration proceedings, the Hoge Raad considers that the arbitrators would have gone beyond the ambit of the dispute if they had inquired into and ruled on that question. In such a case, their award would have been open to annulment pursuant to Article 1065(1)(c) of the Code of Civil Procedure, because they would have failed to comply with their terms of reference. Furthermore, according to the Hoge Raad, the parties themselves could not have raised the question of the possible nullity of the licensing agreement for the first time in the context of the proceedings for annulment.

27 The Hoge Raad states that such rules of procedure are justified by the general interest in having an effectively functioning arbitration procedure and that they are no less favourable to application of rules of Community law than to application of rules of national law.

28 However, the Hoge Raad is uncertain whether the principles laid down by the Court in Van Schijndel and Van Veen, cited above, also apply to arbitrators, particularly since, according to the judgment in Case 102/81 Nordsee v Reederei Mond [1982] ECR 1095, an arbitration tribunal constituted pursuant to an agreement under private law,

without State intervention, is not to be regarded as a court or tribunal for the purposes of Article 177 of the Treaty and cannot therefore make references for a preliminary ruling under that article.

29 The Hoge Raad explains that, under Netherlands procedural law, where arbitrators have settled part of a dispute by an interim award which is in the nature of a final award, that award has the force of res judicata and, if annulment of that interim award has not been sought in proper time, the possibility of applying for annulment of a subsequent arbitration award proceeding upon the interim award is restricted by the principle of res judicata. However, the Hoge Raad is uncertain whether Community law precludes the Gerechtshof from applying such a procedural rule where, as in the present case, the subsequent arbitration award, the annulment of which has been applied for in proper time, proceeds upon an earlier arbitration award.

30 In those circumstances, the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

[…]

(2) If the court considers that an arbitration award is in fact contrary to Article 85 of the EC Treaty, must it, on that ground and notwithstanding the rules of Netherlands procedural law set out in paragraphs 4.2 and 4.4 above [according to which a party may claim annulment of an arbitration award only on a limited number of grounds, one ground being that an award is contrary to public policy,

which generally does not cover the mere fact that through the terms or enforcement of an arbitration award no effect is given to a prohibition laid down by competition law], allow a claim for annulment of that award if the claim otherwise complies with statutory requirements?

(3) Notwithstanding the rules of Netherlands procedural law set out in paragraph 4.5 above [according to which arbitrators must not go outside the ambit of disputes and must keep to their terms of reference], is the court also required to allow such a claim if the question of the applicability of Article 85 of the EC Treaty remained outside the ambit of the dispute in the arbitration proceedings and the arbitrators therefore made no determination in that regard?

(4) Does Community law require the rules of Netherlands procedural law set out in paragraph 5.3 above [according to which an interim arbitration award that is in the nature of a final award acquires the force of res judicata and is open to appeal only within a period of three months following lodgement of the award at the registry of the Rechtbank] to be disapplied if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which an interim arbitration award having the force of res judicata has held to be valid may nevertheless be void because it conflicts with Article 85 of the EC Treaty?

(5) Or, in a case such as that described in Question 4, is it necessary to refrain from applying the rule that, in so far as an interim arbitration award is in the nature of a final award,

annulment of that award may not be sought simultaneously with that of the subsequent arbitration award?'

The second question

31 By its second question, which is best examined first, the referring court is asking essentially whether a national court to which application is made for annulment of an arbitration award must grant such an application where, in its view, that award is in fact contrary to Article 85 of the Treaty although, under domestic procedural rules, it may grant such an application only on a limited number of grounds, one of them being inconsistency with public policy, which, according to the applicable national law, is not generally to be invoked on the sole ground that, because of the terms or the enforcement of an arbitration award, effect will not be given to a prohibition laid down by domestic competition law.

32 It is to be noted, first of all, that, where questions of Community law are raised in an arbitration resorted to by agreement, the ordinary courts may have to examine those questions, in particular during review of the arbitration award, which may be more or less extensive depending on the circumstances and which they are obliged to carry out in the event of an appeal, for setting aside, for leave to enforce an award or upon any other form of action or review available under the relevant national legislation (Nordsee, cited above, paragraph 14).

33 In paragraph 15 of the judgment in Nordsee, the Court went on to explain that it is for those national courts and tribunals to ascertain whether it is necessary for them to make a reference to the Court under Article 177 of the Treaty

in order to obtain an interpretation or assessment of the validity of provisions of Community law which they may need to apply when reviewing an arbitration award.

34 In this regard, the Court had held, in paragraphs 10 to 12 of that judgment, that an arbitration tribunal constituted pursuant to an agreement between the parties is not a `court or tribunal of a Member State' within the meaning of Article 177 of the Treaty since the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator.

35 Next, it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.

36 However, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void.

37 It follows that where its domestic rules of procedure require a national court to grant an application for

annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty.

38 That conclusion is not affected by the fact that the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by all the Member States, provides that recognition and enforcement of an arbitration award may be refused only on certain specific grounds, namely where the award does not fall within the terms of the submission to arbitration or goes beyond its scope, where the award is not binding on the parties or where recognition or enforcement of the award would be contrary to the public policy of the country where such recognition and enforcement are sought (Article V(1)(c) and (e) and II(b) of the New York Convention).

39 For the reasons stated in paragraph 36 above, the provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention.

40 Lastly, it should be recalled that, as explained in paragraph 34 above, arbitrators, unlike national courts and tribunals, are not in a position to request this Court to give a preliminary ruling on questions of interpretation of Community law. However, it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied (Case C-88/91

Federconsorzi [1992] ECR I-4035, paragraph 7). It follows that, in the circumstances of the present case, unlike Van Schijndel and Van Veen, Community law requires that questions concerning the interpretation of the prohibition laid down in Article 85(1) of the Treaty should be open to examination by national courts when asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.

41 The answer to be given to the second question must therefore be that a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.

The first and third questions

42 In view of the reply given to the second question, there is no need to answer the first and third questions.

The fourth and fifth questions

43 By its fourth and fifth questions, which can be examined together, the referring court is asking essentially whether Community law requires a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of res judicata and may no longer be called in question

by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of the subsequent award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.

44 According to the relevant domestic rules of procedure, application for annulment of an interim arbitration award which is in the nature of a final award may be made within a period of three months following the lodging of that award at the registry of the court having jurisdiction in the matter.

45 Such a period, which does not seem excessively short compared with those prescribed in the legal systems of the other Member States, does not render excessively difficult or virtually impossible the exercise of rights conferred by Community law.

46 Moreover, domestic procedural rules which, upon the expiry of that period, restrict the possibility of applying for annulment of a subsequent arbitration award proceeding upon an interim arbitration award which is in the nature of a final award, because it has become res judicata, are justified by the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of res judicata, which is an expression of that principle.

47 In those circumstances, Community law does not require a national court to refrain from applying such rules, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.

48 The answer to be given to the fourth and fifth questions must therefore be that Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of res judicata and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.

