

ANSWERS

I. General Remarks on Grading

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

II. Model Answers

1 Question 1 (20%)

A Belgian seller and a German buyer concluded an oral contract for the sale of a horse. The animal was to be delivered 'free farm'.

a) Is the CISG applicable in this case?

	Points (up to)
<ul style="list-style-type: none">▪ The CISG's scope of application is defined by the territorial-personal and the material scope of application.	2
<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"><ul style="list-style-type: none">– First, the sales contract must be of an international nature.	1
<ul style="list-style-type: none"><ul style="list-style-type: none">– Second, a connection to a Contracting State pursuant to either Art. 1(1)(a) (autonomous application) or Art. 1(1)(b) (application through conflict of law rules) 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">▪ Here, both Parties have their places of business in different states (i.e. Belgium 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 (i) that the parties' places of business are in different Contracting States at the time of conclusion of the contract (in such cases, the CISG is applied autonomously, i.e. without recourse to the conflict of law rules of the	2

seized court) or (ii) that the rules of private international law (conflict of law rules) of a Contracting State's court lead to the application of the law of a Contracting State.	
<ul style="list-style-type: none"> Here, both Germany and Belgium are Contracting States, which is why CISG is applied autonomously. 	1
<ul style="list-style-type: none"> The CISG is applicable to “contracts of sale of goods”, but the convention defines neither the term “goods” nor “contracts of sale”. Both terms are to be interpreted autonomously (Art. 7(1)). 	
<ul style="list-style-type: none"> Only objects which are movable and physical at the time of delivery are understood to be goods in the meaning of the CISG. 	1
<ul style="list-style-type: none"> Here, the horse is a good in the sense of the CISG, because it is movable and physical at the time of delivery. 	1
<ul style="list-style-type: none"> A sales contract under CISG is understood a contract obliging the seller to deliver goods, hand over the documents related to same and transfer the property in the goods; the buyer is obliged to pay the price for the goods and to take delivery of them. 	2
<ul style="list-style-type: none"> Here, the seller is obliged to deliver the horse, while the buyer is obliged to pay the price for the horse and take delivery. The contract is therefore a contract of sales pursuant to the CISG. 	1
<ul style="list-style-type: none"> None of the exceptions pursuant to Art. 2 are relevant in the present case. In particular, the seller could reasonably infer that the horse would not be used for private purposes, given that it had to be delivered to a farm. 	2
<ul style="list-style-type: none"> For the above reasons, the CISG is applicable. 	1

b)1) Where is the place of delivery?

	Points (up to)
<ul style="list-style-type: none"> The contract between the seller and the buyer was concluded orally and does not explicitly determine the place of performance. 	1
<ul style="list-style-type: none"> The parties agreed on delivery «free farm», but this simply means that the seller was to bear the costs of transport. 	0
<ul style="list-style-type: none"> Under Art. 8(1) and (2), a contractual clause is to be interpreted according to the parties’ hypothetical intent or, in case that intent cannot be determined, according to the understanding that a reasonable person of the same kind would have had in the circumstances. 	1
<ul style="list-style-type: none"> In the present case, there are insufficient grounds to determine the 	1

hypothetical intentions of the parties. Therefore, the clause «free farm» needs to be interpreted under objective criteria.	
<ul style="list-style-type: none"> However, there are no objective criteria which could decide the place of delivery in the present case. Thus, the general principles of Art. 31 govern. 	2
<ul style="list-style-type: none"> Art. 31(b) and (c) regulate the buyer's duty to collect the goods, whereas Art. 31(a) specifies the seller's obligation to deliver, if the contract involves the carriage of the goods, as complied with when handing the goods over to the first carrier for transmission. 	1
<ul style="list-style-type: none"> Thus, the provisions of the CISG set the general principle that the place of performance for the obligation to deliver is the seller's place of business, as the parties did also not agree on the seller's duty to transmit the horse to the buyer, but only that that the seller has to bear the relevant costs. 	1

b)2) When does the risk pass to the buyer?

	Points (up to)
<ul style="list-style-type: none"> As set out in b)1) above, the place of delivery is at the seller's place of business. Accordingly, pursuant to Art. 69(1), the risk passes with the taking over of the goods by the buyer or the carrier hired by the buyer, thus, with the change of factual control over the goods (Art. 69(1) first alternative) [note: if the place of delivery was determined differently under b)1) the corresponding passage of risk analysis for that place of delivery is credited with full points] 	1
<ul style="list-style-type: none"> Here, the parties agreed on delivery «free farm». It is questionable whether they intended to also agree on a change in the passage of risk. 	1
<ul style="list-style-type: none"> Under Art. 8(1) and (2) CISG, a contractual clause is to be interpreted according to the parties' hypothetical intent or, in case that intent cannot be determined, according to the understanding that a reasonable person of the same kind would have had in the circumstances. 	1
<ul style="list-style-type: none"> In the present case, both results can be argued with good grounds. Accordingly, both results, if based on good reasons, can be argued [note and are credited with full points] 	2

b)3) Who has to carry the transportation costs?

