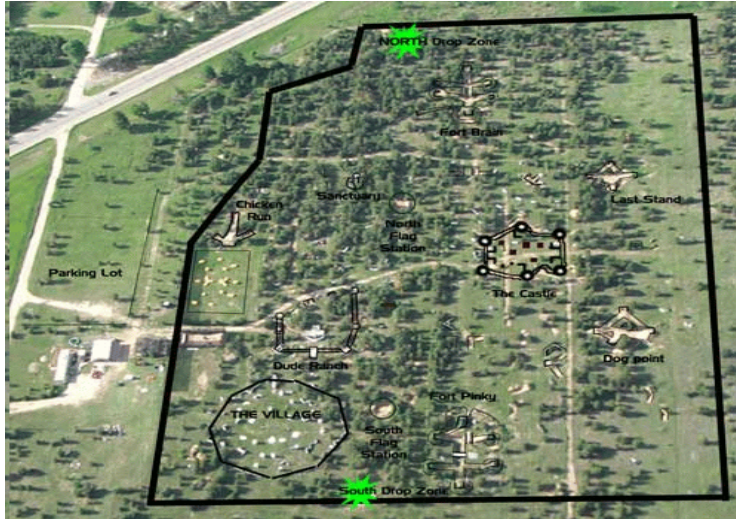


MASTER FACT PATTERN

(Take 15 minutes to read through the entire exam quickly!)

Paintball – a rapidly growing international phenomenon – has been defined as a ‘sport’ in which players compete, in teams or individually, to eliminate opponents by hitting



them with pellets containing paint (“paintballs”) from a special weapon (“paintball gun”). There are many variations of the game, which can be played indoors in halls, as well as outdoors in fields (such as the one shown in the picture). What all versions of paintball have in common is that ‘players’ go to a specific place, dress up in protective body gear, carry guns, and shoot at each other.

Inspired by hunting and military exercises, paintball is ‘played’ by ever growing numbers of people worldwide. The U.S. Sporting Goods Manufacturers’ Association estimates that more than 5.4 million people played the game in the U.S. in 2007, and some sources estimate that more than 10 million people played paintball worldwide in 2008. Paintball can be found throughout Asia, Australia and New Zealand, Europe, Latin America, the Middle East, and in parts of Africa. The Paintball World Cup was held in Taiwan in July 2009, where teams from Australia, Germany, Iran, Japan, Malaysia, the Netherlands, Taiwan and the United States competed. (Germany won, followed by Australia, then Iran, then Japan.) While many people consider paintball to be a dangerous and/or an immoral sport, there is as yet no country that has banned it entirely. Germany has considered banning paintball, but has not yet done so. Some countries, such as Japan, impose strict safety regulations on the equipment used in paintball.

One increasingly popular type of game is called *scenario paintball*, in which the game is based on a specific theme or story, and assigns roles to players. For example, recreations of historic battles (e.g., D-Day) and popular movie themes (e.g. Star Wars) are common paintball scenarios. The scenarios allow players to act out their fantasies in the functional equivalent of live video games.



Your client, a California-based company called Mad Ivan's Scenarios & Tools, Inc. (MIST), is a paintball entrepreneur. In addition to operating a number of indoor and outdoor paintball sites in the United States, MIST has developed two pieces of equipment, both of which are depicted in the photo: first, a Night-Vision Face Mask to be worn by paintball players (the

"mask"), and second, a weapon called "The Defender – The Quadruple Barreled Paintball Gun from Hell" that fires a "devastating stream of paintballs at the rate of 80 rounds per second" (the "gun").

MIST has obtained various types of intellectual property protection. First, MIST has registered trademarks for the mask and the gun; second, MIST has registered its trade names ("Mad Ivan" and "MIST"); third, MIST has one patent on the mask and one on the gun; and fourth, MIST has obtained copyright protection on a number of its innovative scenarios, including its most popular scenario, *Dragon Slayer*. The copyright protection covers not only the idea and rules associated with the scenario (e.g., capture the magical egg that the dragons are guarding), but also special costumes, the lay-out or design of the field, and special scenery (similar to stage sets in the theater). Imagine a small Disneyland for paintballers.

The owner of MIST, Ivan Vile, has hired you to represent his company in connection with his goal of expanding MIST's business activities worldwide. At your initial meeting, Ivan shares with you his vision for MIST's global future. First, Ivan wants to **sell** MIST masks and guns in the Asian Pacific region, where paintball is experiencing the fastest rate of growth. Second, he wants to set up some kind of **distribution system** for masks and guns in the European Union, where paintball is fairly well established in a few countries (England, France and Germany), and starting to gain popularity in many others. And third, Ivan wants to **franchise** its most popular scenarios (or at least license their use by independent paintball site operators in other countries).

