

MUEO

MOI UNIVERSITY

OFFICE OF THE DEPUTY VICE CHANCELLOR
(ACADEMICS, RESEARCH & EXTENSION)

UNIVERSITY EXAMINATIONS **2020/2021 ACADEMIC YEAR** **FOURTH YEAR SUPPLEMENTARY/SPECIAL EXAMINATION**

FOR THE DEGREE OF **BACHELOR OF LAWS**

COURSE CODE: FLB 408

COURSE TITLE: COMMERCIAL ARBITRATION

DATE: 28TH FEBRUARY, 2022 **TIME:** 9.00 A.M. – 12.00 NOON.

INSTRUCTION TO CANDIDATES

- ANSWER QUESTION ONE (1) AND ANY THREE (3) OTHERS.
- ILLUSTRATE YOUR ANSWER WITH RELEVANT DECIDED CASES AND STATUTORY PROVISIONS.

THIS PAPER CONSISTS OF (3) PRINTED PAGES

PLEASE TURN OVER

Question One

a) As an associate in JS Binkley Attorneys, New York, your supervising Partner has asked you to draft a brief outlining how the lessons learned from the Jay UK-US Treaty 1794, the United Nations Compensation Commission 1991, and the Holocaust Tribunals, 1997 arbitrations may be relied on to facilitate claims by individuals, corporations, organizations and governments against the USA and its allies for losses arising from their invasion of Iraq in 2002 and Libya in 2011.

Draft a well-reasoned brief addressing the issues raised by your supervising partner.

(15 marks)

b) The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965, which provides for the resolution of cross-border investment disputes under the ICSID Conciliation and Arbitration Regulations, has been criticized for advancing the interests of developed countries at the expense of developing countries.

Outline the measures the ICSID has designed to maintain its neutrality and evaluate their effectiveness in balancing the interests of capital exporting and capital importing countries respectively.

(10 Marks) (Total 25 marks)

Question Two

Lutumba, who runs a gold exporting business in Kinshasa, the Democratic Republic of Congo, with a marketing office in Nairobi Kenya, has received an order through his Nairobi office to supply gold to an Emir from the United Arab Emirates and contacted the office of the Law Firm where you work to draft the sales agreement.

Your managing partner requires you to draft a memorandum outlining the merits and demerits of litigation vis-a-vis arbitration in Kenya, and if arbitration, whether it should be *ad hoc* or institutional.

Draft the memorandum as instructed.

(15 marks)

Question Three

Discuss the Nairobi Centre for International Arbitration Act and evaluate its effectiveness in making Nairobi a more competitive forum for arbitration in light of section 6 of the Arbitration Act, 1995.

(15 marks)

Question Four

(a) Discuss the requirements for an arbitration agreement under the Arbitration Act, 1995.
(5 marks)

(b) Citing relevant statutory provisions and case law, reconcile the application of the New York Convention 1958 and the UNCITRAL Model Law on Arbitration on arbitrability and on competence-competence and the separability of arbitration agreements in Kenya. (10 marks) (Total 15 marks)

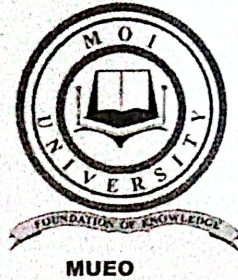
Question Five

(a) Discuss the doctrine of sovereignty in international law and the defence of sovereign state immunity in commercial arbitration. (7 marks)

(b) Critically examine the application of act of state and sovereign state immunity under the Arbitration Act, 1995. (8 marks) (Total 15 marks)

Question Six

Discuss the rationale for judicial intervention in arbitral proceedings under the Arbitration Act 1995. (15 marks)



MUEO

MOI UNIVERSITY

OFFICE OF THE DEPUTY VICE CHANCELLOR
(ACADEMICS, RESEARCH & EXTENSION)

