

STUDENT NUMBER:2248

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MODULE 4B: ASSIGNMENT THREE

Question one

International Commercial Contract

There is an enforceable arbitration contract. Section 7 of the International Arbitration Act 15 of 2017 (“the Act”) provides that (1) For the purposes of this Chapter, any international commercial dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration, unless— (a) such a dispute is not capable of determination by arbitration under any law of 10 the Republic; or (b) the arbitration agreement is contrary to the public policy of the Republic. (2) Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.

Section 16 provides that (1) Subject to section 18 an arbitration agreement and a foreign arbitral award must be recognised and enforced in the Republic as required by the Convention, subject to this Chapter.

The arbitral tribunal will be appointed as follows: Article 11 of the Act provides as follows: (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties. (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article. (3) Failing such agreement, (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a 30 party falls to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court specified in article 6; in an arbitration with a sole arbitrator, if the parties are

unable to agree on the arbitrator, he or she shall be appointed, upon request of a party, by the court specified in article 6.

Will the tribunal have jurisdiction: Article 16 of the Act provides that : (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Improvements: The parties should have stipulated the kind of disputes they were. Referring to. The agreement should have stated how many arbitrators should be appointed and which party.

Question two

Presiding arbitrator duty of independence: Article 5.3 All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party. No arbitrator shall advise any party on the parties' dispute or the outcome of the arbitration.

Article 5.4. Provides that the candidate shall sign a written declaration stating: (i) whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration; and ...”

In casu the Presiding arbitrator will have to state clearly whether changing of legal representation and replacing same with two lawyers from the Johannesburg office of the same global law firm to which the presiding arbitrator belongs will give rise in the mind of other party any justifiable doubts as to his/her impartiality or independence.

Response of the arbitral tribunal: Article 18.3 Following the Arbitral Tribunal's formation, any intended change or addition by a party to its legal representatives shall be notified promptly in writing to all other parties, the Arbitral Tribunal and the Registrar; and any such intended change or addition shall only take effect in the arbitration subject to the approval of the Arbitral Tribunal.

Article 18.4 The Arbitral Tribunal may withhold approval of any intended change or addition to a party's legal representatives 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). In deciding whether to grant or withhold such approval, the Arbitral Tribunal shall have regard to the circumstances, including: the general principle that a party may be represented by a legal representative chosen by that party, the stage which the arbitration has reached, the efficiency resulting from maintaining the composition of the Arbitral Tribunal (as constituted throughout the arbitration) and any likely wasted costs or loss of time resulting from such change or addition.

Article 18.5 Each party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any legal representative so to appear, a party shall thereby represent that the legal representative has agreed to such compliance.

Article 18.6 In the event of a complaint by one party against another party's legal representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that legal representative a reasonable opportunity to answer the complaint, whether or not the legal representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the legal representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.4(i) and (ii).

Declaration of availability” Article 5.4 provides that “.....(ii) whether the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration. The candidate shall furnish promptly such agreement and declaration to the Registrar”.

Question three

Enforceability of the provision for negotiation with reference to relevant case

law Article 16 of Schedule 1 to the International Arbitration Act recognises the concept of kompetenz-kompetenz and provides that an arbitral tribunal can rule on its own jurisdiction, including on any objections with respect to the existence or validity of the arbitration agreement. Even before the enactment of the International Arbitration Act in 2017, the Supreme Court of Appeal recognised the principle of kompetenz-kompetenz and held that once the arbitration tribunal had been appointed, the question of whether the claims made by the claimant were arbitrable was one which fell to be decided by the tribunal.

South African courts have accepted that where the parties have agreed to arbitration as a dispute resolution mechanism, this includes giving the arbitrator(s) authority to rule on a jurisdictional objection (referred to in other jurisdictions as kompetenz-kompetenz). This depends on proper scrutiny of the interpretation of the agreement in question, to verify if this was in fact the parties' intention. In **Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company SARL** [2014] 4 All SA 617 (SCA), Willis JA, writing the majority judgment, referred to **Fiona Trust and Holding Corporation and others v Primalov and others** [2007] EWCA Civ 20 (upheld in **Fiona Trust and Holding Corporation and others v Primalov and others** [2007] UKHL 40), in support of the assumption that the parties to an agreement containing an arbitration clause intended that any dispute in relation to that agreement would be decided by arbitration.

