



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

<b><u>DATE</u></b>	: 04 August 2021	<b><u>SESSION</u></b>	: 08:00 – 11:00
<b><u>ASSESSOR(S)</u></b>	: Ms C Johannes		
<b><u>DURATION</u></b>	: 3 hours	<b><u>MARKS</u></b>	: 80

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NUMBER OF PAGES: 5 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.
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.

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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 the end of submission time. **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**

Karabo (a South African national at all relevant times) and Kyle (a Canadian national at all relevant times) married in Mauritius during 2014. The parties married out of community of property excluding the accrual system, subject to an ante nuptial contract. At the conclusion of the marriage Karabo was domiciled in Namibia and Kyle was domiciled in Australia, both parties were habitually resident in Botswana working for Doctors Without Borders. At the time when the marriage was concluded, the parties intended to move to South Africa and acquire domicile there, instead, they were stationed in Kenya in 2015 and became domiciled and habitually resident there in 2016.

In 2017, while travelling to Italy for a holiday with Kyle, Karabo drafted her first will on an Emirates Plane (registered in Dubai). In Karabo's first will she instituted Kyle as her sole heir.

Later in 2017, Karabo and Kyle had their first and only child, a daughter whom they named Koleka. In 2018, Karabo and Kyle moved to South Africa and became domiciled and habitually resident there. Karabo and Kyle purchased a house in Melville, Johannesburg. In early 2019, Kyle donated a case of premium South African wine to Karabo. In 2019, Kyle stopped working for a year to further his studies, during that year Karabo contributed a disproportionately large amount to the common household expenses.

In 2020, Karabo met and fell in love with a man named Kgotso and decided to separate from Kyle. In December 2020, Karabo instituted divorce proceedings in the Gauteng Local Division of the High Court of South Africa, Johannesburg. Following her divorce from Kyle in December 2020, Karabo drafted her second will while visiting family in Zambia. In Karabo's second will she expressly revokes her first will and institutes Kgotso as her sole heir.

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In March 2021, Karabo passed away in a horrific car accident. She died leaving behind money in a bank account in Johannesburg and a house situated in Botswana. In terms of the relevant legal systems, Koleka is Karabo's sole intestate heir.

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

✓ **The LLC which students must be able to identify from the set of facts.**

- 1.2** The legal system of which country would govern the proprietary consequences of the marriage between Karabo and Kyle at the time of divorce according to Roman Dutch Law? In your answer, you must discuss the impact of the parties' intention to move to South Africa at the time when their marriage was concluded. [4]

✓ **LDM which students must be able to identify from the set of facts.**

✓ **Students must indicate that the LDM is the domicile of the husband**

✓ **Students must be able to identify the time that the LDM is determined.**

✓ **Students must be able to explain the relevance of the principle of immutability to the present factual scenario.**

- 1.3** The legal system of which country would govern the proprietary consequences of the marriage between Karabo and Kyle at the time of divorce according to the proposal by Stoll and Visser? [4]

✓ **No ANC specifying applicable legal system.**

✓ **No common LD.**

✓ **Common HR = Botswana.**

✓ **Botswana = LDM/ proper law of the proprietary consequences of the marriage.**

- 1.4** The legal system of which country would govern a claim by Kyle for the case of wine he donated to Karabo at the time of divorce? [2]

✓ **The LD of Kyle at the time of making the donation.**

✓ **Students must be able to identify Kyle's LD at the time of making the donation from the set of facts.**

- 1.5** Assume that according to the law of Australia 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.

- 1.5.1** The legal system of which country would determine whether Kyle is entitled to claim back the case of wine he donated to Karabo at the time of divorce if classification *lege causae* were applied? [5]

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- ✓ 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 Australia.
- ✓ 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 Australia.

**1.5.2** Would Kyle be entitled to claim back the case of wine he donated to Karabo at the time of divorce if classification *lege fori* were applied? [3]

- ✓ Students must be able to identify that according to LF classification LD at time of donation applicable.
- ✓ LD = SA.
- ✓ According to SA law donation = irrevocable based on facts given in question.

**1.6** Regardless of the classification of a claim for redistribution, would Kyle comply with the requirements for a claim for redistribution against Karabo in terms of section 7(3)-(4) of the Divorce Act 70 of 1979 at the time of divorce? [4]

**1.7** Assume that Kyle wants to exclude the application of foreign law in the divorce matter. What are the public policy grounds for excluding foreign law in terms of *Bell v Bell* 1991 4 SA 195 (W)? [4]

- ✓ Principles of justice;
- ✓ Boni mores;
- ✓ Constitutional values;
- ✓ Public interest.

