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International Sales Law (CISG)

January 14, 2022

Duration: 120 minutes

- Please check at receipt of the exam the number of task sheets. The examination contains 3 (three) pages and 5 (five) questions.

- The questions are all weighted equally (20%).

International Sales Law (CISG)

Exam

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1. **Are following issues governed by the CISG? If your answer is yes, which is/are the relevant provision/s? (20%)**

   a) **Formation of arbitration clauses;**
   b) **Claim for the payment of the price in a consumer sales contract;**
   c) **Question of proof.**

2. **Please analyse the case below and answer the following questions. (20%)**

   a) **Did the parties conclude a sales contract subject to the CISG?**
   b) **Did the parties agree on the allocation of the transport costs?**
   c) **Assuming that the parties did not agree on the allocation of the transport costs, who has to carry them according to the CISG?**

A manufacturer of concrete slabs (i.e. tiles) with place of business in Belgium offered to sell 10 slabs for a price of € 350.– per slab to a buyer with a place of business in the UK. The parties agreed that Belgian law shall apply to the contract.

While the manufacturer's original offer via phone included the phrase "Transport costs € 9.– per km", the buyer's order via email contained the stipulation "free delivery to construction site". The manufacturer's confirmation of the order via email included the phrase "Transport costs € 9.– per km" again. After the delivery of the goods to the UK the buyer refused to pay for the transportation costs.

[cf. CISG-online 716]

Note: Belgium is a CISG contracting state, the UK is not.

3. **Please analyse the case below. Does the Swiss buyer have remedies against the Turkish seller? (20%)**

A Turkish company sold 10 boxes of frozen cheese to a food wholesaler in Switzerland, who – as the Turkish seller knows – primarily supplies a German supermarket chain with food items. After the boxes with the cheese arrived in Switzerland on 1 May 2021, they were immediately transported onwards to the main warehouse of the German supermarket chain, where they arrived on 5 May 2021 and were stored in the cold storage room without being opened. On 25 May 2021 the cheese was delivered to various supermarkets of the chain, where it was subsequently sold to customers. After some customers complained on 29 May 2021 about worms, they had found in some of the cheese, the manager of the supermarket chain informed the Swiss food wholesaler on 5 June 2021. On 10 June 2021, the Swiss

food wholesaler in turn called the Turkish seller and informed him in sufficient detail about the wormy cheese.

Note: Turkey, Switzerland, and Germany are contracting states.

4. Please analyse the case below. Does the buyer have a right to avoid the contract? How would you judge his claim for damages? (20%)

The buyer, a company seated in Germany, is a mass producer of plastic car parts. It requires specifically manufactured moulds into which liquid plastic is pressed to produce the car parts with correct dimensions. Since 2018, the buyer obtained such injection-moulding tools from a company seated in Hungary. The tools were manufactured according to its specifications. With respect to four supply contracts in 2020, the buyer complained about defects in the tools which the seller unsuccessfully tried to cure. Later, the buyer itself repaired all defective moulds and used them for its production. Nonetheless, the buyer declared these four contracts avoided.

The seller requested outstanding payments of approximately € 180,000.–. The buyer rejected the claim because it had terminated the contracts. In addition, it declared set-off with its own damages claims (in the amount of approximately € 550,000.–) for the repair of the defects.

[cf. CISG-online 2545]

Note: Germany and Hungary are CISG contracting states.

5. Please analyse the case below. What are the remedies of the seller? How would you judge his claim for damages? (20%)

In August 2020 MAP, an Australian corporation with its principal place of business in Australia, issued several purchase orders for products to be shipped in October 2020 by HK, a company with its place of business in New York. On 15 October 2020 the seller sent notice to the buyer that the products were at the harbour ready for shipment.

Pursuant to the agreement between the parties, the buyer MAP was required to open a letter of credit seven days prior to shipment. When the buyer failed to do so, the seller HK sent a notice on 1 November 2020, stating that the buyer had to provide the letter of credit within thirty days. On 8 December 2020, the seller sent a second notice requiring the buyer to open a letter of credit pursuant to the terms of the agreement. When the buyer still did not cure, the seller sent a notice of termination dated 15 December 2020. Later the seller sold (and, in January 2021) shipped the goods that were ready for shipment to another customer at a price lower than the price agreed with the buyer MAP. The seller also commenced legal action against the buyer for payment of damages. During the legal proceedings, it was established that the buyer had filed for bankruptcy in October 2020.

