FELLOWSHIP ADMISSION COURSE
2020

ASSIGNMENT M4-B/3
(Module 4)

STUDENT NUMBER: 3729

Question 1

Arbitration proceedings can be resorted to only where there is in existence, a valid agreement to go to arbitration. In this matter, an arbitration clause in an international commercial contract between a German party and a Namibian party reads as follows:

> *"Disputes arising out of this contract shall be referred to arbitration in Johannesburg."*

Both parties signed the contract containing the clause. An arbitration agreement is based on consensus between the parties. By signing the agreement, the contracting parties have agreed to refer disputes arising out of their contract to arbitration on the basis provided by the arbitration clause. Therefore, there is an enforceable arbitration agreement.

As contract between the parties is an international commercial contract, between a German party and a Namibian party, the arbitration between the parties may be regarded as international in terms of the **International Arbitration Act 15 of 2017("Act")**. Arbitrators are appointed in accordance with **Article 11 of Schedule 1 of the Act**, which stipulates that the parties are free to determine their own procedure for the appointment of the tribunal. Assuming that there is a valid arbitration agreement, the parties must, when referring the dispute to arbitration, agree and appoint the tribunal. In the absence of an agreement on the arbitral tribunal or a sole arbitrator, **Article 11 of Schedule 1 to the Act** provides that the court shall make the appointment, on application of one of the parties.

An arbitration clause that forms part of a contract will be treated as an agreement independent of other terms of the contract. In **Zhongji Development Cobstruction Engineering Company Limited vs Kamoto Copper Company SARL**[1] the South African Supreme Court accepted the following principle:

[1] 2015 (1) SA 345

> *"in my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are inclined to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be constructed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."*

In this matter, the arbitration clause of the parties does not exclude matters relating to the validity of the main contract from the jurisdiction of the tribunal. Therefore, once the tribunal has been appointed, it would have jurisdiction to decide a dispute regarding the initial validity of the main agreement.

The arbitration clause may be improved in a number of ways. Firstly, scope of the arbitration may be increased. The words *"any dispute relating to or arising in connection with"* the contract are wider than *"disputes arising out of"* the contract. The arbitration clause should specify the seat of the arbitration and the governing law of the arbitration to ensure that the parties are in agreement as to which law will govern their dispute. Furthermore, it will be necessary for the clause to specify how many arbitrators will be appointed to determine any dispute between the parties and the manner in which these arbitrators shall be appointed. The clause should specify the procedural rules that will govern the arbitration hearing and in so doing should consider whether the rules provide for confidentiality if it is important to the parties. If the rules do not, the clause should include an express obligation to keep the arbitration and all material generated for the purpose of the arbitration confidential.

Question 2

In this matter, the parties' dispute has been referred to arbitration under the **LCIA Arbitration Rules of 2014 ("Rules")**.

Under **Article 5.5 of the Rules**, all arbitrators are required, after their appointment, to forthwith disclose in writing *any circumstances* becoming known to that arbitrator after the date of his or her written declaration *which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence*.

In this matter, the presiding arbitrator is an English attorney who is a senior partner in the London office of a global law firm. The Respondent has given notice that it will be changing its legal representation and that it will be represented at the hearing by two lawyers from the Johannesburg office of the same global law firm to which the presiding arbitrator belongs. The relationship between the presiding officer and the two lawyers from the same firm would have to be interrogated. It cannot be stated with absolute certainty that, because the presiding officer and the two lawyers work from two different offices, which are in two different continents, they barely know each other, and they do not interact with each other. Therefore, the change in legal representation is relevant to the presiding arbitrator's duty of independence and impartiality. The Claimant may find the *sudden* change in lawyers by the Respondent, to appoint lawyers from the same global firm, even though global, somewhat disconcerting. Therefore, these facts require prompt and full disclosure by the presiding arbitrator.

