Name:

Enrolment No:

University of Petroleum and Energy Studies
End Semester Examination May 2019

Course: Arbitration, Conciliation & ADRM **Semester: VIII**
Programme: B.Com. LL.B. (Tax) **CC:LLBL461**
Time: 03 hrs. **Max. Marks:100**

Instructions:
Attempt any four questions from **Section A** .

	Section A		
1.	Explain any four : a) Arbitration b) Impartiality c) Independence d) Negotiation e) Arbitration Agreement f) Confidentiality	**2.5x4**	**CO1**
	SECTION B		
2.	Discuss Public Policy.	**[10]**	**CO2**
3.	Discuss *lex fori*.	**[10]**	**CO2**
	SECTION C		
5.	Compare the interim relief sought before court and tribunal.	**[10]**	**CO3**
6.	Differentiate mediation and conciliation	**[10]**	**CO3**
	SECTION D		
8.	Statement of Facts 1. The Claimant, Wash-o-matics Pvt. Ltd ("Wash-o-matics"), is a private limited company, having its registered office located at New Pehli, represented through its Director, Mr. Ramesh Gaitonde. 2. In January 2018, Wash-o-matics launched Instawash, a new brand of internet-enabled washing machines. The people of Pindia loved the new machine, as it was part of the new 'Internet of Things'. The unique selling point ("USP")of the machine was that it had the ability to automatically communicate with the servers of Wash-o-matics' service department and initiate a 'service request' on behalf of the consumer whenever service was due, a part needed replacement, or the warranty was about to expire. However, the most important distinguishing characteristic of Wash-o-matics, as a company, was its capability to provide genuine and authentic spare parts using blockchain technology and	**[25 x 2]**	**CO4**

smart contracts. The machine would not accept spare parts, which could not be verified as authentic and genuine.

3. Aliababwa Electronics ("Aliababwa"), the Respondent, is a sole proprietorship business owned by Mr. Ali Ababwa.
4. Instawash received a lot of press coverage and very good user reviews within one month of its launch. Based on the advice of a school friend who was a lawyer of Mr. Gaitonde, the Claimant applied to patent Instawash. In March 2018 patent was granted.
5. On 1 April 2018, Mr. Gaitonde, the CEO of the Claimant, went to Dhina to promote Instawash at the Dhina Expo of Innovative Technologies 2018. There he met the Respondent, who showed a keen interest in Instawash. Mr. Gaitonde did not believe in wasting time in legalities and wanted to get straight to business. He used to tell everyone that technology is the new law. He was often heard saying *"My smart contracts don't need any lawyers and I certainly don't intend to pay for their flashy suits!"* Mr. Gaitonde told the Respondent that, based on the new technology, there would no longer be any need to order spare parts. The machines would do everything. They exchanged visiting cards and discussed the possibility of Wash-omatics exporting Instawash for sale in Dhina.
6. A week later, the Respondent wrote an email to Mr. Gaitonde (Exhibit C1) for importing 1000 machines after going through the website of the Claimant (Exhibit C2). The uniqueness of the website was that it used a "Ricardian Contract"– one had to simply enter the details of price, quantity, delivery date, and a contract would be generated and executed automatically by a software.
7. The email sent by the Respondent was marked as a "Business Query" by the mailbox filter of the Claimant and an automated response (Exhibit C3) was sent to the Respondent. Subsequently, the Respondent completed and submitted the business enquiry form.
8. On 15 April 2018, the Claimant sent an email to the Respondent (Exhibit C4) accepting the business proposal of the Respondent and giving instructions for the completion of the contract. Subsequently, the Respondent complied with all the requirements and a shipment of 1000 machines was delivered to the Respondent on 30 May 2018.
9. All machines were sold out within two weeks of being put on display, even without any marketing. The Respondent was ecstatic. He sent an email to the Claimant dated 16 June 2018 (Exhibit C5) praising the company and the use of technology.
10. Subsequently, in the last week of June, the servers of the Claimant received responses from the machines that the display of the machines was showing an error. On remotely accessing the machines, the Claimant came to know that the displays had not been calibrated to the voltage requirements of Dhina, which led to short circuits. Voltage fluctuations and short circuits were not covered within the warranty provided by the Claimant. Therefore, on 2 July 2018 the Claimant shipped the calibrated displays to the Respondent and the account of the Respondent was automatically debited by USD 420,000.
11. Unfortunately, the shipment of spare parts got held up at customs in Dhina for 16 hours because a bug in the software failed to verify the calibrated displays as genuine and instead flagged them as counterfeits. It was only after Kulian Basange, the Head of IT of the Claimant, traced the entire blockchain and sent it to Dhina customs that the goods were released. However, the Claimant is still investigating whether the problem was actually in the software, as claimed by the Dhina customs, or in the technology used by Dhina customs.
12. The calibrated displays were supposed to reach the Respondent within 15 days of shipment. This clause was contained in a "smart contract" within the parent contract (Exhibit C6). The contract was programmed to automatically debit money from the

