Silesian University in Opava
School of Business Administration in Karviné

INTERNATIONAL COMMERCIAL LAW

SELECTED ISSUES OF CONTRACTUAL LAW IN INTERNATIONAL BUSINESS

For the full-time study form

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Subject: Law.

Annotation: This International commercial law university coursebook is designed for students of economic faculties. The students are familiar with the specifics of international business transactions compared to national ones, particularly with regards to applicable law.

There are several ways in case of expansion to foreign markets. The choice which way to choose is made based on the nature of the business and the scope of it as well.

This publication describes the organisational (e.g. establishment a subsidiary abroad) and contractual (e.g. distributorships, franchising) types of entering new markets however it highlights financial, time, administrative and legal advantages and disadvantages of each of them. Great part of the coursebook is related to the international purchase contracts (i. g. international sale of goods contract) and its legal rules included in the United Nations Convention on Contracts for the International Sale of Goods. Legislation of international purchase contracts is additionally supplemented by the application of INCOTERMS and international carriage of goods. Students are also familiarised with various ways of transaction risk reduction by using appropriate insurance and payment. Finally the subjects of the coursebook are also means of dispute resolving that can arise in international trade.

Key words: direct method, collision method, international franchising, international commercial arbitration, international purchase contract, ruling law, international business transactions, foreign subsidiary

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CONTENT

INTRODUCTION

This university textbook translated from Czech language is designed for study course International Business Law and is primary for students of the School of Business Administration in Karvina, Silesian University in Opava. It begins where the study course Law and especially Business Law left off. Both of them are taught in the first year of the bachelor studies.

The aim of the translated text is to introduce the students with the main issues of international business law. Thus the textbook is not a supposed to be an exhaustive source of information, rather is focuses on the most common problems of international trade transactions. International business has its own specifics and particularities compared to intra-national trade. It includes both the general legal rules and specific types of contracts.

The structure of the textbook is based on the informational above. There are eight chapters. In the first chapter readers get familiar with the concept of international trade and sources of international law that are the most frequently used. Second chapter is dedicated to characteristics of contractual relations with international element and the most common methods are explained here, i.e. direct and conflict rules. In chapters 3 and 4 organisational and contractual forms of entering new markets are described, plus their advantages and disadvantages and specific possibilities that an entrepreneur has in case he plans on enter a new market abroad. A lot of space in this coursebook is left for international contract of sale because it is the most common contractual type in practise of international trade. Chapter seven deals with problematic issues of delivery of goods; especially in regards to terms of delivery and international carriage. In seventh chapter readers get familiar with secure payments in international commercial transactions and eighth chapter is devoted to various method of settlement of disputes arising from international business transactions, particularly judicial proceedings and arbitration proceedings.

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1 INTRODUCTION TO INTERNATIONAL BUSINESS LAW

1.1 THE CONCEPT OF INTERNATIONAL BUSINESS LAW

The growing economic importance of international law is unquestionable and along with it there is also the need to regulate legal relations that arise in international business. One special feature of international business is the fact that it can´t be based only on legal norms of one country (whether it´s a domestic private or public norm). Due to this we must create special legal norms regulating relations arising in international trade. International business law is carried out at three levels[1]:

Scheme 1-1: Three levels of relations in international trade

Source: own work

[1] ROZEHNALOVÁ, Naděžda. *Právo mezinárodního obchodu*. Vyd. 2., Praha: ASPI, 2006. ISBN 80-735-7196-X. p. 17

RELATIONS AMONG COUNTRIES (OR INTERNATIONAL ORGANISATIONS)

The area of law that regulates these relations is called **international public law.** It´s a set of legal norms (incorporated in international contracts), which has stabilisation of mutual relations among countries as a primary task and therefore to ensure peaceful development of the entire international community.

The basic principle of international public law is **The Principle of Sovereign Equality of States** creating international community. It doesn't have any "centralised power" (note: it´s not UN´s job or any other institution) which could use an authoritative method of solving disputes between two countries.

In terms of international law this means that there is no legislature. No unified legal order applicable worldwide. There are only a few partial problematic issues covered by international treaties or conventions, such as Purchase Agreement or Contract for the International Carriage of Goods. These, among others, will be the subject in the next chapters.

RELATIONS BETWEEN A COUNTRY AND MERCHANTS DOING BUSINESS ON ITS TERRITORY

In this type of international business relation there are two options of relations. First is a relationship between a country and a foreign business entity operation on its territory. In this case it´s international public law that regulates the relationship (e.g. International Investment Protection) as well as legal norms of public law of the particular country (e.g. national laws on conditions for business investments). The second option is a relationship between a country and business from that country doing business abroad. This type is covered by the national public law (e.g. laws regulating all sorts of exports)

RELATIONS BETWEEN BUSINESSES FROM DIFFERENT COUNTRIES

From our perspective this type of relation is the most interesting one. The legal base for these relations is contained in the branch of law that we call **international private law.** Although it´s important to state the obvious here. That both of the relations mentioned above hugely influence this one as well. Let´s give an example. If there´s a change in relations between countries, for example imposing an embargo on an import of goods to a particular country it will be obviously impossible to create a new legal relation between business of those countries (such as contract of purchase).

Knowing all the information above, let´s try to define the term of international commercial law.

DEFINITION 1 : LAW IN INTERNATIONAL TRADE

The international commercial law describes a wide body of laws from various sources that governs economic relations arising between countries themselves, between countries and businesses abroad or on its territory, as well as relations between the businesses themselves.

1.2 SOURCES OF INTERNATIONAL LAW

Given the diversity of law relations it is obvious that international business law is influenced by various areas of both private and public law. Regarding the public law the most important norms are the administrative and the financial norms. Regarding the private law the most important norms are the business and the civil ones. Here, the essential is to read the legal norms provided by sources of international public law (esp. international treaties) and European Union legislation.

To this we must add also legal rules covered by the sources of international public law (esp. international agreements) and European Union legislation. In procedural areas there are arising more questions concerning cross-border disputes.

There must be a hierarchy in the whole range of sources of international law to make it clear which one of them has greater legal force and therefore shall be given preference when it comes to application of law in international trade.

Thus let´s divide the sources of law into two main groups:

- Primary
- Secondary

1.2.1 PRIMARY SOURCES OF LAW

The primary sources of law are:

- International treaties and conventions
- Regulations and directives of the European Union
- Intra-national sources of law

INTERNATIONAL TREATIES AND CONVENTIONS

They have an important role in the international business. International treaties may be bilateral (between two states or organisations) or multilateral (between many). A treaty is basically a bargain between legal equals and it may cover any aspect of international relations. Example of bilateral agreement is Double Taxation Avoidance Agreement; examples of multilateral agreements are any that institutionalise specific legal regime, such as free trade area, custom union or internal market. The complete list of treaties where the Czech Republic is involved is available on the website of the Ministry of Foreign Affairs of the Czech Republic (www.mzv.cz)

The creation of international contract may lead to **the unification of the law in a certain area** (for example international carriage of good or international purchase of goods). Given the diversity of legislations in different countries the unification is crucial in the process of removal of international trade barriers. A simple definition of unification of law would be a procedure of countries to unify the rules of law in a certain area.

There are also many international organisations involved in the unification of international business law. Let´s mention at least two of them:

- **United Nations Commission on International Trade Law (UNCITRAL)**

  The core legal body of the United Nations system lies in the field of international trade law. It´s business is the modernisation and harmonisation of rules on international business. UNCITRAL is formulating modern, fair and harmonised rules on commercial transactions as well as legal and legislative guides and recommendations, such as:

- United Nations Convention on Contracts for the International Sale of Goods (1980) - so far the most important document made by UNCITRAL which unifies the legislation of international sales contracts
- UNCITRAL Model Law on International Commercial Arbitration (1995) - model that helps countries as a basis for their own legislation making. Some countries, such as Russia took that model as it is, but some countries, such as Czech Republic, just used a part of it and adjusted it as they need

- **International Institute for the Unification of Private Law (UNIDROIT)**
  UNIDROIT is an independent intergovernmental organisation with its seat in Rome, Italy. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between states and groups of states. It also formulates uniform law instruments, principles and rules to achieve those objectives.
  The most important legislative activities are:
  - UNIDROIT Principles of International Commercial Contracts (1994), in this case it´s not an international contract, but it´s an auxiliary source of international law (for more information - see below)

DIRECTIVES, REGULATIONS AND DECISIONS OF THE EU

Sources of European Union law are formed by several groups. There are founding treaties and treaties of accession that are **primary source of EU law,** then there are legal acts of the EU institutions that form **secondary source of EU law,** and general rules and principles of the EU law and international agreements conducted with third parties. Apart of these decisions **of Court of Justice of the European Union** has a significant impact on creation of international trade (for example in questions of relocation of place of business to another country (for more information see below). International agreements were described above so let´s start with the problematic issues of secondary sources of law.

Law that is created by execution of the competence of any EU institution is called **secondary EU law.** According to the Treaty establishing European Community the institutions of EU may issue regulations, directives and decisions as well as recommendations and opinions. The institution itself decides what form of administrative act to issue. **The most common are regulations and directives.**

Legal acts that give the EU institutions the biggest freedom of intervening into national rule of law are **regulations.** They can be characterised by two basic features - enforceable immediately and community feature. Community feature means that they must be applied in its entirety across the EU regardless the country borders. That way Member States cannot implement the regulations incompletely or select only certain provisions. Member States also are not allowed to avoid the binding character of the provision referring to the legal rules and legal practice in national law. The second feature - immediate enforceability - lies in the obligation to implement a law (not requiring any special national performance) without any delays the same way that is their national law implemented and gives all citizens of EU rights and obligations. Member States, including their institutions, courts and local authorities are bound by the EU law and must respect it in the same way as they do the national law.

Directives along with regulations make the most important legal acts of the EU. They try to ensure unification of EU law on one hand and on the other to respect the diversity of

national legal systems. Directives are legally binding for all Member States in terms of achieving the settled goal. However it gives the countries the freedom to choose the forms and means to achieve this goal. In practice the directives do not replace that national law but the Member States are bound to regulate their national law in accordance to the provision of the EU law. The result is generally a two-stage lawmaking process where in the first initial stage the directive lays down the objective that is to be achieved at EU level by Member States to which it is addressed within a specified timeframe. Secondly at the national stage the objective set at European Union level is translated into actual legal or administrative provisions. The general principle is that a legal situation must be generated in which the rights and obligations arising from the directive can be recognised with sufficient clarity and certainty to enable the EU citizens to invoke or challenge them in their national courts.

To achieve harmony of all national legal systems of the Member States of the European Union we use the process of **unification and harmonisation.** Unification is a process of making unified law that replaces national law and that´s why the main legal instrument of unification in the EU is regulation. On the other hand harmonisation sees the goal in harmonising not the unifying the law. Various provisions of national law and administrative provisions shall be progressively eliminated through harmonisation to make the same conditions in all Member States. Thus directives are one of the basic instrument of establishing single market in commercial law, this method was chosen in cases such as convergence of legal regulations of business corporations.

The decisions of the Court of Justice plays an important role in interpretation and implementation of community law in Member States of the EU. They help to unify the interpretation of community law in national level. The Court of Justice reflects the crucial issues of the functioning of the single market in its decisions and influences the further development of the law. And this is happening even though general binding character or the decisions is not legally expressed (as it is in case of regulations). One classic example of influencing the international trade with decision of the Court of Justice is the Cassis de Dijon judgement (Rewe-Zentral, Case 120/78, February 20, 1979).

> *1. In the absence of common rules, obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of a product must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.*
>
> *2. The concept of "measures having an effect equivalent to quantitative restrictions on imports", contained in Article 30 of the EEC Treaty, is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned.*[2]

[2] BLAHUŠIAK, Igor. Judikatura ESD. In: *Euroskop.cz* [online]. [cit. 2013-01-31]. Available at: https://www.euroskop.cz/106/sekce/judikatura-esd/, english version: http://www.cvce.eu/content/publication/1999/1/1/30e68ace-b09f-4340-b249-29bf692376a1/publishable_en.pdf

1.2.2 SECONDARY SOURCES OF LAW

INTERNAL SOURCES OF LAW

There is a great range of sources that can be called internal, in particular it´s legal norms (such as law, regulations, and bill). Alternatively in Anglo-Saxon countries there are also customs and rules established in a previous legal case (precedent).

Legal rules affecting international trade can be either public or private.

Branches of **public law** that affect international trade are

- Administrative law – for example the conditions for foreign business entities in the trade act or the conditions for export of arms in the act on foreign export of military material
- Financial law – for example taxation of foreign legal entities doing business on the territory of another country
- Criminal law – for example the conditions for prosecution of foreign businessmen who committed economic types of crimes, etc.

Branches of **private law** that affect international trade are

- Civil law – deals with disputes between individuals or organisations, defines terms such as legal persons, power of attorney, contract, natural persons, etc.
- Commercial law – provisions on business activities for foreign persons or obligations in international trade
- Intellectual property law – issues related to copyright and industrial rights (patents, trademarks, etc.)
- Conflicting law

Apart of substantive norms there are also **procedural legal regulations** included in sources of law. Among these are norms governing civil procedures or arbitral proceedings.

What is important to determine the applicable source of law of a certain business transaction is the relationship between the international contract and national legislation (law). With the joining the European Union the Czech legal system has undergone some fundamental changes that party weaken the power of national law. There were changes in the Constitution, in article 10 et seq. that now says that issued international contracts that have been ratified by the Czech Parliament and Czech Republic is bound by them are a part of the legal system and if they differ from the national law the international contract is applicable. Therefore **issued international contract takes precedence over the national law.**

Similarly we can also mention the implementation of application precedence of auxiliary sources of EU law.

AUXILIARY SOURCES OF LAW

Auxiliary (or supportive) sources of law are special legal instruments that arose from the need of international trader to secure themselves regarding the applicable law. Their purpose is to overcome the difference between the legal systems in various countries. Usually there are customary rules (norms) that were formed in practise by traders independently on the existence of national legal rules. The necessary condition for its application is however **agreement on its application.** Generally speaking we call them **lex mercatoria.**

Among those there are:

Business practices used in international trade - each business sector has its customs that can become a source of law for the concrete contractual relationship. It may happen that an international agreement involves some of the trade customs as well. An example of it is Article 9 of the UN Convention on Contracts for the International Sale of Goods, Vienna, 1980 (CISG).

> *(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.*
>
> *(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.*

- **General principles on international business transactions -** the principles of contract law are also implied in the international trade, e.g. contractual freedom, equality of the parties, contract compliance, etc.

- **Principles, policies and conditions established by international institutions -** those are for example the ones mentioned above - UNIDROIT Principles of International Commercial Contracts, INCOTERMS 2010 International Commercial Terms, The International Federation of Consulting Engineers (FIDIC) or the principles of European Contract Law.
  However let's emphasize that those are auxiliary sources of international commercial law and its application is conditioned by the explicit agreement of both parties. The principles then may be applied to their legal relation - contract and it shall help to ease the conditions of execution of the contract. Therefore the principles are generally very popular and widely used.

- **Form or sample contracts** - form contracts are enforced mainly by big corporations and the other party usually doesn't have a great chance to change its content. Sample contracts are pre-made types of contracts for those types of international agreements that are used most often. Sample contracts have multiple variations of solutions the contractual relationship. As far as franchising or distributorship contracts the sample contracts are issued for example by the International Chamber of Commerce in Paris (ICC).

And others.

2 LEGAL RELATIONSHIPS WITH INTERNATIONAL ELEMENT

There are not public-law or private-law types of relations among entities strictly from one country in open economy. There are cross-border contractual relations as well. **The international element** of legal relationships due to the fact that **one of the parties is a foreign** or foreign legal entity. In private-law relationship may be the international element be for example a **legal fact decisive for a certain legal relationship that happened abroad** (e.g. conclusion of a contract abroad) or **object of the contract is abroad** (e.g. property that located in another country).

The existence of international element in legal relationships has in terms of legislation two main consequences:

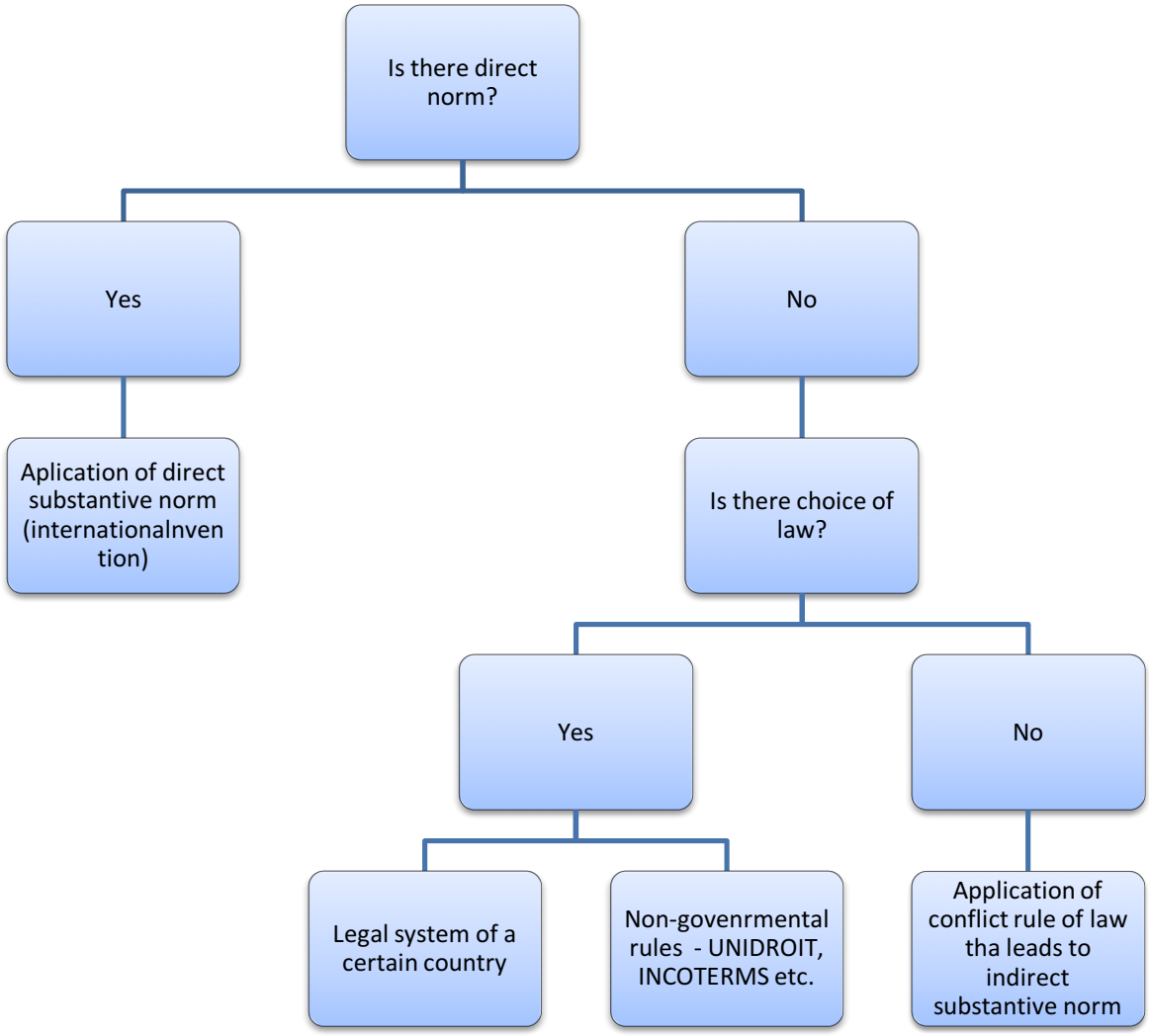
1. it is necessary to determine **applicable law**, i.e. legal system a of country that the contractual relationship shall follow
2. legislation with regards to the harmonisation and unification of legal rules is influenced (ruled) not only national legal systems but legal provisions included in international conventions and agreements (for example acts of the European Union institutions)

Determination of applicable law in **public-law relationships with international element** is not generally a problem. The territorial scope of rules of law in each country regulating legal public-law relationships indicates that those rules of law are applicable to all persons (legal and natural) located on its territory. Therefore the applicable law shall be the law of the country whose institutions are in public-law relationship with the parties of the contract. However this does not exclude the rules of law to set up a different legal regime for domestic and foreign entities.

With **private-law legal relationship** the situation is a little bit more complicated. There we need to respect the principle of autonomy of will. Before determination of applicable law we need to **properly classify its contractual type first**. E.g. contract of sale, contract for work, distributorship contract, etc. In these types of relationships the applicable law may be determined:

1. Implementation of **direct norms and conflict rules of law** if they even exist for this specific type of legal relationship. Direct substantive norms are included especially in international conventions and are applied automatically to every contract.
2. If a certain area is not covered in direct substantive norms it ought to be so called applicable law. In determination of applicable law the will of the parties takes precedence which corresponds with method called **choice of law.**
3. In case the parties don't agree on applicable law conflict rule of law will be determine substantive indirect norm.

Scheme 2-1: Determination of applicable law in legal relationships with international element



Source: own work

2.1.1 Application of Direct Substantive Norms

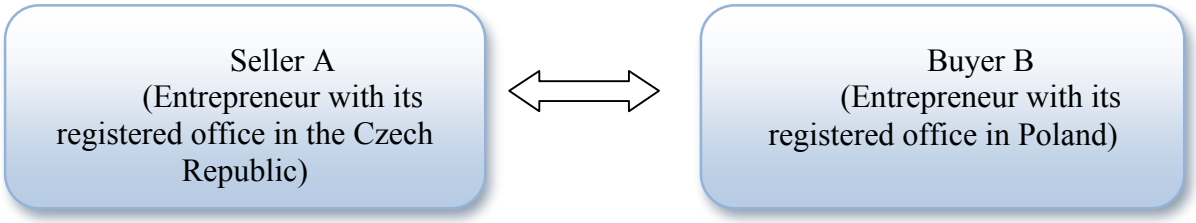
The rights and obligations of the parties in private-law type of legal relationships with international element might be regulated by **direct substantive norms.** Those are legal norms specifically adopted to regulate these relationships and its implementation does not require previous determination of applicable law (by choice of law or based on conflict rules, see more about this below). They are included in international treaties. The only condition for its application is the relevant international contracts must be a part of legal system that is bound for a certain entity. Nowadays there are internationally regulated two sectors of law: **contract of sale and contracts of carriage.**

- United Nations Convention on Contracts for the International Sale of Goods
- United Nations Convention on the Limitation Period in the International Sale of Goods
- Convention and Statute of the International Regime of Maritime Ports
- Convention on International Civil Aviation
- European Convention on Road Signs and Signals
- Convention on International Transport of Goods Under Cover of TIR Carnets

Directive substantive norms are applied automatically provided their conditions included in the contract are met. Further details about those are in chapters 5 (Contracts for the international sale of goods) and 6 (INCOTERMS and international carriage of goods).

EXAMPLE WITH SOLUTION 1 : PURCHASE CONTRACT

A contract of sale was signed between a company A from the Czech Republic and a company B from Poland. The subject is 100 televisions that are supposed to be sold in the country A to end customers. The content of the contract is rather brief - only includes the essentials.



Simplified method of looking for the right legal source of this contract is held in the following manner:

1 – Is there any international convention applicable for this type of legal relationship?

Answer: YES, the United Nations Convention on Contracts for the International Sale of Goods.

2 - Are all requirements of its application in this particular case are fulfilled? The Convention sets those cumulative requirements:

- Parties (seller and buyer) are entrepreneurs from two different countries - CHECK
- Parties have place of business (or registered office) in the countries that ratified the Convention (both Poland and Czech Republic are signatories) - CHECK
- The subject of the contract is goods (i.e. movables, not real estate) - CHECK

Based on the information above it´s safe to say that there is no need to determine applicable law because direct substantive norm will be used - namely United Nations Convention on Contracts for the International Sale of Goods.

2.1.2 CHOICE OF LAW

The choice of law is an agreement of parties on what legal system to apply on their mutual legal relationship, to a certain contract.

In business the freedom of choice of law is usually not limited anyhow so the parties may **choose any legal system to follow.** I.e. not only the legislature of one or the other party involved but also any legal system of a third country. Despite the big benevolence most of the contractual parties choose a legislative that they know or is available to them and that corresponds to their arrangement of their common relation. This agreement should be in written form. In the choice of law are not only incorporated legislations of countries but **nongovernmental law** as well; usually created by various international institutions, such as UNIDROIT rules or INCOTERMS delivery terms or others.

Main advantage of choice of law is the fact that it is usually done with the establishing the mutual (often also contractual) relationship, or during its duration. Therefore both parties

may consider their requirements and consequences in advance, in case of disputes related to the implementation of contractual relationship or what may be applicable to them.

The choice must be made expressly or must be clear from provisions in the contract or other circumstances of the case. The parties may choose the applicable law for the contract as a whole or just for its part. The parties may also agree to use another applicable law anytime different from the one used before.

The choice of law may be done within a specific contract as one of the provisions, so called **Choice of Law clause.** The provision may be something like this:

„This agreement shall be governed, construed and enforced in accordance with the laws of the State of … (governing law) … without regard to its conflict of laws rules. "

If no applicable law is chosen or the choice made is invalid then the contract is governed by conflict rules of a specific country´s law (for example EU).

2.1.3 APPLICATION OF RULES OF CONFLICTING LAW

Conflicting rules of law are special types of rules referring legal rules. They are legal norms that determine applicable legal system in a certain private-law contractual relationship with international element through **connecting factors.**

Conflict of laws are domestic legal norms in majority of cases; in Czech law they are in Act No. 97/1963 Coll., on International Private and Procedural law, as amended (hereinafter referred to as AIPL, in Czech ZMPS).[3] We can encounter this conflict of law also in international contracts as unified norms, i. g. Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM).

In Member States of the European Union common conflict rules take precedence over national legislation. Common rules regarding conflict of laws were adopted in order to improve the predictability of the outcome of litigation, certainty of the applicable law and freedom of transferring of judicial decisions. These uniform rules in Member States ensure the same legal procedure regardless the country where the accusation was filed. There are following rules and regulations:

- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

Procedural issues are incorporated in

- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)

It usually consists of **extent**, i.e. determination of the scope of relationships that the rules may be applied to (e.g. contract of sale, contract of mandate agreement) and **connection** that is made through **connecting factors** (domicile, nationality, place of damage) determines applicable law.

Despite the fact that conflict rules of law are national norms that a country adopt in exercise of its sovereign power independently there are several types of connecting factors that are common for determination of the applicable law – that connect them.

[3] This act is, by 1. 1. 2014, effectively replaced by new act on the same issue No. 91/2012 Coll., on international private law.

TYPES OF CONNECTING FACTORS

Connecting factors may be divided into several groups according to whether or not they include international element, their subject or matters that are particularly important.

Connecting factors – link between a person and the legal system or rules:

- nationality
- domicile, that is sometimes understood as permanent residence, in other cases its origin (e.g. parent´s origin, place of birth)

These connecting factors are used especially for determination of personal status – legal rule that will apply to him in specific contexts. In Czech law nationality is used for such cases which are completed in the area of private-law legal relations with "national treatment". This implies that to consider natural person eligible it must be considered eligible in the country where he/she has residence (performs legal acts).

Apart of this the connecting factors are used also for determination of applicable law in certain cases of contractual relations, especially in form of place of residence and domicile.

In contracts involving legal persons there are following connecting factors:

- head office
- establishment (incorporation law, i.e. country´s law under which was the legal person established)
- Control (right to control – right of the legal person that is in a position to control the other´s activities; for example "controlling person" section 66a of the Commercial Code No 513/1991 Coll., as amended. A controlling person is a person who de facto or legally exercises, directly or indirectly, a decisive influence on the control or operation of another person´s enterprise.