QUESTION #1

(90 minutes, subdivided among questions A, B & C as noted below)

The two largest paintball markets in the Pacific Rim area are Australia and China. While attending the 2009 Paintball World Cup in Taiwan, Ivan met Ned Kelly, an Irishman who owns and operates a very successful paintball field near Melbourne, Australia. Ned told Ivan that he wished to import MIST's masks and guns into Australia. Ivan gave Ned a copy of MIST's price list, which stated that all sales outside the United States required payment in U.S. Dollars by means of an irrevocable, confirmed letter of credit.

On November 1, 2009, Ned ("B" for buyer) FAXed a purchase order ("PO") to MIST ("S" for seller). B's PO form stated:

"Please ship 50 new MIST™ Night-Vision face masks and 25 Defender paintball guns, C.I.F. Melbourne.

If the performance of any part of this contract by the Buyer is prevented or delayed by reason of any strike, flood, fire, explosion, war or any other cause beyond the control of Buyer, and which cannot be overcome by reasonable diligence and without unusual expense, Buyer shall be excused from such performance to the extent that it is necessarily prevented or delayed thereby.

This contract shall be governed by the Principles of European Contract Law ("PECL", excerpts in FGS&F book at pp. 90-92) and any dispute shall be settled by arbitration."

On November 2, Ivan received the FAX from Ned, as well as notification from the advising/confirming bank that a letter of credit (details in Question B below) had been opened in MIST's favor. On the next day (November 3), Ivan FAXed a copy of MIST's order acknowledgment form ("OA") to Ned. S's OA form stated:

"Sold to Ned Kelly, 50 MIST™ Night-Vision face masks and 25 *Defender* paintball guns, C.I.F. Australia, INCOTERMS (2000).

If the performance of any part of this contract by the Seller is prevented or delayed by reason of any strike, flood, fire, explosion, war or any other cause beyond the control of Seller, and which cannot be overcome by reasonable diligence and without unusual expense, Seller shall be excused from such performance to the extent that it is necessarily prevented or delayed thereby.

This contract shall be governed by the Uniform Commercial Code and any dispute shall be settled in the courts of California."

The total cost of the goods ordered is \$35,000, consisting of \$10,000 for 50 masks at \$200 each, and \$25,000 for 25 guns at \$1,000 each. Assume that ocean freight for the shipment costs \$800, and that insurance costs another \$200. Thus, the C.I.F. price would be \$36,000, which equals the cost of the goods (\$35,000) plus the cost of freight (\$800) plus the cost of insurance (\$200).

Also on November 3, Ivan arranged for the goods to be packed for shipment to Australia, and handed them over to Carl Carrier (“CC”). As stated in S’s price list, as well as on the commercial invoice that S prepared and enclosed with the goods, the masks were packed 10 per box (i.e., 5 boxes containing 10 masks each), while each gun was packed separately in its own box (i.e., 25 boxes containing 1 gun each).

On November 5, CC issued an on board bill of lading “to order of shipper” that described MIST’s cargo as follows:

“30 boxes, said to contain MIST paintball masks and guns, particulars furnished by shipper.”

The bill of lading issued on November 5 stated the goods were “on board”, but in fact, the goods were not actually loaded onto the vessel until November 9.

By coincidence, the Australian government on November 10 imposed a ban (effective immediately) on the import of high-speed paintball guns, such as the MIST™ Defender, in the wake of an accident in which a child was blinded while ‘playing’ paintball. Also unfortunate – at least for Ned – is that the value of the Australian Dollar (\$AU) has declined by nearly 25% against the U.S. Dollar (\$US) since the beginning of November 2009. Finally, Ned has learned by reading a number of global paintball websites that MIST’s Night-Vision Face Masks do not actually allow players to see in the dark.

When the MIST shipment finally arrived in Melbourne on November 21, the guns were not allowed to pass through Australian customs, however the masks cleared customs on November 23. Ned (B) persuaded his cousin, who works at the Port of Melbourne, to take a look at the boxes from MIST which were still stored in the Port of Melbourne warehouse. On November 26, Ned’s cousin opened up the boxes containing MIST masks, and discovered that each of the 5 boxes only contains 5 masks (rather than 10, as should have been in each box), and thus that only half of the masks contracted for were shipped. Ned’s cousin also mentioned that the 25 gun boxes appear to be badly damaged.

