CISG-online 2749	
Jurisdiction	Czech Republic
Tribunal	Nejvyšší soud České republiky (Supreme Court of the Czech Republic)
Date of the decision	17 December 2013
Case no./docket no.	23 Cdo 1308/2011
Case name	*Ideal Bike Corp. v. IMPEXO spol. s r.o.*

Translation:

Sitting in a Panel composed of the Presiding Judge, Pavel Horák, and Justices Zdeněk Des and Kateřina Hornochová, The Supreme Court of the Czech Republic has decided, in the case of claimant **IDEAL BIKE CORPORATION, 497, Sec. 1, Kang Fu Rd., Wu-Chi Town, Taichung, Taiwan, R.O.C.,** represented by Martin Kubánek, a solicitor with his registered office at Praha 1, nám. Republiky 1079/1a, against defendant **IMPEXO spol. s r.o.**, with its registered office at Praha 9, Prosecká 687, postcode 192 00, Company No. 416 94 660, represented by Jiří Bednář, a solicitor with his registered office at Praha 2, Mikovcova 7, for the payment of USD 86,808.58 with incidentals, a case heard by the Prague Municipal Court under File No 8 Cm 168/2007, on the claimant's appeal on a point of law against the Prague High Court's judgment of 19 November 2010, File No 8 Cmo 304/2010-127, as follows:

The Prague High Court's judgment of 19 November 2010, File No 8 Cmo 304/2010-127, **is quashed** and the case is **remanded** to the said court for further proceedings.

Reasoning:

[Facts of the case; procedural history:]

In its action, the claimant seeks from the defendant the payment of the price for the delivery of goods, bicycles, that was billed by the claimant in invoice D20-06030014 dated 7 March 2006 at an amount of USD 86,808.58. The goods, which were intended for the defendant, were loaded on a vessel operated by MOL for transport in Taiwan and, according to the claimant, the risk of damage to the goods being delivered passed under the contract at the moment when the goods were handed over to the first carrier.

In its second judgment of 9 June 2010, File No 8 Cm 168/2007-99, the Prague Municipal Court imposed on the defendant the obligation to pay the claimant an amount of USD 86,808.58 with default interest amounting to 1.8% as from 8 July 2006 to the date of payment (ruling under point I) and decided on the award of the legal costs (ruling under point II). In its order of 18 September 2009, File No 8 Cmo 267/2009-70, the Prague High Court quashed the Prague Municipal Court's first judgment in the case, dated 24 June 2009, File No 8 Cm 168/2007-58, and remanded the case to the first instance court for further proceedings, noting that it was

necessary to continue to address the issue of whether or not the parties had concluded a contract of sale in writing under the Vienna Convention and whether or not the claimant had a right to the payment of the price for the goods that the defendant had not taken over.

[Decision by the Court of First Instance:]

As regards the disputed issue of whether or not the parties had concluded a contract, the first instance court relied on the finding that Ms M.A. from Twin-Sport GmbH, having its registered office at Bergstrasse 16, Mutlangen, Germany, dealt with the defendant on the basis of a contract between the claimant and Twin-Sport, concluded on 1 October 2005, for the fees for the services provided by Twin-Sport on the basis of authorisation arising from sales invoices issued to the Fuji/SE Bikes international distributors, which are listed in Annex 1 to the concluded contract. The defendant attached to its e-mail message of 23 August 2005, addressed to Ms M.A., purchase orders IE 03 and IE 02 containing the specified bicycles. In an attachment to the e-mail of 29 September 2005, sent by M.A. to P.S. (acting on behalf of the defendant), there was a proforma invoice related to purchase order IE 03, which stated a price of USD 132,421. The proforma invoice contains the specification «BICYCLES – F.O.B. TAIWAN». M.A. attached to an e-mail of 14 October 2005 an amended proforma invoice related to purchase order IE 02 with a request for verification. The proforma invoice issued by the claimant on 14 October 2005 contains a specification of dispatch – January, destination **Hamburg**, «BICYCLES – F.O.B. TAIWAN».

To M.A.'s request of 14 October 2005 for the verification of the attached proforma invoice, P.S. responded on the same day by writing «OK».

