ASSOCIATION OF ARBITRATORS (SOUTHERN AFRICA) NPC

Certificate Course in Arbitration 2020

Assignment M 4/B 3

(Module 4)

Law and Practice of Arbitration 1

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QUESTION 1

The validity of the arbitration agreement

1. The subject matter of the arbitration clause is evidently "commercial" as referred to in article 1(1) of the UNCITRAL Model Law ("the Model Law").

2. The parties to the contract, being a German party and a Namibian party presumably have their places of business in Germany and Namibia respectively, i.e. in different States as referred to in article 1(3)(a) of the Model Law.[1] The arbitration clause will accordingly, if it is valid and enforceable, pertain to an "international" arbitration as referred to in terms of article 1(3) of the Model Law.

3. On the premise that the parties have their places of business in Germany and Namibia respectively, those places of business are outside of the State, South Africa, where the place of the arbitration is situate as referred to in article 1(3)(b)(i) of the Model Law. The arbitration clause will accordingly, if it is valid, on that basis as well pertain to an "international" arbitration in terms of article 1(3) of the Model Law.

[1] Subject also to the expanded meaning given to the term places of business in article 1(4)(a) & (b) of the Model Law.

4. The arbitration clause will potentially also relate to an “international” arbitration in terms of article 1(3)(c) of the Model Law on the basis that the agreed subject matter of the arbitration clause relates to more than one country.

5. The arbitration clause conforms to the definition of an arbitration agreement in article 7 of the Model Law.

6. The arbitration clause as an arbitration agreement in terms of the Model Law will accordingly be enforceable by a court that has been given jurisdiction to enforce such a clause by the domestic legislation of the country where the court is situate.

7. Such legislation will in principle be legislation in terms of which a country has adopted the Model Law, whether unaltered or adapted, but that is not a necessary precondition. The arbitration clause will be enforceable if in terms of the laws of the country where enforcement is sought recognises an arbitration agreement as described in the postulated scenario as valid and enforceable.

8. Germany has adopted the Model Law. The arbitration clause will accordingly be enforceable in terms of German Law.

9. Namibia has not adopted the Model Law. The relevant legislation regarding arbitration in Namibia remains the legislation that pertained when Namibia became a republic. That legislation was and remains the South African Arbitration Act, 42 of 1965. The arbitration clause is an "arbitration agreement" as defined in section 1 of the (Namibian) Arbitration Act, 1965. The arbitration clause will, accordingly, be enforceable by the Namibian courts in terms of Namibian law.[2]

10. South Africa has adopted the Model Law in terms of the South African International Arbitration Act, 15 of 2017 ("the IA Act"), albeit in adapted form.

11. The Model Law applies in South Africa in terms of section 6 of the IA Act.

12. Section 1 of the IA Act defines the term "*arbitration agreement*" with reference to article 7 of the Model Law in the form adopted in terms of the IA Act ("the SA Model Law").

13. The arbitration clause is an "arbitration agreement" in terms of article 7(1) of the SA Model Law, that was concluded in writing as required by article 7(2) of the SA Model Law.

[2] It will also be enforceable in terms of the Namibian common law, which is again the same as South Africa's.

14. In terms of article 1(2), the SA Model Law applies in South Africa only if the juridical seat of the arbitration is in South Africa.[3]

15. The juridical seat of the arbitration is determined in accordance with article 20 of the SA Model Law. In term of article 20(1) the parties are free to agree on the juridical seat of arbitration. Absent agreement, the juridical seat of the arbitration is determined by the arbitral tribunal having regard to the circumstances of the case.

16. In the postulated scenario the juridical seat of the arbitration is Johannesburg.

17. The SA Model Law accordingly applies to the arbitration and the arbitration clause will accordingly on the basis of its being a valid written arbitration agreement providing for international commercial arbitration be enforced by South African courts.[4]

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[3] With certain specified exceptions where the SA Model Law applies even if the "seat of arbitration" is elsewhere. The Model Law refers to the "place of arbitration" in its article 1(2). The term "juridical seat of the arbitration" in the SA Model Law can be accepted to be equivalent to "the place of the arbitration" in the Model Law. The term "juridical seat" was probably adopted to provide a term that encompasses a "seat of arbitration" if the parties did not agree on a "seat" or "place" of arbitration, in which event the "seat of arbitration" is determined by the arbitral tribunal having regard to the circumstances of the case.

[4] In principle the Gauteng Division of the High Court, but potentially also other divisions of the High Court and also Magistrates' Courts e.g. if, say, the Namibian party has attached property of the German party in Cape Town to found jurisdiction and the German party applies or pleads for a stay.

Appointment of arbitral tribunal

18. As always with arbitration the appointment of the arbitral tribunal will principally be a matter for the parties' agreement. Failing agreement about the appointment, the possibility exists that the agreement provides a procedure for the appointing of the arbitral tribunal as referred to in article 11(2) of the SA Model Law. On the face of the postulated scenario the arbitration clause does not prescribe such a procedure.