Question #1(A) (45 minutes)

Ivan called you this morning, upset about an e-mail message he received on Tuesday (December 1) from Ned. In that message, Ned explained all the problems that have arisen – the import ban, the dropping value of the Australian Dollar, the 50 missing

masks, the rumors that the masks don't really provide night vision, and the damaged gun boxes – and told Ivan that he wants to “forget the whole thing” and walk away from the contract. Ned does not want to pay for the guns at all (\$25,000), since he cannot import them into Australia, and because they appear to be damaged. Ned does not want to pay for the masks, either, because half are missing, and besides, even the delivered ones are probably defective.

Ned, who studied law for one year before deciding to seek his fortune in the world of paintball, believes that he should be excused from performing under the contract, because of the currency fluctuation and the import ban, and points to the excuse (*force majeure*) clause in the contract. In the alternative, Ned argues that he is not obligated to pay under the contract, either because MIST has breached the contract, or because there is no valid contract between Ned and Ivan/MIST. Ned also tells Ivan that he has started arbitration proceedings in Melbourne, per the arbitration clause in B's (Ned's) purchase order (PO) form.

Ivan tells you that he is very confused by this whole mess, and wants you to explain the situation to him. Ivan insists that he delivered conforming goods and that he should get paid. (Wait until Question B below to discuss particulars related to the letter of credit.) Please explain the legal situation to your client. Be sure to discuss the question of applicable law, along with your evaluation of Ned's claims, identify the arguments you would make on behalf of Ivan/MIST, and mention any steps that you would advise your client to take at this time.

Question #1(B) (30 minutes)

As already mentioned, B (Ned) does not want to pay for the goods that were shipped by S (Ivan/MIST), and started arbitration proceedings to address the contractual issues. But since this case involves a letter of credit, Ned has also contacted the Oz Bank in Australia, which issued the irrevocable letter of credit on behalf of Ned and for the benefit of MIST, and asked the issuer not to pay because of fraud. The letter of credit, which was advised and confirmed by the Seattle-based Shamu Bank, states:

“We are instructed by Oz Bank to inform you that they have opened their irrevocable credit in your favor for account of Ned Kelly, Melbourne, Australia, for the sum not exceeding a total of about \$U 36,000, available by your drafts on Oz Bank, to be accompanied by:

- Clean on-board negotiable ocean bill of lading
- Insurance policy
- Commercial Invoice covering 50 MIST™ Night-Vision Face Masks and 25 Defender™ paintball guns, C.I.F. Melbourne

This credit is subject to the Uniform Customs and Practices (UCP).

We confirm the credit.”

On November 3, after he handed the goods over to CC (Carl Carrier) for shipment to Australia, Ivan left for Europe on business, and did not have an opportunity to demand payment under the letter of credit until after he returned to California for Thanksgiving. On Monday, November 30, Ivan presented a draft to Shamu Bank’s San Francisco branch, demanding payment of \$US 36,000, along with the original bill of lading, and copies of the commercial invoice and the insurance policy covering the shipment. Shamu Bank has not yet honored Ivan’s demand. In fact, Shamu Bank called Ivan this morning (December 2) and told him that it had just received a message from the Australian issuing bank (Oz) urging it not to honor the demand because of possible fraud. Ivan asks you what he should expect in regard to the letter of credit, and how he should proceed. Advise him.

TIME LINE FOR QUESTION #1 (ALL DATES IN 2009)

- November 1 B (Ned) sends purchase order (PO) to S (Ivan/MIST) by FAX
- November 2 S receives PO that was FAXed by B
 S receives advice of letter of credit from Shamu Bank
- November 3 S sends order acknowledgment (OA) to B by FAX
 S packs goods for shipment & gives them to CC (Carl Carrier)
 S leaves for Europe
- November 5 CC issues on board bill of lading to S
- November 9 CC actually loads goods onto vessel for shipment to Australia
- November 10 Australian government bans import of high-speed paintball guns
- November 21 Goods shipped by S arrive in Melbourne, Australia
- November 23 MIST masks are cleared through customs in Melbourne
- November 26 B's cousin, who works for Port of Melbourne, inspects boxes shipped by S (Ivan) and discovers problems
- November 30 S (Ivan/MIST) demands payment under letter of credit by the San Francisco branch of the confirming bank (Shamu)
- December 1 B (Ned) sends e-mail to S (Ivan)
- December 2 Confirming bank (Shamu) contacts beneficiary (S) under letter of credit and tells Ivan that it has been asked not to honor by the Australian issuing bank (Oz) because of fraud

