JUS 5230 spring 2021
Grading guidelines

Exam:

Starseneca is a multinational pharmaceutical company with headquarters in England and production facilities in many different countries. In the course of the year 2020, it develops a vaccine against a contagious disease that worries sanitary organisations in many countries.
Before the product is fully developed, in April 2020, an English hospital enters into a contract with Starseneca for the purchase of one million vaccines as soon as the product is developed and approved by the authorities.
After the product has been developed, in September 2020, a German hospital enters into a contract with Star Seneca for the purchase of one million vaccines to be delivered within three months after the product is approved by the authorities.
The product is approved in December 2020.
Starseneca has a production capacity of two million vaccines every quarter, if all its factories work at full capacity. However, some of the factories do not run at full capacity, because the production equipment needs an upgrading. Therefore, the rate of production is lower than expected, and Starseneca cannot deliver to both hospitals according to their respective contracts.
At the end of March 2021, Starseneca has delivered in full the agreed volume of vaccines to the English hospital, and only a reduced volume to the German hospital.
Assuming that you are a lawyer for the German hospital, please analyse the legal position of your client.

1. You can assume that neither of the contracts has a choice of law clause. Which law shall be applied?
2. Is the necessity of upgrading the production equipment an event that can be considered to be a force majeure circumstance?
3. Assuming that it is a force majeure circumstance, can it be invoked as an impediment to the performance of the contract?
4. Assuming that it can be invoked as an impediment, what are the consequences on the performance of the contract?

Assume now that the contract with the German hospital has an arbitration clause, which makes reference to the UNCITRAL Arbitration Rules.
The German hospital starts arbitration proceedings requesting damages for breach of contract.
The arbitral tribunal considers that the contract is international, and does not find it appropriate to apply a national law. Instead, it applies the UNIDROIT Principles.
The arbitral tribunal finds that the principle of good faith is very strong under the UNIDROIT Principles. It reasons that insisting on an accurate performance of the contract would be against the principle of good faith, because the product was new and it should have been expected that there would be some initial difficulties. On this basis, the Arbitral Tribunal finds that there was no breach of contract.
Assuming that the arbitral award was rendered in a country that has adopted the Model Law, please analyse the position of your client:

5. Did the arbitral tribunal have the power to apply the UNIDROIT Principles?
6. Assuming that it did not have this power, what law should have been applied?
7. Assuming that it did not have this power, what remedies against the award are available to the client?
8. Assuming that it had this power, did it apply the UNIDROIT Principles correctly?
9. Assuming that it did not apply them correctly, what remedies against the award are available to the client?

Introduction

Due to the pandemic, all teaching at the Faculty of Law has been carried out online in the Spring semester 2021. Moreover, access to student reading rooms has been subject to significant restrictions. As the pandemic has made the study situation extremely demanding, grading must take this into account.

As a consequence of the extraordinary circumstances under which this semester's exams are taken, the faculty decided that exams should be held at home with all books and material available to the students.

The learning outcome for this subject is described as follows:

- Identify sources of regulation that are applicable to international business transactions: international conventions, national law, commercial practices and other forms of "soft law";
- Evaluate the extent to which the parties may derogate from the above mentioned rules in their contracts;
- Understand the mechanisms of choice of forum and choice of law, permitting to identify the law applicable to the contract;
- Appreciate the effectiveness of these rules in case the parties have chosen to submit any dispute regarding their transaction to international arbitration.

Guidelines specific to the exam questions

The exam asks students to assume that they are a lawyer for one the parties in a contractual relationship, and to analyse the legal position of that party.
This permits students to show that they have understood that rights and obligations, as well as exercise of remedies for breach of contract, depend not only on the contract terms, but also on the governing law.
It permits furthermore to show that students have understood how the governing law is chosen.
These issues are central throughout the lectures and the reading material.

The case is modelled quite closely on a case examined in the reading material and in the lectures: The production capacity of a seller is reduced, and the seller cannot deliver the agreed volumes to both its buyers. In the case in the exam, one party receives full delivery, and the other party (the German party) not. Students are asked to discuss the legal position of the German party.

Students are not expected to give lengthy explanations, as their papers should not exceed 2500 words.

The first question asks to explain which law governs the contracts. Students are asked to assume that neither of the contracts has a choice of law clause.

Students should explain that, lacking choice by the parties, the governing law is determined by conflict rules (rules of private international law).
This is explained in the book that is obligatory reading (G. Cordero-Moss, *International commercial contracts*), p. 153-171.
The reasoning is as follows:

- Rules of private international law differ from country to country, unless they are regulated in a convention or regulation;
- Courts apply the private international law of their own system;
- Therefore, in order to find out which conflict rules shall be applied to determine the law governing the contract, it is necessary to find out which courts may have jurisdiction on the case;
- The courts of more than one country may have jurisdiction;
- Therefore, to be able to advise the client, the lawyer must ascertain which courts may have jurisdiction, which law these courts' conflict rules would determine as applicable, and what that law says on the merits of the case.

The involved parties are English and German. Students have been informed that they are not expected to know specific details of Brexit, but that they can refer to it to the extent they find it relevant.

Students should first turn to the question of jurisdiction.
This is explained in the book that is obligatory reading (G. Cordero-Moss, *International commercial contracts*), p. 153-158.
There is no need to be very detailed, what is important is that students have understood the mechanism.
To verify whether German courts have jurisdiction, the Brussels I regulation should be applied. According to Brussels I, the courts of the place of the defendant or the courts of the place of performance have jurisdiction.
After Brexit, Brussels I does not apply in England. Therefore, jurisdiction of English courts will be determined by English law. Students do not need to go into the details of English rules on jurisdiction; however, the court of the place of the defendant is generally always available.
This shows that both English and German courts are available if the German party wants to start a suit: English courts because they are the courts of the defendant, and German courts because they are the courts of the place of performance.
It's a plus if students discuss how the contract regulation of the place of performance may be used to influence jurisdiction.

