QUESTION 2

A.

A party to arbitration proceedings intends to appoint two legal representatives from the local office of the same global firm of which the presiding arbitrator is senior partner in the London office. The issue is whether the intended change of lawyers implicates the presiding arbitrator's duty of independence and impartiality under article 5 of the 2014 LCIA arbitration Rules.

Article 5.3 of the Rules requires arbitrators to be impartial and independent of the parties. Impartiality means the absence of bias. The arbitrator must approach the dispute before him or her with a mind open to persuasion by the evidence and the submissions of the parties. The test for impartiality is objective. It is whether he reasonable person would reasonably suspect that the arbitrator might be biased.

Independence concerns the relationship between the parties and the arbitrator. For example a personal, business, professional or familial relationship between the arbitrator and one of the parties. There is no closed list of relationship which affect the independence of a decision maker.

The intended change of legal representation does not affect the independence of the presiding arbitrator. The proposed change does not mean the presiding arbitrator has a professional or personal relationship with the South African company.

A reasonable person who knows that an arbitrating party belatedly wants to change lawyers and employ lawyers who work for a law firm associated with an arbitrator would reasonably suspect that the arbitrator might be biased. Therefore the change in legal representation is relevant to the presiding arbitrator's duty of impartiality under article 5.

B.

In terms of articles 1 and 2 of the LCIA Rules a request for arbitration and the response to the request respectively must be accompanied by the particulars of their legal representatives if any.

Article 18.1 confers the right of parties to legal representation. Article 18.2 envisages that legal representatives are appointed before the arbitral tribunal is constituted.

Once the arbitral is formed any change of legal representatives has to be approved by the tribunal. This is in terms of article 18.3. In exercising its power to consent to any intended change to a party's legal representatives the factors the tribunal takes in to account include the party's right to legal representation of its own choice, the possibility of the change resulting in the reconstitution of the tribunal, wasted costs and delays occasioned by the delay.

The intended change of lawyers in the present instance is likely to result in the reconstitution of arbitral tribunals because of a reasonable suspicion of bias on the part of the presiding arbitrator. This will delay resolution of the dispute and contribute to the escalation of costs. For these reasons the arbitral tribunal should refuse to approve the proposed change.

C.

Under article 14.4 of the rules the arbitral tribunal has general duties to act fairly and impartially between arbitrating parties affording each of them the opportunity to present their case and to contradict the case advanced by their opponent. Further the tribunal has the duty to adopt procedures suitable to the circumstances of the dispute which result in a fair, cost effective and quick finalisation of parties' disputes.

An arbitrator is required by article 5.4 of the rules to furnish a declaration of availability before accepting appointment because an arbitrator who is not ready to enter upon the reference without delay defeats the objective of expediting the resolution of parties' disputes.

Article 5.4 requires a prospective arbitrator to disclose his or her involvement in incomplete arbitrations because it is a way of determining whether the arbitral candidate is not in any way conflicted in relation to the arbitrating parties. The arbitral candidate may for example be acting as a legal representative of one of the parties in other ongoing arbitral proceeding. It is also a way of determining whether a prospective arbitrator is available to take up an appointment.

QUESTION 3

A.

A multi - tiered dispute resolution clause is one which provides for the resolution of a dispute by other alternative dispute resolution techniques prior to resorting to arbitration. The issue here is whether an arbitral tribunal can enforce a tiered dispute resolution clause in circumstances where a party has by –passed the pre-arbitration dispute resolution mechanism.

In term of article 23 of the UNCITRAL Arbitration Rule an arbitral tribunal has the power to decide its own jurisdiction. This includes determining whether a dispute is properly before it.

