

MODEL ANSWERS

I. General Remarks on Grading

A well-structured and founded answer, even if not fully correct, is evaluated in favor of the students. Answers without legal argumentation are not awarded the maximum score.

II. Model Answers

1 Question 1 (20%)

1) Pony Case

	Points
<ul style="list-style-type: none"> ▪ According to Art. 1(1) CISG, the Convention applies to contracts of sale of goods. The terms “goods” and “contract of sale” are interpreted autonomously (Art. 7(1) CISG). 	1
<ul style="list-style-type: none"> ▪ All objects which are movable and physical at the time of delivery are goods in the meaning of the CISG. 	1
<ul style="list-style-type: none"> ▪ <i>In casu</i>, a pony is a good in the sense of the CISG as it is a movable. 	1
<ul style="list-style-type: none"> ▪ A sales contract under the CISG is understood as a contract obliging the seller to deliver goods, hand over documents related to these goods and transfer the property in the goods; the buyer is obliged to pay the price for the goods and to take delivery of them. 	1
<ul style="list-style-type: none"> ▪ <i>In casu</i>, the seller is obliged to deliver the pony, while the buyer is obliged to pay the price and take delivery. The contract is therefore a contract of sales pursuant to the CISG. 	1
<ul style="list-style-type: none"> ▪ Art. 2 CISG explicitly excludes specific sales contracts. According to Art. 2(a) CISG the Convention does not apply to sales of goods bought for personal, family or household use (consumer sale). Therefore, the CISG only applies to cases where the buyer has bought the goods for business or professional purposes. The intended use is decisive, not the actual use. 	2
<ul style="list-style-type: none"> ▪ The seller must have been able to identify the purpose of the transaction. If the purpose was not discernible, CISG may govern a consumer transaction. 	1
<ul style="list-style-type: none"> ▪ Here, the buyer’s daughter is going to use the pony to participate in competitions. It is not bought for the equestrian center. The pony will be used in the family of the buyer. 	1
<ul style="list-style-type: none"> ▪ The buyer informed the seller that the pony is for her daughter. Therefore, the seller was able to identify the purpose of the contract. 	1
<ul style="list-style-type: none"> ▪ According to Art. 2(a) the CISG is not applicable 	0.5

2) Mixed contract

	Points
<ul style="list-style-type: none"> ▪ According to Art. 1(1) CISG, the Convention applies to contracts of sale of goods. The terms “goods” and “contract of sale” are interpreted autonomously (Art. 7(1) CISG). 	0 (if point was given above)
<ul style="list-style-type: none"> ▪ All objects which are movable and physical at the time of delivery are goods in the meaning of the CISG. 	0 (if point was given above)
<ul style="list-style-type: none"> ▪ <i>In casu</i>, the waste separation plant is movable and physical. 	1
<ul style="list-style-type: none"> ▪ According to Art. 3(1) CISG, a contract 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. 	1
<ul style="list-style-type: none"> ▪ According to Art. 3(2) CISG the convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services. ▪ The preponderant part is determined on the basis of the value relationship between work and goods; the percentage value limit being drawn at 50%. 	1 1
<ul style="list-style-type: none"> ▪ In the case at hand a large-scale plant is to be manufactured. The buyer does not supply any material. Therefore, according to Art. 3(1) the CISG would be applicable. ▪ However, the planning, assembly and putting together of a large-scale plant can play a very important role in such projects. As indicated, the value of the plant itself is less than 50% of the total contractual value. Therefore, Art. 3(2) CISG comes into play. 	1 1
<ul style="list-style-type: none"> ▪ According to Art. 3(2) the CISG is not applicable 	0.5

3) International Application

	Points
<ul style="list-style-type: none"> ▪ Two cumulative prerequisites govern the territorial application of the CISG pursuant to Art. 1: <ul style="list-style-type: none"> - First, the sales contract must be of an international nature. - Second, a connection to a Contracting State pursuant to either Art. 1(1)(a) or Art. 1(1)(b) must exist. 	1
<ul style="list-style-type: none"> ▪ Pursuant to Art. 1(1), the first prerequisite for the territorial application of the CISG is that the parties to the sales contract have their places of business in different states at the time of conclusion of the contract (international nature of the sales contract). 	1

