

**THE REPUBLIC OF UGANDA**

**THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION  
(CADER)**

**CAD/ARB/NO/11 OF 2015**

**CHINA JIANGXI CORPORATION FOR  
INTERNATIONAL ECONOMIC AND  
TECHNICAL CORPORATION ..... APPLICANT**

**VERSUS**

**COTTON DEVELOPMENT ORGANISATION ..... RESPONDENT**

**RULING**

The Applicant prays that CADER appoints an adjudicator to resolve the dispute between the parties.

The ADR clauses at the heart of this Application arise from a contract executed between the parties on 12<sup>th</sup> June 2014.

The clauses read as follows: -

***Section 7. General Conditions of Contract for the  
Procurement of works***

***1. Definitions***

*1.1 (b) The ‘Adjudicator’ is the person appointed jointly by the Employer and Contractor to resolve disputes in the first instance.*

## **24. Disputes**

24.1 *If the Contractor believes that a decision taken by the Project Manager was outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to any Adjudicator appointed under the contract within 14 days of the notification of the Project Manager's decision.*

## **25. Procedure for Disputes**

25.1 *Unless otherwise specified in the SCC, the procedure for disputes shall be as specified in GCC 25.2 to 25.4.*

25.2 *Any Adjudicator appointed under the contract shall give a decision in writing within 28 days of receipt of a notification of a dispute, providing that he is in receipt of all the information required to give a decision.*

25.3 *Any adjudicator appointed under the contract shall be paid by the hour at the rate specified in the SCC, together with*

*reimbursable expenses of the types specified in the SCC, and the cost shall be divided equally between the Employer and the Contract, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.*

25.4 Any arbitration shall be conducted in accordance **with the arbitration law of Uganda**, or such other formal mechanism specified in the SCC, and in the place shown in the SCC.

<b>GCC Clause Reference</b>	<b>Special Conditions</b>
GCC 25.1	<i>The procedure for disputes shall be as specified in GCC 25.2 to 25.4</i>
GCC 25.3	<i>Fees and types of reimbursable expenses to be paid to the Adjudicator.  As per the Schedule of payments determined by the Center of Arbitration and Dispute Resolution</i>

GCC 25.4	<p><i>The arbitration shall be conducted in accordance with the Arbitration law of Uganda.</i></p> <p><i>Arbitration shall take place at: Kampala, Uganda.</i></p>
GCC 26.1	<p><i>The Appointing Authority for the Adjudicator is: <b>Center of Arbitration and Dispute Resolution</b></i></p>

When a dispute, the Applicant (then represented by Enoth Mugabi Advocates & Solicitors) issued a notice dated 13<sup>th</sup> January 2015 to “*refer the matter to either adjudication or arbitration pursuant to GCC 24 and 25 read together with the respective SCC*”.

The parties also appeared before me whilst under the belief that the Dispute Resolution clause was affected by the High Court (Civil Division) Temporary Injunction Order, which stipulated that the arbitration between the parties was to be concluded within forty days.

Paragraph 7 of the Respondent’s Affidavit in Reply, states that, “... *notwithstanding that the arbitration agreement provides for the resolution of disputes through adjudication under the arbitration agreement in the contract CADER does not have jurisdiction to appoint an Adjudicator at this stage and that it is also not a requirement under the contract for the parties to jointly appoint the initial Adjudicator*”.

Respondent’s Counsel submitted that GCC Clause 1.1(b) obligated the Employer and Contractor to jointly appoint the Adjudicator.

Further that GCC Clause 26.1, vests CADER with jurisdiction to appoint the Adjudicator only when: -

- i) the jointly appointed Adjudicator resigns;
- ii) the jointly appointed Adjudicator dies;
- iii) the parties are agreed that the Adjudicator is not functioning in accordance with provisions of the Contract; or
- iv) any of the three events above occur and the parties are still unable to jointly agree on the Adjudicator.