Note: Australia and the USA are CISG contracting states.

ANSWERS

I. General Remarks on Grading

A well-structured and founded answer, even if not fully correct, was evaluated in favour of the students. Answers without legal argumentation were not awarded full marks.

II. Model Answers

1. Are following issues governed by the CISG? If your answer is yes, which is/are the relevant provision/s? (20%)

a) Formation of arbitration clauses;

	Points (up to)
▪ Arbitration clauses are often part of an international sales contract and the question whether the formation of arbitration clauses is also governed by the CISG was often raised in courts.	0
▪ According to **Article 4 CISG**, the **CISG only governs the formation** of the contract of sale as well as the rights and obligations of the seller and the buyer arising from the sales contract.	2
▪ It is assumed that the formation of the contract, **including the arbitration clause**, falls within the scope of application of the CISG except for the formal validity of the arbitration agreement (cf. Article 4(a) CISG).	1
▪ This follows particularly from **Article 19(3) CISG**, according to which the "**settlement of disputes**" contained in a declaration of acceptance materially alters the offer and thus turns it into a counteroffer.	2
▪ Therefore, the formation of **arbitration clauses is governed by the CISG**. (cf. SCHLECHTRIEM/SCHWENZER, Commentary on the UN Convention on the International Sale of Goods (CISG), Art. 4 para. 11)	0
▪ Other argument: The scope of application of the CISG is limited to contracts of sale. Therefore, separate arbitration agreements are not governed by the CISG. The fact that the arbitration agreement is incorporated into the sales contract does not change its nature. (cf. KRÖLL, Selected Problems concerning the CISG's Scope of Application, p. 43 et seq.)	1 AP

b) Claim for the payment of the price in a consumer sales contract;

	Points (up to)
▪ According to **Article 1(1) CISG** the **Convention applies to contracts of sale of goods**.	1
▪ Generally, the nature of a contract of sales is not relevant for the applicability of the CISG (cf. Article 1(3) CISG). However, Article 2 CISG names **exceptions where the CISG is not applicable** despite the existence of a contract of sale.	1
▪ Following **Article 2(a) CISG** the Convention does not apply to sales of goods bought for personal, family, or household use, unless the seller, at the time of the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.	1
▪ Generally, the CISG therefore only applies to cases where the buyer has bought the goods for **business or professional purposes**. Thereby, the intended use is decisive, not the actual use.	1
▪ In most cases, typical **consumer sales are therefore excluded** from the CISG.	1
▪ A claim for the **payment of the price in a consumer sales contract** is, consequently, **not governed** by the CISG. (cf. SCHLECHTRIEM/SCHWENZER, Commentary on the UN Convention on the International Sale of Goods (CISG), Art. 2 para. 4 et seq.)	1

c) Question of proof.

	Points (up to)
▪ The question whether the CISG also governs the burden of proof has long been subject to dispute. Today, the prevailing view is that the **CISG is also applicable in regard to the distribution of burden of proof**.	1
▪ This rule can be deduced from the **wording of several provisions** in the CISG (e.g., Article 2(a) CISG, Article 35(2)(b) CISG, and Article 79 CISG), which all expressly state – at least with regard to certain questions – on whom the burden of proof lies. Article 79(1) CISG, for example, says that 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	1

account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. Thus, the issue of the burden of proof cannot be considered to be outside the scope of the CISG.	
▪ On top of that, in the view of a **uniform application of the CISG (Article 7(1) CISG)** the burden of proof must be governed by the convention. A contrary approach would endanger the uniform application of the CISG, as the domestic rules on the burden of proof significantly vary amongst the different legal systems.	1
▪ The **CISG does not establish a general rule** on the allocation of the burden of proof. In application of **Article 7(2) CISG**, the above mentioned provisions can be used to develop a general principle that every party must prove the facts on which its claim, right, or defence is based, and the party relying on an exception must prove this exception. However, the burden of proof may shift in exceptional cases, for instance where facts are so closely related to one party that it would be impossible for the counter-party to adduce the necessary evidence.	2
▪ In any case, the burden of proof concerns only matters that fall into the scope of application of the CISG.	1 AP
▪ In conclusion, the question of **proof is governed by the CISG**.	0
(cf. SCHLECHTRIEM/SCHWENZER, Commentary on the UN Convention on the International Sale of Goods (CISG), Art. 4 para. 25-26; KRÖLL STEFAN, Selected Problems concerning the CISG's Scope of Application, p. 47.)	

