MODULE 4

LAW AND PRACTISE OF ARBITRATION, INTERNATIONAL ARBITRATION AND EVIDENCE

Module 4 B

Evidence in the Context of Modern Arbitration Practice

This Submission:	***Assignment B/3***
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Association of Arbitrators (Southern Africa)

Question 1

General

1. International commercial arbitration is conducted under national arbitration law, usually the law of the place or seat of the arbitration.

2. The International Arbitration Act (Act 15 of 2017) facilitates the use of arbitration as a method of resolving international commercial disputes and has adopted the UNCITRAL Model Law on International Commercial Arbitration.

Arbitration Agreement

3. In this case the parties have freely agreed to arbitration and on the judicial seat of arbitration, namely Johannesburg.

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

4. The arbitration clause is in writing and it was signed by both parties. It is therefore a form of "Consensual Arbitration". The parties have of their **own accord agreed** to submit their disputes to arbitration for resolution.

5. The clause is also, to an extent, a form of "Ad hoc Arbitration" in that the agreement implies that future and or existing disputes must be referred to arbitration without an arbitration institution being specified to facilitate and supervise the proceedings and to supply procedural rules for the arbitration.

6. The provisions under the International Arbitration Act (Act 15 of 2017), more specifically Article 7 of MAL, provides two options for the definition of an arbitration agreement. Option 1 under MAL is similar to the definition found under the Arbitration Act (Act 42 of 1965), namely that it must be in writing.

7. Most countries have now adopted the "*in-writing*" requirement. Refer:

"CHAPTER II ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. …."

8. The arbitration clause is therefore enforceable and the parties may not seek any other relief in respect of such disputes. It will therefore be a breach of contract to litigate, unless parties agree to set aside arbitration agreement.

9. The parties have deliberately intended to record their agreement in writing and by their signatures.

Appointment of Arbitral Tribunal

10. Article 10 of MAL provides that the **parties are free** to determine the **number of arbitrators**, and failing such determination, the number of arbitrators shall be one. (By default)

11. Article 11 of MAL provides that the **parties are free to agree** on a **(any)** procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of said Article.

12. The parties can therefore agree on the identity of a single arbitrator or on the identities of any number of arbitrators.

13. Where the parties are unable to agree on the identity of an arbitrator or arbitrators, the arbitrator(s) shall be appointed, upon request of a party, by the court specified in Article 6 of MAL. In this case the Gauteng Division of the High Court seated in Johannesburg.

14. Where the parties are **unable to agree on the procedure** of appointing an arbitrator or arbitrators,

    14.1. ***for arbitration requiring three arbitrators***, each party shall appoint one arbitrator, and these two arbitrators shall appoint the third arbitrator; if a party falls to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court specified in Article 6 of MAL. In this case the Gauteng Division of the High Court seated in Johannesburg, or

    14.2. ***for arbitration requiring a single arbitrator***, if the parties are unable to agree on the arbitrator, he or she shall be appointed, upon request of a party, by the court specified in Article 6. In this case the Gauteng Division of the High Court seated in Johannesburg.

Jurisdiction regarding Validity of Main Contract

15. Arbitration has a consensual basis in that the arbitral tribunal's jurisdiction is derived from the agreement of the parties to the dispute.

16. The law applicable to the arbitration proceedings will be that of the juridical seat. Arbitration legislation generally only applies to disputes which are arbitrable, that is to disputes which are permitted to be resolved by a private arbitral tribunal and are not reserved for national courts.

17. The International Arbitration Act (Act 15 of 2017) retains Article 1.5 but sets out general guidance on arbitrability for purposes of applying the Model Law in Section 7 of the Act, namely:

> *"Section 7. Matters subject to international commercial arbitration*
>
> *(1) For the purposes of this Chapter, any international commercial dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration, unless –*
>
> *(a) such a dispute is* ***not capable of determination by arbitration under any law of the Republic****; or*
> *(b) the arbitration agreement is* ***contrary to the public policy of the Republic****.*

*(2) Arbitration **may not be excluded** solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement."*

18. Therefore, as long as the dispute, in this case the validity of the main contract, complies with these provisions, the parties are entitled to dispose of this matter through arbitration and the arbitral tribunal would have jurisdiction to decide the dispute.

