

THE REPUBLIC OF UGANDA

**THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION
[CADER]**

CAD/ARB/57/2017

DONTAK AGENCIES LTD ----- APPLICANT

VERSUS

NAKASERO HOSPITAL LTD ----- RESPONDENT

RULING

The parties executed the Grocery Supply Service Agreement.

The notice to refer the dispute to arbitration was served upon the Respondent on 25th August 2017. The Applicant deposes that the Respondent ignored the notice.

The Application and supporting Affidavit have been drafted by the Applicant; he also served the paperwork himself.

The Affidavits on record evidence that Respondent directed the Applicant to effect service upon Sebalu & Lule Advocates. That Sebalu & Lule Advocates acknowledged service, on 4th and 16th October 2017, but did not honor the designated hearing dates by sending counsel to represent the Respondent.

Neither the Respondent nor Sebalu & Lule have filed in any Affidavit in Reply challenging the Applicant's entitlement to orders prayed for.

The dispute resolution clause states,

“4. Dispute Resolution

No claim arising out of a breach of the terms and conditions of this agreement shall be subject to court process without prior arbitration and conciliation being sought by the parties.”

The clause as it stands requires the parties to submit to arbitration and conciliation.

The record does not show that the respondent and respondent's counsel participated as of right in constituting the conciliation or arbitration forums envisaged under Clause 4.

In the same vein, neither the respondent nor respondent's counsel have yielded to the served notices to appear before CADER.

We have previously held that all parties to alternative dispute resolution clauses are under a mutual obligation to fulfill the clause, by active participation failing which they unwittingly forfeit their statutory rights – *Uganda Post Ltd versus East Africa General Insurance Co. Ltd* [2009] UGCADER 4.

For example, **Section 62 Arbitration and Conciliation Act, Cap.4** (hereafter ACA) dictates that conciliation when invoked bars commencement of the arbitration proceedings.

As the record stands the Applicant has not invoked conciliation. The Respondent has not appeared to demand that conciliation should be resorted to first and foremost. In any event the conciliation only proceeds by consent. Conciliation unlike the arbitration agreement is not enforceable as of right under the ACA.

It has been held in the past that circumstances similar to what is pertaining here have frustrated the functionality of the conciliation agreement.

The remedy for any well intended after thought to revert back to conciliation lies in **Section 30 ACA**, which permits the parties to record a settlement before the arbitrator.

Section 30 ACA settlements arise from any settlement procedure, which may go beyond conciliation, as long as it has been devised and positively invoked by the parties. **Section 30 ACA** settlements are not limited as **Section 59 ACA**, which are bound by the conciliation regime.

When faced with a similar arbitration compounded clause, Justice J.K. Findlay of the High Court, Court of First Instance in *Westco Airconditioning Ltd versus Sui Ching Construction & Engineering Co. Ltd* [1998] HKCFI 946, held

10. The parties agreed to submit their disputes to the architect in the first instance. That reference may not be to arbitration because the architect may not give a decision at all, and, if he does, it may not be binding. But, whatever the outcome of the reference to the architect, the parties have the right to refer the dispute to what is undoubtedly an arbitration. An agreement that requires that the

parties submit their disputes ultimately to arbitration, although it may also require the parties in the first instance to follow a procedure - such as, attempting an amicable settlement - is, to my eyes, an arbitration agreement. A first instance procedure such as this is not in any way inconsistent with the concept of arbitration, or with our statutory definition of "arbitration agreement".

11. There is, therefore, as I see it, a clear "agreement by the parties to submit to arbitration" their disputes. It matters not, it seems to me, that the parties must, firstly, take some other step before this is done. It cannot possibly have been the intention of the parties that, if one of them issues a writ before that step is taken, their joint wish to avoid proceedings at law is frustrated. And it would make a complete nonsense of the arbitration agreement if it were so that one party could issue a writ on the eighty-ninth day, and the court was not bound to grant a stay then, but it must grant it on the ninety-first day because the period has then expired. I have no doubt that I have before me an arbitration agreement, and, that being the case, I am required by the statute to refer the parties to arbitration.

For clarity of mind I have warned myself that Justice J.K Findlay was not resolving an application for the appointment of an arbitrator. The jurisdiction to determine Article 11 UNCITRAL Model Law on International Commercial Arbitration applications for compulsory appointment of arbitrators, lies with the Hong Kong International Arbitration Centre (HKIAC) under Section 24 Hong Kong Arbitration Ordinance, Cap.609.

For the inquisitive mind the Hong Kong Legal Information Institute website¹ impressively lays out the comparative text of Section 24 from the first enactment to the current state as follows,

<p align="center">CAP 609 ARBITRATION ORDINANCE Section 24 Article 11 of UNCITRAL Model Law (Appointment of arbitrators) s24-20110601.html (20110601)</p>	<p align="center">CAP 609 ARBITRATION ORDINANCE Section 24 Article 11 of UNCITRAL Model Law (Appointment of arbitrators) s24.html (Current Version)</p>
<p>Line(s) 9-15: Caution : This is a past version. See the</p>	<p>Changed Line(s) 9-22:</p>

¹ <http://www.hklii.hk/compareversiondifference.php?lang=eng&cap=609&item=s24&oldversiondate=20110601&newversiondate=>

<p>current version for the latest position.</p> <p>24. Article 11 of UNCITRAL Model Law (Appointment of arbitrators) (1) Article 11 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(2) and (3)—“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.</p>	<p>24. Article 11 of UNCITRAL Model Law (Appointment of arbitrators) (1) Article 11 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(2) and (3)— “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.</p>
<p>Line(s) 17:</p> <p>(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.</p>	<p>Changed Line(s) 24-28:</p> <p>(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.</p>
<p>Line(s) 19:</p> <p>(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.</p>	<p>Changed Line(s) 30-42:</p> <p>(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.</p>
<p>Line(s) 21:</p> <p>(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</p>	<p>Changed Line(s) 44-55:</p> <p>(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</p>

