

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**ARBITRATION CAUSES No. 0002 and 0005 OF 2023 (consolidated)**

5 **(Arising from London Court of International Arbitration (LCIA) Consolidated Arbitration**  
**No. 204602 of 2021)**

**GREAT LAKES ENERGY COMPANY NV ..... APPLICANT**

**VERSUS**

10 1. **MSS XSABO POWER LTD** }  
2. **BRYAN XSABO STRATEGY CONSULTANTS (U) LTD** } .....  
**RESPONDENTS**  
3. **MOLA SOLAR SYSTEMS (U) LTD** }  
4. **CONSICARA GLOBAL INVESTORS LTD** }  
15 5. **DR DAVID ALOBO** }

**Before: Hon Justice Stephen Mubiru.**

**RULING**

a) Background:

20 The applicant is an international energy company incorporated and registered in the Netherlands with interests in various countries in Africa, while the 1<sup>st</sup> respondent is a company incorporated in Uganda for the purpose of managing and operating solar and wind power plants in Uganda. The applicant is part of a multinational conglomerate generically referred to as the Janus Continental Group (“the JCG Group”) and a subsidiary of GL Africa Energy Limited. The  
25 beneficial owner of the JCG Group is and was at all material times Humphrey Kariuki Ndegwa, a Kenyan businessman. The 2<sup>nd</sup> to 4<sup>th</sup> respondents are all companies incorporated in Uganda, the 2<sup>nd</sup> applicant held 80 ordinary shares while the 3<sup>rd</sup> applicant held 20 ordinary shares in the 1<sup>st</sup> respondent. The rest of the respondents are both direct and indirect shareholders of the 1<sup>st</sup> respondent. The 2<sup>nd</sup> to 4<sup>th</sup> respondents are all owned and/or controlled by the 5<sup>th</sup> respondent, Dr  
30 David Alobo, a private individual who resides in Germany.

The applicant and the respondents entered into an investment and ancillary agreements for building, developing and maintaining a 20MW capacity solar photovoltaic generator facility at

Kabulasoke, Gomba District. At the material time, the 2<sup>nd</sup> and 5<sup>th</sup> respondents owned and controlled the 1<sup>st</sup> respondent, which is the project company which holds the licence to build, own and operate the Project. By those agreements, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as the original shareholders of the 1<sup>st</sup> respondent, entered into a shareholders' agreement, a memorandum of understanding and an investment agreement in which the applicant as a lender, would become a shareholder in the project company upon paying for the shares so allotted to it. The parties executed multiple other transactional documents including; a Call Option Agreement giving the applicant a call option right over shares in the 1<sup>st</sup> respondent, a Shareholders Agreement in respect of the 1<sup>st</sup> respondent, Loan Agreements, a series of Share Charges which secured the applicant's rights in respect of its investment in the 1<sup>st</sup> respondent and a personal guarantee issued by 5<sup>th</sup> respondent in respect of his and the 1<sup>st</sup> respondent's obligations to the applicant.

Among the multiple other transactional documents executed, were two loan agreements not contemplated by the Investment Agreement, to wit; a US \$150,000 loan agreement dated 24<sup>th</sup> July 2017 which was expressly to finance the 1<sup>st</sup> respondent's costs on the Project pending completion of the Investment Agreement. Consequently the applicant paid to the 1<sup>st</sup> respondent US \$ 150,000 in five tranches between July, 2017 and February, 2018 and no part of the loan has been repaid. An additional loan agreement was on 28<sup>th</sup> February, 2018 executed in the sum of US \$ 5,000,000 which was also stated to be for the purpose of financing the 1<sup>st</sup> respondent's running costs on the Project pending completion of the Investment Agreement. Consequently the applicant paid to the 1<sup>st</sup> respondent US \$ 5,000,000 in five tranches between February, 2018 and July, 2018 and no part of that loan too has been repaid. During the month of July, 2018, the applicant entered into a US \$ 10,000,000 facility agreement with 1<sup>st</sup> respondent, making that sum available to the 1<sup>st</sup> respondent (including US \$ 1m already advanced on 15<sup>th</sup> June, 2018) to fund the 1<sup>st</sup> respondent's operating expenses. All sums drawn under that facility were repayable with interest on its Termination Date which, unless otherwise extended was 31<sup>st</sup> December 2020. Between June, 2018 and January, 2019 the 1<sup>st</sup> respondent drew down a total of US \$ 9,420,000 in four tranches. No part of the facility has been repaid by the 1<sup>st</sup> respondent.