UNIVERSITY EXAMINATIONS

2019/2020 ACADEMIC YEAR

FOURTH YEAR FIRST SEMESTER EXAMINATION

SPECIAL/SUPPLEMENTARY

FOR THE DEGREE OF

BACHELOR OF LAWS

COURSE CODE: FLB 408

COURSE TITLE: COMMERCIAL ARBITRATION

DATE: 15TH JUNE, 2021 **TIME:** 9.00 A.M. – 12.00 NOON

INSTRUCTION TO CANDIDATES

- ANSWER QUESTION ONE (1) AND ANY THREE (3) OTHERS.
- ILLUSTRATE YOUR ANSWERS WITH RELEVANT DECIDED CASES AND STATUTORY PROVISIONS.

THIS PAPER CONSISTS OF (3) PRINTED PAGES

PLEASE TURN OVER

QUESTION ONE

Arbitration has been considered as more convenient cheaper and effective means of dispute resolution in comparison to litigation. It is for this reason that most jurisdictions promote party autonomy in the choice of forum under an arbitration to determine any dispute arising out of their contract by discouraging court interventions such matters. Similarly, courts promote the doctrine of competence/competence to empower arbitral tribunals to determine any dispute under an arbitration clause as to whether they have jurisdiction over it so as to promote party autonomy.

Section 6 (1) of the Arbitration Act, 1995 of Kenya, directs courts before whom proceedings are commenced over matters that are subject to arbitration agreements to stay the proceedings and refer the parties to arbitration unless, inter alia, the arbitration agreement is null, void or inoperative; or there is no dispute between the parties regarding the arbitration agreement to be referred to arbitration, and if the application for stay is brought before applicant enters appearance. Since the legislative history of this provision was to give effect to both Article II (3) of the New York Convention and Article 8 of the UNCITRAL Model Law that sought to promote arbitration:

- a) Discuss the assertion that section 6 (1) effectively permits national legislation to derogate from party autonomy in the choice of the forum to determine their dispute. (8 Marks)
- b) Consider any reforms to the section to promote party autonomy. (7 Marks)
- c) Evaluate the application of the application of party autonomy and competence/competence under the Arbitration Act, 1995 of Kenya. (10 Marks) (Total 25 Marks)

QUESTION TWO:

The Kenya Law Reform Commission has commissioned a project to comprehensively review and document the Laws of Kenya by synthesizing the Statutory provisions and Court decisions that interpret them as Restatements of the Laws of Kenya. With regard to Arbitration, the Lead Consultant requires you draft a summary of the sources and development of arbitration law in Kenya from the pre-colonial times to date.

Write a well-reasoned memorandum to address the concerns of the Lead Consultant. (15 Marks)

QUESTION THREE:

The Nairobi International Arbitration Centre, established under the Statute seeks to promote the choice of Nairobi as the preferred forum for the resolution of international commercial arbitration disputes.

Having regard to the provisions of the Nairobi Centre for International Commercial Arbitration Act, suggest any reforms, including to the Arbitration Act, 1995 that may enhance the centre's attractiveness. (15 marks)

QUESTION FOUR:

Discuss the defence of sovereign immunity in international commercial arbitration claims.
(15 Marks)

QUESTION FIVE:

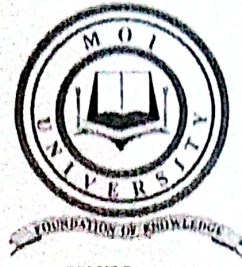
"Choice of law is as much a concern in international commercial arbitration as in conflict of laws" Anon.

Consider the veracity of this statement in view of the relevant provisions of Kenyan Law
(15 Marks)

QUESTION SIX:

Jacob the successful party in an arbitration comes to your chambers for advice on how he can enforce the award.