19. Failing agreement by the parties, article 11(3) will apply.

20. In terms of article 11(3)(a), if the arbitral tribunal is to consist of three arbitrators, each party would be able to appoint one arbitrator and the two arbitrators appointed in that manner should then appoint the third arbitrator. If the two arbitrators are unable to agree on the identity of the third arbitrator within 30 days of their appointment or if one of the parties fails to appoint the arbitrator that it is entitled to appoint in terms of article 11(3)(a), the appointment shall at the request of a party to the arbitration agreement be made by the court.[5]

[5] In terms of article 11(3) of the SA Model Law.

21. In an arbitration with a sole arbitrator, if the parties cannot agree on the arbitrator, the court shall appoint the arbitrator.[6]

22. The court is the High Court within whose area of jurisdiction the arbitration is to be held, in this case, in other words, either the South Gauteng High Court or the North Gauteng High Court, those courts having concurrent jurisdiction over the whole of Gauteng.

Jurisdiction to decide a dispute regarding initial validity of the main contract

23. An attack on the validity of the main contract would include an attack on the validity of the arbitration clause and, hence, on the jurisdiction of the arbitral tribunal.

24. In the usual course for contracts that are not subject to the IA Act, the question will arise whether the arbitration clause is severable from the remainder of the contract.[7] For an international arbitration, however, article 16(1) of the SA Model Law specifies that an arbitration clause which forms part of the wider contract shall be treated as an agreement independent of the other terms of the contract. This is, however, subject to a plea to that

[6] Whether the parties had so agreed or by default in terms of article 10(2).

[7] Unless the arbitral tribunal sits under rules or an arbitration agreement that provides that the tribunal would be able to decide on its own jurisdiction.

effect being raised by the party who wishes to attack the validity of the agreement in its statement of defence.

Improvements that can be suggested

25. Butler in the AoA's notes "*Introduction to International Commercial Arbitration : a Southern Africa Perspective*" ("the IA notes") refers to four criteria that an arbitration clause should ideally provide for, being mandatory consequences for the parties, exclusion of the intervention of state courts before the delivery of the award, granting the arbitrator(s) adequate powers to resolve the disputes likely to arise between the parties and permitting application of a procedure leading to efficient and rapid rendering of an award.[8]

26. Butler goes on to identify a list of 21 considerations that should be considered in relation to arbitration clauses/agreements in general. Of these, some are potentially applicable to the posited scenario. No purpose will be served by listing them here.

27. The potentially relevant considerations may all be catered for by adopting the rules of a particular arbitral institution, say, the rules of the AoA, or the

[8] At p 54.

London Court of International Arbitration Rules ("the LCIA Rules"), or the UNCITRAL Arbitration Rules ("the UNCITRAL Rules").

28. The potentially relevant considerations can accordingly conveniently be addressed by adding the wording "*in accordance with the rules of the* (whichever set of rules would be suitable)". The rules referred to have of course to be correctly specified, preferably by their full title and year of last revision reference.

QUESTION 2

Relevance of presiding arbitrator's being a senior partner in London office of global law firm representing one of the parties, albeit via its Johannesburg office

29. The arbitration is an international commercial arbitration that is subject to the jurisdiction of the South African courts.

30. The LCIA Rules (2014) posit "*circumstances …. which are likely to give rise in the mind of any party* (to the arbitration) *to any justifiable doubts as to* (the arbitrator's) *impartiality or independence*" as the test that should apply to the question whether a particular arbitrator can or cannot act in a matter because of the apprehension of bias that a party may have.[9]

31. The test posited by the LCIA Rules is similar to the test formulated in **President of the RSA v SARFU**.[10]

32. The fact that one of the parties to the arbitration has appointed the Johannesburg office of the same global law firm to which the presiding arbitrator is attached is accordingly relevant. It is a circumstance likely to

[9] Articles 5.4, 5.5 and 10.1 of the LCIA Rules.

[10] **President of the RSA & others v SARFU & others** 1999 (4) SA 147 (CC) at [48].

give rise in the mind of a party to justifiable doubts as to the presiding arbitrator's impartiality or independence.[11]

How should arbitral tribunal respond to notice of change of legal representation?

33. Article 18.3 of the LCIA Rules provides that a change of a party's legal representatives after the arbitral tribunal's formation has to be promptly notified to the tribunal and all parties (and the LCIA Registrar).

34. The intended change is then subject to the tribunal's approval, which approval may be withheld if such change or addition compromises the composition of the tribunal.

35. The tribunal in considering whether approval should be granted or not has to have regard to the circumstances including the general principle that a party may be represented by a legal representative of its choice, the stage which the arbitration has reached, the efficiency resulting from maintaining the composition of the tribunal and any likely costs or loss of time resulting from such change or addition.

