THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION

CAD/ARB/09/06

DR. CLEMENS FEHR …… APPLICANT

VERSUS

PROF. GEORGE KANYEIHAMBA …… RESPONDENT

RULING

The Applicant Dr. Clemens Fehr lodged this Chamber Summons Application, under **Sections 11** and **68** of the **Arbitration and Conciliation Act**, Chapter 4 Laws of Uganda (hereinafter referred to as the **ACA**), for the compulsory appointment of an arbitrator, with the Center for Arbitration and Dispute Resolution (hereinafter referred to as **CADER**) on 14th November 2006.

The Application was listed for hearing for 29th November 2006 at 10.00a.m.

The Affidavit of Service, sworn by one Alli Loka shows that the Chamber Summons were served upon the Respondent's Advocate Mr. Masembe Kanyerezi on 15th November 2006.

On 29th November 2006, at 9.58a.m., the Respondent's Affidavit in Reply sworn by Mr. Alex Buri, in opposition to the Application for the appointment of an arbitrator was filed at CADER.

The Applicant's Advocate, Mr. Okecha Michael, in order to file a comprehensive reply, requested for extension of time, to read the Respondent's Affidavit in Reply, which had been filed and served at the last minute on 29th November 2006,. The Applicant's prayer for extension of time was granted. The next hearing was set for 12th December 2006 at 10.00a.m, with the joint consent of both Counsel.

On 12th December 2006 the hearing commenced at 10.00a.m. but was rescheduled to 11.00a.m., because Mr. Alex Buri holding brief for Mr. Masembe Kanyerezi stated that Mr. Masembe Kanyerezi was held up in another court session. There was no explanation regarding the absence of the Respondent.

Owing to the fact that 12th December 2006 had been mutually agreed upon at the instance of both Counsel, I directed that the matter would be stood over until 11.00a.m. and that it would be advisable for the Respondent to also be

present in the session. The hearing commenced at 11.10a.m. and Mr. Masembe Kanyerezi joined the session at 11.26a.m., when the Applicant's Advocate had already started presenting his client's case.

The Respondent's Counsel insisted at this juncture that he had a preliminary objection to the application which in his view ought to have been heard immediately, given that it would dispose of the entire matter. Having listened to this argument, I directed that the preliminary points of objection would be raised in answer to the submissions made by the Applicant's Counsel. The delayed appearance was attributed by Mr. Masembe Kanyerezi to the High Court which had issued short notice to attend to a case which was not cited, but most importantly, that the High Court Summons as a rule of thumb override all other business in Uganda. I informed the Respondent's Counsel that the view, whilst most patronizing, would not be in my opinion be upheld by the High Court, for the judiciary cannot bear the responsibility for promoting inefficient performance of other institutions in the country, by advocating for intermittent interruptions, rather I believe that it is the inability of advocates to diligently appropriate and manage their time, which would be the cause of the problem. I believe if the Respondent's Counsel had notified all parties concerned in the said

High Court case that 12th December 2006, had already been reserved by the parties thirteen days earlier, when there was no conflict on the timetable of the Respondent's Counsel, then other convenient arrangements would have been made. This might explain why this rule of thumb cannot be traced in any legislation.

We then took a ten minute break to allow Mr. Masembe Kanyerezi to acquaint himself with the submissions which had already been made by the Applicant's Advocate.

This application is lodged pursuant to an arbitration clause arising from the Lease Agreement executed by the parties on 1st August 2006.

Clause 6 of the Lease Agreement reads as follows,

> *"In case any dispute or difference shall arise between the Parties hereto as to the constructions of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith then such dispute or difference shall be and is hereby referred to arbitration and final decision of a person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person*

> *to be appointed on the request of either party by the President for the time being of the Uganda Law Society."*

In the Affidavit sworn in support of the Application, the Applicant stated as follows: -

1. That in a letter dated 5th November 2005, attached as **Annex B**, the Respondent was requested to nominate an arbitrator and as it were there was no response.

2. That the Applicant's lawyers wrote to the President Uganda Law Society (U.L.S) to appoint an arbitrator as evidenced by **Annex C**, to the Applicant's Affidavit.

