# STUDENT NUMBER: 2249

## MODULE 4: ASSIGNMENT M4/B3

DUE DATE: 25 SEPTEMBER 2020

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## QUESTION 1

1. An international commercial dispute regarding a contract can often be resolved by the arbitral tribunal with reference only to the written contract and the procedural rules chosen by the parties. The law applicable to the arbitration proceedings will be that of the juridical seat.

2. The fact that the agreement names Johannesburg as its jurisdictional seat, therefore, implies that the International arbitration law applicable in South Africa will apply.

3. Although not ideal, since the arbitration clause is prone to interpretation, the arbitration clause remains enforceable. Naming the city in which the arbital seat is vested is sufficient to determine jurisdiction.

4. The parties are normally free to make an express determination of which system or rules of law should be applied. The first stage of the inquiry in determining the applicable law is therefore to establish whether the parties have made an express choice. Once they do, the tribunal will be constituted according to the chosen rules.

5. The LCIA Rules of 2014 article 16.4 apply the law of the seat to the arbitration agreement as the default position. Where parties have agreed to use these rules, it will be unnecessary to decide on the law with the closest and most real connection to the arbitration agreement.

6. Where the question arises whether a matter in dispute is arbitrable, the law applicable to that issue will depend on the circumstances. If the arbitral tribunal makes

an award regarding a matter which is not arbitrable under the law of the seat of the arbitration, the award can be set aside by the court at the seat.

7. Article 20 of MAL provides for the arbitral tribunal to determine the place of arbitration where the parties have not so agreed:

Article 20. Juridical seat of arbitration

(1) The parties are free to agree on the juridical seat of arbitration. Failing such agreement, the juridical seat of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

8. An arbitration agreement which did not specify a specific country but which provided for arbitration in a third country, under the rules of the third country and in accordance with the rules of procedure of the International Commercial Arbitration Association was found to be valid as it sufficiently indicated the parties' intention to arbitrate.
9. The drafter of an arbitration clause should consider the following improvements to the arbitration clause:

9.1. Clarifying the applicable rules to be applied;

9.2. The manner in which the proceedings are to be conducted, namely ad hoc or institutional arbitration.

9.3. The scope of arbitration clause: should it be wide or narrow?

9.4. How many arbitrators will constitute the tribunal and their required qualifications.

9.5. Clarifying which court will have jurisdiction in respect of that arbitration.

9.6. The venue of arbitral proceedings, particularly the venue for the evidentiary hearing. This need not necessarily be held at the seat of the arbitration.

9.7. It should set out what the substantive governing law is, namely what is the law governing the merits of the dispute.

9.8. It should clarify if the parties choose more than one system of national law and whether they are limited or not in that choice to systems of national law.

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**QUESTION 2**

1. Article 18 deals with legal representation.
2. A recent tactical ploy has been for a party to change counsel at a late stage in the proceedings and to appoint a lawyer from the local office of a global firm which has close links with one of the arbitrators, which could call in question the arbitrator's independence. Article 18.3 and 18.4 address this problem.
3. Article 18.4 in particular reads as follows:

   *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."*

4. In the scenario provided, if the legal representatives are allowed to be replaced, it would compromise the impartiality of the arbitrator and open proceedings up for dispute.
5. Similarly, to Article 18, Under Article 12(1) of Schedule 1 to the International Arbitration Act, if persons are approached in connection with their possible appointment as an arbitrator, they must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.

6. It is therefore trite no matter what the rules applied, that the arbitrator can never be seen or actually be biased with a vested interest in the outcome. This is particularly ingrained in Article 5.3
7. The arbitrator should consider what impact it would have on the proceedings if the legal representatives were to remain, and weigh that up against any long-term delays that such refusal will cause.
8. Since the arbitrator had already been appointed, with his identity known to the parties, it can only be deduced that the South African company has acted deliberately an as such the request should be denied.
9. In accordance with Article 5.4, all the parties would have had the relevant information and it cannot be said to have been an honest mistake.
10. The information provided prior to date of declaration:

    *10.1. a brief written summary of his or her qualifications and professional positions (past and present);*

    *10.2. the candidate shall also agree in writing fee-rates conforming to the Schedule of Costs;*

    *10.3. the candidate shall sign a written declaration stating:*

    *10.3.1. (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*

    10.3.2. *(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.*
11. The parties are given enough time to consider the above information, in terms of Article 14, which provides for ***"****21 days from receipt of the Registrar's written notification of the formation of the Arbitral Tribunal",* to make contact and raise disputes.
12. In terms of Article 14.6, the presiding arbitrator will only adjudicate on procedural order. There must still be complete impartiality in proceedings despite the fact that the presiding arbitrator will not participate in the adjudication of the merits.