It´s use is two folded the same way as it is with connecting factors related to natural persons. In the Czech law the connecting factor of establishment is mostly used for establishment of head office of legal person.

Connecting factors regarding the subject of a legal relationship with international element may be:

- location – e.g. the law of the place where it is located is applied to relations of immovable and substantial rights
- currency
- flag

Connecting factors regarding relevant facts may be:

- the place of conclusion
- the place of performance of the contract
- the place where the tort or offence was committed

INTERNATIONAL ELEMENT IN PROCEDURAL LEGAL RELATIONS

International element may occur not only in substantive law but in procedural as well. To determine the applicable law we use connecting factor **lex fori –** law of a forum. Law of a forum is used not only to all issues regarding the procedure but this connecting factor is

also applicable in determination of substantive law if (for some reason) any other law or other conflict rule of law cannot be applied, for example for public order exception.

Public order exception is generally known principle that a court or other authority may not apply foreign law if such application is against basic principles of public order or law of the country and principles of their understanding of morality and justice.

There is a problem with application of conflict rules of law and determination of the applicable law based on the fact that conflict rules of law are first and foremost national rules. Firstly each country may choose its own conflict rules of law, as well as its extent and connection. Different definition may have for the circle of relations (contract) that the relevant conflict rule is applied. Or another connecting factor (the place of performance of the contract instead of domicile) may be used to determine the applicable law.

Neither a formal agreement of conflict rules of law adopted in different countries (i.e. its identical wording) doesn´t exclude various consequences of its application. This statement is based on the fact the conflict rules of law in different countries in its content and connection use the same legal terms but their content may vary from country to country. For example the term "place of conclusion of the contract" (a contract is concluded at the moment of acceptation – unconditional and on time – is sent to the address of the proposer) is in some countries replaced with term "theory of delivery" (the contract is regarded as concluded when unconditional acceptation is delivered to the proposer within its acceptance period).

In connection to the determination of applicable law through conflict norms there are several things to bear in mind – time, or period of time within the determination is supposed to happen. If the parties don´t choose the applicable law and/or if they don´t solve a possible dispute with an agreement then the applicable law will be determined by a court, or other authority, and the determination will be upon the initiated proceeding (a legal action). Therefore it may happen that in the terms of applicable law the claims cannot be made to the claimant at all or in desired extent.

Let´s recall the choice of law or based on conflict rules may only be determined applicable law – legal system of a certain country – not rights and obligations of parties in a certain private-law legal relationship with international element. Legal norms that regulate rights and obligations are referred to as substantive norms. These are national legal norms national legal norms incorporated usually in Commercial or Civil Codes of countries. With regard on the fact that their use to regulate legal relations is only possible based on determination of applicable law they are called indirect substantive norms.

2.2 ROME I REGULATION

The most common conflict norm applied within the EU is already mentioned **Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)**. This regulation takes precedence over national conflict rules of law of each Member States which makes the common conflict rules unified within the European Union.

The regulation determines connecting factors of certain types of contracts as follows:

- **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 immovable property** or to a **tenancy of immovable property** shall be governed by the law of the country where the property is situated;
- 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;
- **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;
- **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;
- **a contract concluded within a multilateral system** which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments

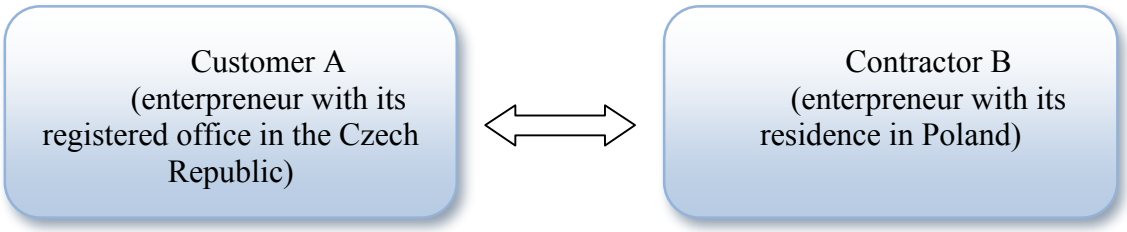
Regulation Rome I also regulates the **scope of the law applicable.** The law applicable to a contract by virtue of this regulation shall govern in particular:

- Interpretation
- Performance
- Within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations. Including the assessment of damages in so far as it is governed by rules of law
- Various ways of extinguishing obligations and prescription and limitation of actions
- Consequences of invalidity of the contract

Regulation Rome I also respects **so called public order exception** which means usage of any provision may be rejected only it would be crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this regulation (art.9). Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. Application of public order exception means that certain national legal norms – especially in public-law sector – must be applied always to regulate public legal relations with international element; see below.

EXAMPLE WITH SOLUTION 2: CONTRACT FOR WORK

There was a contract concluded between a company A from the Czech Republic and a company B from Poland. It is contract for work for office furniture and its assembling in the company´s place of business. The contract only contained the essentials.



Simplified process of searching the right source of law for this contract is held as follows:

1 – Is there an international convention applicable for this type of relation?

Answer: No, contract for work is not regulated by any international convention that is binding for the Czech Republic or Poland. Therefore we have to find the right applicable law for this legal relationship.

2 – Did the parties choose applicable law in their contract?

Answer: No, therefore we have to determine applicable law based on conflict rule of law.

3 – What conflict of law shall be applied and with chat outcome?

Answer: The Czech Republic and Poland are both Member States of the EU so the conflict norm is Regulation Rome I. Specifically it´s article 4, par. 2 b) 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. In other words the legal system of the provider´s place of business will be applied (provider of the service), i. e. relevant legal norm regulating contract for work in Polish legal system will be applied.

2.3 APPLICATION OF THE CZECH LEGAL SYSTEM AS THE APPLICABLE LAW

As it was described above the legal norms regulating commercial contractual relations in domestic Commercial Code are one of the indirect substantive legal norms. That´s why commercial legal relations in international trade are not only in the usual provisions in Commercial Code but also special provisions in Chapter III, Special provisions on contractual relations in international trade (sections 729-755 of the Commercial Code). These provisions apply, in addition to the other provisions of this Code, if:

- At least 1 participant (person) has his seat, place of business or residential address on the territory of a country different from that of the other participants. (international element)
- Provided that their relationships are governed by Czech law. (Czech law is the applicable law regardless it´s agreed by the parties or determined by a conflict norm)
- Provisions in chapter III are special provisions therefore it takes precedence over provisions in chapters I and II of the Commercial Code.

According to section 756 of the Commercial Code the provision of the Commercial Code may only apply if an international convention binding on the Czech Republic and published in the Collection of Laws doesn´t provide otherwise. This is the case of contract of sale with international element whose legal regulation is included in the United Nations Convention on contracts for the international sale of goods that takes precedence over national laws.

CONTENT OF COMMERCIAL CONTRACTUAL RELATIONS

An essential feature of legal regulation of contractual relationship is its non-mandatory character. Contractual parties may choose its rights and obligations in the contract different from the law, with the exception of mandatory provisions enumerated in section 263 of the Commercial Code. In determining the rights and duties arising from a relationship of obligations, account is also taken of the business practice – trade usage – prevalent in a particular field of business, unless these are contrary to the contents of the contract or to the law.

In terms of obligatory nature there are several things binding for commercial contractual relationship:

- **Mandatory norms of international contract**
- **Contractual arrangements of the parties (on issues regulated in international conventions)**
- **Dispositive norms of international convention**
- **Mandatory norms of commercial code**
- **Contractual arrangements of the parties**
    - Explicit (e.g. delivery time)
    - Referring to other terms
    - In terms of Commercial Code the referring to other terms have a different effect depending on whether the general commercial terms that Commercial Code classify as made by specialised or interest groupings or others, for example prepared by one of the parties. General terms and conditions are a part of the contract and are binding even if only mentioned in the contract (e.g. INCOTERMS 2010 rules). Other may require be attaching to the contract or known to both parties to be binding. Referring to business practices that are practices still common in a specific business area (finance) or referring to other elements e.g. concluded frame contract, annexes, existing common practice, etc. All references must be sufficiently exact to avoid any doubts about what is and what is not included in the contractual relationship.
- **Dispositive norms of commercial code**
- **Mandatory norms of civil code**
- **Dispositive norms of civil code**
- **Business practice**
- **Principles in commercial code**

The content of the contractual relationship in international trade is also regulated by mandatory and dispositive norms existing and binding for the Czech Republic issued by the institutions of the European Union.

2.4 PUBLIC REGULATION OF INTERNATIONAL BUSINESS TRANSACTIONS IN THE CZECH REPUBLIC

Legal norms of public law serve the country to protect its own interests. Though it the country regulates import or export of sensitive commodities, change its tax claims, administrative issues and other duties.

This public-law regulation is provided not only in **national law** but also in **community law** (European Union policy towards third countries) and it is also regulated in the country´s commitment to international community in **international conventions** (e.g. to respect UN Security Council resolution on embargo against some countries).

In the national law there are several legal provisions of public law nature that are designed to regulate international commercial transactions. Its purpose is to protect national security, cultural values, environment, etc.

2.4.1 ACT NO. 228/2005 COLL., ON CONTROL OF TRADE IN PRODUCTS THE POSSESSION OF WHICH IS RESTRICTED IN THE CZECH REPUBLIC FOR SECURITY REASONS, AS AMENDED

This act regulates trade with goods the possession of which is restricted in the Czech Republic for security reasons (for example firearms or ammunition) and its transport from the territory of the European Union to the Czech Republic, vice versa or its import and export to/from third countries.

The government sets out a list of those products, conditions of their transport and forms of permit application (e.g. Government Regulation No. 178/2011 Coll., listing some pyrotechnic products and stipulating terms and conditions under which they can be imported, including a specimen of an import permit application).

The products may be carried only with the permit issued by Ministry of Industry and Trade. The ministry decides whether or not to grant the permit based on written permit application of natural person or natural person authorised to do business in the Czech Republic.

There are following requirements in the permit application: Identification of the claimant:

- Proposed validity period (max. 1 year)
- Name of the specific product, its quantity or volume
- Identification of the foreign partner
- Name of the country of origin
- Total price of imported or exported products in Czech crowns.

If a natural person carries the product without the permission then it commits an offence, if legal person does that then it is administrative offence. This may be fined up to 5 million CZK or up to the five-times value of the products if that would be higher than 5 million CZK.

2.4.2 ACT NO. 38/1994 COLL., ON FOREIGN TRADE WITH MILITARY MATERIAL

This act regulates conditions of foreign trade with military material and governmental institutions in this area of trade. The scope of this act is from trade with Member States of the

EU to commercial import/export of military material from/to third countries. In such trade may not be included weapons of mass destruction (nuclear, chemical and biological weapons).

Trade with military material may be done only by legal entity with its head office in the territory of the Czech Republic or natural entity doing business under special authorisation by government. The permit is issued by Ministry of Industry and Trade based on binding decisive of other authorities, such as Ministry of Foreign Affairs, Ministry of Interior and Ministry of Defence.

Permits may be issued to legal person provided that:

- Capital of this legal person by not more than 49 % consisted of deposits coming from foreign entities; with the exception of deposits from foreign persons located or resident in any European Union Member State
- Members of statutory body of the legal person and company secretaries – if appointed – and members of Supervisory Board – if established
    - Reached the age of 21 years
    - Are nationals of any Member State of the EU
    - Have permanent residence in the territory of the European Union
    - Are eligible to perform legal acts,
    - Fulfil requisites for performance of some functions in governmental institutions and bodies according to special law
    - Meet the prerequisites for sensitive activities in accordance with special law
- Trade with military material is made by legal entity on its own name and behalf and on its own account,
- Financial backing of this trade with military material is sufficient with regards to anticipated range.

Ministry will not issue authorisation in case certain condition for its issue are not met or in case that the issue would lead to state of threat of foreign political or commercial interests of the Czech Republic or of public order, security and safety of its population.

Legal person that has been granted a permit to trade with military material may make only the transaction that it is entitled to do; solely on the basis and extent and under conditions specified in the permit. A license is required for each and every contract with military material. There is no need for specialised licence for each contract for only carriage of military material, just a general license.

2.4.3 ACT NO. 71/1994 COLL., ON THE SALE AND EXPORT OF GOODS OF CULTURAL VALUE

This act was created because of need to limit the export of goods of cultural value abroad due to its huge increase after the fall of communism and "opening the borders" to the west. Goods of cultural value are especially naturals or man-made goods important for history, literature, art, science or technology.

Goods of cultural value may be exported from the territory of the Czech Republic only if they have an export certificate. This certificate is an expert opinion where it is stated that this particular good of cultural value does not show any signs of cultural heritage. These certificates are issued on request of the owner by museums, galleries, libraries and the National Heritage Institute or Ministry of Culture.

Goods of cultural value with archaeology nature and sacred and iconic goods of cultural value muse are accompanied by a **certificate of permanent export.**

2.4.4 ACT NO. 69/2006 COLL., ON THE IMPLEMENTATION OF INTERNATIONAL SANCTIONS

This act regulates some of the obligations of legal and natural persons in the implementation of international sanctions in order to maintain or restore world peace and security and protection of fundamental human rights and fight against terrorism.

International sanctions are, for the purposes of this act, command, prohibition or limitation as follows

- Decisions of **United Nations Security Council**
- Common positions, joint actions or other measures taken based on provision in the **Treaty on European Union – Common Foreign and Security Policy** or direct applicable provisions of European Communities.

Among those sanctions are also common boycott of trade with a certain country.

In trade and services the sanctions may be restrictions or prohibition of:

- Import or purchase of goods that are subject of international sanctions, its re-sale or any disposal with it,
- Export, sale or enabling of disposal with Czech goods that are subject of international sanction; or a person that is a subject of an international sanction, as well as territory,
- Transit operation of Czech goods across a territory that is subject of an international sanction or goods that is subject of an international sanction across the territory of the Czech Republic
- Transit of other goods on a territory that is subject of an international sanction or goods or persons that are subject of an international sanction across the territory of the Czech republic, or
- Any activities that support or may support activities listed above.

Anyone who get to know in a credible and trustworthy way that there is a property which is subject of an international sanction is obliged to notice it to Ministry of Finance. If during preparation or conclusion of contract it is suspected that one of the party is subject of international sanction or its property or other contractual relationship are subject of an international sanction, however this suspicion is not possible verify before the conclusion of the contract, the other party must without delay notify the Ministry of Finance immediately after the conclusion of the contract.

3 ORGANISATIONAL REPRESENTATION IN FOREIGN MARKETS

To extend business to a territory of another country is possible either by establishing a certain **organisational structure** on that territory or by finding a **contractual partner** as an independent businessman that is already settled there and know the background, the legal culture and environment. The latter is also described in the next chapter so let's focus on the organisational forms of entering new markets.

Creation of a certain type of organisational structure leads to more thorough control and management of business activities abroad compared to "simple" contractual obligation of a foreign partner. While in the case of having a contractual partner abroad who is an independent businessman on his own the organisational structure (generally we can call it branch abroad) is still dependent on its founders who keep their decision rights on its existence, activities, employees, external activities, etc. Although there are also disadvantages with establishing and managing this kind of branch, such as high costs for operation and implementation of other nation´s law (esp. labour and tax areas). Implementation of foreign legal system may effectively lead to higher protection of employees, insufficient investment protection made abroad or chargeability abroad and others.

Organisational background of business abroad may be done by:

- Establishing a branch company abroad
- Establishing a business entity abroad
- Relocation of a legal entity´s place of business abroad
- Establishing some of the types of business entity
- Establishing a joint-venture

3.1 ESTABLISHMENT OF A BRANCH ABROAD

Legislation on establishing a subsidiary of a company abroad is usually ruled by the legal system of the country where the subsidiary is established. Further interpretation may also come from the Commercial Code of the Czech Republic which is harmonised with the EU law and follow the rule of "national treatment", i.e. enable foreign enterprises to establish a business in the Czech Republic under the same conditions as domestic entrepreneurs have

§ 21 COMMERCIAL LAW

1. *Foreign persons (individuals and entities) may engage in business activities on the territory of the Czech Republic under the same conditions and to the same extent as Czech persons, unless the law stipulates otherwise.*
2. *For the purposes of this Code, a „foreign person" (in Czech „zahranicni osoba") is understood to be an individual whose residential address is outside the territory of the Czech Republic, or a legal entity whose seat is outside the territory of the Czech Republic. A legal person whose seat is in the Czech Republic is deemed to be a Czech legal entity (in Czech „ceska pravnicka osoba").*
3. *For the purposes of this Code, „business activity by a foreign person on the territory of the Czech Republic"means business activity by a foreign person who has an enterprise, or an organizational component of such, located on the territory of the Czech Republic.*

4. ***A foreign person's authorization to carry on a business activity on the territory of the Czech Republic takes effect on the day as of which that person, or that person's organizational component, is recorded in the (Czech) Commercial Register. Such foreign person is authorized to engage in the range of business activities specified in his (its) entry in the Commercial Register. The application for this is filled by the foreign person concerned.***
5. *The provisions of subsection (4) shall not apply to individuals (natural persons) who:*
   a. *have a permanent residential address in a member state of the European Union or in some other state of the European Economic Area (i.e. Switzerland) if such individuals carry on business activity on the territory of the Czech Republic.*
   b. *a family member of a person described in a) who has the right of residence in the Czech Republic*
   c. *a citizen of a third state who got granted a legal permanent resident status of any Member State of the EU*
   d. *a family member of a person described in c) who has the right of residence in the Czech Republic*
   e. *any other person other than those referred in a) to d) who has the right to do business under the Trade Act of the Czech Republic*

Organisational component of domestic legal person needs to be registered with the local authority in a commercial register. This type of component of a company **doesn´t have own legal personality**, in other words, it is still the same legal person. The head of the foreign organisational component has right to act on behalf of establishing business entity which means that if for example a Czech company establish own organisational component in Poland the head of the organisational component enters into contracts on Polish territory on behalf of the Czech company.

As far as the legal personality of foreign entities operation on the territory of the Czech Republic the legal regulation of internal legal relations or liability is under provision § 22 of the Commercial Code.

§ 22

Under Czech law, the legal capacity of a foreign person other than a foreign individual (foreign national) is determined by the law under which such person was established. ***This law also governs the foreign person's internal legal relations and its members' or partners' liability for the person's obligations.***

3.2 ESTABLISHMENT OF A LEGAL ENTITY ABROAD

Establishing a business entity abroad is just a variation of establishing a branch rather than organisational component of a company. The reason is that with establishing a business abroad, a new legal entity is created - with own institutions, ownership structure, etc. This new legal person is created under a foreign legal system of the country where the business is establishing.

It is obvious that legislation of business forms is different in each country, although the area of limited liability companies is harmonised quite well. Let´s see some examples of capital companies establishable abroad and their minimal capital required.

Table 3-1: Limited Liability Company

Name	**The minimum capital required**
Germany– GmbH	25.000 EUR
England– Ltd.	1 GBP
Netherlands– B.V.	18.000 EUR
Poland– Sp. z o. o.	5.000 PLN
Hungary– Kft.	500.000 HUF

Table 3-2: Joint-stock Company

Name	**The minimum capital required**
Germany– AG	50 000 EUR
England– Plc.	50 000 GBP
Netherlands– N.V.	45 000 EUR
Poland– S.A.	100 000 PLN
Hungary– zrt.	20 000 000 HUF

3.3 RELOCATION OF A LEGAL ENTITY´S PLACE OF BUSINESS

The requirements for relocation a legal entity´s seat abroad are regulated by §26 of Czech Commercial Code.

§ 26 COMMERCIAL CODE

1. *A legal entity formed under the law of a foreign state (country) for the purpose of conducting business activity which has its seat abroad may relocate its seat to the Czech Republic if such relocation is permissible under an international treaty binding on the Czech Republic and promulgated in the Collection of Laws or in the Collection of International Treaties, The same shall apply to relocation of a Czech legal entity's seat to a foreign country.*
2. *Relocation (transfer) of a seat under subsection (1) becomes effective on the day as of which it is entered in the (Czech) Commercial Register.*

The possibility to relocate the place of business of a company within the EU isn't all clear even with the legally recognised freedom of establishment. Current jurisdiction of the European Court of Justice of the European Union (ECJ) that has dealt with this issue multiple times doesn´t have the relocation of a seat very much in favour. Thus let's look at some of the decisions of the ECJ on the freedom of relocation of a seat within the EU:

DAILY MAIL (1988)

Daily Mail was a tax-law case. Daily Mail plc wanted to move its de facto head office (tax residence) to the Netherlands because of the more favourable tax regime there, while at the same time it planned to remain a company subject to UK company law. The UK Treasury Department refused permission for the transfer of seat, which is necessary under UK law.

The decisions of the ECJ was that to **relocate the place of business (its administration and management) abroad** while keeping the status of a company established according to the legal system of a different country **is not possible.**

CENTROS (1998)

Two Danes established Centros Ltd under UK company law. The company was trade only in Denmark, however. The incorporators clearly stated that they had established the entity under UK company law solely to avoid the minimum capitalisation requirement for Danish limited liability companies. The Danish commercial registry considered this to be an unlawful circumvention of the Danish minimum capitalisation rules and so refused to register the company's branch office in Denmark.

> The decision of ECJ says *that a Member State may not refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. Given that the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment.*

ÜBERSEERING (2002)

The ECJ went further in the Überseering case. All the directors of Überseering BV, a limited liability company organised under Dutch law, were resident in Germany. As a consequence, in accordance with current thinking on company seats, the German courts decided that, owing to the location of the company's principal office, German corporate laws apply to the company. The Dutch corporate entity was therefore dismissed from court proceedings in Germany.

The ECJ decided in favour of Überseering company:

> *...Such objectives cannot, however, justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment conferred on companies by Articles 43 EC and 48 EC.*

INSPIRE ART (2003)

A Dutchman established the company Inspire Art Ltd under the laws of England and Wales and requested the registration of the company's Dutch branch office at the commercial registry in the Netherlands. The registry took the position that specific Dutch rules for foreign entities registered in the Netherlands were to apply to the company. As a consequence, Inspire Art Ltd would have been required, *inter alia*, to use a company name indicating its foreign origin, and comply with the minimum capitalisation rules for Dutch limited liability companies.

VALE (2012)

And the last but not least, also very important decision of the ECJ is on VALE Construzioni Srl. A company established in Italy that decided to relocate to Hungary with its management as well as production line. They basically dissolve their company in Italy and relocated to Hungary and asked for change of a legal form to Hungarian kft. They got refused.

It was decided that a company which was previously incorporated and registered in Italy cannot, by virtue of Hungarian company law, transfer its seat to Hungary and cannot obtain registration there in the form requested. Clarification was needed in particular of an obiter in an earlier case of the ECJ (Cartesio) on the conditions under which such cross-border conversion of a company must be permitted by virtue of EU law.

On those grounds, the ECJ rules that:

1. Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company.
2. Articles 49 TFEU and 54 TFEU must be interpreted, in the context of cross-border company conversions, as meaning that the host Member State is entitled to determine the national law applicable to such operations and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies, such as the requirements relating to the drawing-up of lists of assets and liabilities and property inventories. However, the principles of equivalence and effectiveness, respectively, preclude the host Member State from
    - refusing, in relation to cross-border conversions, to record the company which has applied to convert as the 'predecessor in law', if such a record is made of the predecessor company in the commercial register for domestic conversions, and
    - refusing to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin.

CONCLUSIONS THAT CAN BE MADE ON THE BASIS OF THOSE DECISIONS

1. **It is not possible just to relocate a seat without changing legal form or somehow differently dissolute the company.**
2. **It is possible to establish or acquire a holding of a company abroad.**
3. **It is possible to have organisational component of a company established abroad and effectively perform business activities.**

The conclusions of ECJ decisions above allowed to make a situation that we call **competition of legal systems.** It means that a business entity has a right to choose which legal system suits the most its requirements, such as minimal capital required, employee protection, etc. And according to that the company can set up its business there. However the company may still do business abroad through establishment of a branch (organisational component). Given the limits for minimum capital it´s convenient to establish a business in Great Britain and then create its organisational component in the Czech Republic through which it effectively may do business on the territory of the Czech Rep.

3.4 ESTABLISHMENT SOME OF THE TYPES OF COMMUNITY BUSINESS ENTITIES

European community law has created several types of international business entities that has the advantage (compared to the national ones) of **possibility to relocate freely** within the EU without abolition the current one in the country of origin.

There are these types of transnational community business entities:

- **European Economic Interest Grouping**
- **Societas Europaea**
- **European Cooperative Society**

In future there could be also European Private Company (SEP) with limited liability, to encourage the setting up and running of small and medium sized enterprises in the Single Market.

3.4.1 EUROPEAN ECONOMIC INTEREST GROUPING (EEIG)

European economic interest grouping is regulated in

- Council Regulation EC No 2137/1985 of 25 July 1985 on the European Economic Interest Grouping.
- law no. 360/2004 Coll., on EEIG

The purpose of the grouping is to **facilitate or develop the economic activities of its members by a pooling of resources, activities or skills**. This will produce better results than the members acting alone. It is not intended that the grouping should make profits for itself. If it does make any profits, they will be apportioned among the members and taxed accordingly. Its activities must be related to the economic activities of its members, but cannot replace them.

- An EEIG cannot employ more than 500 persons.
- An EEIG can be formed by companies, firms and other legal entities governed by public or private law which have been formed in accordance with the law of a Member State and which have their registered office in the European Union (EU). It can also be formed by individuals carrying on an industrial, commercial, craft or agricultural activity or providing professional or other services in the EU.

- An EEIG must have at least two members from different Member States.
- The contract for the formation of an EEIG must include its name, its official address and objects, the name, registration number and place of registration, if any, of each member of the grouping and the duration of the grouping, except where this is indefinite. The contract must be filed at the registry designated by each Member State. Registration in this manner confers full legal capacity on the EEIG throughout the EU.
- When a grouping is formed or dissolved, a notice must be published in the Official Journal of the EU (C and S series).
- An EEIG may not invite investment by the public.
- An EEIG does not necessarily have to be formed with capital. Members are free to use alternative means of financing.

The profits of an EEIG will be deemed to be the profits of its members and will be apportioned either according to the relevant clause in the contract or, failing such a clause, in equal shares. The profits or losses of an EEIG will be taxable only in the hands of its members. As a counterweight to the contractual freedom which is at the basis of the EEIG and the fact that members are not required to provide a minimum amount of capital, each member of the EEIG has unlimited joint and several liability for its debts. The EEIG must have at least two organs: the members acting collectively and the manager or managers. The managers represent and bind the EEIG in its dealings with third parties even where their acts do not fall within the objects of the grouping.

An EEIG´s official address must be within the EU. It may be transferred from one Member State to another subject to certain conditions.

3.4.2 SOCIETAS EUROPAEA

Legal regulation of Societas Europaea (European company) is in

- Council Regulation no. 2157/2001 of 8 October 2001 on the Statute for a European company
- law no. 627/2004 Coll., on European company

There is provision for four ways of forming a European Company.

