ASSIGNMENT M4-B/3
INTERNATIONAL COMMERCIAL ARBITRATION /

COSTS AWARDS (Module 4)

MEBERSHIP NUMBER 2241

QUESTION 1

Is there an enforceable arbitration agreement?

Parties can choose to have their dispute to be settled by arbitration in terms of ad hoc or institutional arbitration. Where parties choose ad hoc arbitration, they will make minimal provision in their dispute resolution agreement or clause. They will choose this approach where they desire to have control over arbitration proceedings, i.e. regarding things like the seat of arbitration; the rules of arbitration; the language of arbitration; the venue; how an arbitrator or arbitrators will be appointed, and so on.

On the other hand, if the parties choose instructional arbitration, they will agree on the institution under whose auspices the arbitration will be conducted. Where this approach is chosen, the parties will leave all the details concerning the arrangement and conducting of arbitration proceedings in the hands of the arbitration institution they have chosen.

The arbitration clause chosen by the parties in this case study is indicative of their desire to have ad hoc arbitration. Their intension is to take charge of all details relating to their arbitration. The arbitration clause is enforceable, to the extent that it has been agreed to by both parties. There is nothing wrong with it. However, the effect thereof is that the parties still have to agree further details regarding their arbitration proceedings. It is not an efficient way of going about making arrangements for their arbitration.

Appointment of Arbitral Tribunal

In view of the choice they made, the parties would still have to reach agreement on other issues, such as the arbitral tribunal to determine the dispute. They can either convene in one place to agree the rest of their details or do it remotely before they convene the arbitration proceedings. They can reach agreement themselves or through their legal representatives. They can also jointly choose to go the institutional arbitration route, in which event they will have to choose the arbitration institution under whose auspices their arbitration will take place. The arbitration institution will take care of all the details from then on.

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

The parties arbitration clause states that disputes arising out of their contract will be referred to arbitration. My interpretation of the clause is that it includes any and every dispute which may arise out of the contract. In the circumstances, the arbitration tribunal will be entitled to decide a dispute regarding the initial validity of the contract.

How can the arbitration clause be improved?

The arbitration clause can be improved by including the following elements: how an arbitrator(s) will be chosen; the venue; the governing law of the contract; the seat of arbitration (Also called the place of arbitration, which determines the procedural law governing the arbitration; the court which has supervision over the arbitration; the "nationality" of the award); the language of arbitration; the rules of arbitration.

I would suggest a clause along the following lines:

"1. 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 Arbitration Rules (2010) and the IBA Rules on the Taking of Evidence in International Arbitration (2010), which Rules are deemed to be incorporated by reference into this clause.

1.1 The number of arbitrators shall be one

1.2 The seat, or legal place, of arbitration shall be Johannesburg.

1.3 The language to be used in the arbitral proceedings shall be English.

1.4 The governing law of the contract shall be the substantive law of the Republic of South Africa."

QUESTION 2

Presiding Arbitrator Duty of Independence and impartiality

Article 5.3 of the LCIA Arbitration Rules of 2014 stipulates that arbitrators must be impartial and independent of the parties, and must not represent any party to the arbitration or advise it on the subject matter of the arbitration.

Article 5.4 stipulates that an arbitrator must disclose any circumstances known to him or her which can give rise to doubt about his/her independence and impartiality, and to also indicate his/her commitment to devote sufficient time, industry and diligence to the arbitration.

Article 5.5 stipulates that an arbitrator must be committed to the arbitration process to the end and also disclose anything that has come to his/her attention after his/her appointment that is likely to give rise to doubt about his/her impartiality and independence.

Article 18.4 stipulates:

"The Arbitral Tribunal may withhold approval of any intended change or addition to a party's legal representative where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict or other like impediment)…"

The proposed change of legal representatives is likely to give rise to a perception of bias and lack of independence on the part of the arbitrator, and compromise the arbitrator's duty of independence and impartiality. The best way of dealing with the situation would be for the arbitrator to withdraw as such or to prevail on his colleagues to decline the instruction to represent one the parties involved in the arbitration.

In the light of the above provisions of the LCIA Rules, the arbitral tribunal cannot countenance any situation which can compromise its integrity,

impartiality or independence. I would recommend that the tribunal withhold its approval of the intended change in terms of Article 18.4, in view of Article 5 of the Rules, in particular Article 5.5.

General Duties under Article 14 and Declaration of Availability under Article 5.4

Article 14.4(ii) places a duty on the arbitral tribunal to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute. On the other hand, in terms of Article 5.4.(ii), an arbitrator is required to furnish a declaration of availability before accepting appointment in order to ensure that he or she will devote sufficient time, attention and diligence to the arbitration before him or her in order to ensure unnecessary delays in the proceedings. The arbitrator is required to furnish a declaration of availability before accepting the appointment in order to ensure that he/she will be fully committed to the arbitration and he/she will have no distractions. The disclosure is also aimed at avoiding possible delays in the proceedings due to the unavailability of the arbitrator on some dates when the arbitration is supposed to take place.