36. The terms of the notice given by the South African company in the posited scenario and the fact that the notice is given shortly before the hearing

[11] LCIA Rules article 5.5.

suggests that the South African company may well already have consulted with the attorneys from the South African branch of the global legal firm. I would think that in such circumstances the view of the US corporation would be decisively important.

37. The particular provision seems to me to be tailored to suit the circumstances of global law firms by providing grounds for not withholding approval. From my perspective a conflict of interest is a conflict of interest and that is that. The test referred to in paragraph 2 above should be applied consistently.

38. Although it all depends of the circumstances, in the posited scenario it seems to me that approval should be granted, but the compromised arbitrator will have to withdraw from the matter or be withdrawn by the LCIA. Finding a replacement for the compromised arbitrator on short notice, but still before the evidentiary hearing, would be (or may well be) preferable to a postponement arising from the South African company's having to instruct new attorneys.

39. From my perspective, unless the US corporation agrees thereto, the presiding arbitration should not be allowed to continue acting as arbitrator in the matter. Arising from the notice that was given shortly before the evidentiary hearing, that may well be the case even if the South African company decides not to change attorneys.

Article 5.4 of the LCIA Rules in the perspective of article 134 of the rules

40. Article 14.4 of the LCI rules specifies, among others, that the arbitral tribunal general duties include to act fairly and impartially as between all parties.

41. This duty has to be seen in the context of the "principle" that justice must be seen to be done as referred to in Butler & Finsen, **Arbitration in South Africa : Law and Practice**.[12]

42. The "principle" that justice must not only be done, but also must be seen to be done, gives credibility to dispute resolution procedures, whether court procedures or alternative dispute resolution processes, not only for the parties involved in a particular dispute, but also for the public in general.

43. Taking into account that the juridical seat of the arbitration is in Gauteng, South Africa, the test for bias as specified in the **President of the RSA & others v SARFU & others**[13] is relevant. The question is accordingly whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.

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[12] At par 5.2.3, p 166.

[13] **President of the RSA & others v SARFU & others** 1999 (4) SA 147 (CC) at [48].

44. Articles 5.4, 5.5 and 10.1 of the LCIA Rules posit a test that is closely akin to the test for bias as specified in **President of the RSA v SARFU**.

45. Article 14.4 LCIA Rules posits a continuing duty to act fairly and impartially encompassing that all parties should be given reasonable opportunity of advancing its case and dealing with that of its opponent.

46. These duties are related, both being part of the rules of natural justice.

47. Whether an arbitrator has to disclose her involvement in a matter, whether as party or representative of a party, or as arbitrator, mediator or adjudicator, the outcome of which, if pronounced in a court of law, would set precedent for the matter of which the arbitrator is to be seized, or may have involved evidence, especially expert evidence, that may be relevant to the matter on hand, depends on the circumstances.

48. In principle however the arbitrator has to make disclosure to enable the parties to address whatever the issue is that may be residing in the arbitrator's mind that may have a bearing on her decision-making. The duty of disclosure would be similar to the duty resting on a technically expert arbitrator who brings her own expertise to bear on the case before her.

Such expertise and the views or opinions that it dictates (on a *prima facie* basis)[14] should be disclosed to enable the parties to address them.

49. The reason why disclosure should be made is because not making disclosure undermines the principle of *audi alteram partem*.[15] The arbitrator may be influenced by evidence, including expert evidence, and argument extraneous to the matter in respect of which he/she has been appointed. Involvement in such a matter is, accordingly, something that can reasonably be expected of an arbitrator or candidate arbitrator to disclose. What exactly should be disclosed would depend on the circumstances.

50. An arbitrator's duty in this regard may well be more exacting than what would be expected of a judge. A judge is assumed to have the ability to be able to maintain an approach from one case to the other that is uninfluenced by her prior knowledge, to be impartial in adjudicating disputes and to be able fairly to determine where the truth may lie in a welter of contradictory evidence.[16]

51. Relevant also is that a judge is bound by his/her oath of office. The reasonableness of the apprehension relating to whether a judge sitting in the

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[14] The arbitrator should approach the issue on the basis that her views and opinions arising from her expertise may be wrong.

[15] Which is arguably given an exaggerated importance in our law.

[16] **President of the RSA & others SARFU & others** 1999 (4) SA 147 (CC) at par [40].

matter should make disclosure of her private knowledge and expertise or even recuse herself from a matter is assessed in the light also of the oath of office taken by judges to administer justice without fear or favour and their ability to carry out that oath by reason of their training and experience, it being assumed that they can disabuse their minds of irrelevant personal beliefs or predispositions.[17]

52. Taking into account that an arbitrator does not take an oath of office, insofar as that is a relevant consideration in respect of a judge, it must lead to a conclusion that an arbitrator's impartiality has even to a higher degree to be beyond reproach and question.

[17] See **President of the RSA & others SARFU & others** 1999 (4) SA 147 (CC) at par [48].

QUESTION 3

Enforceability of provisions compelling or purporting to compel parties to a dispute to negotiate towards settlement

1. The relevant provisions provides for international commercial arbitration that is subject to the jurisdiction of the South African courts.