On the basis of the evidence taken, the first instance court concluded, at first, that an employee of Twin-Sport GmbH had acted on behalf of the claimant on the basis of due representation under the contract of 1 October 2005. The court also deduced that the parties had validly concluded a contract for delivery of goods, which was handed over to the carrier on 9 March 2006 and in relation to which the claimant issued invoice D20-06030014 for an amount of USD 86,808.58, including a provision concerning the FOB term, on 7 March 2006. By accepting the claimant's offer, the defendant, as the buyer, agreed that it should arrange and pay for the carriage fee (the defendant agreed to that in its e-mail message of 14 October 2005). The claimant responded to the defendant's purchase orders in accordance with the terms and conditions by issuing a «proforma invoice», in which it specified the goods in which the defendant had shown interest in its purchase order, including the amount and price of the goods. Then, upon the request for the verification of the «proforma invoice», the defendant approved those in its e-mail. With regard to the derogation declared by the People's Republic of China in accordance with Article 12 of the United Nations Convention on Contracts for the International Sale of Goods, published as no. 160/1991 in the Official Gazette («the Vienna Convention»), written form was obligatory for the conclusion of the contract under the Vienna Convention. The first instance court interpreted the dealings that had taken place between the defendant and the claimant's representative via e-mails as written form within the meaning of Article 13 of the Vienna Convention.

The first instance court therefore concluded that under Article 31 of the Vienna Convention, the claimant had delivered the goods to the defendant by handing the goods over to the first carrier for transmission to the defendant, as the buyer. If the claimant has performed its obligation under the concluded contract of sale, the defendant is obliged to pay the price for the goods. The first instance court therefore granted the demanded price to the claimant, including default interest under Article 78 of the Vienna Convention at the agreed rate specified in the proforma invoice.

[Decision by the Court of Appeal:]

Upon the defendant's appeal, the Prague High Court, in its judgment of 19 November 2010, File No 8 Cmo 304/2010-127, changed the first instance court's judgment by rejecting the action for the payment of USD 86,808.58 with default interest at 1.8% as from 8 July 2006 to the date of payment (ruling under point I), and decided on the award of the legal costs (rulings under points II and III).

As regards the first instance court's conclusions on the meeting of the requirement for written form of the parties' acts carried out via e-mail correspondence, the appellate court noted that Article 13 of the Vienna Convention has never been amended. According to the appellate court, the text of the convention is completely clear (for the purposes of this Convention «writing» includes telegram and telex), and it is not possible to interpret the Vienna Convention even *per analogiam* as covering e-mail communication too because a recipient can alter any e-mail message delivered to him in any way, unlike a delivered telegram or telex.

After that conclusion, the appellate court also noted that when considering the eventuality of the establishment of a contract without the need for written form, it reckoned that when parties having their registered office in a State that declared its derogation under Articles 12 and 96 of the Vienna Convention conclude a contract, Article 11 does not apply and the form of the contract is subject to the principles of private international law, and thereupon to the body of law determined on the basis of private international law. According to the conflict of law rule in Section 10(2)(a) of Act No 97/1963 on Private and Procedural International Law (hereinafter the «PILA»), it is necessary to apply Chinese law to the form of contracts; the current position of Chinese law has not been found. The appellate court therefore examined whether the parties had made to each other such non-formal acts, which would result in a non-formal contract, and concluded that even if the e-mails could be considered to constitute written form, with regard to the content of the communications a contract of sale had not been concluded.

The appellate court therefore concluded that the parties had not entered into a contract of sale. Thus, the claimant did not have a right to the payment of the price for the goods that the defendant had not taken over, nor the default interest related to the payment of the invoiced price for the goods.

[Appeal to the Supreme Court – Position of the Claimant (Seller):]

The claimant filed an appeal on a point of law against the appellate court's decision. The claimant bases the admissibility of the appeal on a point of law on Section 237(1)(a) CPR [Civil Procedure Rules]. The appellant on a point of law also claims that the appellate court has assessed the case contrary to substantive law, in particular as regards the following issues:

- finding the content of Chinese law as regards the requirement for the form of contracts of sale;

- whether on the basis of the claimant's and defendant's declarations of will, as described, a contract of sale under the Vienna Convention was concluded;

- whether the representative was authorised to act on behalf of the claimant.

The claimant invoked grounds for an appeal on a point of law under Section 241a(2)(a) and (b) and (3) CPR.

In the first place, the claimant disagrees with the way in which the appellate court handled the derogation by the People's Republic of China under Articles 11 and 96 of the Vienna Convention. Referring to the derogations, the appellate court concluded that the form of the contract had to be assessed under Chinese substantive law rather than under Article 13 of the Vienna Convention. However, the appellate court did not even consider the content of Chinese law despite the claimant's claim that the People's Republic of China at first did, upon its accession to the Vienna Convention in 1993, declare its derogation from Article 11, but in the meantime the Chinese regulations governing the conclusion of contracts have been amended and at present it is generally possible to conclude contracts in any form, while the exchange of electronic data and electronic mail is also considered to be written form if they allow the content to be expressed in a tangible form.