[…]

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden by order of 21 March 1997, hereby rules:

1. A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the EC Treaty (now Article 81 EC), where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.

2. Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of res judicata and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.

Glossary

patent - a government authority or licence conferring a right or title for a set period, especially the sole right to exclude others from making, using, or selling an invention

Questions and exercises

IV.1. Regarding applicable law: the characteristic service is provided by the lessor.
Who provides the specification for the equipment leased?
A. the supplier
B. the lessor
C. the lessee
D. the producer
IV.2. Who has the legal ownership on the leased assets during the term of the lease agreement?
A. the supplier
B. the lessor
C. the lessee

D. the producer
IV.3. Know how is:
A. a secret technical knowledge related to production of services (knowledge patented), protected only as a „trade secret"
B. a secret technical knowledge related to production or services (knowledge patented), protected only as a „trade secret"
C. a secret technical knowledge related to production or services (knowledge not patented), protected only as a „trade secret"
D. a secret technical knowledge related to production or services (knowledge patented), protected only by secret trade
IV.4. Find the odd one (the one that does not fit in): The test for patentability is
A. novelty
B. inventiveness
C. resistivity
D. industrial applicability
IV.5. The seat of the European Patent Office is in:
A. Paris
B. Munich
C. Geneva
D. Ottawa

Useful sources

The FIDIC Suite of Contracts https://fidic.org/sites/default/files/FIDIC_Suite_of_Contracts_0.pdf
UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works

https://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf
UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING (OTTAWA, 28 MAY 1988) https://www.unidroit.org/leasing-ol/leasing-english

Chapter V
Contracts related to the marketing of goods

In relation to marketing of goods we are going to discuss agents, sale representatives and distributors.

Let us start with **independent foreign agent**. Agents are intermediaries who undertake to find buyers for (or seller of) the goods, that is to say, to obtain orders or find specific goods for their principals. So, agents do not take title to the goods, and do not bear the risk that the buyer may not pay. As a general rule, they do not have the power to bind the principal (to conclude a contract with the buyer acting on behalf of the principal), however, with special authorization they can do it. They are usually paid in combination of commission and salary.

In civil law countries agents are usually more protected than principals, and even more if there is an employment relationship between them. If there is such relationship, they are called „sales representative", who are employees acting in the name and on behalf of the principal. It should be mentioned that some legal systems do not make distinction between independent agents and employed agents.

In national laws this legal institution is usually regulated, if not, rules of agency contract (service contract) apply. In practice, the court sized should decide what law to apply. The European Contract Convention will help in the European Union. The law of the residence of the agent applies, because the agent is providing the characteristic performance under agency contract.

The European Union legislation on self-employed commercial agents requires the agency contract to be in writing. It can be concluded for definite or indefinite period. If it is concluded for indefinite period, it can be terminated by notice. The period of notice shall be one month for the first year of the contract, two months for the second year commenced, and three months for the third year commenced and subsequent years. There is also the possibility for immediate termination of the agency contract if one of the parties fail to carry out all or part of his obligations, or if exceptional circumstances arise.

The before-mentioned legislation enumerates the obligations of the agent. The agent should look after the interests of the principal, act dutifully and in good faith, make proper efforts to find partners, to conclude transactions, and share information with his principal, and to comply with reasonable instructions given by his principal.

However, the principal should also act dutifully and in good faith, share information, and pay the agreed remuneration to the agent.

A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract: where the transaction has been concluded as a result of his or her action; or where the transaction is concluded with a third party whom he or she has previously acquired as a customer for transactions of the same kind. The commission shall become due as soon as, and to the extent that one of the following circumstances obtains: (a) the principal has executed the transaction; or (b) the principal should (according to his or her agreement with

the third party) have executed the transaction; or (c) the third party has executed the transaction. The right to commission can be extinguished only if and to the extent that: it is established that the contract between the third party and the principal will not be executed, and that is due to a reason for which the principal is not to blame. The agent is entitled to commission on commercial transactions concluded after the agency contract has terminated: if the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or if, the order of the third party reached the principal or the commercial agent before the agency contract terminated.

The Directive entitles agents for indemnity and damages if certain conditions are met.

The principal may prevent the agent from dealing in competing products during or after the term of the agency contract for max. two years following the termination of the agreement.

Independent foreign distributor buys the goods from the supplier and resells them, takes title to the goods, bears the risk of non-payment.

Distribution agreement is a framework agreement for future purchases (sale contracts) by the distributor from the supplier. It is also a supply/purchase concession we can say. It is usually not regulated in national laws as such, therefore you should pay attention to several issues when drafting a distribution contract.

If no law is chosen in the European Union, the contract is governed by the law of the country with which the distribution agreement is most closely connected: habitual residence of the party who performs the characteristic performance (distributor). However, mandatory rules of the forum will be applied. We can make distinction between:
(1) sole distributorship – only the supplier can sell on a specific territory beside the distributor,
(2) exclusive distributorship – even the supplier is barred to sell (not allowed in the European Union).
However, if it violates competition law provisions, it can affect the validity of the contract.

In the following table you can see why it is more attractive for a principal to choose an agent rather than a distributor:

The principal …	AGENT	DISTRIBUTOR
can keep control over the terms of the sale	+	-
can choose the customer	+	-
can keep the customer	+	-
can conctrol marketing, IP	+	-
has smaller risk of stock pile	-	+
has bigger profit margin	+	-
has less concern with administration, taxation	-	+

Fig. 3[25]

Franchise agreement should be also mentioned here. With the franchise agreement the franchisor grants right to the franchisee to sell goods or services under the distinctive sign of the franchisor and to make use of the uniform sales presentation.

These franchise contracts are usually very detailed, good example is the McDonalds franchise agreement:
https://www.sec.gov/Archives/edgar/data/1508478/000119312511077213/dex101.htm

Reading

Drafting a distribution contract[26]

Parties have great contractual freedom in the determination of their *reciprocal* rights and obligations. In order to make good contracts they have to pay attention to the following factors:
Who are the parties to the agreement? In some cases more legal entities belong to the same economic group: which legal *entity* will be responsible for the contractual obligations? Can the contractual obligations be transferred to other entities of the group, to a third party? Does the agreement remain valid if the other party is taken over by a competitor?

[25] Prepared by the author.
[26] Source: H. van Houtte, The Law of International Trade, Sweet and Maxwell, 2002, pp. 181-183.

The distribution agreement must clearly define the object of the relationship. For which products is the distribution granted? What about new products? For which territory? Is the distributor the exclusive representative for that area? Is the supplier also allowed to deliver directly? etc.

It is, in general, not customary for a distributor to sell way outside his geographic area, i.e. his „natural" market. Transport costs and possible double customs duties often make this exercise *unappealing*. Within the European Union, however, there are no customs duties, and the transport costs are likely to be less. In this situation, sales outside the distribution areas and possible parallel imports into the area of another distributor may become appealing. Through territorial exclusivity the distributor can protect himself against competition from outside. However, for example, within the European Union, this protection must not go two far otherwise it will conflict with the competition rules.

