THE **REPUBLIC OF UGANDA,**

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCMA NO 924 OF 2013

(ARISING FROM HCCS NO 70 OF 2013)

BRITISH AMERICAN TOBACCO UGANDA LTD}.....APPLICANT

VS

LIRA TOBACCO STORES}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant is the Defendant and filed this application under section 5 of the Arbitration and Conciliation Act cap 4 and Regulation 13 of the Arbitration Rules by chamber summons for orders that the dispute between the Plaintiff/Respondent and the Applicant/Defendant in civil suit number 70 of 2013 are the subject of an arbitration agreement between the parties and should be referred and resolved through arbitration. Secondly it is for orders that the arbitration clause is enforced by a stay of the suit and referral of the matters in dispute to arbitration. Thirdly for costs of the application be provided for.

The grounds of the application are that by a distribution agreement dated 1st of January 2010 between the parties, the Respondent agreed to distribute various cigarette and other tobacco products within a defined territory for the Applicant under the terms of the agreement. Secondly under clause 7.13.2 of the agreement, the parties agreed to settle all disputes amicably through mediation in the first instance and failure of which either party shall have the right to require the dispute to be preferred to arbitration. Thirdly civil suit number 70 of 2013 commenced by the Respondent is for breach of contract of the agreement among other things. Fourthly the dispute between the Applicant and the Respondent relate to the validity of one order made by the Respondent after expiry of the agreement which dispute is governed by clauses 1.1, 3.1 and 5.2

of the agreement. Fifthly the Applicant has also filed a counterclaim in respect of consequential acts governed under clause 9.1 of the agreement. Lastly that is just and equitable that the arbitration clause is enforced by stay of the suit and referral of the matters in dispute to arbitration.

The application is supported by the affidavit of Agnes Nantongo, legal Counsel of the Applicant Company conversant with the facts and authorised to swear the affidavit by the Applicant. The facts in support of the application disclosed by the affidavit is that on 1 February 2010 the Applicant and the Respondent entered into a distribution agreement for the distribution of cigarettes and other tobacco products. The agreement lapsed on 31 December 2012 as it was for a period of only one year. Upon lapse of the agreement, the Respondent filed civil suit number 70 of 2013 claiming breach of the distribution agreement by the Applicant. The dispute as framed by the Respondent is for breach of the agreement or clauses contemplated under the agreement for which the Respondent has claimed general, exemplary and punitive damages. The contention between the Applicant and the Respondent is that the agreement lapsed on the 31 December 2012 and was never impliedly extended by the Applicant as alleged by the Respondent since there was no valid order made for the supply of the products after the expiry of the agreement. The dispute between the parties by way of counterclaim relates to the performance of certain acts consequent upon expiry of the agreement governed by clause 9.1 of the agreement. In a letter dated 4th of February 2013, the Respondent was requested to comply with clause 9.1 of the agreement but has to date neglected to do so. The dispute between the parties is subject to an arbitration clause. The dispute is in respect to matters agreed to be referred to arbitration under the agreement. The arbitration agreement between the parties is valid, operative and capable of being performed in so far as it was the clear intention of the parties that the arbitration clause would survive upon lapse of the agreement as evidenced by the conduct of the parties and the nature of the disputes now arising between the parties. The arbitration clause was still operative after lapse of the agreement.

Nanteza Hasfah, the legal Counsel of the Respondent Company deposed an affidavit in reply on the behalf of the Respondent in which she opposes the Applicant’s application. Firstly she contends that the application was brought in bad faith due to the fact that there was a trade custom which the parties used to follow during their commercial transactions to the effect that

the prior distribution agreements were signed way after the expiry of the running agreement. During the lapse of such agreement the parties continue to do business and all distribution agreements were signed in the Months of June or July of every year. In appropriate cases, other considerations may be used by the court to exercise its inherent jurisdiction to try the dispute i.e. the parties may have waived their right to proceed with arbitral proceedings under the arbitration clause. Accordingly the Respondent waived its right to refer the matter to arbitration by filing the suit with this honourable court. The Applicant submitted to the same by filing a written statement of defence and counterclaim. It cannot turn round and prefer referring the matter to arbitration. Consequently the application ought to be disallowed.

During the scheduling conference, Counsel Michael Mafabi of Messrs Sebalu and Lule Advocates represented the Defendant while Sharon Tem of Tem Advocates and Solicitors represented the Plaintiff. On 30 October 2013 the suit was mentioned pending the fixing of application number 924 for stay and reference to arbitration whereupon it was agreed that the Applicant would file written submissions by 1 November 2013 and serve the Respondents Counsel. Secondly the Respondent will file and serve their reply by 7 November 2013 and any rejoinder would be filed by 11 November 2013. Ruling was reserved for the 14 November 2013 at 2:30 PM.

