



<u>FACULTY</u>	: Law
<u>DEPARTMENT</u>	: Mercantile Law
<u>CAMPUS</u>	: APK
<u>MODULE</u>	: IHR0021/ITL41B0 INTERNATIONAL TRADE LAW
<u>SEMESTER</u>	: Second
<u>EXAM</u>	: October / November 2020

<u>DATE</u>	: 29 October 2020	<u>SESSION</u>	: 08:30-11:30
<u>ASSESSOR(S)</u>	: PROF EA FREDERICKS PROF MM WETHMAR-		
<u>MODERATOR</u>	: LEMMER		
<u>DURATION</u>	: 2 HOURS	<u>MARKS</u>	: 70

NUMBER OF PAGES: 6 PAGES

INSTRUCTIONS:

1. Please ensure that your surname, initials, student number and email address are on the answer script.
2. Please answer ALL THE QUESTIONS on the answer script.
3. Number your answers clearly.
4. Your answers should be substantiated in detail with reference to authority (including case law, legislation and authors).

5. Please ensure that you submit the correct answer script.
6. Submit only ONE answer script.
7. You may not seek the assistance of a fellow student during this assessment. You may not use any part of another student's answers to complete this assessment. **YOU ARE REMINDED** that ALL RELEVANT RULES and policies of the University and the Faculty apply to this assessment.
8. It is your responsibility to contact the lecturer immediately (via WhatsApp, direct telephone call or email) if you experience any problems related to the question paper.
9. By undertaking this online assessment, you will be deemed to have made the following declaration:

"I certify that my submitted answers are entirely my own work and that I have neither given nor received any unauthorised assistance during this assessment."

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Useful information

- Brussels I *bis* Regulation member states include: Bulgaria, France, Germany, Portugal and the United Kingdom.
- Hague Convention on Choice of Court Agreements member states include: Bulgaria, France, Germany, Portugal and the United Kingdom.
- Rome I Regulation member states include: Bulgaria, France, Germany, Portugal and the United Kingdom.
- South Africa and Zambia are non-member states to the instruments indicated above.
- Bulgaria, France, Germany, Japan and Zambia are CISG non-reservation (A 95) member states.
- CISG non-member states include Portugal, South Africa and the United Kingdom.

Please read through the factual scenario below and answer the questions that follow.

Bundu Power Suppliers Pty (Ltd) (Bundu) is a company incorporated in South Africa. Its central administration and principal place of business are in Cape Town (South Africa). Onduleurs SARL (Onduleurs) is a company incorporated in France. Its central administration and principal place of business are in Nice (France). Onduleurs does not have branch offices anywhere else in the world but is the owner of immovable property in Johannesburg (South Africa).

Bundu and Onduleurs concluded a contract of purchase and sale of 30 (thirty) Uninterrupted Power Supply (UPS) units to be delivered in Sofia (Bulgaria) by Onduleurs. The UPS units had to be sent from the harbour in Le Havre (France) to the harbour in Varna (Bulgaria).

Payment of the purchase price (€25 000) by Bundu had to be effected by way of a documentary letter of credit (DLC) issued by First National Bank (FNB) in Cape Town (South Africa) into Onduleurs' bank account held at the Bank of Lisbon in Portugal.

The contract was concluded in Johannesburg (South Africa) on 06 July 2020 while the duly authorised representatives of the companies were attending a conference there. Delivery and payment had to take place during September 2020.

The parties neither expressly nor tacitly selected the courts of a particular legal system to exercise jurisdiction over matters that may arise as a result of a dispute between them. They also did not select a particular legal system to govern their contract. The contract does, however, incorporate the FOB standard terms of the ICC (2020 version).

Payment was effected as agreed. Delivery also took place but Bundu claims that 30% of the UPS units was defective (since they lacked the appropriate power settings required for their proper operation).