Annex C, which is a letter dated 18th September 2006 from Mwesigye, Mugisha & Co. Advocates addressed to the President U.L.S, reads in part as follows:-

> *"Wherefore we pray that you by virtue of the authority vested in you both by the said lease agreement and recognized by Section 11(4), (c) of the Arbitration and Conciliation Act appoint an impartial arbitrator, one who is less likely to be intimidated by the title of the defendant within 4 days from the date of this notice."*

3. That the response of the President U.L.S, was to pending the appointment of an arbitrator, more so in light of the objection by the Respondent's lawyers to the appointment of the arbitrator, as set out in **Annex D**, attached to the Applicant's Affidavit.

4. The letter from the President U.L.S, written on 10th October 2006, in part, reads as follows:-

> *"I have however received a letter from M/S MMAKS Advocates dated 4th October, advising that the matter is subject of a court case (see copy of the letter attached).*
>
> *In the circumstances and without prejudice, I would like to urge counsel to agree on how you intend to resolve the matter and advise me further.*
>
> *In the meantime, I will pend the appointment of an arbitrator until when I get a clear indication on the matter."*

5. The MMAKS letter dated 4th October attached to the response by the President U.L.S, which is part of **Annex D**, to the Applicant's Affidavit reads as follows:-

> *"We advise that the Applicant has filed a suit in respect of this matter being H.C.C.S No.76 of 2006 DR. CLEMENS FEHR –VS- PROF. GEORGE KANYEIMBA, which is before His Lordship Justice Mukiibi in the Land Division of the High Court at Kampala. (Copies of pleadings are enclosed).*
>
> *It is clear from the Plaint that Dr. Clemens Fehr has put before the Court all the matters in dispute between the Parties which were referable to arbitration. We filed our defence and did not object to the Court jurisdiction. In so doing Dr. Clemens Fehr waived the arbitration provision and we accepted his waiver. It is no longer open to him to seek to apply the arbitration provision.*
>
> *The purpose of this letter is to bring to your attention and to point out that no arbitrator in the dispute can now be appointed by you."*

The Respondent's reply to the Application is set out in the Affidavit in Reply sworn by the Advocate Mr. Alexander Buri, who deponed in reply to the Affidavit sworn by the Applicant as follows: -

> *"5. THAT instead of persisting in the appointment of an arbitrator the Applicant on the 9th March 2006 instead filed a suit in the* ***High Court, Civil Suit No. 76 of 2006, Clemens Fehr Vs. George Kanyeihamba*** *in relation to the matters in dispute which were put before the High Court, Land Division for determination and the said suit is still pending (Copies of the Plaint and Defence in the suit are annexed as "A" and "B" hereto);*
>
> *6. THAT in filing the suit the Applicant waived his right to arbitration which waiver was acceded to by the*

Respondent filing a defence in the suit and not seeking a stay of the proceeding and it is now too late in law for arbitration to be resorted to;

7. THAT further and in any event, this is not a case in which the parties have failed to agree on the arbitrator and even if it were, the arbitration clause provides for the President of the Law Society to be appointing authority in that circumstance to the exclusion of this "appointing authority" and this application is misplaced."

Dr. Clemens Fehr in his Affidavit in reply deponed as follows,

"2. That in response to paragraphs 5 and 6 thereto, I am advised by my lawyers Mwesigye, Mugisha & Co. Advocates; which advise I verily believe to be true that I did not waive my right to arbitration by filing HCCS No.76 of 2006 because the law is very clear in Section 5 of the Arbitration Act, Cap 4 Laws of Uganda which in effect provides that proceedings in the high court or in a magistrates court cannot bar arbitral proceedings.
*4. That copies of various letters dated 21st July 2005, 1st September2005 (sic) & 5th December 2005 dating way back to the days when the respondent was still represented by J B Byamugisha & Co. Advocates and even to the current lawyers for the respondent for the aforementioned in paragraph 3 above but all of which were to no avail are hereto attached and marked "**A", "B",** & "**C"** respectively. Annextures "A" & "B" were responded to by copies of letters annexed hereto as **"D"** & **"E";** but no mention was ever made concerning the issue of arbitrators.*

The **Annexes A, B** and **C** respectively read in part as follows,

"Annex A – dated 21st July 2005

From Mwesigye, Mugisha & Co. addressed to J.B. Byamugisha Advocates.