Article 18.3 of the Rules states that any change to a party's legal representative after formation of the arbitral tribunal needs the approval of the tribunal. This is to avoid "*compromising the composition of the Arbitral Tribunal*". **Article 18.4** provides a list of the elements that the tribunal will consider when deciding to approve a new legal representative. These include the parties' right to choose its arbitration attorney, the stage of the arbitral proceedings, the efficiency resulting from maintaining the tribunal and the waste of cost or time resulting from changing the tribunal. In this matter, given

that the dispute between the parties is fairly complex and that the notice to change legal representation is given by the Respondent before the scheduled evidentiary hearing, it may be costly to change the presiding officer and further, the change will delay the hearing and finality of same. Therefore, the tribunal should not approve the change.

In terms of **Article 5.4 of the Rules**, an arbitrator is required to declare not only that he is independent and impartial, but also that he is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration. Therefore, the arbitrator must provide a declaration of availability before accepting appointment so that he may avoid unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute, as he is required by **Article 14 of the Rules**.

Parties are entitled to expect in an arbitration that an arbitrator will not only be impartial and independent of the parties, but that the arbitrator has also checked, before appointment, that any existing or anticipated diary commitments will permit the arbitrator to fulfill his mandate without delay. Therefore, to the extent that the arbitrator is involvement in other arbitrations, the arbitrator would be expected to disclose details of the number of the arbitrations he is involved in, and the commitments that might impact the arbitrator’s ability to devote sufficient time to this arbitration.[2]

[2] https://www.lcia.org/adr-services/lcia-notes-for arbitrators.aspx#1.%20INTRODUCTION

Question 3

In this matter, the dispute resolution clause of the parties is a multi-tiered clause. The clause provides for distinct stages involving separate procedures for dealing with and resolving disputes arising from the contract of the parties. In terms of the clause, negotiation was a condition precedent to arbitration. The clause makes negotiation mandatory by the language used, that is, *"the parties must …".*

The South African company elected to refer the dispute to arbitration without firstly referring it to negotiation, contending that the provision for negotiation is irrelevant because it is not enforceable. In **Southernport Developments (Pty) Ltd v Transnet Ltd**[3], the court considered the enforceability of a preliminary agreement to negotiate in good faith linked to an arbitration clause. The Supreme Court of Appeal held that the agreement to negotiate in good faith was not an agreement to agree as it was not dependent on the absolute discretion of the parties. The inclusion of the arbitration clause distinguished it from an unenforceable agreement to agree, and the final and binding nature of the arbitrator's decision rendered certain and enforceable what would otherwise have been an unenforceable preliminary agreement.

The inclusion of a deadlock-breaking mechanism in the dispute resolution clause of the parties, that is arbitration, rendered the referral to negotiation by the parties enforceable.[4] Therefore, the parties were required to firstly refer their dispute to negotiation and if negotiation failed to produce a settlement within the prescribed period, then either party was at liberty to refer the dispute to arbitration. In light of the foregoing, the arbitral tribunal should stay the arbitration proceedings so that the parties should first refer their dispute to negotiation, which is a prerequisite for arbitration.

[3] 2005 (2) SA 202 (SCA)
[4] Hugo, Kirsten & Kirsten (Pty) Ltd v Collotype Labels (Pty) Ltd (323/2019) [2020] ZASCA 21 (25 March 2020)

Article 34 in schedule 1 of the International Arbitration Act provides limited circumstances in which a court may set aside an arbitral award. **Article 34** provides that an award may be set aside if:

1. the underlying agreement to arbitrate is invalid;
2. notice of the appointment of an arbitrator or of the proceedings was improper;
3. the arbitrator purports to decide matters outside the scope of the agreement to arbitrate;
4. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement; or
5. an award is contrary to public policy.

Assuming that the tribunal incorrectly decides that the arbitration should continue, and an award is made on the merits, the court should be reluctant to set aside the award, only on the basis of non-compliance with the provision for negotiation. Non-compliance with the provision for negotiation does not establish a ground for setting aside the award. This ground is not prescribed under **Article 34** to justify setting aside the award. An important feature of arbitration is that there are limited grounds on which a party can ask a court to set aside an award. This promotes efficiency and finality in the arbitration process. If a party can have an award set aside on the basis that the negotiation provision was not complied with, the efficacy of the arbitration process will be seriously undermined.

