

**GUJARAT NATIONAL LAW UNIVERSITY  
GANDHINAGAR**

Course: Advanced Contracts (Evolving Jurisprudence in Contract Law)  
Semester-VII (Batch: 2014-19)

Mid Semester Test: August-2017

Date: 24<sup>th</sup> August, 2017

Duration: 2 hours

Max. Marks: 30

**Instructions:**

- Read the questions properly and write the answers in the given answer book.
- The respective marks for each question are indicated in-line.
- Do not write any thing on the question paper.
- Indicate correct question numbers in front of the answers.
- No questions or clarifications can be sought during the exam period, answer as it is, giving reason, if any.
- **Bare Act is not allowed.**

**Answer all the questions**

**Marks**

- Q.1 In ABC Port Trust ('Port Trust') there are 10 berths/terminals. Out of these berths/terminals, three are being run by the Port Trust; one dry cargo berth is being run by the Indian Oil Corporation (a public sector undertaking), two dry cargo are being run by private operators and one is being run by MNO. (5+2+5  
=12)

The Port Trust issued Request for Qualification (RfQ) on 01 January 2016 inviting global invitations for modernisation of two terminals/berths at the Port Trust under public private partnership mode for a concession period of thirty years. In response to the said RfQ, five parties submitted their bids. Among these five parties were MNO (a consortium consisting of M Co, N Co and O Co) and PQR (a consortium consisting of P Co, Q Co and R Co). All the five parties were duly qualified and were asked to participate in the next stage of bid, i.e. Request for Proposal (RfP) and submit their offers with regard to revenue sharing. Only two parties, i.e. MNO and PQR submitted the RfP. The bid quoted by MNO was 35%, as against 30% quoted by PQR. Since MNO was the highest bidder, its proposal was recommended for acceptance by the tender committee of the Port Trust on 24 March 2016. At this stage, on 25 March 2016, PQR submitted objections to the consideration of the bid of MNO on the ground that in terms of the Policy Clause against creation of monopoly, MNO was not entitled to take part in the entire bidding process because it was already operating one berth for dry cargo of the Port Trust. The Policy Clause, which is subject matter of interpretation, reads as follows:

*Policy: If there is only one private terminal/berth operator in a port for a specific cargo, the operator of that berth or his associates shall not be allowed to bid for the next terminal/berth for handling the same cargo in the same port.*

Letter of Award (LoA) was issued in favour of MNO by the Port Trust on 27 March 2016. Aggrieved by this action, PQR filed a writ petition in the High Court. The submission of the petitioner (PQR) was that since MNO was already operating a berth for dry cargo it could not have submitted its bid for the berths in question which are also meant for dry cargo. It was contended that as per the policy quoted above, if a private operator is operating a berth he cannot be allowed to bid for the next berth for handling the same cargo in the same port. This contention of the writ petitioner was

accepted by the High Court which interpreted the Policy Clause by holding that the word 'next' in the Clause indicated that a private operator could not take part or bid for the next successive berth for the same cargo. The High Court, therefore, held that the bid of MNO was wrongly considered and consequently set aside the award in favour of MNO and further directed that the Port Trust may either accept the single remaining bid of PQR after negotiating the price which should not be less than the price offered by MNO, or it may invite fresh bids for the berths in question.

Aggrieved by the judgment of the High Court and contending that it misinterpreted the Clause, MNO has filed an appeal before the Supreme Court of India. MNO's contention is that the Clause is applicable only when a single private berth in port for a specific cargo is being run by a private operator. That is, when there is only one single private operator operating a berth in a port (dealing with one specific cargo), then, this single private operator alone will not be allowed to bid for the next berth for handling the same specific cargo.

Based on the afore-stated factual matrix, decide:

- (a) Which of the interpretations of the Policy Clause is correct: that which was taken by the High Court or that which was taken by MNO and the Port Trust? Substantiate your answer with sound reasoning.
- (b) Could MNO be prevented from bidding for the berths in question?
- (c) Discuss the scope of judicial review by the superior courts while dealing with contractual matters.

Q.2 DSG Company administers a marketing program centered on what it calls 'mobile alerts' — text messages sent to subscribers. Consumers can sign up for mobile alerts on DSG's website or by sending a text message with the word 'JOIN' to a number associated with DSG, called a 'short code'. On 01 January 2015, 'P' (a lawyer) enrolled in DSG's mobile alert program by texting the word 'JOIN' to DSG's short code. Thereafter, on 31 December 2015, 'P' texted the word 'STOP' to that same short code, indicating that he no longer wished to receive mobile alerts from DSG. DSG sent 'P' a text message indicating that he had unsubscribed and would no longer receive mobile alerts. Despite this assurance, it is alleged that DSG continued to send 'P' text messages, including on at least fifty particular occasions between 11 January 2016 and 30 January 2016. Each of the ten messages was sent by an automatic telephone dialling system after 'P' revoked his consent. (08)

P sues and seeks damages. On 13 June 2016, the defendant (DSG) moved to compel arbitration, arguing that 'P' (plaintiff) was on notice of the Terms of Use on DSG's website, which contain an arbitration agreement. 'P' avers that he did not investigate, carefully or otherwise, DSG's website, terms of use, privacy policy, and arbitration agreement prior to joining DSG's mobile alerts program, and that he did not read or know about DSG's arbitration agreement. He goes on to insist that he never thought of arbitration agreement when enrolling in DSG's program and that DSG never presented any arbitration agreement to him.

In fact, the hyperlink to DSG's 'Terms of Use' appears in the website footer of DSG's home page, as well as its page containing information about its mobile app. The 'Terms of Use' hyperlink appears in a grouping of 27 other hyperlinks, arranged in four columns, that cover topics as diverse as 'Careers', 'Gift Cards', 'Commercials & Films', 'Find a Store', etc. 'Terms of Use' was sandwiched between 'Only at DSG' and 'California Disclosures', near the bottom of the third column of links. DSG does not point to any 'notice to users' of the 'Terms of Use', nor does it allege that users of

DSG's website were affirmatively required to accept the 'Terms of Use' before completing certain functions.

On the basis of the above facts, decide whether or not DSG's motion to compel arbitration be denied?

Q.3 Write short notes on **any two** of the following:

(2x5=  
10)

- (a) Lord Hoffman's Principles of interpretation of contract.
- (b) Substantive and procedural unfairness in contract.
- (c) Government Contract.

\*\*\*\*