19. Article 16 of MAL deals with the power of the arbitral tribunal to rule on its own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement, and in that context, the severability of the arbitration clause.

20. Therefore, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision, ruling or award by the arbitral tribunal that the main contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Improvements to Arbitration Clause

21. The wording adopted in an arbitration agreement must be adequate to fulfil the intentions of the parties.

22. The agreement should be in broad, inclusionary terms and should rather state: ***"All disputes …"***

23. Where a model arbitration clause is used, it is sensible to supplement it by reference to:

    23.1. the number of arbitrators,
    23.2. the place of arbitration,
    23.3. the law or laws governing the arbitration clause (eg. amended UNCITRAL, Model Law applicable to South Africa),
    23.4. the contract of which it forms part of,
    23.5. the rules under which the dispute shall be settled (eg. ICC),
    23.6. the language of the arbitration,
    23.7. that the dispute shall finally be resolved by arbitration, and
    23.8. that it shall apply to any and all disputes between the parties.

Question 2

Relevance to PA's Duty/ Article 5 of the Rules

1. Consider the following:

> 5.3 All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party. No arbitrator shall advise any party on the parties' dispute or the outcome of the arbitration.

> 5.4 Before appointment by the LCIA Court, each arbitral candidate
>
> shall sign a written declaration stating: (i) whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration; AT COMMENCEMENT

> 5.5 If appointed, each arbitral candidate shall thereby assume a continuing duty as an arbitrator, until the arbitration is finally concluded, forthwith to disclose in writing any circumstances becoming known to that arbitrator after the date of his or her written declaration (under Article 5.4) which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence, to be delivered to the LCIA Court, any other members of the Arbitral Tribunal and all parties in the arbitration. DURING ARBITRATION

> 5.9 The LCIA Court shall appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties. The LCIA Court shall also take into account the transaction(s) at issue, the nature and circumstances of the dispute, its monetary amount or value, the location and languages of the parties, the number of parties and all other factors which it may consider relevant in the circumstances. Also factors that may compromise impartiality and independence.

> 10.1 The LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if:
>
> (iii) circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.

2. The intended change in legal representation is indeed relevant to the PA's duty of independence and impartiality.

3. Correctly and in line with the terms and rules of natural justice, the LCIA Arbitration Rules constantly refers to, "***impartial / impartiality***" and to "***independent / independence***".

4. Impartiality and independence are two very separate and distinctive requirements and the arbitrator must adhere to and comply with both. An arbitrator may very well be impartial and unbiased but in this case he ***can no longer declare*** that he is perfectly ***independent***.

5. There is now a clear and undisputed link between the PA and one of the parties' legal representatives with the common denominator being the same global law firm as their employer.

6. The PA must now act in terms of Article 5.5 and disclose the circumstances that are now likely to give rise (in the mind of any party) to such justifiable doubts as to his impartiality or independence.

7. A party to the arbitration is entitled to be represented by (any) a legal representative chosen by that party.

Relevance to PA's Duty/ Article 5 of the Rules

8. The intended change will and can only take effect subject to the approval of the Arbitral Tribunal.

9. The intended change could compromise the composition of the Arbitral Tribunal and the finality of any award (on the grounds of possible conflict or other like impediment).

10. The Arbitral Tribunal should stay proceedings and lodge a complaint by its own initiative in order to decide the matter.

11. In order to decide whether to grant or withhold such approval, the Arbitral Tribunal shall have regard to the circumstances, including but not limited to:

    11.1. the general principle that a party may be represented by a legal representative chosen by that party,

11.2. the stage which the arbitration has reached,

11.3. the efficiency resulting from maintaining the composition of the Arbitral Tribunal (as constituted throughout the arbitration) and

11.4. any likely wasted costs or loss of time resulting from such change or addition.

12. The Arbitral Tribunal must also:

12.1. consult with the parties and their legal representative,

12.2. grant them a reasonable opportunity to respond to and answers to the complaint,

12.3. act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s),

12.4. adopt suitable procedures,

12.5. avoiding unnecessary delay and expense, and

12.6. provide a fair, efficient and expeditious means for the resolution of the parties' dispute.

13. The Arbitral Tribunal should also remember that:

13.1. Actual bias does not have to be proven; it is sufficient if there are grounds for a party to fear that it would not receive fair treatment.