Question 4

In this matter, the dispute between the SOC and the Energy Company concerns an increase in prices payable by the SOC to the Energy Company, which will ultimately influence the price paid for liquid petroleum gas by consumers in South Africa.

The SOC wishes to disclose certain documents used or generated in the arbitration, which are not otherwise in the public domain, for further dissemination to the public. The oil company argues that certain parts of the documents, which contain commercially sensitive information, should first be redacted, but the SOC is not prepared to agree to the redactions. The arbitration is held under the **LCIA Rules** and the **International Arbitration Act 15 of 2017 ("the Act")**.

Confidentiality is generally regarded as one of the primary underpinnings of arbitration and this is reflected by **Article 30 of the LCIA Rules**. **Article 30** imposes duties of confidentiality on parties and on arbitrators, with which the arbitral tribunal should ensure that it and the parties comply with.

Section 11 of the Act makes a distinction between international arbitration involving a public body and other international arbitrations between non-state-parties regarding the privacy of arbitration hearings and the confidentiality of the arbitration proceedings. With respect to arbitration involving a public body, **section 11 (1) of the Act** simply states that, arbitration proceedings to which a public body is a party are held in public, unless for compelling reasons, the arbitral tribunal directs otherwise. The section is silent as to whether in these proceedings, there is a general principle to keep confidential all documents used or generated in the arbitration.

However, in this matter, the **LCIA Rules** are applicable to the proceedings between the parties and the silence of **section 11** is cured by **article 30,** which offers a mechanism to guard confidentiality by casting obligations on the parties and the arbitral tribunal to maintain secrecy regarding proceedings and deliberations. The obligation is not

absolute, but limited to the extent that the disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. **Article 30 and section 11** do not restrict or limit the powers of the arbitral tribunal to rule on disclosure of documents used or generated during in the arbitration, but confers an obligation on the arbitral tribunal to guard confidentiality.

Therefore, the SOC should approach the arbitral tribunal to resolve the dispute on the public disclosure of the documents. The tribunal has powers to make appropriate orders in respect to whether the energy company's trade secrets fall within the exceptions of **section 30 of the LCIA Rules.**

Article 14.5 of the LCIA Rules provides that the arbitral tribunal shall have the widest discretion to discharge the general duties, under **article 14**, subject to such mandatory law(s) or rules of law as the arbitral tribunal may decide to be applicable. Therefore, there are no limits to the arbitral tribunal's discretion to govern the arbitration proceeding. The arbitral tribunal has a wide discretion to adopt procedures suitable to the circumstance of the arbitration. Therefore, the tribunal will not be compelled to decide the issue, but has a discretion to consider, under the circumstances of the matter, the effect of its decision and the interests of the public, whether the courts would be better place to make a decision sought by the SOC. Therefore, the arbitral tribunal has a discretion to legitimately defer to the court on this particular issue, should the tribunal so wish to.

Question 5

Article 9 of the Model Law expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law are compatible with an arbitration agreement. The term interim measure is comprehensively defined under **article 17 (2) of the Model Law**, and includes the power to issue an anti-suit injunction. In terms of **article 17,** the Model Law empowers the arbitral tribunal, unless otherwise agreed by the parties, to order any party to take an interim measure of protection in respect of the subject matter of the dispute, if so requested by a party. The party requesting an interim measure under **article 17** must satisfy the arbitral tribunal that there is a reasonable possibility that he will succeed on the merits of the case and that harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.

Security for costs is a key weapon in the arsenal of a respondent facing an unmeritorious claim. By applying for and obtaining security for costs, a respondent can obtain some comfort that if it ultimately prevails in the arbitration, it can recover what are often the substantial legal fees incurred in defending the claim.[5] Interim awards may relate to security for costs. **Article 17 (2) of the Model Law** authorizes the arbitral tribunal to order security for costs. When the tribunal is asked to order security for costs against a claiming party, the tribunal when exercising its discretion will consider whether or not there is a reasonable possibility that the requesting party will succeed on the merits of the case. It may be noted that the **article 17** does not deal with enforcement of such measures. Therefore, the preliminary orders provided by **articles 17C** have no direct coercive effect and therefore cannot accomplish the purpose of *ex parte* relief.

