

**EVALUATION GUIDELINES - Written examination****EXC 21211  
International Commercial Law****Department of Law and Governance****Start date:** 31.05.2017 Time 09:00**Finish date:** 31.05.2017 Time 12:00

For more information about formalities, see examination paper.

## Exam commercial law spring 2017 answers

### Question 1 (10%)

a)

As a main rule, the parties may choose the applicable law and jurisdiction. However, the choice can be restricted by overriding national mandatory rules.

b)

It is not the same. The applicable law is the law that will govern the contract. Jurisdiction means the place chosen or applicable for a dispute resolution.

### Question 2. (10%)

International sales pose many risks that domestic sales or sales “over the counter” do not represent. In short, the following can be mentioned: transportation risk (which also applies to domestic sales), credit risk (which also applies to domestic sales), currency risk, credit risk, political risks, jurisdiction issues, language problems, cultural difficulties etc. It should be awarded if the students elaborate on the various risks.

### Question 3. (10%)

Numerous covers are available in the market for cargo insurance. Different conditions may be used for different types of cargo. Cargo insurance normally covers cargo damage and loss from door to door, subject conditions in the policy. The insurance generally covers cargo value + 10% anticipated profit + costs + salvage + contribution in general average.

Who should take out cargo insurance depends on who is a risk subject INCOERMS. Most covers are on an all risk basis and covers physical loss of or damage to the cargo. The students have got a copy of the Institute Time Clauses Cargo (ITCC) and will likely refer to this.

#### Question 4 (10%)

Exporter Ltd must deliver the goods, as described in the sales contract, within the agreed time. Exporter Ltd must also arrange for export clearance and other documents needed for the shipment of the goods. They must also buy cargo insurance for the benefit of the buyer.

In order for the LoC to be established and enforced, The Bill of Lading issued by the ship must be clean. Packing list, invoice and evidence of cargo insurance must also be presented to the bank.

When using the CIF term, the seller delivers when the goods pass the ship's rail in the port of shipment. The seller must pay the costs and freight necessary to bring the goods to the named port of destination BUT the risk of loss or damage to the goods, as well as any additional costs due to events occurring after the time of delivery, are transferred from the seller to the buyer.

#### Question 5 (10%)

Competition rules aim at protecting consumer interests. Competition policy is applying rules to make sure that companies compete with each other and, in order to sell their products, innovate and offer good prices to consumers. It regulates competition, not competitors. It is also merger control, preventing companies from becoming too dominant and thus preventing competition.

#### Question 6

a)

Article 1. in CISG states that a commercial international sale of goods between parties residing in different places will be governed by CISG if both parties have ratified the convention. In this case, there is a sale, the paprika powder is goods, and it was a commercial sale. Both countries where the parties resided have ratified CISG. It will therefore apply.

b)

Article 39 (1) in CISG requires the buyer to put forward a claim within reasonable time if there is nonconformity of the goods. The written notification was sent on September 20<sup>th</sup>, three months after the delivery date. However, the seller was notified by the phone call on July 20<sup>th</sup>. There is no requirement for the notification being in writing, so yes, the notification was given within reasonable time.

c)

The starting point is whether it was conformity of the goods subject Article 35(1) in CISG. It can be concluded that the contract specifically required the goods to be steam treated. Both the buyer and the seller were experienced operators in the field and the seller ought to have considered in the light of the Directive that even in the absence of a specific contractual exclusion radiation treatment was out of the question. So yes, there is nonconformity of the goods.

d)

The buyer wants to avoid the contract. In order to avoid the contract, there must be a fundamental breach of contract. According to Art. 49.1 and 51.1a the buyer can require the contract avoided if the failure by the seller to supply conforming goods amounts to a fundamental breach of contract. What constitutes a fundamental breach of contract is defined in Art 25. A breach of contract 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. This is 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. The seller was a professional, and the conclusion is that he should have been aware of the problem with radiation treatment. The buyer can declare the contract avoided as there is a fundamental breach of contract.

e)

Reference is made to Art. 74. In determining damages, the starting point is the economic position where the aggrieved party would have been if the contract had been performed correctly. Hence, the amount of damages can be higher than the face value of the contract and include loss of profit. The seller knew that the buyer would incorporate the powder into its own products, and sell it onwards to the buyer's customers. The seller must have understood, at the time the contract was entered into, that the buyer would not be able to deliver to its customers, and that such a breach of contract would cause damage to the buyer.

The buyer can claim an anticipated loss of profit in addition to being refunded the purchase sum. The fact that such a resale had not yet been evidenced in a contract will not be relevant. Exemption from liability is laid out in article 79, the application of which is not possible in these circumstances, because the seller ought to have known about the nonconformity and problems of being able to resell the paprika powder. A reasonable sum covering anticipated loss of profit should be awarded. The cost of destruction of the paprika powder can also be claimed from the seller.

The next question is whether the loss could have been mitigated. Reference is made to Art. 77. There is a failure to mitigate if the buyer does not take reasonable measures to mitigate the loss. It cannot be required as reasonable that the buyer could have found buyers outside of Europe and thereby having mitigated the loss. Thus, the buyer cannot in this case be required to have found buyers outside Europe, and there is no failure to mitigate the loss.

