



<u>FACULTY</u>	: Law
<u>DEPARTMENT</u>	: Private Law
<u>CAMPUS</u>	: APK
<u>MODULE</u>	: IPR0014 / PIL41A0 PRIVATE INTERNATIONAL LAW
<u>SEMESTER</u>	: First semester
<u>EXAM</u>	: Main Examination Memorandum

<u>DATE</u>	:	15 June 2021	<u>SESSION</u>	:	16:30 – 19:30
<u>ASSESSOR(S)</u>	:	Ms C Johannes			
<u>MODERATOR</u>	:	Prof M Wethmar-Lemmer			
<u>DURATION</u>	:	3 hours	<u>MARKS</u>	:	80

NUMBER OF PAGES: 6 PAGES (INCLUDING THIS PAGE)

INSTRUCTIONS:

1. Your answers must be in **ONE TYPED DOCUMENT**, or one scanned document (if you have written your answers) **in Word or Pdf format ONLY**.
2. Your answer sheets **MUST** have your **INITIALS, SURNAME & STUDENT NUMBER** on top of **EACH PAGE**.
3. Ensure that if your answers are written that you write neatly and legibly.
4. Read the scenarios carefully and answer the questions that follow.

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5. **You are reminded that all relevant rules and policies of the University and the Faculty apply to this assessment.** This means, for example, that you cannot cut-and-paste material other than your own work as answers for this assessment.
6. By undertaking this 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 unauthorized assistance in this assessment".
7. Do not make use of the write submission function on blackboard to submit your examination.
8. **You must follow all instructions on the examination paper as well as those provided to you on blackboard.**
9. You must submit before **19:30 pm, Tuesday, 15 June 2021**. Late submissions will not be accepted.
10. The mark allocation should guide you regarding how much you should write/type to answer each question. Do not spend excessive time on questions that only require a short answer.
11. You must work within the allocated time frame. Follow the time guide provided on blackboard.

QUESTION 1

In 2013, Karabo (a female, Tanzanian national at all relevant times) met Kamogelo (a male, Zambian national at all relevant times) while on holiday in Bali (Indonesia). A year later in 2014, Karabo and Kamogelo married in Marrakesh (Morocco). Karabo and Kamogelo married out of community of property, by way of antenuptial contract, excluding the accrual system. At the time when their marriage was concluded Karabo was domiciled in Ghana and habitually resident in Namibia, while Kamogelo was domiciled in Ghana and habitually resident in Nigeria. Kamogelo is an architect and Karabo is a financial consultant.

In 2016, Kamogelo visited Barcelona (Spain) to do research on the local architecture. While in Barcelona (Spain) Kamogelo drafted his first will in a restaurant. In his first will Kamogelo instituted Karabo as his sole heir.

In January 2017, Karabo received a job offer in South Africa to work as the Finance Director of a bank called "Moola Bank" in Johannesburg. Later that year Karabo and Kamogelo moved to South Africa, and they purchased a home in Northcliff, Johannesburg. In that same year Karabo and Kamogelo became domiciled and habitually resident in South Africa.

In 2018, Karabo and Kamogelo had their first child, a boy whom they named Siya. After the birth of their first child, Karabo donated a rare antique watch to Kamogelo, which she inherited from her father. In 2019, while on holiday in Mauritius the parties decided to adopt a little girl named Anna. During the adoption process Kamogelo gave Anna's biological mother R50 000 for gifting them with

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Anna. Anna's adoption prompted Kamogelo to draft his second will, in which he expressly revokes his first will and institutes his children Siya and Anna as his sole heirs. Kamogelo wanted to ensure his children's financial security if anything should happen to him. Kamogelo's drafted his second will while in Mauritius.

Kamogelo and Karabo lived happily in South Africa until the lockdown in 2020, during which they had several disagreements and realised that they no longer share the same views on life. This caused them to separate and in September 2020, the parties obtained a divorce in the Gauteng Local Division of the High Court of South Africa, Johannesburg.