Is the distributor allowed to distribute competing products during and after termination of the agreement? It is important to specify weather the distributor will exclusively deal in the products of the supplier or whether he may also distribute competitive products. It is also important that the distributor does not become the competitor to the supplier after termination of the contract. To avoid this, it is useful to include non-competition close to regulate the position after termination of the contract. The agreement should, therefore, also regulate the return of the remaining stock, which the distributor is no longer allowed to sell.

Is the distributor obliged to keep certain commercial or technical information *confidential* during or after the life of the agreement?

To what extent is the distributor responsible for the publicity and promotion of the product? Will the manufacturer supply

him with brochures and other material for this purpose? How?

Is the distributor obliged to notify the supplier about any breach of the supplier's *intellectual property rights* (patents, *trademarks*, etc.) and defend these rights in law?

Under what modalities are the goods to be sold to the distributor (price, place of delivery, place and time of payment, currency of payment)? A purchase price which is too high will drive the distributor out of the market.

It is recommended that the price list should be attached to the distribution agreement. Moreover, the power of the supplier to increase the price is often limited by contract. In that case the distributor may, for example, have stipulated that the new price list will only be effective after three months or, at least, that it will not affect orders already placed.

To what extent can annual minimum sales *quotas* be imposed? Are these quotas only indicative, or are they sanctioned by *contract termination*? How will future sales quarters be determined?

Is a recommended sales price suggested to the distributor? It is contrary to the EU competition rules and to the laws of many countries to oblige the distributor or resellers to sell the goods for fixed price, they must have freedom to fix their own sales price. In some countries the distributor is considered to be an agent and is covered by the rules for agencies if he is not free to determine his own price. Although the supplier may want to recommend sales prices, as soon as a recommended price becomes in fact binding, it may infringe competition law.

Is the distributor obliged to keep products in stock, to maintain certain quality standards for his stuff,to give a certain service? Some products require a large stock,

expensive equipment and/or qualified staff. In such a situation the distributor may be obliged to make considerable investments.

What is the term of the agreement? Distributors understandably hesitate to invest in their business if their distribution rights can be terminated at will by the manufacturer. The supplier on the other hand may not want to be bound for too long. For him it is essential to keep some room to maneuver.

The agreement is sometimes concluded for a specific term. However, usually it is entered into for an indefinite time but either party is given the right of terminating the agreement open specific date after having given notice of a fixed number of months before that date.

In order to reconcile the interests of both sides the agreement sometimes indicates that it cannot be terminated during an initial period But maybe renewed afterwards. The parties may also accept that the agreement will be terminated if specific criteria are not met (e.g. sales quarter, sales increases, promotion activities). Likewise, the parties may agree that specific conditions (e.g. the *insolvency* of the party, etc.) terminate the contract. The agreement may does give the manufacturer a wide range of options for dismissing the distributor. These contractual clauses, however, are sometimes *void* under the law of the distribution area.

Distribution agreements must determine what will happen when the agreement comes to an end. Must composition be paid for goodwill? Most stock be returned and if so, under what conditions? May the distributors start dealing in competing products?

What law is applicable to the agreement? It is recommended that the distribution agreement should indicate the law applicable to the agreement. If no choice of law is made, the

law of the residence of the distributor is generally applicable (unless there is evidence of a closer connection with another legal system). Even though the particular law is applicable to the agreement, local mandatory law may be applicable to specific matters such as, for instance, to the termination of the agreement.

Glossary

reciprocal - mutual
entity - an organization (as a business or governmental unit) that has a legal identity which is separate from those of its members
unappealing - unattractive
confidential - marked by intimacy or willingness to confide (to have trust)
intellectual property rights - rights given to persons over the creations of their minds, the creator is usually given an exclusive right over the use of his or her creation for a certain period of time
trademark - a device (such as a word) pointing distinctly to the origin or ownership of merchandise to which it is applied and legally reserved to the exclusive use of the owner as maker or seller
quota - a proportional part or share assigned to each in a body
contract termination - ending a contract
insolvency - the state of being unable to pay the money owed, by a person or company, on time
void - not valid or legally binding

Questions and exercises

V.1. Please, find statements which are true:
A. distributors buy the goods from suppliers and resell them, take title to the goods, but do not bear the risk of non-payment
B. agents do not take title to the goods, and do not bear the risk that the buyer may not pay
C. As a general rule, agents have the power to bind the supplier
D. „sales representatives" are employees acting in the name and on behalf of the principal
V.2. Please, complete:
Franchisor grants right to the franchisee to sell goods or services under the ……. sign of the frenchisor and to make use of the uniform sales presentation
V.3. Please, find the correct (true) statement:
A. The principal may prevent the agent from dealing in competing products during or after the term of the agency contract.
B. The principal may not prevent the agent from dealing in competing products during or after the term of the agency contract.
C. The principal may prevent the agent from dealing in competing products during the term of the agency contract but only for two years.
D. The principal may prevent the agent from dealing in competing products during or after the term of the agency contract but only for two years following the termination of the contract.
V.4. Please, find the odd one (the one that does not fit): In an agency contract, the obligations of the principal are:
A. act dutifully
B. act in good faith
C. share profit

D. pay remuneration
V.5. An agent is basically
A. distributor
B. intermediary
C. James Bond
D. executor

Useful sources

What Is a Distribution Agreement? https://bizfluent.com/facts-7647057-sole-distributor-agreement.html

What Is a Franchise Agreement? https://www.thebalancesmb.com/franchise-agreement-1350570

Chapter VI
International contracts related to transport of goods

There are several modalities of international transport of goods. Most goods are transported by sea, as this is the cheapest way of transportation (as you do not need infrastructure, only ports). Railway transportation is also relatively cheap and efficient. But goods can be transported also on road or by air, and there is also the combination of different modalities of transport under the same contract, it is the so-called multimodal transportation.

We are going to start with **the international transport of goods by rail**. The most important international legal instrument in this field is the Convention concerning International Carriage by Rail, what is also called COTIF after its French abbreviation. This convention has established the Intergovernmental Organization for International Carriage by Rail, the OTIF and the primary aim of the organization is the harmonization of the regulation related to the contract of international carriage of goods, technical standards, rules and procedures. To achieve this goal, COTIF elaborated Uniform Rules concerning the Contract of International Carriage of Goods by Rail which is also called CIM.

These Uniform Rules apply to every contract of carriage of goods by rail for reward when the place of taking over of the goods and the place designated for delivery are situated in two different member states of the COTIF convention, irrespective of the place of business and the nationality of the parties to the contract of carriage. They also apply when

the place of taking over of the goods and the place designated for delivery are situated in two different states, of which at least one is a member state, and the parties to the contract agree that the contract is subject to these Uniform Rules.

The seller of the goods, who dispatches the goods and who concludes the contract of carriage with the railway is called consignor. The railway company is the carrier. By the contract of carriage, the carrier undertakes to carry the goods for reward to the place of destination and to deliver them there to the consignee (it is usually the buyer).