- **Merge -** two or more public limited companies or existing SEs may merge to form an SE provided at least two of them are governed by the laws of different Member States.
- **Formation of a holding company** – available to public and private limited companies with their registered offices in different Member States or having subsidiaries or branches in Member States other than that of their registered office. At least two of the companies must be governed by the laws of a different Member States, have had a subsidiary company governed by laws of another Member State for two years and had a branch in another Member State.
- **Conversion of a public limited company previously formed under national law -** An SE may convert from a public limited company provided that it has been either registered for at least 2 years governed by the laws of another Member State.
- **Formation of a joint subsidiary** - available under the same circumstances to any legal entities governed by public or private law. Two or more companies, firms or other legal bodies formed under the law of a Member State with registered offices and head office within the EU may form an SE by subscribing for its shares. At least 2 of the companies must be governed by the laws of a different Member State or for 2 years have had a

subsidiary company governed by the laws of any Member State or had a branch in another Member State.
- An existing SE may itself forms another SE as a subsidiary company, in which it may be a sole shareholder.

The SE must have a minimum capital of EUR 120 000.

Organisational structure of SE is formed by general meeting of shareholders and either:

- **A management board and a supervisory board** – this is called also two-tier system and is used in the Czech Republic or
- **Administrative board** – this is also called single-tier system where the activities are concentrated to one institution.

The SE can also transfer its registered office within the EU without dissolving the company.

3.4.3 EUROPEAN COOPERATIVE SOCIETY

Legal regulation of European Cooperative Society (SCE) is included in

- Council Regulation No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society and
- law no. 307/2006 Coll., on European Cooperative Society

The main purpose of SCE is to serve the needs of its signatories or development of their economic and social activities, especially concluding contracts with members to supply goods or provide services or to provide work that that particular SCE is specialising in. The purpose of SCE is also meet their common economic, social and cultural needs and aspirations through one or more jointly owned and democratically controlled European Cooperative Society or national cooperative society. SCE may also provide its services through its subsidiary.

Legal regulation allows SCE individuals who have their resident in different Member States to establish SCE or it may be established by legal entities under the national laws of the Member States.

SCE may be created:

- by **5 or more natural persons or legal entities** with a resident in at least two different Member States or if it is created only by legal entities then it´s sufficient if there are two of them provided they create it under the law of one Member State and follow the laws of two others, or
- by a **merge of two or more** existing cooperatives, or
- By **conversion of a national cooperative society** into new legal form without dissolving the old one; if it has an establishment or subsidiary in another Member State.

It is not agreed otherwise in establishing provisions in SCE all members liable only up to the deposited amount. If the members have limited liability then it is added after the official name of the SCE. If not settled otherwise the SCE may not exist to serve the interests of their stakeholder groups, returns on capital must always be subordinated to other interests. The minimum capital if an SCE is EUR 30 000.

The organisational structure is very similar to the Societas Europaea Structure SCE where are also two-tier structure and one-tier structure models.

The registered office of an SCE may be transferred to another Member State within having the obligation to establish new legal person.

3.5 JOINT VENTURE

Joint Venture (JV) is a type of business arrangement very often used in international trade in which two or more parties agree to pool their resources for the purpose of accomplishing a specific task. Underneath this term are however several types of various cooperational relationships. It could be temporary partnership, independent cooperation of entrepreneurs or agreement on sharing common interest in research, etc.

In practice it is often used when domestic company establish new legal entity with international company that will use the experience and knowledge of both of them. Know-how, trademarks, investments…

According to the form of establishment of joint venture we can differentiate two types:

1. **Institutional joint venture**
    - Joint venture is created for a particular business project by creating a new institution-legal person in a form of a company of a certain country where it has its place of business.
    - This type of joint venture has basically the same advantages and disadvantages as the establishment of foreign branch abroad has (for more information, see above).
2. **Contractual joint venture**
    - Contractual joint venture is an arrangement in which two parties come together for a particular business project and sign a contract outlining the terms under which they will work together. It is based on their mutual contractual relationship. In Czech national law this is covered in section 673 et seq. of the Commercial Code - agreement on silent partnership and in section 829 et seq. of the Civil Code - association/consortium agreement
    - Indisputable advantages over the former are lower costs for administration and management of the establishment, a disadvantage might be the fact that some business areas can only be covered by legal persons.

4 CONTRACTUAL REPRESENTATIONS ON FOREIGN MARKETS

If a company wants to expand its business to foreign market it doesn't have to create a new organisational structure in form of a branch or new company on a foreign territory. In many cases it´s much more efficient, mostly for administrational and financial reasons, to enter a contractual relationship with a partner that is already a businessman on this territory. He already knows the business culture, the legal environment and can provide good background for business expansion.

Let´s give examples of the three most used contracts in the practice of international trade:

1. Franchising
2. Distributorship contract
3. Business representation contract

4.1 FRANCHISE CONTRACT

FRANCHISE CONTRACT

Franchising is the practise of using another firm's successful business model that is franchisor (the supplier of franchise) allows using to a franchise. Franchise indicates a business system composed of a brand name, a system of format implying the distribution of a product and/or services through a network. This system replicates itself with every new business partner (franchisee) that invests and becomes another member of the network. It´s a business model aimed at the distribution of goods and/or services based on the licensing of a brand, network, a set of intellectual property rights (including brand names, trademarks or trade names associated with the brand), and a business format.[4]

Franchise contract is a business system (esp. sales) that is built on the idea of re-applying a previously tried and successful system. The idea of franchising is quite old but its boom in the new concept dates back to the 80´s in the USA in car-making industry. The indisputable advantage is rather fast and effective way of entering new markets by the franchise provider without big investments in distribution network.[5] At the same time franchise is also suitable for its recipients who do not have many experiences or own brand so they can use someone else´s already proven business system.

Franchise agreement is not usually regarded in jurisdiction as contractual type.[6] Czech Republic is no exception. From the perspective of the Czech law franchise agreement is linkage between several contractual provisions (esp. contract of sale, contract of mandate, commission contract, agency contract, license or lease). Generally a legal relation of franchise contract is under Commercial Code (if the agreement is between entrepreneurs and their

[4] Decision of the Office for the protection of competition of 26.5.2000, p. 25/00-907/00-240, available on http://kraken.slv.cz/UOHSS025/2000. Own loose translation. More about proceedings of the Office for the protection of competition (in Czech) in SCISKALOVÁ, Marie. Teoretická východiska procesního řízení Úřadu pro ochranu hospodářské soutěže. *Veřejné zakázky a PPP projekty*. 2010, 2., č. 1, p. 122-127. ISSN 1803-9553.

[5] According to the statistics of the European Union this type of business is six times more successful than a regular companies

[6] An exception of this rule is for example USA or Canada.

businesses) or Civil Code. However legislation of competition needs to be taken into account (esp. in matters of pricing, exclusivity, etc.)

Given relatively frequent occurrence of franchise agreement in international trade there are some international institutions that provide support sources applicable to this type of contract. For example:

- **Model Franchise Disclosure Law** - adopted by International Institute for the Unification of Private Law (UNIDROIT). Particularly interesting is especially article 6 that talks about information to be disclosed and information the franchisor shall provide in the disclosure document.
- **ICC Model International Franchising Contract** - issued by International Chamber of Commerce (ICC) in Paris.
- **European Code of Ethics for Franchising** - published by European Franchise Federation - a non profit association under Belgian law

Here is important to remind that those are supporting sources of international commercial law and therefore its implementation is bounded by an agreement of both parties otherwise its performance cannot be judicially enforceable.

If parties don't agree a conflict rule of national law is applicable. Within the EU this problematic issues is under provisions art.4, chap. 1 e) Rome I Regulation as follows:

- Franchise contracts are governed by the law at the franchisee's seat.

CHARACTERISTICS OF FRANCHISE CONTRACT

There is no legal definition of franchise contract in Czech legislation. The only definition was given by the High Court in 1998[7]and the Czech Franchise Association:

> *Franchising is a system of marketing goods and/or services and/or technology, which is based upon a close and ongoing collaboration between legally and financially separate and independent undertakings, the Franchisor and its individual Franchisees, whereby the Franchisor grants its individual Franchisee the right, and imposes the obligation, to conduct a business in accordance with the Franchisor's concept.*
>
> *The right entitles and compels the individual Franchisee, in exchange for a direct or indirect financial consideration, to use the Franchisor's trade name, and/or trade mark and /or service mark, know-how, business and technical methods, procedural system, and other industrial and /or intellectual property rights, supported by continuing provision of commercial and technical assistance, within the framework and for the term of a written franchise agreement, concluded between parties for this purpose.*
>
> *"Know-how" means a body of non-patented practical information, resulting from experience and testing by the Franchisor, which is secret, substantial and identified;*
>
> - *"secret" means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; it is not limited in the narrow sense that each individual component of the know-how should be totally unknown or unobtainable outside the Franchisor's business ;*

[7] Decision of High Court in Prague of 28 of April 1998, SJS 725/2000, sp.zn. 7A 170/1995, only available in Czech language

- *"substantial" means that the know-how includes information which is indispensable to the franchisee for the use, sale or resale of the contract goods or services , in particular for the presentation of goods for sale, the processing of goods in connection with the provision of services, methods of dealing with customers, and administration and financial management; the know-how must be useful for the Franchisee by being capable, at the date of conclusion of the agreement, of improving the competitive position of the Franchisee, in particular by improving the Franchisee's performance or helping it to enter a new market.*
- *"identified" means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality ; the description of the know-how can either be set out in the franchise agreement or in a separate document or recorded in any other appropriate form."*

Based on the decisions above there are some key elements of franchise that are worth highlighting:

- The subject of the contract is to provide **manufacturing and commercial know-how**, or other industrial rights. Know-how is a set of franchisor´s knowledge and skills acquired during his business practices that are not commonly available in the commercial circles.
- It is a vertical **long term relationship.** Franchise contract validity has to be long enough to earn profit back to the franchisee so he can develop his business in this area. In practice the most common length is five year.
- The recipient of franchise (franchisee) **does business on the behalf of provider** of the franchise (franchisor) and uses his **trademark**
- Franchisee is an entrepreneur that however must do business in accordance to the provided "manual" and must tolerate supervision by the franchisor.
- Franchisor usually gets one-time **fee for disclosure and revenue fee.**
- Franchisee may be bound also to purchase **materials from a particular supplier.**
- The franchisor usually provides further training, consultations, etc.

Franchising is applied primary in small and medium enterprises, mostly in sector of services and trade. There are three types of franchise[8]:

1. **Franchising in the service sector** – the purpose of this franchising is to provide services, e.g. operating real estate agencies, fast food restaurants, hotels, beauty salons, car rentals, hairdresser, etc. Franchisor usually provides right of use for his branch (business name) and trademark, knowledge, etc.

2. **Franchising in production** – providing industrial rights such as patents, utility models, industrial designs that allow franchisee to sell them under the brand, name and trademark of the franchisor.

[8] ROZEHNALOVÁ, Naděžda. Právo mezinárodního obchodu. Vyd. 2., Praha: ASPI, 2006. ISBN 80-735-7196-X. s. 546, own translation

3. **Franchising in sales (distribution)** – franchisor is generally entitled to distribution of goods (usually exclusive) on a certain territory after is has been branded by franchisor or advertised.

In international trade there are several ways of providing franchise according the franchisee search method:

1. **Master-franchising** - The franchisor chooses one contractual partner on the territory of one country who has the right to conclude franchise contracts with other franchisee (sub-franchisee). Franchisor may also enter the new market using the method of joint-venture with a local businessman that knows the background of that country. This newly created company would then enter into franchise contract with other franchisees.

2. **Direct franchising** - Under this model, the franchisor grants to the franchisee the right to open one franchised business at one location with a specified geographic range that will be protected from other franchised business of the same system.

3. **Area development franchising** – the franchisor grants the franchisee (or area developer) the exclusive right to open and operate several franchised businesses within a much broader geographic territory. Area developers typically will be required to open a certain number of stores within a specified time frame as set by the franchisor.

REQUISITE OF FRANCHISE AGREEMENT

Given the fact that franchise agreement is not listed as contractual agreement there are no special requisites that need to be meet to make it valid. However its content is based on very specific requirements of the parties. If we take into account the definitions of franchise listed above as well as European Code of Ethics for Franchising we can deduce some of the important provisions that every franchise agreement should include.

Apart of necessary information such as names of contractual parties the franchise agreement should include these issues:[9]:

- scope of the franchise agreement, determination of the type of franchise (esp. if concerns the licences and trademarks - therefore more rights and obligations of the parties)
- specification of the goods, services or technology provided to franchisee
- the rights granted to the Franchisor
- the rights granted to the Individual Franchisee
- the goods and/or services to be provided to the Individual Franchisee
- the obligations of the Franchisor
- the obligations of the Individual Franchisee
- the terms of payment by the Individual Franchisee (in the Czech Republic it's from 10 to 15 thousandths of million CZK), other fees - mainly the one calculated as a percentage from the turnover of the franchisee (between 1 % - 7 %) or other

[9] http://franchising.cz/abc-franchisingu/8/evropsky-kodex-etiky-franchisingu/

- the duration of the agreement which should be long enough to allow Individual Franchisees to amortize their initial investments specific to the franchise
- the basis for any renewal of the agreement
- the terms upon which the Individual Franchisee may sell or transfer the franchised business and the Franchisor's possible pre-emption rights in this respect
- provisions relevant to the use by the Individual Franchisee of the Franchisor's distinctive signs, trade name, trademark, service mark, store sign, logo or other distinguishing identification
- the Franchisor's right to adapt the franchise system to new or changed methods
- provisions relevant to training of franchisee, eventually its employees
- provisions on legal succession
- provisions for termination of the agreement
- Provisions for surrendering promptly upon termination of the franchise agreement any tangible and intangible property belonging to the Franchisor or other owner thereof.

Parties of the agreement should also think of agreement on the protection of confidential information. What information will be kept confidential will be decided by the parties in the agreement. The contract should also specify the method of dealing with this information, i.e. what will be regarded as breach of contract and what consequences this causes (avoidance, penalty, etc.)

The franchise agreement also includes so called franchise manual. This serves franchisee to gain important information about doing business especially know-how of the franchisor.

4.2 MODEL (DISTRIBUTORSHIP) CONTRACT

Similar to the franchise contract the model distributorship contract is not in legislation of the Czech Republic listed as an individual contractual type. A supplier of a certain good, similar to franchisor, doesn't have to have knowledge or means to expansion to foreign markets therefore its more convenient for him to find a new partner in that market (distributor) who already has all necessary information about the market and thanks to them he can be much more successful than the supplier.

In the case of model distributorship contract the contractual relationship is concluded between a supplier of a certain goods and its distributors. The actual performing the transaction has therefore two well-known parties on each side - seller (supplier) and buyer (distributor). Distributorship contract by itself has not the nature of contract of sale. It is concluded in order to create a **long term contractual conditions** (legal framework) which the contracts will meet. The distributorship contract therefore eases the contractual process because there is no need to negotiate conditions for each further contract.[10]

A transaction made on the basis of model distributorship contract has two complementary parts:

1. **Distributorship contract** – its purpose is create framework conditions for future transactions - individual contracts of sale

2. **Contract of sale** – its purpose is to deliver certain goods

[10] in Czech national law this definition corresponds to an exclusive distribution contract definition that is regulated by § 745 et seq. Commercial Code.More about this below, in section 5.4.1.

These legal relations are followed by selling the goods to the end customer based on contract of sale between distributor (seller) and end customer (buyer).

It mostly depends on the will of the parties whether they choose to use any of secondary sources of international law or whether they let this issue to conflict rule. Auxiliary sources issued by international institutions may be used as a source of legal regulation as well. Its implementation is conditioned by an agreement of both parties. Those are:

- **Model Selective Distributorship Contract (ICC)** – issued by Commercial Law and Practice in Paris

Regulation (EC) of the European Parliament and of the Council regulates the conflict rule of law of distribution contract. In article 4, chapter 1 f) it says:

- **a distribution contract shall be governed by the law of the country where the distributor has his habitual residence.**

Let´s add that the contract of sale itself allows individual transactions to be considered separately in international purchase contract regime, i.e. esp. **United Nations Convention on Contracts for the International Sale of Goods.** In case of impossibility to implement this international convention the conflict rule of the country where the seller has his residence is applied (more about conflict rule in chapter 2).

CHARACTERISTICS OF DISTRIBUTORSHIP CONTRACT

Based on the model contract we can determine some of characteristics that may occur in distributorship contracts:

- Esp. emphasizing the principle of protection of producer of goods by allowing supervising **over distribution network** throughout the sale. The reason may be ensuring a uniform approach to providing services to the end customer (e.g. sale of technologically sophisticated devices that may require to be sold only by selected dealers). This means that a supplier and esp. distributors won´t be selling goods to others, outside of the distribution network. In order to ensure such supervision a supplier may also set up own branch abroad through which he controls his network of distributors. However this means higher costs, administrative work, etc.
- **Distributor is an independent entrepreneur** that acts on his own account and own behalf. Thus distributors are neither employee nor sales representative and cannot act on the supplier´s behalf.
- In most of the cases the distributors may apart of the goods that are the subject of distribution contract also other goods. This means that the distributor offers the end customer a wide range of mutually competing products. This could be prevented by including **non-competition clause** that would prohibit the distributor offering other supplier´s products.
- If larger distribution networks are created it is appropriate to separate the market into several territorial units and appoint one distributor in each. On one hand the distributor is

limited by this on the other hand he has an advantage in being **exclusive distributor** for this area.

- Distributor is usually obliged to provide end customer with **guarantee service** for the goods. Conditions of warranty are limited especially by the legal system of the country where the distributor has his residence however it may be further specified by the manufacturer/supplier to ensure unified service to all end customers in all areas, countries.
- There are different types of special arrangements such as the obligation to buy **minimum quantity of goods**. If not required minimum amount has not been purchase the distributor must pay its adequate price or other sanction or fee. Distributorship contract may also be connected with other **marketing activities,** advertising, unified presentation under the same trademark (or distributor is he is more well-known in that area), common design of retail location, etc. There might be also other obligations regarding **confidentiality** included.

REQUISITE OF DISTRIBUTORSHIP CONTRACT

Given the information in the model contract by ICC there are some recommended requisite that a distributorship contract should include. It is based on a fair and balanced approached to interest of both supplier and distributor.

- Preamble – general (esp. seller´s) declaration about expanding distribution of supplier´s goods through distributor
- Subject - specification of goods that supplier agrees to deliver to distributor (further information are usually in annex of the contract)
    - in this section is also usually a provision on possibility to change range of distributed goods, for example because it is no longer produced by supplier
- Distributor´s obligations
    - Main obligation of distributor is to purchase goods. The contract usually says that a certain quantity of good is required within certain period of time (month, year, …) and if the distributor doesn´t obey the supplier usually has the right to avoid the contract (alternatively special type of fee may be agreed).
    - One of distributor's obligations is also share information about turnover, inventory of goods, distribution problems, etc.
- Supplier´s obligations
    - Main obligation of supplier is to supply goods. Especially supplier cannot refuse distributor´s order if meeting all requirements according to contract
    - Purchase price is usually determined by price list of supplier updated for the year when supplier got the order from distributor. Distributor must be notified about a possible one-sided change in price list.
- Marketing
    - Provisions on requirements of distributor´s store appearance
    - Product demonstration events
    - Other sales supporting methods esp. advertisement
- Training and support
    - Provision on training of employees and technical support
- Warranties and guarantee service
    - Maintenance and repairs of sold goods is regularly provided by distributor

    - As far as this services goes distributors must have sufficient amount of spare products for replacement for defective ones
- Protection of intellectual property
    - Distributor usually uses trademark, brand or other indication of producer in order to identify the goods and to advertise it. In any case previous consent of supplier is required
- Supervision
    - Distributor must allow supplier freely access his place of business to check performance of contractual obligations of distributorship contract
- Confidentiality clause
    - Both parties are obliged to keep confidential about information that is considered confidential.
- Possibility of sub distribution
    - Distributor may be entitled conclude distributorship contract with third party that fulfils all necessary requirements settled by supplier. If distributor enters into sub-distributional contractual contract he is obliged to notify supplier.
- Duration of contract and its termination
    - By its nature distributorship contract is long-term agreement; usually several years or indefinite period of time. In case of substantial breach of contract there must be given an option to terminate the contract ahead of schedule.

4.3 COMMERCIAL REPRESENTATION CONTRACT

In practice commercial representation (agency) contract is very frequently used type of contractual relationship when entering new markets. Also in this type of contract a partner - called commercial agent - well aware of local background is used.

It is a type of contract that is expressly regulated in Czech Commercial Code plus - given due to the frequent use in international trade - also in **Council Directive 86/653/EEC** of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. This directive unifies basic terms such as commercial agent, rights and obligations, reward, conclusion and termination of the agency contract, etc.)

Besides that there are other sources of legal support for commercial agency contract in international environment.

- **Model Commercial Agency Contract**- issued by International Chamber of Commerce in Paris

If two contractual parties don't agree on applicable law then the conflict rule of law need to be used:

- In the EU law there is art. 4, par 1 b) that says that **a commercial agency contract shall be governed by the law of the country where the commercial agent has his habitual residence** (i.e. following the legal system of the country according to the **place of business of commercial agent**)

Let´s also include definition of commercial agency contract provided by Czech Agency Contract.

DEFINITION 3: COMMERCIAL REPRESENTATION CONTRACT

Commercial Agency Contract binds two parties - Principal and Agent. One party asks the other party - either a person or a company - to carry out the promotion of international trade transactions for a continuous period of time as an independent intermediary without assuming liability for those transactions. It´s a type of long term representation towards the conclusion of certain types of contracts - usually the trading ones - or to negotiate and conclude transactions on behalf of the represented party.

Legislation in Commercial Code distinguishes two main activities that commercial agent may perform for the represented party. Firstly it´s **negotiation** - and conclusion of transactions in the name of the principal and on his account; secondly there is **representing** - activities that are done on behalf of the principal aimed at the conclusion of specified contracts. That´s why it addresses provision on brokerage contract (a contract with an intermediary) -§ 658, 1 Commercial Code and provisions on mandate -§ 654, 2 Commercial Code.

The contract on commercial representation must be in written form.

Essential parts of the commercial representation contract are:

- **determination of contractual parties** - representative, principal

According to the law, the representative cannot be a person who as an organ may bind a legal entity (for example executive of limited-liability Company), a partner or member who under the law is authorised to bind the other partners or members or liquidator or bankruptcy trustee or composition trustee.

- **subject of the contract**

It should be clearly understandable from the subject of the contract what the main activities of the commercial representative are. Whether he negotiates the contract, concludes them or what type of transaction is it limited to (for example only to contracts with certain goods, insurance contracts, etc.). The provisions on commercial representation shall not apply to persons operating on a stock exchange or a commodity exchange.

Other parts of the commercial representative contract usually are:

- **specification of territory**

In the specified territory, the commercial representative is obliged to pursue with due diligence the commercial activity which is the object of his obligation. If the territory is not defined in the contract it is presumed that the commercial representative shall pursue his activity on the territory of the Czech Republic. .

If a commercial representative has his registered office, place of business or residential address outside the territory of the Czech Republic, the decisive factor in applying the provisions of section 653 is the country in which the commercial representative has his seat, place of business, or residential address at the time the commercial representation contract is concluded.

- **termination of commercial representation**

This type of contract may be concluded either for indefinite period or it may expire. If the parties don't agree otherwise in the contract either explicitly by stating date or by mentioning the goal of the contract, it is presumed that the validity of the contract is for indefinite period.

If contract normally terminated with expire of the time for which the contract was concluded. If the parties continue to abide by the terms of the contract it is presumed that the validity of the contract has been extended by the period for which it was originally concluded. If after expiry of the additional period the parties still continue to abide by the terms of the contract then it changes to the concluded for indefinite period.

- **period of notice**

A contract which is concluded for an indefinite period of time may be terminated by either party giving notice. However there are some legally binding limitations:

  - the parties may only agree on longer periods of notice, not shorter, than it is in law
  - The period of notice shall be one month for the first year of contract. 2 months for the second year and 3 months for the third year and subsequent years.
  - the period of notice to which the principal is committed may not be shorter than that which must be complied with by the commercial representative

If not agreed otherwise the notice period must end at the end of month.

If an exclusive representation was agreed upon for a fixed period, either party may terminate the contract by the procedure. Provided that in the last 12 months the volume of transactions did not reach the sum set in the representation contract or the volume proportionate to sales on the market.

- **commission**

Commercial representative is entitled to an agreed commission. However its amount is not the main point of the contract. If the amount is not agreed in the contract the representative is entitled to a commission usual for similar representative agreements.

- **indemnification**

The commercial representative is entitled to an indemnity after termination of his contract in two cases. Firstly if the commercial representative has acquired new customers for the principal or has significantly increased the volume of business for the principal with existing customers and the principal continues to derive substantial benefits from the business with such customers. Secondly if the payment of this indemnity if equitable having regard to all the circumstances and esp. the commission lost by the commercial representative on business transacted with such customers, includes also the application or non-application of a restraint of trade clause.

The amount of indemnity may not exceed the representative´s commission calculated from his annual average remuneration over the preceding 5 years. If his contract lasted less than 5 years the indemnity shall be calculated on the average for the period.

The right to an indemnity must be claimed up to one year after termination of contract.

- **reimbursement**

In addition to his commission the commercial representative is also entitled to reimbursement of expenses related to his activity. But only if such reimbursement was agreed.

- **non-exclusivity and exclusivity of commercial representation**

Commercial representation may be concluded either as exclusive or nonexclusive. Unless contract says otherwise the commercial representation is nonexclusive.

Exclusive commercial representative is not authorised to take on commercial representation of another party within such scope nor to conclude commercial transactions on his own account or on another party´s account. The principal is obliged not to use another representative for commercial transactions within the specified territorial area and in the specified scope being the object of such representation.

Represented party may conclude own transactions even without the other party however have to pay provision as the other party would be presented in the transaction.

- **competition clause**

The contract on commercial representation may include a written agreement that the commercial representative may not execute activity which was the object of his commercial representation within the stated geographical area either on his own account or someone else's account or some other activity which would be competitive in relation to the principal's activity.

A restraint by trade clause contrary to the provisions of the information above shall not be valid. In the case of doubt, the court may limit or nullify a restraint of trade clause which would restrict the commercial representative more than the necessary protection of the principal requires.

DIFFERENCE BETWEEN DISTRIBUTORSHIP AND COMMERCIAL REPRESENTATION CONTRACT

Here´s an overview of some important difference between distributorship contract and commercial representation contract:

- Distributorship contract varies from commercial representation contract especially in scope of performance because it is mostly used for products. Commercial representation contract may also be used for different types of transactions that representative concludes on the behalf the principal or negotiates for him.
- While in case of distributorship contract the remuneration is a difference between the buying and selling price in case of commercial representative it is commission dependent on turnover or profit that is made by the representative.

The last but not least difference is the method of transacting a business. While on the basis of distributorship contract the contracts of sales are concluded directly : supplier-distributor (distributor therefore takes over the ownership and then pass it on the end customer); in case of commercial representation contract the made on behalf of the represented party, which means that the rights are directed passed from principal to end customer.

5 CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The contract of sale is undoubtedly the most common both the national and the international business transaction. As such it can be either direct or indirect transaction. If direct then the seller deals with the buyer directly, however if the transaction is indirect then there is middle - third - party in between that mediates the transaction in some way.

5.1 SOURCES OF LEGAL REGULATIONS ON INTERNATIONAL SALE OF GOODS

An example of an international contract of sale can be listed (with regards on the international aspect in private law sector) contract of purchase that is concluded by parties which do not have a resident, domicile or their place of business on the territory of the same country. In case of purchase of real estate the parties an example would be also a contract that is concluded by two parties from the same country however the subject of the contract (real estate) is located on a territory of a different country.

Also in case of contract of purchase the procedure of determination the applicable law is followed, usually on the basis of an established procedure (such as choice of law, direct or conflict rules of law). If the parties don´t choose the applicable law then the national one will be followed; in case of purchase of goods the national law of the country where the seller has its registered office or residence; in case of estate contract the applicable law is the one where the property is.