Total Points Question 1	**16 + 2 AP**

2. Please analyse the case below and answer the following questions. (20%)

a) Did the parties conclude a sales contract subject to the CISG?

	Points (up to)
▪ Whether a sales contract is subject to the CISG is decided according to **Article 1 CISG**. First of all, the **parties' places of businesses have to be in different states**. If both are in contracting states (CS), the contract is subject to the CISG.	1
▪ In our case, one party has its **place of business in Belgium, the other one in the UK**. Therefore, the parties have their place of business in **different states**.	1
▪ As Belgium is a CS and the UK is not, the CISG **cannot be applied by way of Article 1(1)(a) CISG**.	1
▪ According to **Article 1(1)(b) CISG** the Convention applies also to contracts of sale of goods between parties whose places of business are not in contracting states, if the rules of private international law still lead to the application of the law of a contracting state.	1
▪ However, according to **Article 6 CISG** the principle of freedom of contract governs the CISG. Therefore, the parties are free to **choose the applicable law**. If they do so the applicable law has to be defined according to their choice.	1
▪ In the present case, the parties have **chosen Belgian law without mentioning the CISG**. Such clauses are subject to discussion as they do **not expressly state whether they are excluding the CISG**.	1
▪ Some courts interpret the parties' intention as excluding the CISG and favouring the applicability of e.g. Belgian sales law.	1 AP
▪ But most of the courts agree that the choice of the law of a CS is presumably **not an implicit exclusion of the CISG** as the **CISG is part of each contracting state's national law**. The parties' choice rather identifies that the CISG is applicable but for any potential gap in the CISG the chosen national law is used for **gap-filling**. For the assumption of an implicit exclusion of the CISG, there would need to be further indications in the contract.	1 1 AP
▪ Therefore, the choice of "Belgian law" does **not lead to the exclusion of the CISG**. The parties **concluded a sales contract subject to the CISG**.	1

▪ One point was rewarded for the discussion of the material scope (**Article 3(1) CISG**) (cf. KRÖLL/MISTELIS/PERALES VISCASILLAS, UN Convention on Contracts for the International Sale of Goods, Art. 6 para. 18).	1

b) Did the parties agree on the allocation of the transport costs?

	Points (up to)
▪ According to Art. 23 CISG a contract is concluded when the acceptance of the offer becomes effective in accordance with Art. 18 et seq. CISG. The acceptance must i) be final and unqualified and ii) must **mirror the offer**. **<u>Stipulation "free delivery to construction site" by the buyer</u>**	1
▪ In the case at hand, the sellers original offer included the phrase "transport costs € 9.– per km". The buyer's acceptance via email, on the other hand, contained the stipulation "free delivery to construction site". The acceptance, therefore, **does not mirror the offer** of the seller.	1
▪ Pursuant to **Article 19(1) CISG** a reply to an offer which contains additions, limitations or other modifications is a rejection of the offer and **constitutes a counteroffer**.	1
▪ However, a reply to an offer which purports to be an acceptance but contains additional or different terms which **do not materially alter** the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect (Article 19(2) CISG).	1
▪ Price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are **considered as materially altering the contract (Article 19(3) CISG)**.	1
▪ The clause **"free delivery to construction site" contained a change of the seller's offer**, as the buyer did not want to pay the transportation costs. This must be considered as a **material alteration** in the sense of Article 19(3) CISG. Thus, the writing of the Buyer "free delivery to construction site" constitutes a **rejection of the offer and a counteroffer** according to Article 19(1) and (3) CISG.	1