The contract of carriage must be confirmed by a consignment note for which there is a uniform model. Among useful sources at the end of this chapter you will find a link to a model consignment note, please, take your time and examine it. The carrier gives the copy (duplicate) of the note to the consigner. We should mention here that the consignment note does not have the same effect as a bill of lading. The carrier has the right to examine at any time whether the conditions of carriage have been complied with, and whether the consignment corresponds with the entries in the consignment note made by the consignor. The consignment note is a prima facie evidence (that is to say, accepted as correct until proved otherwise) of the conclusion and the conditions of the contract of carriage and the taking over of the goods by the carrier.

The consignor and the carrier can agree who is responsible for the loading and unloading of the goods. In the absence of such an agreement, for the loading and unloading of the goods is responsible the carrier, whereas for full wagon loads

loading is responsible the consignor, and for unloading after delivery the consignee.

The carrier must hand over the consignment note and deliver the goods to the consignee at the place designated for delivery against receipt and payment of the amounts due according to the contract of carriage. The consignee has the right to examine the goods before taking them over.

Let us see liability rules related to the carriage of goods by rail. The carrier is liable for the following damages that occur between the time of taking over of the goods and the time of delivery:
(1) loss of goods,
(2) damage to the goods,
(3) late delivery.

This liability is:
- joint and several (all the carriers who took part in the carriage are liable),
- objective (liable for late delivery, loss and damage), and
- limited (the carrier is relieved of liability if he or she could not avoid it or was unable to prevent damages).

The carrier is also relieved of liability to the extent that the loss or damage arises from the special risks inherent in one or more of the following circumstances:
- carriage in open wagons,
- absence or inadequacy of packaging,
- loading of the goods by the consignor or unloading by the consignee,
- the nature of certain goods is such that they break, decay easier, etc.,

- irregular, incorrect or incomplete description or numbering of packages,
- carriage of live animals,
- goods are accompanied by an attendant.

In the beforementioned cases the presumption is that the carrier is not liable, however, the other party may prove the opposite.

Regarding compensation, in case of loss the carrier should pay the market price of the goods, but maximum 17 SDR/kg (SDR means special drawing rights used by the International Monetary Fund). The presumption is that 30 days after the deadline of delivery the goods are lost. In case of damage, the compensation is proportional to the value of the goods. If there is late delivery, the compensation may not exceed four times the carriage charge, and the damage should be proven. However, if the consignor declared in the consignment note a value for the goods, this amount will be the limit for the compensation.

The next modality of transportation is **carriage of goods by road**. This is regulated by the Convention on the Contract for the International Carriage of Goods by Road, the abbreviation used for this convention is CMR. There are lot of similarities with the COTIF convention. The CMR convention applies to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties. The contract of carriage should be confirmed by issuing consignment note in three copies. The

first copy is handed over to the sender, the second accompany the goods, and the third is retained by the carrier. The consignment note is important, because it is prima facie evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier. After arrival of the goods at the place designated for delivery, the consignee is entitled to require the carrier to deliver to him against a receipt the second copy of the consignment note and the goods. If the goods are lost, the consignee is entitled to enforce in his own name against the carrier any rights arising from the contract of carriage.

The carrier is liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery. However, the carrier is relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent. The carrier is also relieved of liability when the loss or damage arises from special circumstances, already mentioned for rail carriage, like carriage in open wagons and so on. Regarding compensation, there are similar provisions in this convention as already mentioned for rail carriage, with the difference, that the maximum payable compensation for lost goods is 8 SDR/kg.

We should mention shortly the Convention on International Transport of Goods under Cover of TIR Carnets (TIR Convention). The main point is that goods in sealed vehicles are not checked in all transit countries on the way, but only

in the country of destination, what makes transportation more efficient.

Air carriage is regulated by the Montreal Convention, the full title of which is Convention for the Unification of Certain Rules for International Carriage by Air. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward.

In respect of the carriage of cargo, an air waybill is issued by the carrier, which proves the conclusion of the contract and the taking over of the goods. However, any other means which preserve a record of the carriage to be performed may be substituted for the waybill.

The carrier is liable for damage like destruction, loss or damage to the goods only if that happened during the carriage by air. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:
(a) inherent defect, quality or vice of that cargo,
(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents,
(c) an act of war or an armed conflict,
(d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

Compensation maximum is 17 SDR/kg, except if the consignor declared the value of the goods. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the state parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which

the contract has been made or before the court at the place of destination.

The cheapest way of **transportation** is **by sea**, however this is also the riskiest. The contract between a shipowner and a trader for the hire of a ship and the delivery of cargo is called charter party. There are two types, one is time charter, when we hire the ship for certain number of days, and voyage charter, when we hire the ship for a voyage between two or more ports, and it does not matter how long is the journey.

There were several attempts to regulate international carriage of goods by see, however, the most successful are the Hague-Visby Rules. These rules apply to every bill of lading related to the carriage of goods between ports in two different states if the bill of lading is issued in a contracting state, or the carriage is from a port in a contracting state, or the contract contained in or evidenced by the bill of lading provides that these rules or legislation of any state giving effect to them are to govern the contract, whatever the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

The carrier includes the owner or the charterer of the ship who enters into a contract of carriage with the shipper. Shipper is the one who dispatches the goods, the same as consignor with rail carriage.

Under the Hague-Visby Rules the contract of carriage applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea. The carriage of goods covers

the period from the time when the goods are loaded on the ship to the time they are discharged from the ship.

In Chapter VII the bill of lading is discussed in detail, The basic functions are that it proves that the goods where handed over to the carrier, proves the conclusion of the freight contract, and proves the legal title (the buyer takes over the goods with this document).

The carrier is bound to exercise due diligence to:
- make the ship seaworthy,
- properly man, equip and supply the ship,
- make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

If the carrier exercises due diligence he or she is not liable for damage. He or she is also not liable in case of fire, perils, dangers and accidents of the sea, act of God, war, etc. The shipper who claims that the ship was not seaworthy or properly equipped has to prove this.

Regarding the issue of compensation, it is the market price of the lost goods, but cannot exceed 666 SDR/package or 2 SDR/kg. Except if the value of the goods is indicated on the bill of lading. There is also no upper limit if the carrier caused the damage recklessly or intentionally.

Reading

Fake copper and fake insurance - a cautionary tale[27]
MinterEllisonRuddWatts Andrew Horne and Nick Frith

Mercuria Energy Group is a large Swiss commodities trader. Last year, it purchased US$36 million of copper from Bietsan, one of its existing suppliers in Turkey, for delivery in China. The transaction seemed unexceptional. Unfortunately, when the cargoes arrived in China, it was discovered that the containers held not semi-refined blister copper, but paving stones that had been roughly spray-painted to look something like copper. They could not have passed more than a cursory inspection.

It seems that the copper, about 6,000 tons in more than 300 containers, was exchanged for the stones before their journey from Turkey to China began. The copper was initially loaded into containers, where it was surveyed by an inspection company and the containers were sealed to prevent fraud. However, it appears that the containers were then opened and the copper replaced with the paving stones, following which the containers were re-sealed with fake seals. This was done for a number of shipments which left port every few days.

