



Prof. Dr. Yeşim M. Atamer

HS 2020

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## **International Sales Law (CISG)**

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**Date:** January 7, 2021

**Duration:** 120 minutes

**Notes:**

- The exam consists of five questions.
- The questions are weighted as follows:
  - Question 1 (15 Points [25%]);
  - Question 2 (7.5 Points [12.5%]);
  - Question 3 (15 Points [25%]);
  - Question 4 (15 Points [25%]);
  - Question 5 (7.5 Points [12.5%]).

Total: 60 Points.

- The exam must be solved and drafted without any help of third parties.

## **International Sales Law (CISG)**

### **Exam**

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#### **Legal requests**

##### Claimant:

1. *The claimant ("the Buyer") seeks damages for a loss of profit amounting to CHF 900'000.–.*
2. *The claimant further seeks reimbursement for a replacement unit, the price for which exceeded the price for the seller's original unit by CHF 50'000.–.*

##### Defendant:

1. *The defendant ("the Seller") claims damages from the Buyer for unrightfully avoiding the contract.*

#### **The facts**

The Buyer (a manufacturer of office material [mostly scissors] incorporated in Switzerland) ordered by letter dated 29 September 2019 a laser cutting machine for scissors. As proposed by the Seller (a company based in Munich, Germany) in its initial offer including his conditions of sale, the Buyer ordered the machine "Cutting Edge S". On 11 October 2019 the Seller confirmed the order in writing.

The Buyer and the Seller (together "the Parties") agreed on a total net price of CHF 1'245'000.–. Clause 8.5 of the conditions of sale (heading: Price) further stated that the parties agreed the net price to be a "price quotation ex works Munich/Germany". Clause 9.2 of the conditions of sale (heading: Delivery) provided that delivery had to be made by the end of February 2020. According to clause 5 of the conditions of sale (heading: Specifications), the Buyer had to provide "*all technical specifications and all relevant data for the scissors intended to be manufactured*" before the end of November 2019. Under clause 6.1 the Seller was obligated to provide mechanics employed by its Swiss subsidiary to ensure the unit's assembly as well as operational readiness at the Buyer's place of business. The parties expected this to take less than one day.

The Parties further agreed that an acceptance test had to be conducted at the Seller's factory in Munich. The sample materials needed to perform such test were to be supplied by the Buyer at least 14 days before the acceptance test.

By e-mail of 20 December 2019 the Seller informed the Buyer that production of the unit was delayed due to the late arrival of the specifications on 15 December, and was now scheduled for the end of summer 2020. The Buyer objected to such drastic change in schedule. Through his legal counsel, he set an additional time period for the delivery of the unit until 30 May 2020. With letter of 15 June 2020, the Buyer's legal counsel declared the contract avoided. Immediately after declaring avoidance, the Buyer purchased a different production unit as substitute.

## QUESTIONS

*Note: Switzerland and Germany are CISG contracting states.*

1. Is this a sales contract governed by the CISG
  - a. regarding the geographical-personal scope of application? (5 points)
  - b. regarding the material scope of application? (5 points)
  - c. if the parties would have (validly) agreed in the contract that it shall be governed by Swiss law? (5 points)

*Note: Assume that the CISG is applicable to the given contract when answering questions 2-5.*

2. Define the Parties' agreement regarding the place of performance. (7.5 points)
3. Did the Buyer successfully avoid the contract? (15 points)
4. Which provisions of the CISG does the Buyer base his damages claims on? Are the prerequisites for a claim for damages existent? On what grounds can the recoverable loss be limited? (15 points)
5. Briefly explain on what grounds a party generally can be exempt from paying damages under the CISG? Would the Seller have any grounds to ask for a reduction of damages? (7.5 points)

## ANSWERS

### I. General Remarks on Grading

A clean, well-developed and well-structured solution was considered in favour of the students. Answers without explanation were not awarded full marks.