	Points (up to)
<ul style="list-style-type: none"> ▪ The CISG does not provide for rules governing the expenses of delivery. However, following Article 7(2) CISG, each party must – as a general rule – bear the costs of his/her own performance. Therefore, unless otherwise agreed, the seller must bear all transportation costs to the place of delivery and the buyer all transportation costs from the place of delivery (here: the seller's place of business). 	2
<ul style="list-style-type: none"> ▪ The parties are free to – expressly or impliedly – to agree on who has to bear the costs. 	1
<ul style="list-style-type: none"> ▪ Here, the Parties agreed on delivery "free farm" which is an explicit agreement regarding the costs for transportation. 	1
<ul style="list-style-type: none"> ▪ Accordingly, the seller has to bear the costs until the horse reached the farm. 	1

Total Points Question 1	34
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2 Question 2 (30%)

a) Is the CISG applicable in this case?

	Points (up to)
<ul style="list-style-type: none"> ▪ Reference to Question 1 regarding the CISG's scope of application is defined by the territorial-personal and the material scope of application [Note: no points for general answers regarding the territorial-personal and material scope of application, but points for reference to Question 1. If the scope is only defined in Question 2, the relevant points of Question 1 are granted here]. 	1
<ul style="list-style-type: none"> ▪ The first question is, whether the Parties concluded a valid choice of law agreement in the standard conditions of sale. 	0
<ul style="list-style-type: none"> ▪ Given that both parties have their place of business in a Contracting State, the CISG applies, with regard to the question of whether the standard conditions of sale have been validly concluded (Art. 14 and Art. 18). 	1
<ul style="list-style-type: none"> ▪ Here, the question is whether the parties validly agreed on the law of Switzerland as the applicable substantive law. An agreement on the law of Switzerland would include the CISG, i.e. render the CISG applicable in the case at hand. 	1

<ul style="list-style-type: none"> Here, the reference to the seller's standard conditions of sale was only included in the written order confirmation, i.e. after the conclusion of the sales contract. 	1
<ul style="list-style-type: none"> The standard conditions of sale contain changes to the extent of one party's liability and a choice of law/jurisdiction clause. These changes constitute material alterations in the sense of Art. 19(3). The purported inclusion of the standard conditions of sale therefore amounts to a counter-offer. 	2
<ul style="list-style-type: none"> Here, there are no indications that the buyer expressly accepted the counter-offer. Rather the seller remained silent. 	2
<ul style="list-style-type: none"> Silence or inactivity alone do not constitute acceptance (Art. 18(1) second sentence). Silence in response to an offer may only be taken as acceptance in context with further relevant circumstances if this is justified on the basis of the principle of good faith 	2
<ul style="list-style-type: none"> However, the counter-offer can be accepted by conduct. Acceptance by conduct consists of an implicit indication by the offeree of its acceptance of the offer. Conduct equivalent to an acceptance may be seen in the acceptance of the goods. 	2
<ul style="list-style-type: none"> Here, the buyer accepted the goods. This may be seen as having accepted the counter-offer as per the written order confirmation. [Note: also the conclusion that silence does not amount to a confirmation can be correct and leads to full points] 	1
<ul style="list-style-type: none"> However, the counter-offer only relates to the inclusion of the standard conditions of sale. The inclusion of standard conditions of sale follow specific rules. 	1
<ul style="list-style-type: none"> For a valid incorporation, the offeree must have known or could not have been unaware of the offeror's intent to include the standard terms into the contract at the time of contract conclusion (Art. 8(1)), or this must be the understanding that a reasonable person of the same kind as the offeree would have had in the same circumstances (Art. 8(2)). 	2
<ul style="list-style-type: none"> This imposes on the offeror of standard terms two specific requirements: Firstly, any contract offer must include a clear reference to the standard terms the offeror intends to incorporate into the contract. Secondly, the offeror must send the standard terms to the offeree or make them otherwise available (“making available test”) 	2
<ul style="list-style-type: none"> Standard terms available only online have effect under the condition that the offer clearly refers to the standard terms and the URL where they may be found and that based on the circumstances (e.g., 	2

