THE REPUBLIC OF UGANDA
IN THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION
CAD/ARB/NO.10 OF 2012

TRAL LTD ……...…….. APPLICANT

v.

THE ATTORNEY GENERAL OF UGANDA …….. RESPONDENT

RULING

The Applicant filed this Application for the compulsory appointment of an arbitrator on 11th May 2012.

The Application was set down for hearing on 25th May 2012.

Counsel Mohmed Mbabazi represented the Applicant, whilst the Acting Director Civil Litigation, counsel Robina Gureme Rwakoojo represented the Respondent.

The Application is supported by an Affidavit deposed by Nyangoma Patrick, counsel for the Applicant.

The Respondent did not file any Affidavit in Reply.

The Applicant's submissions and Affidavit in Reply bear out the following:-

1. The Republic of Uganda represented by the Ministry of Gender, Labour and Social Development (MoGLSD) contracted Tral Ltd on 12th November 2009, to supply an executive tent.

2. The Applicant issued a Notice of Arbitration dated 12th March 2012.

3. The Applicant in Para (e) Notice of Arbitration stated that she had sought, in vain, payment of the second and last balance of 20%, accrued interest from 11th February 2011 and withholding tax receipts.

   The Respondent's failure to satisfy these claims is what caused the Applicant to declare the breach of contract and issue the Notice of Arbitration.
4. The Applicant has submitted that the Respondent did not take any action with regard to the Notice of Arbitration.

5. The Respondent's inaction is the reason why this Application for the compulsory appointment of an arbitrator was filed before CADER.

Respondent's counsel in her submission deemed this Application premature. This submission was first influenced by the 9th March 2011 letter from the Permanent Secretary MoGLSD, which sought to clarify the payment position.

Reference to this letter was submission from the bar, given that the Respondent had not filed an Affidavit in Reply.

In any event Applicant's counsel in his counter reply pointed out the 9th March 2011 was not in dispute.

What was in dispute was whether the Applicant had been paid after fulfilling her contractual obligations. This can only be resolved when the Respondent answers all queries to the Applicant's satisfaction.

Saville J., in ***Hayter v. Nelson***, [1990] 2 Lloyds Report 265, page 268, observed that,

> "The proposition must be that if a claim is indisputable then it cannot form the subject of a "dispute" or "difference" within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected - as indeed they were rejected by Mr. Justice Kerr (as he then was) in ***The M.Eregli***, [1981] 2 Lloyds Report 169 in terms approved by Justices Templeman and Fox in ***Ellerine v Klinger***, [1982] 1 W.L.R. 1375.
>
> As Lord Justice Templeman put it (at p. 1383):-
>
> > There is a dispute until the defendant admits that the sum is due and payable.
>
> In my judgment in this context neither the word "disputes" nor the word "differences" is confined to cases where it cannot then and then be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them."

Templeman LJ, in **Ellerine Bros Ltd v. Klinger**, [1982] 2 All E.R., 737 (at p.741) observed that,

> "…if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say, '*I don't agree*'.".

This is why I observed in the course of the hearing, that existence or non-existence of a dispute is a state of mind resident in either party.

The second reason for the Respondent's submission, was that the preliminary steps set out in the staggered dispute resolution clause, had been disregarded by the Respondent.

The pertinent clause states as follows,

> **GENERAL CONDITIONS OF CONTRACT FOR PROCUREMENT OF SUPPLIES**.
> **Settlement of Disputes**
> 10.1 The Procuring and Disposing Entity and the Provider 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.
> 10.2 If the parties fail to resolve such a dispute or difference by mutual consultation within twenty-eight (28) days from the commencement of such consultation, either party may require that the dispute be referred for resolution under the Arbitration law of Uganda or such other formal mechanism provided in the SCC.
>
> **SPECIAL CONDITIONS OF CONTRACT.**

GCC clause reference	Special Conditions
GCC 10.2	The formal mechanism for the resolution of disputes shall be in accordance with the Arbitration and Conciliation Act.Cap.Laws (sic) Uganda.

Respondent counsel submits that the Respondent has not taken any effort to resolve the dispute amicably.

Lord MacMillan in the House of Lords, seventy years ago, observed in ***Heyman v. Darwins***, [1942] All E.R. 337, 347D,

> "*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 clauses.*
>
> *The other clauses set out the obligations which the parties undertake to 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 one the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution*."

Dispute resolution clauses have since 1942, evolved with remarkable sophistication.

Lord MacMillan's observation today applies to any form of dispute resolution clause.

The exception arises only when the clause lays the duty squarely upon one party.

I am therefore of the considered opinion that the duty to realize the Clause 10 dispute resolution clause falls equally upon the shoulders of all parties.

There is nothing in Clause 10 clause, which suggest that the obligation to seek amicable resolution was the Applicant's sole duty.

On the contrary Clause 10 is most emphatic on the dual obligation, given that it states "*The Procuring and Disposing Entity **and** the Provider shall make every effort to resolve amicably…*" [emphasis mine].

The behavior of the parties is best followed in a tabular format.

	Date	**Action**	**Number of days passed since 12th March 2012 Notice**
1	12th March 2012.	Applicant sends out Notice of Arbitration. Penultimate paragraph on Page 3 "The Claimant proposed the Centre for Arbitration & Dispute Resolution (CADER) as the Appointing Authority in the appointment of the Arbitrators.	
2	11th May 2012.	Applicant files Application for compulsory appointment of the arbitrator	82
3	25th April 2012	Parties appear for Hearing	93

A total of 93 days passed since the Applicant issued out the notice of arbitration, up to the day of hearing of this Application.

Neither party evidenced any ongoing efforts to resolve the matter amicably.

Neither did the Respondent evidence any response to the Applicant's invitation to delegate powers to CADER to appoint the arbitrators.

The Respondent's silence in face of all communication amounts to waiver of the amicable resolution provision.

For example, it was open to the Respondent to first remind the Applicant of the amicable resolution undertaking. This step can also be repeated as a pre-emptive measure to the arbitration proceedings.

It was also open to the Respondent to set chart out steps for the amicable resolution phase.

The Respondent chose to stay silent both on the actual dispute and also activation of the dispute resolution clause.

I find that the Applicant has proved the Respondent's has been indolent with regard to the dispute resolution clause. This indolent mindset is one not to be encouraged, for it will most certainly lead to a drastic and catastrophic decline in confidence in the efficacy of dispute resolution clauses.

I therefore come to the conclusion that the Respondent has not lodged this Application prematurely.

This is a proper case to invoke the power to effect the compulsory of an arbitrator.

Every compulsory appointment of an arbitral tribunal only be cures the failure by the Respondent to honor it's obligation under the dispute resolution clause, in this case, the arbitration phase.

I have read Clause 10 set out in the GCC and SCC once more. It does not mention the number of arbitrators. I am therefore bound by Section **10 (2) Arbitration and Conciliation Act**, **Cap.4 Laws of Uganda** to appoint only one arbitrator. I therefore appoint James Nangwala as the arbitrator. In case James Nangwala is not be able to accept this statutory appointment for an unforeseen event under S.12(1) Arbitration and Conciliation Act, then the matter shall be referred to Rachel Kabala or Jackie Nakalembe.

Should James Nangwala not take up the appointment, then the alternative arbitrators they can only be approached in the sequential order listed.

Costs of the Application are awarded to the Applicant.

Dated at Kampala on the 27th day of May 2012.

……
Jimmy M Muyanja
Executive Director
CADER