Disclosure of Involvement in other Pending Arbitrations

In regard to another or other unfinished arbitrations in which the arbitrator is involved, the arbitrator must disclose the parties involved in the arbitration; how far the arbitration(s) have gone; when the arbitration(s) is/are likely to be concluded; the impact the other arbitrations is likely to have on the current arbitration. The requirement for disclosures is aimed at avoiding possible conflicts of interest on the part of the arbitrator and to also ensure his/her dedication to the current arbitration.

QUESTION 3

Arbitrators derive their powers from an arbitration agreement between contracting parties or the law of the place of arbitration. (Inherent Powers of Arbitrators/arbitrationlaw.com. 23/09/2020). This means that the arbitration agreement is the primary source of the arbitrator's powers. The arbitrator has a duty to respect the autonomy of the parties and uphold the agreement between the parties in its entirety. Omitting or disregarding any portion of an agreement between parties constitutes misconduct and or irregularity on the part of the arbitrator.

Three important judgments of the Supreme Court of Appeal and the Constitutional Court, namely, Telcordia Technologies Inc v Telkom SA Limited [2007] 3 SA 266 SCA; Lufuno Mphaphuli & Associates (Pty) Limited v Andrews CCT97/07 [2009] ZACC 6; and Zhongji Development Construction Engineering Company Limited v Kamoto Copper Company Sarl 2014 JDR 2159 (SCA).have all given strong support for the principle of party autonomy in arbitration and have stressed that there is a need for judicial intervention in arbitration to be minimised.

The principle of party autonomy must be upheld by arbitration tribunals, just as it must be upheld by the courts.

The arbitral tribunal must enforce the provision for negotiation by suspending the arbitration proceedings and directing that the parties enter into negations without delay in order to try to resolve the dispute between them. If the parties reach a settlement, they can enter into a settlement agreement. That would be the end of the dispute. The parties can approach the arbitrator and request him or her to make their written agreement the award of the tribunal. Once the arbitrator is satisfied that the agreement meets his/her requirement for making it his/her award, the arbitrator can go ahead and make the agreement an award of the arbitral tribunal.

Article 34(2)(iii) of the UNCITRAL Model Law provides that a party to an arbitration can apply to the court with jurisdiction to set aside an arbitration award on the grounds that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

The aggrieved party can successfully challenge the award by launching an application in the court with jurisdiction to set aside the award on the basis that the award contains decisions on matters beyond the scope of the submission to arbitration. The arbitrator's decision resulted in non-compliance with the provision for negotiation. The party can argue that in omitting to enforce the provision for negotiation, the arbitrator committed an irregularity or misconducted himself/herself in ruling that the arbitration should continue without affording the parties to enter into negotiations to try to resolve their dispute.

While the object of arbitration is to achieve a fair resolution of disputes without unnecessary delay and expense, that does not nullify the arbitral tribunal's duty to conduct the arbitration according to the wishes of the parties. The arbitral tribunal does not have powers to unilaterally override or amend the agreement between the parties. In the end, the duty to enforce the agreement between the parties must not be sacrificed at the altar of expediency, that is, speedy conclusion of the arbitration and saving costs. The primary object of arbitration of settling disputes between parties efficiently and expeditiously can still be achieved while complying with the duty to uphold the parties' agreement.

QUESTION 4

Article 30.1 of the LCIA Arbitration Rules stipulates that:

"The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority."

On the other hand**,** section 11 of the International Arbitration Act No 15 of 2017 stipulates that:

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

(2) Where the arbitration is held in private, the award and all documents created for the arbitration which are not otherwise in the public domain must be kept confidential by the parties and tribunal, except to the extent that the disclosure of such documents may be required by reason of a legal duty or to protect or enforce a legal right."

Both the International Arbitration Act and the LCIA Arbitration Rules make provision for disclosure of arbitration materials under certain circumstances. The critical question is whether the SOC and the relevant minister meet the requirements of those exceptional circumstances under which arbitration materials can be publicly disclosed. Is there is a legal duty on the SOC party or the relevant minister to disclose the arbitration materials; or that they have a legal right to pursue or protect? Their contention is that the documents should be disclosed in the public interest. Can the public disclosure be justified on the basis that the dispute concerns an increase in prices payable by the SOC to the energy company in terms of their contract will ultimately

influence the price paid for liquid petroleum gas by consumers in South Africa? These are questions which will have to be answered by the arbitral tribunal or the court with jurisdiction.

