**FELLOWSHIP ADMISSION COURSE**

**2020**

**ASSIGNMENT M4-B/3**

**STUDENT NO. 2150**

**INTERNATIONAL COMMERCIAL ARBITRATION/ COSTS AWADS**

**DUE DATE 23 SEPTEMBER 2020**

**QUESTION 1**

There is an enforceable arbitration agreement because:

* There is an existing dispute
* The dispute establishes the jurisdiction of the arbitration tribunal

The constitution of the tribunal will be subject to the law and rules governing the arbitration. As such, the appointment may be[[1]](#footnote-1)

* By mutual agreement by the parties through an appointing authority in terms of the UNCITRAL rules i.e. articles 8 to 10 whereupon
* A sole arbitrator may be appointed or if three arbitrators are to be appointed then each party selects an arbitrator and the two arbitrators select a presiding arbitrator
* If the parties don’t agree there is a default mechanism for appointing the arbitrator
* Otherwise the arbitrator is appointed by the court

Once constituted the tribunal will have jurisdiction to decide on the matter because the principle of party autonomy.

* This is provided the arbitration is severable from the principal agreement
* The tribunal then decides the matter using the law that the parties expressly selected i.e. Namibian or Germany law
* The law of the seat of arbitration may be used provided it preserves the validity of the agreement
* Previously the law governing the commercial contract would have been used

Improvements to the arbitration clause

* An arbitration clause must be consistent, certain and operable
* In that respect, I would use an international reference as a standard to revise the clause[[2]](#footnote-2)
* Based on the international standard I would implement the following revision

*"Any dispute’’ arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the UNCITRAL Rules, which Rules are deemed to be incorporated by reference into this clause.*

1. The number of arbitrators shall be three.
2. The seat, or legal place, of arbitration shall be Johannesburg.
3. The language to be used in the arbitral proceedings shall be English.
4. The governing law of the contract shall be the substantive law of South Africa.

**QUESTION 2**

*Relevance to Arbitrator’s impartiality*

* In terms of article 5.4 and 5.5 of the rules, an arbitrator must make pre and post appointment declarations relating to his independence and impartiality
* In terms of the former, the arbitrator must make known any circumstance that has potential to be deemed a potential conflict of interest i.e. independence
* In the latter, once appointed, the arbitrator must disclose in written format any circumstance that may lead to doubt concerning his impartiality or independence.
* These declarations must be made known to all stakeholders in the arbitration proceedings
* This declaration must also be made known to the other members of the tribunal as well as all parties in the arbitration.
* Independence refers to the requirement that there be no actual or past dependent relationship between the parties and the arbitrators which may or at least appear to affect the arbitrator’s freedom of judgment
* In the present matter, the change in attorneys brings rise to a potential conflict of interest which must be addressed
* This is permissible in terms of rule 18.4 in that this may lead to a potential compromise of the tribunal and the validity of the award

Article 5.4

* Article 14.4(i) obliges the tribunal to act fairly and impartially at all times
* This obligation appears to be peremptory
* The arbitrator may not reasonably be expected to carry out his general and special obligations if he is biased or there is no element of impartiality
* As demanded in Article 5.4(ii) the arbitrator must state in his declaration whether he is ready, willing and able to devote sufficient time, diligence and industry to ensure the arbitration is conducted without any undue delays.
* Should he confirm a conflict, he would not be able to comply with the provisions of Article 14 and Article 5.

Issues to be disclosed regarding involvement in other arbitrations

* In terms of article 14(ii) the arbitral tribunal must commence and conduct its duties expeditiously
* The tribunal is therefore obliged to declare the nature, content and extent of its involvement in other arbitrations in so far as this may impact on
* The general duties of the tribunal in its current arbitration
* If there could be a potential conflict of interest