If it was decided that the applicable law is the law of the Czech Republic (based on the choice of law or the conflict rule of law) then the Civil Code would be applied (provided that the purchase meets the conditions and requirements of the contractual relationship).

Before the provisions in the Commercial Code were made there had been (in accordance with § 756 ComC) **United States Convention on Contracts for the International Sale of Goods** (notice by the Federal Ministry of Foreign Affairs No. 160/1991 Coll.) and **Convention on the Limitation Period in the International Sale of Goods** (Collection of Acts as the Notice of the Ministry of Foreign Affairs No. 123/1988 Coll.) as well as the Protocol amending this Convention. (Notice of the Federal Ministry of Foreign Affairs No. 161/1991 Coll.).

5.2 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The United Nations Convention on Contracts for the International Sale of Goods (CISG) has been recognised as the most successful attempt to unify a broad area of commercial law at the international level. It aims to reduce obstacles to international trade, particularly those associated with choice of law issues, by creating even-handed and modern substantive rules governing the rights and obligations. The CISG has been signed by 78 countries (data from 12/2012).

Image 5-1: Map of the signatory of the United Nations Convention on Contracts for the International Sale of Goods

Source: Pace Law. CISG Database [online]. 2006 [cit. 2013-02-08]. Accesable at: http://www.cisg.law.pace.edu/cisg/cisgintro.html

STRUCTURE AND LEGAL NATURE OF THE CONVENTION

The Convention is formed of 101 articles divided into 4 chapters:

1. Sphere of Application and General Provisions
2. Formation of the Contract
3. Sale of Goods
4. Final Provisions

Generally speaking the Convention regulates two basic areas of questions regarding the international contract of purchase - its closure and the rights and obligations of the seller and the buyer. In principle the legal regulation is comparable to the legal regulation of national purchase contract in Civil or Commercial Code. Detailed information on that topic is in the Convention itself, art. 4:

ARTICLE. 4 OF THE CISG

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

Therefore the Convention doesn´t regulate the validity of the contract and the consequences arising from neither its invalidity nor the effects that the contract might have on the property law towards the selling goods. These questions among others not specified are

not explicitly answered in the Convention and cannot be solved by any of the general principles. They might be resolved by the applicable law designed in accordance with the provisions in international private law.

It means if the parties didn´t agree on the applicable law the contract would follow according to the national conflict rule the legal regulation of the country where the seller has a registered office or residence at the time of concluding the contract. We assume that following that law still means a reasonable arrangement of relations between the seller and the buyer.

ARTICLE. 7 OF THE CISG

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Thanks to the wide liberty of contract there are following rights and obligations given both by the contract itself and by the customs and practices agreed by the parties (see art. 9 of the Convention), or by practise that has been established already. The CISG also counts on a tacit agreement (implicit) on customary norms that were known to both parties or are generally known in international trade and its sector.

If the rights and obligations of the buyer and the seller are not clear then the parties shall follow the provisions of the Convention, resp. the legislative provisions of the applicable law which then choose the conflict rules in accordance with international private law.

Rules of law included in the Convention are non-mandatory which means it is possible to exclude their application based on the agreement of both parties.

As far as **the interpretation of rules of law tacitly agreed** there are several interpretative guidelines that can be helpful in the Convention, art. 8.

ARTICLE. 8 OF THE CISG

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of 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.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Questions regarding the limitation of rights and obligations of the seller and the buyer arising from the international contract of purchase shall be governed by the legal regulation in the Convention on the Limitation Period in the International Sale of Goods, 1974 and the

Protocol amending the Convention on Limitation Period in the International Sale of Goods, 1980 (notice no. 123/1988 Coll. as amended by notice no. 161/1988 Coll.) that takes precedence over the limitation rules in the Commercial Code.

5.2.1 CONDITIONS OF IMPLEMENTATION

To make the Convention applicable in a particular sector of law several conditions has to be cumulatively fulfilled:

1. **Parties of the contract** (seller and buyer) are businesses from different countries bounded by the Convention
2. The contractual relationship between parties has to be classified as **contract of sale**
3. **The subject** of the contract of sale has to be movable (i. g. goods)

AD 1) PARTIES OF THE CONTRACT

The condition for preferred implementation of the provisions of the Convention is that the contract of sale is concluded by parties (buyer and seller) from the countries of the Convention that are bounded by it and is compatible with the legislative and is incorporated into the legal system of the country. The Convention might be applied also in case where the national law should be used according to the provisions of the international private law. This means that if the conflict rule points to the application of the Czech national law as a part of the Convention, this application takes priority over the law. Therefore the Convention can be applied even if the other party of the contract doesn´t have their place of business in the country bounded by the Convention.

The Convention condition the implementation by **variety of places of business.** For determination of application of the Convention the nationality is not considered if the business has more than one office (for example headquarters in one country and assembly lines in other countries). The decisive point is the place that has the closest bond to the contract of purchase (e.g. the Convention is applicable if the goods are shipped from the assembly line that is located in the member country of the Convention even if the main office of the company is in a country that didn´t ratified the Convention). For more details, here´s art. 10 of the Convention.

ARTICLE. 10 OF THE CISG

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

AD 2) IT´S CONTRACT OF SALE

The Convention doesn't include the definition of contract of sale. However it is commonly known as contractual legal relationship within which the seller is obliged to deliver the goods, hand over all necessary documents and transfers the legal rights and the buyer is obliged to pay the purchase price and take over the goods.

The subject of the contract can also be goods not yet made. The criteria for distinguishing the contract of sale and contract for work are the same as in the domestic Commercial Code.

ART. 3 PARAGRAPH 1) OF THE CONVENTION:

Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

To distinguish it it´s crucial to know who supplies the majority of the material for the production (for example the construction materials). If the majority of it is supplied by the ordering party "customer" then it´s contract for work which means it is not possible to apply the Convention and initiation of conflict rules (according to the Czech legal system the applicable law is determined by the registered office of the producer). However if the producer provides everything necessary for the production it is already contract of sale and the Convention is applicable.

ART. 3 PARAGRAPH 2) OF THE CONVENTION:

This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

When compared to the Czech legal system the main difference is it comes to situation when the contract also includes installation/assembly services. While Czech Commercial Code always classify it as contract for work the Convention needs the proportion of the assembling to the whole performance.

AD 3) THE SUBJECT IS MOVABLE - GOODS

Firstly let´s emphasize that the Convention applies to the contract of sale, i.e. purchase of movable assets, which can be concluded by persons who have registered offices in different countries; in no case that is designed for purchase of real estate/immovable.

Although it does not cover all possible goods. Following ones are excluded from the Convention:

- the goods is bought for personal, family or household reasons; unless the seller hadn´t known before the conclusion of the contract or wasn´t supposed to know that it is meant for this reason,
- purchase on auction sale,
- purchase on execution or by court decision,
- purchase of securities or money,
- purchase of ships, vessels, hovercrafts or aircrafts,
- Purchase of electricity.

CONCLUSION OF CONTRACTS OF SALE

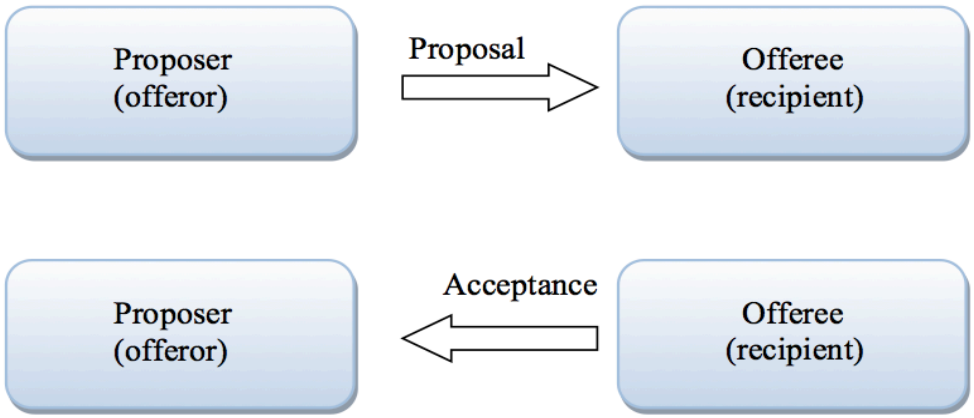
Generally there is a principle of informality of legal acts which is also evident in the case of contract of sale concluded on the basis of the Convention.

ART. 11 OF THE CONVENTION

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

The contract is created on the basis of free, definite and mutually addressed and content wise identical expression of will of the participants (parties), i.e. legal act - **(draft) contract proposal** (offer, order) and **acceptance of the proposal.**

Scheme 5-1: The process of concluding a contract



Source: own work

CONTRACT PROPOSAL

Legal action that shall be considered a contract proposal has to meet certain requirements that affect the recipient of the proposal, the content of it and the intention of the proposal as well.

Firstly the contract proposal has to be designed only to **one or several persons**. Therefore it is not possible look at for example promotional flyer as conclusion of a contract. A contract that is not intended for one or several persons is considered to be an invitation/call for tenders unless the person making that call specify otherwise.

The content has to be sufficiently specific which means it ought to include also all necessities of contract of sale - the proposal is considered as sufficiently specific if the goods is marked and if the amount and price is explicitly or implicitly determined or if it includes also provisions on its determination.

Finally there has to be also clear expression of will of the proposer to be binding in case of acceptance.

The offer stands till it reaches to the offeree. For more detail - article 24 of the Convention.

ART. 24 OF THE CONVENTION

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is

made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

The Convention makes difference between two forms of proposals:

- Oral form of proposal - according to the provision it comes into force in the moment of oral expression
- Other forms of proposal - become effective from the moment of a personal delivery to the agreed place

These effects are particularly important in terms of continuity to other possible tasks that can lead up to the dependency to the effects of the proposal. For example amend or withdrawal of the proposal itself.

The proposal to conclusion of the contract is possible to **withdraw**:

- if the withdrawal reaches the offeree before the offeree accept the offer

  and

- the proposal is not marked properly as irrevocable.

On the other hand the proposal is not possible to **withdraw:**

- if it is obvious based on the statute of limitation or other method that it is irrevocable,

  or

- if the offeree could reasonably rely on its irrevocability and acted on it.

The proposal - even the irrevocable one - can be withdrawn in case that the notice about the withdrawal reaches the offeree sooner or at the same time as the acceptance. The proposal - even the irrevocable one - then terminates as soon as the proposal gets its rejection.

5.2.2 ACCEPTANCE OF THE PROPOSAL AND CONCLUSION

Acceptation means a declaration made by a certain person - offeree - or other acts that indicate their agreement with the proposal. The acceptation of the proposal can be made either:

1. **declaration** (explicitly)

2. **acts** that indicate the consent (implied)

   To indicate the consent without notifying the proposer (i.e. shipping the goods or paying the purchase price) is possible if the parties agreed on it or it is based on common practise or the offer.

General principle is that silence doesn't mean consent. That also works in concluding international contracts of sale. Silence and/or inactivity themselves don't mean a consent however silence can be interpreted as a consent in cases where it follows the practices or

customs between parties or the ones included in previous contracts, such as distributorship (general agreement) contract.

The contract is concluded at the moment of becoming effective. **The acceptance of the proposal becomes effective in the moment when the consent reaches the proposer.** (more information on the term "reach" in art. 24 of the Convention, see above). The acceptance is effective if the proposer get the evidence of consent of the offeree in:

- **the acceptance period** (i.e. in the period that the proposer determined for the acceptance of the proposal)
- **reasonable period of time** - if the acceptance period is not determined) taking into account the circumstances of the transaction (the circumstances can be for example the speed of the media that the proposer used)
- **case of the oral proposal must be accepted immediately** unless the circumstances say otherwise.

Let's add another perspective on this topic, a different conception in cases of acceptance of the proposal by acting on it.

ART. 18 CHAP. 3

However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at ***the moment the act is performed****, provided that the act is performed within the period of time laid down in the preceding paragraph.*

As it was said above the acceptance is needed to be done in the acceptance period (or the reasonable period of time, depends on the circumstances). We also answer the question on when does the acceptance period starts. The starting point is determined by the way of concluding the contract:

- The acceptance period determined by the proposer in a telegram or in a letter starts in the moment when the telegram is sent or the date that is on the letter (if there's no date in the letter itself then the date on the envelope)
- The acceptance period is determined by the proposer by telephone, teleprinter or other means of instantaneous communication starts in the moment when the proposal reaches the offeree.

Bank/National holidays and public holidays are calculated and included in the acceptance period. However if the notice cannot reach the proposer on the last day of that period because it's a bank or public holiday then the acceptance period is calculated from the first day after the holiday.

In certain cases a late acceptance can have the same effect of the acceptance on time, more about this in article 21 of the Convention.

ART. 21 OF THE CONVENTION

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

In case of late acceptance there are two different possibilities for the issue. For once it's when the recipient of the proposal sent out the acceptance too late, secondly it's a situation when the acceptance is sent on time but due to other circumstances, such as negligence of the post service, it was not delivered on time. While in the first option the proposer's notification for the creation of the contract is necessary in the other one the creation of the contract is assumed unless the proposer informs that the proposal is not longer valid.

The legal action of acceptance can also be withdrawn provided that the notification about it reaches the proposer before or in the moment when the effects were supposed to begin.

If the answer to the proposal (appear to be an acceptance) include changes compared to the original proposal, there are two possible options depending on the intensity of the changes:

1. **A significant change of contract conditions**

   In cases that the answer to the proposal (appear to be an acceptance) includes provisions, limitations or other changes is regarded as a rejection of the proposal. At the same time this act needs to be understood as **a new proposal (counteroffer)** that must be accepted by the original proposer. The contract of sale is regarded as concluded if the counteroffer is accepted. Examples of provisions, limitations and other changes may be clauses or departures from the terms and conditions of the contract regarding the purchase price, the payment method, quality or quantity of the goods, time and place of the delivery, extent of liability towards the other party or dispute settlement.

2. **An insignificant change of contract conditions**

   Not every change of the original contract conditions have the consequences listed above. The answer to the proposal that seem like an acceptance also includes the clauses or departures that do not change the conditions of the proposal significantly is an acceptance. The acceptance is not made only if the proposer orally raises objections to the changes without undue delay or sends a notice about it. If the proposer doesn't do that then the changes become a permanent part the contract and it is considered to be accepted.

5.2.3 GENERAL OBLIGATIONS OF SELLER

The content of each contract is determined by mutual rights and obligations of the parties. The fulfilment of obligation of one party means the right to fulfil of the other.

General obligations of the seller are:

- delivery of the goods,
- provide any documentations related to the goods,
- Pass of ownership of the goods.

The Convention doesn't keep the parties from negotiating other possible obligations of either one of them.

DELIVERY OF THE GOODS

General obligations of seller are to deliver the goods. For that it is crucial to know when, where and how this is done. The Convention does not go into detail, it only deals with it partially therefore in practise it is better to specify this obligation using INCOTERMS (see more above).

The place of delivery depends on the agreement of the parties. It can be

1. A place settled and **agreed in the contract**

2. If the seller is not bound to deliver the goods at any particular place then the obligation to deliver goods depends on the fact whether or not the contract also includes carriage.

   a. if a contract of sale includes transport then the fulfilling the obligation to deliver means **handing the goods over to the first carrier**

   b. If the contracts of sale doesn´t include carriage the obligation to deliver is fulfilled by just **enabling the buyer** to have it, either in a warehouse or at the assembly plant. Also there is no carriage involved if the goods are already with the buyer or if the buyer himself goes to the seller and takes the goods. However both parties must had known that before they agreed to the contract.

   c. In other cases the enabling to access the products at the places where the seller has a place of business at the time of concluding the contract.

There are other obligations of seller in art. 32 of the Convention related to the carriage:

ART.32

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to affect such insurance.

Time of delivery should be specified in the contract as well. According to the method of specifying it there are:

1. determined by **the date** – in this case the obligation is to fulfil the obligation to deliver by a certain date which we call fixed

2. determined by **the period of fulfilment** – in this case the fulfilment shall be done anytime within a settled period of time (either in the contract itself or is obvious from it) unless the circumstances indicate that the buyer determines the carriage.

If the time of delivery is not determined by any of the methods listed above it shall be fulfilled within a reasonable time after the conclusion of the contract. Reasonability undoubtedly depends on the subject of the contract and other circumstances.

Situations when the goods were not delivered on time are solved depending on the method of delivery. If the time of delivery was settled as fixed it is regarded as a fundamental breach of the contract that permits the aggrieved party to terminate performance of the contract. On the other hand if the time of delivery was not settled as fixed the seller must be given additional time to fulfil the obligation.

However there might occur a situation when the seller doesn´t deliver the goods even before the settled the time of delivery. In this case the seller has the right to deliver any missing parts or defective goods up to the actual time of delivery - if the enforcement of this law doesn´t cause the buyer unreasonable inconvenience or unreasonable expenses.

When there are also **documents that have to be handed over** with the goods the seller has to hand it over within the time and on the place that is specified in the contract. Those can be additional technical specifications, certificates of quality and/or origin, manuals, etc.

If the seller handed the documents over before the time of delivery any defects on the documents can be removed up to the actual time of delivery - if the enforcement of this law doesn´t cause the buyer unreasonable inconvenience or unreasonable expenses. The buyer still has the right to compensation under the provisions in the Convention.

The obligation to deliver is not limited to the fulfilment on time and at a certain place but it also includes **conformity of the goods** (i.e. goods which conform to the description, no defects). To do that the seller must deliver goods in accordance with the contract in combination of quality, quantity and description with respect to conformity following the provisions in the contract, then packed or provided with additionalities according to the contract.

If the contract of sale doesn´t specify otherwise the Convention (art. 35, chap.2) helps to define the conformity.

ART. 35 CHAP. 2 AND 3 OF THE CONVENTION

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

OBLIGATION TO TRANSFER OF OWNERSHIP OF PROPERTY

The Convention doesn´t deal with the transfer of ownership of property. According to the Czech Commercial Code (§ 443) the ownership rights transfer from the seller to the buyer with the delivery. The seller earns the ownership rights of the transported good at the same time as obtaining permission to dispose with the transported goods.

Acquiring an ownership rights may also be postponed. Typically this option is used in cases so called **retention of title.** If the ownership of a sold movable thing is to pass to the buyer after payment of the purchase price, this retention clause must be agreed in writing. Unless something else follows from the agreement, the danger of contingent destruction or contingent impairment shall pass to the buyer at the moment of releasing the thing. Therefore the buyer cannot re-sell the good before the purchase price is fully paid to the seller because it is not yet in his possession.

The seller is also obliged to deliver only the goods that are free from any kid of claim from the third party unless the buyer agrees to buy goods with such claim and limitation.

5.2.4 GENERAL OBLIGATIONS OF THE BUYER

The general obligations of the buyer are to pay the price and take delivery of the goods.

PAYMENT OF THE PRICE

As far as payment of the price the most important factors are the calculation of the price, the place of payment and time for payment.

Calculation of the price:

- can be settled in the **contract of sale** either explicitly or implicitly by determining the fulfilment post facto,
- If the price or the determination of it is not included in the contract then the parties implicitly agreed on using the price that is commonly used for the same products at the comparable conditions and sector at the time of concluding the contract.

Place of payment:

- negotiable in the contract of sale itself (typically this is to be made to the seller´s account in a certain bank)
- if the place of payment is not settled beforehand in the contract of sale the buyer is obliged to pay
    - at the seller's place of business (the seller is charged for any increase in expenses provided they are caused by change of his place of business after the contract is made) or
    - if payment is to be made against the handing over of the goods or of documents the buyer must pay the price at the place where the handing over takes place.

Time for payment:

- it is negotiable to settle a specific date of the fulfilment or period of time within the price should be paid (doesn´t have to be connected to the time of delivery, can be prior to it or even after the deliver - credit transaction)
- if the time for payment is not in the contract the buyer must pay the price when he receives the goods or documents controlling their disposition,
- the seller secure himself and cover the situation where the goods are to be delivered only against the payment the entire purchase price,
- where the contract also involves carriage the seller must dispatch the goods but he may do so on terms according to which the goods or documents controlling their disposition will not be handed over to the buyer except against payment of the price.

The Convention doesn´t go deep into the issue of different ways to pay the purchase price. It mostly depends on the parties how they agree on it. Given the distance that might be between them it is usually not in case, however it is not entirely off the table. More frequent are bank transfers or other types of securing payment methods, such as letter of credit (for more details see chapter 7).

The buyer also has the right to refuse to pay the price before he has a chance to check the goods unless the procedure that was previously agreed between parties doesn´t allow checking on goods before the payment.

OBLIGATION TO TAKE DELIVERY

The buyer fulfil the obligation to take delivery if

1. he makes all necessary actions that can be reasonably participated from him to enable the seller to fulfil his obligation to deliver goods. This obligation can be for example communication of necessary information about the carriage, etc.

2. obligation to take delivery

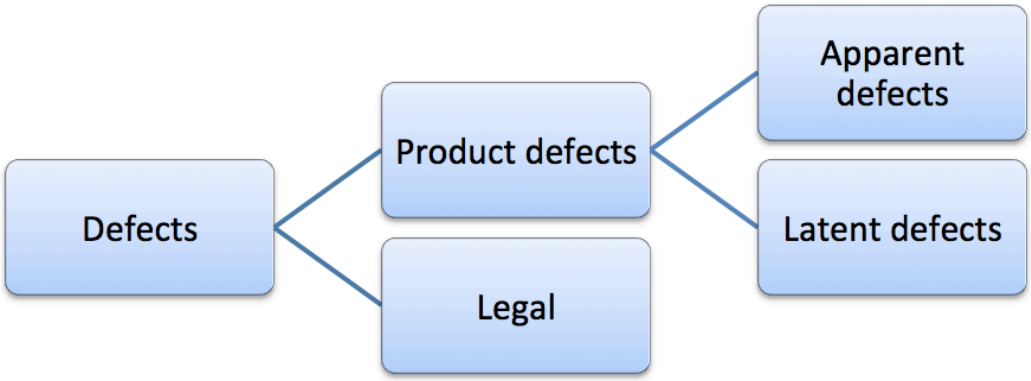
5.2.5 LIABILITY FOR DEFECTS

General obligation of seller is to fulfil it conformly and without defects.
In general, there are two types of defects

1. **Defects of substance -** defects in quality, quantity and packaging; there are two types - apparent defects and latent defects

2. **Legal defects** – connected to the rights of the third parties tied up to the goods (such as lien or intellectual property rights. Legal defects are specified more in art. 42 of the Convention.

Scheme 5-2: Types of defects



Source: own work

TRANSFER OF RISKS

To create liability for defects is a key to transfer risk from seller to buyer. The seller is liable for any defects that the goods have in the moment of transfer of risks to buyer, even if the defect becomes apparent after that.

The moment when the transfer of risks is described (depending on the place of transfer) in articles 67, 68 and 69. There are three types of it.

CASE WHEN THERE IS NO PARTICULAR PLACE TO HAND OVER THE GOODS AND THE CONTRACT OF SALE INVOLVES CARRIAGE

ART. 67 OF THE CONVENTION

(1) 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.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

There are two situations in the Convention in this case. Firstly if the seller is not obliged to deliver the goods to a particular place the transfer of risks is bound to the moment of handing over the goods to the first carrier. Secondly if the carrier executed the shipping himself the risk doesn´t pass to the buyer before the goods are handed over to the agreed place.

CASE WHEN THE GOODS ARE SOLD IN TRANSIT

ART. 68 OF THE CONVENTION

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the

risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

CASE WHEN THE CONTRACT OF SALE DOESN´T INVOLVE INFORMATION ABOUT CARRIAGE

ART. 69 OF THE CONVENTION

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he ***takes over the goods*** *or, if he does not do so in due time, from the time when* ***the goods are placed at his disposal*** *and he commits a breach of contract by failing to take delivery.*

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

In the case when the buyer shall collect the goods in the seller's place of business is the moment of transfer of risks bound to the handing over the goods. The transfer of risks is made as well even if the goods are ready to be handed over but the buyer didn't collect it on time.

Transfer of risks results in loss and damage that is made after the transfer to the seller won´t relieve the buyer from paying the purchase price. The buyer only can be relieved if the loss or damage is caused by an action or omission of the seller.

DETECTION OF DEFECTS

To apply a possible liability for defects the defect must be detected first. Necessary condition for detection of defects is examining the goods.

The obligation to examine goods is included in article 38 of the Convention:

ART.38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

NOTICE OF DEFECTS

It is not sufficient only to determine a defect but it must be noticed to the seller too. The time-limit for the notice varies depending on the type of the defect - apparent or latent. For more information see article 39 of the Convention.

ART. 39 OF THE CONVENTION

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

The first paragraph of the article deals with the situation of apparent defect, i.e. the type of defect that can be detected during regular inspection of goods. Such as quantity, missing parts, external damages - scratches, packaging defects, etc. Those types of defects have to be noted within a reasonable time after they were discovered. Reasonable time is an amount of time that depends on a specific situation; if it was within the reasonable time or not is up to a court to decide.

Second paragraph includes information about latent defects - that cannot be discovered during a routine check. The time-limit is the same as it is in Czech Commercial Code which is two years and starts at the day when the buyer delivered the goods. The Convention as well as the Czech Commercial Code doesn´t recognise legal warranty period for the goods that is a subject of contract of sale. The warranty period may be adjusted in the contract. If it is agreed the liability for defects can also be used for defects that occur later than at the time of delivery of the goods.

The rights of the buyer do not extinct even the goods have apparent or latent defects if the defects are results of something that the seller was not aware of or he could not know and didn´t tell the buyer.

Legal defects and its notifications are described in articles 41, 42 and 43.

ART. 41 OF THE CONVENTION

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim.

However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

ART. 42 OF THE CONVENTION

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

ART. 43 OF THE CONVENTION

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

5.2.6 BUYER'S REMEDIES FOR BREACH OF CONTRACT BY SELLER

In case of breach of contract the buyer´s contractual obligations arise, there are two types of remedies

1. Exercise the rights provided in articles 46 - 52 of the Convention
    a. Require performance previously promised by the seller (delivery of the goods)
    b. Withdrawal of the contract
    c. Remedy of Price Reduction
    d. Special clauses of quantitative defect
    e. Special case of the buyer´s refusal of the delivery
2. Right to claim damages by exercising his right to other remedies provided in articles. 74 - 77 of the Convention.

The buyer can exercise both - the rights listed in articles 46 - 52 and claim damages.

REQUIRE PERFORMANCE PREVIOUSLY PROMISED BY THE SELLER

The buyer may require the seller to fulfil his obligations that promised to fulfill in the contract. That situation can happen especially if the goods were not deliver at all or were delivered defected.

- In that case of defects it is important to see if the breach of the contract is fundamental or not.
    - Fundamental breach of contract - the buyer can ask for **substitute goods** (switch for the defected ones) or repair the defective goods unless that would be unreasonable regarding all the circumstances. The request for substitute must be made either in conjunction with notice of defects or within a reasonable time thereafter.
    - Non-fundamental breach of contract - it is possible only to require **repair of defective** goods with a limitation unless it would be unreasonable regarding all the

circumstances. The request for repair must be made either in conjunction with notice of defects or within a reasonable time thereafter.

The difference between fundamental and non-fundamental breach of contract is defined in article 25 of the Convention.

ART. 25 OF THE CONVENTION

A breach of contract committed by one of the parties is fundamental if it 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.