the offeree's use of the Internet in prior communications), the offeror may rely on the fact that the offeree can easily download, print and take note of the standard terms.	
<ul style="list-style-type: none"> Here it is unclear whether the reference to the seller's website included the URL. Taking into account all circumstances, there are no sufficient grounds to conclude that the standard conditions of sale were validly included. [note: with good arguments also the contrary can be concluded and should be awarded with full points.] 	1
<ul style="list-style-type: none"> Accordingly, the choice of law clause included in the standard conditions is not binding. Therefore, the CISG applies in accordance with Art. 1.1(a). [Note: if the conclusion above was that the standard conditions were validly included, the CISG would still be applicable by way of Art. 1.1(b) as part of Swiss law] 	2

b) What are the buyer's remedies?

	Points (up to)
<ul style="list-style-type: none"> The seller must deliver goods which conform with the contract. If it fails to do so, it will constitute a breach of contract under Art. 35, and the buyer will be entitled to remedies under Art. 45 et seq. But the buyer must first examine the goods and give a timely notice (Arts. 38 – 40 and 44). 	2
<ul style="list-style-type: none"> According to Art. 38(1) the buyer has to examine the goods within as short a period as practicable in the circumstances. The starting point is usually the time of delivery. 	1
<ul style="list-style-type: none"> In the case at hand, the buyer detected the non-conformity within three days of the delivery. This is within the required timeframe for examination. 	1
<ul style="list-style-type: none"> In case of non-conformity, notice has to be given to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered or ought to have discovered the non-conformity (Art. 39). 	1
<ul style="list-style-type: none"> In the case at hand, the buyer gave immediate notice. This is within the required timeframe for notification. 	1
<ul style="list-style-type: none"> Given that the seller has delivered goods which are not in conformity with the contract (Art. 35) and that the buyer gave timely notice (Art. 39), the buyer has a claim for subsequent performance in the form of a replacement delivery or repair (Art. 46(2) and (3)). Alternatively, the buyer may opt for a reduction of the purchase price (Art. 50). In cases where the seller has committed a fundamental breach of contract (Art. 25) the buyer has the right to 	5

<p>avoid the contract (Art. 49(1)(a)). Finally, the buyer can set the seller an additional reasonable period of time for performance. If the seller fails to perform within such reasonable period of time, the buyer obtains an (additional) right to declare the contract avoided (Art. 47). In addition to above remedies, the buyer can claim damages (Art. 74).</p>	
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c) Can the buyer avoid the contract?

	Points (up to)
<ul style="list-style-type: none"> ▪ The buyer has an immediate and unconditional right to avoid the contract in case of a fundamental breach of contract. 	1
<ul style="list-style-type: none"> ▪ Whether the violation of the obligation constitutes a fundamental breach of contract is determined according to Art. 25. Under that provision, the decisive question is whether the breach of contract is of such seriousness that it substantially deprives the buyer of what he could expect from the contract, from an objective point of view. 	2
<ul style="list-style-type: none"> ▪ If the non-conformity can be repaired and the seller is prepared to repair the goods, and the repair is reasonable for the buyer (cf. Art. 48), no fundamental breach of contract exists. 	1
<ul style="list-style-type: none"> ▪ In the present case, the non-conformity seems to be repairable with the assistance of outside experts. Therefore, the threshold of a fundamental breach is not reached and the contract cannot be avoided by the buyer. 	2

d) Was the choice of forum clause validly concluded?

	Points (up to)
<ul style="list-style-type: none"> ▪ Choice of forum clauses are often part of an international sales contract. 	
<ul style="list-style-type: none"> ▪ According to Art. 4 CISG, the CISG only governs the formation of the contract of sale as well as the rights and obligations of the seller and the buyer arising from the sales contract. 	1
<ul style="list-style-type: none"> ▪ It is assumed that the formation of the contract, including the arbitration clause, falls within the scope of application of the CISG except for the formal validity of the arbitration agreement (cf. Art. 4(a)). This follows particularly from Article 19(3) CISG, according to which the “settlement of disputes” contained in a declaration of acceptance materially alters the offer and thus turns it 	2

into a counteroffer.	
<ul style="list-style-type: none"> Therefore, the formation of choice of forum clauses is governed by the CISG. 	1
<ul style="list-style-type: none"> For the valid inclusion of the choice of forum clause in the sales contract, the arguments of the inclusion of the choice of law clause apply <i>mutatis mutandis</i>. [Note: the reference to the explanations under the choice of law question is awarded with points, but no additional points for repeating the same explanations here] 	1

Total Points Question 2	45
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3 Question 3 (30%)

What are the parties' respective rights and remedies?

