ASSIGNMENT COVER PAGE

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QUESTION 1

1. As the clause provides for arbitration in Johannesburg, the validity of the arbitration agreement will have to be assessed in terms of South African Law and South Africa has adopted the UNICITRAL Model Law (Model Law), as incorporated in the International Arbitration Act 15 of 2017[1] (Act 15).

2. Under the Model Law Article 7[2], the arbitration agreement can be in a clause in a contract or a separate agreement and is required to be in writing (a signature is no longer required).

3. The content of the clause in this case is clear enough to be given effect to, when supplemented by the default provisions of the South African Act 15.

4. As there is a signed agreement in writing in this case, which more than meets the requirements of South African Law, there is an enforceable arbitration agreement.

5. The appointment of the Arbitration Tribunal will be regulated by the South African Arbitration Act 15, and thus Articles 10 to 11, which deals with the appointment and number of arbitrators.

6. Article 10 provides that the parties are free to choose the number of arbitrators in the tribunal[3], but failing this, the number shall be one[4].

[1] (Goverment of South Africa, 2017)

[2] (UNCITRAL, 2006)

[3] (UNCITRAL, 2006)

[4] (UNCITRAL, 2006)

7. The parties are free to agree the procedure for appointment of the tribunal under Article 11(2)[5], but failing this the procedure for appointment in Article 11 (3) and (4)[6] will apply.

8. In terms of Article 16 (1)[7], "*A decision by the arbitral tribunal that the contract is null and void shall not entail by the law itself the invalidity of the arbitration clause.*"

9. This clause recognises the severability, and therefore the tribunal would have jurisdiction to decide the validity of the main contract under a valid arbitration clause.

10. Considering improvements to the Arbitration Agreement, consider Eismann's[8] four criteria when drafting an arbitration clause: The Clause -
    10.1. should create mandatory consequences for the parties
    10.2. should exclude court intervention in the arbitration process prior to the award
    10.3. must empower the tribunal to resolve all disputes likely to arise
    10.4. must provide for an effective and expeditious arbitration procedure and enforceable award

11. Considering the current clause's simple reference to "*Disputes*", it can be improved by stating "*All Disputes and Claims*" to meet the first criterion, also recommended by the Model Arbitration clause in the UNICITRAL Arbitration Rules (2010)[9]

12. Considering the second criterion, the court will need to intervene if the clause is ambiguous or has gaps or if the dispute is not arbitrable. To clarify this, the applicable Arbitration Rules, seat,

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[5] (UNCITRAL, 2006)

[6] (UNCITRAL, 2006)

[7] (UNCITRAL, 2006)

[8] (Butler D. , Introduction to International Commercial Arbitration: A Southern African Perspective, 2020, p. 54)

[9] (UNCITRAL, 2010, p. Annex 29)

substantive law of the contract, and the language of the arbitration should all be specified. The current clause only includes the seat.

13. For the third criterion, an appropriate set of Rules and Law would assist in providing the tribunal sufficient power. Under either the LCIA[10] or UNICITRAL Rules the tribunal have sufficient power and it would be recommended to include one of these.

14. For the fourth criterion, the tribunal must be able to ensure that the arbitration is fair and efficient, as well as ensuring sufficient powers regarding making of awards, which both the LCIA (article14 & 26) and UNCITRAL Rules (Article 17 & 34) allows.

15. As such the clause could be improved as follows:

 15.1. "*All disputes and claims arising out of or related to this contract will be referred to arbitration subject to the LCIA Arbitration Rules (2014). The language will be English. The Arbitration will take place in Johannesburg, South Africa and the Contract shall be subject to South African Law.*"

(Words excluding references 598)

[10] (London Court of International Arbitration, 2014)

QUESTION 2

16. Article 5.4 of the LCIA Rules[11] requires that arbitrators sign a declaration confirming that there is no circumstances known to them likely to give rise to any justifiable doubts on their impartiality or independence before appointment.

17. When completing their statements of independence, arbitrators should, amongst other things, take into account the existence and nature of any past or present relationships, direct or indirect, with any of the parties or their counsel. Any doubt as to if a relationship should be disclosed, must be determined in favour of disclosure.

18. Article 5.5[12] places a continuous duty on all arbitrators to immediately disclose any circumstance of which they become aware of at any time during the course of the arbitration, which might give rise to possible conflicts.

19. Considering Article 5, the change in legal representation by the one party could impact the presiding arbitrator's impartiality and he would have to immediately disclose his relationship with the new counsel. Notwithstanding that there is no conflict of his independence or impartiality, it is critical under article 5 that he disclose.