Confirmation containing "Transport costs € 9.– per km" by the seller	
▪ The confirmation of the order by the seller did not contain the clause "free delivery to construction site", but again listed the cost of **transportation as € 9.– per km**. This constitutes a **counteroffer from the seller** to the counteroffer "free delivery to construction site" of the buyer.	1
▪ The **buyer did not respond** to the confirmation email of the seller. However, he did accept the delivery of the concrete slabs in the UK. It is in question, whether the buyer accepted the counteroffer by just accepting the delivery.	1
▪ Silence or inactivity does not in itself amount to acceptance (**Article 18(1) CISG**), unless there are **additional circumstances**, which would amount to an assent, for example the dispatch of the goods or the payment of the price (**cf. Article 18(3) CISG**). The intention is to be determined with regard to Article 8 CISG.	1
▪ The buyer **accepted the delivery of the goods** without objecting the counteroffer of the seller. This act must be seen as an **implicit acceptance** of the second counteroffer ("Transport costs € 9.– per km").	1
▪ Therefore, an **agreement on the transport costs** has been made by the clause **"transport costs € 9.– per km"** used by the seller. The clause "free delivery to construction site" did not become part of the contract.	1
▪ *[The assumption that the change in transport costs is an immaterial alteration within the meaning of Article 19(2) CISG is also accepted. In that case the contract would be formed according to the buyer's intention if the seller would not object to the counteroffer without undue delay. But the seller in his confirmation email expressly states once again that transport costs are going to be calculated as € 9.– per km. He objected timely. That means that the buyer had to react if he did not want the contract to be concluded, which he did not.]* (cf. KRÖLL/MISTELIS/PERALES VISCASILLAS, UN Convention on Contracts for the International Sale of Goods, Art. 6 para. 18).	

c) Assuming that the parties did not agree on the allocation of the transport costs, who has to carry them according to the CISG?

	Points (up to)
▪ The CISG does **not provide rules relating to the expenses of delivery**. However, following **Article 7(2) CISG**, **each party must – as a general**	1

rule – bear the costs of his/her own performance. Therefore, unless otherwise agreed, the seller must bear all transportation costs to the place of delivery.	
▪ First, the parties are free to – expressly or impliedly – **agree on a particular place of delivery (Article 31 CISG)**. In the absence of such agreement, Article 31(a) to (c) CISG provides fall back rules which have to be distinguished according to the particular case.	1
▪ If the sales contract involves carriage of the goods, the obligation of the seller to deliver consists in handing the goods over to the first carrier for transmission to the buyer (**Article 31(a) CISG**). A sales contract involves carriage of the goods where the seller is in charge to arrange the carriage to the buyer by an independent carrier (e.g., shipment contract). Here, the seller is only obliged to conclude the contracts necessary for the carriage of the goods (cf. Article 32(2) CISG). Article 31(a) CISG does not state an obligation of the seller to transport the goods in his own responsibility and at his own expenses like in such cases where the delivery obligation must be performed at the buyer's place of business. Therefore, it is the **buyer who must bear the costs of the carriage**.	2
▪ If the sales contract does not involve carriage in the sense of Article 31(a) CISG, the fall-back provisions of **Article 31(b) or (c) CISG** apply. In both cases, it is in the buyer's responsibility to organize and bear the costs of the transportation from the place of delivery to the buyer's place of business.	1
▪ In the present case the parties **neither agreed on a place of delivery nor on the allocation of the transportation costs**. There is no indication that the parties agreed for the concrete slabs to be delivered at the buyer's place of business. But the contract **certainly involves transportation**. Therefore, **Article 31(a) CISG is going to be decisive**: the place of performance is at the place of the **seller, he must organize for the transportation, but he is not responsible for the costs**. (cf. KRÖLL/MISTELIS/PERALES VISCASILLAS, UN Convention on Contracts for the International Sale of Goods, Art. 31 para. 13; HUBER/MULLIS, The CISG, A new textbook for students and practitioners, p. 109.)	3