**QUESTION 3**

1. Multi-tiered clauses are common, but they must be carefully drafted, thinking through each stage of the process in terms of its enforceability and whether, in practice, it will be enforceable.
2. In the scenario presented, the arbitration agreement made the process clear, with the requirement for negotiations, fulfilling the role of mediation or an alternative dispute resolution to curtain legal proceedings and costs through full scale arbitration.
3. The requirement for negotiation is therefore an enforceable term of the arbitration agreement and if there had not been compliance with it, that party remains in default with the whole arbitration agreement and process. A multi-tiered dispute resolution clause should be respected and enforced as the choice of the parties. The South African company is therefore incorrect in stating that it is not enforceable, however the English company remains in default, thereby removing the requirement to decide on the enforceability of the clause.
4. In the English case of **Paul Smith Ltd v H & S International Holdings Inc [1991] 2 Lloyd's Rep 127 (QB Com Ct) 128,** the dispute resolution clause provided in part that : *"the parties shall strive to settle [the dispute] amicably but if they are unable to do so the dispute or difference shall be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with those Rules."*
5. The court said regarding this clause:
   "*The plaintiffs rightly concede that the provisions that the parties shall strive to settle the matter amicably, and that a dispute shall, in the first place, be submitted for conciliation, do not create enforceable legal obligations*."
6. However, the statement in the *Paul Smith* case that an agreement to conciliate is not an enforceable legal obligation has been correctly criticised in the subsequent English case of **Cable & Wireless plc v IBM United Kingdom Ltd. 2002] EWHC 2059 (Comm) (11 October 2002).**
7. It is clear that the above provision would not be enforceable unless it was amplified by further qualifications.

*8.* The court thus found In Cable and Wireless that to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would "*fly in the face of public policy as expressed in the CPR...".*

9. If the intention was clear and it expressly set out how the negotiations were to be concluded, it is clear that the parties always had the intention that it should be enforceable.
10. An erroneous decision by the tribunal that they had been complied with would then not deprive the tribunal of its jurisdiction. The erroneous decision by the tribunal would also not amount to a reviewable irregularity and the court would not be required or entitled to make its own determination on the matter. It would undermine the efficacy of the arbitration process.
11. Article 34 of the International Arbitration Act would therefore not apply, since by not complying, and with the tribunal making an incorrect finding as to the enforceability of such requirement, does not render the agreement invalid as a whole.
12. Article 34 of the Model Law, which contains the grounds on which an award may be set aside, may be compared with sections 32 and 33 of the South African Arbitration Act of 1965. The grounds on which an award can be set aside under section 33 are exhaustive and are narrowly interpreted by the courts.

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**QUESTION 4**

1. If the tribunal have not yet published its award, and only the written submissions have closed as per Article 15 of the LCIA Rules, the SOC would have to approach the arbital tribunal with such an application.
2. If the award has been published, the SOC would have to approach the Johannesburg High Court since the arbitration and the appointment of the arbitrators have come to an end.