The issue of enforceability of negotiation before arbitration clauses has come before the courts in England. In *Paul Smith Ltd v H and S International Holding Inc* [1991] 2 Lloyd's Rep 127 the court held that an agreement to negotiate was unenforceable because it lacked certainty. In *Cable and Wireless PLC v IBM United Kingdom Ltd* [2002]2 ALL ER [Comm] 1041 the dispute resolution clause of a contract required the parties to attempt to resolve any dispute through negotiations and if negotiations failed through an ADR procedure. One of the parties [CABLE AND WIRELESS]

approached the court for a declaration as to the meaning of provision in the contract. IBM applied for a stay of proceedings pending referral of the dispute to ADR.

The court in *Cable and Wireless* held that the starting point is the dispute resolution clause. If the multi-tiered dispute resolution clause has sufficient objective criteria in terms of which the court can determine compliance then the clause is enforceable. In addition the court held that courts must not be quick to find uncertainty and therefore unenforceability in the field of dispute resolution because this undermines public policy of encouraging parties to use ADR procedures. The court stayed the hearing for declaratory relief until after the parties had referred all their outstanding disputes to ADR.

In the case at hand the dispute resolution does not merely require the parties to negotiate. There is objective criteria which the arbitral tribunal can use to determine whether there was compliance. The clause is not lacking certainty. The obligation of the parties is to refer the dispute to designated and authorised representatives to negotiate. The clause is therefore enforceable.

The arbitral tribunal must stay the arbitration proceeding until after the dispute has been referred to designated and authorised representatives of the parties to negotiate.

B.

There are two issues which arise for discussion here. The first one is whether an erroneous decision by an arbitral tribunal that a negotiation provision is unenforceable followed by an award on the merits is reviewable. Secondly if the decision can be set aside would such an outcome support the objectives of arbitration, namely the fair resolution of disputes without unnecessary delay and expense. I will address each issue in turn.

Article 34 in schedule 1 of the International Arbitration Act, 2017 confers the high court with power to set aside an arbitrable award. The grounds of review are set in article 34(2) and they are exhaustive. An erroneous finding that the negotiation clause was unenforceable means that the arbitral tribal had no jurisdiction to arbitrate the dispute. This falls within the rubric of article 34(2)(a)(iv) that is the arbitral procedure was not in accordance with the agreement of parties. The award can therefore be set aside under article 34. The case in point is the English case of *Emirates Trading Agency LIC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 [Comm] where the court held that a negotiation before arbitration

clause in a contact was enforceable, a condition precedent to arbitration and non-compliance with the clause deprived an arbitral tribunal of jurisdiction. However on the facts the court found that there was compliance with the condition precedent to arbitration.

A finding that non-compliance with the provision for negotiation strips the arbitral tribunal of jurisdiction because a condition precedent to arbitration has not been satisfied undermines the objective of arbitration. This is because setting aside the arbitral award means resolution of the disputes may have to start afresh with negotiations and then possibly another arbitration hearing. This causes delays and adds to the costs of resolving the dispute. Arbitration proceedings are intended to speedy, cost effective and efficient. A better course which would not run counter to the advantages of arbitration as a dispute resolution mechanism maybe to treat the pre arbitration stages as procedural requirements instead of preconditions. This way an error by the arbitral tribunal with regard to the enforceability of the pre-arbitration clauses does not go to the jurisdiction of the tribunal and erroneous decision will not be set aside.

Question **7**

There are two issues that arise from the facts of this case. The first issue is what amounts to substantial success to warrant an arbitrator awarding costs to an arbitrating party. The second issue concerns the extent to which the high court can interfere with an arbitrator's costs award in terms of section 32(2) or 33(1) of the Arbitration Act 41 of 1965 ("the Act").

Section 35(1) of the Act empowers the arbitral tribunal to award costs of the reference and costs of the award to specify the scale on which the costs of the award are granted. The arbitral tribunal's statutory power is subject to whatever the parties may have agreed on in the arbitration agreement.

The award of costs lies within the discretion of the arbitrator. The discretion must be exercised judiciously and not capriciously. The general rule is that the costs follow the event. This means the successful party must be awarded his or her costs. It is easy to determine the successful party where a party has succeeded in all of his or her claims. Difficulties arise where a party succeeds in some claims and fails in others. The rule is that the party who has achieved substantial success is entitled to

costs. A party is substantially successful where the award places him or her in a considerably better position than before the arbitration proceedings commenced.

