STUDENT MEMBERSHIP NUMBER: 2258 – FELLOWSHIP ADMISSION COURSE 2020
ASSIGNMENT M4-B/3 (MODULE 4) 23 SEPTEMBER 2020

QUESTION 1

1. Is there an enforceable arbitration agreement?

   Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree. (Article 3 of the UNCITRAL Arbitration Rules as revised in 2010, herein after referred to as **"the Rules"**).

2. How would an arbitral tribunal be appointed?

   (Article 6 1**"the Rules")**. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority.

3. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance 7 with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. Does the arbitral tribunal have jurisdiction to decide a dispute regarding the initial validity of the main contract?
   Arbitration legislation generally only applies to disputes which are arbitrable, that is to disputes which are permitted to be resolved by a private arbitral tribunal and are not reserved for national courts.

   This principle is set out in section 7, which however also includes three important qualifications. Firstly, other laws may exclude arbitration. Secondly, the arbitration agreement may not be contrary to public policy. Thirdly, the mere fact that another law confers jurisdiction on a particular court or other tribunal to decide certain disputes will not by itself be sufficient to make such disputes non arbitrable
   The most appropriate general test is that a matter will be regarded as arbitrable if is a matter which the parties are entitled to dispose of by agreement

The arbitral tribunal's decision on the merits of the dispute is known as an award. Therefor the arbitrator does not have jurisdiction to decide over the validity of the main contract.

4. Suggested improvements to arbitration clause to make it more effective?

Arbitration has been defined as "an adjudicative process which takes place pursuant to an agreement between the parties to a dispute, whereby that dispute is referred for final determination to an independent and impartial tribunal appointed by or on behalf of the parties". It follows from this definition that arbitration has five essential characteristics: 14
• It is a procedure for resolving disputes.

• It has a consensual basis derived from an enforceable agreement between the parties;
• The adjudicator or arbitrator is appointed by or on behalf of the parties.

• The agreement must contemplate that the arbitrator will proceed impartially and make an award after receiving and considering evidence and other submissions from the parties; and

• The arbitrator's award is final."

There is no indication as to how the tribunal should be appointed, which conflicts with the fourth criterion. The consequences of this flaw are aggravated by the fact that the applicable rules are not determined.

QUESTION 2

"impartiality"

Article 12 1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

"availability"

Article 11 When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable

doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

QUESTION 3

For ordinary commercial disputes, however, mediation is, generally speaking, probably the most appropriate form of ADR technique for inclusion in a multi-tiered dispute resolution clause as a stage before arbitration.

An arbitration agreement may take the form of a clause in a contract, in terms of which the contracting parties agree to refer any future disputes between them regarding that contract to arbitration on the basis provided by the arbitration clause. National arbitration laws and international conventions normally impose certain formal requirements for a valid arbitration agreement. The arbitration agreement is usually required to be in writing.

The drafter of an arbitration clause should consider some form of ADR (e.g. conciliation/mediation) be a precondition before resorting to arbitration? The rules that should apply, may be whether mediation should be a mandatory first stage before arbitration, drafters of commercial contracts often prefer to have mediation as an option rather than making it mandatory. Proponents of ADR however rightly contend that a mandatory ADR provision should come to be seen as best (dispute) management practice. Where the drafters of a two-stage dispute resolution clause provide for a mandatory reference to mediation as a prerequisite to arbitration, two further questions arise: will the provision for mediation be enforced by the courts and what is the effect of the existence of such a provision on the enforceability of the arbitration provision under national arbitration legislation and the New York Convention?

The question may be asked whether a first stage of a two-tiered dispute resolution clause providing that "any dispute arising out of this contract shall first be referred to conciliation under the UNCITRAL Conciliation Rules of 1980" is sufficiently certain to render it enforceable. When certain of the provisions of the UNCITRAL Conciliation Rules are examined, it is at least arguable that the above provision would not be enforceable unless it was amplified by further qualifications. **In the light of the aforesaid the provisions for negotiation is not enforceable in the present matter, as the provision is not qualified by further qualifications.**

In terms of Article 34. "Application for setting aside as exclusive recourse against arbitral award (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(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

((5) For the purposes of avoiding any doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of the Republic if— (a) a breach of the arbitral tribunal's duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to the applicant; or (b) the making of the award was induced or affected by fraud or corruption.

QUESTION 4

Confidentiality of arbitral proceedings 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.

The SOC must prove that the documents are required by reason of legal duty or is enforceable as a legal right. There is no evidence to that effect in the present matter, therefore there is no evidence in support thereof that the documentation should be disclosed.

30.1 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, <u>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</u>

legal proceedings before a state court or other legal authority.

30.2 The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26 and 27.

30.3 The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal. All concerned parties should therefore agree, prior to the documentation being disclosed as such.

29.1 The determinations of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal, unless otherwise directed by the LCIA Court. Save for reasoned decisions on arbitral challenges under Article 10, such determinations are to be treated as administrative in nature; and the LCIA Court shall not be required to give reasons for any such determination.

