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Course Title International Commercial Law

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TERM TWO 2016: ASSESSMENT ITEM ONE

ASSESSMENT ITEM 1

Weighting: 50%

Length: Approximately 3000 – 3500 words

Objectives

This assessment item relates to learning outcomes 1-5 as stated in the course profile and addresses material covered in modules 1-4 (weeks 1-5) of the course. Answer all questions.

Please also note that additional readings relevant to the assignments may be made available to students. If so, students will be advised on this on the Moodle-based course website which all students should access on a regular basis.

Question 1

5 marks

Define and distinguish between domestic law, public, private international business law and explain their interface.

Question 2

5 Marks

Provide an account of what *Murabaha* and *Musharaka* are and why they are practiced in jurisdictions governed by Islamic Law.

Question 3

20 Marks

Find the following judgment, *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2015] FCA 1028 and answer the following questions:

- (a) Provide an account of the parties in this case and what relief if any is sought by them respectively. (5 marks)
- (b) What was the primary legal issue/s in contention between the parties and what were the relevant legal principles relied upon by the Court? (10 marks)
- (c) What orders were made? (5 marks)

Question 4

20 Marks

Geo Corp Ltd is a leading Queensland importer and distributor of mining equipment who wishes to import a US\$1,750,000 tractor. They communicate with a US company, based in North Dakota, who, subsequently supplies the tractor. Geo Corp seeks your advice as an adviser on the following key legal aspects of its proposed purchase. Assume that the North Dakota company has a standard form contract based on US law, with no arbitration clause, but is amenable to negotiation on key legal issues in exchange for Geo Corp making payment in full, prior to shipment:

- (a) Choice of law issues, Australia or US - what US law would by default govern the sales contract if the standard form US contract was relied upon, and is it possible under US law to select CISG for the law of the contract? (10 marks)

(b) The merits of a compulsory arbitration clause and if arbitration was to be US based, what arbitration law would apply and what arbitration bodies are available. **(5 marks)**

(c) Alternatively, assuming the parties selected Queensland law, discuss and appraise, how a Queensland court judgment or Queensland arbitration award would be recognised and enforced under the US legal system.

(5 marks)

Assessment Criteria

Fail

You will have shown evidence of the following:

- the written expression is poor and difficult to understand
- the answer is poorly organised
- referencing is generally inadequate
- lack of familiarity with the legislation and its application
- failure to identify and address the issues in the question
- reasoning and application demonstrated is poor.

Pass

You will have:

- made a conscientious attempt to address the topic and/or answer the question
- shown evidence of having done the required reading and of having understood the reading
- presented a reasonable argument to back up your conclusions
- demonstrated a reasonable level of spelling and grammatical usage
- used referencing but this may need improvement
- issues that may need to be identified and addressed in more depth.

Credit

You will have:

- addressed the topic and/or answered the question directly
- presented soundly based arguments and backed these up with reasons
- gone beyond description to analysis of key issues
- used the English language well
- shown evidence of reading widely
- demonstrated understanding of the reading
- used referencing that is satisfactory.

Distinction

You will have:

- met the above criteria for a credit
- demonstrated the attainment of a high degree of understanding of the concepts of the course
- demonstrated deep insight into the application of knowledge and skills acquired to complex theoretical and practical situations
- used referencing correctly
- made reference to all appropriate legislation.

High Distinction

You will have:

- met the above criteria for a distinction
- demonstrated the attainment of an outstanding level of achievement regarding the objectives of this course
- demonstrated an interesting and/or original approach/idea/argument
- demonstrated mastery of the relevant referencing system
- ensured conclusions are backed by well-reasoned arguments demonstrating a detailed insight and analysis of issues
- ensured references are made to the appropriate legislation for particular issues.

END OF ASSESSMENT ITEM



LAWS20062 – International Commercial Law

Assessment Item One

S0279063

06th September 2016

Q1:**I. Define domestic law.**

Domestic law is the law that made by lawmaker in constitutional (French 2009). It is the law within the sates of the country such as New South Wales' law, Victoria's law and Queensland's law.

II. Define public law.

Public law is the law establishes between government to individuals and between government to government itself that the law includes tax law, administrative law and criminal law (Harel 2014, p. 1042). For instance, when two companies have dispute or want to work together or contract on beyond the states like between Victoria and New South Wales. Therefore, in this case public law would apply.