Total Points Question 2	**28 + 2 AP**

3. Please analyse the case below. Does the Swiss buyer have remedies against the Turkish seller?

	Points (up to)
▪ The seller **must deliver goods which conform with the contract**. If he fails to do so, it will constitute a **breach of contract under Article 35 CISG,** and the buyer will be **entitled to remedies under Article 45 et seq. CISG**. But the buyer must first examine the goods and give a timely notice (Article 38 – 40 and 44 CISG).	2
▪ In the case at hand the seller sold 10 boxes of frozen cheese containing worms. The question is whether the Swiss buyer examined the goods and gave the seller notice of the non-conformity in time.	0
▪ According to **Article 38(1) CISG** the buyer has to **examine the goods** within as **short a period as practicable** in the circumstances. The starting point is usually the time of delivery.	1
▪ Exceptions, however, can be found in Article 38(2) and (3) CISG. 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 this possibility, the examination period will start when the goods have arrived at the new destination (Article 38(3) CISG).	(see below)
▪ In the present case, the Swiss buyer immediately redirected the boxes to the main warehouse of the German supermarket chain where they were stored and later delivered to various supermarkets of the chain.	(see below)
▪ **This is a case of Article 38 (3) CISG**. The three following criteria have to be cumulatively met in order for Article 38 (3) CISG to be applicable: i) redirection or redispatch; ii) awareness of the seller and iii) lack of reasonable opportunity for examination.	1
Redirection or redispatch	
▪ **Redispatch** is used to describe the case in which the buyer after having received the goods sends them off to a different location.	1
▪ In the case at hand the **Swiss buyer has sent the frozen cheese to a German warehouse**. This act constitutes redispatch under **Article 38 (3) CISG**.	2

Awareness of the seller	
▪ The second criteria for the examination to be deferred until arrival of the goods at their final destination is that the **seller knew or ought to have known of their possibility of redispatch or redirection**. The importance of this criteria lies in the circumstance, that the seller has an interest in knowing as soon as possible if he has fulfilled his contractual duties. Therefore, only if the buyer informed the seller of his intention of redispatch or redirection, or the buyer regularly redispatches or redirects his products the time-period for examination under Article 38 CISG can be calculated more leniently.	1
▪ In the case at hand, it is clearly stated that the **Turkish seller knew about the redispatch to the German warehouse**. As the Swiss buyer primarily supplies a German supermarket chain with food items the Turkish seller also ought to have known about the redispatch.	1
Lack of reasonable opportunity of examination	
▪ The **lack of reasonable opportunity of examination** is often problematic in cases of redispatch. One factor it depends upon is the time of storage. If the goods had been stored at the premises of the buyer, he might have had reasonable opportunity for examination and therefore ought to have inspected the goods for conformity before redispatch. If the goods are **immediately redispatched, the buyer is normally deprived of the chance** to examine them.	2
▪ As the cheese was **immediately redispatched upon arrival in Switzerland**, the buyer did not have a reasonable opportunity of examination. However, **with the arrival of the goods in the main German warehouse and their storage for over two weeks the buyer would have had the chance to examine the goods or let them be examined by the German sub-buyer**. As the buyer did not examine the goods at all and **only informed the seller of the defect on 10 June** (over a month after the goods had arrived at the main storage), the deferral does **no longer seems to be reasonable**. As this is only a factor, other factors have to be taken into consideration as well.	3
▪ In the case at hand, the **worms might not have been detected in a simple examination**, it was therefore **reasonable to defer a further inspection until final arrival on 5 May**. But from 5 May onwards it would have been reasonable to conduct an examination e.g., by defrosting some of the cheese and inspecting it. The Swiss buyer therefore has to carry the consequences of infringing his timely examination duty.	1

▪ However, non-timely examination by itself does not deprive the buyer of his remedies if the notice of non-conformity (**Article 39 CISG**) was still on time. This notice has to be given to the seller **specifying the nature of the lack of conformity** within a **reasonable time** after he has discovered or **ought to have discovered the non-conformity**.	3
▪ Under normal circumstances the buyer could have discovered the non-conformity at any time after 5 May. The **notification was done on 10 June**. That is more than 1 month after the date an examination could have been conducted. On the one hand the buyer should not be deprived of his remedies too easily. On the other hand, the seller's interest in knowing as quickly as possible if there is a non-conformity so that e.g., he can also take redress or take the necessary steps has to be compensated.	1
▪ **It may be argued in both ways**. But the more convincing answer seems to be to reject the remedies of the Swiss buyer as he has not notified the non-conformity in a timely manner. (cf. KRÖLL/MISTELIS/PERALES VISCASILLAS, UN Convention on Contracts for the International Sale of Goods, Art. 38 para. 121 et seq. and Art. 39 CISG)	1 (for argument)

Total Points Question 3	**20**

4. Please analyse the case below. Does the buyer have a right to avoid the contract? How would you judge his claim for damages?