Respondent's bank account on the date of sending the shipment of spare parts. However, there was a refund provision if the goods were not delivered within 15 days. Therefore, at 12:01 a.m. on 18 July 2018, an amount of USD 420,000 was refunded to the account of the Respondent.

13. At about 4 p.m. that evening, the Respondent received the shipment of the calibrated displays. The Claimant's servers received confirmation that the goods had reached the Respondent and, accordingly, the Claimant sent an email the very same day (Exhibit C7) requesting the Respondent to use his "Signature Keys" to authorize a debit of USD 420,000.
14. The Respondent neither replied to this email nor authorized the payment. Mr. Gaitonde tried calling the Respondent as well, but he could not be reached. Wasting little time, on 22 July 2018, the Claimant filed an application under Section 9 of the Arbitration Act of Pindiabefore the Courts in Pindia praying that the Respondent be restrained from using the calibrated displays.
15. The Court ultimately decided the application in favour of the Claimant on 12 September 2018. The operative portion of the order is reproduced below:

    "Since the dispute relates to verification of the authenticity and genuineness of the calibrated displays and a problem with the code relating to the blockchain verification, the same are the cause of the dispute leading to arbitration and need to be preserved for investigation. The petitioner wants to investigate whether there was problem with the displays or a problem at Dhina customs. Furthermore, the petitioner has demonstrated that the respondent has received the calibrated displays but is not willing to pay for them. It will be against fairness to permit the respondent to profit from the sale of the calibrated displays without paying for them.

    The petition is allowed. The Respondent is restrained from selling, using or, in any manner whatsoever, creating a third-party interest in the calibrated displays supplied by the petitioner till the completion of the arbitration proceedings."

16. Legal Evaluation Jurisdiction and Nomination of Arbitrator 16. The dispute has to be decided in accordance with the UNCITRAL Arbitration Rules by three arbitrators. The Parties have included in their contract the following arbitration clause: Clause 45: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. The number of arbitrators shall be 3, one to be appointed by each party and the presiding arbitrator to be appointed by the partyappointed arbitrators or by agreement of the Parties. The seat of arbitration shall be Pindia and the language to be used in the arbitral proceedings shall be English."
17. In line with the arbitration agreement, we appoint Mr. Kartaj King as our arbitrator. His declaration of impartiality and independence and availability is enclosed to this notice (not reproduced).

Merits

18. The Claimant had entered into a Ricardian Contract which contains the smartcontracts for service, spare parts and warranty. Once the Respondent had entered into the contract with the use of "Signature Keys", the Claimant had consented to the smart contracts as well. Moreover, the Respondent had visited the website of the Claimant and could have easily accessed all relevant documents, FAQs and explanations relating to smart contracts under the tab marked "Legal". Hence, the Respondent is liable to pay for the calibrated displays.

	19. Clause No. 46 of the parent contract specifies thatthe contract is governed by the UNIDROIT Principles of International Commercial Contracts (2016). For issues not covered by these principles and the UNCITRAL Model Law, generally accepted principles of international commercial law shall apply, including the UNCITRAL Model Law on Electronic Commerce. 20. The Claimant has delivered the calibrated displays on 18 July 2018, but the Respondent has not paid for the same. Therefore, the Claimant is entitled to the payment of USD 420,000 in accordance with the UNIDROIT Principles and the generally accepted principles of international commercial law. Furthermore, the Claimant is entitled to damages for non-performance and delay in payment. Statement of Relief Sought On the basis of the above, the Claimant requests the Arbitral Tribunal: i) to order the Respondent to pay for the spare parts amounting to USD 420,000; ii) to order the Respondent to pay damages amounting to at least USD 100,000; **Decide both the claims as an arbitrator.**		

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Instructions:
Attempt any four questions from **Section A ..**

