



<b><u>FACULTY</u></b>	: Law
<b><u>DEPARTMENT</u></b>	: Mercantile Law
<b><u>CAMPUS</u></b>	: APK
<b><u>MODULE</u></b>	: IHR0021/ITL41B0 INTERNATIONAL TRADE LAW
<b><u>SEMESTER</u></b>	: Second
<b><u>EXAM</u></b>	: November 2018

<b><u>DATE</u></b>	: 21 November 2018	<b><u>SESSION</u></b>	: 08:30-10:30
<b><u>ASSESSOR(S)</u></b>	: PROF EA FREDERICKS PROF MM WETHMAR-		
<b><u>MODERATOR</u></b>	: LEMMER		
<b><u>DURATION</u></b>	: 2 HOURS	<b><u>MARKS</u></b>	: 70

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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 and Germany.
- The Hague Choice of Court Convention member states include France and Germany.
- Rome I Regulation member states include France and Germany.
- France and Germany are CISG non-reservation (Art 95) member states.
- CISG non-member states include South Africa.

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

Gilbert Sportswear (Gilbert) is a company incorporated in South Africa. Its central administration and principal place of business are in Cape Town (South Africa). Le Coq Sportiva SARL (Sportiva) is a company incorporated in France. Its central administration and principal place of business are in Paris (France). Sportiva does not have branch offices anywhere else in the world but is the owner of immovable property in Johannesburg (South Africa).

Gilbert and Sportiva concluded a contract of purchase and sale of sport equipment to be delivered in Cape Town (South Africa) by Sportiva. The sports equipment had to be sent from the harbour in Marseille (France) to the harbour in Cape Town (South Africa).

Payment of the purchase price (€22 000) by Gilbert had to be effected by way of a documentary letter of credit (DLC) issued by Rand Merchant Bank in Johannesburg (South Africa) into Sportiva's bank account held at First National Bank in Johannesburg (South Africa).

The contract was concluded in Pretoria (South Africa) on 18 March 2018 while the duly authorised representatives of the companies were on vacation there. Delivery and payment had to take place during October 2018.

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, however, clause 15 of their contract provides the following:

"The validity of this Agreement, its interpretation, implementation, enforcement, the respective rights and obligations of the Parties and all other matters arising in any way out of it, or its expiration or earlier termination for any reason shall be governed by and construed in accordance with the laws of Germany."

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

Payment was effected as agreed. Delivery also took place but Gilbert claims that 30% of the sports equipment was defective (since they could not be utilised for the purpose they were intended). Gilbert considers instituting action against Sportiva.

**QUESTION 1**

Advise your client, Gilbert, on whether:

- 1.1 The *Oberlandesgericht* in Germany would have jurisdiction; (6)
- 1.2 The *Tribunal de grande instance* in France is the most appropriate court to hear the matter; (5)
- 1.4 The High Court in Durban would have jurisdiction. (5)

**SUBTOTAL: [16]**

**QUESTION 2**

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

- 2.1 How would the court test to establish the proper law of the contract? (2)
- 2.2 Assume for **2.2 only**, that the contract did not contain clause 15 providing for the choice of a legal system. Formulate the test which the court would utilise to determine the proper law of the contract. (5)
- 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.
  - (i) Predict how the court would go about assessing whether an order for specific performance against Sportiva could be awarded. (2)
  - (ii) Predict how the court would address the transfer of ownership of the equipment from Sportiva to Gilbert. Your prediction should also indicate when exactly ownership would have passed to Gilbert. (5)

**SUBTOTAL: [14]**

**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 Gilbert is entitled to avoid the contract? (6)
- 3.3 Assume that the contract is governed by the CISG. Assume further that Gilbert successfully avoided the contract and continued to purchase replacement sports equipment from another supplier. Evaluate whether Gilbert would nevertheless have recourse against Sportiva under these circumstances. (5)

**SUBTOTAL: [16]**

**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 Gilbert in respect of both the chosen standard terms and the CISG. (6)
- 4.2 Compile the obligations which Gilbert is bound to with regard to “licences, authorizations, security clearances and other formalities” in respect of the chosen standard terms. (2)

**SUBTOTAL: [8]**

**QUESTION 5**

Critically evaluate 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 the DLC was issued by Rand Merchant Bank in Johannesburg (South Africa) (as stipulated in the factual scenario) and that it employed *Viva La Bank* in Paris (France) to effect payment under the DLC if the requirements are met. Formulate an argument in which you assert that the legal system that governs the contractual relationship between Rand Merchant Bank and Sportiva according to South African private international law, is the law of France. (5)

**SUBTOTAL: [5]**

**QUESTION 7**

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 Sportiva and your client submits an application to have this award recognised and enforced by the High Court in Johannesburg (South Africa). Sportiva now insists, however, that the court should set aside the arbitration award especially since it (Sportiva) is convinced that a French arbitral tribunal would have found differently. Predict how the court would approach this issue and what the probable outcome would be. (4)

**SUBTOTAL: [4]**

**TOTAL: 70 MARKS**

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