13.2. Actual bias does not have to be proved; the mere perception and possibility of bias may very well suffice.

14. The intended change in legal representation could compromise the Arbitral Tribunal and the finality of the award, on the ground of conflict of interest or an impediment to the Tribunal’s impartiality and independence.

<u>Declaration of Availability</u>

15. The Arbitral Tribunal has a duty to avoiding unnecessary delays, to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.

16. Arbitrators have a duty to devote to the arbitration the time necessary to conduct the proceedings as diligently, efficiently and expeditiously as possible.

17. Candidate arbitrators should indicate in their Declaration of Availability the number of arbitrations in which they are currently acting, specifying whether they are acting as presiding arbitrator, sole arbitrator, co-arbitrator or counsel to a party, as well as any other commitments and their availability over the next 12-24 months.

18. The LCIA Court shall also consider whether the arbitrator has sufficient availability to determine the case in a prompt and efficient manner that is appropriate given the nature of the arbitration.

19. The parties should ensure that the arbitrators provide the signed declarations as this may facilitate the removal and replacement of an arbitrator who is unreasonably delaying the arbitration by his or her inability to provide a convenient hearing date.

Disclosures regarding other Arbitrations

20. Candidate arbitrators should indicate in their Declaration of Availability the number of arbitrations in which they are currently acting, specifying whether they are acting as presiding arbitrator, sole arbitrator, co-arbitrator or counsel to a party, as well as any other commitments and their availability over the next 12-24 months.

Question 3

1. The clause is a multi-tiered dispute resolution clause.

2. The wording reflects the parties' **true intention** to resolve the dispute by negotiations and a **mutual mandatory obligation** is placed on the parties to follow the stepped process.

3. The parties are were clearly **serious** and agreed on a sufficiently **certain procedures** that should be followed to facilitate an attempt at agreement by negotiation.

4. The arbitral tribunal should find the clause enforceable and that the dispute should be referred to negotiation.

5. In *Cable & Wireless plc v IBM United Kingdom Ltd [2002] EWHC 2059 (Comm)* the court found that the clause was enforceable because it went further than merely imposing an obligation to negotiate but actually prescribed the steps to taken by the parties which included the ADR procedure. The latter procedure was sufficiently certain for a court to evaluate whether the parties have complied or not.

6. In relation to the construction of the dispute resolution clause in *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited [2014] EWHC 2104 (Comm)*, the Court found and made the following observations:

    6.1. The use of the word "shall" (in clause 11) denoted a mandatory obligation on the parties to seek to resolve claims by "friendly discussion".
    6.2. This obligation constituted a condition precedent to the right to refer a dispute or claim to arbitration.
    6.3. The parties were only obliged to wait for a period of four weeks before the matter could be referred to arbitration (as opposed to the friendly discussions having to actually last for four weeks).
    6.4. In line with the sentiments of decisions in other common law jurisdictions, the Court observed that it is to the advantage of all parties if arbitration can be obviated by pre-emptive negotiation by the parties.

7. The arbitral tribunal should treat the term requiring negotiation before arbitration as a ***mandatory procedural requirement*** and it should simply stay the arbitration proceedings pending compliance and until the negotiation requirement has been complied with.

8. In order to set aside the award, the aggrieved party would have to rely on Article 34(2)(a)(iv) and provide proof that the arbitral procedure was not in accordance with the agreement of the parties because of non-compliance with the provision for negotiation.

9. However, there remain strong arguments why the award on the merits should remain enforceable. The validity of the arbitration agreement itself is not in dispute and the court's discretion to set aside an award or to refuse enforcement of an award is discretionary.

10. The court should exercise its discretion on pragmatic and policy grounds in favour of enforcement of the award, in the absence of other grounds justifying refusal of enforcement.

11. The setting aside of the award under these circumstances would not support the object of arbitration, namely the fair resolution of disputes, without unnecessary delay and expense.

Question 4

1. The issues in relation to this matter:

   1.1. interim measures (orders, awards, instructions),
   1.2. the arbitral tribunal's powers / jurisdiction,
   1.3. confidentiality and
   1.4. the preservation of documents / evidence.

2. The question then arise:

   Is there any need for national courts to be involved in the arbitral process?
   The answer in almost every case is "no".[1]

3. Once an arbitral tribunal has been constituted, most arbitrations are conducted without any need to refer to a national court, even if one of the parties fails or refuses to take part in the proceedings.