<ul style="list-style-type: none"> ▪ In the case at hand both parties have their places of business in different states (UK and Germany) at the time of the conclusion of the contract. Therefore, the contract is of an international nature. 	1
<ul style="list-style-type: none"> ▪ Pursuant to Art. 1(1)(a) and (b), the second prerequisite for the territorial application of the CISG is either: <ul style="list-style-type: none"> (i) That the parties' places of business are in different contracting States at the time of conclusion of the contract, or (ii) That the rules of private international law lead to the application of the law of a Contracting State. 	2
<ul style="list-style-type: none"> ▪ <i>In casu</i>, only Germany is a Contracting State, UK is not. However, the Parties have included a choice of law clause in their contract and subjected their contract to arbitration. In principle, the arbitral tribunal is bound by the choice of law clause of the parties. 	2
<ul style="list-style-type: none"> ▪ The choice of 'German law' without expressly excluding the CISG is by most courts not found to be enough to implicitly exclude the application of the CISG. As the CISG is part of German law and applies to international sales contracts the Court will apply the CISG. 	2
<ul style="list-style-type: none"> ▪ German law applies for all subjects not covered by the CISG (Art. 7(2)). 	1 AP
<ul style="list-style-type: none"> ▪ The CISG is applicable. 	0.5

4) The sale of drones

	Points
<ul style="list-style-type: none"> ▪ According to Art. 1(1) CISG, the Convention applies to contracts of sale of goods 	0 (if points given above)
<ul style="list-style-type: none"> ▪ All objects which are movable and physical at the time of delivery are goods in the meaning of the CISG. 	0 (if points given above)
<ul style="list-style-type: none"> ▪ Drones are movable and physical objects and thus subject to the CISG. 	1
<ul style="list-style-type: none"> ▪ However, Art. 2(e) CISG excludes aircrafts from the application of the CISG. The extent of the exclusion is debated as a definition is missing. ▪ Some authors argue that the CISG drafters did not want to cover goods which are subject to special register requirements or property passing rules (like aircrafts). Besides, the purpose of the aircraft shall be of importance when defining the scope of Art. 2(e) CISG. If the purpose is transportation of goods and/or persons, the exception shall apply. 	1 2
<ul style="list-style-type: none"> ▪ <i>In casu</i>, the drones differ fundamentally in their purpose from an "aircraft". They are most probably not subject to a register requirement. They also do not serve transportation but the purpose of taking videos and pictures. The drones are goods under the CISG. 	2
<ul style="list-style-type: none"> ▪ The CISG is applicable. 	0.5

Total Points Question 1	34
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2 Question 2 (25%)

a) Has a contract been concluded between S and B?

	Points
<ul style="list-style-type: none"> ▪ Art. 14-24 CISG (Part II) govern the formation of contracts. 	1
Email from B to S (Monday, 17 April 2023)	
<u>Offer:</u> <ul style="list-style-type: none"> ▪ Pursuant to Art. 14(1) CISG a proposal for concluding a contract addressed to a specific person constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. ▪ The offeror must show its intention to be bound in case of acceptance. Often, the language used by the offeror will show its intention to be bound; where it does not, the statements or conduct of the offeror must be interpreted in accordance with Art. 8. ▪ For an offer to be sufficiently definite it must contain the essential terms of any future agreement (<i>essentialia negotii</i>). Thus, the offer has to include an indication of the goods and – expressly or implicitly – fix the price or make provision for determining the quantity and the price (Art. 14(1) s.2). ▪ An offer is to be differentiated from an <i>invitatio ad offerendum</i> which “is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal” (Art. 14(2)). ▪ To become effective the offer must reach the offeree (Art. 15(1)). ▪ According to Art. 24, an offer “reaches” the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence. ▪ It is sufficient if the statement has entered the recipient’s “sphere of control” regardless of whether the recipient takes notice of it. 	<p>1</p> <p>1</p> <p>2</p> <p>1</p> <p>1</p> <p>1</p> <p>1</p>
<i>Note for correction: No points for withdrawal / evocation / time limit / rejection as there is no indication in the case for such explanations.</i>	0
<ul style="list-style-type: none"> ▪ <u>In the case at hand</u>, the email from B to S (on 17 April 2023) indicates the goods and expressly determines the price (50 boxes à 12 bottles of “Saloio Portuguese Olive Oil 1 liter, each priced at € 96), thus being sufficiently definite. ▪ Moreover, B’s statement lacks any terms suggesting his intention not to be bound; instead, his request (merely) for confirmation from S indicates his intention to be bound by his offer. 	<p>3</p> <p>(1 point each)</p>