7. That this letter serves as notice in accordance to clause 4(b) of the agreement and we propose that your client names and arbitrator for our client's consideration in accordance with clause 6."

"Annex B – dated 1st September 2005

From Mwesigye, Mugisha & Co. addressed to J.B. Byamugisha Advocates.

We are still awaiting the nomination of an arbitrator by your client for our consideration and if we do not hear from you within fourteen (14) days from the date hereof, we request the President Uganda Law Society to appoint one by copy of this letter as provided for in the agreement."

"Annex C – dated 5th December 2005

From Mwesigye, Mugisha & Co. addressed to MMAKS Advocates.

Our client also has issues over boundary and registration of the lease which has never been addressed by your client.

Accordingly we invoke clause 6 of the lease agreement for arbitration of the same and here to (sic) forward the following Arbitrators for your consideration and approval.

i) Chief Government Surveyor
ii) Chairperson of the Association of Surveyors
iii) Chairperson Judicator Services Commission.

Kindly confirm and revert to us so that we can put this matter to rest".

Annexes D and **E** are replies written the Respondent's Advocates, J.B. Byamugisha Advocates. **Annex D** dated 25th July 2005 is in reply to **Annex A** dated 21st July 2005, whilst **Annex E** dated 2nd September 2005 is in reply to **Annex B** dated 1st September 2005. Neither **Annex D** nor **Annex E** addresses the issue of appointment of an arbitrator.

The Applicant's Advocate in his submissions stated that the basis of the application was **Clause 6** of the Lease Agreement. In brief, that the Application was triggered by the Respondent's inaction on the issue of appointment of an arbitrator, evidenced through various communication which had been exhibited in this Application.

In response to the claim that the Applicant had waived the right to resort to arbitration, Mr. Okecha Michael relied upon **Section 5 ACA**, which he submitted allowed any party to an arbitration agreement to apply for stay of proceedings.

Mr. Michael Okecha then stated that the Application to stay proceedings had already been filed in the High Court and referred me to the Affidavit in Support of the Application, only to realize that the Stay Application had not been annexed to this Application. Mr. Okecha Michael then prayed that judicial notice of the Stay Application be taken by the Tribunal. Applicant's Counsel wound up the submissions by praying that CADER exercises its statutory power and appoints an arbitrator.

The Respondent's Counsel Mr. Masembe Kanyerezi in his brusque opening remarks, submitted that the entire application was without merit and should be disallowed on two grounds.

The first ground, was that CADER lacked jurisdiction because the application was based on **Section 11(3) ACA**, which was wholly inapplicable in this case. He further submitted that **Clause 6** of the Lease Agreement was within the four squares of **Section 11(2) ACA**. Further that both **Sections 11(2)** and **11(3) ACA** only applied when there was no existing procedure on the appointment of an arbitrator, agreed between the parties.

The remedy, in the opinion of the Respondent's Counsel, lay in reference of the matter to the President U.L.S.

Thus when the President U.L.S observed that,

> *"In the circumstances and without prejudice, I would like to urge counsel to agree on how you intend to resolve the matter and advise me further.*
>
> *In the meantime, I will pend the appointment of an arbitrator until when I get a clear indication on the matter."*

it was incumbent on the Applicant to act as advised, otherwise the Applicant's folly would create two "tribunals" handling the same dispute contemporaneously, with the added risk of inconsistent findings.

To support this, Respondent's Counsel then referred to the distinguished work by **Mustill & Boyd, The Law and Practice of Commercial Arbitration in England**, Second Edition, Butterworths, 1989, page 156-157, which reads as follows,

> *"**2 Practical applications of the residual jurisdiction***
> *The rules set out above are of practical importance in four situations.*
>
> *(a) Proceedings brought in spite of arbitration agreement.*

> *First, the claimant institutes an action in the courts. Here, unless and until an application is made to stay the action, the jurisdiction of the courts takes effect in full; the action proceeds in precisely the same way as if there had been no arbitration agreement; and, equally, the judgment of the Court is unconditionally binding on the parties. The situation is precisely the same if an arbitration is subsequently started by one or other of the parties. Until the Court decides to grant a stay, it is the action which is the medium for determining the dispute, since there cannot be two tribunals with co-existent powers to make binding decisions as to the rights of the parties."*

Given that **Clause 6** of the Lease Agreement, gave the procedure available in the unfortunate event that the parties failed to appoint an arbitrator then, the Applicant was precluded from applying to CADER and worse still there existed no prerequisite grounds which founded CADER's jurisdiction to entertain the application, Respondent's Counsel further argued.