III. Define private international law.

Private international law is governed by the government with the legal framework, model laws, legal guides that govern between individuals in an international term (Organization of American States n.d) and it regulates relationship between private individuals (European Commission n.d). Furthermore, it has been governed for dealing with dispute or disagreement, which involve with international element (Attorney-General's Department n.d).

IV. Define business law.

Business law is established relating to create new business and the disputes of current business such as tax law, employment law, legal disciplines and bankruptcy (Legal Resources n.d). Furthermore, it helps us to understand about viewing between employees and employers, and to figure out the legal system like contract or trade regarding to business law within the country or states.

V. Distinguish and explain the interface between the four laws above.

Domestic law is applied when the disputes or troubles are happing within the state like in New South Wales, for instance, therefore New South Wales' law or

regulation is applied, but not other states like Victoria or Queensland. However, if the disputes or troubles are happening beyond the states, hence, the public law would apply because the disputes are not in the same state anymore. Therefore, domestic law has no value anymore but if there has been mentioned in the contract that New South Wales' law applies, for example, then New South Wales' will apply, not another dispute's state law. On the other hand, private international law deals problems between individuals, which have international elements, however, business law deals with the dispute with new companies or current companies regarding to many things like tax law or bankruptcy.

Q2:**I. What is Murabaha?**

Murabaha is the sale agreement or contract between the bank and its customers or clients which the contract covers the sell of items by banks then sell them to its clients (Institute of Islamic Banking and Insurance n.d). Moreover, the sell agreement of Murabaha is a set fee is charged rather than Riba, which is the Islamic banking's concept that charge in interest (Investopedia n.d). Murabaha has developed across the decades from a classical Murabaha to Murabaha to the purchase orderer (MPO) or the banking Murabaha (Haron et al., 2015). So, Murabaha is the Islamic banking's system, which the bank sells its goods to its client with a set fee charged rather than interest.

II. What is Musharaka?

Musharaka is referred to joint venture, which combines either labor or capital (Rammal 2004 cited in Usmani, M.I. 2002, p.87). Moreover, Musharaka is about sharing profits or losses between two parties or more (Institute of Islamic Banking and Insurance n.d). As in Islamic financial institutions are not willing to borrow or lending from unknown market (Masood 2010) therefore, Musharaka helps the international investors to run the business by joining venture as well as international trade.

III. Murabaha and Musharaka are practiced in jurisdiction govern by Islamic law.

In Islamic financial system Riba, which is charged interest, is prohibited in Islam but Musharaka does not, and Musharaka provides the joint venture, which provides the trade and increase the Small and Medium Size Enterprises (SMEs) (Masood 2010). It helps the Islam's economic is better and better. Moreover, Musharaka and Murabaha play an important role regarding to form of Shari'ah (the body of Islam law) approved financing. Hence, they helps Islam's economic is better and Shari'ah is still counting them as its part.

Q3:

A. Identify the four (4) parties in the *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2015] FCA 1028 and the relief they are seeking.

- **Party 1: Sino Dragon Trading Ltd** (Applicant).

Sino Dragon Trading Ltd is a trading company that imports and exports company mainly on trading of ore, mine investing, steal investing and the related materials elements (Sino Dragon Trading Limited, 2013) and it is a Hong Kong company. Sino Dragon Trading Ltd was seeking two other forms, which are the issue of draft subpoenas and the production of documents, to remove Mr. Bonnell and Mr. Kay Hoyle (the arbitrators were sent by Noble Resources International Pte. Ltd party) in the arbitrations. Moreover, Sino Dragon also finds the interlocutory in order to prevent the two (2) arbitrators, who were sent by Noble Resources party, for further steps in the arbitration.

Sino Dragon was seeking to have this Court “decide on the challenge” to challenge the party's arbitrators of making appointments or arbitrates, was seeking to remove the arbitrators and also orders to restrain the arbitrators.

- **Party 2: Noble Resources International Pte Ltd** (First Respondent).