	Points (up to)
Avoidance of the contract	
▪ The buyer may declare the contract avoided if one of the grounds set out in Article 49(1) CISG is satisfied. The option under **Article 49(1)(b) CISG**, the so-called **Nachfrist procedure** is only applicable in case of **non-delivery**. Given that in the case at hand, it is a non-conforming delivery, i.e., Article 49(1)(a) CISG is decisive.	2
▪ The buyer has a **right to avoid the contract under Article 49(1)(a) CISG** if following prerequisites are fulfilled:	1
▪ **There has to be a breach of contract (Article 45(1) CISG)**. Any type of breach can be the reason for avoiding the contract. In the case at hand, it is a non-conforming delivery. **The moulding tools were not in conformity with the contract**. Article 35(1) and possibly Article 35(2)(a) and (b) CISG are breached. However, in the CISG system termination of the contract is an **ultima ratio remedy**. That means, any non-conformity of the goods is not enough.	3
▪ In addition, **the breach has to be a fundamental one** (Article 49(1)(a) CISG): Avoidance under Article 49 (1)(a) CISG presupposes the existence of a fundamental breach. **Article 25 CISG** states that there is a fundamental breach whenever non-performance results in such detriment to the other party as to substantially 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 result.	2
▪ If the buyer's interest in performance has been eliminated, the breach is fundamental. However, if the buyer is able to use the object of sale on a permanent basis, albeit with restrictions, a fundamental breach of contract shall be denied.	(see below)
▪ In the case at hand, the buyer first **requested repair of the defective moulds according to Article 46(3) CISG**. The seller was not able to conduct this repair in a successful manner. Therefore, the buyer took it upon himself to conduct the repair and was successful. The **defect has therefore been eliminated permanently and the buyer is able to use the goods for their intended purpose**. The buyer's interest in performance is not violated.	2

▪ Given the above it seems to be the better view to **reject a fundamental breach** and therefore the right of the buyer to avoid the contract. The buyer **cannot avoid the contract under Article 49(1)(a) CISG**.	2
▪ Therefore, the last requirement which is the timely declaration of avoidance does not have to be examined in the question.	0
▪ *Additional points if stated that due to the non-termination of the contract the seller still has a right to claim the price of the goods*	1 AP
<u>Claim for damages</u>	
▪ Even though the buyer does not have the right to avoid the contract, he could nevertheless have a **right to damages under Article 74 CISG** because of the expenses due to repair and e.g., loss of production and profit.	1
▪ To be able to claim damages under Article 74 CISG the following prerequisites have to be existent: o Breach of contract (see answer above) o Recoverable loss o Foreseeability of the loss, o No violation of the mitigation duty (Art. 77 CISG) and o No exemption under Art. 79 or 80 CISG.	
▪ The breach has to be **proven by the party claiming damages**. Furthermore, this party has to prove that the loss occurred as a consequence of the breach or failure in performance (**causality**).	2
▪ As already discussed, a repair was conducted by the buyer at his own expenses. **The repair was undertaken because of the failure of the seller to deliver the moulds in the proper quality, and to later repair them successfully**. This constitutes, as already seen, a failure to perform an obligation. As a direct consequence, the buyer repaired the moulds himself with his own tools. This gave rise to **costs in the amount of approximately € 550,000.–**.	2
▪ The costs arising from this repair are recoverable losses under Article 74 CISG. They were also **foreseeable for any seller**.	0.5
▪ The injured party is under the duty to **mitigate its losses according to Article 77 CISG**. If he fails to do so, the party in breach of contract shall be entitled to a reduction of the damages. The circumstances of the case do not indicate that the buyer did wait for too long to repair the moulds	1

