

EVALUATION GUIDELINES - Written examination**EXC 21211
International Commercial Law****Department of Accounting, Auditing and Law****Start date:** 05.06.2015 Time 09:00**Finish date:** 05.06.2015 Time 12:00

For more information about formalities, see examination paper.

Part 1

1. Here the students should mention art. 25 as to fundamental breach, and also mention that a breach of contract occurs when there is a lack of conformity with the goods, packaging, documents, delivery etc. As to the remedies, the students should mention that a fundamental breach (besides all other remedies) also gives a buyer the right to avoid the contract (art. 49) and the right to claim substitute goods (art. 46(2)).
2. The doctrine of frustration is a Common law doctrine which acts as a device to set aside contracts where an unforeseen event either renders contractual obligations impossible, or radically changes the party's principal purpose for entering into the contract. The students should mention that invoking the doctrine is only for special circumstances. As an example; the doctrine can be invoked if the goods in a contract perish before the risk passes to the buyer.
3.
 - a) Yes, art 11 prescribes that a contract of sale can be concluded in any form. The rules on offer and acceptance are also followed in this case.
 - b) The students should mention Art 19 (2) which states that a reply to an offer that contains additional terms which do not materially alter the offer is an acceptance. However, as stated in art 19 (3), terms that regards settlement of disputes materially alters an offer. The arbitration clause is therefore not part of the agreement.

Part 2

4a) CIF: The seller must pay the cost, insurance and freight required for bringing the goods to the named port of destination. The risk of loss or damage are transferred from seller to buyer when the goods pass over the ship's rail in the port of shipment. The seller is required to clear the goods for export.

DDP: The seller is responsible for delivering the goods to the named place in the country of importation, including all costs and risks in bringing the goods to the import destination. This includes duties, taxes and customs formalities.

The difference for Super salmon is that Super salmon with the chosen INCOTERM only will have to pay for the goods to reach the named port, not the named destination. Further on; the risk will pass when the goods are loaded over to the ship, not when they arrive at the destination. However; Super salmon will have to insure the goods for the carriage to the named port with the chosen INCOTERM.

4b) Can the director of Fishy avoid the contract due to the decrease in salmon prices?

Applicable law: art. 1(1)(a) CISG, both are businesses (meaning it is commercial), are situated in contracting states of the CISG and the contract is for sale of goods. CISG applies to the contract of sale.

The question is if the decrease in salmon prices gives Fishy legal grounds to avoid the contract with Super salmon. The students can mention that avoidance of contract is hard on the seller and they

should mention that it needs to be a fundamental breach of contract for the buyer to be able to avoid the contract, art. 49, ref art. 25. A rise in prices that makes the contract less advantageous is not a fundamental breach (not even a breach), so the contract can not be avoided. Further on there are nothing in the facts that suggest that the contract was not legally entered into, ref. CISG Part II.

4c) Is notice about the poor quality of the salmon given in a timely manner?

The question is whether Fishy loses its right to rely on the breach of contract by waiting for a week to give Super Salmon notice. The students should not discuss whether there is a lack of conformity in this part, just whether notice was given in a timely manner. If the students mix in the discussion on lack of conformity in this part, they should not get a minus for it as long as they solve both questions in a good way.

Art 39 (1) states that the buyer must give notice of lack of conformity within a reasonable time. The students should discuss whether one week is within reasonable time. This have been discussed in class, and the students should conclude that Fishy has complied with (1). The students should get a plus for mentioning that Fishy is also within the absolute time limit in art. 39 (2). Some students might also mention art. 38, this is ok.

4d) If notice is given too late, what are the consequences?

The students should refer to art. 39 (1) which states that the buyer loses his right to rely on the lack of conformity. They should also mention that this means that the buyer will not be entitled to make use of the remedies for breach of contract in the CISG. Some students might also mention art. 44 (reasonable excuse for failure to give notice). This is not relevant here, but it should give a small plus for the students that mention it. Some students might also mention art. 49 (2) which has the same regulation as to "reasonable time". This is ok.

4e) Did Fishy have a duty to sell the salmon as dog food? Can Fishy get damages for the cost of throwing away the salmon?

The students should refer to Section VI of the CISG. More specific they should refer to art. 88 (2) that states that the buyer should sell goods that are subject to rapid deterioration. This means that Fishy should have sold the salmon as dog food. Regarding damages for the cost of throwing away the salmon the students should conclude that Fishy breached the duty to preserve the goods by selling them, and can therefore not get any damages for throwing away the salmon. Some students might mention that if Fishy sold the salmon they could get covered their reasonable expenses for selling the salmon. This should give the students a plus.

4f) Can Fishy avoid the contract for half of the delivery?

The students should refer to art. 49. Good students will also refer to art. 51 that states that art. 49 also will apply to half of the delivery. The students should discuss whether the breach is fundamental with reference to art 25. If the students fail to discuss art. 25, they should get a minus. As to the discussion, the students should put weight on that the salmon should have been suitable for sushi and that the price was a bit over ordinary market price (because of the quality) at the time of the contract. Further on, the salmon was not safe for human consumption. Fishy can avoid the contract for the salmon that was of poor quality.