The applicant having expended monies into the project, and become a shareholder in the project company, was tasked to look for engineers to construct the solar power station at Kabulasoke,

Gomba District, during which process a dispute arose sometime during the year 2019 when the 2<sup>nd</sup> and 3<sup>rd</sup> respondents accused the applicant of having inflated the cost of the engineering and construction component, to a tune of around US \$ 6,000,000 without the knowledge of the project company, fellow shareholders and promoters of the project company. The 5<sup>th</sup> respondent  
5 claimed to have discovered that the applicant's beneficial owner had instructed the EPC Contractor, M/s ImMODO Power Africa, a company which the 1<sup>st</sup> applicant contracted to do the engineering, procurement and construction of the power plant, to inflate the project cost by adding US \$ 6,450,000 as purported consultancy fees yet no such services were to be rendered. It was claimed that the applicant in conjunction with its ultimate beneficial owner, Mr Kariuki, and  
10 others, had conspired to defraud the respondents by dishonestly inflating the true cost of the Project and secretly siphoned US \$ 6,125,000 back to themselves or received US \$ 3,089,235 as secret commission under the guise of this consultancy. The respondents then rescinded the investment agreement on basis of which the applicant had become a shareholder in the project company and also revoked the allotment of shares to the applicant. As a consequence of this  
15 decision, the respondents considered themselves to be released from all obligations under the Investment Agreement and the Ancillary Agreements.

The applicant denied any such conspiracy and maintained that the Agreements remained in full force and effect. The applicant counterclaimed that the respondents had failed to comply with  
20 their various obligations to the applicant under the Agreements as a result of which the applicant had not received the equity investment in the 1<sup>st</sup> respondent to which it would have been entitled, and has not been repaid under the various loans in accordance with their terms. Notwithstanding the dispute, the Project was successful in the sense that construction of the solar power plant at Kabulasoke was completed and the Commercial Operations Date was achieved on 9<sup>th</sup> January  
25 2019 when the power plant was officially commissioned. The plant is generating and supplying power to the Uganda Electricity Transmission Company Limited (UETCL) under a 20-year power purchase agreement entered into with 1<sup>st</sup> respondent executed on 21<sup>st</sup> December 2016.

Pursuant to the arbitration clause in the investment agreement, the applicant commenced arbitral  
30 proceedings at the London Chamber of International Arbitration, seeking specific performance of

the investment agreement. Each of the applicant's claims arose out of distinct agreements, therefore eight requests for arbitration were filed but consolidated into one.

The first phase of the consolidated arbitration focused on the respondents' allegations of fraudulent conspiracy in the procurement of the EPC Contractor for the project which formed the respondents' cross claim. This phase resulted in a partial award rendered on 11<sup>th</sup> March, 2022 where the Tribunal made several declaratory orders in the operative part of its award. It found that all agreements were valid and of full effect. The Tribunal found for the respondents in respect of their claim for breach of fiduciary duty but determined that none of their other claims, particularly their claims for fraudulent conspiracy, were made out. The operative part of the partial award reads as follows;