<ul style="list-style-type: none"> In absence of any information to the contrary, we can reasonably infer that S has agreed to receiving communications via email. The fact that S replies to B’s email supports this assumption. S takes notice of the email in her inbox on the following day. It has thus entered her “sphere of control”. Consequently, the offer is effective. 	
<ul style="list-style-type: none"> The email from B to S (on 17 April 2023) constitutes an offer. 	0.5
Email from S to B (on 18 April 2023)	
<u>Acceptance:</u> <ul style="list-style-type: none"> According to Art. 18(1) an acceptance is a statement made by or other conduct of the offeree indicating assent to an offer. Silence or inactivity does not in itself amount to acceptance. If no time is fixed, the acceptance must reach the offeror within a reasonable time to be effective (Art. 18 (2 s. 2)). In the case of acceptance without notice (Art. 18(3)), the acceptance is effective at the moment the act is performed. As only a final and unqualified acceptance can lead to contract conclusion, the acceptance must mirror the offer. 	2 2 1
<u>Counteroffer:</u> <ul style="list-style-type: none"> A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer (Art. 19(1) CISG). Different terms relating to the quantity and quality of the goods are considered to alter the terms of the offer materially (Art. 19(3) CISG). However, according to Art. 19 (2) CISG 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. 	1 1 1
<ul style="list-style-type: none"> In the present case, S's statements in her email to B, deviate from B's offer.. Instead of “Saloio Portuguese Olive Oil 1 liter” bottles, S refers to “Saloio Portuguese Deluxe Olive Oil 0.75 liter” bottles, thereby modifying both the quantity and the quality of the olive oil. These modifications do not align with the criteria for non-material alterations as stipulated in Art. 19(2) CISG. Changes involving both quantity and quality are deemed material of the terms of the offer (Art. 19(3) CISG). Consequently, S's communication is not merely a non-material adjustment but rather a rejection of B's offer. 	3
<ul style="list-style-type: none"> The email from S to B (on 18 April 2023) constitutes a counteroffer. 	0,5
Payment of € 4’800 by B to S (on 20 April 2023)	
<i>Notes for correction: Any remarks concerning acceptance are only graded once (see above).</i>	

<ul style="list-style-type: none"> Here, B's payment to S in the amount of € 4,800 indicates the assent to the counteroffer by means of conduct instead of statement. 	1
<ul style="list-style-type: none"> B's acceptance becomes effective at the moment the act is performed (Art. 18(3)); in the case at hand when the payment is executed. By transferring the money only two days after receiving the counteroffer the acceptance reaches the offeror in a reasonable time. 	2
<ul style="list-style-type: none"> B's acceptance mirrors ('does not deviate from') S's counteroffer. 	1
<ul style="list-style-type: none"> B's payment to S constitutes an acceptance of the counteroffer. 	0.5
<ul style="list-style-type: none"> Conclusion: S and B have concluded a contract in accordance with the provision of the CISG (regarding the sale of 50 boxes à 12 bottles of "Saloio Portuguese Deluxe Olive Oil 0.75 liter" for € 96 per box). 	1

b) Assuming a contract was concluded, what is the content of this contract?