Applicants Submissions

The Applicant’s argument is that the distribution agreement referred to in the application under clause 7.13.2 has an arbitration clause where the parties agreed to settle all disputes amicably through mediation in the first instance and failure of which either party shall have the right to refer the dispute to binding arbitration. Secondly the suit as framed is founded on a distribution agreement. The gist of the Respondent/Plaintiff's claim is contained in paragraphs 3 and 4 of the plaint and clearly arises from the agreement. Even if the agreement had lapsed, the actions referred to by the Respondent which are the basis of its causes of action against the Applicant naturally arise from the agreement.

The Respondent's complaint as in paragraphs 4, 5, 6, 7 and 8 of the plaint relate to an order that was placed by the Respondent to the Applicant. By paragraph 13 of the Applicant’s defence in the main suit, the order is disputed by reason that it contravened the established order process of

the Applicant Company governed by clauses 1.1, 3.1, and 5.2 of the agreement. The contention is further supported by paragraph 6 of the affidavit in support of the application. The Applicant also disputes the formation of a contract pursuant to the order placed after the agreement had lapsed. To the extent that the Respondent alleges that the order was in compliance with the said agreement, which assertion is disputed by the Applicant, there arises a dispute as to the validity of the order which falls squarely within the ambit of the agreement and the arbitration clause under the agreement. Furthermore the Applicant filed a counterclaim against the Respondent. The counterclaim relates to the enforcement of clause 9.1 of the agreement which provides for determination consequences.

Consequently the Applicants Counsel submits that the dispute is the subject of an arbitration clause under the agreement between the parties. Both parties recognise the arbitration as an effective means of resolving any dispute that could arise. Counsel relied on miscellaneous application number **7062 of 2011, Power and City Contractors Ltd versus LTL Project (PVT) Ltd**. He further relied on the holding of Lord Macmillan in **Heyman vs. Darwin's [1942] 1 All ER 337 at 346**, for the true nature and function of an arbitration clause in a contract. Furthermore it is the Applicants case that section 5 of the Arbitration and Conciliation Act mandates the judge before whom proceedings have been brought in a matter that is the subject of an arbitration clause to refer the matter to arbitration if one of the parties applies for an order of reference. He further submitted that where a party has applied, section 5 makes it mandatory for the reference to be made by use of the word "shall". This was held by the Supreme Court **Civil Appeal number 02 of 2008, National Social Security Fund and Another versus Alcon International Ltd**. The Supreme Court held that an arbitration clause in the contract has an enduring and special effects and courts will always refer the dispute to arbitration where there is an arbitration clause in the contract. The position of law is set out in the cases of **Mugabo vs. Saava and 2 Others civil suit number 65 of 2012; Daniel Delestre and Six Others versus Hits Telecom (U) Ltd Miscellaneous Application Number 310 of 2013**.

The arbitration clause was still effective and operational. The lapsing of the agreement did not destroy the efficacy of the arbitration clause. Recognition of the contract by one party may relieve the other party of the obligation to carry out the other terms of the contract after the date of termination but the recognition does not destroy the efficacy of the arbitration clause

according to the case of **Atteridgeville Town Council and Another versus Costa Livanos t/a Livanos Brother Electrical [1991]**. Counsel referred to several authorities to the effect that a grievance will be arbitrable even though it arose after the termination of the collective bargaining agreement so long as the grievance was based on a right that accrued or had become vested under the agreement prior to its termination.

Respondent's submissions

The Respondents Counsel submits that for the last 22 years the Respondent has been the distributor of the Applicant's products in Northern Uganda under yearly distribution agreements. It was always the usage and custom that the **distribution agreements were signed** several months after the expiry of the running agreements. During the lapse of such agreements, the parties still continue to do business. All distribution agreements were signed in the months of June or July of every year.

On 30 August 2012, the Applicant raised concerns regarding the distribution agreement with the Applicant which concerns once addressed definitely would surpass the distribution agreement. Consequently there were obligations further created that surpass the agreed periods. On 31 December 2012, the Respondent raised an order to the Applicant for the distribution of tobacco which order was received and consideration paid. The obligations therefore surpassed the agreement period. The issues which arise can only be the subject of a full trial rather than arbitration proceedings.