4. There may be times however, at which the involvement of a national court is necessary in order to ensure the proper conduct of the arbitration and it may become necessary, for instance, to ask the competent court to assist or to take some other interim measure of protection.

5. Here a party needs an interim measure, and the first question that needs to be addressed is whether it is better to approach the court or the arbitral tribunal.

6. Before an approach to the tribunal can be considered, it will be necessary to establish if the arbitral tribunal has the necessary power, ***either in terms of applicable law or in terms of the applicable arbitration rules.***

7. ***When considering the LCIA Rules*** and more specifically Articles 25.1 and 25.2 (*Interim and Conservatory Measures*), we find that the arbitral tribunal has the necessary power to do so ***when considered appropriate under the circumstances***.

[1] *Blackaby & Partasides, Redfern and Hunter on International Arbitration, (6th Ed, 2015), p 420, para 7.13*

8. A court may very well be reluctant to grant interim measures in a case where the arbitral tribunal has the power to grant such interim measures ***in the absence of good reasons***, particularly in this case when considering the provisions contained under Article 25(3)(ii) of Rules, namely:

*The power of the Arbitral Tribunal under Article 25.1 shall not prejudice any party's right to apply to a state court or other legal authority for interim or conservatory measures to similar effect after the formation of the Arbitral Tribunal**, in exceptional cases and with the Arbitral Tribunal's authorisation**, until the final award.*

9. ***When considering applicable law*** and Article 9 under Schedule 1 of the International Arbitration Act (Act 15 of 2017), we find:

Article 9. Arbitration agreement and interim measures by court

It is therefore compatible

(1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

(2) The court has the powers contained in article 17J to grant interim measures in relation to arbitration proceedings.

10. Article 17 under Schedule 1 of the International Arbitration Act (Act 15 of 2017) bestow upon the arbitral tribunal the power to grant interim measures.

11. However, Article 17J(2) under Schedule 1 of the International Arbitration Act (Act 15 of 2017) imposes restrictions on approaching a South African court where interim measures are available from the arbitral tribunal.

12. Regarding enforcement, Articles 17H and 17I under Schedule 1 of the International Arbitration Act (Act 15 of 2017) makes provision for the court enforcement of interim measures ordered by the arbitral tribunal.

13. The SOC should therefore approach the arbitral tribunal to resolve the dispute on the public disclosure of the documents.

14. The decision then, as to whether to rather defer to court, rests on the arbitral tribunal, and it remains a decision which requires careful consideration in the light of the particular circumstances.

15. The arbitral tribunal is not always compelled to decide or grant interim measures.

16. As stated, there may be times when the involvement of a national court is necessary in order to ensure the proper conduct of the arbitration and it may become necessary, for instance, to ask a competent court to assist or to take some other interim measure of protection.

17. After considering paragraphs 8, 9 and 11 above, the provisions under section 11 of the International Arbitration Act (Act 15 of 2017) as well as Article 30 of the LCIA Rules should be contemplated.

18. Considering section 11(1) of the International Arbitration Act as well as Articles 30.1 and 30.2 of the LCIA Rules it remain clear that the arbitration proceedings are held in public and that the arbitral tribunal should be held competent to grant such order and that there are no appropriate or any good reasons why the arbitral tribunal should not exercise its powers to grant such interim measures.

11. Confidentiality of arbitral proceedings

(1) Arbitration proceedings to which a public body is a party are held in public, unless for compelling reasons, the arbitral tribunal directs otherwise.

Article 30 Confidentiality

30.1 The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that 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.

30.2 The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26 and 27.

Question 5

1. A so-called "anti-suit injunction" is a type of relief or interim measure granted where the arbitral tribunal directs one of the parties to refrain from instituting (**future**) or to discontinue (**current**) court proceedings in a court outside the seat of the arbitration, where such relief sought ***is in competition*** with that sought in the arbitration proceedings.

2. Article 17(2)(b) of the MAL (2006), will therefore be applicable, namely

> *Article 17. Power of arbitral tribunal to order interim measures*
>
> (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
>
> (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
>
> *(a)* Maintain or restore the status quo pending determination of the dispute;
>
> *(b)* Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
>
> *(c)* Provide a means of preserving assets out of which a subsequent award may be satisfied; or
>
> *(d)* Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The trend favouring arbitral tribunals' power to order security for cost is illustrated by the evolution of the United Nations Commission on International Trade Law (UNCITRAL)'s Model Law on International Commercial Arbitration (the "Model Law" or "MAL").