3. Under Schedule 1 to the International Arbitration Act, local courts can only intervene to assist arbitration proceedings seated in their jurisdiction in relation to the following scenarios:
   3.1. Appointment of arbitrators (Article 11);
   3.2. Procedure for challenging an arbitrator (Article 13);
   3.3. Termination of the arbitrator's mandate arising from the arbitrator's failure or impossibility to act (Article 14);
   3.4. Jurisdiction of the arbitral tribunal (Article 16)
4. Article 17(J) of Schedule 1 provides for court-ordered interim measures. A court has the same powers in relation to arbitration proceedings as it has for proceedings before it to make, on the request of a party:
   4.1. An order for the preservation, interim custody or sale of any goods that are the subject matter of the dispute.
   4.2. An order securing the amount in dispute, but not an order for security for costs.
   4.3. An order appointing a liquidator.
   4.4. Any other orders to ensure that any award that may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party.
   4.5. An interim interdict or other interim order.
5. Article 17(J) further provides that the court will not grant an order for interim relief unless:
   5.1. The arbitral tribunal has not yet been appointed and the matter is urgent.
   5.2. The arbitral tribunal is not competent to grant the order.
   5.3. The urgency of the matter makes it impractical to seek the order from the arbitral tribunal.
6. The court will not grant an order if the arbitral tribunal competent to grant the order has already determined the matter.
7. The court does not have the power to grant interim measures other than those set out above.
8. The tribunal would have to decide on the issue in the scenario where it is possible to approach the arbitral tribunal.
9. Article 6 of the International Arbitration Act further sets out the functions of the Court, namely:

*(1) Subject to paragraph (2), the functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by—*

*(a) the High Court within the area of jurisdiction of which the arbitration is being, or is to be, or was held;*

*(b) the division with jurisdiction over a South African party, or if there is no South African party, the Gauteng Division of the High Court seated in Johannesburg, if the place within the Republic where the arbitration is to take place has not yet been determined, until such place is determined.*

10. In terms of Article 30, the general principle is to keep awards confidential, together with all documents and material created for purpose of the arbitration, save for the following exceptions:
    10.1. to the extent that disclosure may be required of a party by legal duty,
    10.2. 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.
11. Where the seat of the arbitration is South Africa and a public body is a party, the mandatory restriction on private hearings and confidentiality in section 11(1) must be borne in mind. (*Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136 (CA) at 146h-148h and *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184)

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**QUESTION 5**

1. An anti-suit injunction can be brought under Article 17(2)(b), and will be utilised when an action is instituted prior to the award or arbital process being finalised, and when such an action will prejudice the arbital process.

2. South African courts are however not likely to issue an anti-suit injunction in aid of arbitration. There are diverging opinions as to whether a South African court would have jurisdiction to grant an interdict (injunction) prohibiting a party from instituting proceedings in a non-South African jurisdiction. One view suggests that a South African court could grant such an interdict where the respondent is an incola (resident) and the judgment can effectively be enforced.

3. Procedural directions by the arbitral tribunal must be distinguished from interim measures. Interim measures are defined in article 17(2) of UNCITRAL Model Law, as amended in 2006.

4. Once should distinguish between interim measures intended to prevent irreparable harm, those designed to preserve evidence and those that facilitate the enforcement of the award. This include security for the respondent's own legal costs of defending the arbitration.

5. Such terms may include the provision by the applicant party of a cross-indemnity, secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by the respondent party in complying with the Arbitral Tribunal's order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration.

6. The Arbitral Tribunal shall have the power upon the application of a party, after giving all other parties a reasonable opportunity to respond to such application, to order any claiming or cross-claiming party to provide or procure security for Legal Costs and Arbitration Costs by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration. In the event that a claiming or cross-claiming party does not comply with any order to provide security, the Arbitral Tribunal may stay that party's claims or cross-claims or dismiss them by an award.

7. With Article 17J of the UNCITRAL a court has the same power to order an interim measure in relation to arbitration as it has in relation to court proceedings, without considering which interim measures are appropriate for a court to grant in the context of arbitration proceedings.
8. Consequently, the court and the arbitral tribunal have concurrent jurisdiction to grant interim measures.
9. However, the possibility of the court ordering security for costs has been expressly excluded in terms of Schedule 1 articles 17(2)(e) and 17J (1)(b).

10. The tribunal will typically stay the claimant's claim until security has been provided

11. The recent judgment by the Supreme Court of Appeal in *Boost Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd* [2015] ZASCA 93 provides useful guidance on how an arbitral tribunal could exercise its discretion to order security for costs.