[5] https://www.twobirds.com/en/news/articles/2018/uk/speed-read-security-for-costs-in-arbitration-proceedings

Article 17 of the Model law does not deal with enforcement of such measures; therefore, court assistance should be sought in this regard. However, **u**nder **Rule 25.2 of the LCIA Arbitration Rules (2014),** a tribunal has the power, upon the application of a party, to order a claiming party to provide or procure security for legal costs and arbitration costs. This application is served upon the respondent who is given an opportunity to respond. **Rule 25.2** further provides a manner in which its order may be complied with. In the event that a claiming party does not comply with any order to provide security, the arbitral tribunal may stay that party's claims or dismiss them by an award. There, the Respondent should approach the arbitral tribunal on the premise of **rule 25.2 of the LCIA Rules**.

Question 6

In this matter, the parties to the dispute have adopted the Standard Procedure Rules of the Association of Arbitrators (Southern Africa) NPC (2018 edition) ("the Standard Procedure Rules") and the IBA Rules on the Taking of Evidence in International Arbitration (2010) ("the IBA Rules") to govern their arbitration proceedings. The seat of the arbitration is South Africa and the parties have each appointed expert witnesses.

As both parties are to call expert witnesses, it is paramount that the arbitral tribunal deals with manner in which the expert evidence shall be received and evaluated to ensure that the dispute is determined in a cost effective, expeditious and procedurally fair manner. To that end, **Article 5.1 of the IBA Rules** requires the tribunal to determine when the submissions of the expert reports shall be delivered. Therefore, and in term of **article 5.2 of the IBA Rules,** the tribunal must consult with the parties and their experts and make a direction as to the agreed contents of the expert reports to ensure that both reports of the experts are standardized.

Upon giving a direction with respect to the contents of the expert reports and when the parties are to deliver their expert reports, it is paramount that the issues of the reports are narrowed down to those that concern the matter, those that the experts of the parties agree on and those that are in dispute. Therefore, the tribunal must thereafter direct, in terms of **article 5.4 of the IBA Rules**, that a without prejudice meeting of the experts be held to try to reduce the issues on which expert evidence will be required during the hearing. In so doing, the tribunal should take cognizance of the fact that the without prejudice meeting may fail to narrow the issues down if a neutral person is not appointed to chair the meeting and ensure that the parties experts do actually succeed in making meaningful progress in reducing the issues in dispute between them.

Therefore, it will be prudent for the tribunal to direct, in terms of **Rule 29 of the Standard Procedure Rules** that a neutral chairman for the without prejudice meeting shall be appointed in consultation with the parties to ensure that the person appointed

is well respected by the parties experts. By this approach, the tribunal avoids the need to devote considerable time to evaluate and choose between conflicting versions of experts on points which may not even be of fundamental importance to the resolution of the dispute. In further selecting a neutral person who is respected by the expert witnesses of the parties, the report of the neutral person narrowing those issues which are in dispute shall be well received by the parties and their expert witnesses without any issues that may be raised on the report which may further delay the resolution of the dispute.

Once the arbitral tribunal has given a direction as to when the report of the neutral chairman of the without prejudice meeting is to be delivered, and the timelines in which the tribunal shall invite comments from the expert witnesses of the parties on the report, the tribunal must consider the manner in which oral evidence is to be led by the expert witnesses in a cost effective and efficient manner while meeting the standards of procedural fairness. Witness conferencing can be a very effective way of enabling the tribunal to choose between the two experts' differing opinions.

