



<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>	: November 2019

<u>DATE</u>	: 16 November 2019	<u>SESSION</u>	: 08:30-10:30
<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: 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 France, Germany and Spain.
- The entire European Union are members of the Hague Choice of Court Convention.
- Rome I Regulation member states include France, Germany and Spain.
- France, Germany and Spain are CISG non-reservation (Art 95) member states.
- South Africa South Africa is a CISG non-member state.

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

Incredible Discounters Pty (Ltd) (Incredible) is a company incorporated in South Africa. Its central administration and principal place of business are in Johannesburg (South Africa). Bell GmbH (Bell) is a company incorporated in Germany. Its central administration and principal place of business are in Berlin (Germany). Bell does not have branch offices anywhere else in the world but is the owner of immovable property in Cape Town (South Africa).

Incredible and Bell concluded a contract of purchase and sale of computer equipment to be delivered in Barcelona (Spain) by Bell. The computer equipment had to be sent from the harbour in Stralsund (Germany) to the harbour in Barcelona (Spain).

Payment of the purchase price (€18 000) by Incredible had to be effected by way of a documentary letter of credit (DLC) issued by Nedbank in Johannesburg (South Africa) into Bell's bank account held at The National Bank of Spain in Barcelona.

The contract was concluded in Valencia (Spain) on 10 August 2019 while the duly authorised representatives of the companies were on vacation there. Delivery and payment had to take place during October 2019.

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 (2010 version).

Payment was effected as agreed. Delivery also took place but Incredible claims that 35% of the computer equipment was defective (since they lacked the appropriate software required for their proper operation).

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QUESTION 1

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

- 1.1 The *Bundesgerichtshof* in Berlin (Germany) 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 Incredible 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 Incredible. 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 Bell to Incredible. 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? (6)
- 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:
 - (i) Specific performance; or (2)
 - (ii) A reduction in the purchase price. (3)

SUBTOTAL: [16]

QUESTION 4

Your client, Incredible, 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 Bell to Incredible? (3)
- 4.2 Compile the obligations which Bell is responsible for with regard to “Checking, packaging and marking” 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 FOB. (2)

SUBTOTAL: [8]

QUESTION 5

In the context of determining the proper law of contractual capacity, compare the provision under Article 13 of the Rome I Regulation with that in French private international law with particular reference to *Lizardi v Chaize* Cass req 16 jan 1861. Your answer should include a detailed discussion of the three-step fault model. (7)

SUBTOTAL: [7]

QUESTION 6

Assume that the DLC was issued by Nedbank in Johannesburg (South Africa) (as stipulated in the factual scenario) and that it employed *El Gran Banko* in Barcelona (Spain) to receive the required documents and effect payment (of course, on the condition that there is compliance).

Formulate an argument in which you assert that the legal system that governs the contractual relationship between Nedbank and Bell, according to South African private international law, is the law of Spain. (5)

SUBTOTAL: [5]

QUESTION 7

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

Is there any justification for Incredible'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