Following the divorce Kamogelo moved to Dubai (United Arab Emirates) for the opportunity to design a new skyscraper for an architectural firm located there. In January 2021, Kamogelo became domiciled and habitually resident in Dubai. On 28 May 2021, while crossing the road to get to work, Kamogelo was knocked by a speeding Ferrari and died at the scene after losing too much blood.

At the time of his death Kamogelo left behind immovable property located in Zambia and money in a bank account in Dubai. According to the law of South Africa and Dubai, Siya and Anna are Kamogelo's sole intestate heirs. According to the law of Zambia, Kamogelo's parents Lwandile and Malebo are his sole intestate heirs.

- 1.1** The legal system of which country governs formal validity of the marriage between Kamogelo and Karabo? **[1]**

✓ **LLC – students must correctly identify the LLC in the set of facts.**

- 1.2** Identify which conflicts methodology was employed in your answer to Question 1.1 above. **[1]**

✓ **Von Savigny – Bilateral Rules/ Multilateral Rules.**

- 1.3** Assume that Karabo is the sister of Kamogelo's first wife Thandi from whom he obtained a divorce in 2010. According to the relevant legal system, the marriage between a man and his divorced wife's sister is not permitted. Discuss the inherent validity of the marriage between Kamogelo and Karabo considering the role and function of public policy. **[4]**

- ✓ **Ordinarily – LLC applicable to inherent validity of a marriage.**
- ✓ **Students can discuss the law applicable where parties act in *fraudem legis* – but no evidence that is the case in this scenario.**
- ✓ **Students must discuss external public policy - marriage not flagrantly against public policy.**
- ✓ **Students must discuss the positive role of public policy – can render marriage valid, even though not valid according to LLC for the benefit of the economically weaker spouse.**

- 1.4** The legal system of which country would govern Karabo's domicile immediately after her marriage to Kamogelo according to Roman Dutch Law? **[2]**

✓ **At RDL follow wife follows domicile of husband.**

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- ✓ **Students must be able to correctly identify Kamogelo's domicile at the time when the marriage between the parties was concluded and indicate that this would be Karabo's domicile according to RDL.**

1.5 The legal system of which country governs the proprietary consequences of the marriage between Karabo and Kamogelo? Apply the proposal by Stoll & Visser. **[3]**

- ✓ **No ANC specifying applicable legal system.**
- ✓ **Parties share a common domicile.**
- ✓ **Ghana = LDM/ proper law of the proprietary consequences of the marriage.**

1.6 Refer to Stoll & Visser's proposal applied in Question 1.5 above. Discuss Karabo's prospects of successfully claiming against Kamogelo in terms of s7(9) of the Divorce Act 70 of 1979 at the time of divorce. **[3]**

- ✓ **Kamogelo's can claim for re-distribution depends on whether the LDM would permit such a claim - students must correctly identify the LDM.**
- ✓ **Students must discuss the bounds of the South African Court's powers to grant re-distribution ito s7(9).**
- ✓ **Students must use and apply relevant case law such as Bell v Bell – in which a claim for redistribution was granted in accordance with the law of the UK.**

1.7 Assume that according to the law of Ghana donations between spouses are revocable and are regarded as a proprietary consequence of a marriage. In South Africa donations between spouses are regarded as irrevocable and cannot be claimed at the time of divorce.

1.7.1 The legal system of which country would determine whether Karabo is entitled to claim back the watch she donated to Kamogelo at the time of divorce if classification *lege causae* were applied? **[5]**

- ✓ **Students are awarded 5 marks for correctly drafting the classification table. Students must be able to identify the correct columns and must be able to complete each column correctly for the two legal systems at hand namely SA and Ghana.**
- ✓ **Students will only be awarded one mark where they are able to identify the correct columns for the classification table but unable to complete the table correctly.**
- ✓ **For every row of each column of the classification table that is completed correctly students will be awarded a ½ mark in total students who correctly and completely draft the classification table will be awarded ½ x 10 = 5 marks.**
- ✓ **Students will only be awarded 2 ½ marks where they are only able to complete the columns correctly for one of the two legal systems namely SA and Ghana.**
- ✓ **Students must be able to identify that in this instance there is Cumulation.**

1.7.2 Would Karabo be entitled to claim back the watch she donated to Kamogelo if classification *lege fori* were applied? **[3]**

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- ✓ If classification *lege fori* applied – categorised as personal consequence of the marriage.
- ✓ Governed by the LD of party making donation @ time of donation = SA law.
- ✓ According to SA law donations between spouses are generally irrevocable & cannot be claimed at the time of divorce hence Karabo cannot claim back the watch.