Noble Resources International Pte Ltd is a trader with supplies the metal supply chains, which is located in Singapore, and it is a part of Noble Group (Noble

Resources International Pte. Ltd, n.d). Noble Resources has named the arbitrators to arbitrate the claim value which is estimated \$1.9 million from Sino Dragon. The reasons is Sino Dragon Trading Ltd had an agreement with Noble Resources to buy 170,000 dry metric tonnes (DMT) with price of \$119 per DMT, and in the agreement required Sino Dragon Trading Ltd to open letter of credit on or before 17 January 2014 but it failed to open it on time. Therefore, Noble Resources ended the contract with Sino Dragon Trading Ltd.

- **Party 3: Maxwell Thomas Bennett Bonnell** (Second Respondent).

Mr. Bonnell is an arbitrator that was appointed by Permanent Court of Arbitration after rejection of making appointments by Mr. Mehigan (the arbitrator was appointee by Noble Resources) between Noble Resources and Sino Dragon. Mr. Bonnell was seeking the fact that he has been alleged about involvement in the matter; and he was challenging the appointment with Sino Dragon.

Mr. Bonnell has submitted of the decisions which to be made by the Court but not for the challenge to his appointments.

- **Party 4: Jonathan Kay Hoyle** (Third Respondent).

Mr. Kay Hoyle is the presiding arbitrator that was appointed by Mr. Mehigan and Mr. Bonnell. He was continuing to finalize the appointment with Sino Dragon.

Mr. Kay Hoyle has submitted of the decisions which to be made by the Court but not for the challenge to his appointments.

B. The three (3) primary legal issues argument between the parties.

- **The validity of the appointment of the two (2) arbitrators.**

Sino Dragon and Noble Resources agreed with the UNCITRAL Arbitration Rules, then Sino Dragon challenges Mr. Bonnell and Mr. Hoyle under this agreement. According to section 46 of *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2015] FCA 1028, the Articles 12 and 13 are

reasonable clear which mean the party has 15 days to challenge the arbitrator's appointment. Sino Dragon made the first challenge to Mr. Bonnell under the UNCITRAL Arbitration Rules, however, the time was postponed by the Tribunal. Then, Sino Dragon made the second challenge to Mr. Bonnell regarding to the efficacy of the arbitration agreement and the difference culture for the three arbitrators, who live in Sydney. Sino Dragon said that the arbitrators might not really understand about the Asian Respondent, which might influence the quality of the arbitration. And then, the third challenge was made by Sino Dragon to challenge the appointment with two (arbitrators), who are Mr. Bonnell and Mr. Hoyle to solicitors for Noble Resources, Mr. Hoyle and Mr. William QC. Regarding to the Tribunal, according to UNCITRAL Arbitration Rules, Article 13(3), the decision is not for the Tribunal but it is for the arbitrator. However, the age of the challenge that the parties to agree is not expire yet, which is for 15 days, therefore, Sino Dragon did not get any appointment from authority.

- **The production of documents.**

Sino Dragon seeks to order the documents that apply to the Tribunal for production was unsuccessful then Sino Dragon request the court to revisit a procedure. However, the court require a party to make a document under *International Arbitration Act* of section 23 and 23A(3).

- **The issue of subpoenas.**

The three subpoenas for making the documents' production were tried to find by Sino Dragon but the subpoenas were not required to be filed. Sano Dragon has submitted the permission for issuing the subpoenas, even though it had section 23(2) and 23A of *International Arbitration Act*, but it was not accepted. The reason is the Court required the production document of the Model Law (Article 17J), which is about Court-ordered interim measures (UNCITRAL Model Law on International Commercial Arbitration 1985). Furthermore, there are four (4) reasons of rejection the submission such as **first**, there has some sections should be added. **Secondly**, the power is on the Court based on the Article 17J of the

Model Law. **Thirdly**, there is an issue of Sino Dragon that it wants to exist of the power rather than increase the power. **Fourthly**, each party should be cared until there has meeting regarding to arbitration.

The three (3) relevant legal principles relied upon by the Court.

- **UNCITRAL Arbitration Rules.**

UNCITRAL Arbitration Rules is about the disputes between parties to decide legal relationship whether it is contractual or not contractual, and also about the dispute of arbitration contract (UNCITRAL Arbitration Rules 2013). In the agreement of the UNCITRAL Arbitration Law between Sino Dragon and Noble Resources has the Article 12 and 13. In the Article 12 is about the parties can challenge on the arbitrators if they are able to show the doubt as to the arbitrator's impartiality or independence. In the Article 13 is about the parties want to challenge on arbitrators within 15 days after the notification of the challenging has been given to the arbitrators.