Turning to **Section 11(4)(c) ACA**, Respondent's Counsel submitted that Applicant's Counsel was right not to refer to it because it was inapplicable and in any event the third party, that is the President U.L.S, had not failed to perform its duty, but merely suspended performance of its duty. For this reason the application to CADER was misconceived.

Secondly, Respondent's Counsel submitted that instead of the Applicant persisting in the appointment of an arbitrator, he filed a case in the Land Division, High Court – **H.C.C.S No.76 of 2006** (Civil Suit). That this Civil Suit has raised all matters related to the dispute. Further that the Civil Suit amounted to a waiver of the right to resort to arbitration on the part of the Applicant. The waiver occurred again when the Respondent filed the Written Statement of Defence, and, forfeited the right to apply for stay of proceedings under **Section 5 ACA**. The right to apply for stay of proceedings could only accrue to the Defendant in the Civil Suit. For this reason, the Respondent's Counsel submitted that it was now too late for the Applicant to resort to arbitration. Mr. Masembe Kanyerezi then submitted that a High Court authority to this effect existed, which he would submit later to the CADER and Applicant's Counsel the next day – this never occurred.

Respondent's Counsel concluded by praying that the Application should be dismissed with costs.

Applicant's Counsel in reply stated that Section **5 ACA** vested rights in any party interested in invoking the arbitration clause. He found the opinion of the distinguished authors Mustill & Boyd inconsistent with the substance of

Section 5 ACA, which accommodates the concept of waiver. He reasoned that if the filing of a Written Statement of Defence constituted a waiver then **Section 5 ACA** would not exist at all. He also observed that the **Section 11 ACA** is not to be read in entirety as had been submitted by Respondent's Counsel, because all subsections were mutually independent. He was of the opinion that the President U.L.S had failed in his duty to appoint an arbitrator as had been requested by the Applicant, and cited the provisions of **Section 11(4) ACA** in aid of his interpretation. At this point Respondent's Counsel interjected and stated that since the Chamber Summons application did not cite **Section 11(4) ACA** then the Applicant's Counsel could not rely upon it. Lastly, he submitted that **Clause 6** procedure had been exhausted by the Applicant in seeking it's enforcement, hence this Application.

The **ACA** is derived in part from the **United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration** (hereinafter referred to as the **MAL**).

The **MAL** is contained in the United Nations document A/40/17, Annex I, which was adopted by the United Nations General Assembly on 11th December 1985; this can be downloaded from the website link,

http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/477/79/IMG/NR047779.pdf?OpenElement.

Uganda, like many other nations adapted the **MAL** with some modifications. In passing it should be noted that this has enabled created a bigger body of precedent law from adapting countries which can be referred to other than case law from United Kingdom as was previously the case in past legislation which was derived from United Kingdom.

Thus **Section 11 ACA** is derived from **Article 11 M.A.L**, which reads as follows,

> ***"Article 11. Appointment of arbitrators***
> *(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 party fails 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 or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the

> *advisability of appointing an arbitrator of a nationality other than those of the parties."*

Section 5 ACA, which has been cited by both Counsel, is derived in part from **Article 8 M.A.L**, which reads as follows,

> *"**Article 8. Arbitration agreement and substantive claim before court***
> *(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*
>
> *(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."*

I now turn to consider the case as presented by both parties. To begin with I am find am unable to take judicial notice of the Applicant's application to stay the High Court proceeding because this was not tendered in evidence by the Applicant.