**1.8** Assume that following the divorce between Karabo and Kyle, Kyle moves to Australia with Koleka without first obtaining Karabo's permission. Discuss the remedies available to Karabo. [3]

- ✓ Remedy lies in the Hague Convention on Civil Aspects of International Child Abduction.
- ✓ Students must identify the correct provision in the Hague Convention Civil Aspects of International Child Abduction within which Karabo's remedy will lie - Karabo can apply to the central authority in South Africa.
- ✓ The application must be made within 1 year and the children must be under 16.
- ✓ The central authority will facilitate the voluntary return or institute proceedings to the return of the children.

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**1.9** Assume that both Karabo's first and second will are formally valid in terms of the law of Botswana only. Who inherits the money in Karabo's bank account in Johannesburg? **[4]**

- ✓ Will 2 = invalid to its own testing systems so entire will is not valid.
- ✓ Can save the revocation clause because will 2 valid to a testing system of will 1 to which will 1 is also valid (Botswana).
- ✓ Karabo dies intestate – intestate succession of movable property governed by LUD.
- ✓ According to LUD (which students must identify) – Karabo is her sole intestate heir and inherits the money in Karabo's bank account in Johannesburg.

**1.10** Assume that both Karabo's first and the second will are formally valid in terms of the law of Zambia only. Who inherits the money in Karabo's bank account in Johannesburg? **[3]**

- ✓ Will 2 valid to of own testing system.
- ✓ Will 2 validly revokes will 1.
- ✓ Kgotso inherits the money in Karabo's bank account in Johannesburg.

**1.11** Assume that Karabo's first will is formally valid in terms of the law of Dubai only and her second will is formally valid in terms of the law of Botswana only. Who inherits the money in Karabo's bank account in Johannesburg? **[3]**

- ✓ Will 2 = invalid to its own testing systems so entire will is not valid.
- ✓ Cannot save the revocation clause because will 2 not valid to a testing system of will 1 to which will 1 is also valid.
- ✓ Will 1 valid to the LLA (which students must identify) therefore Kyle inherits the money in her bank account in Johannesburg.

**SUB -TOTAL: [40]**

**QUESTION 2.**

In December 2019, Dali (seller) and Emile (buyer) concluded an instalment agreement for the sale of Dali's antique furniture. Dali is domiciled and habitually resident in South Africa and Emile is domiciled and habitually resident in France. The contract between Dali and Emile was concluded in Antwerp (Belgium) at an antique furniture exhibition. At the time of the conclusion of the contract, the antique furniture was being held at Dali's storeroom in Johannesburg (South Africa). The furniture that Dali sells is manufactured in Windhoek, Namibia. According to the contract, delivery had to take place at Emile's chateau in Bordeaux (France) and payment was to be made in Dali's bank account in Johannesburg (South Africa). The furniture was transported from South Africa through the Netherlands to Emile's chateau in Bordeaux (France) for delivery. The contract provided that ownership would only pass on payment of the full purchase price. The reservation-of-title clause was not registered in any public registry. Delivery took place as agreed, but only 40% of the purchase price has been paid to date. The parties did not choose a legal system to govern their agreement. Assume

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that Dali institutes proceedings against Emile for payment of the remainder of the purchase price in the Gauteng Local Division of the High Court of South Africa, Johannesburg.

- 2.1** Identify the *lex loci solutionis* of the contractual agreement between Dali (plaintiff) and Emile (defendant). [2]  
 ✓ **LLS = place of delivery and place of payment which students must be able to identify from the set of facts.**
- 2.2** The legal system(s) of which country(ies) will be applicable to the contractual dispute between Dali (plaintiff) and Emile (defendant) if the Gauteng Local Division of the High Court of South Africa, Johannesburg applies the unitary principle [4]  
 ✓ **Unitary principle = 1 place of performance (looks for legal system of closest connection) if not clear there are different options.**  
 ✓ **Apply the scission principle, apply the place of delivery, apply the place of payment – students must be able to identify these legal systems from the set of facts. Where students list the applicable connecting factor without identifying the actual applicable law (legal system) from the set of facts they will only be awarded half a mark.**  
 ✓ **Student must be able to indicate that all the options carry equal weight.**
- 2.3** The legal system(s) of which country(ies) would apply to:
- 2.3.1** a counterclaim by the defendant? [1]  
 ✓ **LF = SA.**
- 2.3.2** determine who bears the onus of proof? [2]  
 ✓ **Lex causae.**  
 ✓ **Students must be able to identify the specific legal system(s) from the set of facts.**
- 2.4** The legal system(s) of which country(ies) would be applicable to a dispute in respect of Dali's contractual capacity if:
- 2.4.1** Kent v Salmon 1910 TPD 637 is applied? [2]  
 ✓ **The LCC which students must be able to identify from the set of facts. [2]**
- 2.4.2** Tesoriero v Bhyjo Investments Share Block (Pty) Ltd 2000 (1) SA 167 (W) is applied? [3]  
 ✓ **The proper law of the contract which students must be able to identify from the set of facts. [3]**
- 2.5** To which aspect(s) of the contract could the law of the Belgium be applicable? [2]  
 ✓ **Belgium = LLC so it can be applicable to;**  
 ✓ **formal validity (Ex Parte Spinazze);**  
 ✓ **contractual capacity (Kent v Salmon).**  
 ✓ **As the proper law of the contract, it could also be applied;**  
 ✓ **to contractual disputes in respect of contractual capacity (Tesoriero v Bhyjo Investments Share Block (Pty) Ltd).**