#### K. OPERATIVE PART

293. Having carefully considered all of the evidence and submissions before it, and for the reasons set out above, the Tribunal finally ORDERS, DECLARES, DECIDES AND AWARDS as follows:
- 293.1. Declares that the Agreements (other than the Call Option Agreement) have (and each of them has) not been suspended, revoked, rescinded or terminated and are (and each is) valid, of full effect and enforceable.
- 293.2. Declares that the Call Option Agreement has not been suspended, revoked, rescinded or terminated, is not an illegal contract, null or void ab initio, and is valid, of full effect and enforceable.
- 293.3. Declares that each of the Second, Third, Fourth and Fifth Respondents are in breach of Clause 6.2 of the Investment Agreement.
- 293.4. Declares that the First, Fourth and Fifth Respondents are in breach of Clause 6.3 of the Investment Agreement.
- 293.5. Orders the Second, Third, Fourth and Fifth Respondents to each perform their obligations under Clause 6.2(b) of the Investment Agreement by delivering to the Claimant change of bank mandates of the First and Second Respondent, such change of bank mandates to include the Claimant's nominees in respect of all bank accounts operated by the First and Second Respondent. The change of bank mandates shall be delivered to the Claimant within 14 days of the Claimant's confirmation of the names of its nominees.
- 293.6. Declares that the Claimant is liable to pay to the First Respondent the sums of USD 3,089,235 and USD 775,257 together with interest thereon, as repayment of secret commission. Liability for these sums is subject to the set-off of any amounts due from the First Respondent to the Claimant under

one or more of the Agreements. The Tribunal will determine the rate, period and quantification of interest payable and will address matters relating to set-off in the second phase of this arbitration.

5 293.7. Declares that any or all of the unpaid price of the EPC Contract in the total amount of USD 2,585,508 is unpaid secret commission for which the Claimant will be liable to fully compensate the First Respondent upon payment by the First Respondent to Immodo of any or all of the unpaid price under the EPC Contract.

10 294. The Parties have liberty to apply to the Tribunal for a variation of the time for performance by the Second to Fifth Respondents pursuant to the order made at paragraph 293.5 above.

15 295. All claims and cross-claims which have already been introduced into the arbitration, but have not been ruled upon in this Partial Award, including all claims for costs, are reserved to a further award in the arbitration.

The second phase of the arbitration primarily dealt with and decided all outstanding claims and crossclaims in the arbitration save for those that were reserved for a further phase. This time, the focus was on the applicant's claims for relief arising out of the respondents' breach of contractual obligations under the Investment Agreement and the ancillary agreements. This phase resulted in  
20 the second partial award rendered on 10<sup>th</sup> January, 2023. The Tribunal made several orders in the operative part of its award. It found for the applicant on a majority of the reliefs sought in the arbitration. The operative part of the partial award reads as follows;

#### U. OPERATIVE PART

25 271. Having carefully considered all of the evidence and submissions before it, and for the reasons set out above, the Tribunal finally ORDERS, DECLARES, DECIDES AND AWARDS as follows:

271.1. The Tribunal declares that:

30 271.1.1 The 96 ordinary shares in the First Respondent which were the subject of its board resolution of 6 July 2017, were validly issued and were properly allotted to and paid up by the Claimant.

271.1.2 The amounts loaned by the Claimant under the USD 5m Loan and the USD 150,000 Loan are to be treated as equity contributions by the Claimant in the First Respondent under the terms of the Investment Agreement.

35 271.1.3 The Claimant has, by its letter dated 9 October 2019, served a valid and effective Call Option Notice on the Second, Third, Fourth and Fifth Respondents.