The **Mustill & Boyd** text book cited cannot also be taken into account, in this instant case. It is a 1989 Edition. The United Kingdom law which the

authors comment upon is set out in Appendix 1 and these include the Arbitration Act 1950, Arbitration Act 1975 and Arbitration Act 1979. Since 17th June 1996, the effective law on arbitration in the United Kingdom has been the Arbitration Act, Chapter 23, which was enacted pursuant to the **MAL**. In any event the passage cited from the text by the learned authors Mustill & Boyd relates to court proceedings brought in spite of the arbitration agreement, whilst this Application is one regarding the compulsory statutory powers CADER may exercise in light of default to procure the appointment of an arbitrator by one of the parties to the arbitration agreement, it is not about the competing jurisdiction between courts and arbitral tribunals.

In any event, the issue of competing jurisdiction between arbitral tribunals and courts, is now addressed by **Sections 5(2), 9** and **16(8) ACA**, which are *pari materia* to **Articles 8(2)**, **5** and **16(3) MAL** respectively. In brief Sections **5(2)** and **16(8) ACA** confirm that the arbitral tribunals can proceed to handle matters placed before them notwithstanding that there are pending court applications, more because **Section 9 ACA** stipulates that the powers of the courts in matters governed by the arbitral legislation are limited to the prescribed instances set out in the **ACA -** thus there is no conflation. The

totality of the above is that in an application such as this it matters not that there is a court case. This is because the matters which the courts are empowered to resolve pursuant to **Section 9 ACA** are not related to merits of the case, but issues which support the arbitral process either affirming the validity of the concluded arbitral process or by checking the excesses or failures of either the parties or the arbitral tribunal.

It is important to note that the arbitration clause unlike other provisions in an agreement is one which bestows a mutual obligation upon both parties. This is what a third party or institution or an appointing authority ought to address it's mind to, when requested by a party to perform the function of appointing an arbitrator.

Lord Macmillan in ***Heyman v Darwins***, [1942] All ER 337, 346(D-E), expressed the complimentary nature of an arbitration clause as follows,

> *"I venture to think that not enough attention has been directed to* ***the true nature and function of an arbitration clause in a contract****. It is quite distinct from the other clause. The other clauses set out the obligations which the parties undertake towards each other* hinc inde*; but the arbitration clause* ***does not impose on one of the parties an obligation in favour of the other****. It embodies the*

> *agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal* ***of their own constitution****. Moreover, there is this very material difference that, whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement."*(bold emphasis mine).

Thus Mr. Alex Buri's averment in the Affidavit in Reply that Applicant failed in "persisting in the appointment of an arbitrator" indicates that the Respondent was not advised or informed, by his Counsel, that the obligation to secure the appointment of an arbitrator is an obligation which is mutually binding upon the parties. If anything in failing to ensure the performance of the mutual obligation, the Respondent denied himself from exercising the "party autonomy" right guaranteed by **Section 11 ACA**, that is, to participate in the setting up of an arbitral tribunal of their "own" constitution.

This mutuality is restated in the ruling of Catherine Muganga in ***B.M. Steels Ltd v. Kilembe Mines***, CAD/ARB/10/04, 15th July 2004 (unreported) in the

form of prudential normative response expected of a respondent party in receipt of a request to concur in the appointment of an arbitrator.

The prudential normative response was set out as follows,

> *"It is prudent to point out at this stage three possible courses of action which could have been taken by the Respondent:*
>
> *a) First the Respondent would have consented to the Arbitrator suggested by Applicant with a view of having a one-person arbitral panel.*
>
> *b) Secondly the Respondent would oppose the Applicant's nomination by indicating another nominee Arbitrator whilst inviting the Applicant to consent to the Respondent's nomination with a view to having a one-person arbitral panel.*
>
> c) *Thirdly the Respondent would oppose or consent to the Applicant's nomination. Nevertheless the Respondent would then proceed to indicate another Nominee chosen by the Respondent and invite the Applicant to consent to the second nomination person with a view of having a two person tribunal."*

From the evidence tendered, I find that with regard to the appointment of an arbitrator pursuant to **Clause 6** of the Lease Agreement, the following events took occurred.

1. One thousand four hundred and fifty days later after execution of the Lease Agreement, the Applicant on 21st July 2005 (**Annex A -** Applicant's Affidavit in Rejoinder) proposed that the Respondent

should name an arbitrator, which nomination the Applicant would take into account.