20. Under Articles 18.3[13] and 18.4, a party must notify the Tribunal of any intended change or addition to its named representatives and the Tribunal may withhold approval of that intended change or addition where the change or addition could compromise the composition of the Tribunal or the finality of any Award (on the grounds of possible conflict).

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[11] (London Court of International Arbitration, 2014)

[12] (London Court of International Arbitration, 2014)

[13] (London Court of International Arbitration, 2014)

21. The Tribunal will have to take into account the particular circumstances in the case in deciding whether or not to grant its approval. This will include the general principal that a party has the right to be represented by a legal representative chosen by that party, the stage which the arbitration has reached, the value of maintaining the composition of the Tribunal and any likely wasted costs or delay resulting from the proposed change.

22. In this particular case, the arbitration was already advanced, and the tribunal was notified of the changed just prior to the hearing.

23. If the relationship between the counsel and the presiding arbitrator is seen a conflict of interest, the tribunal should not approve the change. Similarly if there is no prior relationship or no conflict of interest the tribunal can approve the change in counsel.

24. The LCIA Rules require an arbitrator, before appointment, to confirm that he is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration.

25. An arbitrator's confirmation signifies a commitment not only to devote sufficient time to the proceedings within the appropriate timeframe, but also to draft any award on the issues promptly after the last submission from the parties (oral or written).

26. Similarly with disclosures as to independence and impartiality, the arbitrator should keep the parties and the LCIA informed of any change in commitments after his appointment which might alter his earlier confirmation relating to availability.

27. Arbitrators have a duty to devote the necessary time to an arbitration, and accordingly they statement should include details on their involvement In other Arbitrations concerning:
    27.1. Number of pending arbitrations
    27.2. Number of outstanding awards
    27.3. Arbitrator's role as presiding, sole or co-arbitrator or counsel
    27.4. Any other pre-existing commitments (operations, extended vacations etc) which may impact the Arbitration

28. In confirming that he is available, the arbitrator has turned his mind to such commitments and allows the LCIA confidently to confirm to the parties that the selected tribunal has the necessary availability.

(Words excluding references 585)

QUESTION 3

29. On provision for negotiation Butler[14] states that "*Where appropriate wording is used, the provision for negotiation before arbitration should clearly be treated as mandatory rather than aspirational.*"

30. Therefore a clause requiring negotiation should be treated as a "*mandatory procedural requirement*" and not just as a plain pre-condition.

31. It was ruled in *Walford v Miles*,[15] that in English Law a clause for negotiation was unenforceable. The reason why an agreement to negotiate, similar to an agreement to agree is unenforceable is because it lacks the necessary certainty. It was concluded that a "lock out" agreement, where a duration for negotiations is stated, is however enforceable.

32. Article 23[16] of the Rules gives the tribunal the power to rule on its own jurisdiction. Therefor in this case, the arbitrator can rule on the enforceability of the specific clause.

33. Based on the facts of this case, the clause contains a "lock out" provision due to the stated days for negotiation and therefore the arbitrator should rule that the procedural requirement for negotiations has not been met and should be enforced first.

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[14] (Butler D. , Introduction to International Commercial Arbitration: A Southern African Perspective, 2020, p. 63)

[15] (Walford v Miles, 1992, p. AC 128)

[16] (UNCITRAL, 2010, p. Annex 16)

34. When enforceable, the arbitrator under Article 26,[17] may at the request of a party grant interim measures. Therefore the arbitrator should on the request of the English company under Article 26(2) (b)[18] grant an interim measure to enforce his ruling, by staying the arbitration pending compliance of the negotiation clause.

35. Under Article 34(2) (iii) the English company could challenge and apply to the court to set aside the arbitration award, on the basis that the tribunal had no jurisdiction (non-compliance).

36. In *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd*,[19] a provision for amicable negotiations as a pre-condition for arbitration was found to be enforceable and in that case non-compliance would have meant that the arbitrator had no jurisdiction which would have invalidated the award.

37. It should however be emphasised that the court should exercise their discretion under Article 34(2) on when "*An arbitral award may be set aside …*"

38. The court's discretion should rather be in support of the enforcement of the award, as the arbitration agreement itself is not in dispute.

39. The benefit of arbitration, fair resolution, would be seriously challenged if a party can have the award set aside on the basis that the arbitrator exceeded his jurisdiction.

[17] (UNCITRAL, 2010, p. 17)

[18] (UNCITRAL, 2010, p. 17)

[19] (Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd , 2014, p. EWHC 2104)

40. Butler[20] further suggests that interpretation of a term requiring negotiation before arbitration should be treated as a mandatory procedural requirement, rather than a precondition, which excludes the Arbitral Tribunal's jurisdiction.

