



<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>	: January 2020 (2)

<u>DATE</u>	: January 2020	<u>SESSION</u>	: TBC
<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: 5 PAGES

INSTRUCTIONS:

1. Answer ALL THE QUESTIONS.
 2. Number your answers clearly.
 3. Your answers should be substantiated in detail with reference to authority (including case law, legislation and authors).
 4. 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, France, Germany, Italy, Portugal, the Netherlands and Spain.
- The entire European Union are members of the Hague Choice of Court Convention.
- Rome I Regulation member states include Belgium, France, Germany, Italy, the Netherlands and Spain.
- Belgium, France, Germany, Italy, the Netherlands and Spain are CISG non-reservation (Art 95) member states.
- South Africa and Portugal are CISG non-member state.

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

Mckore Graphics (MG) is a company incorporated in South Africa. Its central administration and principal place of business are in Durban (South Africa). Enzo Enterprises (EE) is a company incorporated in Italy. Its central administration and principal place of business are in Rome (Italy). EE does not have a branch in South Africa.

MG and EE concluded a contract of purchase and sale for the delivery by EE of 300 sophisticated printing machines designed by a leading Spanish graphic designer. 200 of these machines had to be delivered in Lisbon (Portugal) and 100 in Porto (Portugal). The machines had to be sent from the harbour in Rotterdam (the Netherlands) to the harbour in Lisbon.

Payment by MG had to take place in EE's account at Grande Bank in Spain. It had to be effected by documentary letter of credit (DLC) issued by Rand Merchant Bank in Johannesburg (South Africa) and confirmed by Premier Bank in Rome (Italy).

The contract was concluded in Brussels (Belgium) on 18 June 2019 and delivery and payment had to take place during October 2019.

The contract does not contain a submission to jurisdiction clause and the parties neither expressly nor tacitly chose a legal system to govern the agreement. However, the contract incorporates the CIF standard terms of the ICC (2000 version).

Payment was effected as agreed. Delivery also took place but MG claims that 30% of the machines were defective. MG considers instituting action against EE.

QUESTION 1

MG, aggrieved by these events, approaches you for advice. Assess in detail whether:

- 1.1 The appropriate court in Port (Porto) would have jurisdiction; (5)
- 1.2 The *Tribunal de commerce* in Paris (France) is the most appropriate court to hear the matter; (5)
- 1.4 The High Court in Johannesburg would have jurisdiction. (6)

SUBTOTAL: [16]

QUESTION 2

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

- 2.1 Explain to MG in detail how one would determine the law applicable to this particular contract. (6)
- 2.2 Assume further for the purposes of **2.2 only**, that French law is the proper law of the contract and that it also governs the relevant proprietary issues.
 - (i) Predict how the court would go about assessing when risk would have been transferred to MG. Your prediction should indicate when exactly this would have occurred. (2)
 - (ii) Predict how the court would address the transfer of ownership of the equipment from EE to MG. Your prediction should also indicate when exactly ownership would have passed. (6)

SUBTOTAL: [14]

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 Incredible is entitled to avoid the contract? (5)
- 3.3 Assume that the contract is governed by the CISG. Assume further that, since Incredible is at a loss for the inoperative equipment, it is now intent on issuing alternative claims. Predict how the court will approach the matter if they now claim for specific performance. (3)
- 3.4 Comment on the accuracy of following statement:

“Damages, in terms of the CISG, are peculiar because they may generally not be claimed in addition to other remedies. A claim for damages may include loss of profit but it has no application in respect of the avoidance of contracts.” (3)

SUBTOTAL: [16]

QUESTION 4

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

- 4.1 When precisely did the risk in respect of the equipment pass from EE to MG? (3)
- 4.2 Compile the obligations which EE is responsible for with regard to “allocation of costs” in respect of the chosen standard terms. (3)
- 4.3 Incredible request you to point out how your answer in 4.1 would have differed if the parties were to incorporate the EXW standard terms into their contract as opposed to CIF. (2)

SUBTOTAL: [8]

5/...

QUESTION 5

Explain in detail whether the Supreme Court of Appeal's decision in *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 5 SA 393 (SCA) supports the proposal that liberative prescription must be regarded as a substantive issue governed by the *lex causae*, irrespective of how the *lex causae* classifies its own liberative prescription rules. (7)

SUBTOTAL: [7]

QUESTION 6

Assume that Premier Bank was appointed as a mere advising bank. How would the proper law of the contractual relationship between Premier Bank and Rand Merchant Bank be determined in South African private international law? (5)

SUBTOTAL: [5]

QUESTION 7

Assume that the appropriate court in France handed down judgment against EE. MG, of course, intends to initiate procedures for the recognition and enforcement of the judgement in Italy but is concerned that the court would probably refuse, since there is no real linkage of the parties and the contract to France.

Is there any justification for MG'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