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- 2.6** The legal system(s) of which country(ies) would govern the transfer of ownership of the furniture from Dali to Emile, while they were being held at Dali's storeroom? **[2]**

✓ **LS at that point in time which students must be able to identify from the set of facts.**  
**[2]**

- 2.7** The legal system(s) of which country(ies) would be applicable to the reservation of title clause? **[3]**

✓ **In respect of a reservation of title clause there are 4 different opinions/options of legal systems that could apply to such clauses taught to students in this module. (See lecture slides) –**

✓ **Students must discuss and apply all 4 opinions. [3]**

✓ **Students will not be awarded the full 3 Marks for only listing the opinions/options without application instead ½ marks will be awarded for listing the option/opinion only.**

- 2.8** The legal system(s) of which country(ies) would apply to the transfer of ownership of the furniture while in transit to its destination? **[2]**

✓ **LLE – which students must identify from the set of facts.**

✓ **LLD – which students must identify from the set of facts.**

- 2.9** Assume that Dali obtained judgement in its favour before a court in France and not a South African court. Assume that the Court in France attached Emile's property to found jurisdiction and awarded double damages in Dali's favour. During the proceedings Emile entered an appearance only to apply for the release of his attached property. Following the decision, Emile appealed the French court's judgment, and the appeal is pending. Identify whether the South African court would recognise and enforce the French court's judgment? **[6]**

✓ **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.**

- 2.10** Assume that payment has been settled in full and that no contractual relationship exists between Emile and Dali. Assume that the furniture Dali sold Emile breaks shortly after delivery

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due to manufacturing default. Emile then institutes delictual proceedings against Dali in the Gauteng Local Division of the High Court of South Africa. The legal system of which country would most likely be applied to Emile's delictual claim by the Gauteng Local Division of the High Court of South Africa, Johannesburg? [4]

- ✓ **Students must indicate that the LLD is applicable and explain how the LLD is interpreted in South Africa. [2]**
- ✓ **LLD = Johannesburg, South Africa.**
- ✓ **Applicable case law must be identified & applied - *Burchell v Anglin & Caterham Car Sales*.**

**SUB -TOTAL: [33]**

### **QUESTION 3**

Megan and Shaun married in the Philippines in 2010. After 3 years, Megan and Shaun wished to obtain a divorce because their marriage relationship had irretrievably broken down. The parties were unable to obtain a divorce in the Philippines because divorce is illegal in that country. In January 2014, Megan and Shaun managed to obtain a divorce in the Dominican Republic. In 2015, Shaun met and fell in love with a woman named Lungile. In 2016, Shaun married Lungile at an intimate ceremony held in the Seychelles. In 2021, after a nasty fall out with Shaun Lungile decides to divorce Shaun and claim half of his estate, because they were married in community of property. Lungile institutes divorce proceedings in the Gauteng Local Division of the High Court of South Africa. Shaun disputes Lungile's claim to half of his estate on the basis that he and Lungile were never validly married because his divorce from Megan was not validly obtained.

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

- ✓ **Was the divorce between Shaun and Megan validly obtained?**

**3.2 Identify the *lex causae* in the set of facts above. [1]**

- ✓ **Philippines.**

**3.3 Which type of incidental question is present in the set of facts above? [1]**

- ✓ **The incidental question properly so called.**

**3.4 Discuss the four possible approaches the court could apply to answer the incidental question present in the set of facts above. [4]**

- ✓ **The internal law of the *lex causae* – which students must be able to identify from the set of facts.**

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- ✓ The private international law of the *lex causae* – which students must be able to identify from the set of facts.
- ✓ The internal law of the *lex fori* – students must identify LF.
- ✓ The private international law of the *lex fori* – students must identify PIL of LF.

SUB -TOTAL: [7]

TOTAL: 80

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