2. An agreement to negotiate towards an agreement or to come to an agreement about some specified matter is void for uncertainty and hence unenforceable. The discretion vested in the parties to agree or disagree would leave a court unable to enforce the agreement were the negotiations to break down.[18]

3. However, if such an agreement is subject to a deadlock-breaking mechanism that would take effect if the parties fail to come to agreement would be enforceable.[19] The deadlock-breaking mechanism may be an agreement that the matters upon which the parties are unable to agree should be referred to a third party, e.g. an arbitrator, for determination.

[18] See **Premier, Free State & others v Firechem Free State (Pty) Ltd** 2000 (4) SA 413 (SCA) at [35].

[19] See **Letaba Saw Mills (Edms) Bpk v Majovi (Edms) Bpk** 1993 (1) SA 768 (A) at 773I-774F; **Southernport Developments (Pty) Ltd v Transnet Ltd Southernport** 2005 (2) SA 202 (SCA) at [7]-[8]; **Makate v Vodacom Ltd** 2016 (4) SA 121 (CC) at [95]-[98].

4. The provisions in the agreement relevant to the postulated scenario provides that a dispute arising from the agreement must be resolved by negotiation, failing which a party may refer the dispute(s) to arbitration contains a deadlock-breaking mechanism. It is accordingly valid and enforceable. A party who refuses or fails to take part in the negotiating process can be compelled to do so.

How can an arbitral tribunal enforce such a provision?

5. The South African company's giving notice of a dispute in terms of the UNICTRAL Rules was premature. The South African company should have called upon the English company to submit to the negotiation process and to appoint a designated and authorised representative to represent it in such negotiations. Only after the negotiations failed to produce a settlement would a reference to arbitration be competent (or if the English company's conduct justified application of the doctrine of fictional fulfilment as referred to below).

6. Accordingly, the arbitrator's appointment was premature and hence invalid. The arbitral tribunal should rule that it does not have jurisdiction to decide the dispute. This will force the South African company to comply with the prescribed procedure.

7. If in such circumstances the English company after having been called upon to do so fails to appoint a representative and fails to participate in negotiation toward a settlement, it will amount to its deliberately thwarting the agreed process of negotiation. The doctrine of fictional fulfilment will then be susceptible of being employed. The English company's appointment of a representative and participation in the process of negotiation will be deemed to have occurred.[20]

8. Accordingly by ruling that it does not have jurisdiction the arbitral tribunal will enforce the clauses providing for negotiation. However, an arbitral tribunal will have to be appointed anew once negotiation has failed (or is deemed to have failed because of the English company's failure to participate).

9. On the basis of the wording of the clauses posited it would not be a situation where the arbitral tribunal can "stay" its proceedings pending completion of the negotiation process.

[20] See **Scott & another v Poupard & another** 1971 (2) SA 373 (A) at 378G-H; **Du Plessis N.O. & another v Goldco Motor & Cycle Supplies (Pty) Ltd** 2009 (6) SA 617 (SCA) at [24]-[27]; **Lekup Prop Co No 4 (Pty) Ltd v Wright** 2012 (5) SA 246 (SCA) at [6]-[12].

Challenging the award under article 34 of the SA Model Law

10. The arbitration award will be susceptible of being set aside in terms of article 34(2)(a)(iv) on the basis that on a proper interpretation of the relevant clauses, the negotiation processes were preconditions for the matter to be referred to arbitration. Accordingly, the whole process will have to be started again.

11. Such result would be entirely in accordance with the object of arbitration, namely the fair resolution of disputes, without unnecessary delay and expense. In the example posited the South African company's conduct by seemingly wishing to leapfrog the prescribed negotiation process avoided potential amicable settlement on some if not all of the issues in dispute.

12. No doubt the ultimate result by the matter having to be taken to court etc would have resulted in delay and expense. However, that delay and expense is to be attributable to the South African company. If it had complied with the full extent of the alternative dispute resolution mechanism comprising negotiation and then arbitration in terms of what it had agreed to, the resultant delay and expense would not have occurred.

QUESTION 4

13. The arbitration is an international commercial arbitration that is subject to the IA Act and the SA Model Law.

14. There is a potential conflict between section 11(1) of the IA Act and article 30 of the LCIA rules. It arises because the South African entity is a state owned company.

15. Albeit that the postulated scenario in terms of the question does not provide complete information regarding the nature of the operations of the SOC, on the assumption that it is a functionary or institution that in relation to the contract at issue would be "*performing a public function in terms of any legislation*".[21] That is a reasonable assumption taking into account that the dispute is said to be one which could ultimately influence the price paid for liquid petroleum gas by consumers in South Africa. Accordingly section 11(1) of the IA Act will apply.

16. Section 11(1) provides that (international commercial) arbitration proceedings to which a public body is a party are held in public, unless for compelling reasons the arbitral tribunal directs otherwise.