Witness conferencing involves the experts for each party to be heard simultaneously. The experts are seated opposite or alongside each other in front of the arbitral tribunal at the same time and each is asked to comment and respond to the opinions of the others on an agenda basis. This enables individual members of the arbitral tribunal to obtain the opinions of the experts on specific issues with a degree of immediacy that is not possible where there may be an interval of several days between the particular topics being dealt with by the opposing experts. Therefore, the tribunal should favour witness conferencing as an ideal model for receiving oral evidence at the hearing. With this approach, the agenda or the issues to be considered at the hearing must be delivered to both parties well before the hearing in order for both parties to be aware of the evidence and those issues the tribunal would want to be addressed on to expeditiously resolve the dispute between the parties. This will further guide the parties to focus at the hearing on those aspects of the oral hearing, which are relevant to the resolution of the dispute and disregard irrelevant matters. By so doing, the oral

evidence hearing will be both efficient and cost effective, while meeting the requisite standards of procedural fairness.

Question 7

As a general principle, a successful party is entitled to costs.[6] Therefore, costs are generally, but not always, borne by the unsuccessful party. In the instant matter, the arbitrator made the following costs award:

> *As A has been substantially successful, Y and Z shall pay the costs of A, on the High Court scale, as agreed, between party and party, including the costs consequent upon the employment of two counsel.*
>
> *As X used the same legal representatives as Y and Z, no costs order is made regarding the costs of X."*

The arbitrator's order on costs with respect to Y and Z did not deviate from the general principle with regards to costs. A was substantially successful against Y and Z, therefore A was entitled to costs as per the arbitration agreement of the parties. Therefore, I agree with the arbitrator arbitrator's order on costs with respect to Y and Z. However, as X was substantial successful in defending the suit instituted by A against him, or put differently, as A was not substantially successful against X, I do not agree with the costs order of the arbitrator with respect to X. In **Kathrada v Arbitration Tribunal and Another 1975 (2) SA 673 SA (A)**, Botha JA pointed out that the arbitrator's discretion to award costs was 'a discretion which must be exercised judicially upon a consideration of all the relevant facts and in accordance with recognized principles.

Therefore, as X was the substantially successful against A, X should have been awarded costs.

It is trite that the award of an arbitrator is ordinarily final. That is provided for expressly in **section 28 of the Act**:

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[6] Kathrada v Arbitration Tribunal and Another 1975 (2) SA 673

‘Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.’

The grounds upon which a court may review the award of a consensual arbitrator are confined to those stipulated in **section 33 (1) of the Act**. **Section 33 (1) the Act** permits a court to interfere with an award where an arbitration tribunal has misconducted itself, or committed a gross irregularity, or exceeded its powers, or the award has been improperly obtained.

The award of cost is not treated any different from the arbitral award for purpose of review.[7] The arbitrator’s conduct, with respect to costs must fall within the strict constraints of **section 33 (1)** for the award of costs to be reviewable.[8] The court in **Leadtrain Assessments (Pty) Ltd v Leadtrain,** held, with respect to review of costs, that it would be extraordinary if the conduct of an arbitrator that falls short of the strict constraints of **section 33 (1)** were nonetheless to be capable of being set aside and remitted for reconsideration under **section 32 of the Act.**

Therefore, for an award for costs to be reviewable and remitted for reconsideration under **section 32**, it must not only fall within the ambit of **section 33 (1)**, but it must also be on good cause. In **Leadtrain Assessments (Pty) Ltd and others v Leadtrain**, the Court held,

> “It is not desirable to attempt to circumscribe when “good cause” for remitting a matter will exist. It will exist pre-eminently where the arbitrator has failed to deal with an issue that was before him or her …… but once an issue has been pertinently addressed and decided there seems to us to be little room for remitting the matter for reconsideration. The guiding principle of consensual arbitration is finality – right or wrong …… However one approaches the question

[7] Leadtrain Assessments (Pty) Ltd v Leadtrain *(Pty) Ltd* 2013 5 SA 84 (SCA)
[8] *Ibid*

> of what is “good cause” it seems to us that it inexorably requires something other than to mere error on the part of the arbitrator.”

Therefore, a case must be made out of something more than “a mere error on the part of the arbitrator”.