

INTERNATIONAL TRADE LAW (IHR0021)



PROGRAM : LLB
SUBJECT : INTERNATIONAL TRADE LAW
CODE : IHR0021
DATE : 22 NOVEMBER 2017
DURATION : 2.5 HOURS
WEIGHT : 50%
TOTAL MARKS : 70

EXAMINER : DR EA FREDERICKS
MODERATOR : PROF MM WETHMAR-LEMMER
NUMBER OF PAGES : 5 (FIVE) [INCLUDING COVER PAGE]

INSTRUCTIONS:

PLEASE WRITE NEATLY.

YOUR ANSWERS SHOULD BE SUBSTANTIATED IN DETAIL WITH REFERENCE TO AUTHORITY (INCLUDING CASE LAW, LEGISLATION AND AUTHORS).

READ ALL QUESTIONS CAREFULLY.

THE RULES OF THE UNIVERSITY OF JOHANNESBURG RELATING TO EXAMINATIONS APPLY TO THIS EXAM.

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Useful information

- Brussels I bis Regulation member states include Belgium, Germany, the Netherlands and Portugal.
- The Hague Choice of Court Convention member states include Belgium, Germany, the Netherlands and Portugal.
- Rome I Regulation member states include Belgium, Germany, the Netherlands and Portugal.
- Belgium, Germany and the Netherlands are CISG non-reservation (Art 95) member states.
- CISG non-member states include Mauritius, Portugal and South Africa.

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

Print Direct (Pty) Ltd (Print Direct) is a company incorporated in South Africa. Its central administration and principal place of business are in Durban (South Africa). Ink Masters GmbH (Ink Masters) is a company incorporated in Germany. Its central administration and principal place of business are in Hamburg (Germany). Ink Masters does not have branch offices anywhere else in the world.

Print Direct and Ink Masters concluded a contract for the purchase and sale of printing machines (printers) to be delivered in Durban by Ink Masters. The printers had to be sent from the harbour at Hamburg (Germany) to the harbour in Durban (South Africa).

Payment of the purchase price (€20 000) by Print Direct had to be effected by way of a documentary letter of credit (DLC) issued by ABSA Bank Ltd in Durban (South Africa) into an account held by Ink Masters at the Bank of Lisbon (Portugal).

The contract was concluded in Port Louis (Mauritius) on 25 August 2017 while the duly authorised representatives of the companies were on holiday there. Delivery and payment had to take place during October 2017.

The parties neither expressly nor tacitly chose a legal system to govern their contract. However, clause 12 of the contract provides the following:

“The parties to this contract submit to the jurisdiction of the District Court in the city of Amsterdam (the Netherlands) in the event of a dispute arising between them regarding any aspect of the contract.”

Further, the contract incorporates the CIF standard terms of the ICC (2010 version).

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Payment was effected as agreed. Delivery also took place but Print Direct claims that 20% of the printers were defective (as the operating systems installed were dysfunctional for the South African market). Print Direct considers instituting action against Ink Masters.

QUESTION 1

Advise your client, Print Direct, on whether:

- 1.1 The District Court in Amsterdam (the Netherlands) would have jurisdiction; and (4)
- 1.2 Your response in 1.1 would differ if Print Direct's central administration and principal place of business were in Belgium. (4)

Your client requests you to assess what the position would be if the contract between itself and Ink Masters did **not** contain a submission to jurisdiction clause as stipulated in clause 12.

Advise your client on whether:

- 1.3 A court in Germany would have jurisdiction; and (4)
- 1.4 The High Court in Durban would have jurisdiction. (5)

SUBTOTAL: [17]

QUESTION 2

Assume for the purposes of **QUESTION 2 only**, that the court in Germany indeed has jurisdiction over the matter.

- 2.1 Which particular court would probably hear the matter? (2)
- 2.2 Explain how you would go about determining the proper law of the contract. (3)
- 2.3 Assume further for the purposes of **2.3 only**, that German law is the proper law of the contract.
 - (i) Predict how the court would address an issue relating to the supervening impossibility of performance? (2)
 - (ii) Predict how the court would address the transfer of risk of the printers from Ink Masters to Print Direct? (3)

SUBTOTAL: [10]

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QUESTION 3

Assume for the purposes of **QUESTION 3 only**, that the appropriate court in Germany 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 Print Direct is entitled to avoid the contract? (6)
- 3.3 Assume that the contract is governed by the CISG. How would the court test to determine whether Print Direct is in a position to claim a reduction in the purchase price? (3)

SUBTOTAL: [14]

QUESTION 4

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

- 4.1 Compare the rules in respect of the passing of risk under the standard terms chosen by the parties with those of the CISG. Your answer should include an indication of when precisely risk would have passed to Print Direct in respect of both the chosen standard terms and the CISG. (6)
- 4.2 Explain Print Direct's obligations with regard to the "allocation of costs" in respect of the chosen standard terms. (4)

SUBTOTAL: [10]

QUESTION 5

Critically evaluate the accuracy of the following statements in respect of comparative law:

In Belgium, Germany and the Netherlands, the principles of the boni mores form the basis of the legal system; the central figures are professors and judges; the case law is persuasive; and their civil codes are compact and precise. Whereas, in the United Kingdom for example, case law forms the basis of the legal system; the central figures are legislators and judges; the case law sets a precedent; and legislation is the primary source of law. (6)

SUBTOTAL: [6]

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QUESTION 6

Assume that the DLC was issued by ABSA Bank in Durban (South Africa) and confirmed by Sparda-Bank Hamburg (in Germany).

Formulate an argument in which you assert that the legal system that governs the contractual relationship between Sparda-Bank and Ink Masters according to South African private international law, is the law where the confirming bank is situated. (5)

SUBTOTAL: [5]

QUESTION 7

Assume that the District Court in Amsterdam (the Netherlands) handed down judgement against Ink Masters. Your client, Print Direct now intends to initiate procedures for the recognition and enforcement of this judgement in Germany. Ink Masters argue that the judgment should not be recognised (and enforced) because Print Direct was not domiciled in the forum state and the Dutch court exercised jurisdiction in terms of the *lex fori* and not the Brussels Ibis Regulation.

Critically assess whether there is any merit in this argument. (4)

SUBTOTAL: [4]

QUESTION 8

Assume that the dispute in question was not referred to a court but, in terms of the contract between the parties, to arbitration at the ICC's Court of Arbitration in London. The latter court then made an arbitral award against Ink Masters and your client submits an application to have this award recognised and enforced by the High Court in Johannesburg (South Africa). Ink Masters now argue that since there is no common-law ground of jurisdiction between the parties, the court should refuse the application. Predict how the court would approach this issue and what the probable outcome would be. (4)

SUBTOTAL: [4]

TOTAL: 70 MARKS