### II. Model Answers

#### 1. Is this a sales contract governed by the CISG

##### a. regarding the geographical-personal scope of application? (5 points)

	Points (up to)
<ul style="list-style-type: none"><li>▪ According to Article 1(1)(a) CISG, the convention is applicable to contracts of sale between parties who have their places of business in different states (internationality of the sales contract).</li></ul>	1
<ul style="list-style-type: none"><li>▪ In addition, (according to Article 1(1)(a) CISG) i) the states in which the parties are resident must have acceded to the CISG (1.5), or ii) the rules of international private law of the lex fori must provide for the application of the law of a contracting state.</li></ul>	2.5
<ul style="list-style-type: none"><li>▪ The Parties' places of business lie in Switzerland and the Federal Republic of Germany, which are both CISG contracting states.</li></ul>	1
<ul style="list-style-type: none"><li>▪ As regards the geographical-personal scope of application, the sales contract is therefore governed by the CISG.</li></ul>	0.5
<ul style="list-style-type: none"><li>▪ <i>Additional point, if discussed how an arbitral court would decide.</i></li></ul>	1 AP

##### b. regarding the material scope of application? (5 points)

	Points (up to)
<ul style="list-style-type: none"><li>▪ From a material perspective, the CISG applies to sales contracts (Article 1(1) CISG) or contracts for work and materials (Article 3(1) CISG)</li></ul>	0.5
<ul style="list-style-type: none"><li>▪ According to Article 3(1) CISG, 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.</li></ul>	0.5

<ul style="list-style-type: none"> <li>▪ As stated by Article 3(2) CISG, it 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 labor or other services. This is determined on the basis of the value relationship between work and goods; the percentage value limit being drawn at 50%.</li> </ul>	0.5
<ul style="list-style-type: none"> <li>▪ The Parties have concluded a contract for the production of a laser cutting machine for scissors. Despite the fact that the Seller is obligated to supply materials, these are not part of the unit to be delivered as the materials are merely needed to perform the acceptance test. Only a sample of materials was needed for the determination of acceptance. As such, the materials are not to be considered as substantial for the production of the machine.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ In addition, the contract between the Parties does not fall under the exemption of Article 3(2) CISG. The obligation to manufacture the unit does not carry less weight than its assembly and putting into operation. The latter is expected to take less than one day, whereas the production of the unit itself takes a much longer time. On this basis, it may be assumed that the unit itself has a much higher value than the labor provided in connection with the assembly and putting into operation.</li> </ul>	2
<ul style="list-style-type: none"> <li>▪ As regards the material scope of application, the sales contract is therefore governed by the CISG.</li> </ul>	0.5

**c. if the parties would have (validly) agreed in the contract that it shall be governed by Swiss law (5 Points)**

	Points (up to)
<ul style="list-style-type: none"> <li>▪ On ratification, the CISG becomes part of each contracting state's national law and is applied to international purchase agreements ex officio. However, Article 6 CISG gives the parties the right to opt-out.</li> </ul>	2
<ul style="list-style-type: none"> <li>▪ Whether or not choice of the law of a contracting state ('Swiss law') can suffice to exclude the application of the CISG has been discussed in many court decisions. Courts in several different jurisdictions agree that there need to be further indications to come to such conclusion.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ In the case at hand there are no such indications. These types of choice of law clauses are interpreted as to only define Swiss law as the law applicable for issues not covered by the CISG, like e.g. the limitation period. The CISG remains applicable as it forms part of Swiss law.</li> </ul>	1.5
<ul style="list-style-type: none"> <li>▪ Therefore, the choice of "Swiss law" does not lead to the exclusion of the CISG.</li> </ul>	0.5

**2. Define the Parties' agreement regarding the place of performance (7.5 points)**

	Points (up to)
<ul style="list-style-type: none"> <li>▪ The first question to be addressed is whether the Seller's conditions of sale were included into the contract. In literature and case law it is accepted that the party using standard terms needs to make those available to the other party so that it has a reasonable opportunity to take notice of the terms introduced.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ According to the case, the Seller had attached his conditions of sale to his initial offer. The Buyer had ordered according to this offer without proposing any changes. Art. 18 CISG provides that a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Therefore, the conditions of sale are included into the contract.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ Clause 8.5 of the conditions of sale stipulates that the price is defined "ex works Munich/Germany".</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ Clause 6.1, however, stipulates the Seller's obligation to provide mechanics to ensure the unit's assembly as well as operation at the Buyer's place of business.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ The place of performance needs to be determined by interpretation of the contract.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ As Munich is where the Seller is seated, it can be assumed that the contract does not involve any carriage, i.e. the transportation must be organized by the Buyer. Therefore, Clause 8.5 points towards the place of performance being in Munich at the Seller's factory.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ It can also be argued that the assembly of the unit as well as the putting into operation has a subordinated role in the given contract as it was expected to take less than one day.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ Based on the information given, Munich/Germany, i.e. the Seller's factory is the place of performance.</li> </ul>	0.5
<ul style="list-style-type: none"> <li>▪ <i>Additional points, if the place of payment for the buyer is also discussed.</i></li> </ul>	1.5 AP