The Respondents Counsel relies on annexure "B" to the affidavit in reply. She submits that without prejudice, there was a trade custom which the parties used to follow during the commercial transactions to the effect that the distribution agreements were signed every year after the expiry of the running agreement. During the lapse of such agreements, the parties still continued to do business. All distribution agreements were signed in the months of June or July of every year. Section 45 of the Evidence Act provides that where the court has to form an opinion as to the existence of any general custom or right, the opinion as the existence of that custom or right, of persons who would likely know of its existence if it existed, are relevant. Counsel relied on the decision of justice Kiryabwire in **Chevron Kenya Ltd versus Daqare Transporters Ltd miscellaneous application number 490 of 2008** for the term "trade usage".

She further relied on Black's Law Dictionary 7th edition for the definition of the term "trade usage". It is defined as the practice or method of dealing having such regularity of observance in the region, vocation, or trade that it justifies an expectation that it will be observed in a given transaction; a customary practice or set of principles relied on by persons conversant in or connected with a trade or business. After reference to several other authorities, the Respondents Counsel submits that to be binding upon the party, a trade usage must be sufficiently general so that the parties could be said to have contracted with reference to it. Counsel further referred to the Sale of Goods Act section 15 (c) and other authorities.

From the submissions, she prays that the court exercises its discretionary powers to try the matter as the trade usage, customs, commercial incidents and obligations under this case are far beyond the simplistic scrutiny of the arbitration process. Both sections 5 and 40 of the Arbitration and Conciliation Act are couched in mandatory language, in appropriate cases; other considerations may be used by the court to exercise its inherent jurisdiction to try the dispute. For instance the parties may have waived the right to proceed under the arbitration clause. For this proposition of the law, Counsel relied on the holding of this court in the case of **Daniel Delestre and others versus Hits Telecom (U) Ltd** (supra). The Respondents Counsel further sought to define the word "waive" from several authorities. She contended that the Respondent waived a right to refer the dispute to arbitration by filing the current suit. The Defendant submitted to the same waiver by filing a written statement of defence and lodging a counterclaim thereto. Finally the Respondents Counsel maintains that under section 14 of the Judicature Act, read in conjunction with section 98 of the Civil Procedure Act, this court has inherent jurisdiction and discretion to exercise its inherent powers in conformity with the principles of justice, equity and good conscience to try a dispute. The Respondent's case is an appropriate case in which the court should exercise its discretionary powers to try the dispute and not to refer it to arbitration in the interest of justice.

Rejoinder by Applicant's Counsel

In rejoinder, the Applicants Counsel reiterated earlier submissions and invited the court to uphold the principle of separability of an arbitration agreement.

The Applicants Counsel invites the court to uphold the principle of separability of an arbitration agreement. According to Halsbury's laws of England volume 2 (2008 (fifth edition) an arbitration agreement which forms or was intended to form part of another agreement whether or not in writing, is not regarded as invalid, non-existent or ineffective because the other agreement is invalid, or did not come into existence or has become ineffective; and for that purpose it is treated as a distinct agreement. Counsel further relied on **Russell on Arbitration 21st edition at page 57** for the proposition that the doctrine of separability greatly increases the scope of all arbitration clauses. It establishes that an arbitration agreement has a separate life from the contract for which it provides the means of resolving the dispute.

Furthermore the import of section 5 of the Arbitration and Conciliation Act is that it vests rights in any party interested in invoking an arbitration clause. The only test to be applied is whether the arbitration agreement is null and void; whether the arbitration agreement is in operative or incapable of been performed or whether there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. This was the decision of this court at page 11 of the case of **Daniel Delestre and others versus Hits Telecom (U) Ltd** (supra). The Respondent has not proved by way of any affidavit evidence that the Applicant's application offends the tests laid out in section 5 of the Arbitration and Conciliation Act. Furthermore the court has no powers to intervene in matters governed by the Arbitration and Conciliation Act under section 9 thereof.

On the question of waiver, the filing of a suit by the Respondent cannot be constituted as a waiver of the right to arbitrate. Similarly, the Applicant has never waived its right to refer the dispute to arbitration. By filing its defence, the Applicant did not waive or consent to a waiver of the right to arbitration. Furthermore in paragraph 5 (c) of the Applicants defence, it is averred that the suit had been prematurely filed since the Plaintiff had not complied with the mandatory dispute resolution mechanism. A waiver of the right to arbitrate would apply only, if the Applicant did not file an application for reference of the dispute to arbitration as held by the Supreme Court in **National Social Security Fund and Another versus Alcon International Ltd, Supreme Court Civil Appeal Number 15 of 2009.** Furthermore there is no evidence of any waiver by the Applicant of the right to have the disputed referred to arbitration.