The primary dispute between the parties concerns the price increases proposed by the energy company. That is the dispute before the arbitrator. The secondary dispute arises from the SOC disclosing its wish to publicly disclose the arbitration material. The correct approach of handling the secondary dispute would be for the arbitral dispute to direct the SOC and the minister to approach the High Court in Johannesburg to assert their right to disclose the arbitration materials publicly on the basis that it is in the public interest to do so. The court is best placed to decide the question.

Even if it is possible for the tribunal to decide the question, it is not compelled to decide the issue in the particular circumstances. The arbitrator can legitimately refer the matter to the court for decision. In that way, the arbitrator will keep the arbitration focused on determining the primary dispute between the parties, which arose out of the price increase proposed by the energy company.

The deference to the court does not mean that the arbitrator would have to necessarily suspend arbitration proceedings. They can still continue because the outcome of the court would not have a bearing on the outcome of the arbitration process. However, in view of the fact that the parties will be involved in the proceedings in court and are likely to use the same legal representatives they are using in the arbitration, it may be expedient to suspend the arbitration proceedings.

QUESTION 5

Article 17(2) of the UNCITRAL Model Law on Arbitration (The Model Law) defines an interim measure as any temporary measure, usually in the form of an award, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) Preserve evidence that may be relevant and material to the resolution of the dispute

Anti-suit injunctions are essentially provisional measures issued against a party that prohibits the respondent from continuing or filing a suit in another forum or disregarding a valid arbitration agreement made between the parties. (www.arbitrationlaw.com 24/09/2020). Paragraph 17(2) (b) is the one which empowers the arbitral tribunal to grant an inti-suit injunction. The anti-suit injunction will be granted where the respondent commences or continues with a suit in another jurisdiction or forum, disregarding a valid arbitration agreement between the parties to an arbitration.

Paragraph (c) is concerned about preserving assets out of which a subsequent award may be satisfied. It is not concerned with the provision of security for costs. Security for costs is an interim measure sought by a party (usually the respondent) to protect against the potential scenario that it is eventually successful in the arbitration and is awarded its costs to be paid by the claiming party but the claiming party has insufficient money to pay the adverse costs order made (www.lexology.com 24/09/2020).

Provisional measures can be granted by the courts or arbitral tribunals. The are two sources of an arbitral tribunal's power to grant interim measures namely the national law of the country of the arbitration seat, and (to the extent that law allows) the agreement of the parties (as contained either in the arbitration agreement or the set of arbitral rules that the parties agree to follow).

Article 17(1) states that "unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures". This general power is considered wide enough to include the power to grant an order for security for costs. In the light of the wide interpretation of Article 17(1), it would seem that an arbitral tribunal has the power to grant an order for security for costs in an arbitration seated in a jurisdiction that has adopted the Model Law.

In the light of what has been stated above, the respondent can approach the arbitral tribunal for an order for security for its legal costs. This would save it time and money in that it would avoid the delays which are usually encountered in launching court applications.

Article 17J of the Model Law deals with court-ordered interim measures and Article 25 of the LCIA Arbitration Rules deals with interim and conservatory measures which may be taken by the arbitral tribunal. In the light of the provisions of these two instruments, it would be more efficient and cost-effective for the respondent to move an application to obtain security for its legal costs with the tribunal than going straight to the Rwandan court. The arbitral tribunal does have an effective sanction to ensure compliance with the order for security for costs it may make. It can simply stipulate that unless

and until the claimant provides the security the arbitration proceedings will not proceed.

QUESTION 6

Article 5.3 of the IBA Rules on the Taking of Evidence in International Arbitration (2010) (The IBA Rules) states:

"If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration."

While the provision facilitates the leading of expert evidence in a procedurally fair manner, it makes the pre-arbitration process a long drawn out process, which is not cost-effective and expeditious. The process provides for any party involved in the arbitration to submit original expert reports and to also submit revised or additional reports and to also respond to party's witness statements. There can be much back- and- forth between parties involved, which can be time consuming and also increase the costs significantly.

I would suggest the following modifications to the parties in my first procedural directive:

(1) At the first preliminary meeting with the parties and their representatives, I would facilitate the narrowing of issues between the parties in order to curtail the proceedings and to inform each party's expert of the issues the experts must concentrate on in producing their reports.
(2) I would also present my suggestions on modifications to Article 5 of the IBA Rules to the parties at the preliminary meeting.

(3) If they agree with my suggestions, I would ensure that the modifications are reflected in the minutes of the preliminary meeting and the parties both sign the minute. I would also formalise the modifications in a directive. The essence of my modifications will be as follow hereunder.

(4) The experts must submit their reports to both the tribunal and their other party simultaneously, on a set date agreed at the preliminary meeting.

