

**FINAL EXAMINATION
INTERNATIONAL BUSINESS TRANSACTIONS
PROFESSOR SELDEN
FALL 2006**

1. You have **three (3) hours** to complete this exam.
2. This exam is **open book** and open notes. You are allowed to bring the textbook, the document supplement, the Nutshell (if you have it), and your own notes. No other materials are permitted.
3. The exam has three sections:
 - a. Essays (two pages – page 2 and 3);
 - b. Contract Analysis (three pages – page 4, 5 and 6)
 - c. Short Answer (one page – page 7).You will receive all sections of the exam at the same time. **Please note the grading weight for each section and the suggested amount of time.**
4. All answers must either be typed double space, in a font no smaller than 12 points, or written in standard blue books. In blue books, write only on the right hand side of the page and double-space your work. Please write legibly.
5. Write your exam number on your exam envelope. Put your correct class section and student exam# at the top of this page, each page of questions, and each blue book. **Do not** use your name, student ID number or Social Security number on any exam materials.
6. If you feel a question is ambiguous, you may explain your reasonable understanding of the question, and answer that question. Your response will be graded in light of the question as you have reasonably interpreted it.
7. At the conclusion of the exam, return all test materials, including blue books, scratch paper, and this exam packet to the envelope and submit it to the proctor. **Do Not** seal the envelope. Students who do not return all exam materials may not be graded.

ESSAY QUESTIONS:

(50% of exam grade; Approximately one hour to one-and-a-quarter hour)

Star Bright Plastics is a Chinese company based in the southern province of Guangdong. Among other things, it makes animated holiday ornaments, which it sells to U.S. and Canadian wholesalers. One of its most popular products is the “Snoring Santa,” which features a Santa Claus reclining in a chair. When the ornament is touched, Santa snores loudly.

Star Bright has two related problems on which it would like your advice. In July, it suffered a very serious fire at its factory, which was caused by the explosion and fire of a nearby illegal fireworks factory. Star Bright’s machinery was destroyed, including the specialized molds used to produce its ornaments. The factory is now running again, but the market for holiday ornaments is very time-sensitive, and no wholesaler or retailer would accept delivery of ornaments this late.

Problem No. 1:

To make it easier to assure its customers that they would receive on-time delivery of orders, Star Bright signed an agreement early this year with DXL, a company in Los Angeles, California that provides warehouse space and logistics support. Under this agreement, DXL was expected to receive large shipments of ornaments from Star Bright and hold them in the DXL warehouse. When Star Bright received orders from its customers in the U.S., it would give that information to DXL, which would then ship the required number of boxes of each ornament to the Star Bright customer.

This contract required Star Bright to ship a minimum of 10,000 cartons of ornaments to DXL for warehousing and handling, between March and September, 2006, each carton containing 24 ornaments. DXL was to be paid for each carton that it stored, and a separate fee for each carton it shipped to a Star Bright customer. Due to the fire, Star Bright delivered only 1,000 cartons to DXL.

The agreement with DXL provides:

In the event that Star Bright brings an action against DXL to enforce the terms of this agreement, such action shall be brought in the state or federal courts located in Los Angeles County, and California law shall apply. In the event that DXL brings an action against Star Bright to enforce the terms of this agreement, such action shall be brought in the courts of China located in Guangzhou, Guangdong Province, China, and the law of China shall apply.

Star Bright wants to know whether this provision will be enforced in a California court. In other words, if DXL files suit against Star Bright in a California court, will that court accept or reject jurisdiction? If it does accept jurisdiction, will it apply California or Chinese law?

Problem No. 2:

Star Bright had a contract with a Canadian wholesaler to deliver US\$500,000 worth of ornaments no later than August 15, 2006. That was impossible to do after the fire, and Star Bright promptly gave notice to the Canadian buyer. The contract includes the following provisions:

Force Majeure: The principle of force majeure shall apply to relieve a buyer of its obligations under this agreement, where applicable.

Arbitration: Any dispute under this agreement shall be arbitrated in London, applying the laws of England to the interpretation and enforcement of this contract.

Both China and Canada are signatories to the Convention on Contracts for the International Sale of Goods, and the parties did not exclude its application in their contract. Star Bright is considering asking the Canadian buyer to agree that the arbitrator(s) can apply Canadian law, which presumably would include the CISG. Before it suggests this to the Canadian company, however, Star Bright wants to know whether you are aware of any differences between the English common law regarding the subject of *force majeure* and the provisions of the CISG.

In case the Canadian company does not agree that the arbitrator(s) can apply Canadian law, Star Bright wants to know whether it can argue that the CISG should be applied by the arbitration panel, while still respecting the contract provision calling for the application of “the laws of England.”