4. Article 17 of MAL (1985) only allowed tribunals to order interim measures that it deemed "***necessary in respect of the subject-matter of the dispute***".

5. As disputes regarding costs were not deemed substantive or part of the "*subject-matter of the dispute*", the MAL (1985) was usually interpreted as excluding the possibility for arbitrators to order security for costs.

6. Recognizing the need to clarify the possibility for tribunals to take such measures, Article 17 of MAL (2006) was amended by the specific deletion of the wording and the reference to "*the subject-matter of the dispute*".

7. Now Article 17 of MAL (2006) provides that "***unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures***" The older 1985 reference to the "*subject-matter of the dispute"* was therefore deleted from this article.

8. Article 17 of MAL (2006) therefore empowers arbitral tribunals not only to order interim measures that bear on substantive issues but also interim measures on procedural matters such as security for costs, although this measure is not specifically mentioned in the Model Law.

9. Note that the UNCITRAL Arbitration Rules, which parties can choose as their *lex arbitri*, have also been amended in a similar manner.

10. A notable consensus has therefore developed that acknowledges the importance of security for costs in international arbitration proceedings and empowers arbitral tribunals to issue such orders.

11. However, Article 9 of MAL provides for the court to grant interim measures of ***protection*** (*security for costs*) to a party:

Article 9. Arbitration agreement and interim measures by court

It is therefore compatible

(1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

(2) The court has the powers contained in article 17J to grant interim measures in relation to arbitration proceedings.

12. Article 17(2) of MAL (2006), read and interpreted on its own, ***does not allow or authorise the arbitral tribunal to order security for cost***. There is no express provision empowering the arbitral tribunal to specifically order security for costs.

13. Note that the "minor refinements" to Articles 17(2)(e) and 17J(1)(b) under Schedule 1 of the International Arbitration Act (Act 15 of 2017) now ***expressly authorise*** the arbitral tribunal to grant security for costs unless the parties agree otherwise.

(e) Provide security for costs. **Any party, not only Claimant**

(b) an order securing the amount in dispute but not an order for security for costs;

14. Based on the above-mentioned paragraphs, the respondent should first approach the arbitral tribunal for such cost order.

15. A court may very well be reluctant to grant interim measures which the tribunal has the power to grant in the absence of good reasons, particularly when the applicable rules contain a provision like Article 25.3 of the LCIA Rules.

16. Article 25.3 of the LCIA Rules makes stipulates that the power of the Arbitral Tribunal under Article 25.1 shall not prejudice any party's right to apply to a state court or other legal authority for interim or conservatory measures to similar effect ***after the formation of the Arbitral Tribunal***, in ***exceptional cases*** and with the ***Arbitral Tribunal's authorisation***.

17. The respondent will therefore not be able to approach a Rwandan court unless it is an exceptional case and the arbitral tribunal provides its authorisation.

18. In term of Article 17H (Recognition and enforcement of interim measures), and interim measure issued by the arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of Article 17 I.

19. The respondent will therefore be able to approach competent court to enforce the order.

Article 17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

Article 25 Interim and Conservatory Measures

25.1 The Arbitral Tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances:

(i) to order any respondent party to a claim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner;

(ii) to order the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration; and

(iii) to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.

Such terms may include the provision by the applicant party of a cross-indemnity, secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by the respondent party in complying with the Arbitral Tribunal's order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration.

25.2 The Arbitral Tribunal shall have the power upon the application of a party, after giving all other parties a reasonable opportunity to respond to such application, to order any claiming or cross-claiming party to provide or procure security for Legal Costs and Arbitration Costs by way of

deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances. Such terms may include the provision by that other party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs and losses incurred by such claimant or cross-claimant in complying with the Arbitral Tribunal's order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration. In the event that a claiming or cross-claiming party does not comply with any order to provide security, the Arbitral Tribunal may stay that party's claims or cross-claims or dismiss them by an award.