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QUESTION 1

- 1.1 Bundu, your client, approaches you for advice. It intends on suing Onduleurs in the Western Cape High Court in Cape Town (South Africa). Advise Bundu in detail on the possibilities of success. Your response to Bundu must include an evaluation of the rules taken into consideration for purposes of establishing jurisdiction. (5)
- 1.2 Bundu now enquires about the possibility of success in suing Onduleurs in the *Bundesgerichtshof* in Berlin (Germany). Advise it on whether this would be the most appropriate European court to institute the action. If not, offer a recommendation (with reasons, of course) on which would be the preferred court. Your response must include an evaluation of the rules taken into consideration for purposes of establishing jurisdiction. (7)
- 1.3 Assume for purposes of this question (1.3) only that Clause 14 of the parties' contract reads as follows:

"In the event of a dispute arising between Onduleurs and Bundu, the Commercial Court (part of the Queen's Bench Division) in London (the UK) shall enjoy jurisdiction for purposes of addressing same."

In light of this new fact, assess whether the Commercial Court in London will indeed exercise jurisdiction. (5)

SUBTOTAL: [17]

QUESTION 2

Assume for the purposes of **QUESTION 2 only**, that the *Bundesgerichtshof* in Berlin (Germany) indeed has jurisdiction over the matter.

- 2.1 Predict how this court would determine the law applicable to this particular contract. (6)
- 2.2 Would your answer in **2.1** have differed if the appropriate court in Japan exercised jurisdiction over the matter? (3)
- 2.3 Assume further for the purposes of **2.3 only**, that German law is the proper law of the contract and that it also governs the relevant proprietary issues.

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- (i) Predict how the court would approach issues relating to the supervening impossibility of performance in a contract. (2)
 - (ii) Predict how the court would go about assessing when risk would have been transferred to Bundu. Your prediction should indicate when exactly this would have occurred. (2)
 - (ii) Predict how the court would address the transfer of ownership of the UPS units from Onduleurs to Bundu. Your prediction should also indicate when exactly ownership would have passed. (5)
- 2.4 Compare the role players of the German legal system with that of Zambia. (4)

SUBTOTAL: [22]

QUESTION 3

Assume for the purposes of **QUESTION 3 only**, that the appropriate court in France has jurisdiction over the matter.

- 3.1 Conduct an evaluation of whether the court will apply the substantive provisions of the United Nations Convention on the International Sale of Goods (CISG) (1980)? (5)
- 3.2 Assume that the contract is governed by the CISG. How would the court assess whether Bundu is entitled to avoid the contract? (6)
- 3.3 Assume that the contract is governed by the CISG. Assume further that, since Bundu is at a loss for the inoperative UPS units, it is now intent on issuing alternative claims. Predict how the court will approach the matter if the claim now concerns:
- (i) Substitute of goods; or (2)
 - (ii) A reduction in the purchase price. (3)

SUBTOTAL: [16]

QUESTION 4

Your client, Bundu, has some concerns regarding the standard terms incorporated into the contract.

4.1 When precisely did the risk in respect of the UPS units pass from Onduleurs to Bundu? (3)

4.2 Bundu requires you to evaluate whether there is any merit in the following argument raised by Onduleurs:

“There rests no responsibility upon us (Onduleurs), in terms of the contract, to provide for export clearance or assistance with import clearance.” (3)

SUBTOTAL: [6]

QUESTION 5

Assume that the DLC was issued by FNB in Cape Town (South Africa) (as stipulated in the factual scenario) and that it employed the *Banque centrale de France* (BCF) in Nice (France) to receive the required documents and effect payment (of course, on the condition that there is compliance) into Onduleurs' bank account in Portugal. Formulate an argument in which you assert that the legal system that governs the contractual relationship between FNB and Onduleurs, according to South African private international law, is the law of France. (5)

SUBTOTAL: [5]

QUESTION 6

Assume that the appropriate court in Germany handed down judgment against Onduleurs. Bundu, of course, intends to initiate procedures for the recognition and enforcement of the judgement in France but is concerned that the court would probably refuse, since the only linkage the parties and the contract have with France, is Onduleurs' domicile.

Evaluate whether there is any justification for Bundu's concern, or are there other factors which the “court addressed” would take into consideration in order to decide whether the recognition and enforcement of a judgment is to be refused? Discuss briefly. (4)

SUBTOTAL: [4]
TOTAL: 70 MARKS