Once the ships were all at sea, Mercuria paid the US$36 million price. The fraud was discovered only when the first few ships arrived in China.

[27] Terms & conditions state that „You are allowed to use it for non-commercial purposes…" ……
https://www.lexology.com/library/detail.aspx?g=279c4d08-c02f-40c6-b796-47212c1d1313

It was not Mercuria's first experience of lost metal. In 2014 and 2015, it was obliged to recognise provisions for potential losses after metal warehoused in a Chinese port was seized by authorities who were investigating fraud. It no doubt believed that it had put appropriate security measures in place.

Once the ships were all at sea, Mercuria paid the US$36 million price. The fraud was discovered only when the first few ships arrived in China.

Normally, in cases of theft, a trader could make a claim upon its cargo insurance policy. Unfortunately for Mercuria, it discovered that it had been doubly defrauded. Only one out of seven cargo insurance policies arranged by Bietsan was real – the rest had been forged.

The case highlights both commodity traders' vulnerability to fraud and their risks if adequate insurance is not in place. Had Mercuria been properly insured for the loss, the burden would have fallen upon its insurers.

Mercuria is now left to seek recovery against Bietsan in the Turkish courts and in UK arbitration, as well as making a formal criminal complaint with the Turkish authorities.

Had Mercuria sought verification from the insurers that each of the policies upon which it relied were real, it might have avoided the loss altogether. This is a cautionary tale for those who would rely upon proof of insurance that is not provided or verified directly by the insurer.

Glossary

carrier: an individual or entity engaged in transporting passengers or goods for hire by land, water, or air
warehouse: a structure or room for the storage of merchandise or commodities
stevedore: one who works at or is responsible for loading and unloading ships in port
to stow: to load, to pack, to store
bill of lading: a document issued by a carrier that lists goods being shipped
pier: a structure (such as a breakwater) extending into navigable water for use as a landing place or promenade or to protect or form a harbor
moorage: an act of making fast a boat or aircraft with lines or anchors
bonded warehouse: a warehouse under bond to the government for payment of customs duties and taxes on goods stored or processed there
waybill: a document prepared by the carrier of a shipment of goods that contains details of the shipment, route, and charges
non-negotiable receipt: non-negotiable receipts must be endorsed upon transfer
freight forwarder: an agent who performs services (such as receiving, transshipping, or delivering) designed to move goods to their destination
confirming house: an agency that arranges and purchases the export of goods on the behalf of foreign buyers
cargo: the goods or merchandise conveyed in a ship, airplane, or vehicle
quotation: bid, offer
to procure: to get, to obtain

Questions and exercises

VI.1. The Montreal Convention applies to:
A. carriage of goods
B. carriage of persons
C. carriage of goods and persons
D. none
VI.2. The French abbreviation for the Convention concerning International Carriage by Rail is:
A. CODIT
B. COVID
C. COTIF
D. OTID
VI.3. The cheapest way of international transport of goods is by:
A. rail
B. road
C. sea
D. air
VI.4. Under the Hague-Visby Rules the reckless carrier has to pay the following compensation for goods perished:
A. market price of the goods
B. 666 SDR/package
C. 2 SDR/kg
D. 17 SDR/kg
VI.5. The seller of the goods, who dispatches the goods and who concludes the contract of carriage with the railway is called …….

Useful sources

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Chapter VII
Financing international business transactions

There are several issues related to the financing of international trade. The basic problem is that nowadays the buyer and the seller usually do not meet face to face especially in international sales, therefore the seller by dispatching the goods risks never to be paid, and the buyer paying before checking the goods risks never to receive the goods or to receive non-conforming goods. Another issue is that usually merchants constantly lack cash, so they prefer to pay only when they resell the goods. However, this can be done only if the seller or a financial institution credit them. In addition, there are several risks associated with the payment, for example, the bank can go insolvent, the currency of payment may depreciate, and so on. Several methods of financing have evolved in international trade: cash payment (wire transfer), letter of credit payment, documentary collection. They are done through banks. Banks play a crucial role in the finance of international trade.

Most, least risky for….

Wire transfer (in advance or after delivery) or payment with check. With wire transfer it can be either that the buyer orders its bank to transfer the money, or if the seller and the buyer agree, it can be done with collection, when the seller „collects" the money from the buyer's bank account, however, for this the seller will have to present certain documents to the bank proving that it dispatched or delivered the goods. The International Chamber of Commerce has issued its Uniform Rules for Collections which

apply only if the parties agreed to apply it. Otherwise, national law applies.

Wire transfer is a relatively inexpensive way of payment. However, if the buyer transfers the money in advance, there is the risk that the seller might not ship conforming goods. Therefore, trust is needed between the parties for simple wire transfer without presenting documents on the shipment of the goods.

Check is a negotiable instrument, a written order directing a bank to pay money as instructed. It is also a credit instrument, as you can not cash it before the date. This is an example for check.

Fig. 4 - check

With a **bill of exchange** the issuer orders the addressee to pay on a certain date or after a certain sum to a third party. It is a written order by the drawer to the drawee to pay money to the payee. That is to say, in a business transaction it is the buyer who orders its bank to pay the purchase price to the seller. It is a negotiable instrument, represents money debt, without condition (there is no requirement to show legal

title), therefore no objection can be invoked related to the underlying business (*e.g.* deficient performance, set-off). It has a credit function, because until the expiry you do not have to have the money. Works similarly like the check.

Promissory note is very similar to bill of exchange, but here the issuer promises that he will pay at a certain future date.

The next method of payment we are going to discuss is with **letter of credit**, which solves the two problems mentioned at the beginning of this lecture, that is to say the issue of trust between the seller and the buyer, and the need for credit by the buyer. But before discussing it, first we should take a look into the commercial paper (security) that is used for this transaction. This is the bill of lading (B/L) a negotiable security representing goods. It is issued by the carrier to the shipper (who is the seller) when the carrier takes over the goods. It has several functions:
(1) It proves that the goods where handed over to the carrier a. proves what, how much and in what condition was taken over by the carrier for transport to the destination port b. for letter of credit payment the bill of lading should be so-called „clean" meaning that the carrier took over the goods „in apparent good order and condition". The carrier will not open the packaging of the goods, he will examine only their external appearance.
(2) The bill of lading also proves the conclusion of the freight contract between the shipper and the carrier.
(3) It proves the legal title to the goods. The buyer will take over the goods with this document when they arrive to the port of destination. However, as already mentioned, this is a negotiable instrument, thus the buyer can sell the goods in

the meantime and transfer the title to the goods with transferring the bill of lading to a third party.