- **UNCITRAL Model Law.**

The United Nations Commission on International Trade Law (UNCITRAL) is essential to improve the legal framework for international trade and is used in term of negotiation agreement by commercial parties (UNCITRAL Model Law on International Commercial Arbitration 1985). In the Article 13(3) of UNCITRAL Model Law is about the challenging party may request for continuing the arbitral proceeding within thirty (30) days after getting the notification of rejection the challenge. Therefore, Sino Dragon used this Article 13(3) on the application to remove an arbitrator. Moreover, San Dragon said that Mr. Bonnell and Mr. Kay Hoyle should be cut off their position because of they failed to act without any postpone letters.

- **International Arbitration Act.**

The Court relies on the International Arbitration Act on the subpoenas and the failure to assist arbitral tribunal (International Arbitration Act 1974, 2011).

C. The first judgment was unsuccessful or dismissed for the application and there were some issues need to be questioned like apprehended bias, and the rejection of the suspending regarding to decision-making of the challenge. Furthermore, the case of Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (2015) 2 FCA 1046 considered for the second judgment was about the indemnity costs.

Q4:

A.

- **Uniform Commercial Code (UCC).**

Uniform Commercial Code is the code that address of the commercial law in American law and it applies for almost the states in the US (Michael, 2015). In the UCC have plenty of sections. According to UCC, in 41-02 Sections, which is talked about sales, mentions several things such as the context of the buyers and the seller, the process of reaching the agreement between buyers and sellers like acceptance, banker's credit, cancellation, commercial goods and so on. Furthermore, in 41-07 Section, which is about documents of title, would be applied as it provides the title of goods delivery and some certain agreements.

- **Contracts for the International Sale of Goods (CISG).**

CISG is governed for making afford to achieve in the broad area at the international level of the commercial law (Flechtner, n.d), and it was established in 1980. According to table of contracting states, both Australia and United States have signed the contract, which the effective date of Australian was on 1988 and the effective date of United States was on 1989. However, United States will not be applied by subparagraph 1(b) of article 1 because on Article 95 declaration has been filed. According to United Nations Convention on CISG, Article 1(b) is about the application law of Contracting State is applied when the sale of goods process in the different states. On the other hand, the Article 93 declaration has been filed by Australia that is the Contracting Stats applies to all Australian states and to all

external areas except Christmas Island. Hence, it is possible that US selects the law of the contract under CISG.

B.

- **The merits of a compulsory arbitration clause.**

Arbitration is good for reaching the agreement without going to the court. It helps the parties save much valuable time and fee for the court. The decisions or agreement will be faster than going to the court. However, the arbitration might not balance the benefit between the parties because the benefit will be on the party, which knows a lot of regulations or laws than the others. Therefore, it is better if the arbitration has been made and reached the agreement without involving with the court.

- **Which arbitration law would apply?**

If arbitration was to be US based, the arbitration law is according to what agreement between the parties are about. If in the agreement mentions to take US arbitration law then US law would apply but if it does say to take Australian arbitration law then Australia law would apply. It is basically rely on what the agreements are about. However, if there has no mention about it at all, then, the CISG would apply in order to be bias because if US law were applied then Australia would argue because Australia does not know well about US law, and same thing to US if Australian law would apply. Therefore, in order to be fair for both parties, CISG is a good option to choose.

C.

- **Queensland court judgment or Queensland arbitration award.**

According to Commercial Arbitration Act (2013), in Section 35 and 36 are regarding to arbitral award. The party depends on the award must provide the original or a copy of the original award, and the award can be requested to translate into English if the award is not made in English. However, the language is not the issue in the case between Australia (Queensland) and USA (North Dakota). On the other hand, if

the arbitral award is regardless of the State where it was made then the Section 36 is applied. In the Section 36 mentions that the enforcement of the award is not on the line with the public policy of this State. It means that the award bleaches the public policy of the state.