Regarding the submission on trade and usages, the submission does not apply in the circumstances of this case.

Ruling

I have carefully considered the written submissions of the parties, the application of the Applicant and the affidavit evidence in support and opposition to the application as well as the authorities cited by the parties which authorities were supplied with the submissions.

Clause 7.13.2 of the distribution agreement dated 1st of January 2012 between the Applicant and the Respondent provides as follows:

> "17.13.2 Disputes between the Company and the Distributor.
>
> (A) Any dispute arising out of or in connection with this Agreement shall in the first instance be referred for consideration and possible resolution to senior managers of both the Company and the Distributor. Should these persons not be able to resolve the dispute within 7 (seven) days of it being referred to them (or within such alternative period as they may mutually decide) then they shall by agreement appoint a third party to act as mediator, and not as arbitrator, to mediate the resolution of the dispute. The costs of the mediator shall be borne by the parties to the dispute in equal shares.
>
> (B) Should the parties fail to agree on the mediator or should the selected mediator referred to in the foregoing clause fail to resolve the dispute within 7 (seven) days (or within such alternative period as they may mutually decide), then any party shall have the right to require that the dispute be referred to arbitration by an arbitrator appointed by agreement of both parties, provided that the arbitration shall be stated in the summary manner with a view to it being completed as soon as possible and in any event within fourteen (14 days) after the completion of the arbitration, or as soon as possible thereafter.…"

The first issue for consideration in my view is whether the Defendant/Applicant waived its right to apply for reference of the dispute for arbitration. In paragraph 3 of the written statement of defence, the Applicant/Defendant avers that the Plaintiff's suit is prematurely before the court and as such has not applied the mandatory dispute resolution mechanism as set out in the

agreement. It avers that it reserves the right to raise a preliminary objection on the basis of the failure to apply the mandatory dispute resolution mechanism in the agreement.

I have duly considered section 5 of the Arbitration and Conciliation Act which provides as follows:

> "5. Stay of legal proceedings.
>
> (1) A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, refer the matter back to the arbitration unless he or she finds—
>
> (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
>
> (2) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made."

Section 5 (1) of the Arbitration and Conciliation Act clearly provides that a judge or magistrate before whom proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a written statement of defence and both parties have had been given a hearing, refer the matter back to the arbitration. In other words a party may apply for reference to arbitration after filing a written statement of defence. The filing of a written statement of defence does not operate as a waiver of the right to apply for reference of the matter to arbitration. Consequently the submission of the Respondents Counsel that both the Respondent and the Applicant waived the right to apply for reference of the dispute to arbitration has no merit.

Concerning submissions on the exercise of the court's discretion (if any) so as to enable the Respondent adduce evidence of any custom or usage in the circumstances of the case, the issue is

whether the court has discretion in the matter. The wording of section 5 of the Arbitration and Conciliation Act is that the a judge or magistrate before whom proceedings are brought in a matter which is the subject of an arbitration agreement shall, if the party applies after the filing of a defence and having given both parties a hearing, refer the matter back to arbitration. In other words, the court has no discretionary powers under section 5 (1) of the Arbitration and Conciliation Act, not to refer the dispute for arbitration. The powers of the court are only to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed or whether there is not in fact any dispute between the parties with regard to matters agreed to be referred to arbitration. In other words the powers of the court are confined to establishing whether the agreement is null and void, inoperative or incapable of been performed on whether there is no dispute as contemplated by the parties in the arbitration clause. The power whether to refer the dispute for arbitration or not under section 5 (1) of the Arbitration and Conciliation Act is not a discretionary power. It is simply a power to determine whether the conditions or grounds upon which the dispute may not be referred exist. The grounds for not referring the dispute for arbitration are statutory. The powers of the court are confined to establishing the statutory grounds for refusal of an application by any of the parties to an arbitration agreement to refer the dispute for arbitration. In the premises, the arguments of the Respondents Counsel so as to move the court to permit the adducing of evidence about any customs or usages cannot be sustained. The only basis for refusal of any reference has to fall within the grounds set out under section 5 (1) of the Arbitration and Conciliation Act. The question of adducing evidence of any "customs or usages" does not fall within the statutory grounds for refusal of the reference.