In simple terms a fundamental breach of contract is when the damage is foreseeable and substantial. Specifically this can be settled in contract of sale to make any doubts disappear.
If the goods were not delivered to the buyer on time the buyer may add additional reasonable time within the seller may fulfill the obligation. The buyer cannot claim any of his rights before the seller´s deadline unless he gets a notice from the seller that the obligation will not be fulfilled within this period of time. However the buyer doesn´t lose the right to claim damages for delay in performance.

The case when the seller decides on his own to remove any defects on the goods (i.e. even without a request from the buyer) is included in article 48 of the Convention. It may be a substitution delivery of goods, repairs or delivery of missing parts. In this case particularly, it has to be done without causing the buyer unreasonable inconvenience. The buyer cannot refuse such performance unless he withdraws from the contract first. The seller has to give notice about such performance to the buyer who can give his own opinion about it (esp. if it causes unreasonable inconvenience).

ART. 48 OF THE CONVENTION

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

A significant limitation of an originally promised performance (in kind) is in article 28 of the Convention where it said that a court is not obliged to decide in these cases in kind unless it would do so under own law on similar contracts. This means that the actual enforcement of payment in kind can be procedurally limited in certain countries (esp. in countries where common law is enforced - the compensation of the damages is preferred over performance in kind there)

AVOIDANCE FROM CONTRACT

The buyer´s right to avoid the contract is created by not fulfilling any of the seller´s obligations. Depending on the nature of the breach there are two types of situations that may occur:

1. In case that the seller breached the contract of sale fundamentally the buyer can avoid the contract **immediately.**

2. In case that the goods are not delivered the avoidance is only possible if the seller doesn't deliver it **within the additional period of time** that the buyer suggested or the seller himself give notice about not being able to deliver the goods.

The effects of avoidance don´t occur automatically immediately nor after the deadline of the additional period of time. It is necessary to make a written statement of avoidance and notify the other party. It becomes effective at the moment when it reaches the other party.

The effects of avoidance from a contract are specified more in articles 81, 82, 83 and 84 of the Convention.

ART. 81 OF THE CONVENTION

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

All rights and obligations of both parties from the contract of sale cease to exist excluding a potential claim for damages. If the contract includes also an arbitration clause (for more see chapter 8.3) it won't be affected by the avoidance too. Any performance that has been done already by any party has to be returned with the termination of the contract (for example refund for the goods)

ART. 82 OF THE CONVENTION

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

This article 82 deals with cases when the returning or refunding (of goods) is not possible, esp. if it is no longer in the same condition as it was in the moment of delivery.

ART. 83 OF THE CONVENTION

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

ART. 84 OF THE CONVENTION

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or

(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

REMEDY OF PRICE REDUCTION

The buyer can decide on reduction of purchase price on his own, without the consent of the seller if the delivered goods are not in accordance with the contract. The buyer can reduce the price regardless the price was paid or not. If the buyer already made the payment he may ask for its partial refund.

Extent of price reduction is calculated as a difference between the price of the goods that was actually delivered and the price of the goods that would have at the time of the delivery without defects.

In some cases the buyer is not entitled to ask for price reduction. If the seller has delivered goods before the date for delivery and then deliver any missing parts or make up any deficiency in the quantity or replaced of any non-conforming goods (art. 37 of the Convention) or if the seller deliver the goods after the deadline however without unreasonable

delay and without causing the buyer unreasonable inconvenience (article 48 of the Convention).

SPECIAL CLAUSES OF QUANTITATIVE DEFECTS

ART. 51 OF THE CONVENTION

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

The claims listed above (avoidance the contract, price reduction and fulfillment of obligations after the agreed time) can only be applied on the missing parts of the performance.

SPECIAL CASE OF THE BUYER´S REFUSAL OF THE DELIVERY

ART. 52 OF THE CONVENTION

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Article 52 deals with special cases when the seller delivers the goods before the date they agreed on or in bigger quantity. The buyer may either take the delivery or refuse to take it, or part of it (if it´s the case when the seller delivers too much of the goods).

5.2.7 SELLER'S REMEDIES FOR BREACH OF CONTRACT BY BUYER

Seller´s contractual obligations are created if the contract is breached or some obligations listed in the Convention are breached, there are two types of remedies:

1. exercise the rights provided in the Convention (art. 62 - 65 of the Convention)
    a. Right to performance (payment of the purchase price)
    b. Right to avoid the contract
    c. Specification of the form
2. claim damages as provided in articles 74 -77 of the Convention

Also the buyer's remedies may be applied cumulatively - some of the claims mentioned in articles 62 - 65 plus claim damages.

RIGHT TO PERFORMANCE

The seller may require to be paid the purchase price that is in the contract, take delivery or perform his other obligations unless the seller has resorted to a remedy which is inconsistent with this requirement. If other obligations were agreed the seller may require performing them as well. Although there is still a procedural limitation - a court is not bound to enter a judgement for specific performance unless the court would do so under its own law (article 28 of the Convention).

The seller may also fix an additional period of time of reasonable length for performance by the buyer of his obligations.

ART. 63 OF THE CONVENTION

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

AVOIDANCE THE CONTRACT

The seller´s right (as well as the buyer´s) to avoid the contract is created by not fulfilling any of the buyer´s obligations. Depending on the nature of the breach there are two types of situations that may occur:

1. In case that the buyer breached the contract of sale fundamentally the seller can avoid the contract **immediately.**

2. In case that the buyer doesn´t perform his obligation the price or take delivery of the goods **within the additional period of time** or declares that he will not do so within this time.

   The effects of avoidance don´t occur automatically immediately nor after the deadline of the additional period of time. It is necessary to make a written statement of avoidance and notify the other party. It becomes effective at the moment when it reaches the other party.

The effects of avoidance from a contract are specified more in articles 81, 82, 83 and 84 of the Convention.

SPECIFICATION OF THE FORM

Some contracts of sale do not include specifications of form, measurement or other features of the goods. If the buyer fails to make such specification either on the date agreed upon or within a reasonable time after a request from the seller the seller may make the specification himself in accordance with the requirements of the buyer that may be known to him.

If the seller makes the specification himself then he must inform the buyer about it and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so within the time the specification made by the seller is binding.

5.2.8 COMMON PROVISIONS ON PARTIES´ OBLIGATIONS

There are several rights that can arise both to seller and buyer if the performance of contract is threatened. Those are:

- Right to suspend the performance
- Right to avoid the contract for supposed breach
- Right to avoid the contract with respect to instalment

RIGHT TO SUSPEND THE PERFORMANCE

Right to suspend the performance is reserved for cases when there are serious concerns that the other party won't fulfill own obligations. The conditions of this right are further investigated in article 71 of the Convention.

ART. 71 OF THE CONVENTION

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

RIGHT TO AVOID THE CONTRACT FOR SUPPOSED BREACH

If after the conclusion of the contract it becomes apparent that the other party will not perform a substantial part of his obligation the first party may avoid the contract. The party suspending performance must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

RIGHT TO AVOID THE CONTRACT WITH RESPECT TO INSTALMENT

Special reason for avoidance the contract is described in article 73 of the Convention in cases of instalments. Instalment contracts are type of agreement in which payments of money, delivery of goods or performance of services are to be made in a series of payments, deliveries or performances (such as contract for delivery of 500 tons of grain divided into five instalments of 100 tons).

ART. 73 OF THE CONVENTION

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment

constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

First two chapters of this provision follow a timeline of breach of contract. While the first paragraph deals with the breach that already happened the second one describes the breach that may occur in future. The last paragraph is about situations so called interdependence deliveries.

5.2.9 RIGHT TO INDEMNITY

Breach of contract (both by seller or buyer) is followed by creating right to claim for damages to the other party. Damage can also be done by delay in delivery of goods or delivery of defective goods. Consequences of breach of contract in terms of payment of purchase price are a separate topic as well as implementation of the Convention, issues regarding seller´s liability for death or personal injury caused by the goods to any person.

A precondition for creation right to claim damages is fulfilling simultaneously these criteria:

1. Failure to perform any of other party´s obligation
2. Existence of damages
3. Existence of causality - the connection between a cause and an effect (causal nexus) in this case failure and damage.

The extent of damages also includes the amount of money corresponding to the actual loss and other party´s loss of profit caused by the breach of contract. The extent is:

- **actual loss or damages**, i.e. how much was the party's asset diminished due to the breach of contract (for example defects on products that all spontaneously ignited and caused also burn damages in a warehouse)
- **loss of profit**, i.e. how much was the party´s asset not increased due to the breach of contract (for example by not delivering the goods the buyer could not sell it and could not make profit)

The concept of claim damages according to the Convention is based on so called **predictable damages** by the party that breached the contract. Damage claim cannot exceed the foreseen loss and loss of profit taking into account the facts that the blamed party knew of or could have known of as a possible consequence of the breach. Foreseeable damage can be for example breach of obligation to deliver a certain amount of grain due to change of weather in the case of purchase of harvest.

The method of damage claiming is determined in the Convention and is only provided **in money.**

The party that caused the damage can require a reduction of damages claim if the other party failed to take reasonable measures to reduce the loss including loss of profit.

The Convention also involves so called objective liability for damage which means the fault is not sought in the party that didn´t fulfill own obligation.

To relieve of liability for damages is only possible when there are **circumstances that exclude liability.** This issue is further elaborated in articles 79 and 80.

ART. 79 OF THE CONVENTION

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

In practice of international trade there are usually **vis major** types of circumstances that exclude liability. Unavoidable consequences of situations when no party is responsible such as overpowering force (natural disasters), wars, decisions of international organisations on imposing embargo on import of a certain goods into a certain country, etc. However there are other situations that are not classified as vis major, when the obstacles are eliminable but they would cost more than was planned and that´s why they weren't eliminated.

Liability is also excluded if the failure to fulfill obligation of one party was caused by an act or omission of the other party, i.e. a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party´s act or omission (art.80).

Liability for damages is included under special circumstances is involved in articles 75 and 76 of the Convention.

ART. 75 OF THE CONVENTION

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the

difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

That means that apart of the actual extent of damage and loss of profit the buyer that bought goods in replacement can also claim damages in the amount of difference between the purchase price and price agreed upon in the replacement type of transaction.

ART. 76 OF THE CONVENTION

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

This article addresses the situation when the buyer doesn't buy any goods in replacement. In this case he is entitled to be paid the difference between agreed contractual purchase price and regular price in the time of avoidance the contract. This sum is basically to cover the loss of profit that would be made in case the goods were not properly delivered and he could not re-sell it and make a profit on it.

As far as this let's also mention the right to claim interest on late payments. This right is created especially in context of payment of purchase price although it can be created under other circumstances as well - payment of any other financial commitment.

The level of interest is not included in the Convention. Therefore it can be calculated either:

1. Agreement in the contract of sale
2. Conflict rule

Exercises of right to claim interest on late payments doesn´t prevent the party from claim for damages.

5.3 CLAUSES REGARDING THE CONTRACT OF SALE

Special clauses in a contract of sale represent agreements of parties included in contract of sale that supplement or modify its content, i.e. rights and obligations of the parties. Its validity depends on the validity of the contract itself.

As special clauses connected to contract of sale can also be provisions in Civil Code such as pre-emption right or right to repurchase that can be also add to contract of sale concluded between companies. The same goes for other clauses in Commercial Code such as trial purchase, price clause in international trade there can also be currency clause, prohibition of re-export and clauses of sales restriction.

Liberty of contract gives parties to agree in written form on other provisions (objections, conditions, etc.). If the parties don't agree on anything else these provisions will forfeit in a year after the contract is concluded, if the seller doesn´t claim his rights within this period of time.

5.3.1 CURRENCY (MONETARY) CLAUSE (§ 744 COMC)

The currency-monetary clause is usually added to contracts when dealing with international partners. Given the liberty of contract it can be in any type of contracts - even intra-national ones.

Currency clause is a mutual agreement that the prices are based on a certain exchange rate of a currency which is used for paying the price (secured currency) in relation to another currency (reinsuring currency). If the ration of those two changes the final purchase price changes in the same ration as well. For example if on the day of the contract conclusion the ration between securer and reinsuring currency is 4:1 and on the of the performance the ration changes to 6:1 the buyer pays in the secured price 50 % more.

The decisive moment for review the changes is the moment of contract conclusion and the moment of performing the obligation. If not otherwise agreed the default middle exchange rate is the one of the country where the debtor has his registered office or residence.

CURRENCY CLAUSE

Section 744

(1) If a contract stipulates that the price or another monetary obligation is understood to be at a particular rate of exchange for the currency in which the obligation is to be fulfilled (i.e. the secured currency),, in relation to a certain other currency (i.e. the reinsuring currency), and if after conclusion of the contract the rates of exchange of both currencies alter, the debtor is bound to pay the amount either reduced or increased proportionately, so that the amount of the reinsuring (or securing) currency remains unchanged.

(2) If the contract does not specify which exchange rates are to be taken into account, it is presumed that these will be the median exchange rates effective in the country where the debtor has his registered office, place of business or residential address at the time the contract was concluded and at the time when the monetary obligation is fulfilled.

(3) If the clause uses several currencies as reinsuring (or securing) currencies, the average of the exchange rates between the secured and the reinsuring currencies shall apply, unless the clause provides otherwise.

5.3.2 PROHIBITION OF RE-EXPORT (§ 739 ET SEQ. COMC)

In prohibition of re-export the buyer promises the seller not to re-sell his goods to a certain geographical area. If this area is not specified in the contract it is under the law the territory of the country where the goods is delivered or where the buyer has his place of business or residence. Prohibition of re-export must be in written form.

The prohibition is only limited to the export of goods designed for business purposes not personal purposes of the buyer or other vendee, including their families. In case of violation of this prohibition the buyer must compensate the damaged caused regardless if the re-export made he or the third person (vendee).

The buyer is also obliged to prove that the goods were not re-exported from the area on seller´s request without undue delay.

If the parties don't agree on any other time limit this prohibition is only valid one year after the contract conclusion, if the seller does not apply it within this period of time.

PROHIBITION OF RE-EXPORT

Section 739

If a contract of sale states in writing that the buyer is prohibited from re-exporting goods which he bought, the buyer is liable to the seller if such goods are exported by any party from the specified area. The buyer is obligated to compensate the seller for any damage which he suffered by a breach of this obligation, irrespective of whether the goods were exported by the buyer himself or by another party, and whether the buyer bound the other parties having acquired the goods in an appropriate manner not to export them

5.3.3 CLAUSES ON SALES RESTRICTIONS (§ 742 ET SEQ. COMC)

Clause on sale restriction limits the seller to sell his goods only to a certain group of customer, to a certain country or in a certain amount or under other conditions set out in the contract.

The clause must be in written form.

The clauses on sales restrictions must be accordance with fulfillment of obligations arising from the international agreement and must prevent violation of rights in industrial or other property rights. It is valid till a breach of the clause or for two years after the delivery of goods.

CLAUSES ON SALES RESTRICTIONS

Section 742

(1) Under a "clause on sales restrictions" (in Czech "ujednani o omezeni prodeje"), the seller undertakes not to sell specified goods to a certain category of customers or to a certain country, or to sell such goods only on a limited scale or under the terms specified in the agreement.

(2) This clause (agreement) must be in writing and its validity depends on the validity of the contract of sale in which it is included or to which it is related.

5.4 CONTRACTS CONDUCTED IN RELATION TO CONTRACT OF SALE

Contracts made in connection to the contract of sale are a separate type of contracts that are related to contract of sale in its economic functions. With regard to its use there are included in special provisions for contractual relationships in international trade. Examples: Exclusive sales contract, Contract on linked transactions, i.e. interdependent contracts and multilateral barter transactions.

If the parties don't agree otherwise in the contracts the applicable law is the one that suits the best the reasonable arrangement of these relations as whole (usually it´s the law that governs the contract of sale itself).

5.4.1 EXCLUSIVE SALES CONTRACT (§ 745 ET SEQ. COMC)

Exclusive sales contract is a contract where the supplier agrees to sell his goods exclusively to a certain customer.

It differs from the contract on exclusive sales representative. Sales representative only mediates the transaction or conclude the transactions on behalf of the represented party. In

exclusive sales contract case the exclusive supplier and exclusive customer represent themselves and make business on their own behalf and own name with separate contracts of sale.

For the exclusive sales contract to be valid the Commercial Code requires to be it in written form.

EXCLUSIVE SALES CONTRACT

Section 745
Fundamental Provisions
(1) Under an "exclusive sales contract" (in Czech "smlouva o vyhradním prodeji"), the supplier undertakes not to deliver the goods specified in the contract to a person in a particular area other than the customer.
(2) The contract is not valid if it is not in writing, or if it fails to specify the area or the types of goods to which it applies.

5.4.2 CONTRACTS ON LINKED TRANSACTION (§ 750 ET SEQ. COMC)

Contracts on linked transaction are types of contracts that deal with some of the problems of implementation of international economic relations, particularly problems caused by a deficit in trade or payment balance between countries.

A common feature of those contracts (as well is dependent contracts and multilateral barter agreements) is that one trade is dependent on realisation of another trade.

CONTRACTS ON LINKED TRANSACTIONS

Section 750
Interdependent Contracts
If the contract, or the circumstances under which the contract was concluded and which were known to both parties at its conclusion, indicate that performance of this contract (i.e. the principal contract) is dependent on performance of another contract (i.e. the subsidiary or accessory contract), performance of the subsidiary contract is considered as a suspensory condition for the effectiveness of the principal contract. If part performance under the principal contract is to be rendered, or is rendered in advance, non-performance (non-fulfilment) of the subsidiary contract is considered as a resolutory (dissolving) condition

INTERDEPENDENT CONTRACTS

Interdependent contracts are the ones that it is not the duty of the contractor to perform until some obligation contained in the same agreement has been performed by the other party. They cover reciprocal trades that serve exchange of goods beyond the scope of commercial agreements, junk-time trades that prevent from unwanted increase of clearing transaction level after reaching credit limit.

Legally speaking there are two separate contracts of sale. If the contract, or the circumstances under which the contract was concluded and which were known to both parties at its conclusion, indicate that performance of this contract (principal contract) is dependent on performance of another contract (subsidiary or accessory contract), performance of the subsidiary contract is considered as a suspensory condition for the effectiveness of the principal contract. If part performance under the principal contract is to be rendered or is

rendered in advance, non-performance (non-fulfilment) of the subsidiary contract is considered as resolutory (dissolving) condition.

MULTILATERAL BARTER TRANSACTIONS

Multilateral barter transaction are commercial transaction in which several parties conclude one or several interdependent contracts, under which reciprocal deliveries of goods between parties having their seat, place of business or residential address on the territory of different countries are to be affected by the purchase price is settled only among those parties having their seat, place of business or residential address on the territory of the same country.

Relations created by multilateral barter transactions are under the same provisions that regulate contract of sale, with several exceptions, such as:

- none of the parties may postpone delivery of goods for international partner which has its place of business, seat or residential address on the territory of another country
- multilateral barter transactions parties that have their seat, place of business or residential address on the territory of the same country are liable for performance of the obligation of each one of them - jointly and severally
- the right to repudiate the contract does not belong to any party in multilateral barter transactions when one of the other parties is in default with its performance while another party has already fulfilled its obligation. Unless the party withdrawing from the contract compensate all the damage

6 INCOTERMS® AND INTERNATIONAL CARRIAGE OF GOODS

6.1 INCOTERMS®

The INCOTERMS® rules were issued by International Chamber of Commerce in Paris (ICC) that was updated multiple times. The newest version is INCOTERMS® 2010 edition published on 1st January 2011. In the prior version the rules were divided not into 13 but into 11 predefined terms.

DEFINITION 4: INCOTERMS

The INCOTERMS® rules of International Commercial Terms are a series of predefined commercial terms published by ICC that specify rights and obligations of contracts for the international sale of goods, particularly costs, risks and sellers/buyers responsibilities.

The INCOTERMS® are a set of trade terms most commonly used in international contracts for sale of goods. They provide internationally accepted definitions and rules of interpretation for most common commercial terms. They are not created by any state, they do not supersede the law governing the contract rather they are secondary source of law created by another subject. Given its non-governmental origin they are not legally binding just by them therefore it has to be incorporated in contracts for the sale of goods and **agreed by both parties.** And also refer to the use of a specific rule within the term and not remember the year of their issue (the latest in 2010). If the note stating year is missing then the latest rules are applied.

The INCOTERMS® rules deal with issues regarding seller´s and buyer´s obligation to conclude a contract of carriage, which bears the cost of transportation of goods, who arranges export/import documentation or who bears the risk of damage. Yet there are some issues not incorporated, such as method of payment for goods. This should be included the contract itself or as a reference to other rules (e.g. Uniform Customs and Practice for Documentary Credits) or they may not solve this issue at all. Although if it is not included in the contract then it means that national law on conflict rule will be applied.

The International Commercial Terms are widely used not only in international trade but in national one as well. Some rules emphasize the need for bureaucratic obligations in export or import only applies when it is possible.

In any case by its nature they are a linkage between a contract of sale and contract of carriage. In a sense they complement flawed UN legislation - UN Convention on Contracts for the International Sale of Goods.

The INCOTERMS® 2010 rules may be divided into two groups according to the type of carriage they specialise in.

- Any type of carriage
  - EXW, FCA, CPT, CIP, DAT, DAP, DDP
- Maritime transport (places of delivery and destinations are ports)
  - FAS, FOB, CFR, CIF

Scheme 6-1: INCOTERMS® 2010

Source: own work

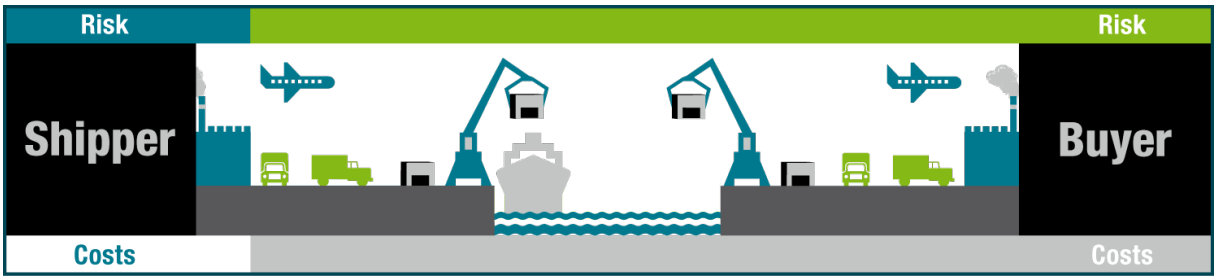
In terms of spreading out obligations of parties, it's safe to say that E rules have least of seller´s obligations and D rules have least of buyer's obligations. F and C rules have it equally split.

EXW (EX WORKS) – NAMED PLACE

«Ex works» means that the seller delivers when he places the goods at the disposal of the buyer at the seller's premises or another named place (i.e. works, factory, warehouse, etc.) not cleared for export and not loaded on any collecting vehicle.

This term thus represents the minimum obligation for the seller, and the buyer has to bear all costs and risks involved in taking the goods from the seller's premises However, if the parties wish the seller to be responsible for the loading of the goods on departure and to bear the risks and all the costs of such loading, this should be made clear by adding explicit wording to this effect in the contract of sale .This term should not be used when the buyer cannot carry out the export formalities directly or indirectly. In such circumstances, the FCA term should be used, provided the seller agrees that he will load at his cost and risk.

Scheme 6-2: EXW



Source: http://www.primecargo.dk/Information/Shipping%20Tools/Inco%20Terms.aspx

FCA (FREE CARRIER) – NAMED PLACE

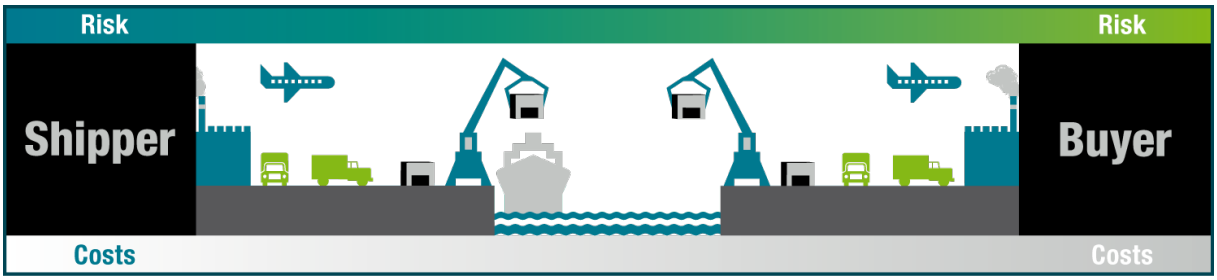
«Free Carrier» means that the seller delivers the goods, cleared for export, to the carrier nominated by the buyer at the named place. It should be noted that the chosen place of delivery has an impact on the obligations of loading and unloading the goods at that place. If delivery occurs at the seller's premises, the seller is responsible for loading. If delivery occurs at any other place, the seller is not responsible for unloading.

This term may be used irrespective of the mode of transport, including multimodal transport.

«Carrier» means any person who, in a contract of carriage, undertakes to perform or to procure the performance of transport by rail, road, air, sea, inland waterway or by a combination of such modes.

If the buyer nominates a person other than a carrier to receive the goods, the seller is deemed to have fulfilled his obligation to deliver the goods when they are delivered to that person.

Scheme 6-3: FCA



Source: http://www.primecargo.dk/Information/Shipping%20Tools/Inco%20Terms.aspx

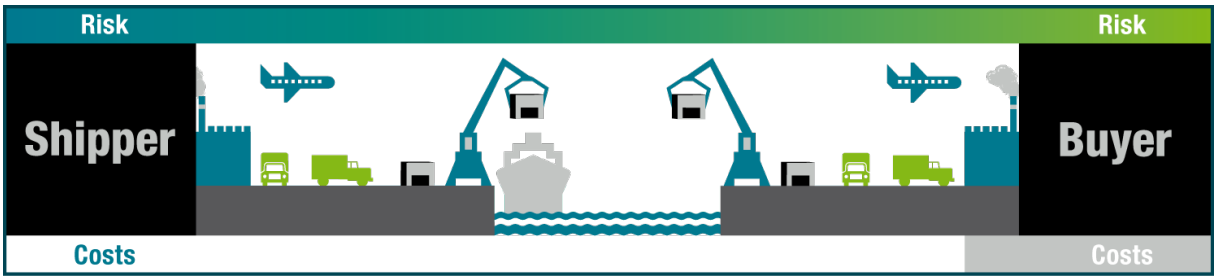
CPT (CARRIAGE PAID TO) – NAMED PLACE OF DESTINATION

«Carriage paid to...» means that the seller delivers the goods to the carrier nominated by him but the seller must in addition pay the cost of carriage necessary to bring the goods to the named destination. This means that the buyer bears all risks and any other costs occurring after the goods have been so delivered.

«Carrier» means any person who, in a contract of carriage, undertakes to perform or to procure the performance of transport, by rail, road, air, sea, inland waterway or by a combination of such modes. If subsequent carriers are used for the carriage to the agreed destination, the risk passes when the goods have been delivered to the first carrier.

The CPT term requires the seller to clear the goods for export. This term may be used irrespective of the mode of transport including multimodal transport.