	Points (up to)
<ul style="list-style-type: none"> As seen above, the parties concluded a contract regarding the sale of 50 boxes à 12 bottles of "Saloio Portuguese Deluxe Olive Oil 0.75 liter" for € 96 per box. 	1
<ul style="list-style-type: none"> However, it is questionable whether the parties agreed on the Standard Terms referred to by S in the email to B and available on her website. 	1
<ul style="list-style-type: none"> In contrast to the question of material validity, the question of effective incorporation of standard terms into the contract is governed by the CISG. <i>(Question of material validity is governed by applicable domestic law)</i> 	1
<ul style="list-style-type: none"> There are two prerequisites for the inclusion of Standard Terms: (1) The Standard Terms must be part of the offer or counteroffer, requiring a clear and understandable reference to them. (2) The other party must have had a reasonable opportunity to take notice of the terms introduced. Reasonable opportunity is given, where, in electronic communications, the terms are made available to and retrievable electronically by that party and are accessible to that party at the time of negotiating the contract. <p><i>Note for correction: There is no indication in the case that S has used her Standard Agreements in prior contracts with B This argument will thus not be awarded with any points.</i></p>	1 2
<ul style="list-style-type: none"> <u>In the case at hand</u>, S makes a clear and understandable reference to her Standard Terms in her email containing the counteroffer to B, stating "<i>any orders will from now on be subject to our Standard Terms which can be found on our website</i>". In contemporary business practices, companies routinely provide information about themselves on their websites, often including their Standard Terms. Provided the Standard Terms were accessible 	1

<p>on their website at the time of contracting, the opposing party had reasonable opportunity to take notice of these terms. While this seems particularly reasonable when contracts are concluded on the corresponding website, it should also suffice if the contract is concluded via email and access to the website at the time of conclusion was reasonably available. Thus, by referring to the Standard Terms on her website S provided reasonable opportunity to B to take notice of the terms.</p> <ul style="list-style-type: none"> ▪ <i>[It may be argued in both ways.]</i> 	<p>3 (1 point per argument)</p>
<ul style="list-style-type: none"> ▪ Conclusion: In addition to the sale of the 50 boxes à 12 bottles of “Saloio Portuguese Deluxe Olive Oil 0.75 liter”, the parties agreed on the inclusion of S’s Standard Terms. <p><i>alternative:</i></p> <ul style="list-style-type: none"> ▪ <i>[Conclusion: The parties did not agree on the inclusion of S’s Standard Terms. Thus, the parties only agreed on the sale of the 50 boxes à 12 bottles of “Saloio Portuguese Deluxe Olive Oil 0.75 liter”]</i> 	<p>1</p>
<p>Total Points Question 2</p>	<p>39.5</p>

3 Question 3 (30 % of total points)

a) Which remedies does B have?

	Points (up to)
<ul style="list-style-type: none"> ▪ The possible remedies of the buyer for breach of contract are listed in Art. 45 CISG: Specific performance claim (Art. 46), Avoidance of contract (Art. 49), Price reduction (Art. 50) as well as damages according to Art. 74. ▪ However, if the risk in respect of the lost goods had already passed to the buyer, he would have no remedies but would have to pay the price (Art. 66 CISG). Therefore, first the passage of risk must be discussed. 	<p>3</p>
<p><u>Passing of risk:</u></p> <ul style="list-style-type: none"> ▪ As a principle, risk passes with delivery at the correct place and time of delivery of the goods. According to the facts of the case the place of delivery was the place of business of the buyer in Switzerland and time of delivery was 31.7.2023. ▪ The seller had assumed the risk of the goods up to the point of time when delivery takes place at the buyer’s place of business (Art. 69). ▪ The flower bulbs that S had intended to deliver to B were destroyed by the fire on 15 July, i.e. before delivery. ▪ As flower bulbs are generic products, the seller can and must procure a replacement elsewhere. There is no indication in the facts that the flower bulbs can no longer be obtained elsewhere on the market. Cf. however the Variation (3.2.) 	<p>2</p> <p>1</p> <p>1</p> <p>1</p>