2. Forty two days later, after the first proposal dated 21st July 2005 (**Annex A -** Applicant's Affidavit in Rejoinder), the Respondent on 1st September 2005 (**Annex B -** Applicant's Affidavit in Rejoinder), the Applicant reminded the Respondent that he was still awaiting the Respondent's nomination of an arbitrator. There was a further notification that the Respondent's nomination was to take place within fourteen days, after which the Applicant would apply to the President U.L.S to appoint an arbitrator.

3. Ninety five days after the second notice dated 1st September 2005 (**Annex B -** Applicant's Affidavit in Rejoinder), the Applicant on 5th December 2005 (**Annex C -** Applicant's Affidavit in Support of the Chamber Summons) nominated the Chief Government Surveyor, the Chairperson of the Association of Surveyors and the Chairperson Judicator Services Commission, and required the Respondent to confirm his approval of the nominations.

4. Two hundred eighty seven days after the issuing the third notice dated 5th December 2005 (**Annex B** – Applicant's Affidavit in Support of the Chamber Summons), the Applicant on 18th September 2006 (**Annex C -** Applicant's Affidavit in Support of the Chamber Summons) wrote to the President Uganda Law Society requesting him to appoint an arbitrator.

5. Fifty seven days after issuing the fourth notice dated 18th September 2006 (**Annex C - Applicant's Affidavit in Support of the Chamber Summons**), the Applicant filed the Chamber Summons Application, on 14th November 2006, for the compulsory appointment of an arbitrator by CADER pursuant to under **Section 11 ACA**.

Whilst the Applicant sought to have one arbitrator appointed pursuant to **Clause 6** of the Lease Agreement for a total of four hundred and twenty four days and again sought the same appointment pursuant to **Section 11 ACA** for another fifty seven days, the Respondent paid a blind eye to this request and Application.

Whilst the prudential norms listed in ***B.M. Steels Ltd v. Kilembe Mines***, CAD/ARB/10/04, on the one hand point out the proactive measures which parties can undertake to perform their part of the mutual obligation, they on the other hand illuminate the fact that non-performance of the mutual obligation imposed by **Clause 6** of the Lease Agreement, can only be interpreted as an act or omission aimed at frustrating performance of the mutual obligation.

I find that all of the Applicant's actions spread over four hundred and eighty one days, were within the intent of **Clause 6** of the Lease Agreement, whereas the Respondent's silence over the same period only served to grossly and unjustly delay the Applicant's right to invoke the right to arbitration and needless to say the Respondent's right to participate in constitution of a tribunal of their own choice, as was originally intended.

The Applicant's requirement on 1st September 2005, that the Respondent ought to reply in the affirmative within fourteen days, failing which the Applicant would lodge a request with the President U.L.S was well within **Section 11 ACA**, given that the time limit for appointment of an arbitrator only applies when three arbitrators are required by the parties - **Section**

11(3)(a) ACA. In this instant case **Clause 6** of the Lease Agreement stipulates that only one arbitrator shall be appointed.

The Respondent's Counsel submitted that CADER had no jurisdiction to entertain this Application because **Clause 6** only empowered the President U.L.S. to give relief to the parties.

Section 11 ACA sets out the chain-reaction-process, which dictates the relief the Applicant would resort to when the Respondent refused to comply with the request to appoint an arbitrator.

In the case of one-arbitrator appointments, the chain-reaction-process set out in the **ACA** is follows.

First chain-reaction-process - **Section 11(2) ACA** permits the parties to agree to on the procedure for appointing an arbitrator.

Second chain-reaction-process - **Section 11(3)(b) ACA** permits a party to lodge an application with the appointing authority, for the appointment an arbitrator, when the parties fail to agree upon one.

Third chain-reaction-process - **Section 11(4)(c) ACA** permits a party to lodge an application with the appointing authority, for the appointment an arbitrator, when the third party entrusted with powers to appoint an arbitrator, under the terms of a party agreed procedure fails to perform the function.

Given that **Clause 6** of the Lease Agreement envisaged an arbitrator either appointed directly by the parties or by the President U.L.S, in the event that the parties are unable to appoint one, it is beyond doubt that **Clause 6** of the Lease Agreement is well within the provisions of **Section 11(3) & (4) ACA**.