Scheme 6-4: CPT



Source: http://www.primecargo.dk/Information/Shipping%20Tools/Inco%20Terms.aspx

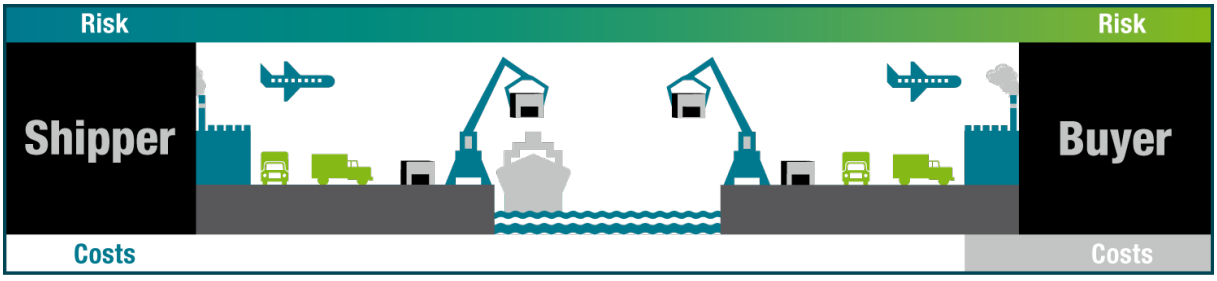
CIP (CARRIAGE AND INSURANCE PAID TO) – NAMED PLACE OF DESTINATION

Carriage and Insurance paid to... means that the seller delivers the goods to the carrier nominated by him but the seller must in addition pay the cost of carriage necessary to bring the goods to the named destination. This means that the buyer bears all risks and any additional costs occurring after the goods have been so delivered. However, in CIP the seller also has to procure insurance against the buyer's risk of loss of or damage to the goods during the carriage. Consequently, the seller contracts for insurance and pays the insurance premium. The buyer should note that under the CIP term the seller is required to obtain insurance only on minimum cover. If the buyer wishes to have the protection of greater cover, he would either need to agree as much expressly with the seller or to make his own extra insurance arrangements.

«Carrier» means any person who, in a contract of carriage, undertakes to perform or to procure the performance of transport, by rail, road, air, sea, inland waterway or by a combination of such modes.

If subsequent carriers are used for the carriage to the agreed destination, the risk passes when the goods have been delivered to the first carrier. The CIP term requires the seller to clear the goods for export. This term may be used irrespective of the mode of transport including multimodal transport.

Scheme 6-5: CIP



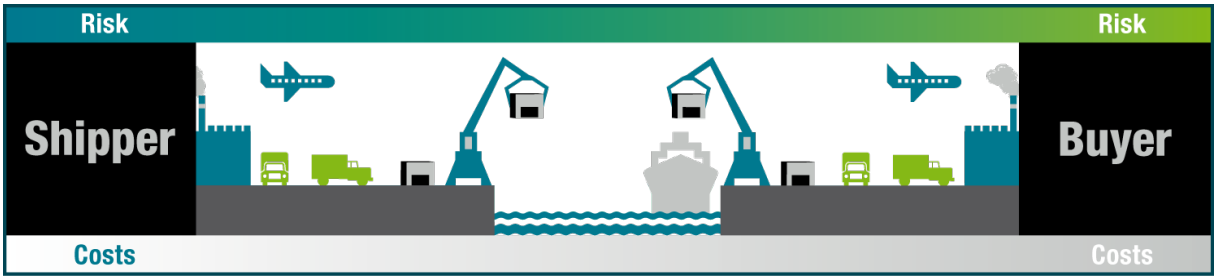
Source: http://www.primecargo.dk/Information/Shipping%20Tools/Inco%20Terms.aspx

DAT (DELIVERED AT TERMINAL) – NAMED TERMINAL AT PORT OR PLACE OF DESTINATION

New Term - May be used for all transport modes

Seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named terminal at the named port or place of destination. "Terminal" includes quay, warehouse, container yard or road, rail or air terminal. Both parties should agree the terminal and if possible a point within the terminal at which point the risks will transfer from the seller to the buyer of the goods. If it is intended that the seller is to bear all the costs and responsibilities from the terminal to another point, DAP or DDP may apply.

Scheme 6-6: DAT



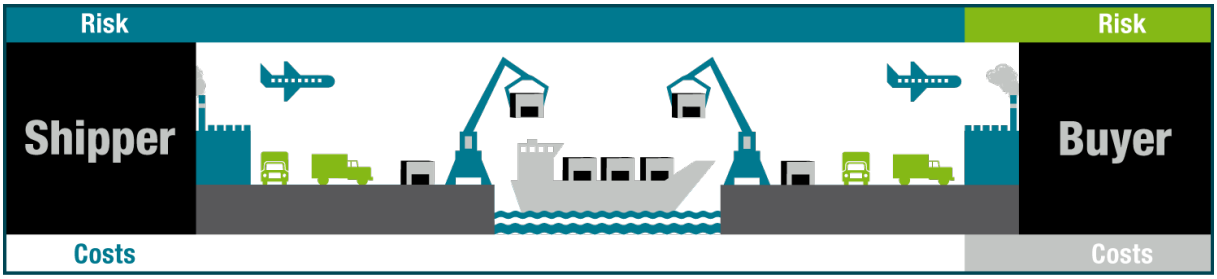
Source: http://www.primecargo.dk/Information/Shipping%20Tools/Inco%20Terms.aspx

DAP (DELIVERED AT PLACE) – NAMED PLACE OF DESTINATION

New Term - May be used for all transport modes

Seller delivers the goods when they are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. Parties are advised to specify as clearly as possible the point within the agreed place of destination, because risks transfer at this point from seller to buyer. If the seller is responsible for clearing the goods, paying duties etc., consideration should be given to using the DDP term.

Scheme 6-7: DAP

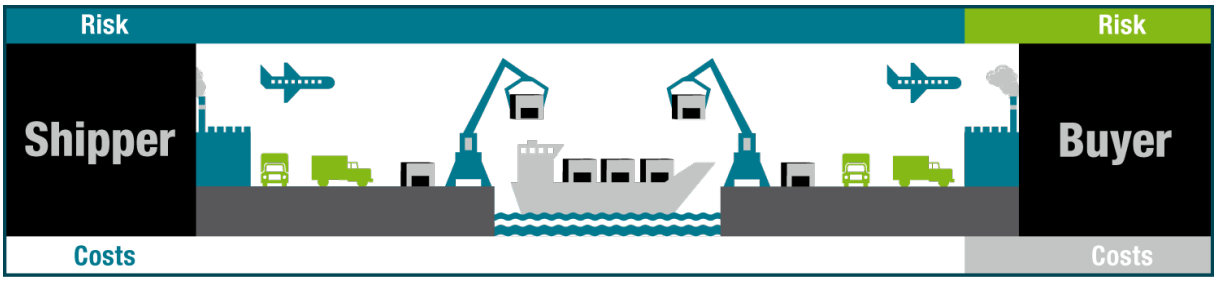


Source: http://www.primecargo.dk/Information/Shipping%20Tools/Inco%20Terms.aspx

DDP (DELIVERED DUTY PAID) – NAMED PLACE OF DESTINATION

Delivered duty paid» means that the seller delivers the goods to the buyer, cleared for import, and not unloaded from any arriving means of transport at the named place of destination. The seller has to bear all the costs and risks involved in bringing the goods thereto including, where applicable (Refer to Introduction paragraph 14), any «duty» (which term includes the responsibility for and the risk of the carrying out of customs formalities and the payment of formalities, customs duties, taxes and other charges) for import in the country of destination.

Scheme 6-8: DDP

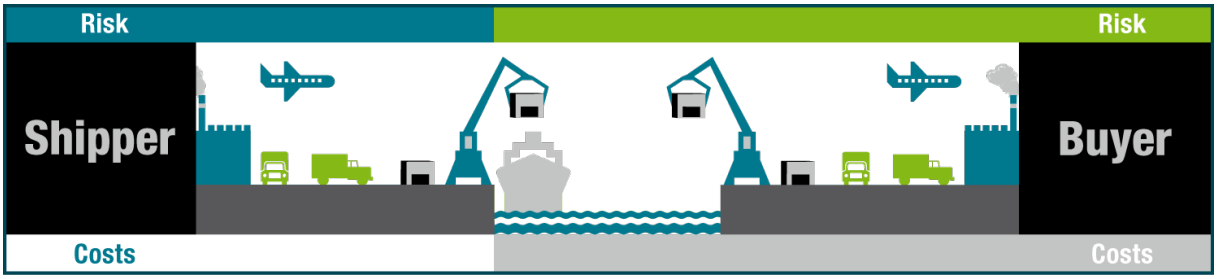


Source: http://www.primecargo.dk/Information/Shipping%20Tools/Inco%20Terms.aspx

FAS (FREE ALONGSIDE SHIP) – NAMED PORT OF SHIPMENT

«Free Alongside Ship» means that the seller delivers when the goods are placed alongside the vessel at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that moment. The FAS term requires the seller to clear the goods for export. THIS IS A REVERSAL FROM PREVIOUS INCOTERMS VERSIONS WHICH REQUIRED THE BUYER TO ARRANGE FOR EXPORT CLEARANCE. However, if the parties wish the buyer to clear the goods for export, this should be made clear by adding explicit wording to this effect in the contract of sale. This term can be used only for sea or inland waterway transport.

Scheme 6-9: FAS

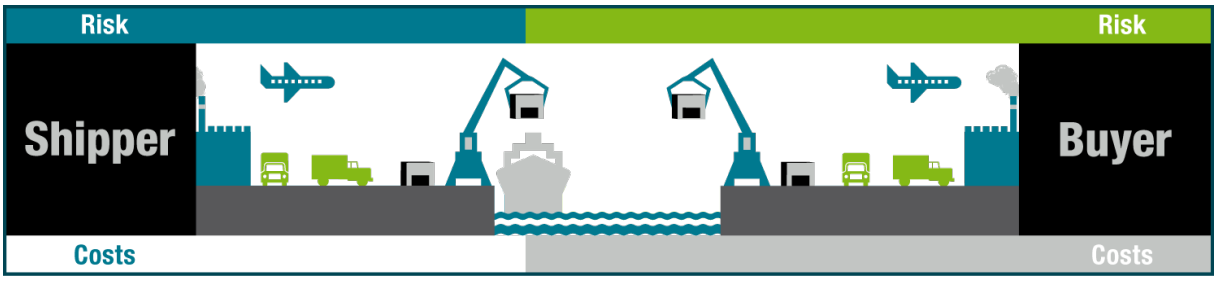


Zdroj: http://www.primecargo.dk/Information/Shipping%20Tools/Inco%20Terms.aspx

FOB (FREE ON BOARD) – NAMED PORT OF SHIPMENT

«Free on Board» means that the seller delivers when the goods pass the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point. The FOB term requires the seller to clear the goods for export. This term can be used only for sea or inland waterway transport. If the parties do not intend to deliver the goods across the ship's rail, the FCA term should be used.

Scheme 6-10: FOB



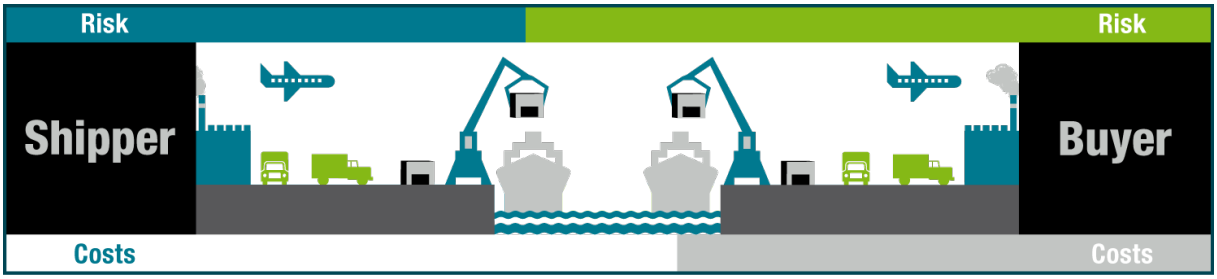
Source: http://www.primecargo.dk/Information/Shipping%20Tools/Inco%20Terms.aspx

CFR (COST AND FREIGHT) – NAMED PORT OF DESTINATION

«Cost and Freight» means that the seller delivers when the goods pass the ship's rail in the port of shipment. The seller must pay the costs and freight necessary to bring the goods to the named port of destination BUT the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time of delivery, are transferred from the seller to the buyer.

The CFR term requires the seller to clear the goods for export. This term can be used only for sea and inland waterway transport. If the parties do not intend to deliver the goods across the ship's rail, the CPT term should be used.

Scheme 6-11: CFR



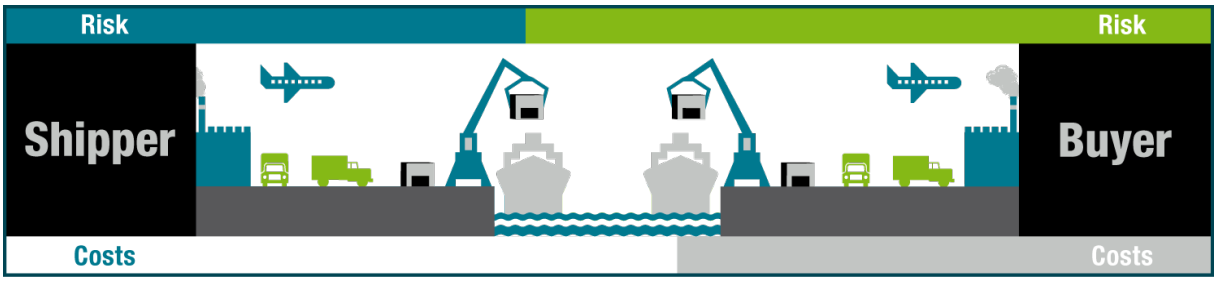
Source: http://www.primecargo.dk/Information/Shipping%20Tools/Inco%20Terms.aspx

CIF (COST INSURANCE AND FREIGHT) - NAMED PORT OF DESTINATION

"Cost, Insurance and Freight" means that the seller delivers when the goods pass the ship's rail in the port of shipment. The seller must pay the costs and freight necessary to bring the goods to the named port of destination BUT the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time of delivery, are transferred from the seller to the buyer.

CIF the seller also has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage. Consequently, the seller contracts for insurance and pays the insurance premium. The buyer should note that under the CIF term the seller is required to obtain insurance only on minimum cover (Refer to Introduction paragraph 9.3). Should the buyer wish to have the protection of greater cover, he would either need to agree as much expressly with the seller or to make his own extra insurance arrangements.

Scheme 6-12: CIF



Source: http://www.primecargo.dk/Information/Shipping%20Tools/Inco%20Terms.aspx

6.2 CONTRACTS IN INTERNATIONAL TRANSPORTATION

6.2.1 SOURCES OF LEGAL REGULATIONS IN INTERNATIONAL TRANSPORT

Characteristics of legislation of international transportation, both in terms of its technical and contractual, is its extend unification in the form of international treaties and conventions.

Here are some (chronologically lister) international conventions that deal with contractual relations in international transport including limitation periods for claims from contract of carriage or other special procedural issues (possibility to solve disputes in court or arbitration, jurisdiction of local decision-making institutions, etc.)

- **The Convention concerning International Carriage by Rail** (COTIF) - Bill No. 8/1985 coll., as amended
- **The Convention on the Contract for the International Carriage of Goods by Road** (CMR) - Bill No.11/1975 Col.
- **United Nations Convention on the Carriage of Goods by Sea** (Hamburg Rules 1978) – No. 193/1996 col.
- **The Convention for the Unification of Certain Rules for International Carriage by Air** – No. 123/2003 Col. (Montreal Convention 1999). In many countries this Convention replaced the Warsaw Convention from 1929.

To add to the international conventions here are some others that regulate more technical issues of international transportation.

- Convention and Statute of the International Regime of Maritime Ports (adopted in 1923) - bill no. 64/1932 Coll.
- Convention on International Civil Aviation (adopted in 1944) - bill no. 147/1947 Coll., as amended by no. 29/1957 Coll.
- Vienna Convention on Road Traffic (adopted in 1957) – bill no. 175/1960 Coll.
- Agreement Concerning the Adoption of Uniform Conditions of Approval and Reciprocal Recognition of Approval of Motor Vehicle Equipment and Parts (adopted in 1958) - bill no. 176/1960 Coll.
- Convention on International Transport of Goods Under Cover of TIR (adopted in 1975) - bill no. 144/1982 Coll.
- International Convention for Safe Containers (adopted in 1972) - bill no. 62/1986 Coll.

International legislature under which is Czech Republic bound are a part of national law - § 756 of Commercial Code and take precedence over the national law.

6.2.2 INTERNATIONAL RAIL SERVICES

Unification of rail services legislation happened in 1961 with the International Convention concerning the carriage of goods by rail (CIM). Further needs to develop international rail transport both goods and people led negotiation a new multilateral international agreement - Convention concerning international carriage by rail (COTIF) - bill no. 8/1985 Coll.

The Convention consists of three parts. First is General Provisions - the actual text of the Provision that mainly establishes Intergovernmental Organisation for International Carriage by Rail (OTIF), with Protocol on the Privileges and Immunities of the Organisation. Its aim is to establish system of uniform law in these fields of law: international carriage of passengers and goods in through traffic by rail among all Member States.

Second part of the Convention is common provisions and Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV) - Appendix A to COTIF. In the third part there is Appendix B to COTIF - Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM).

CIM Uniform rules are completed by four other annexes on special issues concerning dangerous goods (RID), personal wagons (RIP), containers (RICO) and express parcels (RIEX).

CIM Uniform rules are binding for all shipments of goods transported with waybills issued for transport in at least two countries on routes listed by Intergovernmental Organisation for International Carriage by Rail. They can also be implemented for other type of transportation if provided in CIM itself.

CIM Uniform rules are binding for countries who signed COTIF Convention as well as for other parties involved in their contractual relationship. They may depart from its provisions only if allowed by CIM. CIM Uniform rules or international tariffs do not deal with some issues so they shall be governed by national law of the country where the entitled party asserts his rights.

6.2.3 INTERNATIONAL ROAD TRANSPORT

Legislation that unifies conditions for international transport by road is in Convention on the Contract for the International Carriage of Goods by Road (CMR) of 1956 - bill no.11/1975 Coll.[11]

The CMR Convention shall apply to every contract for the carriage of goods by road in vehicles (motor and articulated vehicles, trailers or semitrailers) when the place of taking over of the goods and the place designated for delivery as specified in the contract are situated in two different countries, or which at least one is a contracting country. This activity also shall be done for reward. This Convention shall also be applied in cases when the goods is carried over part of the journey by sea, rail, inland waterways or air provided the goods are not unloaded from the vehicle.

The CMR Convention is binding and the parties may depart from it only in cases expressly stated in the Convention. Other issues not addressed by the Convention shall be governed by the applicable law or the law chosen by the parties or conflict rule unless stated otherwise.

6.2.4 MARITIME TRANSPORT

In sector of maritime transport the Czech Republic is binding by United Nations Convention on the Carriage of Goods by Sea, also called Hamburg Rules, 1978 - notice 193/1996 Coll.

Hamburg rules issued in 1978[12] are applicable to all contracts of carriage by sea between two different countries, if:

1. the port of loading as provided for the contract of carriage by sea is located in a contracting country. The port of discharge as provided for in the contract of carriage by sea is located in a contracting country or one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a contracting country.

2. the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any state giving effect to them are to govern the contract.

Hamburg rules are applicable to all parties and they only may depart from them if the Convention allows.

6.2.5 INTERNATIONAL AIR TRANSPORT

Legislation regarding international air transport was unified by Montreal Convention on Air Carrier Liability (Montreal Convention)[13] - notice of Ministry of Foreign Affairs no.123/2003 Coll., that replaces Warsaw Convention from year 1929, as amended.

Montreal Convention introduces a uniform legal framework to govern air carrier liability in the event of damage caused to passengers, baggage or goods during international journeys. It applies to all international carriage for reward excluding the carriage of postal items. The carrier shall be liable only to the relevant postal administration in accordance with

[11] Source: http://www.jus.uio.no/lm/un.cmr.road.carriage.contract.convention.1956.amended.protocol.1978/doc.html

[12] Source: http://www.admiraltylawguide.com/conven/hamburgrules1978.html

[13] Source: http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/

the rules applicable to the relationship between the carriers and the postal administration. It also applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

For the purposes of this Convention, the expression "international carriage" means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

The provisions in Montreal Convention - if not stated otherwise - are binding. All clauses in the contract of carriage that would lead to deviation from the Montreal Convention are invalid. The parties shall have right to agree on right and obligations that are not addressed by the Convention.

6.2.6 CONTRACTS ON CARRIAGE OF GOODS ACCORDING TO INTERNATIONAL CONVENTION

Despite minor differences among contracts of carriage of goods in various international convention there are some common points that all share.

Given the information above it´s safe to say that the international nature of carriage is not determined by its place of business or residence but mostly by the fact that the journey goes cross-border. That´s why the carriage of goods arranged between two entities from one country is governed by an international convention provided the goods are shipped to or from abroad.

Contract of carriage is created between consignee and carrier and doesn´t have pre-defined format. Handover of goods to the carrier and its take over accompany also (in case of rail transport it is even mandatory) handover of documents - waybill, bill of lading, air waybill. This is both a document proving existence of the contract and a security (bearer bond or certificate security) that embodies the right to dispose of goods during carriage and right to hand over the goods to the entitled person.

Essentials of the carriage documentations are regulated by a certain convention, however the most important are:

- identification of the parties (carrier, shipper)
- determination of recipient
- goods description (shipment) including data on weight, quantity, etc.
- destination

And other, such as:

- payment method (e.g. set of fares)
- determination of price of goods
- list of documents required for carriage (for customs or other governmental institutions) and handed over to the carrier.

In next parts of the conventions there are also interpretations of rights and obligations between parties. The consignor is bound to handover the goods/shipment, inform about its nature, hand over all necessary documents and pay the agreed price (fare).

The carrier is obliged to carry and deliver the goods in a regular manner and on time. All conventions regulate the liability of the carrier for delay and damage on the goods is limited-liability. That is because there are also other factors such as actual defects on goods, defective packaging, damaged caused by rightful owner) and do not give right to the injured party to claim damages for loss of profits.

The recipient has right to take over the shipment against the shipping documents and is obliged to pay the costs that were not paid to the consignor.

7 PAYMENT AND SECURING INSTRUMENTS

7.1 PAYMENT METHODS IN INTERNATIONAL TRADE

What also influences the risks associated with the implementation of international transactions is chosen payment method. **Method, place and time of payment** of the agreed price is usually included in the contract as "terms of payment". The terms of payment influence the level of risk of parties involved and method of payment leads to ensuring the mutual performance (esp. Documentary payments).

Methods of payment may be:

- **Payment in cash** – payment in cash is not often used in international transactions due to the long distance. Plus we have to bear in mind that payment in cash is in many countries (including Czech Republic) limited up to a certain amount. In the Czech Republic this issue is covered by Act No. 254/2004 Coll., the restriction of cash payments as amended. This act says that service payment, the amount of which exceeds the amount of 350 000 CZK is obligated to make payment by bank transfer. To limit all payments are included in both Czech and foreign currency payments made by the service at the same beneficiary during one calendar day.

Due to the distance between the parties it is unusual, with few exceptions (e.g. purchase at sales show/exhibition) to use cash payment in international trade. More often there is a third party included in the payment transaction, usually a bank.

- **Bank transfer** (smooth payment) – payment orders in foreign currency abroad or payment orders in foreign currency within the Czech Republic. It is possible to enter orders within an advance due date of up to 364 days advance. On the due date, orders are processed as orders created on their due dates and their status will change. The payment must be made by bank transfer to a specific bank account number which specified in the contract. The purchase price is considered to be paid at the day when the money is transferred to the account. Payments made this way are also referred as "open account payment". Supplier of goods in this case sends the goods with stating the period of time for payment the purchase price. The customer then pays the price within this period of time. In a way it is a form of short-time credit transaction. This method is usually made between two long-term mutually trusted contractual partners. Its main advantage is low cost of implementation.

- **Documentary payment** – payment for goods is in the case of documentary payment bound to submission of the required documents, two of them are documentary letter of credit and documentary collection. Among documents that are used in international trade are especially well-known carriage documents (bill of lading, waybill, postal certificate, etc.) and insurance documents (proof of insurance contract).

The payment can also be made through bills of exchange

- Bills of Exchange

Bill of exchange fulfills the function of a mean of payment as well as it is an important insuring instrument. Legally speaking a bill of exchange is a security that has to contain certain requirements under the law. Legal regulation is in Act No. 191/1950 Coll., bills of exchange and cheques as amended. In international trade they are often used therefore easily tradable. The owner of the bill of exchange may get a big part of it by selling it to a bank (so called discount of bill of exchange). The bank then shall pay the owner of the bill of exchange the value discounted by a certain amount that is calculated from its maturity and interest rate.
Promissory note is a negotiable security containing a written commitment. Unlike a bill of exchange a promissory note is the debtor´s promise to pay. Bill of exchange is written proof of financial commitment. It is a command of drawer to drawee to pay to payee a certain sum on a certain day at a certain place.

- Designation that it is a bill of exchange, it must be part of the text of the bill of exchange and written in the language in which the whole document is written.
- unconditional payment order
- name of the drawee
- indication of maturity
  - Payable at sight – Maturity at sight is formally based on expressly using words "at sight", "at presentation", "after sight", etc. Another option consists in not stating the day of maturity as mentioned above. With bills of exchange at sight the due day is not determined clearly in advance. The due day is the day when the bill of exchange is presented to the respective person for payment.
  - Payable at a fixed period after sight – the time stated in the bill runs from the day of acceptance of the bill after sight
  - Payable at a fixed period after the date of drawing – the period of time starts at a fixed period after the day of drawing
  - Payable on a fixed day – determination of maturity date
- Place of payment
- Designation of the payee
- Day and place of drawing
- Signature of the drawer

If there is no detail concerning the due date in the bill of exchange, it is assumed that it is payable at sight. The bill of exchange payable at sight or at a certain time may the issuer set interest of bill amount.

- **Cheques** – Cheque is also a security that the issuer of the cheque commands the drawee (bank) to pay a certain amount from his account to the other party.
  - Unconditional order to pay a cheque amount and the designation that is in a cheque and written in the same language in which the whole document is written
  - Unconditional order to pay a certain amount of money
  - Name of the drawee
  - Place of the cheque payment
  - Date and place of issue of the cheque
  - Signature of the drawer

Cheque is always payable at sight. According to the place of issue and payment there are various periods within which the cheque shall be paid (8 days if the the place of issue and payment are in the same country, 20 days if they are in different countries on the same continent and 70 days if they are on different continents).

