

1 MAY 2023

NATIONAL LAW UNIVERSITY, JODHPUR

End Term Examination May - 2023

Semester: UG X Semester (Trade Law Honours)

Subject: International Commercial Arbitration

Time: Three Hours

Instructions :

Marks: 100

- i. Each question carries equal marks.
- ii. The Students are required to attempt five out of six questions.
- iii. Any specific requirements provided within the questions are to be adhered while answering the same.
- iv. Question Nos. 1 & 6 are mandatory to attempt.

Q.1) R2 Detour (*hereinafter* 'Claimant') is a launch service provider, and ShuttleUp (*hereinafter* 'Respondent No. 1') is a start-up specialising in the production of pico-satellites, also known as 'CubeSats'. Claimant were introduced to Respondent No. 1 through Dr Tania Vaidya, the CEO of Morbus Capital (*hereinafter* Respondent No. 2). In early October 2014, Dr Vaidya attended the 72nd International Astronautical Congress in Dubai where she met Mr Richard Ma, (the CEO of Claimant). Dr Vaidya explained Respondent No. 1's pico-satellite program in great detail, as if she had a vested interest in its success. Shortly thereafter, on 12 October 2014, Dr Vaidya introduced Respondent No. 1 to Claimant.

On 13 October 2014, Mr. Ma provided marketing materials relating to Claimant and its launch service capabilities following a request for information from Mr. Jeevs Patel, (the CEO of Respondent No. 1). On 13 November 2014, Claimant and Respondent No. 1 entered into the Agreement (*hereinafter* the 'Agreement'), under which in consideration of the payment provided and to be provided by Respondent No. 1 (totalling GBP 88,300,000). Claimant agreed to provide bespoke launch services to Respondent No. 1.

On the date of execution, Respondent No. 1 paid Claimant GBP 40,000,000 in accordance with Clause 4.1 of the Agreement. Respondent No. 2 was copied on all correspondence between Respondent No. 1 and Respondent No. 1 until the execution of the Agreement. Subsequently, during the due diligence of Respondent No. 1's operations, Respondent No. 1 discovered that in December 2012, Respondent No. 2 extended a credit facility to fund Respondent No. 1 with an aggregate value of USD 400 million to be paid over 10 years.

Since 13 November 2014, Claimant has invested significant time and resources in altering and adapting its system to prepare for the launch of Respondent No. 1's CubeSats. The costs incurred by Claimant increased particularly after it was discovered that there were technical incompatibilities between Claimant's system and Respondent No. 1's CubeSats. Between 2015 and 2017, Claimant also regularly assisted Respondent No. 1 by introducing other companies and contacts to Mr. Patel in response to his queries.

By February 2021, the financial costs to Claimant arising directly from the Agreement were around GBP 60,000,000 exceeding the amount of consideration Respondent No. 1 paid at the start of the contract by nearly GBP 20,000,000. Five months before the scheduled launch date of 5 December 2021, Respondent No. 1 failed to pay the Milestone Payment listed under Clause 4.2 of the Agreement. On 8 August 2021,

Claimant sought immediate payment of the outstanding sum under the Agreement, noting that "ShuttleUp has failed to pay the consideration under the LSA within a reasonable time. Thus, we now require immediate payment of the full GBP 88,300,000."

On 5 December 2021, Respondent No. 1 did not make the required payment. This unequivocally constituted a breach of the agreement. Accordingly, Claimant informed Respondent No. 1 that "in light of your persistent non-payments in breach of the LSA, and with regret, R2 Detour hereby refuses to launch Shuttle-Up's picosatellites." All the attempts of the Parties for an amicable resolution proven unsuccessful. Hence, the Claimant, accordingly brings these arbitral proceedings against Respondent No. 1 for breach of contract (the relevant Dispute Resolution Clause as contained within the Agreement has been ascribed herewith as Annexure — I).

For the sake of clarity, in effect the current claim for recovery is against Respondent No. 2, as Claimant has little hope of a meaningful recovery from Respondent No. 1 due to widespread reports of its "deteriorating financial condition". The Claimant has contended that the close involvement and vested interest of Respondent No. 2 is plainly evident from the start of the transaction due to the USD 400 million credit facility it provided to Respondent No. 1.

Moreover, Respondent No. 2 remained copied on all correspondence regarding the Agreement. Therefore, both Respondent No. 1 and Respondent No. 2 should be considered as parties to both the Agreement and as consequently be brought within the ambit of the arbitration agreement contained therein. Furthermore, the liabilities arising thereof on account of defaults concerning the contractual obligations should be in the nature of joint and several liability and hence should be collectively attributed to Respondent Nos. 1 & 2. However, the Claimant has left the specific apportionment of liabilities to the reason and judgement of the Arbitral Tribunal.

The Respondent No. 1 has challenged the allegations made by the Claimant on two grounds:

- a) Dr. Goh, part-time director of Respondent No. 1 had executed the Launch Services Agreement in accordance with English law on 13 November 2014 and sent it to R2 Detour, with the clear caveat that ShuttleUp were unclear of the validity of the execution process. Under Companies Act, 2013 as the Part-time Director lacks the adequate authority for execution of the Contract, the Contract that has been executed remains invalid.
- b) Secondly, Morbus Capital cannot be joined to the present arbitration proceeding as Respondent No. 2 as the clauses of the Arbitration agreement cannot be made applicable to them. It is also true that Morbus Capital provided ShuttleUp with funding through a credit agreement. However, this was public knowledge and had regulatory approval. It is therefore unclear how this fact, in itself, implies that Morbus Capital was also a party to the arbitration agreement in the Launch Services Agreement.