[21] A referred to in the definition of "public body" in section 1 of the IA Act.

17. By contrast article 30 of the LCIA Rules specifies as a general principle that the parties are to keep confidential all awards in the arbitration, together will all material 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.

18. Section 11(1) of the IA Act must be understood in the context of various provisions of the Constitution of the Republic of South Africa, but more particularly section 195. Relevant provisions of section 195 of the Constitution are the provisions referring to public administration that should be governed by the democratic values and principles enshrined in the Constitution, that specifically refer to public administration that should be accountable and that provide that transparency (of public administration) must be fostered by the public being provided with timely, accessible and accurate information.

19. The decision whether to make the documentation available vests in the arbitral tribunal in terms of section 11(1) of the IA Act. The principle specified by the section is that the arbitration proceedings to which a public body is a party should be accessible to the public. The arbitral tribunal can only for compelling reasons direct otherwise.

20. Article 30.1 of the LCIA Rules, differently from section 11(1) of the IA Act, does not give the arbitral tribunal authority to decide whether disclosure may be required of a party by legal duty or to protect or to pursue a legal right.

21. However because the seat of arbitration is apparently in South Africa the SA Model Law applies to the arbitration.[22] In the circumstances the arbitral tribunal is the body that has to decide the issue in accordance with its obligation in terms of section 11(1) of the IA Act. It is a matter that the legislature has assigned to an arbitral tribunal exercising its arbitral jurisdiction in terms of the IA Act, read with the SA Model Law.

22. The question before the arbitral tribunal will be whether there is any "compelling reason" as referred to in section 11(1) of the IA Act why the allegedly commercially sensitive information should not be made public. What a "compelling reason" is, is a matter requiring interpretation of the phrase "compelling reason" in the context of, also, the provisions of the Constitution, and application of what such interpretation yields to the facts of the matter. Quite clearly a compelling reason should be a reason that trumps the public's right to know as provided for in terms of section 195 of the Constitution. If the "*commercially sensitive information*" that the international energy company seeks to protect is not relevant to the matters referred to in section 195(1) of the Constitution, the arbitral refusal may find

[22] In terms of section 6 of the IA Act, read with articles 1(1) and (2) of the SA Model Law.

that “compelling reasons” for not making the information public exists. If the information is relevant to those matters, the arbitral person should not prohibit the public dissemination of the information.

23. The decision of the arbitral tribunal in this regard will not be an arbitral award. It is a decision of a natural person, other than an organ of state, exercising a public power or performing a public function in terms of legislation. Such decision will accordingly be “administrative action” as referred to in the definition of that term in section 1 of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”). Such decision will accordingly potentially be reviewable under section 6 of PAJA.

QUESTION 5

Anti-suit injunctions under the Model Law

1. An anti-suit injunction is an order or award of a court or arbitral tribunal in one jurisdiction that seeks to prevent or restrain proceedings in another jurisdiction.

2. In the context of arbitrations anti-suit injunctions potentially arises where parties to a contract have agreed to submit disputes between them within a certain scope to arbitration and a party institutes action in another forum, whether a court within the same jurisdiction area as that in which the seat/place of the arbitration is situate, or a court in another jurisdiction.

3. Enforcement of an arbitration agreement can in such circumstances be sought by the party who seeks to enforce the agreement requesting a stay of proceedings in the court in which the proceedings have been instituted. It is however also possible in given circumstances to seek relief by way of an interdict or injunction from a court other than the court in which the action has been instituted to restrain the proceedings from continuing (providing that the court has jurisdiction over the party seeking to proceed in court).

4. The matter of **Donohue v Armco Inc & others**[23] in the House of Lords in England related to circumstances where the appellants, Armco and others, had instituted action against the respondent in a New York court in disregard of clauses in contracts operating between the appellants and the respondent in terms of which they agreed to the exclusive jurisdiction of the courts of England and Wales. The respondent sought an injunction to restrain the appellants from prosecuting the proceedings in New York. The House of Lords per Bingham LJ stated, among other things, that:

> "*If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English Court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear : where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case*"[24].

[23] Donohue v Armco Inc & others [2001] UK HL 64.

[24] At par 24.

5. In international arbitration under the UNCITRAL Model Law, it is possible for such relief to be obtained from an arbitral tribunal constituted and appointed in terms of a relevant arbitration clause providing for international commercial arbitration.

6. In the posited scenario, this will arise in terms article 17(2)(b) of the Model Law providing among other things as follows:

> "*(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) …*
>
> *(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) …*"

7. As indicated in **Donohue v Armco & others**, an anti-suit injunction will generally be given by a court if the party who has instituted action in another court in disregard of the exclusive jurisdiction agreement is able to advance "*strong reasons*" for such an injunction not to be issued. It is, in other words, akin to the type of grounds that will have to be advanced in court if a stay of the proceedings is sought by way of application or special plea.