**QUESTION 3**

* This matter consists of a two-tiered arbitration clause
* The question that arises is whether or not negotiation is peremptory or a precondition
* Our courts[[3]](#footnote-3) have made differing decisions in this regard
* In Paul Smith Ltd v H & S International Holdings the Court held that a condition to conciliate is not peremptory
* The Court referred to the case of *Courtney and Fairbairn v Tolaini Brothers (Hotels) Ltd[[4]](#footnote-4)* in which it was held that an agreement that a dispute will be subjected to negotiation between the parties will not be recognised and enforced by a court as such an uncertainty does not have any binding force.
* In an English matter namely, the *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd* the court held that a condition to negotiate was an enforceable precondition
* In this respect, the implication for the arbitral tribunal is that it does not have jurisdiction to determine the matter
* The tribunal may therefore order that the matter be referred to negotiation failing which arbitration proceedings may proceed
* Alternatively, the tribunal may determine from the facts whether this precondition has been met, a situation which may lead to the commencement of the arbitration proceedings
* In my view the award may be challenged in terms of Article 34 on the grounds of public policy considerations provided that the courts have established that two-tiered dispute resolutions contain peremptory conditions
* Alternatively, one may argue that the award cannot be challenged in that the aspect of negotiation is a procedural matter that should be determined by the tribunal and not by the court.
* An incorrect decision on this issue by the tribunal is not a reviewable irregularity and a court will not be entitled to determine such a matter.
* The fact that the decision by the arbitrator is not reviewable in terms of Article 34 avoids wasted time and costs
* In my view, this in turn supports the object of arbitration which is the expeditious and cost-effective resolution of disputes.

**QUESTION 4**

* In terms of article 30 of the LCIA Rules, the parties to an arbitration agree that all proceedings will be confidential
* This applies to private parties
* Where a public body is involved, section 11 (1) of the International Arbitration Act 15 of 2017 provides that proceedings must be held in public
* This is subject to compelling reasons for the tribunal to direct that proceedings be held in private
* As a result, such proceedings will be available to the public
* Should there be a request for information, this must be directed at the tribunal.
* This may be deferred to court
* That’s said, private arbitrations and public or quasi-public arbitrations are subject to the Constitution of the republic
* In terms of section 32, anyone has a right to information held by the state or another person that is required for the enforcement of or exercise of a right
* A court may at the request of a party to arbitration make an interim order[[5]](#footnote-5).
* This order may not be granted unless:
* *The arbitral tribunal has not yet been appointed and the matter is urgent*
* *The arbitral tribunal is not competent to grant the order*
* *The urgency of the matter makes it impractical to seek such an order from the arbitral tribunal.*
* In my view, given that the arbitral tribunal has already been appointed it is competent to grant the order.
* There is no urgency that would make it impractical to seek the order from the tribunal
* Thus, the SOC must approach the tribunal for an order permitting it to make the information public.

**QUESTION 5**

* In terms of paragraph (b) of the Model Law empowers the arbitral tribunal to grant anti-suit injunctions.
* In this respect, a tribunal may order a party to refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings
* In my view, an anti-suit injunction is applicable in circumstances where a party intends to initiate proceedings in court or other forum while proceedings are underway in relation to the same subject matter in an arbitral tribunal
* In effect, this is a ‘’stay of legal proceedings’’
* A respondent is entitled to secure costs in terms of Article 17(2)(c) makes provision for an order to secure costs
* The Respondent may request security for costs should there be a bona fide risk that it will not be able to enforce a potential costs award
* Alternatively, the claimant can only apply for security of his costs if the respondent has filed a counter-claim.
* Article 17J empowers the court with the same powers as the tribunal with respect to the granting of interim orders. This does not prevent a party to the dispute from approaching the court
* In that respect, the Respondent is mandated to approach the arbitral tribunal for an order for security of costs.
* The tribunal has the capacity to stay proceedings until the claimant has complied with an order for security of the Respondent’s costs.

**QUESTION 6**

* The tribunal could adopt the provisions of the high court rules regarding the use of expert witnesses
* High Court Rule 36(9) determines that a party must give written notice of its intention to call an expert witness, this applies with the natural law
* In addition, that party must also deliver a summary of the expert’s testimony and include in such summary the reasons that supports the expert’s view
* This is shared with the opposite side
* In an arbitration, this may be extended to a detailed report prior to the hearing.
* A single joint expert may also be considered
* In this respect, the tribunal appoints the expert directly
* The expert will be obligated to assist the tribunal by providing expert evidence
* This is preferable from a cost and effectiveness point of view from the norm where each party appoints its own expert witness
* Nonetheless, where each party appoints an expert those experts may be compelled to meet and provide a report indicating points of agreement and points of departure
* Where a joint report is provided or a single joint expert report provided the tribunal may direct inquiries at the expert/s to obtain oral evidence
* Alternatively, the tribunal may permit the cross examination of experts
* A joint report can then be drafted after this meeting in which common ground can be listed and disagreements can be canvassed. This report would then be “with prejudice”.
* After this has been done the experts can draft their individual reports which will then only deal with the points on which they disagree.
* The experts should then deliver a reply to each other’s reports. In this reply they would also state what the result would be if the factual evidence put forward by the opponent is accepted by the tribunal.