It should be noted that whilst **Section 11(3)(a) A.C.A.**, imposes a 30 day time limit for the appointment of three arbitrators, in the case of the appointment of one arbitrator, **Section 11(3)(b) A.C.A** provides no time limit. This therefore leaves it open to the either party to impose a time limit within which they require the appointment of the single arbitrator.

Therefore an applicant, in the case of a three-person arbitrator panel, would have to prove to the appointing authority two things. First, that the 30 days had passed. Secondly, that no arbitrator had been appointed. In the case of a

one-person arbitrator panel the applicant need only prove non-adherence to the self-imposed time limit set by the party requesting the appointment.

The notice dated 18th September 2006, written by the Applicant to the President U.L.S imposed a 4 day time limit, within which an appointment was to be made. The Respondent's replied on 4th October 2006 opposing the Application. The President U.L.S replied on 10th October 2006. It is evident that neither the President U.L.S nor the Respondent's Counsel took note of the 4 day time limit which was imposed by the Applicant. Upon expiration of the 4 day limit the Applicant was at liberty to lodge an application for the compulsory appointment of an arbitrator, on any date he so chose.

Turning to the response the Applicant received from the President U.L.S., I am of the opinion that once the Applicant had lodged the Request the President U.L.S had only two options available, to either appoint an arbitrator or decline to appoint an arbitrator, but not to keep the parties in limbo, by urging "counsel to agree" on how they intended to resolve the matter and advise him further.

From the second paragraph of the response by the President U.L.S., it can be gathered that "the matter" referred to is that which is the "subject matter of a court case….". There is a sense of weariness when the President U.L.S observes that he would in the meantime "pend" the appointment of an arbitrator until such a time he got "a clear indication of the matter".

The duty of a third party or the appointing authority to appoint an arbitrator is similar to the extent the same consideration is taken into account.

First, account must be taken of the fact of existence of the arbitration agreement, which must be evidenced in writing (**S.3(2) A.C.A**) whether agreed within the contract giving rise to the claim or after the claim has arisen. Secondly there must be cogent evidence that the other party has failed to consider the nomination or appointment request made by the complainant. Thirdly, where applicable that a third party has failed to exercise powers vested in them by virtue of an agreement between the parties.

In this case I find that CADER has jurisdiction to consider this application given that the President U.L.S in pending the appointment, did actually fail

to exercise or decline to the powers entrusted to him by **Clause 6 Lease Agreement,** which are recognized by **Section 11(4)(c) ACA**. The dilemma of the court case (HCCS No.76 of 2006, Dr. Clemens Fehr v. Prof George Kanyeihamba) which was presented to the President ULS and then to CADER is irrelevant, because it is essentially about the jurisdiction of the arbitral tribunal. The issue of the jurisdiction of the arbitral tribunal is not one to be considered by the "third party, including an institution" or the "appointing authority" or the Courts. **Section 16 ACA** empowers the arbitral tribunal to consider jurisdictional competence to handle a case lodged before it. As a result **Section 11(6) ACA** stipulates that the chief consideration to be raised by the parties, in applications such as this, is the qualifications and other considerations as are likely to secure the appointment of an independent or impartial arbitrator.

In any event upon reading of the Plaint and Written Statement of Defence in HCCS, No.76 of 2006 (Land Division), there is no indication that the appointment of an arbitrator or specific performance of **Clause 6** Lease Agreement is sought by the parties before the High Court.

Respondent's counsel then referred to the sub-title of the Chamber Summons Application which read ***"[Under Ss 11(3) & 68 of the Arbitration***