	Points (up to)
<ul style="list-style-type: none"> The Parties concluded an international contract for the sale of goods. The seats of both Parties are in Contracting States. Therefore, the CISG is applicable (Art. 1.1(a)). 	1
<ul style="list-style-type: none"> Pursuant to Art. 35(1), seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. The quantity and packaging of the delivered goods are not an issue in the present case. As far as the quality of the goods is concerned, the contract contains an express agreement, namely that the goods must be Bio-Suisse certified. 	2
<ul style="list-style-type: none"> The goods need to be in conformity at the time of passing of risk (Art. 36). In the present case, the risk passed. In the present case, the goods were not in conformity at the time the risk passed (handing over to first carrier, Art. 67). In fact, the certificates were only sent to the buyer three weeks after the date of the delivery. 	2
<ul style="list-style-type: none"> As of the date of the delivery, the buyer withheld payment of the purchase price. The CISG does not contain an express provision granting a party a general right to withhold performance in the event of a breach of contract by the other party. However, such a right of retention is implied in individual provisions (Arts. 58, 71, 85, and 86). Therefore, in accordance with Art. 7(2), a general right of retention can be deduced. 	5
<ul style="list-style-type: none"> Therefore, until the relevant certificates had been delivered and the 	2

non-conformity rectified, the buyer had a right to retain the payment . In addition, the buyer could claim damages (Art. 74) .	
<ul style="list-style-type: none"> With regard to the additional specifications of the goods, the parties did not include a specific agreement in their contract. 	1
<ul style="list-style-type: none"> It is questionable whether the parties agreed that the goods must possess the qualities of goods which the seller has held out to the buyer as a sample or model (Art. 35(2)(c)). 	1
<ul style="list-style-type: none"> However, the presentation of a sample does not always lead to a binding determination of the quality of the goods. It needs to be interpreted whether the parties intended to include the sample as a standard for the contract. 	1
<ul style="list-style-type: none"> In the present case, the fact that only three samples were shown and only very quickly advocates against the parties' intention to conclude a sale by sample. Further, also the fact that the relevant additional specification would not be characteristics the samples would have had, indicates that the samples were only suitable to give the buyer a general impression of the quality of the goods and were not intended to be used for the binding determination of the any additional specifications. 	2
<ul style="list-style-type: none"> In a next step, it has therefore to be examined, whether the buyer made the seller aware at the conclusion of the contract of any particular purpose of the goods and whether such particular purpose would require the delivery of the additional specifications (Art. 35(2)(b)). 	1
<ul style="list-style-type: none"> The made known to the seller that the goods were intended "to be used in the production of food items to be sold in Switzerland". 	1
<ul style="list-style-type: none"> If the contract sets out where the goods will be put to use, the seller is generally expected to meet the specific requirements for the fitness for use in that place or region. 	1
<ul style="list-style-type: none"> It could be argued that the handing over of the "additional specifications", i.e. the nutritional and microbiological data of the food products to the authorities amount to a public law provision of Switzerland. 	1
<ul style="list-style-type: none"> However, in order for the seller to be obliged to take public law provisions for product safety in the buyer's or third-party user's state into account, it does not suffice, pursuant to Art. 35(2)(b), for the buyer to simply name the respective import or third state without further information. Rather, the buyer must have a particular reason, based on the circumstances, to trust the seller's expertise in this particular legal matter. For example, the buyer might have told the seller of such standards with sufficient 	2

<p>clarity, the seller might be specialized in exports to that particular destination, or the seller might advertise his products in the country in question.</p>	
<ul style="list-style-type: none"> ▪ Accordingly, in the present case, the public law provisions (if they qualify as such) do not amount to a quality requirement for a specific purpose. 	1
<ul style="list-style-type: none"> ▪ Therefore, it has to be examined whether the goods are fit for the ordinary purpose (Art. 35(2)(a)). 	1
<ul style="list-style-type: none"> ▪ In the so-called New Zealand mussels case, the German Federal Supreme Court developed rules for this situation which have been applied in subsequent case law and have met with approval in doctrine. According to this leading case, if the parties make no agreement to the contrary, the fitness for ordinary purpose standard does not automatically require that the goods meet the public law standards of either the buyer's state or that of a third country where the goods are used. If in doubt, therefore, the goods must only meet the standards of the seller's state. It is, in principle, the buyer's obligation to be concerned with the applicable public law provisions and make them part of the terms of the contract. 	3
<ul style="list-style-type: none"> ▪ However, this basic principle of risk allocation is subject to three exceptions: <ul style="list-style-type: none"> (1) The relevant public law provisions are also known in the seller's state. (2) If the regulations were made known to the seller by the buyer. (3) If the seller is aware of the regulations. 	3
<ul style="list-style-type: none"> ▪ It is more likely than not that in the present circumstances, the purported Swiss public law provisions do not have to be taken into account by the seller, because he was not made aware of them and wasn't otherwise aware of them. The case does not specify whether Spain knows similar laws. [Note: with good arguments, also the contrary can be argued] 	2
<ul style="list-style-type: none"> ▪ Given that delivery occurred and that – apart from the late delivery of the certificates – the delivery was in conformity with the contract, the buyer has the right to demand payment of the purchase price. 	1
<ul style="list-style-type: none"> ▪ As set out above, the buyer has a right to damages for the late delivery of the certificates. It has now to be examined whether the buyer can set off the damages against the purchase price. 	1
<ul style="list-style-type: none"> ▪ The right to set-off and retention is governed by the CISG to the extent that all claims in question are subject to the Convention, but no specific provision exists. In accordance with Art. 7(2), this 	5