- 271.1.4 The Respondents are in breach of the Call Option Agreement.
- 271.1.5 As a result of the Respondents' breaches of the Investment Agreement found by the Tribunal in its First Partial Award and of the Call Option Agreement, the Claimant is entitled to enforce the full extent of its rights under any or all of the Share Charges.
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- 271.1.6 The Fifth Respondent has no liability under the Personal Guarantee for the amounts demanded in the 23 November 2019 Demand or the 31 August 2022 Demand (or any amount in respect of the USD 5m Loan or the USD 150,000 Loan).
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- 271.1.7 The Second and Third Respondents were advanced the following amounts on the following dates by way of loan from the Claimant pursuant to clause 2.5 of the Investment Agreement: 24 July 2018 - USD 4,066,668 (Mola USD 813,334; Bryan Xsabo USD 3,253,334); 16 October 2018 - USD 2,200,000 (Mola USD 440,000; Bryan Xsabo USD 1,760,000); 3 January 2019 - USD 511,270 (Mola USD 102,254; Bryan Xsabo USD 409,016).
- 15
- 271.1.8 Pursuant to clause 2.5 of the Investment Agreement, interest has and will continue accrue on these amounts from the dates set out in paragraph 271.1.7, at the rate of three (3) months LIBOR +8% per annum net of taxes, calculated on a simple interest basis until the loans have been fully repaid by the Second and Third Respondents.
- 20
- 271.1.9 The Claimant is entitled to the balance held in the Escrow Account, amounting to USD 292,935,700 less any escrow fees and bank charges properly deducted from the Escrow Account since 15 October 2020.
- 271.2 By way of specific performance of their obligations under the Call Option Agreement, the Respondents are ordered to take the following actions within 28 days of the date of this Second Partial Award:
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- 271.2.1 The First Respondent pass a directors' resolution authorising: (i) the transfer of shares in the First Respondent; and (ii) the submission of an application to the Ugandan Electricity Regulatory Authority ("ERA") to obtain ERA's consent for this transfer of 21 ordinary shares in the First Respondent to the Claimant (or such proportion as is required to give the Claimant a 60% shareholding in the First Respondent) and change of control in compliance with Section 46 of the Ugandan Electricity Act 1999 (as amended);
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- 271.2.2 The Second Respondent sign the application form (Form C) to be submitted to ERA applying for consent to the transfer of shares in the First Respondent to the Claimant, the associated change of controlling shareholder of the First Respondent and the consequential, deemed transfer of the licence for the Kabulasoke project, and provide that signed Form C to the Claimant;
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- 271.2.3 The Claimant pay UGX 21,000,000 to the Second Respondent in respect of the Call Option Price;
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- 271.2.4 the First Respondent pass a directors' resolution approving the transfer of the Call Option Shares (as defined in the Call Option Agreement) to the Claimant;
- 5 271.2.5 the Second Respondent sign a share transfer form to transfer the Call Option Shares to the Claimant and provide that signed share transfer form to the Claimant for its counter-signature;
- 271.2.6 the First Respondent file the fully-signed documents identified in paragraphs 271.2.2 and 271.2.4 above with the Ugandan Registrar of Companies (the “Registrar”); and
- 10 271.2.7 all Respondents take any and all other steps required to give effect to the transfer of the Call Option Shares to the Claimant, including to (i) obtain consent from ERA for a change of control in the First Respondent; and (ii) ensure that the transfer of the Call Option Shares to the Claimant is approved and registered by the Registrar.
- 15 271.3 By way of specific performance of their obligations under the Investment Agreement and the Shareholders Agreement, the Second to Fifth Respondents are ordered to procure that the First Respondent allots (and the First Respondent is ordered to allot), within 28 days of the date of this Second Partial Award, the following Redeemable Preference Shares to each
- 20 of the Second Respondent, Third Respondent and the Claimant:
- | Party       | Redeemable Preference Shares (net of windfall) |
|-------------|--|
| Mola        | USD 1,355,588                                  |
| Bryan Xsabo | USD 5,422,350                                  |
| GLE         | USD 11,916,907                                 |
- 25 272. All claims and cross-claims which have already been introduced into the arbitration, but have not been ruled upon in the First Partial Award or in this Second Partial Award, including claims arising out of the Account, all matters left outstanding in paragraph 293.6 of the First Partial Award and all claims for costs, are reserved to a further award in the arbitration.

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The applicant contends that both partial awards are enforceable in Uganda under *The Arbitration and Conciliation Act* as well as *The New York Convention*, and that it is in the interest of commercial justice that the two partial awards of the Tribunal are registered and recognised as binding and enforceable by this Court.

