

EVALUATION GUIDELINES - Written examination**EXC 21211
International Commercial Law****Department of Law and Governance****Start date:** 23.05.2019 Time 09:00**Finish date:** 23.05.2019 Time 12:00

For more information about formalities, see examination paper.

Question 1 counts for about 30 %, question 2 for about 20%, and question 3 for about 50 %

QUESTION 1. LEGAL DISPUTES IN INTERNATIONAL BUSINESS

- a. Explain what arbitration is and give an outline of the procedure from the time a legal dispute arises and until a final arbitration award (arbitration judgement) is given (rendered).

Arbitration is a private method for dispute resolution, and will apply when agreed by the parties, either in a contract or after the dispute arose. The arbitral award will be binding on the parties, and as a main rule that it can not be appealed. Many countries have laws regulating the formal procedure of the arbitration. There should also be a jurisdiction and applicable law clause in the contract.

When a legal dispute has arisen, and the parties are not able to agree on an amicable settlement, the arbitration clause will come into effect. As of the procedure, the parties must agree on time and location. The parties will appoint the arbitrators and will be represented by lawyers in the proceedings. The claim is submitted to the arbitrators. There will be an exchange of pleading and documents supporting the claim and or counter claim of the parties. The arbitration hearing takes place according to the rules applicable and the dispute will be presented to the arbitrators, who will review the case and pass an arbitral award.

- b. Describe the most important differences between arbitration and legal proceedings for the courts.

Arbitration is a private method of dispute resolution, and the arbitrators are chosen by the parties. This procedure is different from dispute resolution in the courts, as the judge(s) are appointed by the court and not by the parties. The parties to an arbitration can agree that neither the arbitration nor the arbitral award will be known to the public. This is not an option when it comes to court procedures. A court judgment can also be appealed to a higher court, whereas an arbitration judgment cannot. Arbitration will take place when agreed by the parties, but when there are court proceedings, the court will decide the time for the hearing.

- c. What is meant by "enforcement" of an arbitration award or a judgement from the court system? Do also explain the procedure undertaken when enforcing an arbitration award or a

Enforcement means that if either of the parties do not pay or act according to the judgment, the other party may enforce the judgment through the courts. Enforcement of an arbitral judgment and court judgments may take place in other countries than where the proceedings took place. Where it may be enforced, depends on local laws as well as international conventions. Arbitral judgments can be enforced in countries having ratified the New York Convention (The Convention on the Recognition and Enforcement of Foreign Arbitral Awards) There are fewer countries that will accept to enforce other country's court judgments than arbitral judgments. The candidates may also refer to the Lugano Convention. The procedure will be according to the laws of the country where enforcement takes place.

- d. Explain the phrases "jurisdiction" and "choice of law"

Jurisdiction means the place where court proceedings shall take place. Choice of law means the law that will be applied when interpreting the contract.

- e. What is “mediation”? Explain the purpose of mediation.

Mediation is negotiation facilitated by a person trusted by both parties. The role of the mediator is to help the parties settling the claim. Mediators do not take side, and the mediation is confidential. If an agreement between the parties is not reached, the parties may still go to court or arbitration.

QUESTION 2. NEGOTIATIONS OF INTERNATIONAL CONTRACTS

- a. Why is it more difficult to negotiate an international contract than a national contract?

There are several factors making it more difficult to negotiate an international contract. The students should mention and elaborate on language challenges, cultural issues, ethical issues political risks, different national laws, different currencies etc.

- b. Give an outline of how a complex international contract normally will be negotiated.
Describe the key elements to consider during the negotiations
- **The key elements may vary according to the type of contract. The parties will connect and start negotiations. The parties must be clearly identified when negotiating. Further, they will draft the commercial requirements for the intended business. The following stages will be:**
 - **The negotiation stage. There may be documents signed such as a "Letter of Intent, MoU", " or similar where the parties agree to negotiate exclusively with the other party.**
 - **The drafting stage**
 - **The significance of jurisdiction, choice of law clauses and method of dispute resolution.**
 - **The final signing of the contract**
 - **Implementing and fulfilling the contract**
 - **Completion or termination**

These factors can be further elaborated on.

- c. Suggest what the key clauses in an international sales contract for the sale of 20.000 standard dishwashing machines from a seller in Singapore to a buyer in Germany should contain.

Identification of the parties.

1. **Product specification**
2. **Price**
3. **Delivery conditions (INCOTERM)**

- 4. Packaging**
- 5. Means of payment**
- 6. Date of payment**
- 7. Delivery period**
- 8. Delivery delays**
- 9. Contractual Responsibility**
- 10. Patents, Trade Marks and Industrial Property Rights if any**
- 11. Certification of product quality**
- 12. Certification of product origin**

QUESTION 3. STAVANGER SHIPYARD – HAMBURG MACHINERY

Stavanger Yard (SY) on the western coast of Norway producing small leisure boats for the international and national market. Their customers are leisure boat dealers in several countries.

In October 2018 SY found out that they needed to replace several parts of their production system and production machinery. If these parts were not replaced within about January 15th, it was a risk that the production system could collapse with the result that several parts of the systems could be damaged and the production would stop. Some of the parts to be replaced had to be specially designed for SY's machines.