8. Butler & Finsen in **Arbitration in South Africa : Law and Practice** at pp 66-67 (with reference to case law) identify various circumstances under which a court of law may refuse a stay and circumstances under which a stay will be granted. Similar considerations will apply if a party applies for an anti-suit injunction under article 17(2)(b) of the Model Law.

9. In "**The Eleftheria**"[25] the English Probate and Divorce Admiralty Division dealt with an application for a stay of proceedings instituted in England in breach of an agreement to refer disputes to a court outside of England. The court, as regard the discretion that a court should exercise when considering whether to grant a stay or not, stated as follows:

> "*The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. The burden of proving such strong cause is on plaintiffs. In exercising its discretion, the court should take into account all the circumstances of the particular case. In particular, but without prejudice to taking into account all the circumstances of the particular case, the following matters, where they arise, may properly be regarded:*
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> *(i) In what country the evidence on the issues of fact is situated, or more readily available, and the effect on the relative convenience and expense of trial as between the English and foreign courts;*
>
> *(ii) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respect;*
>
> *(iii) With what country either is connected and how closely;*

[25] "The Eleftheria" [1969] 2 All ER 641.

(iv) Whether defendants genuinely desire trial in a foreign country, or are only seeking procedural advantages;

(v) Whether plaintiffs would be prejudiced by having to sue in a foreign court because they would,

(a) be deprived of security for that claim;

(b) be unable to enforce any judgment obtained;

(c) be faced with a time bar not applicable in England, or

(d) for political, racial, religious or other reasons be unlikely to get a fair trial."

10. The matter of **The Eleftheria** is regularly referred to as authority in judgments dealing with non-suit injunctions. In other words, the grounds upon which a court would refuse to grant a stay is regarded also as grounds upon which an anti-suit injunction will be refused. Similar considerations will apply.

11. In the case of an international commercial arbitration sitting under the Model Law such considerations will have to serve to satisfy the arbitral tribunal as referred to in article 17A(i)(a) and (b) of the Model Law. A party seeking a temporary interim measure as referred to in article 17(2)(b) of the Model Law will accordingly have to satisfy the arbitral tribunal that:

"*(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially*

outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination".

12. In other words, differently from what would apply in court, the onus will be on the party seeking the anti-suit injunction to persuade the court of its case why the tribunal should issue the order. This will involve, essentially, to show that grounds upon which a court will refuse to issue such an injunction do not apply in the circumstances of the particular matter.

Security for costs

13. Objective meaning has to be given to the provisions of article 17(2) of the Model Law by executing "*essentially one unitary exercise*" of construction in accordance with the pronouncements in **Natal Joint Municipal Penson Fund v Endumeni Municipality**[26] and **Botha-Batho Transport v S Botha & Seun Transport**.[27] In other words intention should not come into it.

14. A statement that article 17(2)(c) of the Model Law "*is intended for use by the claimant*" is nonsensical and irrelevant. It would make sense to say that in terms of its objective meaning article 17(2)(c) most often finds application at

[26] Natal Joint Municipal Penson Fund v Endumeni Municipality 2012 (4) SA 593 SCA at [18]-[25].

[27] Botha-Batho Transport v S Botha & Seun Transport 2014 (2) SA 500 at 12.

the instance of a claimant. However the question is whether in terms of its objective meaning article 17(2)(c), read with article 17A(1) can find application to justify an order for security for costs on application by a respondent or even, in given circumstances, on application by a claimant.

15. An order that a party must put up security for costs will provide means of preserving assets out of which a subsequent award of costs may be satisfied. A party seeking such security will in addition have to satisfy the tribunal as specified in article 17A(1)(a) and (b) of the Model Law.

16. It is arguable that a reading of article 17(2) in conjunction with article 17A(1), in particular noting that an interim measure has to be shown to be harm not adequately reparable by an award of damages, is indicative of an objective meaning that the provision is available to a claimant only. Such interpretation would be unduly restrictive because it would limit the use of article 17(2)(a), (b) and (c) to claimants only. The wording of the relevant provisions does not indicate such a restrictive interpretation.

Who to approach – court or arbitral tribunal?

17. Article 17(2) of the UNCITRAL Model Law does not expressly provide for an order for security of costs. It is moreover exhaustive of what an "*interim measure*" is for purposes of its application. As referred to already, argument

can be raised that an order for security for costs cannot be fitted into the four corners of the circumscription contained in article 17(2)(a) – (d). It is accordingly conceivable that a court may find that if an arbitral tribunal grants an interim measure for security for costs under the Model Law it has exceeded its powers. If enforcement is sought of such interim measure potentially under article 17H(1), a court of law (in Rwanda or elsewhere) may on that basis refuse to grant relief.

18. It will accordingly probably be more expeditious to approach the court in Rwanda for an order that security for costs be put up. This possibility arises in terms of article 17J of the Model Law, which grants the court the same powers of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in courts.[28]

19. Article 25.2 of the LCIA Rules provides that an arbitral tribunal sitting under the rules shall have the power upon the application of a party to order any claiming or cross-claiming party to provide or procure security for legal costs and arbitration costs.