41. Therefor the arbitrator can stay proceedings and if and when the negotiations fail, the arbitration can continue without any party having to refer the matter to arbitration again.

(Words excluding references 450)

[20] (Butler D. , Introduction to International Commercial Arbitration: A Southern African Perspective, 2020, p. 63)

QUESTION 4

42. In considering whether the SOC should approach a court or the Tribunal, consider the International Arbitration Act and the LCIA Rules.

43. The International Arbitration Act[21] under Section 11(1) contains a specific provision on confidentiality, and states "*Arbitration proceedings to which a public body is a party are held in public unless for compelling reasons, the arbitral tribunal directs otherwise".*

44. On the other hand Article 30 under the LCIA Rules[22], states a general principal that the Parties undertake to keep all awards confidential, unless that disclosure may be required of a party by legal duty.

45. Butler also refers to the issue in the Arbitration Course notes[23] and sates that in general an arbitration should be private, unless where safeguards are necessary in the public interest, and that "private" would apply to a non-state process.

46. The implication of these provisions are that any international commercial arbitration proceedings involving state-owned entities, such as Eskom, the IDC, Transnet or SAA, must by default be held in public – with no regard to the commercial nature of the dispute - and the arbitration proceeding will only be private once "compelling reasons" are provided. There appears to be a justifiable reason (ie public funds) for arbitration proceedings involving public bodies to be held in public, but the Act provides no direction as to what "compelling reasons" would entail. Compelling reasons will have to be explored in terms of current relevance, for instance a current international tender, where confidentiality is required until all the bidders has

[21] International Arbitration Act 15 of 2017, South Africa

[22] (London Court of International Arbitration, 2014)

[23] (Butler D. , Introduction to International Commercial Arbitration: A Southern African Perspective, 2020, p. 7)

submitted their documents, that if details be made public, might be detrimental to the entire tender process.

47. This issue can be seen as a type of interim or special measure or application, in which case it would be better suited to approach the Tribunal, as the Act already allows for the information to be made public, but it is the Rules that states that proceedings and information should be kept confidential, unless required by law, which in this case it is, therefore the SOC would have to apply to and convince the Tribunal based on the Rules and the Act rather than a court.

48. In considering if the Tribunal should decide the matter itself or refer it to court, and considering Article 22.1(vii) of the LCIA Rules, it is allowed for the Tribunal to decide on, upon the application of any party, *to order the compliance with any legal obligation*[24]

49. There are however no direct reference in either the LCIA Rules or the Act as to whether the Tribunal can defer a similar issue to the court for a decision, and based on Article 8 of the Act[25], the court should, where a matter is brought before him, and there is an Arbitration Agreement in place (with appropriate Rules), refer the matter to the Tribunal.

50. I would therefore advise that the Tribunal must rule on the issue of confidentiality.

(Words excluding references 488)

[24] (London Court of International Arbitration, 2014, p. 17)
[25] (Goverment of South Africa, 2017, p. 25)

QUESTION 5

51. In his discussion on the 2006 updated version of the UNCITRAL Model Law[26] and the various versions of Article 17 that the Working Group considered, Gaillard[27] highlights that Article 17 (2)(b) would be the appropriate Article under which a tribunal can grant an anti-suit injunction in an Arbitration.

52. One of the key reasons or instances where the tribunal would consider this, would be if one of the parties have brought an action before a court that can obstruct or disrupt the arbitrational proceedings while the Arbitration is still ongoing[28](parallel litigation). This can typically occur when one party wishes to follow the Arbitration route and the other not.[29]

53. Some more positive reasons for an Anti-Suit injunction includes the protection of evidence and to preserve the integrity of the arbitration.[30]

54. Article 17E allows that when a party brings an application for an interim measure or order, the tribunal may require that the requesting party provide the appropriate security. This can be waived if the parties agrees otherwise.[31] [32] From the course notes, it can also be taken that the attachment of assets can be done for security for the respondent's costs. [33] With the applicable Rues being the LCIA Arbitration Rules, Article 25 also confirms that the Arbitration Tribunal have got the power to order a party you provide security.[34]

[26] (UNCITRAL, 2006)
[27] (Gaillard, 2006, p. 261)
[28] (Gaillard, 2006, p. 256)
[29] (Taddesse, 2016, p. 23)
[30] (Taddesse, 2016, p. 28)
[31] (UNCITRAL, 2006, p. 11)
[32] (Butler D. , Introduction to International Commercial Arbitration: A Southern African Perspective, 2020, p. 40)
[33] (Butler D. , Introduction to International Commercial Arbitration: A Southern African Perspective, 2020, p. 69)
[34] (London Court of International Arbitration, 2014, p. 20)

55. When a party considers applying for interim measures, he would need to consider if the court might be reluctant to grant such an order, if it is something that is already contained in the applicable Arbitration Rules and law. In this case, the applicable law is the UNCITRAL Model Law 2006 and the applicable Rules are the LCIA Arbitration Rules.