Although the appellate court referred to Chinese law, its further assessment was based on Czech law. The appellate court also ignored Section 53 PILA that requires judicial authorities to adopt all the necessary measures to find foreign law; when its content is not known to them, they can request the content from the Ministry of Justice. At the same time, had the appellate court found the rules of the governing law, it would have had to conclude that Chinese law no longer requires written form and oral form is sufficient for a contract to be concluded.

According to the claimant, the appellate court did not and did not even try to find the content of the governing law, thereby causing a defect in the proceedings and arriving at an incorrect assessment of the case as to the law.

The appellant on a point of law also disagrees with the appellate court's conclusion that attachments to the e-mails did not contain relevant declarations of will leading to the conclusion of a contract of sale. In the company's opinion, the e-mails and their attachments have to be assessed in connection with each other. This was not a first business contact between the claimant and the defendant; they shared a long business relationship. The defendant regularly

attended distributors' international meetings. At the meeting of distributors «2006 Fuji and SE Bikes' International Distributor Sales Meeting», held in Dongguan in the People's Republic of China on 19 to 22 June 2005. At that meeting, the claimant and Twin Sport, as the claimant's representative, presented the delivery and payment terms and price list for 2006. This fact is relevant for examining the practice established between the claimant and the defendant when assessing whether or not the declarations of will were capable of concluding a contract of sale between them.

Had the court assessed the purchase orders in the context of the e-mails and also other facts outlined above, which represent an established practice between the claimant and the defendant, in the opinion of the appellant on a point of law the court would have concluded that the proposal had been addressed to the claimant. This requirement follows from the rules of interpretation in Article 8 of the Vienna Convention, for according to its paragraph (3) in determining the intent of a party, 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.

The appellant on a point of law disagrees with the appellate court's opinion that as a rule, a proforma invoice cannot be considered to be a declaration of will to create a contract. The appellate court's conclusion is contrary to the Constitutional Court's judgment File No I. ÚS 49/08 and to Article 18 of the Vienna Convention.

Given that, in particular, the parties carried out the first delivery, which the defendant duly paid on time, the circumstances of the case suggest that contracts of sale between the claimant and the defendant on the basis of purchase orders IE 02 and IE 03 were indeed concluded and were also partially performed.

The appellate court's conclusion that proforma invoices would anyway have to be interpreted as the claimant's counteroffer within the meaning of paragraph (1) of Article 19 of the Vienna Convention is incorrect and is not supported by evidence taken. The FOB term is included in the purchase orders themselves. Therefore it is not an additional term relating to the place of delivery within the meaning of paragraph (3) of Article 19 of the Vienna Convention, which would be considered to alter the terms of the offer materially and in conjunction with paragraph (1) of Article 19 of the Vienna Convention could lead to a rejection of the offer.

Default interest is also not considered to alter the terms of the offer materially within the meaning of paragraph (3) of Article 19 of the Vienna Convention, because it is not a payment but a consequence of the late payment of the price.

The appellant on a point of law also claims that even if proforma invoices were considered to be a rejection of the original offer and constituted a counteroffer, that counteroffer was accepted by the defendant. At least as regards purchase order IE 02, the acceptance was done by the e-mail sent by the defendant on 14 October 2005, in which the defendant affirmatively responded to the amended proforma invoice as regards purchase order IE 02 in accordance with its requirement for the colour of a part of the goods. As regards purchase order IE 03, the proforma invoice was sent by e-mail on 29 September 2005. The defendant did not reply to that message. Nevertheless, referring to the established practice between the parties the

claimant claims that silence can be considered to be an acceptance of an offer in accordance with paragraph (1) of Article 18 of the Vienna Convention. The manner of dealings between the parties can establish an obligation of one party to raise its objections on time to an offer of the other party. If the party does not raise any objections, it accepts the offer. Since the subject matter of the first delivery that the defendant took over and for which it paid the agreed price was goods under both purchase orders, IE 02 and IE 03, the contract of sale regarding purchase order IE03 was concluded between the claimant and the defendant at the latest at the moment when the defendant took over the goods that formed the first delivery. In the claimant's opinion, this conclusion is in accordance with paragraph (1) of Article 18 of the Vienna Convention, when the taking over of goods can constitute other conduct indicating assent to an offer.

