International Commercial Law 2023

BY is a Swedish company operating in the energy sector. They own and operate a wide range of power production facilities. Given the growing electricity demand in 2021, BY's board of directors approved the initiative to build two wind turbine farms in Sweden. Having received all the necessary permits from the local authorities, BY started purchasing the necessary components.

In January 2022, BY approached SL, a German manufacturer of wind turbines. Their turbines are produced using a custom, proprietary design, and generate very little noise, even in very strong wind conditions. This was highly appealing to BY, as the lower noise levels minimized the level of noise pollution, and reduced the possibility that BY would have to pay compensation to people living in the vicinity of their wind farms.

For the wind farms to operate, they require another key component: a Supervisory Control and Data Acquisition (SCADA) computer system. SCADA systems are used to centrally monitor and control a group of wind turbines in a wind farm, as well as to ensure the safety of their operations. They are largely standardized in the industry. BY already owns two such systems and has them ready to be installed in the new wind farms.

Negotiations started in early February 2022. Prior to this, SL was alerted to the fact that their turbines, due to their custom design, are causing several SCADA systems to crash. However, they chose not to disclose this information to SL, hoping that they could fix the problem by designing a software update which could be shared with all SCADA system owners. BY did not inquire about SCADA systems during negotiations.

The contract was concluded in June 2022, and contained the following provisions:

> **3. Representations and Warranties**
>
> 3.1 SL represents that the wind turbines to be sold under this Agreement comply with the technical specifications outlined in Exhibit A, including rated power output and noise emission levels.
> 3.2 SL represents that the wind turbines are designed to support integration with Supervisory Control and Data Acquisition (SCADA) systems. BY acknowledges that variations in the design and operation of SCADA systems may impact the effectiveness and performance of any such integration. SL is under no obligation to provide any assistance relating to SCADA system operation.
> 3.4 SL represents and warrants that the wind turbines are designed for a service life of 20 years under normal operating conditions. SL is under no obligation to perform on-site maintenance or repairs.
> 3.5 SL represents that it has obtained all necessary regulatory approvals for the manufacture and sale of the wind turbines.
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> **10. Entire Agreement**
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> This Agreement, including its appendices, constitutes the entire agreement between SL and BY and supersedes all prior agreements, understandings, and communications, both oral and written, between the parties relating to the subject matter hereof.
>
> **11. Choice of Law**
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> This Agreement, and any dispute or claim arising out of or in connection with it, shall be governed by and construed in accordance with the laws of England and Wales.

During the negotiations, clause 3.4 was the most disputed one. Under Swedish environmental protection laws, there is a provision stating that "manufacturers of all wind turbines which are to be installed in Sweden must provide a warranty period of at least 35 years". SL offered to significantly reduce the price, if the warranty period were to be reduced to 20 years. They advised BY that English law, chosen in the contract, contains no such provisions on warranty times. Similarly, no such provision is found in any EU legal sources. BY agreed to lower the warranty period and receive a price reduction.

When the turbines arrived, BY's SCADA systems crashed. This made it impossible to install the turbines, and BY suffered severe financial losses. SL claims that the goods were fully conforming to the agreement. However, to preserve their business relationship and maintain their good reputation, they offered to provide free technical support to BY.

The contract was amended as follows:

> **Addendum to the Agreement dated June 2022:**
>
> SL hereby agrees to provide additional technical support to BY, including the provision of on-site personnel for a period of 12 months, to assist in resolving the SCADA system integration issues with the wind turbines supplied under this Agreement. Such services shall be provided at no cost.

Despite their efforts, SL did not manage to fix the underlying issue. All further negotiations have failed, and BY wants to initiate legal proceedings.

NOTE: This is the original exam paper, as distributed to students. It included an error in paragraph 3, where the words "BY" and "SL" were swapped. The correct version should state "Prior to this, SL was alerted to the fact that their turbines, due to their custom design, are causing several SCADA systems to crash. However, they chose not to disclose this information to BY." This was communicated to students. Given all the facts of the case, the surrounding text, and the way that the question is phrased, this should not have affected their analysis. However, if any mistakes are made due to this, students should not be subtracted any points.

Bachelor questions:

1. What are the consequences of the fact that SL knew, but failed to disclose, that the turbines are experiencing SCADA integration problems?