In terms of section 28 of the Act an arbitration award including a costs order is final. However the Act provides two venues for challenging an arbitration award. There is an application for remittal of the award in terms of section 32 and an application for setting aside in terms of section 33.

In terms of section 32 the high court on the application of a party to the reference may remit a matter to the arbitral tribunal for consideration and for the making of a further award or a new award. The test for remittal is good cause shown. The Act does not define good cause. In the case of *Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd* 2013 (5) SA 84 (SCA) the court held that good cause is demonstrated where the arbitration tribunal failed to consider an issue which was properly before it.

Section 33 (1) of the Act permits the high court on the application of an arbitrating party to set aside an award on four grounds:

i) a member of the tribunal misconducted himself or herself in relation to his or her duties as arbitrator;

ii) the tribunal has committed a gross irregularity in the conduct of the proceedings ;

iii) the arbitrator acted in excess of his or her powers, and

iv) the award was improperly obtained.

In *Bester v Easigas* 1993 (1) SA 30 (C) the court held that an irregularity is gross where it prevents a party from having his or her case fully and fairly determined. Gross irregularity is the ground of setting aside which is most appropriate to the facts of the case at hand.

I turn now to apply the legal principles referred to above to the facts of the case. The parties agreed that the arbitrator can award costs of the award on the high court scale plus costs of the arbitration. A's claim was for two declaratory orders. He was successful in obtaining one declaratory order against Y and Z. He was substantially successful because he is better off post the award than he was at the start of the arbitration. The arbitrator was right in awarding A costs against Y and Z. X was also a successful party. X successfully opposed the declaratory orders sought against him. X was denied his costs. The question is whether the costs order in relation to X can be reviewed. I discuss this issue in the next paragraph.

There is no good cause as contemplated by section 32 which warrants remitting the costs award to the arbitrator. The question of costs was before the arbitrator and the tribunal made a decision. The costs order in relation to X is on a basis which was not ventilated during arguments on costs before the arbitrator. X was denied an opportunity to make presentations to the arbitrator on an issue which was used to make an adverse decision against him. This amounted to a violation of his right to a fair hearing and amounts to a gross irregularity in the conduct of the proceedings. The tribunal's costs award against X was a gross irregularity in the conduct of the proceedings and must be set aside.

Question 1

A

My intention here is to discuss whether the arbitration clause constitutes an enforceable arbitration agreement. Section 2 of South Africa's International Arbitration Act defines 'arbitration agreement' with reference to article 7 of the UNCITRAL Model Law on International Commercial Arbitration.

Article 7 defines an arbitration agreement as a written agreement between parties to refer to arbitration all or some disputes which have arisen or may arise in future in relation to a defined legal relationship. The arbitration agreement may be a standalone contract or a clause in a contract.

The arbitration agreement under discussion is enforceable. This is because there is a defined legal relationship between the parties. The relationship is the international commercial contract. Secondly the agreement in writing. Thirdly the parties have agreed to submit to arbitration future disputes arising out of the international commercial contract.

A. Appointment of Arbitral Tribunal

The arbitration clause is silent on the appointment of the arbitral tribunal and the procedure for the appointment. For this reason we have to turn to article 11 of the Model Law. The Model Law is, subject to certain adaptation, a schedule to the International Arbitration Act.

Article 11 empowers the parties to agree on a procedure for the appointment of an arbitral tribunal. In the event of a deadlock one of the parties can approach the High Court which has jurisdiction over the area where the arbitration will be held for an order that the court appoint the arbitral tribunal. This is by virtue of article 6 of the Model Law.

The arbitral tribunal will be appointed by agreement between the parties. If the parties fail to appoint the tribunal the high court in South Gauteng will make the appointment at the instance of one of the parties.