Finally, the appellant on a point of law disagrees with the appellate court's conclusion that it was not the claimant who made the acts towards the defendant. The appellate court ignored the representation in the relationship between the claimant and its representative and then between the representative and Ms A. on the basis of her employment with the representative. The appellate court did not deal with the evidence taken by the first instance court, in particular the contract for service payments for FUJI & SE bicycles (contract of representation), concluded by the claimant and the representative on 1 October 2005. On the basis of the contract of representation the claimant collected, through the representative, the differences between the production prices of the goods and the FUJI/SE prices based on invoices issued to international distributors of FUJI/SE bicycles. Proforma invoices contained the claimant's letterhead and were issued to the defendant. This is also true for other documents relating to the first and second delivery of the goods to the defendant. If the appellate court deduced that the claimant was not represented, or that the acts of Twin-Sport GmbH did not constitute acts of the claimant's representative, then this assessment of the case as to the law is incorrect.

The claimant therefore moved for The Supreme Court to quash the Prague High Court's judgment and to remand the case to the Prague High Court for further proceedings.

[Appeal to the Supreme Court – Position of the Defendant (Buyer):]

In its statement on the appeal on a point of law the defendant claims that it has never discussed the FOB term with the claimant. There was an explicit agreement between the claimant and the defendant that the claimant's sales representatives contacted the defendant only when the goods arrived in Hamburg and the title and risk of damage to the goods passed only upon the takeover of the goods in Prague. It was never agreed that the defendant should bear any risk upon the loading of the goods on a vessel and the defendant did not even know the company that allegedly transported the goods. The claimant has also failed to prove that the goods were actually lost or burned, and in this respect the claimant's testimony was ambiguous. In this case, a written contract was not concluded; the matter was dealt with by a number of phone calls. The defendant never considered a proforma invoice to constitute an offer to conclude a contract; on the contrary, an invoice was issued on the basis of the actual quantity of the goods only after the takeover of the goods and the passage of the title.

The defendant also claims that the FOB term was never agreed and the established practice between the parties was that the risk of loss and damage to the goods passed upon the passing of the title, so the defendant has nothing to perform for the benefit of the claimant.

[Decision by the Supreme Court:]

[Procedural matters:]

At the beginning, The Supreme Court of the Czech Republic («The Supreme Court») would note that the relevant wording of the Civil Procedure Rules on proceedings on appeals on points of law (until 31 December 2012, with the exception specified in the Act) is contained in Part One, Article II, Point 7 of Act No 404/2012 amending Act No 99/1963, the Civil Procedure Rules, as amended, and other laws.

The Supreme Court, as the court dealing with appeals on points of law (Section 10a CPR) found at first that the appeal on a point of law was filed by an eligible person on time, that it contained the required essentials, that the appellant on a point of law was represented by a solicitor within the meaning of Section 241(1) CPR and that the solicitor had also prepared the appeal on a point of law (Section 241(4) CPR).

Having found the appeal on a point of law to be admissible within the meaning of Section 237(1)(a) CPR, because in its decision the appellate court had modified the first instance court's decision, the appellate court assessed whether the appeal on a point of law was founded and concluded that it was well-founded.

[Interpretation of Art. 13 CISG:]

On the one hand, the appellate court noted that the first instance court's opinion on the conclusion of a contract of sale in the form under Article 13 of the Vienna Convention was incorrect, while on the other hand, with regard to the derogation by the People's Republic of China from the Vienna Convention, in the appellate court's opinion Chinese law should apply to the present case, but that court failed to find that law.

As regards the interpretation of Article 13 of the Vienna Convention made by the appellate court it must be noted, in the first place, that regard must be had to the time when the Vienna Convention was being created, when electronic communications could not be included among the methods of written communication. Therefore the appellate court's argument that Article 13 lists conditions of written form that are completely clear cannot stand its ground. The Vienna Convention regarded as written form also the communication facilities that were modern at that time (telegram and telex) in addition to the traditional documentary form.