25.3 The power of the Arbitral Tribunal under Article 25.1 shall not prejudice any party's right to apply to a state court or other legal authority for interim or conservatory measures to similar effect: (i) before the formation of the Arbitral Tribunal; and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award. After the Commencement Date, any application and any order for such measures before the formation of the Arbitral Tribunal shall be communicated promptly in writing by the applicant party to the Registrar; after its formation, also to the Arbitral Tribunal; and in both cases also to all other parties.

25.4. By agreeing to arbitration under the Arbitration Agreement, the parties shall be taken to have agreed not to apply to any state court or other legal authority for any order for security for Legal Costs or Arbitration Costs.

Question 6

1. Case Management, Expert Witnesses, and Witness Conferencing

2. One of the most expensive and time consuming parts of the traditional adversarial hearing is first the cross-examination of the experts called by the claimant and then, at a subsequent stage, the cross-examination of the expert witnesses called by the respondent.

3. In terms of Article 2 (*Consultation on Evidentiary Issues*) of the IBA Rules of Evidence, the Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.

4. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including the preparation and submission of Expert Reports.

5. During this consultation, the arbitral tribunal should ***propose and even direct*** alternative (modified) procedures to ensure cost-effective, expeditious and fair procedures.

6. Expert evidence is usually divided into two stages, namely:

    6.1. the pre-hearing phase and
    6.2. the evidentiary hearing phase.

Modifications to the Pre-Hearing Phase

7. Article 5 (*Party-Appointed Experts*) of the IBA Rules on the Taking of Evidence deals with the pre-hearing phase and the submission of Expert Reports.

8. In terms of Article 5.4 of the IBA Rules the experts of like discipline should be ordered to meet and discuss their (individual) Expert Reports and to identify the points on which they agree and those they disagree on.

9. To increases the efficacy of the procedures, the following modifications should be suggested:

9.1. At the earliest opportunity practicable, the arbitral tribunal in consultation with the parties and their lawyers should identify the disciplines from which expert evidence is required.

9.2. The instructions to each expert from the same discipline should be identical and formulated by the tribunal, after consultation with the parties.

9.3. The experts should preferably only carry out their investigations after all factual evidence (both documentary and that of witnesses of fact) is available.

9.4. Unlike the normative procedures, the experts should not draw up their individual Expert Reports for disclosure to the other side until the two experts have met "without prejudice" in the absence of the parties and their lawyers, to discuss the points on which they agree and disagree.

9.5. After this meeting, the experts draft ***a joint report*** for the arbitral tribunal and the parties, setting out the points on which they ***agree and disagree***. This report is therefore submitted "*with prejudice*".

9.6. Only now will the experts draft and exchange individual ***Expert Reports*** in which each expert deals ***only with the points on which they disagree***.

9.7. Finally, the (both) expert(s) deliver a reply to the other expert's report, giving his opinion of what the result would be, should the tribunal accept the factual evidence put forward by the opposing party.

10. If this procedure is followed, the need for cross-examination of the experts at the evidentiary hearing may be sharply reduced, even to the point at which a witness conference, as described above, becomes unnecessary.

Modifications to the Evidentiary Hearing Phase

11. "Witness conferencing" has proved an effective alternative for the reception of expert evidence at a traditional adversarial evidentiary hearing.

12. At and during the witness conference the experts for each party are heard simultaneously. The experts are seated opposite or alongside each other in front of the arbitral tribunal together and at the same time.

13. Each expert will be asked to comment and respond to the opinions of the other expert on an agenda basis.

14. 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.

15. During a normative and traditional system of cross-examination, the strength and impact of counsel's questions often overshadows the expert's response. With witness conferencing, the questions from the tribunal or the parties' lawyers are a catalyst for the discussion, but the focus is and remain on the contrasting opinions of the experts regarding the disputed factual and technical issues.

16. Witness conferencing requires careful preparation by the arbitrators on the basis of the documents and Expert Reports submitted previously, including the written expert reports, submitted in advance.

17. The tribunal will draw up an agenda for the witness conference based on the points on which the experts disagreed. Where the experts have previously met "without prejudice" in an effort to reduce the number of points on which they disagree, the "with prejudice" ***joint report*** listing the points on which they still disagree, will be useful by the arbitrators in compiling the agenda.

18. At the witness conference the arbitrators normally assume the primary role in questioning the expert witnesses, although opportunity for effective cross-examination by the parties' lawyers is by no means excluded.