	Section A		
1.	Explain any four : g) Interim Measures h) Doctrine of Separability i) Foreign Award j) Arbitrability k) Party Autonomy l) Appealable Orders	**2.5x4**	**CO1**
	SECTION B		
2.	Discuss right in rem and its Arbitrability.	**[10]**	**CO2**
3.	Discuss *lex arbitri*.	**[10]**	**CO2**
	SECTION C		
5.	Compare the role of arbitrator and conciliator.	**[10]**	**CO3**
6.	Differentiate New York Convention, 1958 and Geneva Convention, 1961	**[10]**	**CO3**
	SECTION D		
8.	Rahul is an Indian merchant. He deals in spices. Kevin is a trader from United Kingdom. They both entered into an agreement for sale of spices from Kerala to London. Both the parties mutually decided that the law applicable on main agreement would be Indian Law. The applicable law on the arbitration agreement was the laws of England. The parties also mutually consented to arbitrate at Singapore in case of any dispute arising during performance of the contract. Meanwhile the ship, which was supposed to carry the goods, was not sail worthy. So, there was a delay in the delivery of the spices. Out of the delay caused by the shipper, Kevin invoked notice of arbitration against Rahul. He based his application on the delay caused in the delivery of the spices. Kevin also contended in	**[25]**	**CO4**

	the notice that the arbitration will take place in London, as the law applicable on the arbitration agreement was agreed to be Law of the England. Rahul protested the notice but appointed the arbitrator on his behave in London. When the tribunal was constituted, Rahul raised objections upon the jurisdiction of the tribunal to resolve the dispute. **Argue as the counsel on behalf of Respondent**		
9.	*Capstone Investment Company Limited* ("**Capstone**") and *Real Value Appliances Private Limited* ("**RV**") had each borrowed loans for the purchase of two flats from *SBI Home Finance Limited* ("**SBI**"). Under a leave and licence agreement, Capstone and RV permitted the appellant, *Booz Allen and Hamilton* ("**Booz Allen**") to use these flats. Thereafter, a tripartite deposit agreement was entered into between Capstone and RV as the first party, Booz Allen as the second party, and SBI as the third party. Under this agreement certain refundable security deposits were made by Booz Allen to Capstone and RV who in turn paid a portion of the sum to SBI due to which the loan in respect of the flat owned by Capstone was cleared, but the loan in respect of the other flat that RV owned remained due and outstanding. Therefore, Capstone became a guarantor for repayment of the amount due from RV, and the flat owned by it was secured in favour of SBI; a charge was created in favour of SBI. As the loan amount due from RV to SBI was not repaid, SBI, on October 28, 1999, filed a mortgage suit in the High Court of Bombay against Capstone, Booz Allen, and RV with regard to the mortgaged property and claimed various reliefs. SBI also took out a notice of motion, seeking interim relief, and the High Court on November 25, 1999 granted certain interim reliefs. Booz Allen filed a detailed reply to the notice of motion. On October 10, 2001, Booz Allen filed an application under Section 8 praying that the parties to the suit be referred to arbitration as provided in Clause 16 of the deposit agreement dated April 5, 1996. **High Court order** The High Court on March 7, 2002 dismissed the application holding that: a. The arbitration agreement did not cover the dispute that was the subject matter of SBI's claim. b. The counter affidavit to the notice of motion for temporary injunction amounted to submission of the first statement on the substance of the dispute before having filed the application under Section 8, of the Act and therefore the appellant had lost the right to seek reference to arbitration. c. The application under Section 8 was filed nearly twenty months after filing the application opposing temporary injunction, during which period the appellant had subjected itself to the jurisdiction of the High Court and in view of the inordinate delay, the appellant was not entitled to the relief under Section 8 of the Act. **Issues before the Supreme Court**	**[5x5=25]**	

	On the above facts and circumstances, the Supreme Court framed the following four questions for consideration: (i) Whether the subject matter of the suit fell within the scope of the arbitration agreement; (ii) Whether the appellant had submitted his first statement on the substance of the dispute before filing the application under Section 8 of the Act; (iii) Whether the application under Section 8 was liable to be rejected as it was filed after a delay of nearly twenty months; and (iv) Whether the subject matter of the suit is arbitrable, that is, capable of being adjudicated by a private forum (arbitral tribunal) (v)whether the High Court ought to have referred the parties to the suit to arbitration under Section 8 of the Act. **Decide all the Issues.**		