56. Article 25.3 and 25.4 of the LCIA Rules, points out that a party may go to a court for interim measures, but when this is after the Arbitrator has been appointed and the Arbitration has started, it needs to be for exceptional cases and with the Tribunal's approval. It further states that if the parties have agreed to use the LCIA Rules, it is assumed that they have agreed not to apply to any court for the order for security for Legal and Arbitration costs.

57. In this case, it would therefore be advised that the respondent should rather approach the Tribunal for the interim security for legal costs.

58. Under Article 25.1 (ii) of the LCIA, the tribunal have the power to order the preservation, storage or sale of goods and property of any of the parties relevant to the Arbitration, and that this security can be utilised as security for any costs incurred. In a case where the tribunal have ordered a certain security for costs, the tribunal will always have the option to stay or to dismiss the award or the claimant's claim until such time that sufficient security is provided.[35]

(Words excluding references 477)

[35] (Butler D. , Introduction to International Commercial Arbitration: A Southern African Perspective, 2020, p. 70)

QUESTION 6

59. Comparing the Standard Procedure Rules of the Association of Arbitrators (Southern Africa NPC (2018) (AoA Rules)[36] and the IBA Rules on Taking of Evidence in International Arbitration (2010) (IBA Rules)[37], specifically on expert witnesses,

59.1. The AoA Rules in Article 17(3), 27(2) and 28(2) allows the hearing of evidence by an expert witness either in person or by submitting statements. The tribunal may hear the witnesses under the conditions and manner in which they see fit.

59.2. The IBA Rules in Article 5 similarly require that the expert submit a report and be available for presenting and questioning in the evidentiary meeting. The IBA Rules however in Article 5(4) allows the tribunal the power to order the experts from the parties to meet and confer on all issues in an attempt to reach agreements on as many points as possible to allow only the items that are in disagreement to be heard and debated at the evidentiary hearing.[38]

60. As Article 17(1) of the ASA rules allows that the tribunal conduct the arbitration as they see fit, it can also refer to other Rules and laws for guidance on best practise in dealing with expert witnesses.

61. The ICC Commission Report on Controlling Time and Costs in Arbitration[39] (ICC Time and Costs) in section 62 to 68 discuss that it is good practice to limit the number of experts per party, ideally to one, so that the reviewing of reports and evidence can be more efficient, this

[36] (Association of Arbitrators (Southern Africa) NPC, 2018)
[37] (International Bar Association, 2010, p. 12)
[38] (Association of Arbitrators (Southern Africa) NPC, 2020, pp. 72-73)
[39] (International Chamber of Commerce, 2018, p. 13)

is a helpful point to consider adding to the current Rules and Arbitration Agreement. It also advise that the experts meet do draw up a list of the items that they agree on and the items that they don't, similar to the IBA Rules in Article 5.

62. Other than the normal use of Expert witnesses being appointed by the parties, the UNCITRAL Model Law[40] (2006) in Article 26, the UNCITRAL Rules (2010)[41] Article 29 and Article 29 of AoA rules allows the tribunal to appoint an expert. This should aid in the expert being fully independent, as opposed by an expert being hired by a specific party.

63. In looking at the different options that is available including party experts, written and oral reports, expert conferencing "without prejudice" and tribunal appointed experts, it should be considered to combine the various rules and techniques. Butler[42] also summarises and proposes possible best practises.

64. Depending on the complexity and value of the Arbitration, some or all of the following can be introduced at the Preliminary Hearing. This case being complex and of high value, I would recommend that all be made part of the process of handling Expert witnesses:

64.1. The parties should identify issues that would require an Expert witness, exchange these with each other and the tribunal, and then the tribunal supply instructions on what to report on to the experts of both parties

64.2. The experts should preferably only carry out their investigations and finalise their reports once all the factual evidence has been presented.

[40] (UNCITRAL, 2006, p. 16)
[41] (UNCITRAL, 2010, p. 19)
[42] (Butler D. W., 2020, pp. 1-4)

64.3. The final expert reports must only be compiled after the experts have met for a conferencing meeting.

64.4. The tribunal appoint an expert that would moderate the expert conferencing and after concluding the conference, provide a fully independent report to the tribunal[43]

64.5. A joint report, by the tribunal expert (moderator) or just between the various experts, should be compiled dealing the issues that they agree on and which they don't agree on and presented after the expert conference meeting.