12. The Court held that, a party would have to show that the institution of proceedings by the company/other party is reckless or vexatious or is in some other respect an abuse of process. Security for costs is an exceptional remedy and should not easily (if ever) be ordered against a claimant company which has shown that it appears to have a strong case, even if the company is in a weak financial position.

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**QUESTION 6**

1. An important duty is imposed on the arbitral tribunal by article 18 as to how it must conduct the proceedings.
2. The parties must be treated with equality and each given a full opportunity to present their case.
3. This concept is set out in Article 15 of the UNCITRAL Rules of 1976. It must still comply with the requirement of reasonableness.
4. The tribunal does not have to sacrifice procedural efficiency in order to accommodate unreasonable demands by a party regarding procedure.
5. In addition to the general power in article 19(2), the tribunal is given a number of specific powers. These include the power to grant interim measures contained in articles 17 and 17A and the power to appoint an expert witness, which is conferred by article 26.
6. On terms of Article 2(1): *"The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each*

*other with a view to agreeing on an efficient, economical and fair process for the taking of evidence."*

7. Where there is more than one expert, appointed by the different opposing parties, Article 5 applies.
8. To curtail the length of proceedings, the tribunal may order that the different experts submit an Experts Report, which contains their qualifications, findings, his present and/or past relationship with the any of the parties, a description of his instruction, his opinions, and a statement of fact upon which the opinions are based, and any conclusions reached.
9. The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.
10. This has the effect of a joint minute used during court proceedings and is an expedited manner in which to deal with opposing experts and to curtail the outstanding issues.
11. When it comes to oral evidence, each party's representative, and the tribunal has the right to question the expert witness and test their findings. The Tribunal should only take in an inquisitorial role rather than an accusatorial role, and be wary of descending into the arena.
12. It might also be prudent to separate the process into different phases and deal with the expert witnesses separately to the main issues or any other issues.

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**QUESTION 7**

1. The fact that X was found not to have breached the shareholders agreement, means that A failed to establish a case against X, and as such, although A was successful against Y and Z, if the claim had only been against X, A's claim would have been dismissed.

2. I am therefore not in agreement that the costs for X's legal representatives should not be considered merely because it is the same legal representatives of Y and Z.
3. An order is not granted against or in favour of a specific lawyer, but rather a party. As such, A should have been ordered to pay the legal costs of X, having failed to prove his claim against him.
4. This however leaves the conundrum that where a claimant is even partially successful, the costs should be awarded to him in toto.
5. I would therefore concur with the costs order, although I differ with the reasons provided.
6. A costs award is part of the award published and not a separate issue that can be appealed. The fact that an arbitrator made the wrong cost order cannot therefore be appealed or reviewed by a court, since it does not fall with in the ambit of Rule 32(2) of the Arbitration Act.
7. This was determined in *Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd* 2013 5 SA 84 (SCA).
8. Here the learned Judge in the court aquo, deemed it within the ambit of the Court, to not only hear argument on the cost order, but consider the counter claim in terms thereof.
9. The court held that where an arbitrator makes an error in law regarding the award of costs, in a private consensual arbitration, such error is not 'good cause' for remittal. The parties are bound by the award of the arbitrator save where a party can show that the costs award should be set aside in terms of Section 33 of the Arbitration Act. The basis for setting aside an award of costs is the same as that for setting aside an award on the merits.
10. According to the SCA at par 7: "*An arbitrator, like a court, exercises a discretion when he or she makes an award of costs.*". It can therefore not be set aside under the ambit of Article 32(2).
11. Section 33 of the Arbitration Act provides that an award can be set aside where the arbitrator has misconducted himself in relation to his duties as an arbitrator or where he has committed any gross irregularity in the conduct of the arbitration proceedings or where he has exceeded his powers, or where the award has been improperly obtained.

12. The finality of the award is one of the advantages of arbitration compared to litigation. “Finality” means that there is no right of appeal to the courts, where it appears that the arbitral tribunal’s award is incorrect on the merits or the cost order. However, the court does have the power to review the award, particularly if the procedure followed by the tribunal has been fundamentally unfair or where the recognition and enforcement of the award would be contrary to public policy.
13. The set of facts provided however does not fall within that ambit.