How the arbitral tribunal should enforce it

Article 7 of Schedule 1 to the International Arbitration Act provides that an arbitration agreement is "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement." A arbitration agreement must be in writing, and is deemed to be in writing if its content is recorded in any form, regardless of whether it or the wider contract was originally concluded orally, by conduct or by other means.

Article 34 in Schedule 1 of the International Arbitration Act 15 of 2017 : provides that

(2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Republic;

In casu the award cannot be successfully challenged because of non-compliance with the provision for negotiation. Article 34 in schedule 1 refers to a party who is under incapacity or that the agreement is not valid, which is not the case.

The object of fair resolution of disputes: It will not support the object of fair dissolution of dispute. Reason being that any such ruling by the tribunal is subject to Court review, either after the arbitral proceedings or, in exceptional circumstances, during the proceedings and before the award.

Question four

Is the tribunal compelled to decide the issue in the particular circumstances

Article 30.1 of the LCIA provides that disclosing information of the arbitration proceedings to "outsiders" is prohibited for all parties and participants. On the same

vein the LCIA is subject to exceptions in case of a “legal duty to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.” Article 30.2 and 30.3 goes further and provides that the deliberations of the Arbitral Tribunal are also confidential and the awards cannot be published without consent of the parties.

The ICC Rules of Arbitration give power to the arbitral tribunal to take measures for protecting confidential information and trade secrets and exclude outsiders from the hearings¹. It lacks general provision on confidentiality, consequently, it does not impose duty on the parties or other participants.

The LCIA Arbitration Rules put more stress on the private nature of the arbitral proceedings by stating that “[a]ll meetings and hearings shall be in private unless the parties agree otherwise in writing or the Arbitral Tribunal directs otherwise.” In Article 30 it stipulates that “unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards together with all materials in the arbitration..” information confidential. Furthermore it also provides “The deliberations of the Arbitral Tribunal are likewise confidential to its members” In the light of this article it be concluded that it imposes duty on both parties and the tribunal and its members, however it does not refer to expert witnesses or other third parties.

Section 11 of the International Arbitration Act provides that: (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.

¹ ICC art. 20(7) and 21(3).

The tribunal is compelled to decide the issue and consider the exceptions.

Could the tribunal legitimately defer to the Court

Under Article 19(2) of Schedule 1 to the International Arbitration Act, in the absence of agreement, an arbitral tribunal can conduct the arbitration in such manner as it considers appropriate, subject to the provisions of Schedule 1. Although Schedule 1 does not expressly provide that the arbitrator can compel a party to disclose documents, the arbitral tribunal can do so in exercising its power to conduct the arbitration in such manner as it considers appropriate.

Under Article 27 of Schedule 1, the arbitral tribunal, or a party with the approval of the arbitral tribunal, can request a competent court for assistance in taking evidence. The court can execute the request within its competence and according to its rules on taking evidence. The Registrar of the Division of the High Court or the Clerk of a Magistrate's Court in whose area of jurisdiction the arbitration takes place can issue a subpoena to compel the attendance of a witness before an arbitral tribunal to give evidence or to produce documents, on the application of the arbitral tribunal or a party and with the approval of the arbitral tribunal. The Division of the High Court has the same powers to make an order for the issue of a commission or request for taking evidence out of its jurisdiction for the purposes of arbitral proceedings as it has for the purposes of its own court proceedings.

The tribunal can legitimately defer to Court

Question five

Which paragraph empowers the arbitral tribunal to grant an anti-suit injunction, and under what circumstances would such an order be appropriate?

Section 17 (2) provides that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(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) 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.

Does article 17(2) authorize the arbitral tribunal to order security for costs, bearing in mind that paragraph (c) is intended for use by the claimant in the arbitration?

Section 17E of the Act provides that (1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Should the respondent approach the arbitral tribunal or the Rwandan Court for such an order?