<ul style="list-style-type: none"> In principle the seller is bound to deliver new goods and carries any additional losses. 	1
Specific Performance Claim	
<ul style="list-style-type: none"> According to Art. 46(1) CISG, the buyer may require performance by the seller unless the buyer has resorted to a remedy which is inconsistent with this requirement. 	1
<ul style="list-style-type: none"> <i>In casu</i>, S does not deliver the contractually agreed flower bulbs on 31 July. There is a breach of contract in the form of non-delivery. The flower bulbs are generic goods and available on the market. B has not resorted to a remedy which is inconsistent with the requirement of performance (no inconsistent-remedy defense). Furthermore, no "defense under national law" according to Art. 28 is apparent. 	2 1 1
<ul style="list-style-type: none"> B's claim for performance has prospects of success. 	0.5
<ul style="list-style-type: none"> Neither substitute delivery (Art. 46(2)) nor repair (Art. 46(3)) are available remedies in this case as the goods have not been delivered. 	1
Price Reduction	
<ul style="list-style-type: none"> If the delivered goods do not conform with the contract, the buyer may reduce the price (cf. Art. 50 CISG). 	1
<ul style="list-style-type: none"> In the present case, there is no lack of conformity of the goods, but a non-delivery. Consequently, price reduction is not possible. 	1
Avoidance	
<ul style="list-style-type: none"> The right to avoid the contract is given according to the prerequisites of Art. 49 CISG. If non-delivery at due date constitutes a fundamental breach right away, the buyer could avoid the contract according to Art. 49(1)(a). If the seller does not deliver the goods within the additional period of time fixed by the buyer (Art. 47(1)) or declares that she will not deliver within the period so fixed, the buyer may avoid the contract according to Art. 49(1)(b). According to Art. 26 CISG, a declaration of avoidance of the contract is effective only if made by notice to the other party. 	2 1
<ul style="list-style-type: none"> <i>In casu</i>, Art. 49(1)(b) can be applied and not Art. 49(1)(a). B granted S an additional period of three weeks on 1st August, one day after the originally agreed delivery date. This is both a timely and a reasonable additional period of time within the meaning of Art. 49(1)(b) in conjunction with Art. 47(1) CISG). S has not delivered within the additional period of time. In the present case, B would have to notify S of the avoidance. 	1 2 1

	1
<ul style="list-style-type: none"> ▪ B has the right to avoid the contract. 	0.5
Claim for damages	
<ul style="list-style-type: none"> ▪ If the seller fails to perform any of her obligations under the contract or this Convention, the buyer may claim damages based on Art. 74 et seq. CISG (Art. 45(1)(b) CISG). 	1
<ul style="list-style-type: none"> ▪ Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract (Art. 74). 	1
<ul style="list-style-type: none"> ▪ The breach of contract does not necessarily have to be fundamental (in the sense of Art. 25) for the claim for damages. 	1
<ul style="list-style-type: none"> ▪ Furthermore, a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated (Art. 77). 	1
<ul style="list-style-type: none"> ▪ S's non-delivery constitutes a breach of contract. According to the facts of the case, B has suffered loss of profit due to non-delivery. 	1
<ul style="list-style-type: none"> ▪ No information regarding the violation of the mitigation duty is given. Art. 77 does not find application. 	1
<u>Exemption from paying damages (Art. 79 and 80)</u>	
<ul style="list-style-type: none"> ▪ However, the seller would be exempt if Art. 79 or 80 CISG apply. An exoneration is only acceptable regarding damages claims (Art. 79(5)). 	1
<ul style="list-style-type: none"> ▪ According to Art. 79(1), a party to the contract is not liable for a failure to perform any of its 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 the conclusion of the contract or to have avoided or overcome it. 	1
<ul style="list-style-type: none"> ▪ The seller bears the burden to prove that the requirements of Art. 79(1) CISG are met. 	1
<ul style="list-style-type: none"> ▪ In principle, the seller bears the risk of procurement and is accordingly also liable for the actions/inactions of her own suppliers. This is her sphere of risk. 	1
<ul style="list-style-type: none"> ▪ Whether the fire was unforeseeable and beyond control is not important under 3.1 as the obstacle could have been overcome by S: <ul style="list-style-type: none"> – The flower bulbs are generic products, the seller can and must procure new goods elsewhere. – There is no indication that the flower bulbs can no longer be obtained elsewhere on the market. S knew already as of 	2