In terms of risks there are several important issues, not only the method of payment, but other circumstances as well, including the maturity of the obligation. The period of time is determining esp. in connection to delivery of agreed goods. We distinguish these:

- **Payment in advance** – Payment before the actual delivery of goods that strengths the position of the supplier in the contractual relationship because it gives him the opportunity to dispose the money before the shipment. In international trade is this method of payment very rare due to high risk for the buyer. More practical is to pay only a part of the purchase price in advance (down payment). This reduces the risks of supplier in case the buyer decides to avoid the contract, or it can also serve to co-finance the production of the goods.
- **Payment at delivery** – equal for both parties but due to long distance between parties it is very often not possible
- **Payment after delivery** – type of payment that is basically performance first, on credit, with an agreed time of maturity

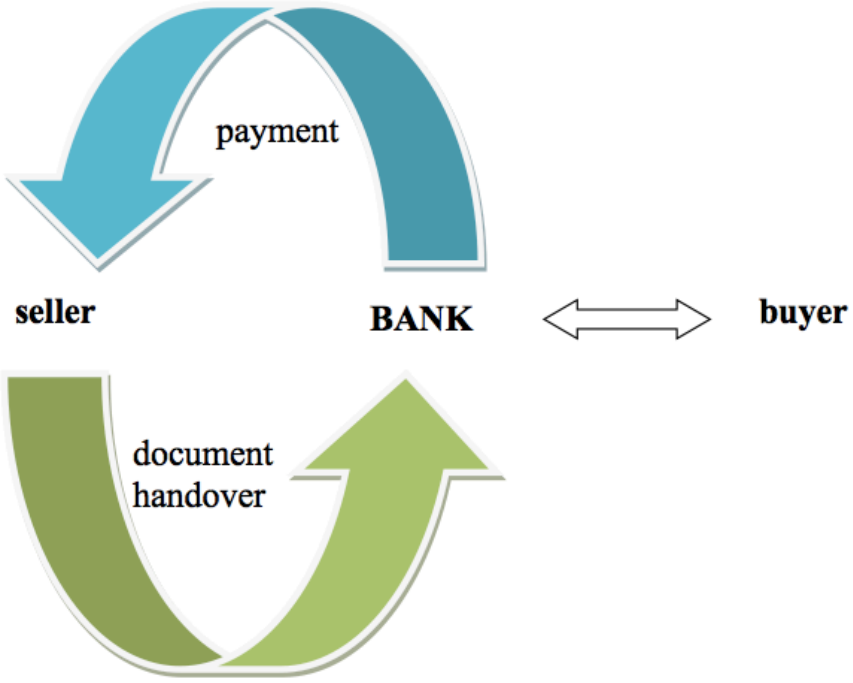
7.2 Letter of Credit

Letter of credit created as a result of need to secure payment transactions in international trade. Its condition is to bound performance to providing certain documents and therefore reducing risk of such a trade.

DEFINITION 5: LETTER OF CREDIT

It is a written obligation on the part of the bank to pay a specific amount subject to meeting of the conditions of the letter of credit stipulated by the buyer. The bank assumes the obligation towards the seller on the basis of request by the buyer.

Scheme 7-1: Letter of credit



Source: own work

Advantages of the Documentary Letter of Credit:

- **Supplier** (seller, producer) has a certainty of payment for the delivery of goods or services once the conditions of the letter of credit are met, the certainty that payment of the agreed amount is bound to meeting of conditions, which are known in advance.

And

- **Buyer** (customer, ordering party) has the certainty that the goods were dispatched before payment. The possibility of limiting commercial risk to a minimum by setting conditions for the letter of credit. It is a motivation for the seller to implement the delivery at agreed time and in line with the conditions of the letter of credit.

On the other hand there are disadvantages of letter of credit – esp. High costs of implementation – bank fees with the establishing.

SOURCES OF LEGISLATION

- National legislation of letter of credit is included in sections 682 – 690 of Commercial Code of the Czech Republic. It is so called absolute transaction which means that Commercial Code is applied to this type of contractual relationship regardless the parties (i.e. if they are legal entities or not). These legal rules are applied if the applicable law is the law of the Czech Republic or if the parties agree on applying the Czech legal system.
- Given quite often usage of this securing instrument of payment in international trade a unified rules were created by **ICC in Paris – Uniform Customs and Practice for Documentary Credits (UCP 600).** Crucial thing here is for the parties to agree on using these uniform customs and practice in their legal relation.

In accordance with the contract the bank notify the beneficiary person in writing that letter of credit was open in his favour. These essentials must be included:

- An amount that the bank agrees to
- Expiry date
- Against documents and other terms and conditions

Under a documentary letter of credit, the bank is bound to provide fulfilment (i.e. make payment) to the beneficiary, provided that the documents specified in the advisory note on the letter of credit are duly presented within the period of validity of the letter of credit. The bank is bound to examine, with due diligence, the relevance of documents presented to it and the consistency of their contents with (he conditions specified in the advisory note on the letter of credit. The bank is liable for any damage caused to the committer due to loss, destruction or damage of documents taken over from the beneficiary, unless it was unable to avert such damage even when exercising due care.

TYPES OF LETTER OF CREDIT

- **Anticipated (notified) letter of credit**

The advising bank (beneficiary´s bank) in this case only announces the authorised person (beneficiary) that there was a letter of credit open on his behalf. Advising bank doesn´t have any obligation arising from the letter of credit towards the beneficiary, it only receive all necessary documents and verify them.

- **Confirmed letter of credit**

If irrevocable letter of credit is initiated by the bank which is bound by it (issuing bank) and confirmed by another bank (beneficiary´s bank), then the beneficiary is entitled to claim the performance from the bank within the announced period of time. This makes the guarantee of payment higher. The issuing bank and beneficiary´s bank are bound towards the beneficiary jointly and severally. If the bank that confirmed the letter of credit provided performance according to the content of the letter of credit it may claim this performance from the bank that asked for confirmation of the letter of credit.

CHARACTERISTICS

- **Independence**

The bank's obligation arising from the letter of credit is not dependent on the legal relationship between the committer and the beneficiary.

- **Irrevocability**

If the advisory note on a letter of credit does not specify that the letter of credit is revocable, the bank can modify it or revoke it only with the consent of the beneficiary and the committer. If the advisory note on a letter of credit specifies that the letter of credit is revocable, the bank can modify it or revoke it until the beneficiary meets the conditions stipulated in the letter of credit. A letter of credit may be modified or revoked only in writing.

SUBJECTS

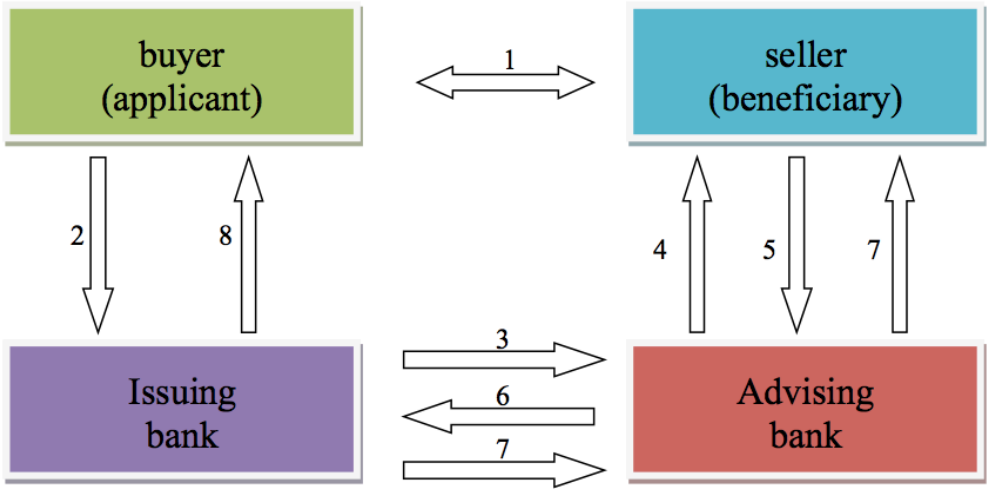
Applicant (buyer) – applicant is the party on whose request the issuing bank issues a credit. The applicant enters into a contract with a bank to open a letter of credit and determines what documents are to be for the purpose of the whole transaction needed.

Applicant´s bank (issuing bank) – the bank which issues a credit that is known as issuing bank. It issues its obligation towards the beneficiary, to pay him a certain amount of money if he presents with certain documents listed in the letter of credit. The contract on opening the letter of credit is concluded between the issuing bank and applicant.

Confirming bank (advising bank) – the bank which adds confirmation to letter of credit. It does so at the request of the issuing bank and taking authorisation from the issuing bank.

Beneficiary (seller, authorised party) – it is the party who is to receive the benefit (aka payment) of the letter of credit. The consignee of a letter of credit and beneficiary may not be the same. The credit is issued in his favour.

Scheme 7-2: Process of letter of credit



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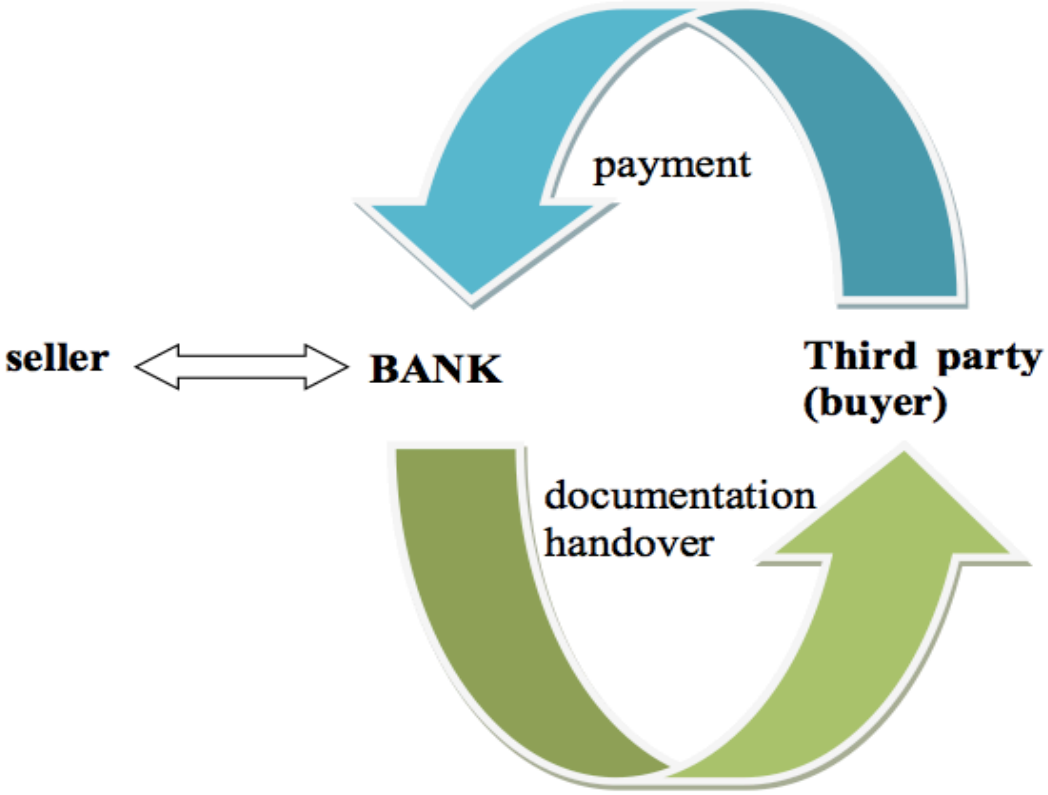
1. Realisation of transaction e.g. contract of sale between a seller and buyer
2. Buyer instructs the issuing bank
3. The issuing bank opens letter of credit in seller´s favour (beneficiary)
4. Advising bank notifies the beneficiary about the opening and what documents are needed to be submitted
5. Beneficiary submits all required documents (e.g. bill of lading)
6. Advising bank checks all documents and sends it to the issuing bank
7. Issuing bank makes payment to the beneficiary – through the advising bank
8. Issuing bank hands over the documents to the applicant so he can dispose his goods and settles its financial compensation

7.3 DOCUMENTARY COLLECTION

DEFINITION 6: DOCUMENTARY COLLECTION

Contract on documentary collection is between a bank and a client who deal in commercial transactions. It is a classic documentary payment instrument used above all in foreign trade. It is a contract where the seller instructs his bank to forward documents related to the export of goods to the buyer´s bank with a request to present these documents to the buyer for payment.

Scheme 7-3: Documentary collection



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Advantages of documentary collection

- **Seller** (Exporter) – **certainty for the exporter** that the bank will not issue documents until the buyer submits a payment order or meets other collection conditions. The bank does not issue documents, even if payment is made as a smooth payment, until it receives authorisation from the sending bank. However there is still a risk that the importer will not make the transaction and will not come to hand over the documents. There is a possibility to arrange instance for these occasions.
- **Buyer** (Importer) – after performing his obligation he receives the documents for goods which enables him to dispose the goods.

There are lower bank charges in comparison with fees for processing a documentary letter of credit.

SOURCES OF LAW

- National legislation of documentary collection is included in sections **692 – 699 of the Commercial Code.** It is so called absolute transaction which means that Commercial Code is applied to this type of contractual relationship regardless the parties (i.e. if they are legal entities or not). These legal rules are applied if the applicable law is the law of the Czech Republic or if the parties agree on applying the Czech legal system.
- Given quite often usage of this securing instrument of payment in international trade a unified rules were created by **ICC in Paris – Uniform Customs and Practice for Documentary Credits (UCP 600).** Crucial thing here is for the parties to agree on using these uniform customs and practice in their legal relation.

Contract on documentary collection is a type of contract when the bank undertakes to deliver to a third party documents conferring the right to dispose of goods, or other documents, provided that a specified sum of money is paid upon their presentation or another act of collection is affected. The bank´s obligation is to ask the debtor to pay the agreed sum of money or to perform another action with the same result according to the contract (i.e. acceptance of bill of exchange). If the debtor refuses to pay the agreed price the bank immediately notify the applicant.

TYPES OF DOCUMENTARY COLLECTION

Documentary collection may be made in two different ways based on against what documents are presented:

- **Documents against Payment (D/P)** – The export documents and the bill of exchange provided to a collecting bank are only made available to an importer when payment is made. The collecting bank then transfers the funds to the seller through the remitting bank.
- **Documents against Acceptance (D/A)** – The export documents and a time bill of exchange are sent to a remitting bank. The documents are then sent to a collecting bank with instructions to release the documents against a buyer's acceptance of the bill of exchange.

SUBJECTS

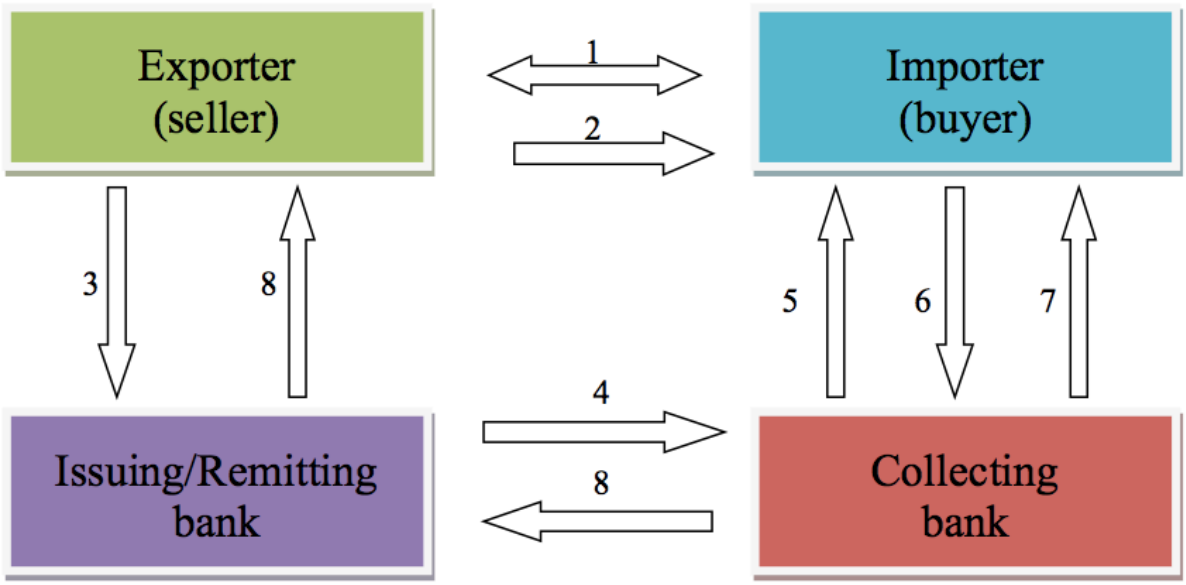
Seller (Exporter) – seller concludes collecting contract with a bank and hand over all necessary documents that are supposed to be transferred to the buyer if the transaction goes well. In the documentary collection there has to be written the amount of money collected, or whether letter of exchange was received and list of documents presented.

Exporter´s bank (Remitting bank) – its main purpose in this transaction is to receive payment and documents and then hand them over to the other bank.

Importer´s bank (Collecting bank) – its main purpose is to transmit funds from buyer to seller as well as documents – from the seller to the buyer. It doesn´t verify the documents.

Buyer (Importer) – the buyer must perform a collecting performance to be able to receive the documents

Scheme 7-4: Process of documentary collection



Source: own work

1. Conclusion of a commercial contract
2. Exporter sends the goods to the buyer according to the contract
3. Exporter hands over of collection orders and all documents
4. The issuing bank hands over the collecting instructions and documents to the collecting bank
5. The collecting bank informs the buyer about receiving the documents and instructions
6. Buyer performs his obligation – pay the agreed price or issue a letter of exchange
7. Based on documentary collection the collecting bank hand over the buyer all documents
8. The collecting bank provide the issuing bank the agreed sum of money in favour if the seller.

7.4 Securing Instruments in International Trade

In realisation of any transaction (regardless if it´s international or national one) the parties always risk that the agreed condition might not be performed by the other party. A major problem associated with international trade is the distance between them, the fact that they often do not know each other, mutual doubts about the performance or even the political situation in the country. Specifically in the case of contract of sale the seller can never be sure that the shipped goods are paid for. And the buyer can never be sure that the goods will be delivered.

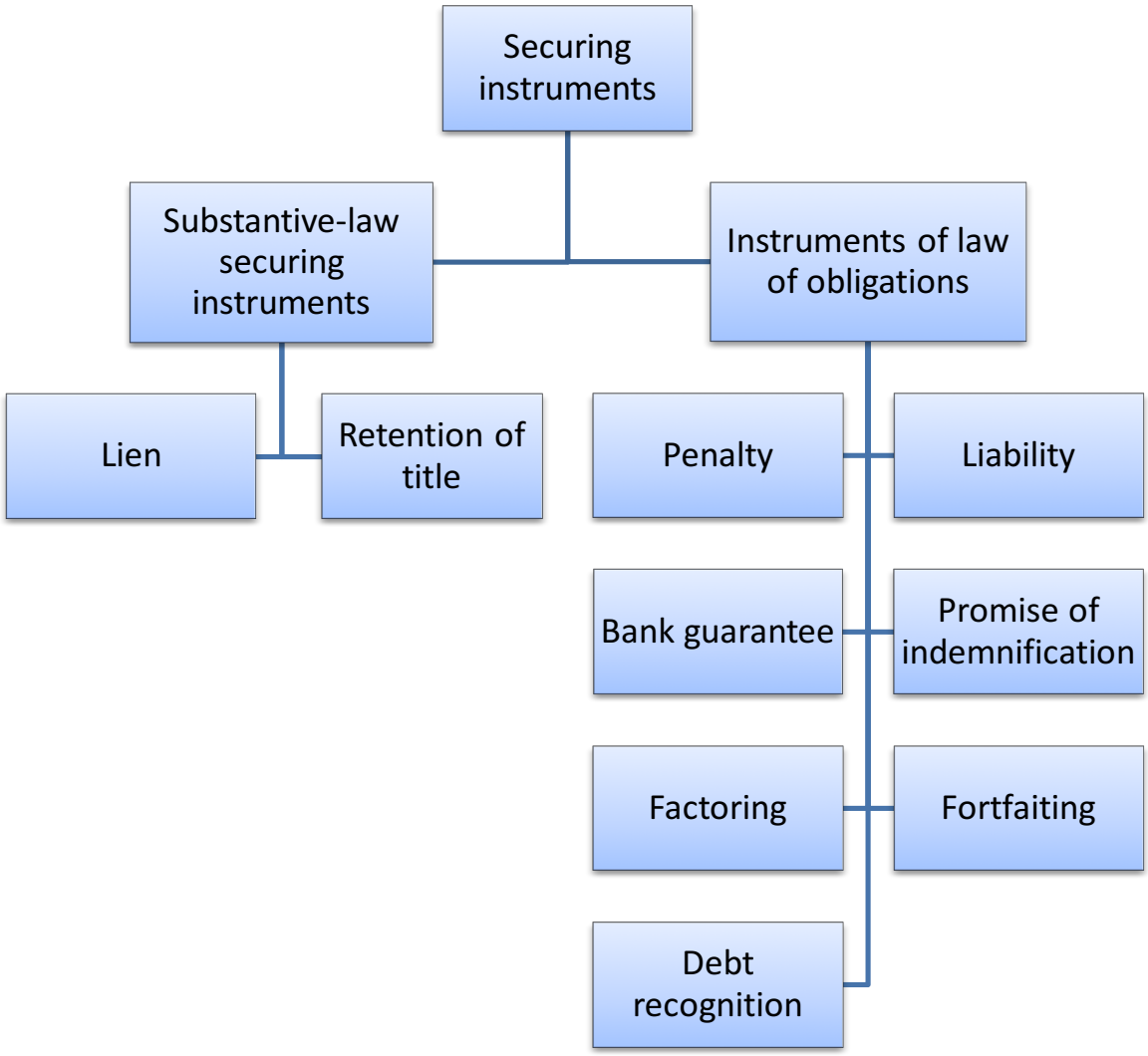
Generally speaking a securing instrument may be anything that strengths the position of creditors in the contractual obligations. In this sense even instruments listed above are securing instruments, such as letter of credit, documentary collection or letter of exchange.

More specifically we can say that there are two levels of this instrument – **substantive-law** (legal lien, retention of title) as well as **law of obligations** (penalty, liability, bank guarantee, agreement on wage deduction, etc.). We can also distinguish securing instruments expressly regulated in law (listed above) or other that is not regulated specifically (factoring or forfeiting).

Among securing instruments used in international trade are:

- **Pledge and lien –** in the case of international trade it has real practical usage especially in case of lending lien.
- **Retention of title –** this instrument is often used in international trade. Its purpose is to ensure that if goods are supplied on credit and the buyer goes into bankruptcy the seller can repossess the goods. Where suppliers are expected to sell goods on credit there is a reasonable expectation that if they are not paid they should be able to repossess the goods. The position of the seller is strengthened by the fact until payment of the full price of the goods he remains the owner of it.
- **Contractual penalty** – in practice it is common way of securing performing that is to pay a certain sum of money in the event that the debtor doesn´t fulfill his obligations
- **Liability** – general liability is a liability of third person to satisfy the debtor´s claim if the debtor cannot perform his obligations himself**.**
- **Bank guarantee** – legal regulation of bank guarantees are incorporated also in Czech Commercial Code. Apart of this national legislation it is also possible to use international ones – **International Chamber of Commerce Demand Guarantee Rules** (the latest version was released in 2010). Demand guarantee is a characteristic feature that we refer to as abstractness which means that a bank is obliged to set out a certain amount on demand of beneficiary if he meets all required conditions in letter of guarantee. Bank guarantee is not dependent on reinsured liabilities. The bank only examines whether the formal conditions were met and if so the guarantee must be paid. The payment may also be linked to submission of some documents which makes is similar to letter of credit (see more above).
- **Promise of indemnification** – the one who is asked to perform something beyond his duties is assured that he will be indemnify in case of damage
- **International import and export factoring –** it is type of purchase of short-term debts (its referrals) by a factoring company which provides the creditor (supplier) with funds before its actual maturity. Legal regulation of assignment is applied to the relationship between supplier and factoring company. The profit of factoring company is consisted of the difference between nominal value of the claim and its contract price. Factoring company may also be awarded for this service with flat rate, for example annual bonuses and it may provide other services for suppliers, for example related to administration of claims, etc. The price of providing factoring depends also on whether the factoring company bears the risks of non-payment by the debtor.
- **International forfeiting** – it is a specific type of financing the transaction that is provided usually by banks**.** Also in this case it is basically a paid assignment of claims with medium and long term maturities**.** In practice there are usually cases of bigger investment units' supplies. Then the claims are secured, for example with bank guarantee, letter of credit, or letter of exchange.
- **Debt recognition** – if a commitment accepted in written form then rebuttable legal presumption is created **–** that at the time of acceptance exists and starts a new limitation period.

Scheme 7-5: – Securing obligations



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8 DISPUTE SETTLEMENT IN INTERNATIONAL TRADE

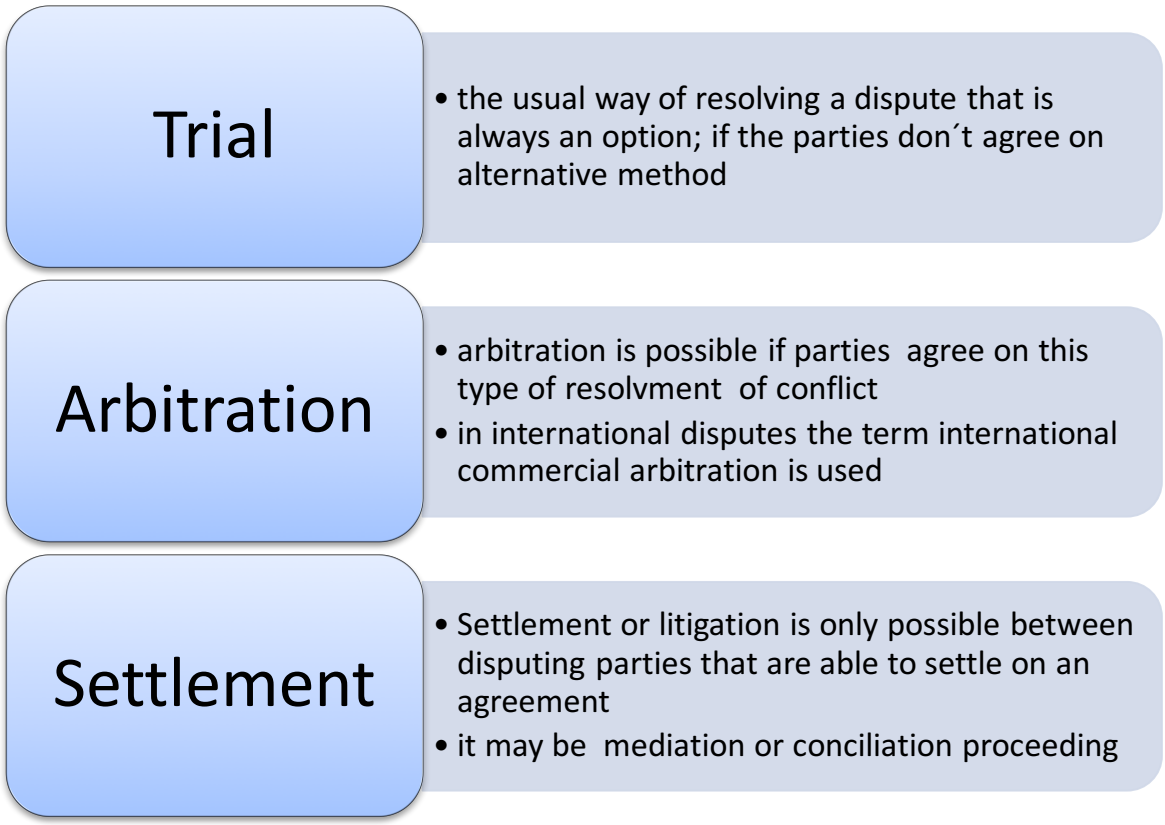
8.1 METHODS OF DISPUTE SETTLEMENT

Legal relationships are constantly created, changed and terminated in the commercial sector. In this context of challenging background there may occur situations that entities are not able to resolve themselves, and they ought to hand the issue over to the third party.

As well as in other countries there are several ways of commercial dispute settlement in the Czech Republic. There is not only trial, but alternative methods as well. As such we can mention litigation through mediator or conciliator. Another alternative is arbitration. The common feature of these alternative methods is the willingness to conform to different ways of dispute settlement without interference by the public sector.

Conciliation proceeding and litigation are resolution between disputing parties about a legal case. The parties try to find a settlement using actively third parties – conciliator and mediator. However this element doesn´t have the right to issue any legally binding document.