### 3. Did the Buyer successfully avoid the contract? (15 Points)

	Points (up to)
<ul style="list-style-type: none"> <li>▪ The Buyer may declare the contract avoided, if either prerequisite set out in Article 49 (1)(a) CISG or in Article 49 (1)(b) CISG is satisfied.</li> </ul>	1.5
<ul style="list-style-type: none"> <li>▪ Avoidance under Article 49 (1)(a) CISG presupposes the existence of a fundamental breach. Article 25 CISG states that there has been a fundamental breach “whenever non-performance 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 result.”</li> </ul>	2
<ul style="list-style-type: none"> <li>▪ Generally, a mere delay in delivery does not constitute a fundamental breach. However, there are exceptions: i) when time is of the essence, ii) seasonal or perishable goods are involved, or iii) the delivery date has been exceeded to an unbearable extent. Punctual delivery must be of crucial importance to the buyer and this has to be apparent to the parties at contract conclusion a delay may amount to a fundamental breach.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ Avoidance under Article 49 (1)(b) CISG is possible, if the Seller sets an additional period (<i>Nachfrist</i>) of reasonable length for performance. After this period has expired fruitlessly or – alternatively – if the Buyer announces that he will not deliver within this period, the Seller may declare the contract avoided.</li> </ul>	2
<ul style="list-style-type: none"> <li>▪ The given contract includes no exact delivery date; Clause 9.2 merely states that delivery is due by the end of February 2020. The parties thus did not agree on a delivery date, compliance with which is essential for the Buyer. As a result, the delay of the Buyer is not a fundamental breach as set out by Article 25 CISG. The Buyer can thus not declare the contract avoided under Article 49 (1)(a) CISG.</li> </ul>	2
<ul style="list-style-type: none"> <li>▪ The Buyer granted the Seller an additional period (<i>Nachfrist</i>) until 30 May 2020. Whether an additional period is reasonable, is determined on a case-by-case basis. Under the given circumstances, the additional period of three months appears reasonable, especially, considering that the Buyer only declared the contract avoided on 15 June 2020, i.e. giving a factual period of 3.5 months. The Seller not only did not deliver within the additional period (<i>Nachfrist</i>) granted by the Buyer but has also stated by e-mail of 20 December 2019 that he could not deliver before end of summer 2020. Therefore, the Buyer had – in principle – the right to avoid the contract under Article 49(1)(b) CISG.</li> </ul>	2
<ul style="list-style-type: none"> <li>▪ However, the right of the Buyer to declare the contract avoided depends also on the qualification of his failure to provide the necessary technical specifications and data on time. Article 80 CISG states that 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.</li> </ul>	1

<ul style="list-style-type: none"> <li>▪ Given that the Buyer was only delayed for 15 days and the Seller in turn suggested a delivery date 6 months after the agreed upon delivery date, it seems to be the better view to grant the Buyer a right to avoid.</li> </ul>	1.5
<ul style="list-style-type: none"> <li>▪ Further to that, the Seller could have made the specifications himself in accordance with the procedure defined in Article 65 CISG.</li> </ul>	2

4. On which provisions of the CISG does the Buyer base his damages claims? Are the prerequisites for a claim for damages existent? On what grounds can the recoverable loss be reduced?  
(15 points)