 Your client S (Ivan) calls you for advice

Question #1(C) (15 minutes):

Assume that Ivan urged Ned to “do whatever it takes to clear the goods through customs” (i.e., import formalities) in Melbourne. Ned tried to bribe the customs inspector to ignore the import ban and let the guns into Australia, arguing that they had been shipped prior to the imposition of the ban, but was unsuccessful. The masks, on the other hand, were not subject to the ban. However, because he feared that the masks were non-conforming, Ned asked his cousin, who worked at the Port of Melbourne, to inspect the MIST boxes and look for any problem with the shipment that might give Ned a basis for “getting out of the contract” with Ivan/MIST. Ned gave his cousin a coupon worth 10 free admissions to his paintball field near Melbourne to thank him for inspecting the boxes and for providing Ned with information about the contents of the mask boxes and the damage to the gun boxes. Has there been a violation of the Foreign Corrupt Practices Act?

QUESTION #2
(30 minutes)

Ivan has located a number of companies throughout the EU that buy and sell paintball equipment. Ivan has approached three of these companies to see if they want to become **dealers** of MIST™ masks and guns in the European Union (“EU”). Based on his discussions with the three prospective dealers, Ivan tells you that he wants to divide the EU into three territories (each consisting of nine countries), and appoint one dealer for each territory. He is not certain whether it would be best to appoint commercial agents or distributors, and seeks your guidance in this regard. Ivan also tells you that each of the three potential dealers says that it is only willing to become a dealer if it is given “full territorial protection”. Ivan has no idea what they mean by this, and wants you to explain this concept to him. Write a short letter to your client, in which you tell Ivan what he needs to think about when deciding whether to appoint a commercial agent or a distributor, and also explain what the potential dealers mean when they talk about territorial protection. It might be helpful if you could give some examples of the types of contractual clauses typically used to “protect” a territory. Also, please tell Ivan if you see any potential EU regulatory problems with the dealer network he is thinking about establishing.

QUESTION #3
(45 minutes)

According to a website devoted to entrepreneurs, it is relatively easy to start a paintball business, and many people worldwide are thinking about doing so. In view of this proliferation, Ivan believes that the global paintball market will evolve quickly, and he wants to be a trend-setter rather than a follower. Ivan believes that, once paintball becomes widely known, players will seek ever more exciting and sophisticated sites and scenarios for their play, and be willing to pay higher prices for new thrills. (He has in mind the evolution of videogames from the introduction of Pong in 1970, to Pac-Man in 1980, to World of Warcraft in 1994, to Rock Band in 2007.) Ivan believes that MIST is way ahead of the curve, in terms of innovation, and wants to franchise MIST's copyrighted scenarios. (As noted in the Master Fact Pattern, a *scenario* consists of the idea for and the rules that govern the game, which are written down in a book, but also includes the field design, the costumes worn by players, and special scenery (e.g., the MISTY Mountain, the Dragon's Pub, etc.).

Ivan has decided to try to franchise MIST's high-end paintball concept in the United Kingdom (UK), where paintball is not only popular, but is also so widespread that field operators are starting to see their income decrease because there are too many competing fields within a relatively small geographic area. Ivan has established contact with a number of successful paintball field operators in England, Wales and Scotland, who are interested in the possibility of turning their generic paintball fields into *Dragon Slayer* franchises. Ivan's goal is that each *Dragon Slayer* franchisee would have to upgrade its field to comply with MIST's standards (in terms of design and scenery, such as castle ruins, towers, and caves). Ivan also wants each franchisee to agree to maintain a minimum inventory of masks, guns and costumes, which would be rented to players who come to the field, as well as paintballs, which would be sold to the players. Ivan wants the franchisees to purchase all of these items from MIST.

Ivan will travel to the UK next week to negotiate with the prospective franchisees, and has asked you to prepare him for the negotiations. He does not want a draft agreement at this time, but has asked you to write a memorandum in which you explain all significant issues that he needs to keep in mind when setting up such a franchise system in the UK. What does Ivan need to think about before meeting with the prospective franchisees, and what legal issues will need to be addressed in the contract? Be as specific as possible when discussing how you think the contract should be arranged, or at least present Ivan with choices and guidance so that he can make an informed decision. Since you only have a small amount of information in your possession, you may need to include in your memorandum some questions for your client, coupled with an explanation of why that information is needed.

END OF EXAM