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[28] The question can of course arise whether the term "*interim measure*" in article 17H carries the same meaning as it has in terms of article 17(2). The term "*interim measure*" is not defined in article 2 of the Model Law. Interpretation of the Model Law should occur with due observance of the provisions of article 2A of the Model Law. The principles on which the Model Law is based presumably include that the effectiveness of arbitration should be advanced. "*The observance of good faith*" may arguably also dictate that the term "*interim measure*" should be interpreted to include an order that security for costs should be put up by a party.

20. The provision includes that the party seeking such indemnity may itself have to provide a cross-indemnity for costs and losses incurred by the claimant or cross-claimant in complying with the arbitral tribunal's order to provide security for costs. It also provides that the arbitral tribunal may stay or even dismiss a claiming or cross-claiming party's claim if that party does not comply with any order to provide security.

21. Relevant is that article 25.4 provides that if parties agree to arbitration in terms of an arbitration agreement specifying that the LCIA Rules shall form part of the 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.

22. Accordingly, the benefit of application of the LCIA Rules is that there can be no argument about the power of the arbitral tribunal to order that a claiming/cross-claiming party should put up security for costs and what the means of enforcement of such an order would be.

23. The same does not apply to the Model Law. A stay of the proceedings ordered by the arbitral tribunal is not encompassed in article 17(2) of the Model Law. On the premise that a Rwandan court does have the power to order a stay of proceedings in terms of article 17J of the Model Law, which is likely, a stay is available in the relevant court as an enforcement mechanism.

The court's order ordering that security for costs should be put up by a claiming or cross-claiming party will in the usual course be accompanied by an order staying the arbitral proceedings until such security is provided.

QUESTION 6

Directions that the arbitral tribunal can usefully give in the first procedural directive to ensure that the conflicting views of expert witnesses can be received and be evaluated in a cost-effective, expeditious and procedurally fair manner

24. The arbitration in the postulated scenario is international commercial arbitration as referred to and described in article 1(3) of the SA Model Law. The juridical seat of the arbitration in terms of article 20 of the SA Model Law is Gauteng Province, South Africa. The SA Model Law applies in terms of section 6 of the IA Act, read with article 1(2) of the SA Model Law.

25. The AOA's 2018 Rules for the Conduct of Arbitrations are closely modelled on the UNICTRAL Arbitration Rules.

26. In terms of article 17(1) and article 27(1) of the AoA's 2018 the arbitral tribunal is under obligation to conduct the arbitration so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute, as well as to proceed within a short a time as possible to establish the facts of the case by all appropriate means.

27. The IBA rules are devised and formulated to supplement rules and provisions that are often applied in international arbitrations, including the

Model Law and the UNCITRAL Arbitration Rules. The IBA rules serve to fill "gaps" in these provisions

28. In these circumstances, for an arbitration of the nature as described in the posited scenario to follow the IBA rules should already be a measure to reduce the time needed to be spent on expert evidence at the evidentiary hearing.

29. The substance of applying the IBA rules in relation to the evidence of experts is to decide which of its measures should appropriately apply and to set time limits that are realistic and in the correct sequence to enable the hearing, whether oral or otherwise, to take place within a reasonable agreed time, so as to enable the parties' experts and the tribunal's experts (if any) can effectively grapple with the matters that require expert evidence.

30. The dates that have to be set to in an endeavour to limit the time that will have to be spend on the testimony of experts are dates for:

30.1 the exchange of documents in terms of article 3(1);

30.2 the delivery of requests to produce in terms of article 3(2);

30.3 the delivery of responses to requests to produce in accordance with article 3(4) and the time period within which objection may be delivered in terms of article 3(5);

30.4 when objections will be ruled on in terms of article 3(7);

30.5 when the parties should submit additional documents on which they intend to rely in terms of article 3(11);

30.6 when each party should identity its witnesses and when witness statements should be submitted in accordance with respectively articles 4(1) and 4(4);

30.7 when revised or additional witness statements should be delivered in terms of article 4(6);

30.8 when the parties have each to identify its experts and deliver its experts' reports in terms of article 5(1);

30.9 when the parties may submit additional expert reports in terms of article 5(3); and

30.10 by when a decision needs to be taken about whether one or more independent tribunal appointed experts should be appointed.

31. Taking into account that the IBA rules as revised in 2010 were some three decades in the making, it is rather difficult to specify modifications that could usefully be made to the provisions of article 5 of the IBA rules.[29]

32. I can do no better than to refer to suggestions in this regard made by Professor Butler in the AoA notes on international arbitration and the addendum thereto. These are:

32.1 witness conferencing. This encompasses that the experts of each of the parties on particular subjects are heard simultaneously after compliance with certain steps that Butler identifies in the addendum during the pre-hearing phase. These are ascertaining at an early stage what expert evidence will be required for purposes of deciding the issues that require to be decided, convening a without prejudice initial meeting of the parties' experts, tabulating the issues of fact and/or opinion upon which the experts agree and also the issues upon which disagreement exists in terms of a joint report and then the exchange of individual reports regarding issues of dispute and subsequent replies thereto;

[29] See commentary on revised text of the 2010 IBA rules on the taking of evidence in international arbitration at pp 1 and 2.