SHIPPER/EXPORTER (2) JOAQUIM MILONGA 245-95 KENORA AVE. HAMILTON, ONTARIO CANADA L8E 1C5	DOCUMENT NO (5) **DAT0201395** **CA2318559** EXPORT REFERENCES (6) EXP 33592
CONSIGNEE (3) (NOT NEGOTIABLE UNLESS CONSIGNED TO ORDER) JOAQUIM MILONGA RUA RAINHA GINGA NR.5, APT.3 LUANDA, ANGOLA EMAIL: JMILONGA@HOTMAIL.COM TEL: 244-92-4585075	FORWARDING AGENT - REFERENCES (7) ATLANTIC & PACIFIC SHIPPING CANADA LTD. 1750 COURTNEYPARK DR. EAST, UNIT #5 MISSISSAUGA, ONTARIO CANADA L8E 1C5 **CHB:** **FMC:**
NOTIFY (4) SAME AS CONSIGNEE ANGOLAN CONTRIBUENTE NUMBER: 100000N09173320	POINT AND COUNTRY OF ORIGIN (8) DOMESTIC ROUTING/EXPORT INSTRUCTIONS (9)
PIER/TERMINAL (10) CN- TORONTO- BRAMPTON	COMBINED TRANSPORT* PRECARRIAGE FROM (10A) TORONTO, ON
VESSEL (11) **MAERSK PATRAS** **ED782E**	PORT OF LOADING (12) MONTREAL, QC
PORT OF DISCHARGE FROM VESSEL (13) LUANDA	FOR TRANSHIPMENT TO (14)
	COMBINED TRANSPORT - ONWARD CARRIAGE (15)* -

CARRIER'S RECEIPT — PARTICULARS FURNISHED BY SHIPPER - CARRIER NOT RESPONSIBLE

MARKS AND NUMBERS (16)	NO. of PKGS. (17)	DESCRIPTION OF GOODS (18) SHIPPERS STOW LOAD AND COUNT	GROSS WEIGHT (19)	MEASUREMENT (20)
		1x40HC CONTAINER:		
TGHU6355685 **SN# 000567**	**107**	**PIECES** **PERSONAL EFFECTS AND HOUSEHOLD GOODS 2034 KGS** **2007 CHEVROLET AVALANCHE, 3182.4 KGS** **VIN #3GNFK12377G280496** **INCLUDING PERSONAL EFFECTS IN THE VEHICLE** **CAED #06B076VZ396820130900116** **HS CODE: 870390** **FREIGHT PREPAID**	**5216.400KGM**	
	107	**TOTAL**	**5216.400KGM**	

- 194. For the purpose of the present carriage, clause 14(2) shall exclude the application of the York/Antwerp rules, 2004.

- 1. Said to contain
- 84. Ground rent/storages costs at POD for Consignee's account according

- 274. The Merchant is responsible for returning any empty container, with interior clean at the designated place, and within 60 days following to the date of release, failing which the container shall be construed as lost. The Merchant shall be liable to indemnify the Carrier for any loss or expense

- ...ch, the Consignee agrees to take delivery of the reefer(s) under tackle. ...Carrier's liability ceases when the goods are disconnected from the tackle. The ...Carrier don't bear any liability for failure of such delivery by Consignee.
...Shipper's stow, load and count
...2135, The Carrier is not responsible for any missing or incorrect Loading Certificate and the responsibility remains with the Merchant/Importer. Any fine or penalty levied against the Carrier is for account of the Merchant.

SHIPPERS DECLARED VALUE
SUBJECT TO EXTRA FREIGHT AS PER TARIFF AND CLAUSE 8 (2) OF THIS B/L

If above commodities, technology, or software were exported from the U.S., the Export Administration Regulations must be complied by the Merchant. Diversions contrary to U.S. law prohibited.

*If the Pre-Carriage or Onward Carriage boxes are filled out, shipment will be treated as Through Combined Transport. Carrier undertakes entire transport from the place where the goods are taken in charge to the place designated for their delivery and assumes full liability for such transport as per clause 6.

Received by the Carrier from the shipper in apparent good order and condition, unless otherwise noted herein, for transportation on board the ocean vessel mentioned herein or any substituted vessel or on board the feeder vessel or other means of transportation.

It is further agreed that the Carrier is at liberty to stow any goods on deck without notice to the shipper. These goods will be considered as goods under-deck in regard to responsibility and limits of liability as well was general average.

IN WITNESS of the contract herein contained the number of original stated below have been issued, each one being the same contents and date, one of which being accomplished the other(s) to be void.

In accepting this Bill of Lading the Merchant expressly accepts and agrees to be bound by all its stipulations, terms, conditions and exceptions -INCLUDING THE TERMS ON THE REVERSE HEREOF AND THE TERMS OF THE CARRIER'S APPLICABLE TARIFF- stated herein whether printed, stamped or written, or otherwise incorporated, of which the Merchant is fully aware notwithstanding the non-signing of the Bill of Lading by the Merchant.

All actions against Carrier under the contract of Carriage evidenced by this Bill of Lading shall be brought before the **"Tribunal de Commerce du Havre"** and no other Court shall have jurisdiction with regards to any such action. Actions against the Merchant under the contract of Carriage evidenced by this Bill of Lading may be brought before the **"Tribunal de Commerce du Havre"** or, in Carrier's sole discretion, in another court of competent jurisdiction.

IN WITNESS WHEREOF THREE (3)

Bills of Lading all of like tenor, have been executed, ONE of which being accomplished, the other shall stand void.

DAY MONTH YEAR	BL/No. CMDU
18-SEP-13	**CA2318559**

Signed for Delmas, a Divison of CMA CGM S.A., the Carrier
by CMA CGM (CANADA) INC. as agent

By_____

(Continued on reverse side)

28

28

https://www.academia.edu/6402536/Continued_on_reverse_side_BILL_OF_LADING

DELMAS a division of CMA-CGM SA

BILL OF LADING FOR COMBINED TRANSPORT AND PORT TO PORT SHIPMENT

Svce: SERVICE : CROSSTRADE Sheet 2 of 2

SHIPPER/EXPORTER (2)
JOAQUIM MILONGA
245-95 KENORA AVE.
HAMILTON, ONTARIO
CANADA L8E 1C5

DOCUMENT NO (5)
DAT0201395 **CA2318559**

EXPORT REFERENCES (6)
EXP 33592

CONSIGNEE (3) (NOT NEGOTIABLE UNLESS CONSIGNED TO ORDER)
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LUANDA, ANGOLA
EMAIL: JMILONGA@HOTMAIL.COM
TEL: 244-92-4585075

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1750 COURTNEYPARK DR. EAST, UNIT #5
MISSISSAUGA, ONTARIO
CANADA L8E 1C5
CHB:
FMC:

NOTIFY (4)
SAME AS CONSIGNEE
ANGOLAN CONTRIBUENTE NUMBER:
100000N09173320

POINT AND COUNTRY OF ORIGIN (8)

DOMESTIC ROUTING/EXPORT INSTRUCTIONS (9)