<p>15 July that she could not rely anymore on her supplier and therefore could have bought new goods on the market.</p> <ul style="list-style-type: none"> Since the flower bulbs can be obtained elsewhere on the market, the obstacle is not unavoidable, which is why the seller cannot rely on Art. 79 CISG to be exempted from paying damages. No causation of the non-delivery by B can be deduced from the facts and Art. 80 CISG cannot be applied. 	<p>1</p> <p>1</p>
<ul style="list-style-type: none"> B may claim damages for non-performance from S. 	<p>0.5</p>

b) Can B claim damages from S for non-performance?

	Points (up to)
<ul style="list-style-type: none"> In general, the seller bears the risk of procurement for generic goods until the passage of risk, i.e. she has to obtain new goods. The seller has to also compensate any losses encountered by the buyer due to e.g. a delay in performance. An exception must be made if the goods cannot be procured on the market anymore ('impossibility'). The buyer's claim for performance would be futile. However, this does not mean that the buyer has no damages claim. Only if the impediment leading to the failure to perform was beyond the control of the seller and she 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 such exemption is accepted (Art. 79(1) CISG). 	<p>1</p> <p>1</p> <p>1</p>
<ul style="list-style-type: none"> In the case at hand the fire was an internal one (endogenous). However, S had taken all precautions and also controlled the fire prevention measures taken in advance. Therefore, if the obstacle is considered to be unavoidable for S one could argue that a damages claim would be rejected based on Art. 79(1) CISG. On the other hand, an internal fire at the place of the supplier lies in the sphere of risk of the seller and therefore cannot be enough to exempt the seller from paying damages for non-performance. <p><i>Both answers have been accepted and graded if substantiated</i></p>	<p>2</p> <p>2</p>
<ul style="list-style-type: none"> B can / B cannot claim damages from S. 	<p>0.5</p>

Total Points Question 3	48
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4 Question 4 (25 % of total points)

a) Did S supply conforming goods?

	Points
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there is no such manner, in a manner adequate to preserve and protect the goods (lit. d).	
<ul style="list-style-type: none"> ▪ Whether goods are fit for the ordinary use must be assessed on the basis of the expectations of a reasonable person in the same trade as the seller and buyer. ▪ For generic goods, either average quality or reasonable quality, i.e. orientation towards the justified expectations of the buyer, is taken as a basis. If the goods are resold, they must be at least merchantable. ▪ The ordinary use must be determined in each individual case. ▪ Any particular use based on lit. b does not seem relevant, as the explanation that the German brand enjoys great trust was only mentioned after the performance and therefore not "at the time of the conclusion of the contract" as required by lit. b. ▪ Regarding the application of lit. d two types of packaging can be distinguished here: Packaging as a part of the presentation of the goods and packaging needed for safe transport. ▪ It is sufficient if the goods are delivered in the packaging customary in international trade and are packaged in such a way that they are protected from damage. 	4
<ul style="list-style-type: none"> ▪ S denies that a different name on the bags leads to a different product. After all, the contents of the bags remained the same: both the bags labelled Silberbären and those labelled Silverbears contain the same Maribo gummy bears. ▪ The product is clearly of average/reasonable quality, as only the labelling or design is slightly different. ▪ The fact that the German brand enjoys a high level of trust might influence the merchantability. However, S with domicile in Europe, has probably no knowledge of the popularity of the German brand in West Africa. S was also not informed of such importance. ▪ The fact that Silberbären and Silverbears are registered as separate brands does not change this. Both refer to the same product. ▪ Furthermore, the products are also contained in the manner usual for such goods, as they are in bags that were adequate to preserve and protect the gummy bears. English language on the packaging is customary in international trade. <p><i>Students are granted the full score even if they conclude based on the same legal explanations that the delivered goods were non-conforming.</i></p>	5
<ul style="list-style-type: none"> ▪ S supplied conforming goods. 	0.5

b) Has B fulfilled the prerequisites to exercise his remedies?