Scheme 8-1: Methods of dispute settlement



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8.2 TRIAL IN INTERNATIONAL TRADE

Resolve a dispute before an ordinary court is a fundamental and most common method of dispute settlement in both national and international trade. Trials hear and decide on disputes in civil-law proceedings; in doing so they ensure that there is no violation of rights and lawful interests of individuals and legal persons and no abuse at those people´s expenses.

Trial in international environment brings its own specifics. This is something else than determination of applicable law which is a matter of searching legal system of a certain country. In case of international trials there is a determination of an institution (court). This is something else than determination of applicable law. Determination of applicable law is a matter of choosing a legal system of a country. On the contrary determination of a court is a matter of authority that will decide on a dispute according the applicable law. As a result this means that in international disputes **the court may decide according to applicable law of a different country than the one in which is settled** (for example a Czech court would have to apply Polish law). Moreover it is also necessary to determine which authority may issue decisions in favour of the party that won.

The matter of jurisdiction is in the Council Regulation No 44/2001 of 22 December 2000 **on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters** (so called BRUSSELS I).

8.2.1 DETERMINATION OF TERRITORIAL JURISDICTION

GENERAL RULES OF DETERMINATION OF TERRITORIAL JURISDICTION

A general rule is that territorial jurisdiction is determined by the residence of the person which is sued in a dispute. The dispute will be held by the court in whose jurisdiction the natural person has its residence and legal person its registered office. However the complainant may decide that instead of this, special provisions on determination of territorial jurisdiction (article 5) shall be used. This may be more convenient in certain cases, esp. Because he can file a suit in his own country. Provisions in first paragraph are important for contractual obligations and those in fifth paragraph for dispute relating to the branch. Let´s look at the whole article here:

ART. 5 OF THE CONVENTION

A person domiciled in a Member State may, in another Member State, be sued:

*1. (a) in matters relating to a **contract, in the courts for the place of performance of the obligation** in question;*

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered, in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

4. as regards a civil claim for ***damages or restitution*** *which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;*

5. as regards a ***dispute arising out of the operations of a branch, agency or other establishment,*** *in the courts for the place in which the branch, agency or other establishment is situated;*

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment, or

(b) could have been so arrested, but bail or other security has been given; provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

This general rule has its **exceptions,** so called exclusive jurisdiction on which the general rules are not applied to. The exclusive jurisdiction is specified in art. 26 of Convention Brussels I. And it is applied in cases related to immovable property (proceedings shall be held in the country where is the property located), establishing or abolition of legal entities (proceedings are held in the country where the entity has its registered office), validity of entries in public registers, such as Trademark register (proceedings are held in the country which keep this register) or enforcement of decisions (proceedings are held in the country on whose territory the performance took place or will take place).[14]

DETERMINATION OF TERRITORIAL JURISDICTION BY AGREEMENT OF THE PARTIES

Let´s also include this option – to determine jurisdiction by an agreement of both parties which is in accordance with provisions included in the Convention. This is also informally called **forum shopping**.

ART. 23 OF THE CONVENTION

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

[14] Ou of curiousity we can also add special provisions regarding disputes arising from consumer contract in art. 16 of the Convention

[14] 1. A consumer may bring a legal action against contractual partners either in court of Member States on its territory the partner has head office or in court of the place where the consumer has residence

[14] 2. Contractual partner may bring a legal action against consumer only in court of a Member State on its territory the consumer has its residence

[14] 3. This article does not affect the right to bring counter-claims in court

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

8.2.2 RECOGNITION AND EXECUTION OF DECISION IN THE EU

RECOGNITION OF DECISIONS

Decisions issued in any of the country of the European Union are automatically recognised in other Member States as well without the need to initiate special proceeding. When in doubts the party applying for recognition may ask a court to determine whether or not to recognise this decision. There are certain cases when the decisions are not recognised:

ART. 34 OF THE CONVENTION

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

DECLARATION OF ENFORCEABILITY

Decisions issued and executed in one Member State will also be executed in other Member State. It is sufficient to **declare the proposal enforceable**. Local jurisdiction shall determined by domicile of the party for which the proposal is proposed or by the place of enforcement.

The procedure of application for a declaration of enforceability shall be governed by the law of EU Member State in which the proposal is made. The party that propose the declaration of enforceability should provide one copy of the decision that has all the requirements of authenticity and certificate issued by a court or legal authority of the Member State where the decision was made.

EUROPEAN ENFORCEMENT ORDER

Legal regulation of European Enforcement Order contains **Regulation No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims**. The purpose of this European Enforcement Order for uncontested claims is to enable free circulation of decisions, court settlements and official documents in all Member States without prior recognition and enforcement. In other words if a decision of a court in any Member State is certified as European Enforcement Order it is executed everywhere within the EU under the same conditions as it is executed in the country of origin.

Under this provision there are conditions settled for national decisions to be considered as European Enforcement Order. Such decision (or court settlement or notarial deed) certified as a European Enforcement Order shall be recognised and enforced in any other Member State without declaration of enforceability.

The condition is uncontested claim which is defined as:

ART. 3 PAR. 1

A claim shall be regarded as uncontested if:

(a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or

(b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or

(c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or

(d) the debtor has expressly agreed to it in an authentic instrument.

Such claim must be for a specific sum of money which has due date is written in the decision, court settlement or an official document.

8.2.3 EUROPEAN ORDER FOR PAYMENT

Legal regulation of European order for payment is included in **Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.**

The purpose of this Regulation is to **simplify, speed up** and **reduce the costs** of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure, and to permit the **free circulation of European orders for payment** throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement.

In border-wise disputes the European order for payment is issued of a sum of money only on the basis of information provided to court by complainant. The court issues the order without further verification. However the defendant has the right to re-appeal to the court. The statement of opposition shall be sent within 30 days of service of the order on the defendant. The defendant shall indicia in the statement of opposition that he contests the claim, without having to specify the reasons for this. A European order for payment which has become enforceable in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.

For proposal making there is a European Order for payment sample form. **The application shall state**:

- the names and addresses of the parties, and, where applicable, their representatives, and of the court to which the application is made;
- the amount of the claim, including the principal and, where applicable, interest, contractual penalties and costs;
- if interest on the claim is demanded, the interest rate and the period of time for which that interest is demanded unless statutory interest is automatically added to the principal under the law of the Member State of origin;
- the cause of the action, including a description of the circumstances invoked as the basis of the claim and, where applicable, of the interest demanded;
- a description of evidence supporting the claim;
- the grounds for jurisdiction;
- the cross-border nature of the case

A court that receives a proposal for issuing European order for payment first examine based on the proposal if all requirements set out by the Regulation are met and whether the claim appears to be well founded.

The European order for payment should apprise the defendant of his options to pay the amount awarded to the claimant or to send a statement of opposition within a time limit of 30 days if he wishes to contest the claim.

8.3 ARBITRATION

8.3.1 GENERAL CHARACTERISTICS

International arbitration is a procedure for the settlement of disputes regarding property claims arising from international trade between physical and legal persons. The basic requirement is admissibility by the applicable rules of law (which is usually the legal system of the place of implementation of arbitration and the legal system of the place of arbitration award).

DEFINITION 7: ARBITRARY PROCEEDING

Generally speaking arbitration can be understood as a procedure for the settlement of disputes between states by a binding third-party award (made by an arbitrator or an arbitral board) on the basis of law and as a result of an undertaking voluntarily accepted.

According to the arbitration agreement the parties involved submit their dispute not to an ordinary court but to an arbitrator or an arbitration board that was appointed after the dispute arises. Arbitration awards have contributed significantly to the development of many areas of international activities, especially in international trade.

The primary source of arbitration in the Czech Republic is **Act. No. 216/1994 Coll. on Arbitration Proceedings and Enforcement of Arbitral Awards**

Among the most significant international agreements on arbitration are:

- **Convention on the Recognition and Enforcement of Foreign Arbitral Awards** (New York Convention, 10. 6. 1958) a
- **European Convention on International Commercial Arbitration** (Geneva, 21. 4. 1961).

The agreement of the parties brings up the possibility to choose the form of the arbitration. One of them is ad hoc where the parties agree on their own rules of arbitration. Another form is on institutional basis where the parties consent beforehand to a specific procedure and/or a specific arbitral court.

Permanent Courts of Arbitration in the Czech Republic are Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic.

Table 8-1: Statistics of disputes (including international ones) at Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic

Year	*Total number or disputes*	*International*	*Intranational*
2000	*192*	*40*	*152*
2001	*216*	*33*	*183*
2002	*282*	*54*	*228*
2003	*450*	*47*	*403*
2004	*598*	*54*	*544*
2005	*869*	*60*	*609*

Year	*Total number or disputes*	*International*	*Intranational*
2006	*1237*	*79*	*1158*
2007	*1082*	*67*	*1015*
2008	*1485*	*93*	*1392*
2009	*2381*	*131*	*2250*
2010	*2946*	*160*	*2786*
2011	*3110*	*150*	*2960*
2012	*1984*	*97*	*1887*

Data from 30.9.2012
Source: Documents to download. Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic [online]. 2012 [cit. 2013-02-08]. Available at: http://www.soud.cz/ke-stazeni

Globally speaking there are several very well known courts of arbitration:

- International Court of Arbitration attached to International Chamber of Commerce in Paris
- Vienna International Arbitral Centre
- The London Court of International Arbitration
- Arbitration Institute of the Stockholm Chamber of Commerce
- New York International Arbitration Center

And others

8.3.2 ARBITRATION AGREEMENT IN INTERNATIONAL TRADE

Therefore arbitration represents a specific way to settle private disputes. In these cases it is not submitted to an ordinary court, but to either one arbitrator or more of them or to permanent court of arbitration.

The subject of an arbitration proceeding may be property disputes only that would otherwise be settled by a court, and without limitations commercial disputes only, excluding:

- disputes related to the enforcement
- disputes caused by a bankruptcy or a composition
- disputes that cannot be solved in peace

Prerequisite for any dispute to be settled by an arbitrator, a group of arbitrators or by a permanent court of arbitration is to have a contract. That can be done as:

1. **Arbitration agreement**, in a case that the dispute between the parties has already began, or

2. **Arbitration clause** is very often a part of a contract between two businesses. It gives the arbitrators the power to settle a dispute that will arise in future or have already arose.

The arbitration agreement ought to include also the arrangements on how the potential dispute should be settled.

An example of this can me an **arbitration clause for international disputes** by Arbitration Court attached to the Commercial and Agricultural Chamber of the Czech Republic:

> *"All disputes arising from the present contract and/or in connection with it shall be finally decided with the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic by one arbitrator appointed by the President of the Arbitration Court."*

Recommended wording of the arbitration clause for on-line proceedings:

> *"All disputes arising from the present contract and in connection with it shall be finally decided with the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic by one arbitrator appointed by the President of the Arbitration Court in accordance with the On-line Rules of the Arbitration Court."*

The parties select the following e-mail addresses for the conduct of the on-line arbitral proceedings:

.....

.....

Arbitration proceeding online is an easier way of arbitration especially when it comes to simpler disputes in business or trade. The core of it is the proceeding in electronic form however the arbitration award may be obtained also in printed form.

The parties may agree on other issues in their arbitration agreement, such as:

- the possibility to review the arbitration award by another arbitrator,
- the number of arbitrators or their selection procedure in case that a party fails to appoint the arbitrator within the deadline,
- procedure of conducting the arbitration proceedings, including the possibility of written arbitration proceeding,
- Authorisation of arbitrators to settle the dispute in accordance of the principle of justice.

The arbitrator may be individually appointed to settle a certain dispute (ad hoc arbitrator) that one natural person or odd number of persons chosen by the parties in the settlement. It doesn´t matter if the person is a citizen of the Czech republic or any other country as long as the person has come of lawful age and is legally competent.

A permanent Arbitration Court can also work as an arbitrator. Nowadays in the Czech Republic there are several of them: Arbitration Court attached to the Czech Chamber of Commerce and Agricultural Chamber of the Czech Republic, Exchange Court of Arbitration attached to the Prague Stock Exchange and Arbitration Court of the Czech-Moravian Commodity Exchange. In case that arbitration agreement doesn´t establish anyhow else both of the parties appoint one arbitrator and those elect a presiding arbitrator. In any event there has to be an odd number of arbitrators. If they are not appointed in 30 days then a court will do it instead. In case of permanent courts of arbitration they also decide on appointment of arbitrators, the proceedings, their statutes and rules.

8.3.3 RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

The recognition and enforcement is globally ensured by **the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1959**. Nowadays this convention was signed by 148 parties that ensure its recognition almost all over the world.

It seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term non-domestic appears to embrace awards which (although made in the proceedings - another country´s procedural laws) are applied. It applies to arbitral awards by institutional arbitration courts as well as the ones made in ad hoc arbitration.

Recognition and enforcement of arbitral awards can be refused upon request of any party involved or based on findings of the competent authority of the country that asks for recognition or enforcement of the arbitral award.

Recognition and enforcement of **arbitral award can be refused upon request of the country against whom it is invoked.** If the country fulfill at least one of those conditions:

- the parties of the arbitration agreement weren't capable to negotiate or the agreement is not valid
- the party against the arbitral award is invoked was not noticed properly about the award or about the arbitration proceeding or the party couldn't make own demands
- the award deals with a dispute that isn't covered by any arbitration agreement or that is not within any arbitration clause or the award contains decisions beyond the scope of the arbitrator or the arbitration clause
- the structure of the arbitration court or the arbitration proceeding wasn't in accordance with the arbitration agreement or the legal rules of the country where this was held in there was no agreement
- the arbitration award has not become binding (i.e. final and enforceable) or was cancelled or the award was postponed by the competent authority of the country where this was issued.

Recognition and enforcement of arbitral award can be refused **if the competent authority of the country where the recognition and enforcement is asked to be applied finds that**:

- the subject of the dispute cannot be a subject of an arbitration proceeding under the law of the country or
- the recognition or enforcement of the arbitral award would be in the contrary to the public policy of the country.

8.3.4 ADVANTAGES OF ARBITRATION

Among advantages of arbitration are smaller costs compared to judicial litigation. It is thanks to faster trials, usage of experts and interpreters as arbitrators, etc.

In international disputes the big advantage are simplified rules of evidence and procedure. That way they are easily adapted to the needs of those involved. Arbitration proceedings are generally held in private who makes them also very popular.

Thanks to the New York Convention the existence of the arbitration award is a good pre-condition for its recognition all around the world and enforcement which is undeniable advantage over the decisions of foreign courts that tend to be tied to a particular country.

Thanks to the New York Convention the existence of the arbitration award is a good pre-condition for recognition all over the world and enforcement which is a strong advantage compared to foreign courts´ decisions that are tied to the particular country.

SUMMARY

International business transactions have its own specific characteristics compared to national law. It´s particularly important to emphasize that applicable law has to be determined. While in case of national transactions we follow the applicability of national law; in case of international transactions there are multiple legal systems therefore it is important to settle down which one shall be applied. Alternatively the parties may decide to use application of nongovernmental rules such as INCOTERMS.

Entrepreneurs who intend to enter foreign markets shall consider how they want to do it. There are several ways of business expanding; the difference between them is in nature and scope of business activities. It is important to keep in mind that every type of business expansion – organisational (e.g. establishing a branch abroad) or contractual (e.g. distributorship or franchise contract) has its own advantages as well as disadvantages - financial, time, administrative and legal. In practice the most common form of business with international partner is to conclude international contract of sale (or purchase contract with international element). The situation got eased up by UN Convention on the International Sale of Goods which was adopted by the large part of international community. Thanks to that the Convention is applicable to most businesses from not only developed world but all countries. In contract of sale is in practice very often included also INCOTERMS rules that fill the gap in applications between international contract of sale and contract of carriage

Important thing to remember is also the fact that international business transactions bear higher risks than the national transactions due to the long distance. The risks may be reduced to some extent by using well-chosen securing payment instrument. However the risk of failure cannot be completely ruled out. In case of dispute on obligation under the contract between parties it is not possible to negotiate an agreement. It´s necessary to address the authority that solves to settle the dispute. In practice of international trade it is very common to prefer arbitration over judicial proceedings.

THE LIST OF LITERATURE

BIBLIOGRAPHY

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[2] KUČERA, Zdeněk, Monika PAUKNEROVÁ a Květoslav RŮŽIČKA. *Právo mezinárodního obchodu*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2008, 407 s. Právnické učebnice (Aleš Čeněk). ISBN 978-807-3801-083.

[3] MACHKOVÁ, Hana. *Mezinárodní obchodní operace.* 4., aktualiz. vyd. Praha: Grada, 2007, 242 s. ISBN 978-80-247-1590-2.

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[5] ROZEHNALOVÁ, Naděžda. *Mezinárodní obchodní transakce: multimediální učební text.* Vyd. 1. Brno: Masarykova univerzita, 2004, 103 s. Multimediální učební text, č. 5. ISBN 80-210-3575-7.

[6] ŠVARC, Zbyněk. *Vybrané otázky práva mezinárodního obchodu.* Vyd. 1. Praha: Vysoká škola ekonomická, 1996, 252 s. ISBN 80-707-9882-3.

LIST OF LEGAL ACTS

[7] Council Regulation EC No 2157/2001 of 8 October 2001 on the Statute for a European Company

[8] Council Regulation EC No 1435/2003 on the Statute for a European Cooperative Society

[9] Regulation of the European Parliament and Council Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I)

[10] Regulation of the European Parliament and Council Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

[11] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)

[12] Communication from the Ministry of Foreign Affairs No. 160/1991 Coll . , The UN Convention on Contracts for the International Sale of Goods , concluded at Vienna on 11 April 1980

[13] Ministry of Foreign Affairs Decree No. 74/1959 Coll . , On the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)

[14] Ministry of Foreign Affairs Decree No. 123/1988 Coll . , The Convention on the Limitation Period in the International Sale of Goods

[15] Act No. 513/1991 Coll . , The Commercial Code , as amended

[16] Law No. 97/1963 Coll . , On International Private and Procedural Law as amended

[17] Act No. 216/1994 Coll . , On arbitration and enforcement of arbitral awards as amended

[18] Act No. 228/2005 Coll . , On the control of trade in products whose possession in the Czech Republic for safety reasons, as amended

[19] Law No. 38/1994 Coll . , On foreign trade in military material amended

[20] Law No. 71/1994 Coll . , Sale and export of cultural values as amended

[21] Law No. 69/2006 Coll . , On the implementation of international sanctions as amended

[22] Act No. 627/2004 Coll. European companies as amended

[23] Act No. 307/2006 Coll . , The European Cooperative Society as amended

LIST OF IMAGES, SCHEMES, DEFINITIONS AND EXAMPLES WITH SOLUTIONS

SCHEMES:

IMAGES:

EXAMPLES WITH SOLUTIONS:

DENITIONS:

ENCLOSURE NO. 1 - SAMPLE INTERNATIONAL CONTRACT

(AGREEMENT ON TRANSFER OF BEARER SHARES) [15]

SOFTCOMP, a. s.
ID: 126 54 896
having its principal office at: Bezručova 12, Prague 8, Zip Code: 186 00
registered in the Commercial Register, Section B, Entry No. 2364, maintained by the Municipal Court, Prague
acting by: František Hála, Chairman of the Board of Directors
(hereinafter referred to as the "**Seller**" on one part)

and

JEKO, a. s.
ID: 542 36 798
having its principal office at: Kolářova 12, Prague 6, Zip Code: 163 00
registered in the Commercial Register, Section B, Entry No. 6541, maintained by the Municipal Court, Prague
acting by: David Ondráček, Chairman of the Board of Directors
(hereinafter referred to as the "**Purchaser**" on the other part)

(Seller and Purchaser referred to also as the "**Contracting Parties**" or separately each the "**Contracting Party**")

have entered on the day, month and year as bellow pursuant to the provision of Sec. 409 and seq., Act No. 513/1991 Coll., Commercial Code, as amended (hereinafter referred to as the "**Commercial Code**") and the provision of Sec. 13, Act No. 591/1992 Coll., on securities, as amended (hereinafter referred to as the "**Securities Act**"), into the following

Agreement on Transfer of Bearer Shares

I.
Subject of Agreement

The subject of this Agreement is particularly the obligation of the Seller to sell the Shares to the Purchaser upon the terms and and subject to the conditions set forth in the

[15] ONDRÁČEK, D. 2008. Vzor mezinárodní kupní smlouvy. *Vzory.cz* [online]. [cit. 2013-02-08]. Dostupné z: http://www.vzory.cz/vzory/podnikani-a-zivnosti/vzor-mezinarodni-kupni-smlouvy/

Article II., paragraph 1. hereinafter and the obligation of the Purchaser to pay the Seller the purchase price described in the Article IV. herein. The obligation to purchase the Shares is completed after the Shares are delivered to Purchaser.

II.

Shares

1. The subject of the purchase are the Shares as below, particularly the Shares issued by joint-stock company **HARDWARE a. s.**, ID: 987 45 234, having its principal office at Myslíkova 76, Prague 2, Zip Code: 120 00, registered in the Commercial Register, Section B, Entry No. 9806, maintained by the Municipal Court, Prague (hereinafter referred to as the "**Issuer**"):

Class:	ordinary shares
Form:	bearer stock
Appearance:	stock certificate
Nominal Value:	1 000 CZK per share
Quantity:	1 000 units
Number identification:	1 - 1000

(hereinafter referred to as the "**Shares** ").

2. The Seller hereby declares that at the time of the transfer of Shares :
   (a) the Shares represent 50 % of the share capital of the Issuer,
   (b) is the exclusive owner and holder of Shares; nominal value of Shares and the share capital of the Issuer are on the date of the signature of this Agreement fully paid up,
   (c) the Shares are free and clear of any claim of third Parties right (e.g. lien, option, pre-emption etc.), right or power of the owner to dispose of the Shares has not been suspended and Shares were not subject to any individual transfer and performance of shareholder right to transfer Shares had not been restricted,
   (d) neither the closing this Agreement nor the purchase of Shares requires any consent of the Board of Directors or other relevant body of the Issuer or the Governmental Administration Body and there are no other conditions that would restrict the transfer of Shares.

III.

Transfer of Shares

Upon the signature of this Agreement the Seller have transferred Shares to the Purchaser. The Purchaser confirms by his signature affixed to this Agreement that upon the execution of this

Agreement he has received from the Seller the Shares set forth in the the Article II., paragraph 1. herein.

IV.

Purchase Price and Payment Conditions

1. The Purchaser shall pay the Seller for the Shares set forth in the Article II. paragraph 1. of this Agreement in consideration of the Purchase Price of 1 500 CZK per Share, i.e. the total Purchase Price for all Shares shall be 1 500 000 CZK.
2. The Purchaser undertakes to pay to the Seller Purchase Price set forth in paragraph 1. of this Article within ten days after the day of the conclusion of this Agreement, by wire transfer to the Seller's bank account, which Seller shall notify in writing to the Purchaser.

V.

Representations and Warranties of the Contracting Parties

1. The Seller hereby represents and warrants to the Purchaser that:
   (a) the particulars set in the Balance sheet duly and truly show the financial standing of the Issuer; the profit and loss statements, that are the part of the Balance sheet, are complete and correct and duly represent accouting procedures of the Issuer;
   (b) there are no obligations without being recorded in the bookkeeping of the Issuer and the Seller is not aware of any details that would give a rise to such obligations.
2. The Seller to the best of his knowledge further hereby represents and warrants the Purchaser the following:
   (a) the Issuer is a Company duly organized, validly existing under the laws applicable in the Czech Republic. Upon the conclusion of this Agreement and purchase of Shares or upon any other action made under herein, the Seller (i) shall neither breach nor elude any legal regulation, (ii) shall not breach any other rule, decision or order of any Body or Person which are binding for the Seller or the Issuer;
   (b) on the date of signature of this Agreement no decision or change was made by the Issuer that could affect the particulars entered in the Commercial Register and such particulars would have not been entered to the Commercial Register;
   (c) the Issuer is not subject to bankruptcy proceedings;
   (d) the Issuer duly performshis duties set out by legal regulations, judicial decisions, arbitration awards and by other binding legal matters;

(e) the Issuer has duly legal title to his property and assets registred in the accounting statetments and all the rights necessary to dispose of his property; the property is free of any legal defects and burden including rights of third Parties and has no knowledge of any circumstances that would cause such a burden;

(f) the Issuer has available all the licenses, statements, permits, consents and other decisions necessary to conduct his business within the scope contemplated by the founding documents of the Issuer and entered in the Commercial Register; all the aforesaid permists, statements, consents and decisions are valid and in force, are not breached and there are no circumstances that whould reasonably cause their breach, cancellation, forfeiture or restriction;

(g) the Issuer, pursuant to the legal regulations, is duly registered with relevant financial and similar authorities, institutions and persons authorized to collect and administer taxes and other legal levies and charges, and he duly executed all administrative actions towards these authorities; there is no pending tax or similar financial duty of the Issuer or circumstance that whould cause any additionalfinancial responsibility to the Issuer.

VI.

Penalty and Damages

1. If any of the Seller‘s representations contained herein shall prove to have been incorrect or untrue, the Seller shall, at his own exepense, and not later than within thirty days following receipt from Purchaser of written notice, cure all consequences arising out and caused by the Seller’s incorrect or untrue representations contained herein.
2. Should the Seller fail to fulfil the obligation set forth in paragraph 1. of this Article, the Purchaser shall pay the Purchaser, upon the Seller’s request, the penalty equal to 5 000 CZK for each breach of such an obligation.
3. The penalty shall be due within 14 days following the liable party received a written notice to settle such a penalty.
4. Each of the Contracting Parties shall be responsible for damages caused by breach of their duties set forth herein. Should any of the Party become aware of circumstances threatening their contractual commitments, the first Party shall promptly notify of this the other Party. Penalty under this Agreement shall be without prejudice to the right to claim damages exceeding such a penalty.

VII.

Final Provisions

1. This Agreement shall come into validity and effect on the day of its conclusion.
2. The Contracting Parties declares that the conclusion of this Agreement and fulfillment of the duties under this Agreement have been properly approved by the relevant company bodies of the Contracting Parties in accordance with legal regulations, articles and other internal regulations of the Contracting Parties; another approval or consent shall not be necessary.
3. The Contracting Parties undertake to respect legitimate interests of the other Party, to act in accordance with the purpose of this Agreement and not counteract this purpose and they shall make all legal and other actions necessary to reach the purpose of this Agreement.
4. All papers shall be delivered on the Contracting Parties' address mentioned in the heading of this Agreement until one of the Contracting Parties shall not announce in written to the other Contracting Party the change of the address. Regardless of the other possibilities of the proof of delivery allowed by the legal regulations, any papers, their delivery is demanded, presumed or allowed hereunder, shall be deem to be delivered, if they had been delivered to the other Contracting Party on the address mentioned in the heading of this Agreement or on the other address announced in written by the Contracting Party to the other Contracting Party.
5. All changes and amendments of this Agreement must be executed upon agreement of the Contracting Parties in written form.
6. In the event that any of the provisions of this Agreement become obsolete, ineffective or invalid, the consequence of this fact shall not be invalidity or ineffectiveness neither of this Agreement as a whole, nor of the other provisions of this Agreement if such invalid or ineffective provision is separable from the rest of the Agreement. The Contracting Parties shall be obliged to replace such a provision by a new valid and effective provision with the same or similar content corresponding duly with the principle and meaning of the previous provision.
7. This Agreement and the relations ensuing from it are governed by and construed in accordance with the laws of the Czech Republic.
8. This Contract has been drawn up in two copies, each Contracting Party shall receive one copy.

Done in Prague on 1 December 2008

.....

SOFTCOMP, a. s.

František Hála

Chairman of the Board of Directors

Done in Prague on 1 December 2008

.....

JEKO, a. s.

David Ondráček

Chairman of the Board of Directors