Before taking leave of this issue, the Respondents Counsel referred to section 14 of the Judicature Act which provides for the unlimited original jurisdiction of the High Court. However under section 14 (2) (a) of the Judicature Act, the jurisdiction of the High Court shall be exercised in conformity with the written law. Particularly under section 14 (2) (b) of the Judicature Act provides that subject to any written law, the High Court may apply any established and current custom or usage. In other words, any customs or usage is subject to the written law. The court therefore has no jurisdiction or discretionary powers to try any customs or usages which are in conflict or not in conformity with section 5 of the Arbitration and Conciliation Act.

What is material under section 5 of the Arbitration and Conciliation Act is whether there is an arbitration agreement between the parties. An arbitration agreement is defined by section 2 (1) of the Arbitration and Conciliation Act and the question for consideration is whether the matter before the judge or magistrate is subject to an arbitration agreement (as defined by the Act). It does not depend on any customs or usages. An arbitration agreement is defined as:

> "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 a defined legal relationship, whether contractual or not.."

In the premises therefore, this court has no power to disregard the express provisions of section 5 of the Arbitration and Conciliation Act and apply any customs or usages by permitting the Applicant to proceed with the trial of the action contrary to the statutory provision for reference. The Respondent's prayers for the High Court to exercise any inherent jurisdiction, to try the dispute, have no merit.

Finally there is no dispute about the fact that there is an arbitration agreement as defined by the Arbitration and Conciliation Act. The remaining matter for consideration is therefore whether there are any statutory grounds for refusal of the application to refer the dispute between the parties for arbitration under section 5 of the Arbitration and Conciliation Act.

The Respondents Counsel strongly submitted that the agreement had expired and therefore the arbitration clause was inoperative. There is no dispute whatsoever that the agreement was for one year and had lapsed. However the Applicant submitted that the rights of the parties for which the Respondent sues the Plaintiff arose from the agreement and it is consequently a dispute contemplated under the agreement to submit to arbitration. Without reference to the numerous authorities cited by the Counsels, the starting point is to define what the dispute is by perusal of the plaint.

Paragraph 3 of the plaint provides that the Plaintiffs claim against the Defendant is for breach of contract, special damages, general damages, exemplary damages, punitive damages, interest at 24% per annum from the date of judgement till payment in full and costs of the suit. Paragraph 4 of the plaint avers that the Plaintiff had for the last 22 been the distributor of the Defendant's products covering specified districts in Northern Uganda. Furthermore the last agreement was

signed for the year ending 31 December 2012. What is of special interest is paragraph 4 (b) of the plaint which provides as follows:

> "That it was always the practice that the distribution agreements were signed even way after the expiry of the running agreement. During the lapse of such agreement the parties continue to do business, all distribution agreements were signed in the months of June or July of every year."

In other words it is very clear from the foregoing paragraph quoted above that it was the practice to continue with the agreement even after the lapse or expiry of the running agreement until a new agreement is signed ordinarily in the months of June or July. It is also specifically indicated that the last agreement expired on 31 December 2012. The plaint was filed on 19 February 2013. Consequently, it was customary that before execution of a new agreement, the relationship between the parties continued until after the execution of the next distribution agreement. Execution of the next distribution agreement merely ratified the ongoing relationship between the parties and therefore the terms of the agreement would remain the same and are deemed to have continued until and unless otherwise modified by the next agreement. Paragraph 4 (e) of the plaint further avers that on 4 January 2013, without any forewarning or notice the Defendant wrote to the Plaintiff informing it of the lapse of the distribution agreement. In paragraph 4 (f) the Plaintiff avers that it has at all material times met all the required international standards of the Defendant as stated in the agreement. Last but not least I have duly considered paragraphs 5 and 7 of the plaint which provides as follows:

> “(5) The Plaintiff shall contend that despite the lapse of the agreement the entered into an agreement in which consideration passed to the Defendant."…
>
> 7. The Plaintiff shall contend that despite the fact that the agreement lapsed with the Plaintiff the Defendant continues to do business with the Plaintiff in the territories of Gulu, Kitgum, and Pader districts."

By the averment in the plaint that it was usual for the Plaintiff to continue doing business with the Defendant after the lapse of the agreement and that a subsequent distribution agreement would be signed around June or July of every year, it is apparent that the relationship averred that existed between the parties is governed by the distributor agreements executed between the

parties every year. It is further the Plaintiff's assertion that the agreement would be signed subsequently there by endorsing the subsisting relationship between the parties prior to the formal endorsement of the subsequent agreement. Last but not least I am persuaded by the statement of law in the case of **Heyman and Another vs. Darwin's, Ltd [1942] 1 All ER 337** and particularly the statement of Lord Macmillan at page 347 quoted by the Applicants Counsel to the effect that:

> "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 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."