PIER/TERMINAL (10)
CN- TORONTO- BRAMPTON

COMBINED TRANSPORT* PRECARRIAGE FROM (10A)
TORONTO, ON

VESSEL (11)
MAERSK PATRAS
ED782E

PORT OF LOADING (12)
MONTREAL, QC

PORT OF DISCHARGE FROM VESSEL (13)
LUANDA

FOR TRANSHIPMENT TO (14)

COMBINED TRANSPORT - ONWARD CARRIAGE (15)*
-

CARRIER'S RECEIPT		PARTICULARS FURNISHED BY SHIPPER - CARRIER NOT RESPONSIBLE		
MARKS AND NUMBERS (16)	NO. of PKGS. (17)	DESCRIPTION OF GOODS (18) SHIPPERS STOW LOAD AND COUNT	GROSS WEIGHT (19)	MEASUREMENT (20)
Whatsoever arising out of the foregoing, including but not limited to liquidated damages equivalent to the sound market value - or the depreciated value due by the Carrier to a container lessor. The Carrier is entitled to collect a deposit from the Merchant at the time of release of the container which shall be remitted as security for payment of any sums due to the Carrier, in particular for payment of all detention and demurrage and/or container indemnity as referred above. - 216. Mis-declaration of cargo weight endangers crew, port workers and vessels' safety. Your cargo may be weighed at any place and time of carriage and any mis-declaration will expose you to claims for all losses, expenses or damages whatsoever resulting thereof and be subject to freight surcharge. - 242. Whenever receiver does not take immediate delivery of OOG cargo and hazardous cargo (class1 and class 7), the shipments will be re-embarked and the merchant will be responsible towards the line for all expenses/charges/fees/freights and demurrages resulting in the delay in taking delivery and re-loading. Class 5.1 can be stored in the yard for 48hrs only if cargo clearance papers are presented by the consignee to terminal before vessel ETB. Reefer containers should be cleared within 13 days of discharge failing which the goods will be confiscated. Reefer units not released upon discharge take the risk of being transferred to dry port (bonded area outside of the terminal yard) and all costs will be on consignees/receivers' account. - 5. FCL		- 200. Demurrage and detention payable by the Merchant as per CMA CGM tariff available on the web site www.cma-cgm.com, or in any of CMA CGM agency - 4. Cargo at port is at receiver risk, expenses and responsibility - 225. The shipper acknowledges that the Carrier may carry the goods identified in this bill of lading on the deck of any vessel and in taking remittance of this bill of lading the Merchant (including the shipper, the consignee and the holder of the bill of lading, as the case may be) confirms his express acceptance of all the terms and conditions of this bill of lading and expressly confirms his unconditional and irrevocable consent to the possible carriage of the goods on the deck of any vessel. - 77. THC at destination payable by consignees as per line/port tariff		

SHIPPERS DECLARED VALUE
SUBJECT TO EXTRA FREIGHT AS PER TARIFF AND CLAUSE 8 (2) OF THIS B/L

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By_____

(Continued on reverse side)

So, we said that the letter of credit has two main functions, one is that it makes payment safe for both parties. Second is a credit function for the buyer. There are two forms of letter of credit, confirmed and unconfirmed.

There are several legal relationships (contracts) which are independent in legal sense. Nowadays, these are usually in the form of model contracts:
(1) sale contract which is the basic agreement, and which is concluded between the seller and the buyer. This agreement will indicate letter of credit as payment method between the parties,
(2) order of the buyer to his bank (the issuing bank) to open a letter of credit for the seller (banking services contract),
(3) irrevocable promise of the issuing bank to the seller that it will pay for the documents (contractual obligation in common law systems),
(4) irrevocable promise of the confirming bank to the seller that it will pay for the documents,
(5) between the issuing bank and the confirming bank also a banking service contract.

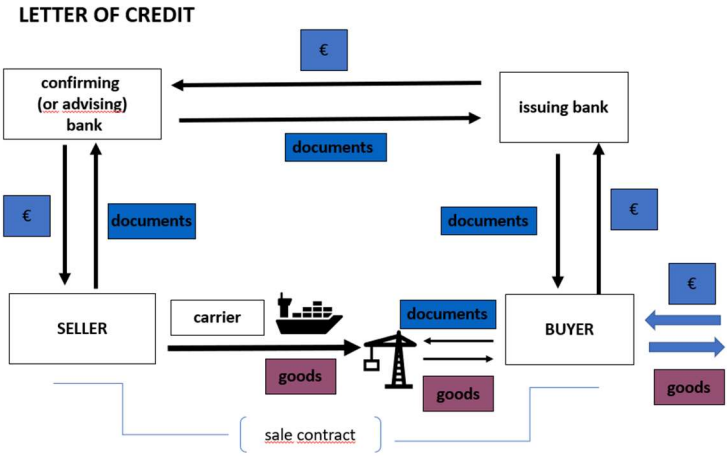


Fig. 5[29] – letter of credit transaction

The basic contract, the sale contract is a separate legal relationship: this was established in the Power Curber case: „The bank is in no way concerned with any dispute that the buyer may have with the seller.”. So, the bank will have to pay if all the required documents are presented, even if there is some dispute regarding the sale contract. Also, if there is a problem with the letter of credit, it will not affect the validity of the sale contract.

We should mention also the „strict compliance principle” which means, that the bank will very strictly examine all the documents in formal sense, and it has the right to refuse them if there is a small mistake, for example the name of one of the parties is misspelled. The statistics shows that lot of letter of credits are not honored by banks upon first presentation.

[29] Prepared by the author.

There are several documents related to a letter of credit transaction, like the invoice, packing list, certificate of origin, quality certificate, tariff documents, insurance, bill of lading, and so on. However, in each transaction different set will be required.

Regarding the law applicable to the letter of credit issues, the parties can agree that they will apply the International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits (UCP 600). However, if there is no such agreement, the court sized will look into its conflict of laws rules and based on that apply a national law. Of course, even if agreed on UCP, mandatory rules of the forum, issuing country and presentation country should be respected, that is to say, it should not be used for money laundering and similar.

Warehouse warrant similarly to bill of lading, represents right of disposal over the goods stored in the warehouse. It is negotiable (transferable) instrument. Usually it has two parts: warrant for the goods + pawn ticket (you can borrow money on the goods).

Bank guarantee is primarily not a payment method, but a guarantee by the bank that it will pay instead of the buyer if the buyer fails to pay until the agreed date for some reason, for example it goes bankrupt. It is also used for large projects. Usually, governments give highway building into concession, so called BOT projects, build the highway, operate it, that is to say, collect the tolls, and at the end of the contract transfer it back to the state. So, with such projects, the potential bidder company applying for the

concession will have to show that it has the means for the project. However, these are usually so large projects, that companies are not able to show the capital that is needed for the whole project. Therefore, they usually provide bank guarantee, showing with this that they will be able to secure the needed money for the project.

So, there is an agency contract between the buyer and the bank, in which the buyer orders its bank to issue a bank guarantee, what is in legal sense a one-sided promise to the seller that it will pay irrespectively to any dispute between the parties regarding the sale agreement. The bank can refuse to pay if the payee acts obviously in bad faith, or the payment would be contrary to international public order.
In any case, after the payment, the bank can dispute the payment.

