

8 MAY 2024

NATIONAL LAW UNIVERSITY, JODHPUR

End Term Examination May - 2023

Semester: UG X Semester (Trade Law Honours)

Subject: International Commercial Arbitration

Marks: 100

Time: Three Hours

Instructions :

- 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) XYZ Corporation, a leading multinational pharmaceutical company based in the United States, specializes in the research, development, and distribution of innovative medical products. ABC Pharmaceuticals, a prominent pharmaceutical company headquartered in India, is known for its extensive product portfolio and market presence in the Indian healthcare sector.

In 2015, XYZ Corporation and ABC Pharmaceuticals entered into a comprehensive commercial agreement aimed at leveraging their respective strengths to penetrate the lucrative Indian pharmaceutical market. The agreement, negotiated over several months, outlined the terms and conditions governing the distribution, marketing, and sale of XYZ Corporation's new line of cutting-edge pharmaceutical products in India.

Following the execution of the agreement, XYZ Corporation commenced operations in India, supplying ABC Pharmaceuticals with its flagship pharmaceutical products for distribution across various regions and market segments. Initial market response was positive, with ABC Pharmaceuticals successfully promoting and selling XYZ Corporation's products through its extensive network of distributors, retailers, and healthcare providers.

However, as the partnership progressed, disagreements and disputes began to emerge between XYZ Corporation and ABC Pharmaceuticals regarding various aspects of the agreement. These disputes primarily revolved around issues such as product pricing, marketing strategies, supply chain delays, and revenue-sharing calculations, leading to tensions and friction between the two parties.

Despite attempts to resolve the disputes through negotiation and mediation, XYZ Corporation and ABC Pharmaceuticals reached an impasse, necessitating the initiation of formal arbitration proceedings as per the terms of the agreement. Following the same, ABC Pharmaceuticals have invoked the arbitration clause and commenced the process of appointing arbitrators. Accordingly, ABC Pharmaceuticals has appointed Mr. John Smith as their Arbitrator. However, his appointment has been challenged by XYZ Corporation on the following grounds:

XYZ Corporation asserts that Mr. Smith, the appointed arbitrator, has a significant conflict of interest due to his prior professional relationship with a senior executive of ABC Pharmaceuticals. They claim that Mr. Smith's previous interactions and collaborations with this executive create a reasonable apprehension of bias in favor of ABC Pharmaceuticals, thereby compromising his impartiality and independence as an arbitrator.



XYZ Corporation provides evidence to support their claim of bias, including emails, meeting minutes, or other documentation demonstrating the nature and extent of the relationship between Mr. Smith and the ABC Pharmaceuticals executive. They argue that these communications indicate a close professional association that undermines Mr. Smith's ability to adjudicate the dispute fairly and objectively.

XYZ Corporation cites relevant legal standards and ethical guidelines governing arbitrator impartiality and independence, emphasizing the importance of ensuring that arbitrators are free from any relationships or circumstances that may influence their decision-making. They contend that Mr. Smith's connection to ABC Pharmaceuticals falls afoul of these standards and warrants his removal from the arbitration panel.

They have further alleged that, the Arbitral Tribunal do not possess the requisite jurisdiction to hear the present dispute, as the Arbitration Agreement in question is not a valid Arbitration Agreement owing to the various discrepancies.

XYZ Corporation, presently has agreed under protest to proceed with the Arbitration Proceeding, however, have requested the Tribunal to decide upon the two fundamental procedural issues, prior to deciding the questions of arbitrability of the Disputes.

(Marks 20)

Note: The Relevant Clauses of the Agreement has been Annexed herewith as 'Annexure I'

- 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 10)
- (b) 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)

Annexure - I

Relevant Excerpts of the Agreement

1. **Clause 3.7: Product Distribution:** The agreement detailed the scope and extent of ABC Pharmaceuticals' distribution rights for XYZ Corporation's products within the Indian territory. It specified the geographical regions, distribution channels, and sales targets for each product category, along with provisions for inventory management and supply chain logistics.
2. **Clause 12.1: Financial Arrangements:** The agreement delineated the financial aspects of the partnership, including pricing mechanisms, payment terms, and revenue-sharing arrangements between XYZ Corporation and ABC Pharmaceuticals. It established benchmarks for sales performance, royalty payments, and profit-sharing based on predefined metrics and milestones.
3. **Clause 30: Dispute Resolution Clause:**
 - (1) *Appointment of Arbitrators*
 - a. The arbitration panel shall consist of three (3) arbitrators, with each Party entitled to appoint one (1) arbitrator. The third arbitrator, serving as the presiding arbitrator, shall be selected by mutual agreement of the two Party-appointed arbitrators within thirty (30) days of their appointment.
 - b. Notwithstanding the above, if either Party fails to appoint an arbitrator within thirty (30) days of receiving Notice of the Initiation of arbitration proceedings, the other Party shall have the unilateral right to appoint all three arbitrators to the arbitration panel.
 - c. In the event of a unilateral appointment of arbitrators by one Party, the arbitration proceedings shall nevertheless proceed in accordance with the terms of this Agreement, and the arbitral award rendered by the panel shall be final and binding upon the Parties.
 - (2) *Restrictions on Evidence and Discovery:*
 - a. The Parties agree to limit the presentation of evidence during arbitration proceedings to documents and information directly relevant to the specific claims and counterclaims raised by each Party. Extraneous or irrelevant evidence shall be excluded from consideration by the arbitrators.
 - b. The Parties further agree to waive their rights to conduct formal discovery procedures, including but not limited to document requests, interrogatories, and

depositions. Any requests for additional information or clarification shall be submitted to the arbitrators for consideration and may be granted at their discretion.

(3) Lack of Remedies:

- a. The Parties acknowledge and agree that the sole and exclusive remedy for any breach or violation of this Agreement shall be limited to monetary damages, with no provision for injunctive relief, specific performance, or other equitable remedies.
- b. The Parties further agree to cap the total amount of damages recoverable under this Agreement to USD 8 million or the total contract value, whichever is lower, irrespective of the nature or extent of the breach or violation giving rise to the claim.

(4) Governing Law and Jurisdiction

- a. This Arbitration Clause shall be seated in New York, United States of America, and shall be governed by and construed in accordance with the laws of Republic of India, without regard to its conflict of laws principles. Any disputes arising out of or relating to the interpretation or enforcement of this clause shall be resolved exclusively by arbitration in accordance with its terms.
- b. The Arbitration Proceedings initiated under this Agreement shall be conducted in accordance with the ICC Rules of Arbitration, 2021 (ICC Rules).

(5) Severability

If any provision of this pathological arbitration clause is held to be invalid, illegal, or unenforceable by a court of competent jurisdiction, such provision shall be severed from this Agreement, and the remaining provisions shall remain in full force and effect.

(6) Entire Agreement

This pathological arbitration clause constitutes the entire agreement between the Parties with respect to the resolution of disputes arising out of or relating to this Agreement, and supersedes all prior or contemporaneous agreements or understandings, whether oral or written, relating to such disputes.