follows from the CISG's mutuality (synallagma) of obligations (see Art. 85 second sentence, Art. 86(1) second sentence) and the principle of concurrent performance stipulated for both delivery (Art. 58) and restitution (Art. 81(2)).	
<ul style="list-style-type: none"> It must be noted, however, that the German Supreme Court recently confirmed a stricter view according to which the CISG only governs the set-off of claims resulting from one and the same contract. 	1
<ul style="list-style-type: none"> A set-off of claims can be exercised by mere declaration, not being subject to any further requirements. 	1
<ul style="list-style-type: none"> In the present case, the set-off relates to claims from one and the same contract. Both the main claim and the set-off claim relate to monies. The buyer has declared the set-off. Therefore, the set-off is valid. 	3

Total Points Question 3	45
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4 Question 4 (20%)

Which arguments speak in favor and which against an exemption?

	Points (up to)
<ul style="list-style-type: none"> The CISG is applicable to the case (Art. 1(1)(a)). 	1
<ul style="list-style-type: none"> According to Art.79, "a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he 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." 	1
<ul style="list-style-type: none"> The exemption pursuant to Art. 79 requires that the following prerequisites are cumulatively met: <ol style="list-style-type: none"> The non-performance was caused by an impediment beyond the obligor's sphere of risk and control; The impediment to performance was, at the time of contract conclusion, objectively not foreseeable, i.e., not foreseeable for a reasonable person in the same situation, and furthermore could not have been reasonably avoided or overcome. 	2
<ul style="list-style-type: none"> Impediment beyond control: There are a number of circumstances 	2

<p>that are widely accepted to constitute the core requirement of an impediment within the meaning of Art. 79(1): natural disasters such as earthquake, fire, flood, drought, hurricane, epidemic or pandemic [Note: some examples are sufficient].</p>	
<p>▪ Impediment beyond control:</p> <p>Arguments <i>in favor</i>:</p> <ul style="list-style-type: none"> - The Helsinki port unexpectedly froze over on approximately December 1, 2021. The winter of 2021 was the worst winter in Helsinki in almost twenty years and ice interfered with shipping already in mid-November. - Therefore, the freezing over of the port constitutes an impediment beyond the seller's control. <p>Arguments <i>against</i>:</p> <ul style="list-style-type: none"> - The Helsinki port freezes over every winter. There are icebreakers that free the port. Therefore, the freezing over cannot be considered to be an impediment beyond control. 	<p style="text-align: center;">7</p> <p style="text-align: center;">7</p>
<p>▪ <i>Foreseeability / Impossibility to overcome</i></p> <p>Arguments <i>in favor</i>:</p> <ul style="list-style-type: none"> - The winter of 2021 was the worst winter in almost twenty years. Therefore, while it could have been foreseen at the time of contract conclusion that the port would freeze in winter, it could not have been foreseen that the port already froze over in early January and not as usually only in January. - The impediment could not have been overcome, because even the icebreakers were stuck in the ice. <p>Arguments <i>against</i>:</p> <ul style="list-style-type: none"> - The seller knew that the port regularly freezes over and was therefore foreseeable. - In light of this, the seller should have arranged for alternative shipping routes. - In any event, a ship managed to leave port in November, so that the seller could have shipped the goods earlier in order not to be affected by the heavy winter. 	<p style="text-align: center;">7</p> <p style="text-align: center;">7</p>
<p>▪ [Note: any other reasonable argument is accepted, too]</p>	

<p>Total Points Question 4</p>	<p style="text-align: center;">34</p>
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