

THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION

CAD/ARB/No.15 of 2011

CPC FREIGHT SERVICES LTD APPLICANT

v.

UGANDA PROPERTY HOLDINGS LTD RESPONDENT

RULING

This Application for the compulsory appointment of an arbitrator was filed on 30th June 2011. The application was heard on 8th July 2011.

The application seeks for the appointment of an arbitrator to determine the dispute which has arisen between the parties and an order for costs.

The parties executed a Contract for the provision of Management Services for the Management of Inland Car Port in 2009.

Ojambo Robert Mugeni, counsel for the Applicant submitted that a dispute has arisen because, the Applicant contends that the Respondent illegally terminated the contract.

It was also submitted that Clauses 14.2 and 17.2 of the contract, which contains the arbitration clause, applied as long as the Applicant was not satisfied with the manner in which the contract was terminated.

Applicant counsel then referred to Para.7 of the Affidavit deposed to by Anthony Okwenye and the Annex C communication.

Para.7 evidences the fact that the arbitration proceedings were commenced on 15th March 2011 when the written request to refer the dispute to arbitration was made. Contrary to Para.7, the document counsel pointed out is Annex B2.

Applicant counsel then noted this Application was necessitated by the Respondent's written confirmation dated 8th April 2011 (Annex D), which turned down the invitation to refer the matter to arbitration.

In Reply, Respondent counsel submitted that CADER should not appoint an arbitrator, because:-

1. Assuming the Applicant was relying on Clause 14, then the lapsed 45-day period, deductible from a combined reading of Clauses 14(1)(g), 14.2 and the termination letter dated 16th February 2011 (Annex B1), means that the arbitral tribunal had no jurisdiction to handle the dispute between the parties.
2. Again if it were assumed, that the Applicant was proceeding under Clause 17, then the lapse of the 28-day period, left the arbitral tribunal with no jurisdiction.
3. This Application was brought two and a half months later, after the contract had been terminated, well above the time limit of 28 or 45 days referred to above.
4. There had to be a dispute arising from an event. In this case the Respondent terminated the contract because the Applicant had failed to remit fees due under the contract. A fact not disputed by the Applicant at all.
5. Lastly that the Respondent, had filed a suit in the High Court, after termination of the contract. This is ***Uganda Property Holdings Ltd v. CPC Freight Service Ltd***, HCCS No.240 of 2011, (Commercial Court Division).

Counsel Pius Olaki in counter reply, submitted that the High Court Civil suit was in itself manifestation that a dispute existed between the parties.

Further expiration of the time limit raised by the Respondent, is for determination by the arbitration tribunal. In any event, whereas the termination was issued on 16th February 2011 (Annex B1), the notice to commence arbitration proceedings was issued on 15th March 2011 (Annex B2) and a further notice dated 31st March 2011 (Annex C).

I shall now deal with the application.

Does an arbitration agreement exist between the parties?

The most critical test is whether an arbitration clause actually exists. The Applicant need only prove that a written arbitration agreement exists.

In this case I have to consider the following contractual clauses.

“14. Termination

14.1 The Uganda Property Holdings Limited may, by not less than sixty days written notice of termination to CPC Freight Services Limited (except in the event listed in paragraph (f) below, for which there shall be a written notice of not less than sixty days), such notice to be given after the occurrence of any of the events specified hereunder numbered (a) to (h) terminate the Contract of:

(g) if the CPC Freight Services Limited fails to comply with payment within 15 days when the amount falls due.

14.2 If either Party disputes whether an event specified in Clauses 14.1 or Clause 14.2 has occurred, such Party may, within forty-five days after receipt of notice of termination from the other Party, refer the matter to arbitration pursuant to the Arbitration Clause and the Contract, shall not be terminated on account of such event except in accordance with the terms of any resulting arbitral award. [**Emphasis mine**].

17 Settlement of Disputes

17.1 The Uganda Property Holdings Limited and the CPC Freight Services Limited shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with the Contract or interpretation thereof.

17.2 If the parties fail to resolve such a dispute or difference by mutual consultation within twenty eight days from the commencement of such consultation, either party may require that the dispute be referred for

resolution in accordance with the Arbitration Law of Uganda or such other formal mechanism specified in the SCC.”

In this case the arbitration clause has been proved to exist in Clause 17.2.

