Caroline Bradley **SPRING SEMESTER 2006**

INTERNATIONAL FINANCE

THREE HOURS.

This is a closed-book exam.

ANSWER 2 OF THE FOLLOWING 5 QUESTIONS

Each question will count for 50% of the exam grade.

Note that there is some potential for overlap in answers to these questions. Avoid substantial overlap in your answers, because, as a general rule, you will only get credit once for each piece of information you give me. If you write "see above", or "see answer to question x" in your second answer, your grade for the second answer will suffer.

DO read the questions carefully and think about your answers before beginning to write.

DO refer to cases and other materials where appropriate. If you make general statements, try to back them up with specific references.

DO NOT use abbreviations unless you explain what you are using them to stand for.

DO NOT make assumptions in answering the hypothetical.

DO explain what further information you might need in order to answer the question properly.

DO write legibly and clearly.

You will get credit for following these instructions, and may be penalized for failing to do so.

1. The global competition for capital is a contest of paramount importance for our country's future. Nothing is written in stone that decrees American capital will stay here or that global capital will continue to come here. The competition we face to keep America at the center of global financial markets is becoming tougher by the day. We must succeed in the future through superior, competitive performance in our financial markets, and through sound, forward-looking public policies. (John Thain, CEO of NYSE Group Inc, March 2006, quoted on the class weblog.)

Discuss the implications of the "global competition for capital" for US securities regulation.

2. EITHER:

a. Parties operating in interstate and international commerce seek, by a choice of law provision, certainty as to the rules that govern their relationship. To hold that their choice is only effective as to the determination of contract claims, but not as to tort claims seeking to rescind the contract on grounds of misrepresentation, would create uncertainty of precisely the kind that the parties' choice of law provision sought to avoid. In this regard, it is also notable that the relationship between contract and tort law regarding the avoidance of contracts on grounds of misrepresentation is an exceedingly complex and unwieldy one, even within the law of single jurisdictions. To layer the tort law of one state on the contract law of another state compounds that complexity and makes the outcome of disputes less predictable, the type of eventuality that a sound commercial law should not seek to promote. (Vice Chancellor Strine in *Abry Partners* v *F&W Acquisition* (Del. Ch. 2006) (quotation posted on weblog)).

Discuss. You may choose to discuss either the specific issue raised in this statement or the more general issue of the relationship between contracts and mandatory rules.

OR

b. Discuss whether or not it is useful (for lawyers, for their clients or for regulators) to think of lawyers working in the area of international finance as managers of legal risk? In your answer please give examples of some of the legal risks (or uncertainties) you read about during the semester and how lawyers try to manage those risks.

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3. On April 1, 2006, in response to terrorist activity in Ruritania by Urbanian nationals, the Government of Ruritania issued an executive order freezing all Urbanian assets held in Ruritania or held by any Ruritanian persons including subsidiaries of corporations incorporated in Ruritania. The executive order prohibited Ruritanian financial institutions from lending money to Urbanian nationals and from holding any debt owed by Urbanian nationals.

Rubank (RB) is incorporated in and does business in Arcadia. Rubank is a subsidiary of Holding Bank of Ruritania (HBR) which is incorporated in Ruritania. HBR's management has close links with the Ruritanian Government and HBR knew that the Government planned to make an executive order freezing some Urbanian assets at the beginning of January 2006.

Ruritanian dollars (R$) are a desirable currency for investment and many of Rubank's customers have deposit accounts denominated in R$. Rubank's contracts specify that R$ denominated deposit accounts held in Arcadia are governed by Arcadian law. However, Rubank's legal adviser has warned the management team in the past that because Ruritanian dollars need to be cleared through the Ruritanian Central Bank the choice of Arcadian law would not eliminate all risks in relation to the impact of any Ruritanian Governmental action on the R$ denominated deposit accounts. What arguments can Urbanian holders of R$ denominated accounts at Rubank make (after the date of the executive order) in order to obtain their funds? Under what circumstances should they succeed?

Rubank lead managed a syndicated loan to Telcom Urbania Inc (TUI), a corportaion incorporated in Urbania, two years ago. The loan agreement provided that Rubank and the other lenders would be able to transfer their interests in the loans to "banks and other financial institutions". In addition, the loan agreement limited the liability of the original lenders to any new lenders and specified that the new lenders were responsible for making their own independent investigation in relation to the loan. In February 2006 Rubank assigned away almost all of its interests in the TUI loan. One of the assignees is a hedge fund based in Ruritania which now needs to dispose of its interest in the TUI loan, but will need to sell its interest for substantially less than it paid to Rubank as a result of the executive order (the executive order does not prohibit loan sales for a period of 6 months after the date of the order). The hedge fund has heard rumors that HBR may have had advance notice of the executive order. What would you need to know to decide whether the hedge fund has any recourse against Rubank?

Discuss.

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4. Write a critique of any two cases we studied during this semester. (**NB:** Note the exam instructions on overlap).

5. Exurbia, a country in Latin America, is negotiating to borrow US $100m from an international syndicate of banks. The loan agreement is to be governed by the law of England and Wales and Borrower will submit to the non-exclusive jurisdiction of the English courts. The loan agreement includes three separate facilities (A, B and C facilities). Exurbia will pay a large utilisation fee to the members of the lending syndicate. As a result, the interest rate on the loan is lower than it would otherwise be. Exurbia hopes that this will encourage credit rating agencies to improve their assessments of Exurbia's financial condition which may help it with future capital raising. The interest rate on the A facility is Libor plus ½ %. The Arranger has suggested to the proposed members of the original lending syndicate that they should share commitments under the three facilities equally.

Exurbia is involved in an intensive ongoing program of infrastructure development (separate from this proposed loan) which includes building roads and investing in communications technologies. Each of these projects is funded through a structure where the investors' returns (on loans and on debt securities) are based on revenues from the projects and the investors are protected by security interests in project assets. Some of the existing and proposed projects are riskier than others.

The draft loan agreement for the multi–facility loan contains the following provisions (numbering is included for your convenience):

> i. During the term of this loan the Borrower will not create or permit to be created and continue, nor permit the Central Bank of the Borrower, or any other agency or instrumentality of the Borrower, to create or permit to be created and continue any security over any of its assets for any purpose;
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> ii. Obligations of the Borrower under this loan rank, and will rank, pari passu in right of payment with all other present and future unsecured and unsubordinated Indebtedness of the Borrower;

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iii. If the Borrower fails to pay any amount payable in respect of any Facility by it on its due date, interest shall accrue on the overdue amount from the due date up to the date of actual payment at a rate which is 2% higher than the rate which would have been paid had the overdue amount constituted a loan under the A facility during the period of non-payment;

iv. The following events shall be Events of Default under this agreement: (A) Any breach by the Borrower of any agreement it has entered into under which it has an aggregate outstanding liability of more than US$50,000;

v. On or after the occurrence of any Event of Default in respect of any Facility the Agent Bank may, and if so directed by Majority Lenders shall by notice to the Borrower cancel the Lenders' commitments under that facility whereupon they shall immediately be cancelled...;

vi. The Agent bank's duties under this agreement are solely mechanical and administrative in nature.

Critically assess these clauses, describing how they fit into the structure of a syndicated loan agreement (you should refer to any other provisions you would consider to be particularly significant given the facts described above) and explaining what changes to these clauses you would recommend. What other potential legal issues do these facts suggest? (Note that you are not expected to discuss issues relating to the project loans except in so far as they may create issues for the proposed syndicated loan).