NATIONAL LAW UNIVERSITY, DELHI

LL.M., Semester-II (Batch of 2021)

End Semester Examinations, April-2022

Paper: International Arbitration

Time: 3 Hours **Total Marks: 50**

Instructions:

1. All questions are compulsory.
2. No clarification shall be sought on the question paper.
3. Respond to the point. In the event you are of the opinion that an assumption is required to be made to respond to a question, clearly outline what the assumption is and why is it vital to responding to the question. Failure to do so clearly and unambiguously would be penalised. An assumption made unnecessarily would also be penalised. The final decision on whether an assumption is vital and required would lie with the course instructor.

Q.1: International Arbitration is a paradoxical idea. On the one hand it attempts to move the matter out of the ordinary court system, and on the other it reverts to it regularly for protecting the sanctity of the arbitral process and its outcome. Discuss with examples this idea, clearly articulating the need for such maintaining such paradoxical framework. **(5 Marks)**

Q.2: While most legal disputes are resolved within one or maximum of two legal frameworks, international arbitration has to deal with four to five legal frameworks. Clearly identify these legal frameworks and critically discuss the role played by them in the international commercial arbitration framework. **(10 Marks)**

Q.3: With the exit of Honda from the Redbull Racing F1team (Redbull Racing) in 2021, Redbull Racing entered into negotiations with chassis designers for potential partnership. The year long process saw Redbull Racing short listing three designers as potential partners, Jaguar Land Rover (Jaguar) being one of them. Discussions between the two first took place at the Whitley, Coventry (England) office of Jaguar and then at the Zurich office of Redbull Racing. In 2008, Tata Motors had acquired a 45% share in Jaguar, making it the single largest shareholder of Jaguar. Two of the five meetings that took place after the share transfer, between Jaguar and Redbull Racing were attended by representatives of Tata Motors, from Tata Motors London office located within the office premises of Jaguar. Representatives of Tata Motors (London Office) were also present during the negotiations of the final agreement between the parties.

The final draft of the agreement, called the Sponsorship Agreement, was contained in seven distinct documents. Three of the documents pertaining to transfer of technology and containing details of funds transfer were forwarded to the Mumbai office of Tata Motors, and suggested changes received therefrom were incorporated in the final agreement. The Sponsorship Agreement was signed by representatives of Jaguar and Redbull Racing only. The agreement carried a dispute resolution requiring submission to arbitration of any dispute that may arise between the parties.

Disputes soon arose between the two on multiple issues with most prominent ones relating to the technology transfer, financial transfers and sharing of fees from endorsements. Jaguar additionally accused Redbull Racing of mismanaging accounts to deny it adequate returns. It also cited a complete lack of coordination on the part of Redbull Racing, and virtual ouster from pit wall during practice, qualifying and race sessions. Aggrieved Jaguar terminated the contract and brought proceedings for damages before the courts in London.

It was rumoured that Jaguar had taken this step under pressure from Tata Motors which was getting concerned about lack of adequate returns from its investments. Jaguar had in the past conceded that much of the financial transfers that had happened in favour of Redbull Racing had been sourced from Tata Motors. Redbull Racing wants to initiate arbitration proceedings against both Jaguar and Tata Motors but is unsure if it is possible. It has approached you for advice in the matter. Advise in view of prevalent theories utilised by arbitral tribunals to assume jurisdiction over non-signatories. **(10 Marks)**

Q.4: Ms. Maggie Zurno (MZ) is a self-made billionaire. Forbes magazine reported that she had made her fortune in the airline industry, with her company Smoothfly Inc (SF) running routes over a dozen or so countries. MZ owns 90% of equity in SF. SF entered into a codeshare agreement with MightNotFly (MNF), the national carrier of Fiction Peoples Republic (FPR) in 2001. MNF is under 100% government ownership. Per agreement, the revenue sharing was 80-20% in SF's favour. SF is incorporated in Malaysia, while MZ, a citizen of Republic of Cloud (RoC), has residences both in RoC and FPR. More recently, MZ has acquired additional residential and commercial spaces in FPR. In 2005, FPR announced its plans to divest its holding in MNF as part of a broader disinvestment programme. SF participated in the disinvestment process making an investment of USD 1.2 billion and in the process acquiring 5% of the total equity of MNF. In 2007, SF wrote to MNF raising concerns at the manner in which its records were being maintained. In particular SF was concerned that MNF was manipulating its services to favour other providers with whom it had codeshare agreements at the cost of SF. MNF strongly denied this assertion, but refused to provide access to SF auditors to various documents. A request to the government by MZ for access to document was also denied claiming them to be 'sensitive in nature.' In 2011 SF and MZ, filed two separate investment arbitration against FPR on the grounds that actions of MNF had violated guarantees under the Malaysia-FPR BIT and RoC-FPR BIT respectively. The Malaysia-FPR BIT had been signed in 2002, while RoC-FPR BIT had been signed in 1995. In 2009, the FPR government completed the total disinvestment process, after which it retained only 10% of equity in MNF. The rest was privately owned, with the largest shareholder having 45% equity. All three, RoC, Malaysia, and FPR have ratified ICSID convention, and all relevant BIT provide for ICSID arbitration and carry commercial reservations. All BITs have common wordings. The investment arbitration was jointly heard by a single ICSID tribunal before which FPR raised the following jurisdictional objections:

i. MZ and SF are the same entity since MZ holds 90% shares in SF. Therefore, filing of two arbitrations is nothing more than forum shopping. The tribunal must either combine or reject one of the claims.

ii. MZ is a resident of FPR and therefore cannot claim protection under a treaty. As a resident of FPR is not a foreign investor.

iii. The dispute is a commercial dispute since government was a mere 10% shareholder.

Decide whether the arbitral tribunal has jurisdiction. Relevant extracts from ICSID and BIT are provided. **(10 Marks)**

Q.5: Short notes on any three: **(3X5=15 Marks)**

a. Arbitration without privity
b. Provisional measures
c. Kompetenz-kompetenz
d. Independence and impartiality
e. Review of arbitral awards

ICSID

Jurisdiction of the Centre
Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

BIT Provisions (RoC-FPR BIT)

Article 3: For the purposes of this Agreement: (a) "company" means any corporation, association, partnership, trust or legally recognised entity that is duly incorporated, constituted, set up or otherwise duly organised: (i) under the laws of a Contracting Party; or (ii) under the law of a third country and is owned or controlled by an entity described in paragraph (a)(i) of this Article or by a natural person who is a citizen or permanent resident of a Contracting Party; regardless of whether or not the entity is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;

(c) "investment" means every kind of asset, including intellectual property rights, invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and investment policies of that Contracting Party,

(d) "investor" means: (i) in respect of Republic of Cloud, a company or a national. A national is a person who is a citizen or permanent resident of Republic of Cloud; (ii) in respect of FPR, a company or a natural person who is a citizen or permanent resident of FPR;

(h) For the purposes of this Agreement, a company is regarded as being controlled by a company or by a natural person, if that company or natural person has the ability to exercise decisive influence over the management and operation of the first mentioned company, specifically demonstrated by way of: (i) ownership of 51% of the shares or voting rights of the first mentioned company.

Article 21: This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the coming into force of this Agreement.

Note: The provisions of Malaysia-FPR BIT are pari materia with provisions of RoC-FPR BIT.