CONTRACT ANALYSIS:

30% of exam grade; Approximately 45 minutes to one hour)

Star Bright is planning to sell its ornaments in the Philippines through a distributor. It has a copy of an agreement used by a U.S. distributor of toys that sells a lot of foreign-made toys in the U.S. Star Bright recognizes that it will need a lawyer in the Philippines to advise it before proposing any draft contract to the distributor, but it also knows that the law of the Philippines is heavily influenced by U.S. law, so it would like to begin with an "American style" agreement. The names of the parties have been inserted at the top of the agreement, but no other changes have been made.

Please review the following agreement and comment on it, paragraph by paragraph, if necessary. You should point out any areas in which changes or additions are needed to accommodate the nature of the proposed sales from China to the Philippines. Please also note those areas in which you will need clarification of the client's intent, any additional areas to research, and try to assign some level of priority to the questions you raise.

One of Star Bright's concerns is intellectual property protection for its designs, including the Snoring Santa, so please pay close attention to this issue, and suggest any additional provisions you may feel are needed. The Philippines is a member of ASEAN, the Association of Southeast Asian Nations.

YOUR ANSWERS TO THIS QUESTION WILL BE GRADED PRIMARILY ON YOUR ABILITY TO IDENTIFY ISSUES AND SET FORTH AN INITIAL ANALYSIS, NOT ON YOUR FINAL CONCLUSIONS REGARDING ANY PARTICULAR ISSUE.

DISTRIBUTORSHIP AGREEMENT

This Agreement, effective as of _____, 2006, is between Star Bright Plastics ("Manufacturer"), with offices in Guangzhou, Guangdong Province, China, and TZ Trading Co. ("Distributor"), with offices in Makati City, Philippines.

1. Distributor will serve as Manufacturer's distributor in the territory of the Philippines ("Territory") for the holiday ornaments produced by Manufacturer ("Products"). Manufacturer will have the right to appoint other distributors in the Territory.
2. Distributor will buy and resell Products and will maintain those stocks of Products that are necessary to promote sale of the Products in the Territory and fulfill the needs of its customers.
3. Distributor will use its best efforts and facilities to promote, maintain and increase the sale of Products in the Territory.

4. Distributor shall not sell the Products to any person located outside the Territory. Distributor shall promptly notify Manufacturer of any inquiry received from a potential customer located outside the Territory.
5. Unless otherwise agreed to in writing by Manufacturer, all expenses and cost incident to Distributor's activities will be borne solely by Distributor.
6. From time to time and at Manufacturer's request, Distributor and Manufacturer will fix minimum amounts of Products which Distributor will purchase during specified periods of time
7. Distributor will make appropriate expenditures for marketing, advertising and promoting of Products in the Territory. For each year of this agreement, Manufacturer agrees to contribute \$ _____ .00 toward the cost of a national advertising campaign which will promote the Products at a consumer level, subject to Manufacturer's reasonable approval of the form and content of the advertising campaign.
8. Manufacture hereby grants to Distributor the right to use Manufacturer's trademarks in the promotion and sale of the Products within the Territory.
9. Distributor shall be entitled to purchase the Products from Manufacturer at a 20% discount from Manufacturer's list prices. All Products will be shipped by Manufacturer to Distributor F.O.B. Guangzhou, China.
10. Manufacturer warrants that all Products sold to Distributor will be free from defects in material and workmanship at the time of the sales transaction. ALL OTHER GUARANTEES, WARRANTIES, CONDITIONS AND REPRESENTATIONS, EITHER EXPRESS OR IMPLIED, WHETHER ARISING UNDER ANY STATUTE, LAW, COMMERCIAL USAGE OR OTHERWISE, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE HEREBY EXCLUDED. In no event will Manufacturer be liable to Distributor for any business expenses, loss of profits, or incidental or consequential damages, however caused.
11. The term of this agreement is three (3) years from the date hereof, but either party may terminate this Agreement, with or without cause, upon ninety (90) days' prior written notice to the party. A party may terminate this Agreement immediately on written notice to the other party if the other party fails to perform any material obligation in this Agreement or becomes insolvent, makes an assignment for the benefit of creditors, or files a petition in bankruptcy or if a receiver or trustee is appointed to take possession of its assets.
12. Distributor agrees that on termination of this Agreement (with or without cause) Manufacturer will not be liable for any termination compensation whatsoever, whether based on good will established or investments made by Distributor or otherwise.

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13. The validity and operation of this Agreement and the performance of the obligations imposed upon the parties hereunder shall be governed by the laws of the State of New York, and any disputes relating thereto shall be resolved in the Courts of the State of New York.

14. Manufacturer will have no liability to Distributor with respect to any order for the Products placed by Distributor which Manufacturer is unable to fill for any reason beyond its reasonable control, including without limitation, inventory shortages, work slowdowns or stoppages,

15. Any notices under this agreement shall be in writing and shall be deemed given when properly deposited in the first-class mail, postage prepaid, addressed to the parties' respective business address.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as to the date first set forth above.

MANUFACTURER -- By Title:

DISTRIBUTOR -- By Title: _____

Date: _____ Date

[SIGNATURES TO FOLLOW]