**QUESTION 7**

**TRADITIONAL APPROACH**

* The case is similar to the case of Clarke and others v Semenya and others[[6]](#footnote-6) in that the party who brought the application (the claimant) in the claim is not outwardly successful.
* In addition, in casu, the arbitrator also refrained from making costs orders against certain of the respondents in the matter. In addition, the arbitrator issued declaratory orders in favour of the applicant.
* In the present case, the declaratory orders were rendered invalid because final relief was not granted to A.
* In the Clarke case, the court held that this rendered the orders redundant
* On the contrary, the courts and arbitration tribunals (based on standard rules) award costs to the successful party in a matter
* Success needs not to be outright but merely substantial
* The matter was brought to the court for determination
* The court did not agree with the arbitrator
* In that respect the court proposed that the costs award be reconsidered by the arbitrator in terms of *John Sisk & Son (SA) v Urban Foundation and Another* 1985 (4) SA 349 (N) 359E-H

**CURRENT MATTER**

* In the current matter I do not agree with the Arbitrator’s award on costs in that “A” was not substantially or outrightly successful
* While ‘’A’’ requested a declaratory order, it was premised on two legs
* The primary order dealt with a request that “X”, “Y” and “Z” had breached the shareholders agreement
* The secondary issue was that “A” had validly accepted the offer by “X’, “Y” and “Z” to acquire their shares
* A was successful in the first order but not in the second order
* As such, this made the first order redundant
* As such, costs ought to have been ordered against A premised on the principle that he who alleges must prove

**REVIEWABLE COSTS ORDER**

* In terms of section 33(1) of the Arbitration Act 42 of 1965 a court is allowed to set aside an award if any member of the arbitral tribunal has misconducted itself, committed a gross irregularity, or exceeded its powers or improperly obtained the award
* Alternatively, in terms of section 33(2), an arbitral award for costs may be remitted to the arbitrator on good cause shown
* In the case of South African Forestry Co Ltd v York Timbers 2003 (1) SA 331 (SCA) para [14], the court held that, good cause
* *‘’…is a phrase of wide import that requires the Court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances’’*
* In casu, there is no evidence of misconduct in this regard
* There is however indicative evidence of goo cause
* In terms of *Leadtrain Assessments v Leadtrain[[7]](#footnote-7)* the Court established that “good cause” occurs where an arbitrator has failed to deal with an issue that was before him such as the award of all costs in this matter
* Furthermore, the Court established that the issue of costs is ought to be addressed and decided to achieve finality in an arbitration as the matter in dispute[[8]](#footnote-8)
* Accordingly, therefore the award in the case of “A” lacks any grounds for review in terms of section 33(1) but there are grounds for review in terms of “good cause” in terms of section 33(2) for the matter to be remitted for review by the court.

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5. Prof David Butler: Introduction to International Commercial Arbitration: A southern African Perspective p65

6. Paul Smith Ltd v H & S International Holdings [1991] 2 Lloyd’s Rep 127 (QB Com Ct) 128

7. Courtney and Fairbairn v Tolaini Brothers (Hotels) Ltd[[9]](#footnote-9)[1975] 1 WLR 297

8. Watford v Miles [1992] 2 AC 128

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11. Buttler D W Addendum to Module Notes for assignment M4/B3

12. Butler and Finsen Arbitration in South Africa Law and Practice (1993) Juta p 279

13. Leadtrain Assessments (Pty) Ltd and Others v Leadtrain (Pty) Ltd and Others 2013 (5) SA 84 (SCA)

14. Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others (2001) (2) SA1097 (C)

15. The Arbitration Act 42 of 1965

1. Model Law : Article 11(2) chapter 111 as well as chapter 111 [↑](#footnote-ref-1)
2. LCIA [↑](#footnote-ref-2)
3. *Paul* *Smith Ltd v H & S International Holdings* [↑](#footnote-ref-3)
4. [1975] 1 WLR 297 [↑](#footnote-ref-4)
5. Article 17(J)(1) of the International Arbitration Act [↑](#footnote-ref-5)
6. **CASE NO 24286/08**  [↑](#footnote-ref-6)
7. *Leadtrain Assessments (Pty) Ltd and Others v Leadtrain (Pty) Ltd and Others* 2013 (5) SA 84 (SCA) [↑](#footnote-ref-7)
8. *Kolber v Sourcecom Solutions* [↑](#footnote-ref-8)
9. [1975] 1 WLR 297 [↑](#footnote-ref-9)