Pursuant to the above Disputes, the Claimant and the Respondent No. 1 have mutually agreed to request the Tribunal to pass a Procedural Order on the following issues:

- a) Whether the issue of valid execution of the Agreement by the part-time Director, be brought within the scope of Clause 25(a) of the Agreement? (Marks 10)
- b) Whether, Morbus Capital can be joined as a party to the present arbitration proceedings, despite being a non-signatory. (Marks 10)

Q.2) *"The Competence of the Tribunal in terms of hearing a dispute, remains central to any arbitration proceeding. The principle derives its legitimacy from two specific sources: a) Party Autonomy and b) Notion of Public Policy. A lapse in judgement resulting in erroneous assumption of jurisdiction of a dispute often results in far-reaching ramifications, which not has the potential of derailing the arbitration proceeding to start with, but also assumes a significant position, when seen from the perspective of the enforcement of an award".*

Given the above context answer the following question:

- (a) Discuss the Principle of Competence-Competence, highlighting its significance within the ambit of an arbitration proceeding? (Marks 10)
- (b) Secondly, discuss the ground of Public Policy as a ground for challenging the Award, as enumerated under Article 34 of the UNCITRAL Model Law, 2006 as well as under Article V.2 of the Convention on Enforcement of Foreign Arbitral Awards. (Marks 10)

Q.3) *"The process of International Commercial Arbitration is necessarily an import of the Private International Law regime and draws its fundamental notions from the Conflict of Laws. Though, owing to the facets of 'Public Policy' and the involvement of 'Municipal Courts' at various stages, the legal experts have refrained from including it within the purview of Private International Law. However, one could still find traces of elements of Private International Law within the International Commercial Arbitration legal framework, and the element of 'Internationality' stands testament to the same."*

In context of the foregoing paragraph, provide an opinionated account of the how has term 'International' been defined within the evolving legal jurisprudence of International Commercial Arbitration. In furtherance of the same, please assess the mechanism through which the issue of uniformity in defining 'International' has been dealt under the Indian legal jurisdiction. (Marks 20)

Q.4) Answer the Following:

- (a) What is "*Lex Arbitri*"? Examine in detail the role of the National Courts (of the Country that has been chosen as the *Lex Arbitri*) in an ongoing proceedings' of the "International Commercial Arbitration" in another country while focusing on their power of intervention in such proceedings. (Marks 10)
- (b) Given the context of the above two question, kindly elucidate your position on the theory of Delocalisation, as an approach to make an International Commercial Proceeding truly International. (Marks 10)

Q.5) *"The fundamental role that an Arbitrator plays in an arbitration proceeding is undeniable. As an umpire, an Arbitrator is required to be both independent and impartial, irrespective of the fact, whether the Arbitrator has been appointed by the Parties or has been chosen as a Presiding Arbitrator by the party appointed Arbitrators. Hence, they are often subjected to serious scrutiny and a stringent disclosure regime".*

Given the above, kindly discuss the applicable regime to ascertain the Independence and Impartiality of an Arbitrator, while focusing upon the prevalent standards that are made applicable to the Arbitrators. (Marks 15)

Further, provide a detailed account concerning the available remedies to the Parties, should they come to believe that the Arbitrator in question has ceased to remain Independent or Impartial. (Marks 5)

Q.6) A Belgian buyer and an Indian seller negotiate the prospective sale of a piece of equipment to be designed according to the buyer's specifications. The negotiations are initiated by the buyer's parent company. After the buyer's parent company and the seller have exchanged information about the commercial terms of the prospective contract, one of the buyer's subsidiaries participates in the negotiations to provide the technical specifications of the equipment. During one of the telephone conversations with the buyer's subsidiary, the seller had asked whether the buyer would be willing to accept an arbitration clause in the contract, according to which the arbitration would be an Institutional arbitration which is to take place in Paris under the SIAC Institutional Rules on Arbitration.

The subsidiary answered that it would ask the parent company, but that in principle it could not see any obstacles to that. There was no follow up on this matter. The negotiations advances and the seller expects that the contract will soon be formalized. To ensure a quick performance, the seller starts purchasing some of the material necessary for the production of the equipment. Due to unexpected developments in the market, the buyer loses interest in the equipment and the contract is never formalized.

The seller affirms that the buyer had in fact committed itself to buying the equipment, and requests reimbursement of the damages that it suffered as a consequence of the buyer's breach of its de facto contractual obligations. The seller initiates arbitration in Moscow against the parent company on the basis of an oral arbitration agreement. The buyer objects to the jurisdiction of the arbitral tribunal, because there is no arbitration agreement.

Under Indian law, an arbitration agreement must be in writing, whereas, under the Belgian law, if a *consensus ad idem* can be established with respect to the conduct of the Parties, then an Oral agreement between the parties would be considered as a valid contract. Even if there was a binding oral arbitration agreement, it would not have entered into between the seller and the buyer's parent company, because the subsidiary did not have the power to bind the parent company. Based on the Terms of Reference drawn by the Parties, the Arbitral Tribunal has been requested to pass a Procedural Order passing an order concerning the following issues:

- (a) What would be the applicable law under which the Tribunal should assess the dispute? (Marks 5)
- (b) Whether the subsidiary could be a joined as a Party to the arbitration in the current proceedings? (Marks 5)
- (c) Assuming that the arbitral tribunal finds that it has jurisdiction, and the seller obtains an award ordering the parent company to pay a certain amount. The seller seeks enforcement of the award in Norway. Determine, if the Seller would be successful in getting the award enforced in the National Courts of Norway? (Marks 10)