15. November 2019 SY entered into a contract with Hamburg Machinery (HM), a German manufacturer of production equipment of the type used by SY. The main terms of the contracts were:

- a. The parts included in the contract were designed and manufactured on the basis of drawings and specifications provided by SY.
- b. The total contract price was EUR 1,2 million
- c. The goods should be livered at SY's site in Stavanger during the period 15th December – 20th December. The transportation from Hamburg to the site should be arranged for and paid by HM.

During the negotiations SY emphasized that it was crucial that the parts were delivered in time as a delay would have the effect that the entire production would have to be shut down for a period, which again could result in loss of sales to customers. It was also explained that it would take about 10 – 12 days to install the new parts into their production systems, maybe even longer time.

On 5th December SY received an email from HM reading as follows:

"We now realize that the agreed delivery date is too optimistic and that we will deliver the products too late. Delivery will be made at about 15th January. We assume that this is ok for you".

The email was discussed by the top management of SY and it was decided not to reply to the mail for the time being. However, on 15th December they sent the following email to HM:

"With reference to your email dated 5th December and our contract, we hereby declare avoidance of our contract"

HM replied the same day and argued that a delay of about 25 days did not give SY the right to declare avoidance and at any rate, they had lost the right to do so as they did not declare avoidance just after the receipt of the mail dated 5th December. Furthermore it should be taken into account that the parts were specially made and designed for SY. It is more difficult to void contracts when the products have been custom made.

Question 3a.

Does CISG apply to the contract between SY and HM? Does CISG apply the sales contracts between SY and their customers abroad? Does CISG apply to the contracts between SY and their customers in Norway?

CISG will apply according to Art. 1. It is a sale, the sale is commercial, and the parties are residing in different states. Both states are contracting states.

Question 3b

If you were asked to make a reference in the contract between SY and HM to a specifics Incoterm, which term would you refer to?

It is agreed that the buyer, HM, have to arrange for transportation from Hamburg (assumed that it is at the factory of HM), the term DDP could be used. The seller, HM, is then responsible for delivering the goods to the named place in the country of importation, including all costs and risks in bringing the goods to import destination. This includes duties, taxes and customs formalities

Question 3c

Discuss if SY have the right to declare avoidance of the contract with HM.

Below you should assume that SY and HM agreed that the delivery should be made and that, but that all remedies apart from the right to declare avoidance were maintained.

The production was closed down 10th January in order to be sure that no damage would be inflicted to the production system. The new parts arrived 17th January. 30. January the new parts were installed and the production started.

As a result of the shut down of the production, SY lost a sales contract with a foreign customer as the boats ordered by this customer would be delivered too late. The profit for this contract would have been EUR 40.000. The customer was an important customer for SY and this customer also stated that they now had problems with their own customers resulting from the problems and that they would never do business with SY again.

There is a breach of contract on the part of HM. It was a clear agreement the products should be delivered between 15th and 20th December. A question to be raised is whether or not SY had agreed to a new delivery date by not responding to the mail. However, according to Art 18 (1) "A

statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.”

It should be considered whether SY lost their right to void the contract due to late notification. Reference is made to Art. 39.1. The buyer must notify the seller within “reasonable time”. SY did not reply to the last email from HM until 10 days later. Knowing the products were in production, it is fair to say that the notification was too late. However, another conclusion should be accepted as long as the issue is discussed.

The products were delivered late, and it was a breach of contract on behalf of the seller (HM). The starting point is Art 30, which states the goods must be delivered according to the contract.

Remedies for breaches of contract by the seller is in Section III in CISG.

YS declare voidance of the contract. Reference is made to ART 49, giving the buyer the right to void the contract if it is a fundamental breach of contract. What is to be considered a fundamental breach is laid out in Art 25, which reads”

“A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.”

It is not the case here, since the products were both tailor made and it must be assumed that the products were needed for the production of future products by SY.

With reference to Art. 49, the buyer loses the right to claim voidance if he has taken delivery of the goods, even if they did so within reasonable time after becoming aware of the breach. See also Art 72. If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

In this case, it should be concluded that there is no fundamental breach of contract entitling SY to void the contract since the delivery had taken place, and the products were incorporated into the machinery. It is therefore not possible for the buyer to return the products.

Question 3d

Discuss if there are any remedies available for SY under which they may claim compensation from HM for (a) the loss of the profit of EUR 40.000 and (b) the loss of future profit by losing their important customer.

- a) This question is answered with reference to Art. 74. The seller is liable for the loss of profit and other costs due to the delay of the goods and the stop in production. Sy lost profit on the sale to their customer. HM is liable for compensating SY for EUR 40.000.
- b) The other claim is for anticipated future income loss, since they lost the customer altogether. It should be discussed whether this claim is too remote. According to Art. 74,

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. It is foreseeable that the contract lost due to the delay is the liability of HM, but not that the customer was lost altogether.

- c) **It is foreseeable for HM that a contract was lost due to the delay. It can though be argued that it was not foreseeable that an important customer was lost due to the delay. The conclusion is that this claim will not be the liability of HM.**

Question 3e

Assume (for this question only) that the contract between SY and HM contains detailed regulations of the right to declare avoidance of the contract and that several of these clauses are in conflict with the articles in CISG. Which set of rules would prevail, the clauses in the contract or the articles in CISG?

CISG is not mandatory, reference made to Art. 6 and Art .12. This means they can deviate from the rules.