In the authentic version of the Vienna Convention (Article 101) the wording of Article 13 of the Vienna Convention is as follows «For the purposes of this Convention 'writing' includes telegram and telex», in Russian «*Для целей настоящей Конвенции под 'письменной формой' понимаются также сообщения по телеграфу и телетайпу*», and in French «*Aux fins de la présente Convention, le terme 'écrit' doit s'entendre également des communications adressées par télégramme ou par telex*». The content of those authentic versions

clearly shows that with regard to the formulation «'writing' includes», the usual documentary form is joined by those two other forms; this can lead to the conclusion that Article 13 of the Vienna Convention does not contain a final (exhaustive) list of forms that can be considered to be written forms. As regards the above two forms, the recorded information is transmitted over a distance and eventually, the addressee of the legal act has also a text at his disposal. Both of the communication technologies that are common at present, fax and e-mail, also have those features. Older literature from the 1990s, i.e. the period of time when electronic communications only started to be used more widely, deduced that Article 13 of the Vienna Convention included also that communication technology as well (*cf*., for example, Piltz, B. in Westphalen, F. Graf von (ed.): *Handbuch des Kaufvertragsrechts in den EG-Staaten einschl. Österreich, Schweiz und UN-Kaufrecht*. The first edition. Köln: Verlag Dr. Otto Schmidt, 1992, p. 21, margin number 40, and other literature referred to therein).

It would therefore also be possible to subsume under Article 13 of the Vienna Convention, electronic communication that carries out the same functions as paper communication, i.e. the ability to store information and to be intelligible for the addressee. The parties may agree on what type of written form they intend to use (Article 6). They may, for instance, agree that they only accept paper letters sent by a particular courier service. Unless the parties have limited the notion of writing, there should be a presumption that electronic communications are included in the term «writing». This presumption could be strengthened or weakened in accordance to the parties' prior conduct or common usages (Article 9). In theory this is supported by CISG-AC Opinion no 1, Electronic Communications under CISG, 2003. Professor Christina Ramberg (available at http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html#art13).

With regard to the above arguments it is therefore possible to conclude that unless established practice between the parties or usages suggest otherwise, e-mail can also be considered to be written form under Article 13 of the Vienna Convention for the purposes of the Convention.

[Applicability of the CISG; Effect of Art. 95 reservations made by China and by the Czech Republic:]

When expressing its agreement with the Vienna Convention, the Government of the People's Republic of China declared that it did not feel bound by paragraph (1)(b) of Article 1 and by Article 11, nor by the provisions of the Vienna Convention which concerned Article 11. Upon the ratification of the Vienna Convention, the Government of the Czech and Slovak Federal Republic declared that it did not feel bound by paragraph (1)(b) of Article 1. Under paragraph (1) of Article 1, the Vienna Convention regulates contracts of sale of goods between parties whose places of business are in different States, (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. In a situation where at the relevant period of time, i.e. when the contract of sale was reportedly concluded by the parties, the Czech Republic and China had declared derogation from paragraph (1)(b) of Article 1, the Vienna Convention has to be used in accordance with paragraph (1)(a) of Article 1. *Cf*., identically, Kapitán, Z. *Podmínky aplikovatelnosti*

Úmluvy OSN o smlouvách o mezinárodní koupi zboží [*Conditions of the Applicability of the UN Convention on Contracts for the International Sale of Goods*]. Právní fórum 7/2008, p. 275.

[Effect of Art. 96 reservation made by China:]

In a situation where the People's Republic of China has declared its derogation under Article 96 in conjunction with Article 12, declaring that it does not feel bound by Article 11 nor by the provisions of the Vienna Convention which concern Article 11, it is not possible to proceed from Article 11, according to which 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.

If a State in which one of the parties has its place of business declares derogation under Article 96, as the People's Republic of China did in the present case, it does not automatically necessitate contract conclusion in written form. It only means that that State is not bound by that provision (*cf*., identically, Rozehnalová, N. *Právo mezinárodního obchodu* [*International Trades Law*]. Prague, ASPI, a.s., 2006, p. 556).

In a situation where the People's Republic of China has declared its derogation as to Article 11 of the Vienna Convention, the form of agreement used by the parties cannot be assessed under that Article of the Vienna Convention; under the principles of private international law conflict of law rules in Act No 97/1967 on Private and Procedural International Law should be applied, and under Section 4 read in conjunction with Section 10 Chinese law should be applied as regards the assessment of form.

In the present case it is therefore relevant, as regards assessing the form of the conclusion of the contract of sale, whether Chinese law requires written form. On the same conclusions regarding the derogation by the People's Republic of China from Article 11 of the Vienna Convention *cf*., identically, Michael R. Will ed., *The CISG and China: Dialog Deutschland-Schweiz VII*, Faculté de droit, Université de Genève (1999), pp. 7 to 22 (available at: http://www.cisg.law.pace.edu/cisg/biblio/zeller.html).