	Points
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<ul style="list-style-type: none"> ▪ According to Art. 38 the buyer must examine the goods, or cause them to be examined for defects, within as short a period as is practicable in the circumstances. ▪ The examination has to be conducted within as short a period as is practicable in the circumstances. After receipt of the goods, the buyer needs to examine inter alia the outer appearance and check the features of the delivered goods. ▪ In case of hidden defects, the period starts when signs of the lack of conformity become evident. ▪ The relevant period depends on the individual case. Especially the complexity of the goods needs to be considered. 	<p>1</p> <p>1</p> <p>1</p> <p>1</p>
<ul style="list-style-type: none"> ▪ In the present case, the alleged defect is regarding packaging. This concerns the outer appearance and should be noticed within a short period of time. ▪ B should have discovered the defect as soon as he received the delivery, i.e. on 19 September 2019. The period of examination could therefore not have lasted longer than a few days at most. 	<p>2</p>
<ul style="list-style-type: none"> ▪ If the product is indeed defective, the buyer must give notice of the lack of conformity within a reasonable time after he discovered it or ought to have discovered it according to Art. 39(1). ▪ The length of the period depends on the circumstances. Circumstances that need to be taken into account are such matters as the nature of the goods, the nature of the defect, the situation of the parties and relevant trade usages. ▪ In any event the buyer loses the right if he doesn't give notice at the latest within a period of two years from the date on which the goods were actually handed over to the buyer (Art. 39(2)). ▪ If the buyer fails to give the notice on time, he loses the right to rely on a lack of conformity and therefore all remedies. ▪ Only if the exceptions of Art. 40 or 44 CISG are applicable the buyer can make use of (some) remedies despite an untimely notification. 	<p>1</p> <p>1</p> <p>1</p> <p>1</p> <p>1</p>
<ul style="list-style-type: none"> ▪ <i>In casu</i>, B informed S on 18 February 2020 that the products were non-conforming. This is 5 months after receipt of the products. ▪ Given that the alleged non-conformity could have been ascertained without any detailed examination just by looking at the goods once, a notification 5 months after delivery is clearly too late. ▪ The exceptions of Art. 40 or 44 CISG do not apply to the case at hand. S never assumed that the packaging should contain the word "Silberbären" and therefore was not aware of any breach of contract (Art. 40). Furthermore, there seems to be no reasonable excuse for the failure to give the required notice (Art. 44). 	<p>1</p> <p>1</p> <p>1 AP</p>
<ul style="list-style-type: none"> ▪ B has waited too long to notify S and has therefore lost the right to rely on a lack of conformity. 	<p>0.5</p>

c) Which remedy is B exercising? Examine, if this claim can be successful.

	Points
<ul style="list-style-type: none"> In a letter dated 25 August 2020, S is asked to deliver the correct product within four weeks, therefore B claims substitute delivery according to Art. 46 (2). 	1
<ul style="list-style-type: none"> Art. 46(2) demands for the following prerequisites: There must have been a delivery of non-conforming goods (Art. 35-37). The goods need to be examined correctly and the non-conformity must have been notified in time. Further the non-conformity must constitute a fundamental breach according to Art. 25: Non-performance must result in such detriment to the other party as to substantially deprive them of what they are entitled to expect under the contract (seriousness of the breach), unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result (foreseeability of the consequences). In determining the fundamentality the “reasonable use test” as well as the right to cure of the seller (Art. 48) need to be taken into consideration. Further, the buyer needs to demand substitute delivery within a reasonable time. Finally, according to Art. 82(1) the buyer loses the right to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. 	1 3 1 1
<ul style="list-style-type: none"> The students are expected to discuss whether the English version of labelling would constitute a fundamental breach although the content of the packages is exactly as contracted for. In any event, B did not request substitute delivery within a reasonable time. 	2
<ul style="list-style-type: none"> B is not entitled to substitute delivery. 	0.5

Total Points Question 4	42.5
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