1.8 Could the doctrine of renvoi be applied to determine the legal system applicable to a claim by Karabo for the watch she donated to Kamogelo at the time of divorce. [3]

- ✓ No, the doctrine of renvoi cannot be applied.
- ✓ One of the statutory exclusions are present. Students must identify the correct statutory exclusion applicable in respect of a claim for the donation made by Karabo at the time of divorce. [2]

1.9 Discuss the requirements Karabo and Kamogelo had to satisfy to adopt Anna and whether based on the information provided they would have successfully met these requirements. [3]

- ✓ Students must identify that if the child is adopted from a member state of the Hague Convention on Intercountry Adoption, then the requirements of the Convention will apply because SA is a member state of the Convention.
- ✓ Students must identify the requirements in the convention and correctly apply the requirements to the factual scenario. Where students list the requirements without application only half a mark is awarded. [3]

1.10 Assume that both will 1 and will 2 are formally valid in terms of the law of Nigeria only. Who would inherit Kamogelo's immovable property? [4]

- ✓ Will 2 = invalid ito its own testing systems so entire will is not valid.
- ✓ Can save the revocation clause because will 2 valid ito a testing system of will 1 ito which will 1 is also valid (Nigeria).
- ✓ Kamogelo dies intestate – intestate succession of immovable property governed by LS.
- ✓ According to LS (which students must identify) - Kamogelo's parents Lwandile and Malebo are his sole intestate heirs.

1.11 Assume that will 1 is formally valid in terms of the law of Ghana only and the second will is formally valid in terms of the law of Nigeria only. Who would inherit the money in Kamogelo's bank account in South Africa? [3]

- ✓ Will 2 = invalid ito its own testing systems so entire will 2 invalid.
- ✓ The revocation clause cannot be saved. Will 1 is valid ito own testing system – Ghana LD @ execution.
- ✓ Karabo inherits the money in Kamogelo's bank account.

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1.12 Assume that Kamogelo drafted his second will by recording an audio containing his last wishes on his cell phone. The legal system(s) of which country(ies) will govern the formal validity of Kamogelo's second will in respect of the money in his bank account in South Africa? **[3]**

- ✓ **Mauritius – LLA.**
- ✓ **South Africa – LD at execution.**
- ✓ **Dubai/ United Arab Emirates – LUD.**

1.13 Assume that Kamogelo dies intestate. At the time of Kamogelo's death Natalie (a female South African national) claims that she is entitled to Kamogelo's immovable property located in Zambia on account of a marriage ceremony she concluded with Kamogelo in Tanzania prior to his death, in February 2021. According to South African private international law the *lex situs* governs the intestate succession of Kamogelo's immovable property, making the law of Zambia applicable. According to the law of Zambia a surviving spouse is regarded as the sole intestate heir. If there is not a surviving spouse, the deceased's children (if any) are regarded as the intestate heirs.

The internal law of South Africa regards the marriage between Kamogelo and Natalie as invalid. The internal law of the Tanzania regards the marriage between Kamogelo and Natalie as valid. The internal law of Zambia regards the marriage between Kamogelo and Natalie as valid. According to the private international law of Zambia, the *lex domicilii* of the husband at the time of the marriage, Dubai, determines the validity of a marriage. The internal law of Dubai regards the marriage between Kamogelo and Natalie as invalid.