32.2 chess clock arbitration. This encompasses limiting the time for parties to lead, cross-examine and re-examine witnesses at evidentiary hearings. This can realistically only be done once expert reports have been exchanged and the nature and extent of matters in issue have been established;

32.3 hiving off hearings involving expert witnesses into separate stages so as first to establish the facts upon which the expert witnesses' opinions are to be based and/or having separate hearings on different issues to which expert evidence is necessary.

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Directions that the arbitral tribunal can usefully give in the first procedural directive to ensure that the conflicting views of expert witnesses can be received and be evaluated in a cost-effective, expeditious and procedurally fair manner

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41.3 hiving off hearings involving expert witnesses into separate stages so as first to establish the facts upon which the expert witnesses' opinions are to be based and/or having separate hearings on different issues to which expert evidence is necessary.

QUESTION 7

Correctness or otherwise of arbitrator's costs award

42. The arbitrator got it wrong regarding which party had substantial success. Albeit that the arbitrator ruled that Y and Z irremediably breached the shareholders agreement, thereby triggering the deemed offer, that declarator had no effect because the offer was declared to have lapsed before A had accepted it. In substance accordingly A achieved no success in achieving what he set out to achieve and what the substance of the dispute was about, i.e. an award in terms of which he could acquire X, Y and Z's shares.

43. In such circumstances a court of law would probably have declined to exercise its discretion to grant any declaratory order and A would have been ordered to pay X, Y and Z's costs.

44. A court of law may have deviated from the usual principle that the costs follow the event if very substantial time of the matter was spent on the issue of whether the deemed offer had been triggered. Relevant in this regard may be whether Y and Z had acted improperly or frivolously in persisting with their denial that the offer of their shares had been triggered. Such deviation may encompass that Y and Z have to pay a portion of A's costs, or would be deprived of their costs in respect of portion of the proceedings.

45. In arbitral proceedings different considerations may operate. This is probably best expressed in terms of article 42(1) of the UNCITRAL arbitration rules reading as follows:

> "*The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstance of the case*".

46. It may accordingly be reasonable for an arbitrator to either order Y and Z to pay portion of A's costs, depending on the circumstances relating to how much time and effort was spent on the question whether a deemed offer from Y and Z to A had been triggered and the conduct of Y and Z during the arbitration. An order in terms of which Y and Z would not be able to recover all their costs on the agreed scale from A could also be appropriate.

Reviewability

47. In **Leadtrain Assessments (Pty) Ltd & others v Leadtrain (Pty) Ltd & others**[31] the SCA per Nugent and Tshiqi JJA held that there is no reason to distinguish between a costs award and any other aspects of an arbitral award from the perspective of reviewability in terms of section 33(1) of the Arbitration Act, 1965. On that basis the scope for a court to interfere with an

[31] Led Train Assessments (Pty) Ltd v Led Train (Pty) Ltd & others 2013 (5) SA 84 (SCA) at [15].

arbitrator's award as to costs is limited, more so after the judgment of **Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews**.[32]

48. It should in my view be possible to have the arbitrator's costs award reviewed in terms of section 33(b) of the Arbitration Act on the basis that the costs award constituted a gross irregularity. The arbitrator's failure correctly to perceive which party obtained substantial success in the proceedings is a misdirection to such an extent that a court may well conclude that it resulted in X, Y and Z not receiving a fair trial in respect of the costs aspect. On the face of the award only it appears that the arbitrator was intent on not having A pay costs despite A's not obtaining any substantial relief. That can potentially be regarded as indicative of bias constituting a gross irregularity.

49. As regards the deprivation of X of his costs, albeit that it was completely successful in resisting the relief that A sought, can on similar basis be regarded as a gross irregularity. The fact that X utilised the same attorneys as Y and Z does not mean that X did not have to bear part off the attorneys' costs. There was no basis for depriving X of an award for costs and not granting him his costs is again a serious misdirection that can justify the relevant part of the costs award being reviewed and set aside.

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[32] **Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews** 2009 (4) SA 529 (CC) at par 221-223 and 235-236.

50. The fact that the issue had not been raised by the arbitrator or A during the proceedings, amounted to X being denied a fair hearing in relation to costs. The award depriving X of his costs will be susceptible of being reviewed and set aside in terms of section 33(b) of the Arbitration Act.[33]

[33] See **Steeledale Cladding (Pty) Ltd v Parsons** 2001 (2) SA 663 (D) at 660E-F, with reference to **Kannenberg v Gird** 1966 (4) SA 173 (C) at 186.