The respondent can approach the Rwandan Court which is empowered by Article 17J which provides that : A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

Article 25 (1) of the LCIA provides that The Arbitral Tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances: (i) to order any respondent

party to a claim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner;

The arbitral tribunal also have the power to order security.

Question six

Directions the arbitral tribunal could usefully give in its first procedural directive

1. Article 28 of Rules for the conduct of arbitration 2018 provides that In the event of an oral hearing, the arbitral tribunal shall give the parties notice of the date, time and place thereof.
2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.
3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.
4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).
5. Article 19(1) of Schedule 1 to the International Arbitration Act provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
6. In the absence of agreement, the arbitral tribunal can conduct the arbitration in such manner as it considers appropriate, subject to the provisions of Schedule 1. The arbitral tribunal can determine the admissibility, relevance, materiality and weight of any evidence.

Modifications that the tribunal could usefully direct should be made to the provisions in article 5 of the IBA Rules regarding the procedures applicable

Article 29 of the Standard Procedure Rules provides that after consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

The expert shall, before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.

The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

How oral expert evidence can be most efficiently received at the evidentiary hearing

Article 27 (2) provides that Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the

arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

Subsection 4 provides that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Question seven

To what extent do you agree with the arbitrator's order on costs, paying particular attention, on the given facts, to the question as to which party / parties achieved substantial success?

The question of costs is a matter within the arbitral tribunal's discretion. Generally, costs are awarded in favour of the successful party.

If the arbitration is conducted under the rules of an arbitration institution, those rules often include provisions on the quantification of costs. If no such rules are applicable, the manner in which costs are quantified are determined by the arbitral tribunal.

In this case the arbitration is conducted under Standard Procedure Rules (2018 edition) of the Association of Arbitrators (Southern Africa).

Article 41 of the Rules provide that unless the parties otherwise agree, the award of costs is in the discretion of the arbitral tribunal. In exercising its discretion, the tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

Article 40 (2) provides that the term "costs of arbitration" includes only: (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator; (b) The reasonable travel and other expenses incurred by the arbitrators; (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal; (d) Any fees and expenses of the Association. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2(b) to (d), but may not charge additional fees.

I agree with the arbitrator's order as he awarded costs to the successful party.

To what extent is the costs award reviewable under either section 32(2) or 33(1) of the Arbitration Act 42 of 1965?

An arbitrator, like a court, exercises a discretion when he or she makes an award of costs

It is trite that the award of an arbitrator is ordinarily final. Section 28 of the Act provides that 'Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.'

Section 33 (1) of the Act permits a court to interfere with an award where an arbitration tribunal has misconducted itself, or committed a gross irregularity, or exceeded its powers, or the award has been improperly obtained.

Section 32 (2) of the Act provides that the court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct.'

Where there is misdirection on the part of an arbitrator in exercising his discretion in relation to costs this allows a court to set aside his award and remit the matter for reconsideration².

The Court in **Leadtrain Assessments** (supra) stated that in **Joubert/a Wilcon v Beacham**³ it was said that 'it is trite that an arbitrator is obliged to award costs on the same basis as would a Court' – and in that respect the court was no doubt correct. The Court went on to say that 'his award is liable to be set aside on review if he fails to do so' – but in that respect it was not correct.

² Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd (427/12) [2013] ZASCA 33 (28 March 2013)

³ 1996 (1) SA 500 (C).

Based on **Leadtrain** above the Court cannot set aside an award if the arbitrator fails to award costs on the basis as would a Court.

In *casu* the Court would only interfere if the arbitrator has misconducted himself , or committed a gross irregularity, or exceeded his powers: (section 33(1)). In terms of section 32 (2) the Court will interfere on application by one of the parties.

References

(a) Acts

1. Arbitration Act 42 of 1965
2. UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
3. International Arbitration Act 15 of 2017

(b) Case law

4. Joubert/a Wilcon v Beacham 1996 (1) SA 500 (C).
5. Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd (427/12) [2013] ZASCA 33 (28 March 2013).
6. Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company SARL [2014] 4 All SA 617 (SCA).

(c) Rules

7. ICC Rules
8. IBA Rules
9. Standard Procedure Rules (2018) Edition.
10. LCIA Arbitration Rules 2014