Once ascertained which courts have jurisdiction, the conflict rules of the courts' legal system shall be examined.
This is explained in the book that is obligatory reading (G. Cordero-Moss, *International commercial contracts*), p. 171-176.
If an action is brought before a German court, the court will apply the Rome I regulation. According to Rome I, a contract of sales is governed by the law of the seller (the party making the characteristic performance).

If an action is brought before an English court, the court will apply English conflict rules. Students do not need to go into the details of English conflict rules – however, the UK has implemented an act on choice of law corresponding to Rome I.
Therefore, the contract will be subject to English law, irrespective of whether German or English courts have jurisdiction.

The second question asks whether the necessity of upgrading production equipment is an event that can be considered to be a force majeure circumstance. Students should explain what a force majeure circumstance is.
This is explained in the book that is obligatory reading (G. Cordero-Moss, *International commercial contracts),* p. 109-114.

A force majeure circumstance is an event that is unforeseeable, beyond the control of the affected party and that could not reasonably be overcome. It seems unlikely that the upgrading of production equipment meets these requirements. The need to upgrade production equipment is normally evident from the technical specifications, therefore it is not unpredictable; the decision to upgrade production equipment is normally taken by the seller, therefore it is not beyond the control of the seller. Students should highlight that the definition of force majeure depends on the governing law. It's a plus if students make a comparison between English and German law.

The third question asks to assume that the necessity to upgrade meets the requirements for a force majeure circumstance, and to explain whether the circumstance could be invoked as an impediment in this case.
This is explained in the book that is obligatory reading (G. Cordero-Moss, *International commercial contracts*), p. 115-116.

Under English law, failure to deliver the whole volume to the German buyer would not be deemed to be due to the force majeure circumstance. It would be deemed to be due to the fact that the seller had entered into a contract with another buyer. Therefore, it would not be considered to be beyond the control of the seller, but self-induced. Therefore, the seller would not be excused. It's a plus if students make a comparison between English and German law.

The fourth question asks to assume that the necessity to upgrade can be invoked as an impediment, and asks to explain what are the consequences on the performance of the contract.
This is explained in the book that is obligatory reading (G. Cordero-Moss, *International commercial contracts*), p. 115-116.

If delivery of the agreed volume is prevented by a force majeure circumstance, the seller is excused for its non-performance. It's a plus if students make comparative observations, showing that different legal systems have different rules on how to allocate the reduction between the buyers.

The fifth question asks whether an arbitral tribunal seized with the dispute has the power to apply the UNIDROIT Principles. Students are asked to assume that the parties had agreed to arbitration

under the UNCITRAL Arbitration Rules and in a country that has adopted the UNCITRAL Model Law.
This is explained in the book that is obligatory reading (G. Cordero-Moss, *International commercial contracts*), p. 298-303.
Under the UNCITRAL Arbitration Rules, the arbitral tribunal does not have the power to apply the UNIDROIT Principles ("rules of law", as opposed to "law") on its own motion.

The sixth question asks to assume that the arbitral tribunal did not have the power to apply the UNIDROIT Principles, and asks how the governing law should have been determined.
This is explained in the book that is obligatory reading (G. Cordero-Moss, *International commercial contracts*), p. 203-209.

Under the UNCITRAL Arbitration Rules, the arbitral tribunal shall apply the law that it deems appropriate. This is the so-called voie directe, meaning that the arbitral tribunal does not need to apply conflict rules to determine the applicable law. Under the Model Law, to the contrary, the applicable law is determined applying conflict rules. Students should explain that the arbitration rules chosen by the parties have the same force as a contract, and that they can derogate from the applicable arbitration law when this is not mandatory.
It's a plus if students refer to other approaches for determining the applicable law in arbitration.

The seventh question asks to assume that the arbitral tribunal did not have the power to apply the UNIDROIT Principles, and asks what remedies against the award are available to the losing party.
This is explained in the book that is obligatory reading (G. Cordero-Moss, *International commercial contracts*), p. 288-289 and 298-303.

Arbitral awards are final and binding, and there is no appeal against them. However, there is the possibility to challenge their validity before the courts of the place of arbitration. Also, enforcement of the award can be resisted. Challenge to the validity is regulated by the arbitration law of the place of arbitration (in this case: the Model Law). Enforcement is regulated by the New York Convention. In these two instruments, the grounds for invalidity and for refusing enforcement are the same. If the arbitral tribunal has applied the UNIDROIT Principles without having the power to do so, it is possible to argue that it violated the applicable procedural rules or that it exceeded its power - both are grounds for setting aside the award or for refusing enforcement. It is also acceptable that students conclude that there is no possibility to set aside the award or refuse enforcement, as long as they examine these grounds.

The eighth question asks to assume that the arbitral tribunal had the power to apply the UNIDROIT Principles, and asks whether they were applied correctly.
This is explained in the book that is obligatory reading (G. Cordero-Moss, *International commercial contracts*), p. 43-57.

The principle of good faith is very strong in the UNIDROIT Principles. However, it is not clear how it should be interpreted. Students should explain that it is not possible to ascertain that there is only one correct way of applying the principle of good faith in the UNIDROIT Principles.

The nineth question asks to assume that the arbitral tribunal did not apply the UNIDROIT Principles correctly, and to explain what remedies against the award are available to the losing party.
This is explained in the book that is obligatory reading (G. Cordero-Moss, *International commercial contracts*), p. 224-225.

Students should explain that error in application of the law is not one of the grounds for setting aside an award or refusing enforcement. Therefore, even if the award is wrong, the losing party has no remedies.