himself. Therefore, **a violation of Article 77 CISG does not seem to be the case**.	
▪ Any exemption of the seller under **Article 79 and 80 does also not seem to be the case**.	0.5
▪ As a result, the **buyer has a claim of € 550,000.–** for the costs encountered due to repair of the defective goods. (cf. CISG online 2545; KRÖLL/MISTELIS/PERALES VISCASILLAS, UN Convention on Contracts for the International Sale of Goods, Art. 74 para. 7 et seq.)	1
Additional points for explanations regarding set-off: ▪ *A right to set-off though not explicitly stated in the CISG, can be derived from the general principles of the Convention (cf. Article 7 (2) CISG). A set-off requires mutual monetary claims arising from the same contractual relationship subject to the CISG. The consequence of the implied or expressly declared set-off is that the mutual monetary claims are extinguished by set-off insofar as they relate to the same contractual relationship.* ▪ *In the case at hand, both claims, the claim for damages (in the amount of approximately € 550,000.–) as well as the claim for outstanding payments (approximately € 180,000.–), are monetary claims. The claim for damages is owed by the seller to the buyer, whilst the claim for outstanding payments is owed by the buyer to the seller. The claims are therefore of mutual nature. Furthermore, the buyer has according to the case expressively declared set-off.* ▪ *In conclusion set-off is possible. The difference between the damages (€ 550,000.–) and the outstanding payments (€ 180,000.–) of € 370,000.– has still to be paid by the seller.* *(c.f. Germany, Bundesgerichtshof, 24 September 2014, CISG-online 2545)*	1 AP

Total Points Question 4	**20 + 2 AP**

5. What are the remedies of the seller? How would you judge his claim for damages?

	Points (up to)
Buyer's obligation to make timely payment	
▪ According to **Article 53 CISG** the buyer **must pay the price for the goods** and take delivery of them as required by the contract and the CISG. The provisions regarding payment of price can be found in Article 54 et seq. CISG.	1
▪ For the time of payment, **Article 58 CISG** is decisive. If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal (Article 58(1) CISG). The delivery terms determine the meaning of 'placing at the buyer's disposal' in the specific case.	1
▪ In the case at hand the **parties have a contractual stipulation**. According to the contract, the buyer was required to **open a letter of credit seven days prior to shipment**. On 15 October the seller sent notice that the goods were in the harbour ready to be shipped. It is arguable that the buyer had now at least 7 days to open the letter of credit.	2
▪ As **Article 59 CISG** expressly states, the buyer must **pay the price on the date fixed or determinable from the contract** without the need for any request or compliance with any formality on the part of the seller. The buyer will, therefore, be in breach of his obligation to pay the price without any notice needed from the seller.	1
▪ In the case at hand, the buyer **did not open a letter of credit in due time**. Thus, he is in **breach of his obligation** to pay the price and the seller is entitled to **remedies according to Articles 61 et seq. CISG**. (cf. HUBER/MULLIS, The CISG, A new textbook for students and practitioners, p. 307 et seq.)	3
Remedies of the seller	
▪ According to Article 6(1) CISG, if the buyer fails to perform any of his obligations under the contract, the seller may (a) exercise the rights provided in Articles 62 to 65 CISG and (b) claim damages as provided in Articles 74 to 77 CISG.	0
▪ In the present case, the seller wants to **terminate (=avoid) the contract** and **claims damages**.	1

Avoidance of the contract by the seller	
▪ Termination of the contract is designed as an ultima ratio remedy under the CISG (cf. above, question 4). Given that in this case the parties' stipulation regarding payment is vague, and there is also no indication regarding the time of performance being essential, **non-timely payment would not qualify for a fundamental breach under Article 25 CISG**. Therefore, the buyer is advised to make use of the Nachfrist procedure to avoid the contract. The following requirements must be met:	1
▪ First, there has to be a **breach of contract (Article 61(1) CISG)**. In the case at hand, the obligation to open a letter of credit was due (see above) and not performed.	1
▪ Second, the seller must grant a **Nachfrist**. Pursuant to **Article 64(1)(b) CISG** the seller may declare the contract avoided if the buyer does not, within the additional period of time fixed by the seller in accordance with Article 63(1) CISG, perform his obligation to pay the price, or if he declares that he will not do so within the period so fixed.	2
▪ The additional period according to **Article 63(1) CISG** must be **definite** (fixed or determinable) and of **reasonable length**. The Nachfrist must expire without the buyer fulfilling his obligations.	2
▪ Notice of an additional time of performance under Article 63(1) CISG can only be given once the buyer's obligation is due.	0.5 AP
▪ As seen above the buyer's obligation to issue the letter of credit is due.	0.5 AP
▪ In the case at hand, the seller set on 1 November a period of **thirty days as the additional period of time**. Thirty days are **sufficient** to issue a letter of credit. Therefore, the time-period can be qualified as reasonable. The notice for an additional time of performance was given correctly.	2
▪ After the first additional period elapsed, the seller sent on 8 December another request for performance. On 15 December when the seller sent a notice of termination the breach of the contract was therefore fundamental in the sense of Article 25 CISG as more than one additional period of time had elapsed without the letter of credit being opened. Therefore, the seller **rightfully made use of his right to terminate the contract**.	1
▪ Third, a **declaration** of avoidance of the contract is effective only if made by notice to the other party (**Article 26 CISG**). The seller must make clear that he no longer wants to be bound by the contract as a result of the seller's breach.	0.5