19. Article 28.4 of the SP Rules (2013) provides for witnesses, at the discretion of the arbitral tribunal, to be examined by means of videoconference. The same could be applied to expert witnesses.

Question 7

1. It should be noted that in terms of section 28 (*Award to be binding*) of the Arbitration Act (Act 42 of 165) and unless the arbitration agreement provides otherwise:

   1.1. an arbitral award shall be final and binding,
   1.2. an arbitral award shall not be subject to appeal,
   1.3. each party to the reference shall abide by and comply with the award in accordance with its terms.

2. Section 35 (*Costs of arbitration proceedings*) of the Arbitration Act requires the arbitrator in his award to include directions as to who should pay the various costs. However, the arbitrator must give effect to the agreement between the parties where specific direction is given in respect to the awarding of costs.

3. The general principle is that costs are awarded to the successful party. In other words, the loser pays his and the other party's costs. ***This is true even where the winner is not an outright winner.***

4. In the case of *John Sisk (Pty) Ltd v The Urban Foundation*[2] the arbitrator awarded to the contractor approximately half the amount that he had claimed and he apportioned the costs between the parties in approximately the same ratio. This award of costs was taken on review and the court, in referring the award back to the arbitrator for reconsideration, indicated that in its opinion the contractor had in principle been successful in its claim, although it had not won as much as it had claimed, and therefore ought to have been awarded costs.

5. ***The principle that the court was enunciating was that one should ask whether the claimant was justified in bringing the matter to arbitration at all.***

[2] *John Sisk & Son (SA) (Pty) Ltd v Urban Foundation 1985 (4) SA 349 (N)*

6. In *John Sisk v The Urban Foundation* it was clear that the courts remitted the award of costs for reconsideration because the arbitrator had not followed the usual rule but gave no indication why he had departed from it and left the court to conclude that he had not properly applied his mind to the matter. It would therefore seem that if the arbitrator wishes to depart from the usual rule he should in his award make it clear that he has done so for good reasons which he has carefully considered.

7. If his claim has been dismissed in *toto* and he received nothing, then clearly the matter should not have been brought to arbitration and the contractor ought to pay the costs. If however the claim was upheld at least in part and he received at least portion of the amount claimed then he was justified in bringing the matter to arbitration and he should be awarded costs. He had won in principle but had overstated his claim which the arbitrator reduced to the figure he considered appropriate.

8. The question might also be simply stated thus: if the claimant emerged from the arbitration richer than when he went in, he was successful and would be entitled to an award of costs.

9. The purpose of an award of costs has been authoratively stated as:

"…costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based".[3]

To what extend do I agree with the order on costs

10. Considering the principles above, particularly that under paragraph 5, and that the claimant was not the outright winner, the question should be asked whether the claimant was justified in bringing the matter to arbitration at all.

11. Parties Y and Z were found to have breached the shareholder's agreement. Had the arbitrator found that the claimant ought to have known that the deemed offer had factually lapsed, I would be reluctant to agree with the arbitrator's order on cost.

[3] *Law of Costs, Service Issue 9, AC Cilliers, Butterworths, April 2004, p 1-4; Innes CJ in Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 488*

12. Had the arbitrator found that the claimant could not have reasonably been aware that the deemed offer had factually lapsed, I would be inclined to agree with the arbitrator's order on cost as the claimant was justified in bringing the matter to arbitration.

Cost Award Reviewable?

13. Should the arbitrator depart from the normal rules he must give full reasons for doing so in order to demonstrate that he had applied his mind to the question and exercised his discretion in a judicial manner, failing which he runs the risk of having his award remitted or set aside.

14. The remittal or setting aside of an award of costs was reconsidered by the SCA in *Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd 2013 (5) SA 84 (SCA)* where the court distinguished between the standards laid down for the review of ***statutory arbitrations*** (*Kathrada v Arbitration Tribunal 1975 (2) SA 673 (A)*) from those of ***private, consensual, arbitrations***.

15. The court held that where an arbitrator makes an error in law regarding the award of costs, in a private consensual arbitration, such error is not "***good cause***" for remittal; refer section 32(2) of the Arbitration Act.

16. The parties are bound by the award of the arbitrator save where a party can show that the costs award should be set aside in terms of section 33 of the Arbitration Act.

17. The basis for setting aside an award of costs is the same as that for setting aside an award on the merits; refer section 32(2) of the Arbitration Act.