B. Jurisdiction to determine validity of main contract

Article 16 of the Model Law empowers the Arbitral Tribunal to rule on its own jurisdiction. In the exercise of this power the arbitration clause which forms part

of another contract is treated as separate from the terms of the agreement which it forms part.

The arbitral tribunal can pronounce on the initial validity of the main contract. A finding that the initial contract was invalid does not automatically invalidate the arbitration agreement where the agreement is severable from the main contract.

C. Improvements to the Arbitration Agreement

i) I would add the word ‘all’ to make it more emphatic that there is no room for approaching the courts before an award is made.

ii) I would a clause relating to the procedure for the appointment of the tribunal and the rules under which the arbitration will be conducted.

iii) The law which will govern the contract.

The arbitration clause will read as follows:

“All disputes arising out of this contract shall be referred to arbitration under the 2013 Standard Procedure Rules of the Association of Arbitrators (Southern Africa) by a sole arbitrator appointed by the Association. Johannesburg shall be the seat of

the arbitration. English shall be the language of the arbitral proceedings. The law of South Africa shall govern the contract."

Question 4

A.

One of the advantages of arbitration is privacy. The arbitration hearing is generally conducted in private and documents used during the proceedings or generated for the hearing are kept confidential.

Section 11 (2) of the International Arbitration Act, 2017 states that all documents generated for the arbitration which are not already in the public domain must be kept confidential unless the documents are required to comply with a legal duty or to protect or enforce a right. By the same token article 30.1 of the LCIA rules requires the parties to keep confidential all materials created for the arbitration which are not already in the public domain. The exceptions to this general principle are similar to those stated in Section 11 of the Act.

The issue which was arisen here is which forum between the High Court and arbitral tribunal has the jurisdiction to determine a dispute about the disclosure of documents created for arbitration proceedings.

One of the objects of the Act is to limit the intervention of the courts in incomplete arbitration proceedings. To this end article 5 of the UNCITRAL Model Law on International Commercial Arbitration states that in matters governed by it (Model Law) the role of the courts is confined to those matters on which the court is expressly empowered to intervene. The Model Law is a schedule to the Act. Section 6 of the Act provides that the Model Law applies in South Africa unless excluded by a provision in the Act. Section 6 of the Act read together with article 5 of the Model Law limit the intervention of the court to those matters where the court is empowered to intervene.

There is nothing in the Act which gives the court power to decide a dispute about disclosure of documents created for arbitration. The LCIA rules do not allow parties to approach a state court for purposes of resolving a confidentiality of documents dispute.

The SOC in this disclosure dispute must approach the arbitral tribunal and not the high court to determine the dispute.

B.

Should the arbitral tribunal confronted with a dispute about disclosure of documents created for the arbitration defer to the high court or decide the matter itself?

The arbitral tribunal should decide the disclosure dispute itself. Firstly, there is nothing in both the Act and the LCIA Rules which requires the tribunal to defer. Similarly the high court is not empowered to intervene. Secondly deferring to the high court will undermine the objectives of speed and cost effectiveness. The proceedings have not reached the hearing stage. The high court has its own congested roll. It could be months before the disclosure application is determined and there is also the possibility of appeal. By contrast the arbitral tribunal is capable of determining the dispute without delay.

Question 5

A.

An anti-suit injunction is an order issued by the arbitral tribunal which prohibits an arbitrating party from instituting or continuing proceedings in another forum. Paragraph (b) of Article 17 (2) empowers an arbitral tribunal to order an anti-suit injunction. Such an order would be appropriate where a party to the submission takes proceedings in a state court.

B.

Where there is credible evidence than an arbitrating party has limited means and will be unable to pay its opponent's costs the arbitral tribunal will order that party to set aside money to cover the opponent's costs. Additionally the order for security will only be made if the party's case on the merits is frivolous or vexatious. This principle was enunciated in *Boost Sports Africa (Pty) Ltd v The South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) a case which dealt with when companies can be required to furnish security for costs.