1.13.1 Identify the incidental question in the set of facts above. **[1]**

- ✓ **Was the marriage between Kamogelo and Natalie validly concluded?**

1.13.2 Apply the approach followed in the decision of *Phelan v Phelan 2007 1 SA 483 (C)* to answer the incidental question. The legal system of which country would be applicable to the incidental question? **[1]**

- ✓ **Dubai.**

1.13.3 Apply the legal system that according to the criticism of South African conflicts authors should have been used to answer the incidental question in *Phelan v Phelan 2007 1 SA 483 (C)*. Who will inherit Kamogelo's immovable property? **[1]**

- ✓ **Siya and Anna according to LF.**
- ✓ **Mark awarded for mentioning policy considerations taken into account.**

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1.13.4 Apply the private international law of the *lex fori* to answer the incidental question. Who will inherit Kamogelo's immovable property? [1]

✓ **Natalie.**

1.13.5 Does the type of incidental question present in the set of facts above differ from the incidental question in *Dhansay v Davids 1991 4 SA 200 (C)* and how? [2]

✓ **Yes, in this case the incidental question is the incidental question properly so-called.**

✓ **In the *Dhansay v Dhansay* the incidental question (although not identified) was the incidental question not properly so-called.**

SUB -TOTAL: [44]

QUESTION 2

In December 2019, "Daisy" (seller) a flower company with its usual place of business and incorporated in Hong Kong entered into a sales agreement with "Potted Lilly" (buyer) a company with its usual place of business and incorporated in Johannesburg, South Africa. According to the agreement Daisy sold 1000 orchid flowers (500 white orchids and 500 purple orchids) to Potted Lilly to be sold at their new flower store opening in Windhoek (Namibia). The agreement between the parties was concluded in Japan at a flower festival. The orchids were pruned and prepared for delivery at Daisy's flower store in Hong Kong. According to the contract delivery had to take place in Namibia at Potted Lilly's store while payment of the purchase price had to be made in three equal instalments into one of Daisy's bank accounts in Hong Kong. Assume that payment took place as agreed, but a dispute between Potted Lilly (plaintiff) and Daisy (defendant) arises in respect of short delivery. Daisy only delivered 300 white orchids and 200 purple orchids. The parties did not choose a legal system to govern their agreement. Assume that Potted Lilly institutes proceedings against Daisy in the Gauteng Local Division of the High Court of South Africa, Johannesburg.

2.1 The legal system of which country would most likely be applicable to the contractual dispute between Potted Lilly (plaintiff) and Daisy (defendant) in respect of the breach of contract (short delivery)? [6]

✓ **No express agreement.**

✓ **Must discuss 2 Approaches and indicate that regardless of approach most important factor LLS.**

✓ **LLS – place of performance = place of delivery & payment.**

✓ **Scission principle – place of defective performance = Namibia.**

✓ **Unitary principle – Scission principle, delivery, payment = Namibia & Hong Kong.**

✓ **Namibia or Hong Kong.**

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2.2 Refer to your answer in Question 2.1. Could the South African National Credit Act nevertheless be applicable to the contractual agreement between Potted Lilly and Daisy? [2]

- ✓ **Agreement has effect in SA because the consumer Potted Lilly is incorporated in South Africa.**
- ✓ **NCA can thus apply provided that Potted Lilly's annual turnover does not exceed R 1 million since agreement has "effect within" SA.**

2.3 Refer to your answer in Question 2.1. The legal system(s) of which country(ies) would govern following:

2.3.1 the onus of proof? [2]

- ✓ **LC/Proper Law - Namibia.**
- ✓ **Hong Kong.**

2.3.2 costs awarded in favour of the plaintiff? [1]

- ✓ **LF - South Africa.**

2.4 The legal system(s) of which country(ies) would govern the transfer of ownership of the orchids from Daisy to Potted Lilly if ownership passes:

2.4.1 once the orchids are shipped and en route to its destination? [2]

- ✓ **LLE – which students must correctly identify from the facts.**
- ✓ **LLD – which students must correctly identify from the facts.**

2.4.2 upon payment of the final instalment? [3]

There are four different opinions/views/ possible legal systems applicable:

- ✓ **LS at time of transfer & LS at time of sale - which students must correctly identify from the facts.**
- ✓ **LS as it changes - which students must correctly identify from the facts.**
- ✓ **LS at conclusion of contract - which students must correctly identify from the facts.**

Students must correctly which students must correctly identify the applicable law. Where students do not apply only ½ a mark is awarded.