64.6. The party experts can after this report then draft their individual reports dealing only with the items on which they are not in agreement on, and present this to the tribunal and then be questioned and cross examined on these points.

65. By implementing these rules, the actual duration spend on expert witnesses, including giving oral evidence, during the evidentiary hearing will be shortened significantly and be more efficient.

66. In increasing the efficiency of the oral testimony of the expert witness, including cross examination by the various parties on either his own report or on something that the opposing party might have stated in their testimony, it would be pertinent to circulate all the witness statements and other evidence to all the expert witnesses to allow for proper preparation.

67. The parties should also guard against simply reading off written statements as oral evidence, but to rather summarise or limit oral evidence to complex items only.

(Words excluding references 745)

[43] (Association of Arbitrators (Southern Africa) NPC, 2020, p. 73)

QUESTION 7

68. In this case, the Standard Rules Article 40 and 41[44], Sections 34 to 36 of the Arbitration Act[45] and the Arbitration Agreement is applicable. There are no significant items on costs in the Arbitration Agreement, except for stating that the award of costs should be on the High Court scale.

69. The claimant sought declaratory relief, thus clarity, on if the respondents was in breach of the shareholders agreement and that as a consequence of that, the respondents offered their shares to the claimant and that the claimant then accepted the offer.

70. The Arbitrator ruled that two of the three respondents was in breach of the agreement, and therefor triggering the deemed offer of their shares. As breach was the main issue to be established for the balance of the issues to be triggered, I agree that the claimant was substantially successful in at least 66.6% of his claim of breach.

71. The further fact that the deemed offer has expired before the claimant could accept it, is seen to carry less weight than the first issue of if there was in fact Breach, hence this could be seen that that even though the claimant was less successful in the second claim, the weight of this was not sufficient to trop the overall success rate from at least 66.6% to below 50%

72. Costs traditionally follow the result of the arbitration if there has been substantial success[46], thus the substantially successful party is awarded costs.[47]

[44] (Association of Arbitrators (Southern Africa) NPC, 2018)
[45] (Government of South Africa, 1965)
[46] (ENS Africa, 2020)
[47] (Butler & Finsen, 1993, p. 277)

73. I agree therefor that the Claimant should be awarded costs, and that the respondent(s) should be liable for such costs. As there was actually three respondents, they would typically share the cost, but if, like in this case, the Claimant was only successful against 2 of the 3 respondents, it can be argued that the Claimant would be liable for the cost of the 3rd respondent. This would typically end up proportioning the costs, especially if all three the respondents had their own council. In this case, all the respondents however had the same council and legal team, hence I agree that the first two respondents should also carry the cost of the 3rd.

74. Section 35(1) of the Arbitration Act[48] states that the "*award of costs . . . shall be in the discretion of the arbitration tribunal"*. And in *Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd 2013 5 SA 84 (SCA),* it was reiterated that "*The guiding principle of consensual arbitration is finality – right or wrong – and we see no reason why an award of costs is to be treated any differently to any other aspect of the award"*[49]

75. Section 32 of the Act allows for the remittal of the Award or any matter of the arbitration back to the tribunal for reconsideration, and specifically Section 32(2) allows the court, *on good cause shown*, to refer a matter back to the tribunal. From *Leadtrain* above, this might also then include Costs.

76. However in *Leadtrain,* the judges observed that Brand J, in *Kolber v Sourcecom Solutions (Pty) Ltd,* stated that *'a party to arbitration proceedings should not be allowed to take the arbitrator on appeal under the guise of a remittal in terms of s 32(2)'*

48 (Government of South Africa, 1965)
49 (Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd, 2013, p. 6)

77. It would seem like to pre-requisite of *"good cause shown*", however wide this meaning is, will have to be proven before a case can simply be remitted back to the tribunal.

78. Section 33 of the Act refers to the instances where a court can set aside the award of an arbitrator as being:[50]

    78.1. Misconduct by the Tribunal

    78.2. Gross irregularity in the proceedings

    78.3. The tribunal exceeding its powers

    78.4. If an award has been improperly obtained

79. Considering these instances and the comments from the judges in *Leadtrain*, a cost reward will be final and not reviewable unless one of the items in Section 33 of the Act is alleged and proven.

80. From the Caselaw, it is clear that it is no easy task in alleging, proving and succeeding in getting a Cost Award remitted or set aside by a court, and parties should be warned against that, as this can also simply be seen as a waste of money, something which arbitration is supposed to prevent.

(Words excluding references 712)

[50] (Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd, 2013, p. 4)

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