Regarding applicable law, the bank performs the characteristic performance, thus, it will be the law of the country where the seat of the bank is. However, the parties are free to choose a law, or ICC Uniform Rules for Demand Guarantees.

International factoring is a special financing technique. The seller assigns its receivables (money it is owed by the buyer) to the factoring company (factor). The factoring company makes advance payments to the seller before the date of maturity. It is usually a complex service, the factor also does bookkeeping, analyses, collection.

If it is a true factoring agreement (it depends on the parties), then the seller is not liable for the debts of the buyer, except

in the case of bad faith of the seller, that is to say, when it knew in advance that the buyer is insolvent.

Factoring is usually regulated by different national laws, however, there is an international convention, the Convention on International Factoring from 1988 (Ottawa), but applies only in very few countries like France, Germany, Italy, Hungary, Latvia, Nigeria.

Another special financing technique is **forfeiting**. It is basically the same as factoring, the difference is that the receivable is incorporated in a bill of exchange or in a promissory note, and the assignment takes place by discounting.

Reading

The gatekeepers who help open America to oligarchs and scammers[30]
By Will Fitzgibbon, Debbie Cenziper and Alice Crites
April 5, 2022

[…]

In Wyoming, Dillmon said she spent a decade working for the Secretary of State's office, processing corporate paperwork. She later decided to start her own business as a registered agent, setting up shop under the names Wyoming Means

[30] International Consortium of Investigative Journalists https://www.icij.org/investigations/pandora-papers/the-gatekeepers-who-help-open-america-to-oligarchs-and-scammers/

Business and 1 Accurate Agent while continuing to work for the state.

Dillmon said she makes about $50,000 a year as an agent, charging $150 for company formation services and $50 annually after that. “Anyone you ask who knows me will say I’m a hardworking, honest person, and I take pride in having a good reputation, both personally and professionally,” she said.

Records show that some of Dillmon’s business comes from Kancelaria Wyoming, an LLC that advertises it helps Polish business owners establish companies in Wyoming and bank accounts in the Cayman Islands and Belize, both notorious tax havens.

“Wyoming is a unique state that allows you to set up and run a company … without revealing the data of its owners,” Kancelaria Wyoming says on its website. “You can live anywhere in the world and manage the company remotely.”

In a statement, Kancelaria Wyoming described Dillmon as a “manager” for the LLC and said its marketing accurately describes Wyoming law. The firm added that it is “not obliged to perform due diligence” on company owners and lacks the “appropriate legal tools to do it.”

“We cannot be held accountable for their business activities,” the firm said.

Dillmon said she has no ownership interest in Kancelaria Wyoming but declined to elaborate. She said Wyoming law does not require her to research her clients.

In one case, records show, Dillmon told the state that companies she had represented — including holymolyroler356 llc, uncle freds dreaded machine maker 34 llc and funfearandmoney3 llc — were based at an address on 20th Street in Vero Beach, Fla., near a dental office and a park. Vero Beach and Indian River County officials said they have no such address on record.

Dillmon said she simply reported the address she was given. “I cannot confirm or deny the address is or was valid at that time,” she told The Post and ICIJ.

Even if she learns of wrongdoing by a company she represents, Dillmon said she is under no obligation to stop providing services.

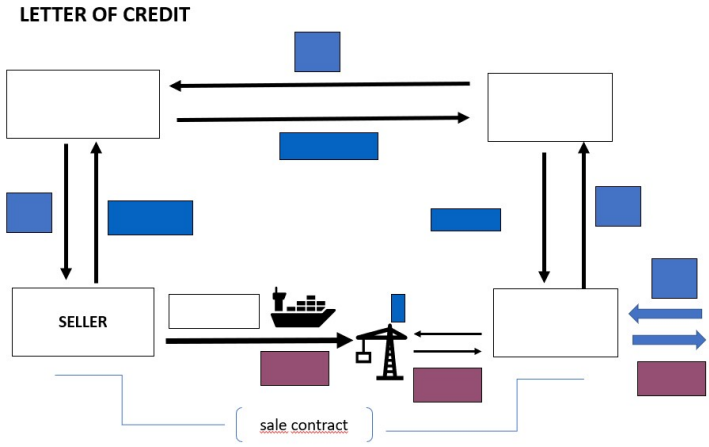
One company on Dillmon’s roster was sued last year by the Securities and Exchange Commission, which alleged that the owners had targeted inexperienced investors at churches and falsely promised financial windfalls that would also provide humanitarian relief in West Africa, records show. EarthSource Minerals International, which settled the fraud case without admitting wrongdoing, did not respond to requests for comment.

Glossary

Questions and exercises

VII.1. What are the two main functions of the letter of credit?

VII.2. What is the difference between the bill of exchange and the promissory note?
VII.3. The „shipper" in an international business transaction with a letter of credit is:
A. the owner of the ship
B. the seller
C. the buyer
D. the charterer of the ship, who operates it
VII.4. Please, fill in:



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What Is a Promissory Note? https://www.thebalance.com/promissory-note-1798611
How a Letter of Credit Works https://www.thebalance.com/how-letters-of-credit-work-315201

Bill of Lading in Shipping: Importance, Purpose, And Types https://www.marineinsight.com/maritime-law/what-is-bill-of-lading-in-shipping/
Factoring https://businessjargons.com/factoring.html

Key for the Questions and exercises

I.1. B
I.2. C, A, D, B
I.3. foreign element
I.4. A
I.5.

Contract for…	*connecting factor*
sale of goods	seller's habitual residence
provision of services	service provider' habitual residence
tenancy of immovable property	where the property is situated
franchise contract	franchisee' habitual residence

II.1. C
II.2. The Vienna Convention is applicable, because the places of business both of the buyer and the seller are in contracting states.
II.3. Buying one bottle of wine by a private person is definitly for personal use, and according to art. 2 of the Convention in such cases the Convention does not apply.
II.4. The offer has to be (art. 14):
- addressed to one or more specific persons
- with the intention to conclude the contract
- and sufficiently definite (this means, that it has to indicate: goods, price, quantity)

II.5. A, D
II.6. First, determining if there is a contract in force.
if yes:
Is there breach of contract?
if yes:
Is it fundamental or ordinary?

if fundamental: avoidance of the contract and damages
If ordinary: price reduction or repair…
III.1. B
III.2. passage of risk
III.3. C
III.4. DDP
III.5. **IN**TERNATIONAL **CO**MMERCIAL **TERMS**
IV.1. C
IV.2. B
IV.3. C
IV.4. C
IV.5. B
V.1. B, D
V.2. distinctive
V.3. D
V.4. C
V.5. B
VI.1. C
VI.2. C
VI.3. C
VI.4. A
VI.5. consignor
VII.1. makes payment safe for both parties and credit for the buyer
VII.2. Bill of exchange: the issuer orders another person (e.g. its bank) to pay
Promissory note: the issuer itself promises to pay
VII.3. B

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