Clause 14.2 merely refers to the arbitration clause as signified by the term “.... *refer the matter to arbitration pursuant to the Arbitration clause ...*”.

Is there a dispute between the parties?

At this stage it is a prima facie test, which determines whether there is a dispute or not.

The telltale mark is that the parties are at loggerheads. It suffices that one party contends that it is aggrieved and that the Respondent has not settled the claim to its satisfaction.

The question then, is whether the notice of the existence of a dispute was issued.

The written notice to commence arbitration, set out in Para.4 Annex B, reads as follows,

“4. In the event that our agreement is nevertheless terminated, we are of the view that a serious dispute has now arisen between the parties and the same should accordingly be immediately resolved.

Therefore, in accordance with clause 14.2 and 17 of our agreement, we hereby give notice and require that the disputes between the parties be referred to arbitration.”

The Respondent’s first reply, dated 23rd March 2011 (Annex B3), in part reads as follows,

“We note and observe your right to seek arbitration as per contract. However, failure to pay rent for our property can never be an issue for arbitration.”

The Respondent’s second reply, dated 8th April 2011 (Annex D), in part reads as follows,

“We have noted its contents but regret to inform you that based on your current and past failure to perform on this management contract, we are not ready to proceed to arbitration.”

This is patent evidence that the respondent was notified of the existence of a dispute.

Such is the case here with the Applicant. In any event, passing the prima facie test has nothing to do with the merits of the claim. It is only the arbitral tribunal, which can determine whether there is merit in the claim before it.

It should be also observed that the arbitration clause is a special agreement, which survives the termination of the agreement. This is because the clause sets up a forum where any outstanding issues shall be resolved. Indeed the Respondent can also refer any outstanding issue to arbitration.

To this extent, the reasonable person would ready accept any invitation to refer a matter to arbitration, after recognizing that it is a forum which either party can refer outstanding claims for resolution.

In effect it is a two-fold pledge. First, to collaborate with the aggrieved party to participate in collaborative venture to establish the tribunal. Secondly, to meet the aggrieved party, before the neutral arbitrator, who will determine the unresolved claim.

Refusal to honor this pledge, inevitably divests the Respondent of the opportunity to engage in a collaborative effort to establish the tribunal.

Are the time limits an essential consideration in the appointment of the arbitrator?

Section 11 Arbitration and Conciliation Act [ACA], mandates CADER to preside over applications, which contend either that a party has failed to appoint an arbitrator, or the procedure for appointment of an arbitrator has not precipitated any results.

The time limits, therefore, are not a crucial element, at this juncture since they relate to the merits of the claim.

The appointment of an arbitral tribunal does not estop the Respondent from raising the issue of expired time deadlines, which affect the jurisdiction of the arbitral tribunal. Indeed the Respondent is stirred by **S.4 ACA** not to sleep but to relentlessly raise this or any other objectionable ground before the arbitral tribunal or the High Court.

Be that as it may, protestations regarding the expiry of time limits can be raised before the arbitral tribunal under **S.16 (a) ACA** or before the High Court under **S.34 (1)(v) ACA**.

Is the current court relevant in determining whether an arbitrator should be appointed or not?

I have looked at the *Plaint*. It is *Uganda Property Holdings Ltd v. CPC Freight Services Ltd*, HCCS No.240 of 2011 (Commercial Court Division).

The complainant in that court case is not the Applicant. I therefore need not go further in examination of the *Plaint*. At this juncture the Applicant is not obligated to present its' intended claim against the Respondent, before me. Neither does the Respondent have a right to demand that the Applicant should table his claim when applying for the appointment of an arbitrator. The Applicant need only indicate that there is a dispute, which has not been resolved to its satisfaction by the Respondent.

I find merit in this application and the circumstances are appropriate for CADER to appoint an arbitrator as prayed for in this application.

I therefore appoint Solome Luwaga as the arbitrator.

Should Solome Luwaga not take up the appointment, for unforeseen reasons, I then appoint the Emeritus retired Principal Judge Herbert Ntabgoba or Dorothy Kiyimba Kisaka; they can only be approached in the sequential order listed.

Costs of this Application Motion shall be borne by the Respondent.

Dated at Kampala on the 10th day of July 2011.

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Jimmy M Muyanja
Executive Director, CADER.