(5) I would keep all time lines reasonable yet not too liberal, to ensure that the pre-arbitration processes do not take up too much time and yet maintain a fair procedure.

(6) I would also provide for time for the parties and their experts to study their opponent's expert report and to decide whether to call further experts.

(7) I would ensure that the parties convene a meeting of the experts to facilitate discussion between them and to also narrow the issues. This meeting will also be used for each of the experts to respond to issues raised by the other party's experts, and to also make additions or revisions to the initial expert reports.

(8) I would give a directive that the experts must produce a joint report after the meeting within stipulated time frames. I would also give a directive that the report must be written in clear and simple language. I would make it clear at the meeting that the joint report must deal with issues they found common ground on and issues they still differ on.

(9) The joint report must be signed by each party's expert(s) and submitted with the tribunal by a stipulated date, before the evidence hearing.

(10) At the evidence hearing, I would give a directive that each expert must only elucidate the opinions he or she still holds, on which or she did not agree with the other expert.

(11) The evidence hearing procedure will be a normal process of evidence in chief, cross-examination and re-examination.

QUESTION 7

Section 35 of the Arbitration Act 42 of 1965 (The Arbitration Act) stipulates that an arbitrator must give a clear directive about costs in his or her award. The general principle is that costs are awarded to the successful party. Costs must be awarded to a party even if the party is only partially successful. In *John Sisk (Pty) Ltd v The Urban Foundation* 1985(4) SA 349 (N) the court held that the arbitrator should have awarded costs to the contractor in the case, even though the contractor was only partially successful, that is, it was not awarded the whole amount it claimed.

The court elucidated the general principle by stating that a party who is justified in bringing a matter to arbitration must be awarded the costs in full even though he is partially successful in respect of quantum. If a party brings a matter to arbitration and the claim is dismissed completely, then the party must pay the costs because it was not justified in bringing the matter before arbitration in the first place. The principle applies even where there are multiple claims and counter claims arising from substantially the same circumstances. A view has been expressed that the claims must be reckoned together and costs must be awarded to the outright winner.

While it is generally accepted that the award of costs is at the discretion of the arbitrator, the courts expect the arbitrator to exercise that discretion judicially and in accordance with recognised principles. The arbitrator must have compelling reasons for departing from the general principle that costs are awarded to the successful party

In the FGL arbitration, the arbitrator found that A did not prove irremediable breach of the contract against X. This means A was unsuccessful against X; A should not have brought a claim against X to arbitration at all. Due to the fact

that A was unsuccessful against X arbitrator ought to have awarded costs to X, against A. While he departed from the general principle that costs must be awarded to a successful party, the corollary of which is that if a party who brings a claim to arbitration is unsuccessful, costs must be awarded against that party, the reasons furnished by the arbitrator in departing from the general principle were not raised in during argument The arbitrator ought to base his decisions on the evidence led and arguments raised before him. He does not have the powers to make a decision based on his own reasons.

Regarding whether the costs award in the FGL arbitration are reviewable, the judgement in *Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd* (427/12) [2013] ZASCA 33 (28 March 2013) (Leadtrain) is instructive. The Supreme Court of Appeal held that where an arbitrator makes an error of law in the awarding of costs in a private consensual arbitration, such error is not a good cause for remitting the award to the arbitrator under section 32 of the Arbitration Act. A paragraph from the judgment is worth quoting:

"[15] It is not desirable to attempt to circumscribe when 'good cause' for remitting a matter will exist. It will exist pre-eminently where the arbitrator has failed to deal with an issue that was before him or her – which was what occurred in *York Timbers* – but once an issue has been pertinently addressed and decided there seems to us to be little room for remitting the matter for reconsideration. The guiding principle of consensual arbitration is finality – right or wrong – and we see no reason why an award of costs is to be treated differently to any other aspect of an award. It would be extraordinary if the conduct of an arbitrator that falls short of the strict constraints of s 33(1) were nonetheless to be capable of being set aside and remitted for reconsideration under s 32(2). As pointed out in *Benjamin v Sobac South African Building and Construction (Pty) Ltd,* correctly, the effect of so holding would be to emasculate the provisions of s 33(1). However one approaches the question what is 'good cause' it seems to us that it inexorably requires something other than to mere error on the part of the arbitrator."

In the light of the decision of the SCA above, I submit that the cost award is not reviewable under section 32(2) or 33(1). A no-cost order is a legitimate cost order. An arbitrator can make a cost order in favour of one of the parties to the proceedings or make no order as to costs at all, just as the courts can. The effect thereof is that each party will pay its own costs. The grounds for review set out in section 33(1) are not extant in the FGL arbitration. There exists no good cause for remittal of the award either.