Paragraph (c) of article 17(2) does authorise the arbitral tribunal to order security for costs. This is because paragraph (c) preserves assets out of which an award may be realised. A costs order may be part of an award.

C.

Article 17 J deals with court-ordered interim measures. There is no restriction in the court-ordered interim measures in the sense that they are available to both claimants and respondents. Arbitral tribunal interim measures are by virtue of article 17 (2) (c) of the Model Law only available to claimants.

In terms of article 25 of the LCIA rules the arbitral tribunal has power to grant security for costs against a claimant and a respondent only if the respondent has failed a counterclaim.

An arbitral tribunal under the LCIA rules has the power to stay the claim or counterclaim or dismiss them by an award where the claimant or counterclaimant has failed to comply with an order to provide security for costs. This power is laid down in article 25.2. The prospect of a stay or worse dismissal by an award which is final and binding is a strong incentive for a claimant or counterclaimant to comply with an order of security for costs.

The respondent should approach the arbitral tribunal rather than the Rwandan court for the security for costs order. This is because the sanction for non-compliance at the disposal of the tribunal is more likely to result in compliance.

Question 6

These are arbitration proceedings between an English company and a South African company held under the 2018 edition of the Association of Arbitrators (Southern Africa) Standard Procedure Rules and the 2010 IBA Rules on the Taking of Evidence in International Arbitration. The evidential hearing will involve expert evidence and both parties have appointed expert witnesses. In this essay I discuss how the arbitral tribunal can reduce the time spent hearing the conflicting versions of the expert witnesses without compromising the rights of the parties to present their respective cases fully and fairly.

The 2018 Standard Procedure Rules are silent on party appointed expert witnesses. They only deal with expert witnesses appointed by the arbitral tribunal. Article 5 of the IBA Rules regulates the presentation of evidence by party appointed expert witnesses. The preamble to the IBA Rules states that the Rules are not prescriptive but they are a guide. The parties and the arbitral tribunal are at liberty to adapt the rules suit the particular circumstances of their dispute.

In terms of article 5 parties can appoint expert witnesses who submit reports to the arbitral tribunal. The expert reports are compiled on the basis of instructions

received from the party who wants the expert to testify on its behalf. This system of leaving it entirely to the parties to appoint experts does not conduce to a speedy and cost effective hearing. This is because the experts may not be from the same discipline and the instructions received from the arbitrating parties may be different. The expert reports will be on different subjects. A lot of time will end up being spent by cross examiners trying to impeach the credibility of the experts at the evidential hearing.

A better method which the arbitrator can explore with the parties at the preliminary meeting is to identify the disciplines from which expert evidence is necessary. Secondly the instructions to the expert witnesses must be identical so that they investigate and compile reports on the same thing.

Under the IBA rules an arbitral tribunal has a discretion to order the experts to convene a meeting at which they explore issues on which they can reach consensus. The parties compile a report setting out the issues on which they agree, the issues they disagree and the reasons for the disagreement. A discretion may or may not be exercised. A better course is the arbitrator issuing a procedural directive ordering the meeting of the parties at which they will attempt to find common ground if any

and compile a joint report of the issues on which they agree and those on which there is no consensus.

In terms of article 8 of the IBA rules expert witnesses testify after the witnesses of fact of all the parties have given evidence. This avoids the situation which applies to litigation where expert witnesses give evidence days or even months apart. There is no provision in the IBA rules that the common cause issues in the joint report should constitute the experts' evidence in chief so that their oral evidence should commence with oral evidence. The issues on which the experts agree as set out in their joint report should be included in the record of the arbitration as the expert witnesses' evidence in chief. In this way the duration of the evidential hearing is reduced because it will start with cross examination of the witness. Furthermore cross examination itself should be reduced because on the disputed issues each expert will have had the opportunity to comment on report compiled by the other side's expert. Here the right to a fair hearing is protected because each side has a chance to present its case and to comment on the case presented by their opponent.