The GCC Clause 26, states as follows,

### **26. Replacement of Adjudicator**

*26.1 Should the Adjudicator resign or die, or should the Employer and the Contractor agree that the Adjudicator is not functioning in accordance with the provisions of the Contract, a new Adjudicator will be jointly appointed by the Employer and the Contractor. In case of disagreement between the Employer and the Contractor within 30 days, the Adjudicator shall be designated by the Appointing Authority designated in the SCC at the request of either party, within 14 days of receipt of such request.*

Lastly, it was submitted that the Respondent had not failed to accede to appointment of an Adjudicator. This is because the 13<sup>th</sup> January 2015 notice

was not sufficiently worded to attract the Respondent's concurrence. Worst still the Applicant had not replied to the Applicant's 10<sup>th</sup> June 2015 request to provide the Curriculum Vitae details of nominees listed in the 13<sup>th</sup> January 2015 notice.

To begin with, it should be noted in ***Board Of Governors, John Paul S.S. Chelekura v. Kheny Technical Services Ltd***, CAD/ARB No.22 of 2012, I held that,

*“The contract defines the adjudicator as: -*

*“1.1 (b)*

*The ‘Adjudicator’ is the person appointed jointly by the Employer and the Contractor to resolve disputes in the first instance.”*

*This definition is synonymous with the function of arbitration agreement set out in S.2(1)(e) Arbitration and Conciliation Act, Cap.4, [hereafter referred to as the ACA] which reads as follows: -*

*“arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not.”*

*There is no provision in the ACA, which restricts the definition of an arbitrator.*

*My considered conclusion is that the ACA legislation has to be purposefully construed.”*

It is true that the clauses elaborately obligate both parties to jointly appoint the adjudicator.

It is instructive to note that the Arbitration and Conciliation Act empowers parties to draft clauses in any manner. Therefore the parties are not limited in imposing any number of dispute resolution process tiers as are conceivably possible.

It is however not true that the clauses constitute a jurisdictional impediment to CADER effecting appointment of the adjudicator.

The turning point is that the S.11(4) ACA statutory relief to enforce compulsory appointments is triggered by failure of the consent processes agreed between the parties.

There are two stark examples of failure of the agreed party procedure.

First, the Respondent's request for nominee CVs which was issued one hundred and forty eight days after the Applicant's 13<sup>th</sup> January 2015 propositioning letter.

Secondly, the deposed admission by Godwins Awach in Para.7 that the Respondent had been previously advised that there existed no arbitration agreement.

In either case, the reality is that Kampala is literally speaking a small town, where the Respondent would have walked over, called or emailed the Applicant's advocate to clarify the basis of the arbitration proposition.

Against this background, I find that this Application has merits and I accordingly exercise the powers vested by S.11(4) ACA to appoint an adjudicator.

I shall list out the arbitrator in the supplementary Ruling.

I decline to make any order as to costs because the Applicant did not indicate the specific provision of S.11 ACA, which was being invoked. It is important that parties should be specific as to what provision they are invoking, given that it may help to focus the opposite party to comprehend the precise nature of statutory relief being invoked.

Lastly, I shall exercise the liberty to comment on the forty-day deadline set by the High Court.

The court record which was put on the CADER record, by consent of both parties does not indicate the factors which influenced the forty-day deadline.

There is no empirical evidence that ADR tribunals can as a matter of fact resolve the dispute within the ad hoc timelines set by the courts.

The courts do not run a forty-day timetable when resolving cases. Resolution of cases is the same task ADR tribunals have to perform, day in, day out.



Therefore I am compelled to observe that imposition of timeframes within which ADR tribunals must conclude disputes is misconceived to the extent that there is no legal basis for the judiciary to derive and impose such timelines.

In this instant case, there is nothing in the court record which shows that consideration was given either to the fact that the parties would have failed to set up an Adjudicator tribunal within five minutes or the timeline it would take to process a compulsory application under the ACA.

**Issued at Kampala on the 28<sup>th</sup> day of July 2015.**

**Jimmy Muyanja**  
**Executive Director.**