▪ In the case at hand, the seller sent a written notic**e of termination dated 15 December 2020**. The declaration of avoidance has, therefore, been made correctly.	1
▪ The **time limit in Article 64(2) CISG is not applicable** in the present case as the buyer has not yet paid the price.	0.5
▪ The seller had the **right to avoid the contract** according to Article 64(1)(b) CISG. (cf. SCHLECHTRIEM/SCHWENZER, Commentary on the UN Convention on the International Sale of Goods (CISG), Art. 62 para. 9 et seq.; Art. 63 para. 6 et seq.; Art. 64 para. 19 et seq. ; HUBER/MULLIS, The CISG, A new textbook for students and practitioners, p. 325 et seq.)	1
<u>Claim for damages</u> ▪ To be able to claim **damages under Article 74 CISG** the following prerequisites have to be existent: o Breach of contract (see answer above) o Recoverable loss o Foreseeability of the loss (**not applicable in cases of Article 75 and 76 CISG**), o No violation of the mitigation duty (Art. 77 CISG) and o No exemption under Article 79 or 80 CISG.	1 0.5
▪ **Recoverable loss**: As for the calculation of damages under Article 74 CISG, **Article 75 CISG** states that in case of avoidance of the contract and resale of the goods by the seller, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further losses recoverable under Article 74 CISG.	1
▪ The seller has **resold the goods to a third party to a lower price than the price in the contract with MAP**. According to Article 75 CISG the **difference** between the contract price with MAP (contract price) and the contract price with the third party (substitute price) is the loss the seller has encountered. He can also claim compensation of **further losses e.g., for acquisition of a new buyer**.	2 1 AP
▪ **Mitigation of loss:** The injured party is under the duty to mitigate its losses according to **Article 77 CISG**. In the present case, the seller sold and, in January 2021, shipped the goods that were ready for shipment to another customer. The goods were originally ready for shipment on 15 October	1

and the buyer, after having received two notices, still did not manage to open a letter of credit. Therefore, the **seller took all reasonable measures** to mitigate the occurred loss. It cannot be alleged that he waited too long for the termination and conclusion of the cover transaction. On top of that, the **seller was not aware of the bankruptcy** of the buyer as this was only established in the legal proceeding before the court.	
▪ **No exemption under Article 79 or 80 CISG:** In **Article 79 CISG** the Convention also states reasons for not being liable for the failure to perform. Para. 1 states that 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. In this case, the obligee would have to carry the burden of the atypical risk which hampered performance.	2
▪ Procurement risk for money is carried by the buyer. He is deemed to have guaranteed his financial capacity so that a specific performance claim for the price is given even if he loses his money due to an impediment beyond his control. Exemptions from this principle are very limited (e.g., unexpected imposition of exchange controls), **filing for bankruptcy does certainly not qualify as an exemption**.	1
▪ Therefore, the **buyer is liable for damages under Article 74 and 75 CISG** and must compensate the loss of the seller. (cf. SCHLECHTRIEM/SCHWENZER, Commentary on the UN Convention on the International Sale of Goods (CISG), Art. 74 para. 11; KRÖLL/MISTELIS/PERALES VISCASILLAS, UN Convention on Contracts for the International Sale of Goods, Art. 79 para. 13 and 23).	1

Total Points Question 5	**30.5 + 2 AP**

Total Points Question 1	**16 + 2 AP**
Total Points Question 2	**28 + 2 AP**
Total Points Question 3	**20**
Total Points Question 4	**20 + 2 AP**
Total Points Question 5	**30.5 + 2 AP**
TOTAL	**114.5 + 8 AP**