QUESTION 5

In terms of article 17 B, the arbitral tribunal may, unless otherwise agreed by the parties 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 issue of the award by which the dispute is finally decided, the arbitral tribunal orders a party to

(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.

Article 17 E. Provision of security (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.

Article 17 G. Costs and damages The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the

measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

"Anti-suit injunction" – is an order issued by a court or arbitral tribunal that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction or forum. If the opposing party contravenes such an order issued by a court, a contempt of court order may be issued by the domestic court against that party.

It is often used as a means to prevent forum shopping. In recent years many jurisdictions have placed a high standard to obtain an injunction such as where the proceedings are "oppressive or vexatious".

Anti-suit injunction refers to an extraordinary procedure where a court issues an order to the effect that proceedings in a second jurisdiction should not precede, necessary to prevent an irreparable miscarriage of justice.

Article 25 Interim and Conservatory Measures

25.1 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: (if) 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;

Article 17 J. Court-ordered interim measures 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 conditions set forth in article 17 is intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

14 UNCITRAL Model Law on International Commercial Arbitration 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.

QUESTION 6

The arbitral tribunal can include the following directions in its first procedural directive to ensure the most cost-effective, expeditious and procedurally fair manner in which to deal with conflicting views of parties' appointed expert witnesses:

In terms of article 4 of the Standard Procedure Rules of the AA, the arbitral tribunal may, as it deems fit, follow formal or informal procedures and receive evidence or submissions, orally or in, writing, sworn or unsworn, at joint meetings with the parties or, if the parties so agree, by the interchange of written statements or submissions, between the parties with copies to the arbitral tribunal, provided that each party shall be given reasonable opportunities of presenting evidence or submissions and of responding to those of the other party.

In terms of article 5 the arbitral tribunal shall have the power to depart from any statutory or common law rules of evidence to the extent that it deems reasonable provided that the rules of natural justice shall be observed. Question the parties or their witnesses on any matter relevant to the issues, make any enquiries as the arbitral tribunal considers necessary or expedient or rely, in its Award, on its own expert knowledge or experience in any field.

In terms of article 5 of the IBA Rules on the Taking of Evidence in International Arbitration, 2010

A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues within the time ordered by the Arbitral Tribunal, (a) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.

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.

In terms of article with respect to oral testimony at an Evidentiary Hearing:

(c) thereafter, the Claimant shall ordinarily first present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties'

questioning; (d) the Arbitral Tribunal may question a TribunalAppointed Expert, and he or she may be questioned by the Parties or by any Party Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts; (e) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase.

Article 5 can be modified by directing the parties to agree on facts in dispute and common cause fact and that experts witnesses only need to testify on the facts in dispute, which fall within their expert knowledge.

5. Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and 18 questioned by the Arbitral Tribunal may also be questioned by the Parties.

QUESTION 7

In terms of article 41 costs will be allocated as follows:

1. 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.

In the matter of **- Leadtrain Assessments (Pty) Ltd and Others v Leadtrain (Pty) Ltd and Others (427/2012) [2013]**

The appellants applied to the South Gauteng High Court for the award to be made an order of court, that prompted a counter-application by Mr Lilford for an order setting aside paragraph 4 (partially) and paragraph 5 of the costs award, alternatively, remitting those portions of the award to the arbitrator under **s 32(2)** of the Act for reconsideration.

7] An arbitrator, like a court, exercises a discretion when he or she makes an award of costs. In support of the counterapplication it is alleged by Mr Lilford that the arbitrator in this case misdirected himself in exercising that discretion. The central question is whether misdirection in the exercise of his discretion – if it occurred – entitles Mr Lilford to have the affected part of his award set aside and the matter remitted for reconsideration by the arbitrator.

The arbitrator gave no explanation for his decision not to award costs in favour of X, whilst A was not substantially successful in his claim against X.

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, but Mr Lilford does not seek to bring himself home on any of those grounds. On the contrary, conduct of that kind has been disavowed. He confines himself instead to **s 32(2)**, which provides as follows:

'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.'

In support of his submission that misdirection on the part of an arbitrator in exercising his discretion in relation to costs allows a court to set aside his award and remit the matter for reconsideration.

We have already said that the review grounds in s 33(1) have been disavowed in this case. The submission was instead that misdirection on the part of the arbitrator provided 'good cause' for the matter to be remitted under s 32(2). It is true that the term has a wide meaning – as this court said in *South African Forestry Co Ltd v York Timbers*[9] – but the term falls nonetheless to be applied in the context in which it is used. That context in this case is the **Arbitration Act, which** is directed at the finality of arbitration awards.

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*[10] – 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.[11] 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,*[12] 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.

The parties failed to address the arbitrator in their argument in respect of a costs order by the arbitrator as to the reason for the arbitrator's decision to make no costs order in favour of X, therefore the arbitration award is final. There are no allegations of anything more than a mere error on the part of the arbitrator in the present matter. The costs order made by the arbitrator should therefore be set upheld.