2.4.3 at the conclusion of the contract? Apply Roman-Dutch Law. [2]

- ✓ **LD of person wishing to transfer ownership –**
- ✓ **Student must correctly identify Daisy's domicile at time of wanting to transfer ownership.**

2.5 Assume that a dispute arises in respect of Daisy's contractual capacity:

2.5.1 The legal system(s) of which country(ies) would be applicable to the dispute if the decision in *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W) is applied? [2]

- ✓ **Proper Law is applicable –**

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- ✓ **Students must correctly identify the proper law based on their answer to question 2.1 above.**

2.5.2 If the court today were to apply the decision in _____ to the dispute, it would apply the law of Japan to determine Daisy's contractual capacity. **[1]**

- ✓ **Kent v Salmon.**

2.6 Assume that Potted Lilly obtained judgment in its favour before a court in Hong Kong and not a South African court. Assume that the court in Hong Kong ordered specific performance. During the proceedings Daisy entered an appearance only to contest the jurisdiction of the Hong Kong court. Following the decision, Daisy appealed the Hong Kong court's judgment, and the appeal is pending. Identify whether the South African court would recognise and enforce the Hong Kong court's judgment? **[8]**

- ✓ **Students must identify and apply the requirements applicable to the recognition & enforcement of foreign judgements in South Africa – international jurisdiction, final & conclusive judgment, not against public policy, the judgment must not involve the enforcement of a penal (punitive) or revenue (related to tax of income) law of the foreign state, the judgment must not be obtained by fraudulent means, the judgment must be in line with (must not be precluded by) the Protection of Businesses Act 99 of 1978.**
- ✓ **Each requirement must be applied, and students must identify whether the requirement has been met. Only half a mark is awarded for identifying the requirement without application.**
- ✓ **Applicable case law must be identified.**
- ✓ **Students must conclude that the judgment will most likely be recognised & enforced in South Africa because all the requirements appear to be met.**

½ mark awarded for listing a requirement only without application.

2.7 Assume that Potted Lilly purchases vases for their flower store from a company called "Vase Display". Vase Display has its principal place of business and is incorporated in South Africa but manufactures all its vases in Bangkok (Thailand). Potted Lilly also sells the vases it purchases from Vase Display to clients online from around the world. A woman named Delphine who lives in Johannesburg (South Africa) purchased 20 vases from Potted Lilly. Delphine purchases the vases to display the flowers she grows in her garden at an annual flower show where she ordinarily sells her flowers. As soon as Delphine began filling the vases with water, the vases began to crack due to a manufacturing default. Delphine institutes delictual proceedings against Vase Display in the Gauteng Local Division of the High Court of South Africa, Johannesburg.

2.7.1 The legal system of which country would most likely be applied by the Gauteng Local Division of the High Court of South Africa, Johannesburg to Delphine's delictual claim against Vase Display? **[4]**

- ✓ **Students must indicate that the LLD is applicable and explain how the LLD is interpreted in South Africa. [2]**

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- ✓ LLD = Johannesburg, South Africa.
- ✓ Applicable case law must be identified & applied - *Burchell v Anglin & Caterham Car Sales*.

2.7.2 How would your answer to Question 2.7.1 above differ if the Gauteng Local Division of the High Court of South Africa, Johannesburg applied the Rome II Regulation. **[3]**

- ✓ General rule = *lex loci* with the locus being the *damni* (the place of damage).
- ✓ Students must explain the meaning of the *lex loci damni*.
- ✓ Hence the law of Thailand is applicable – place where vases are manufactured.
- ✓ No exceptions in Rome II Regulation are present, facts does not state that Delphine habitually resident in SA, however if resident in SA then SA would apply as parties would share the same HR.

SUB -TOTAL: [36]

TOTAL: 80

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