<p>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.</p>	<p>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.</p>
<p>Line(s) 23-24:</p> <p>(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.”.</p>	<p>Changed Line(s) 57-67:</p> <p>(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.”.</p>
<p>Line(s) 26:</p> <p>(2) In an arbitration with an even number of arbitrators—(a) if the parties have not agreed on a procedure for appointing the arbitrators under article 11(2) of the UNCITRAL Model Law, given effect to by subsection (1), each party is to appoint the same number of arbitrators; or (b) if—(i) a party fails to act as required under an appointment procedure agreed upon by the parties; or (ii) in the case of paragraph (a), a party fails to appoint the appropriate number of arbitrators under that paragraph within 30 days of receipt of a request to do so from the other party, the HKIAC must make the necessary appointment upon a request to do so from any party.</p>	<p>Changed Line(s) 69-74:</p>
<p>Line(s) 28:</p>	<p>Changed Line(s) 76-83:</p>

<p>(3)In an arbitration with an uneven number of arbitrators greater than 3—(a)if the parties have not agreed on a procedure for appointing the arbitrators under article 11(2) of the UNCITRAL Model Law, given effect to by subsection (1)—(i)each party is to appoint the same number of arbitrators; and(ii)unless otherwise agreed by the parties, the HKIAC must appoint the remaining arbitrator or arbitrators; or(b)if—(i)a party fails to act as required under an appointment procedure agreed upon by the parties; or(ii)in the case of paragraph (a), a party fails to appoint the appropriate number of arbitrators under that paragraph within 30 days of receipt of a request to do so from the other party,the HKIAC must make the necessary appointment upon a request to do so from any party.</p>	<p>(2)In an arbitration with an even number of arbitrators—(a)if the parties have not agreed on a procedure for appointing the arbitrators under article 11(2) of the UNCITRAL Model Law, given effect to by subsection (1), each party is to appoint the same number of arbitrators; or(b)if—(i)a party fails to act as required under an appointment procedure agreed upon by the parties; or(ii)in the case of paragraph (a), a party fails to appoint the appropriate number of arbitrators under that paragraph within 30 days of receipt of a request to do so from the other party,the HKIAC must make the necessary appointment upon a request to do so from any party.</p>
<p>Line(s) 30:</p> <p>(4)In any other case (in particular, if there are more than 2 parties) article 11(4) of the UNCITRAL Model Law, given effect to by subsection (1), applies as in the case of a failure to agree on an appointment procedure.</p>	<p>Changed Line(s) 85:</p> <p>(3)In an arbitration with an uneven number of arbitrators greater than 3—(a)if the parties have not agreed on a procedure for appointing the arbitrators under article 11(2) of the UNCITRAL Model Law, given effect to by subsection (1)—(i)each party is to appoint the same number of arbitrators; and(ii)unless otherwise agreed by the parties, the HKIAC must appoint the remaining arbitrator or arbitrators; or(b)if—(i)a party fails to act as required under an appointment procedure agreed upon by the parties; or(ii)in the case of paragraph (a), a party fails to appoint the appropriate number of arbitrators under that paragraph within 30 days of receipt of a request to do so from the other party,the HKIAC must make the necessary appointment upon a request to do so from any party.</p>
<p>Line(s) 32:</p> <p>(5)If any appointment of an arbitrator is made by the HKIAC by virtue of this Ordinance, the appointment—(a)has effect</p>	<p>Changed Line(s) 87-89:</p> <p>(4)In any other case (in particular, if there are more than 2 parties) article 11(4) of the UNCITRAL Model Law, given effect to by</p>

<p>as if it were made with the agreement of all parties; and(b)is subject to article 11(5) of the UNCITRAL Model Law, given effect to by subsection (5)If any appointment of an arbitrator is made by the HKIAC by virtue of this Ordinance, the appointment—(a)has effect as if it were made with the agreement of all parties; and(b)is subject to article 11(5) of the UNCITRAL Model Law, given effect to by subsection (1).</p>	<p>subsection (1), applies as in the case of a failure to agree on an appointment procedure.</p> <p>(5)If any appointment of an arbitrator is made by the HKIAC by virtue of this Ordinance, the appointment—(a)has effect as if it were made with the agreement of all parties; and(b)is subject to article 11(5) of the UNCITRAL Model Law, given effect to by subsection (1).</p>
<p>Line(s) 53: URL: http://www.hklii.hk/eng/hk/legis/ord/609/s24-20110601.html</p>	<p>Changed Line(s) 110: URL: http://www.hklii.hk/eng/hk/legis/ord/609/s24.html</p>

Of further interest is that Section 10 Hong Kong Arbitration Ordinances² vests HKIAC with the discretion to appoint one or three arbitrators, when the parties have failed to agree on the number of arbitrators. In Uganda’s case Section 10(2) ACA commands that, whenever parties fail to agree on the number of arbitrators, then only one arbitrator shall be appointed.

Having noted abandonment of the conciliation procedure by both parties and the Respondent’s inaction on formulation of the arbitration tribunal, I find merit in the Application prayer for statutory appointment of an arbitrator.

The Applicant represented himself. He did not submit on the framework to be considered in allocating costs prayed for, in this admitted instance where he is not a licensed advocate.

I therefore shall make no order as to costs.

Dated at Kampala on the **23rd** day of **February 2018**.

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Jimmy .M. Muyanja
EXECUTIVE DIRECTOR

² <http://www.hklii.hk/eng/hk/legis/ord/609/s23.html>