	Points (up to)
<ul style="list-style-type: none"> <li>▪ Article 74 et seq. CISG are the provisions regarding damages. Damages for breach of contract by one party consists of a sum equal to the loss, including lost profits. According to Article 75 CISG a party may recover the difference between the contract price and the price in the substitute transaction, as well as any damages recoverable under Article 74 CISG, if the contract is avoided.</li> </ul>	1.5
<ul style="list-style-type: none"> <li>▪ The Buyer seeks damages for a loss of profit amounting to CHF 900'000.– as well as the difference between the purchase price and the price of the replacement plant, which exceeded the price for the seller's unit by CHF 50'000.–.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ Therefore, the Buyer would have to base his legal requests on Article 74 CISG (damages for loss of profit) and Article 75 CISG (substitute transaction).</li> </ul>	2
<ul style="list-style-type: none"> <li>▪ The claim for damages under Article 74 CISG requires the following cumulative conditions: <ul style="list-style-type: none"> <li>○ breach of contract;</li> <li>○ damage, i.e. the loss incurred as a result of the breach of contract, including loss of profit;</li> <li>○ foreseeability of the damage at the time of conclusion of the contract as a possible consequence of the breach of contract;</li> <li>○ natural causality; and</li> <li>○ no exemption under Article 79 CISG or Article 80 CISG.</li> </ul> </li> </ul>	2
<ul style="list-style-type: none"> <li>▪ If the aforementioned conditions are met, the Buyer may recover his damages regarding his loss of profit under Article 74 CISG. Given that a loss of profit as well as a possible loss due to a substitute transactions are foreseeable to any professional Seller there seems to be no reason to reject such claim.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ Article 75 CISG further requires that the substitute transaction is concluded “in a reasonable manner and within a reasonable time after avoidance”.</li> </ul>	2
<ul style="list-style-type: none"> <li>▪ Therefore, assuming that the Buyer has rightfully avoided the contract, it has to be discussed whether the substitute unit qualifies being purchased in a reasonable manner and within a reasonable time after avoidance. Considering that the substitute unit exceeded the price for the seller's unit only by CHF 50'000.– and the net price lies at CHF 1'245'000.– reasonability would probably have to be affirmed.</li> </ul>	2

<ul style="list-style-type: none"> <li>▪ As stated in the facts the Buyer bought a substitute unit immediately after declaring avoidance, which has to be qualified as reasonable time period after avoidance.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ As a result, the Buyer would be successful in recovering the difference between the contract price and the price in the substitute transaction under Article 75 CISG.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ In addition, the injured party is under the duty to mitigate its losses according to Article 77 CISG. If it fails to do so, the party in breach of contract shall be entitled to a reduction of the damages. The <i>ratio legis</i> being that a plaintiff may not recover losses that he should have avoided. The circumstances of the case do not indicate that the Buyer did wait for too long to declare avoidance. He also acted quickly in supplying a substitute. Therefore, a violation of Art. 77 does not seem to be the case.</li> </ul>	1.5

**5. Briefly explain on what grounds a party generally can be exempt from paying damages under the CISG? Would the Seller have a right to ask for a reduction of damages? (7.5 points)**

	Points (up to)
<ul style="list-style-type: none"> <li>▪ Possible exemptions are regulated in Articles 79 – 80 CISG.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ Pursuant to Art. 79 (1) CISG a party is not liable for a failure to perform any of his obligations, if it proves that the failure was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract or to have avoided or overcome its consequences.</li> </ul>	2
<ul style="list-style-type: none"> <li>▪ An exemption under Article 79 CISG thus cumulatively requires, i) an impediment, ii) a causal link between the impediment and non-performance, iii) an impediment beyond the party's control, iv) unforeseeability of the impediment, and v) unavailability of the impediment.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ Typically, <i>force majeure</i> qualifies for exemption under Article 79 CISG, meaning exogenous factors, like natural or man-made disasters. Endogenous impediments like death, illness or – in general – in-house problems of a company, such as defective machines or illness of employees are not sufficient.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ There are no indications in the case that a force majeure hindered the Seller from delivering on time.</li> </ul>	0.5
<ul style="list-style-type: none"> <li>▪ Regarding grounds for reduction of damages, Article 80 CISG stipulates that a party cannot rely on the failure of the other party to perform to the extent that such failure was caused by his/her own omission. This means that the injured party is exempted only to the extent the failure was caused by the injuring party. As a typical example, if the failure of a buyer to provide specific information concerning the shipment of the goods causes a late delivery, the seller is exempt from paying damages due to late delivery.</li> </ul>	1
<ul style="list-style-type: none"> <li>▪ In the case at hand, the Seller had a right to delay delivery for at least 15 days, as the Buyer did not deliver the specifications in time. If the Seller can prove that some of the lost profit of the Buyer emerged in this period, he would have a claim for proportional reduction.</li> </ul>	1