   This question asks students to explain how the governing law affects the contract in the pre-contractual stage, as explored in Chapter 3 of the book.
   As explored in Chapter 3.1, under English law, there is an expectation that each party will take care of its own interests (caveat emptor). Even more specifically, English law contains no duty to negotiate in good faith, and even a contractual stipulation to that extent might be deemed unenforceable (Chapter 3.4.2.1). Lastly, no misrepresentation will be found if a party remains silent in regard to material information.
   Some answers might point to the fact that the courts before which the dispute is brought might consider the principle of good faith to have an overriding mandatory character, but that such approach is highly unusual and calls for extreme caution, as explored in 4.3.5. However, this observation is not necessary to achieve a top grade.

2. Is the contractual amendment binding on BY?

   This is a question on the effect of the applicable law on contract formation. Good answers will point out that English law, unlike most Civil Law systems, imposes a requirement of consideration in order for a contract to be formed. Under this doctrine, the parties must be able to demonstrate mutuality of obligations, i.e., that each party has benefits and detriments stemming from the contract. This is explained in Chapter 4.6.2 of the book. While the requirement of consideration is interpreted broadly, it is dubious that the mere potential for preserving the good relationship and reputation would satisfy its requirement; especially bearing in mind that this potential benefit is not gained due to obligations of the other party under the contract. Therefore, it can be concluded that the amendment is not binding.

3. Assume that proceedings are brought before a Swedish court, and that it has jurisdiction to hear the dispute. Could this have any consequence for the rights and obligations of the parties under the contract?

   This is, in essence, a question on whether all rules of connected laws are excluded by the virtue of a choice of law clause. This is answered in-depth in book chapter 4.
   Good answers will point to the fact that the application of the mandatory rules of the law of the forum is generally excluded, unless such rules have an "overriding" character. Such overriding mandatory rules are applicable on the basis of their function and the interests they represent, which, absent a specific conflict rule, calls for a case-by-case analysis. However, it is important to stress that the scope of such rules is to be construed narrowly. This is explored in Chapter 4.3 of the book.
   In the present case, the Swedish provision on mandatory warranty periods seems to serve the underlying policy objective of environmental protection. This seems to suggest that such a rule could potentially be held to be of an overriding character.
   Aside from the overriding mandatory rules, some answers might point to the fact that the interpretation of the contract might be influenced by the judge's local legal system, even on a somewhat unconscious level, as explored in book chapter 4.2.1.3. While such observations are not necessary to achieve a top grade, they can be considered a plus.

Additional master questions:

4. Which courts would have jurisdiction to hear this dispute?

   This is a question on determination of the forum, explored under the book chapter 3.2.1. Under the Brussels I Regulation (recast), a person domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. This means that BY would be able to bring the dispute to German courts, seeing as SL is domiciled in Germany. Further to this, a party can choose to seize the court of the country where, under the contract, the goods were delivered or should have been delivered, or where the services were, or should have been, provided. In this case, the turbines were to be installed and maintained in Sweden, giving Swedish courts the jurisdiction to rule on this case.

5. Assume that the contract is governed by the CISG, and that it contains no choice of law clause. The parties agree to litigate their dispute in Sweden. BY asks the court to order SL to

manufacture and deliver replacement turbines, instead of paying for damages. Under which rules should the court rule on this claim?

This question asks the students to demonstrate their understanding of the limits of application of transnational sources of law. Specifically, good answers will point out that the CISG leaves the question of specific performance to national law, as seen in Chapter 2.6.3.2. The court would, therefore, need to determine the applicable law by using the conflict rules of lex fori. Under the Rome I Regulation, this would be the law of the country where the seller/provider of service has his habitual residence. In the present case, this is Germany. Therefore, German law should be applied to rule on the merits of this claim.

6. Assume that this dispute was referred to arbitration in Oslo, and that the tribunal decides to apply Swedish contract law to resolve the dispute, holding that English law, chosen in the contract, is "inadequate to address this dispute". Would the losing party have any recourse?

   This is a question on the potential consequences of the excess of power by the arbitral tribunal. As explained in Chapter 5.3., the outcome will depend on whether the tribunal has used any conflict rules to make such determination: if it has done so, its substantive interpretation of these rules is not subject to judicial review. Alternatively, if the tribunal has made such decision while giving no regard to the conflict rules and the wording of the contract, it would exceed its power, giving rise to validity and recognition and enforcement challenges.