and Conciliation Act Cap 4 & Rule 13 of the Arbitration Rules.]" and submitted that the omission to refer to **Section 11(4)(c) ACA**, barred the Applicant from referring to the failure by the President ULS to appoint an arbitrator. This is a disingenuous argument, given that there is no provision in the **ACA** which stipulates that the form of the Application must indicate with precision the Section relied upon, otherwise the right of the Applicant to lodge this Application is extinguished. Moreover, whilst on the one hand the failure by the Respondent and the President U.L.S to appoint an arbitrator is well articulated in the Applicant's Affidavits, on the other hand Mr. Alex Buri in the Affidavit in Reply depones that the arbitration clause provides that the President of the Law Society is the appointing authority. This is blowing hot and cold, that the Applicant is precluded from referring to the actions of the President U.L.S, but the Respondent can make reference to the powers of the President U.L.S. The acts of the President U.L.S having been sufficiently evidenced in the affidavit cannot be ignored by CADER when handling a compulsory motion for appointment of an arbitrator such as this one. This is the nature of evil **Article 126(2)(e) Constitution of the Republic of Uganda, 1995** seeks to cure in stipulating that substantive justice shall be administered without undue regard to technicalities.

Mr. Alex Buri further depones as follows,

> *"7. THAT further and in any event, this is not a case in which the parties have failed to agree on the arbitrator and even if it were, the arbitration clause provides for the President of the Law Society to be the appointing authority in that circumstance* ***to the exclusion of this "appointing authority"*** *and this application is misplaced."*(emphasis added).

From the above averment there is the startling proposition, which though it cannot be deciphered from **Clause 6** Lease Agreement, that parties can write an exclusion clause barring CADER from performing it's statutory powers under **Section 11 ACA**.

This construction is doubtful given that the **Section 11 ACA**, clearly distinguishes "appointing authority" from "a third party including an institution" by stipulating that the appointing authority is only vested with jurisdiction when either a party fails to agree on the appointment of an arbitrator or a "third party including an institution" fails to perform a function entrusted to it under that procedure. The legislature went a further step in **Section 68(a) ACA** to also vest the performance of **Section 11** functions in CADER, presumably because there was a significant absence of Alternative Dispute Resolution service providers during the lifetime of the repealed legislation. The legislature in the same breath in Section 2(1)(a)

ACA defined an "appointing authority" to mean an institution, body or person appointed by the Minister to perform the functions of appointing arbitrators and conciliators. So an "appointing authority" in the context of **Section 11 ACA**, can only be CADER as designated by the legislature including persons appointed by the ministerial appointment, and not persons deriving the power from contractual clauses; the latter would within the language of **Section 11(4)(c) ACA,** be the "third parties" or "institutions". Thus the President U.L.S would in the context of **Section 11 ACA** be 'the third party including an institution". The nature of exclusion which is permitted by **Section 11 ACA** is one which is directory on the procedure to be followed by the third party including an institution, say if both parties agreed that the President U.L.S was to be given 30 days before he would deliver his decision, this would be the kind of issue "*the agreement otherwise provides, for securing the compliance with the procedure agreed upon by the parties*" which CADER would have to take into account.

In the circumstances, I find the application has merit.

Neither of the parties suggested any qualifications or other considerations CADER should take into account prior to appointment of an arbitrator.

In view of the above, I appoint the Mr. Samuel Wako Wambuzi (retired Chief Justice Emeritus) as the Sole Arbitrator in the above mentioned matter.

Taking into account **Section 12(1) ACA** I am mindful of the fact that Mr. Samuel Wako Wambuzi (retired Chief Justice Emeritus) may on his own motion disclose circumstances which are likely to give raise to justifiable doubts as to his impartiality or independence.

In such a case the Applicant may be left at loss and compelled to lodge another application for consideration. This would mean more costs and delay to the Applicant.

To forestall such a situation I believe it is prudent in a case like this to list other arbitrators whose services may be called upon to resolve the dispute.

With this in mind I therefore name two other arbitrators. Either nomination shall only take effect if Mr. Samuel Wako Wambuzi (retired Chief Justice Emeritus) declines my appointment. Further the two nominated arbitrators

shall only be approached by the order of order precedence in which I have listed them.

1. Mr. Herbert J. Ntagoba (retired Principal Judge Emeritus).

2. Mr. Seth Manyindo (retired Deputy Chief Justice Emeritus).

I hasten to add that Mr. Samuel Wako Wambuzi or any of the aforementioned arbitrators should notify the CADER when accepting or turning down the nomination made in this Ruling. Costs of this Application shall be borne by the Respondent.

Delivered on 4th January 2007
by JIMMY MUYANJA,
EXECUTIVE DIRECTOR,
CADER.