Regardless of the above arguments it should be emphasised, however, that the form of a legal act is closely linked to the validity of the legal act. When addressing this issue it is necessary to deal with Article 4(b) of the Vienna Convention, according to which except as otherwise expressly provided in this Convention, it is not concerned with the validity of the contract or of any of its provisions or of any usage. However in Articles 11 to 13 the Vienna Convention does regulate the issue of the form of legal acts, and therefore there is no room for the exclusion under Article 4(b) of the Vienna Convention.

Therefore in case Chinese law requires written form for concluding the contract of sale in question, Article 13 of the Vienna Convention will have to be applied (derogation of the People's Republic of China only concerns Article 11 of the Vienna Convention).

[Court of Appeal's failure to determine content of Chinese law:]

However, the appellate court did not find the content of Chinese law, which is decisive for assessing the form required for the contract of sale in question.

Under Section 53(1) PILA, judicial authorities must adopt all necessary measures to find foreign law; where its content is not known to them, they can also request information from the Ministry of Justice (subsection 1). In the case of doubts when examining cases specified in Section 1 PILA, judicial authorities may request an opinion from the Ministry of Justice (subsection 2).

Section 53(1) and (2) of Act No 97/1963 must be interpreted so that in principle, a judicial authority has to find the content of foreign law in any available and reliable manner; it can gain knowledge of foreign law directly from sources available to it, provided they are sufficiently reliable in particular with regard to the possibility of amendments that can be made in the foreign legal system at any time. It can request assistance from the parties, in particular when they are foreign juristic persons with their own lawyers or if the parties are represented by solicitors who can obtain relevant sources, literature or statements and opinions from their foreign contacts, and it can also request a party to submit a certificate of foreign law issued by a competent authority of the foreign country, or it can commission an opinion from a competent expert witness (identically, the Constitutional Court's judgment of 3 April 2011, File No Pl. ÚS 2/11).

If a party claims that a legal issue that is being addressed in the proceedings should be assessed under foreign law as the governing law and the court is not familiar with the content of that law, the court may invite the party to claim facts that are relevant for the determination of the governing law under which the issue at stake should be assessed and to provide the court with the necessary assistance, including, potentially, the submission of a certificate of foreign law issued by a competent authority of the foreign country.

If the court does not find the content of the governing law as described above it shall take all other necessary measures to find it, for example, by ordering an expert opinion or by using procedure under Section 53 of Act No 97/1963 on Private and Procedural International Law.

Only when despite all reasonable effort the court does not find the content of foreign law that is to be used pursuant to the conflict of law rule, a replacement for unfound foreign law should be used. In such case the law does not provide support for applying another State's law, or the most similar law, or for applying general principles of law. Where Czech courts are competent to hear the case Czech law should be applied under the *lex fori* principle (identically as regards this principle, *cf*. Kučera, Z.: *Mezinárodní právo soukromé* [*Private International Law*], the seventh corrected and amended edition. Brno, Plzeň: Nakladatelství Doplněk, Vydavatelství a nakladatelství Aleš Čeněk, 2009, p. 189; in older literature in detail, for example, Másilko, M., Steiner, V. *Mezinárodní právo soukromé v praxi* [*Private International Law in Practice*], Prague, Orbis, 1976, p. 50; in relation to the impossibility to find, or failure to find the law within a reasonable time, the legislator chose the option of the application of Czech law also in new Section 23 of Act No 91/2012 on Private International Law).

The appellate court did not find the necessary measures to find the content of Chinese law that is decisive for assessing the form of the contract of sale in question. The appellate court's assessment as to the law is incomplete, and hence incorrect.

[Conclusions by the Supreme Court:]

With regard to the above, the court dealing with appeals on points of law could not but quash the appellate court's challenged judgment to the extent of both the merits and the related rulings on legal costs, and remand the case to the appellate court for further proceedings (Section 243b(2), the part of the sentence after the semicolon, and the first sentence of sub-section (2) of that Section).

If the court concludes that the parties did conclude a contract of sale, it shall examine whether the contract included provisions on carriage, which can be relevant for assessing the issue of the passing of the risk of damage to the goods and the right to the payment of the price under Articles 66 to 69 of the Vienna Convention.

In further proceedings, the appellate court (the court of first instance) is bound by the legal opinion of the court dealing with appeals on points of law (the first sentence of Section 243d(1) and Section 226(1) CPR).

The court shall decide on the costs of the proceedings on the appeal on a point of law in a new decision on the case (the second sentence of Section 243d(1) CPR).

No remedy is admissible against this decision.

Done in Brno, on 17 December 2013

Pavel Horák

Presiding Judge