Advice Jacob on the procedures for the recognition and enforcement of an award under the Arbitration Act, 1995 noting to highlight any grounds upon which the unsuccessful party may challenge it. (15 Marks)



MUEO

MOI UNIVERSITY

OFFICE OF THE DEPUTY VICE CHANCELLOR
(ACADEMICS, RESEARCH & EXTENSION)

UNIVERSITY EXAMINATIONS 2019/2020 ACADEMIC YEAR FOURTH YEAR FIRST SEMESTER EXAMINATION **SPECIAL/SUPPLEMENTARY FOR THE DEGREE OF BACHELOR OF LAWS**

COURSE CODE: FLB 408

COURSE TITLE: COMMERCIAL ARBITRATION

DATE: 15TH JUNE, 2021 **TIME:** 9.00 A.M. – 12.00 NOON

INSTRUCTION TO CANDIDATES

- ANSWER QUESTION ONE (1) AND ANY THREE (3) OTHERS.
- ILLUSTRATE YOUR ANSWERS WITH RELEVANT DECIDED CASES AND STATUTORY PROVISIONS.

THIS PAPER CONSISTS OF (3) PRINTED PAGES

PLEASE TURN OVER

QUESTION ONE

Arbitration has been considered as more convenient cheaper and effective means of dispute resolution in comparison to litigation. It is for this reason that most jurisdictions promote party autonomy in the choice of forum under an arbitration to determine any dispute arising out of their contract by discouraging court interventions such matters. Similarly, courts promote the doctrine of competence/competence to empower arbitral tribunals to determine any dispute under an arbitration clause as to whether they have jurisdiction over it so as to promote party autonomy.

Section 6 (1) of the Arbitration Act, 1995 of Kenya, directs courts before whom proceedings are commenced over matters that are subject to arbitration agreements to stay the proceedings and refer the parties to arbitration unless, inter alia, the arbitration agreement is null, void or inoperative; or there is no dispute between the parties regarding the arbitration agreement to be referred to arbitration, and if the application for stay is brought before applicant enters appearance. Since the legislative history of this provision was to give effect to both Article II (3) of the New York Convention and Article 8 of the UNCITRAL Model Law that sought to promote arbitration:

- a) Discuss the assertion that section 6 (1) effectively permits national legislation to derogate from party autonomy in the choice of the forum to determine their dispute. (8 Marks)
- b) Consider any reforms to the section to promote party autonomy. (7 Marks)
- c) Evaluate the application of the application of party autonomy and competence/competence under the Arbitration Act, 1995 of Kenya. (10 Marks) (Total 25 Marks)

QUESTION TWO:

The Kenya Law Reform Commission has commissioned a project to comprehensively review and document the Laws of Kenya by synthesizing the Statutory provisions and Court decisions that interpret them as Restatements of the Laws of Kenya. With regard to Arbitration, the Lead Consultant requires you draft a summary of the sources and development of arbitration law in Kenya from the pre-colonial times to date.

Write a well-reasoned memorandum to address the concerns of the Lead Consultant. (15 Marks)

QUESTION THREE:

The Nairobi International Arbitration Centre, established under the Statute seeks to promote the choice of Nairobi as the preferred forum for the resolution of international commercial arbitration disputes.

Having regard to the provisions of the Nairobi Centre for International Commercial Arbitration Act, suggest any reforms, including to the Arbitration Act, 1995 that may enhance the centre's attractiveness. (15 marks)

QUESTION FOUR:

Discuss the defence of sovereign immunity in international commercial arbitration claims.
(15 Marks)

QUESTION FIVE:

"Choice of law is as much a concern in international commercial arbitration as in conflict of laws" Anon.

Consider the veracity of this statement in view of the relevant provisions of Kenyan Law
(15 Marks)

QUESTION SIX:

Jacob the successful party in an arbitration comes to your chambers for advice on how he can enforce the award.

Advice Jacob on the procedures for the recognition and enforcement of an award under the Arbitration Act, 1995 noting to highlight any grounds upon which the unsuccessful party may challenge it. (15 Marks)