- **Enforcement of foreign judgment in North Dakota.**

According to chapter 28-20.1 of enforcement of foreign judgments, the foreign judgment is treated as the same judgment or step of any country in the state. They need to fill the form as normally such as name and mailing address of the judgment creditors and their lawyer, and there is no other process until ten (10) days after a foreign judgment is filed. Furthermore, the fee of filling a foreign judgment needs to be paid by people who fill it. There is no different of the process between foreign judgment and within the state judgment in the country.

References

Attorney-General's Department n.d, *Private international law*, viewed 04 September 2016,

<https://www.ag.gov.au/Internationalrelations/PrivateInternationalLaw/Pages/default.aspx>

Commercial Arbitration Act (Queensland) 2013, viewed 06 September 2016,

<https://www.legislation.qld.gov.au/LEGISLTN/ACTS/2013/13AC008.pdf>

Enforcement of foreign judgment n.d, *Chapter 28-20.1*, viewed 06 September 2016,

<http://law.justia.com/codes/north-dakota/2013/title-28/chapter-28-20.1>

European Commission n.d, *Private international law*, viewed 04 September 2016,

http://ec.europa.eu/justice/glossary/private-international-law_en.htm

Flechtner, HM n.d, *United Nations Convention on Contracts for the International Sale of Goods*, viewed 06 September 2016, <http://legal.un.org/avl/ha/ccisg/ccisg.html>

French, R 2009, 'International law and Australian domestic law', *Supreme Court of New South Wales Annual Conference*, pp. 1-40, viewed 04 September 2016,

<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21aug09.pdf>

Harel, A 2014, *Public and private law*, viewed 04 September 2016,

http://law.huji.ac.il/upload/Chapter_045.pdf

Haron, MS, Ramli, R, Injas, MMY & Injas, RZ 2015, 'Reputation risk and its impact on the Islamic Banks: Case of the Murabaha', *International Journal of Economics and Financial*, vol. 5, no. 4, pp. 854-859, EconLit, EBSCOhost, viewed 4 September 2016.

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2015/1046.html?stem=0&synonyms=0&query=FCA%202015%201028%20or%202015%20FCA%201028>

<http://www.austlii.edu.au/au/cases/cth/FCA/2015/1028.html>

Institute of Islamic Banking and Insurance n.d, *Murabaha on Shari'ah Ruling*, viewed 05 September 2016, http://www.islamic-banking.com/murabaha_sruling.aspx

Institute of Islamic Banking and Insurance n.d, *Musharakah on Shari'ah Ruling*, viewed 05 September 2016, http://www.islamic-banking.com/Musharakah_sruling.aspx

Investopedia n.d, *Murabaha*, viewed 04 September 2016, <http://www.investopedia.com/terms/m/murabaha.asp>

International Arbitration Act 1974, 2011, viewed 05 September 2016, <https://www.legislation.gov.au/Details/C2011C00342>

Legal Resources n.d, *Business law*, viewed 04 September 2016, <http://www.hg.org/corp.html>

Masood, O 2010, 'The rise of Islamic finance: Two-step Murabaha', *Malaysian Accounting Review*, vol. 9, no. 1, pp. 67-84.

Michael, J 2015, *Uniform Commercial Code (UCC)*, viewed 05 September 2016, <https://law.duke.edu/sites/default/files/lib/ucc.pdf>

Noble Resources International Pte. Ltd n.d, viewed 05 September 2016, <http://www.mmta.co.uk/members-directory/8e2200d2-97ac-4d9d-b41a-9990d16d0edf>

Organization of American States n.d, *Private international law*, viewed 04 September 2016, http://www.oas.org/dil/private_international_law.htm

Sino Dragon Trading Limited, 2013, viewed 05 September 2016, <http://www.made-in-china.com/showroom/claire201101/companyinfo/Sino-Dragon-Trading-Limited.html>

Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (2015) 2 FCA 1046, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2015/1046.html?stem=0&synonyms=0&query=FCA%202015%201028%20or%202015%20FCA%201028>

Uniform Commercial Code, n.d, viewed 06 September 2016, <http://www.legis.nd.gov/cencode/t41.html>

UNCITRAL Model Law on International Commercial Arbitration, 1985, viewed 05 September 2016, https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

UNCITRAL Arbitration Rules, 2013, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, viewed 05 September 2016, <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>

United Nations 2010, *United Nations convention on contracts for the international sale of goods*, viewed 06 September 2016, <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>