In other words the dispute between the parties can be about the validity of the contract itself and the arbitration clause would be sufficient to submit that dispute with the arbitral tribunal agreed upon. The arbitration clause does not confer special rights on any of the parties and only reflects the agreement of the parties that in case there was a dispute contemplated by the parties, such a dispute should be resolved by an arbitrator constituted in accordance with the agreement of the parties. The arbitration clause is independent of the terms of the contract dealing with the rights and obligations of the parties to it. Under the Arbitration and Conciliation Act, the independence of the arbitration agreement from the rest of the contract within which it is embodied, is specifically provided for. Section 16 (1) provides that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. For that purpose section 16 (1) (a) provides that an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract and secondly that a decision by the arbitral tribunal that the contract is null and

void shall not itself invalidate the arbitration clause. In other words the Arbitration and Conciliation Act section 16 (1) recognises that the expiry of an agreement or the invalidity of an agreement itself does not render an arbitration clause incapable of enforcement or inoperative. It is therefore my finding that the arbitral tribunal chosen by the parties under the agreement can rule on the issue of the lapsing of the agreement and its effect. For the moment therefore, the terms of any subsisting relationship between the parties are the same terms endorsed from year to year which include clause 7.13.2 that provides for the mode of resolution of disputes between the parties.

In the premises, the Applicants application for reference of the dispute for arbitration under section 5 (1) of the Arbitration and Conciliation Act is granted. The dispute embodied in the High Court proceedings is referred to the arbitral tribunal to be appointed by the parties under clause 7.13.2 of the distribution contract.

The question that remains is whether the suit should be stayed. The Applicant at paragraph (b) of the chamber summons prayed for enforcement of the arbitration clause by stay of the suit and reference of the matters in the dispute to arbitration. Section 5 (1) of the Arbitration and Conciliation Act is entitled in its head note as "stay of legal proceedings". It commands that the judge or magistrate shall upon the application of the parties "refer the matter back to arbitration". The issue of what happens to the dispute thereafter as filed in court has not been the subject of contention between the parties. In **Miscellaneous Application Number 310 of 2013 between Daniel Delestre and others versus Hits Telecom (U) Ltd**, I held that the only order that could be made is that the dispute shall be resolved through arbitration and not the process of the court by referring the dispute to arbitration. Where the court orders the dispute embodied in the proceedings before court to be referred for arbitration, the pending suit lapses. In other words the entire dispute is referred for resolution through arbitration in accordance with the contract of the parties. The High Court retains appellate and supervisory powers as far as arbitration proceedings are concerned. Under section 16 of the Arbitration and Conciliation Act, an arbitral tribunal upon ruling that it has jurisdiction in any matter, entitles the aggrieved party to apply to the court within 30 days of the ruling to decide the matter and the decision of the High Court shall be final. Under section 27, the arbitral tribunal or any of the parties with approval of the arbitral tribunal may request court assistance in taking evidence and the court may execute the

request according to the rules of taking evidence. An aggrieved party may also apply under section 34 of the Arbitration and Conciliation Act to set aside the arbitral award.

The exercise of the powers referred to above by the court leads to the conclusion that the intention of legislature was to give the Court appellate or supervisory powers over arbitral proceedings under the Act. This is made more cogent by section 9 of the Arbitration and Conciliation Act which provides that: "*Except as provided in this Act no court shall intervene in matters governed by this Act*." Consequently a stay of proceedings in the High Court after commencement of an action by one of the parties to an arbitration agreement, serves no purpose after the dispute is referred to arbitration. In other words the court can only intervene in the arbitration proceedings in the manner prescribed by the Arbitration and Conciliation Act. Specific rules of procedure have been provided under section 71 of the Act and the first schedule thereto, prescribing the procedure for moving the court in any manner enabled by the Arbitration and Conciliation Act. In the circumstances therefore a stay of proceedings serves no useful purpose. I am persuaded that the proceedings in this court collapse and the file will be closed. The costs occasioned by commencing the action in the High Court shall be determined by the arbitral tribunal appointed by the parties and the issue is accordingly also referred to the arbitral tribunal to be appointed by the parties.

Ruling delivered in court this 14th day of November 2013.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Patson Arinaitwe holding brief for Michael Mafabi for the Applicant/Defendant

Sharon Tem for the Respondent/Plaintiff

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

14 November 2013