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b) The applications:

The application by Chamber Summons in Arbitration Cause No. 0002 of 2023 is made under the provisions of Articles III and IV of *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“the New York Convention”); sections 35, 36 and 43 of *The Arbitration and Conciliation Act*; and rule 13 of *The Arbitration Rules*. The applicant seeks  
5 orders for recognition and enforcement of the two partial awards handed down on 11<sup>th</sup> March, 2022 and 10<sup>th</sup> January, 2023 respectively, arising from London Chamber of International Arbitration Consolidated Arbitration No. 204602 in the terms set out in the application. It is the applicant’s case that Uganda ratified the New York Convention on 12<sup>th</sup> February 1992 thereby rendering it enforceable in Uganda pursuant to Article 123 of *The Constitution of the Republic of*  
10 *Uganda, 1995* and *The Ratification of Treaties Act*. The applicant has satisfied the requirement of presenting to the Court; a duly authenticated original first and second partial awards or duly certified copies of them, as well as the original arbitration agreement or a duly certified copy of it. The respondents have not challenged the formal validity of the authenticated partial awards and the authenticated arbitration agreements pursuant to which the arbitration proceeded, and the  
15 partial awards were made.

The application by Chamber Summons in Arbitration Cause No. 0005 of 2023 is made under the provisions of Article V (2) (b) of *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“the New York Convention”); sections 34 (1), (2) (b) (xi) of *The*  
20 *Arbitration and Conciliation Act*; section 33 of *The Judicature Act*; section 98 of *The Civil Procedure Act*, and rules 7 and 13 of *The Arbitration Rules*. The respondents seek orders for setting aside the two partial awards handed down on 11<sup>th</sup> March, 2022 and 10<sup>th</sup> January, 2023 respectively, arising from London Chamber of International Arbitration Consolidated Arbitration No. 204602. It is the respondents’ case that part of the first partial Award is in conflict with the  
25 public policy of Uganda. Recognition and enforcement of part of the first partial Award would therefore be contrary to the public policy of Uganda. On the other hand, the second partial Award too is in conflict with the public policy of Uganda, and therefore its recognition and enforcement would therefore be contrary to the public policy of Uganda. In the alternative, recognition and enforcement of both awards be denied.

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c) The Affidavit in reply:



By the 1<sup>st</sup> respondent's affidavit in reply it is averred that on the 25<sup>th</sup> September, 2015, the 1<sup>st</sup> respondent was granted a Generation and Sale License by Uganda Electricity Regulatory Authority (ERA) to construct, own and operate a 20MW pilot solar PV power park at  
5 Kabulasoke, Gomba District. The license may be revoked if the 1<sup>st</sup> respondent does not operate in accordance with the provisions of *The Electricity Act* and any regulations, codes or standards made under the Act. On the 21<sup>st</sup> December 2016, the 1<sup>st</sup> respondent signed a power purchase Agreement (PPA) with Uganda Electricity Transmission Company Limited (UETCL) and thereafter, on 1<sup>st</sup> March, 2017, signed the Implementation Agreement with the Government of  
10 Uganda. In order to raise funds to finance the power project, on 30<sup>th</sup> April, 2017, the respondents signed an Investment Agreement with the Applicant, which was amended by Addenda dated 16<sup>th</sup> November, 2017 and 22<sup>nd</sup> March, 2018. The applicant was to finance the project by first acquiring 49% percent of the shares in the 1<sup>st</sup> respondent and then four years after the effective date of the ERA license, the applicant was to acquire an additional 11% shares in the 1<sup>st</sup>  
15 respondent under a Call Option Agreement, so that ultimately the applicant would become the majority shareholder in the 1<sup>st</sup> respondent with 60% shareholding.

The parties to the Investment Agreement later signed a Shareholders' Agreement in which they recognised the allotment of the 96 ordinary shares valued at shs. 96,000,000/= to the applicant  
20 thereby increasing the share capital of the 1<sup>st</sup> respondent from shs. 100,000,000/= to shs. 196,000,000/= The applicant failed to pay for the 49% ordinary shares allotted to it and its name was not entered onto the register of members. A share call was properly served onto the applicant but it did not pay for the shares. Consequently, the 49% ordinary shares which were allotted to it were forfeited. Meanwhile in January 2019, the respondents discovered that the  
25 applicant had dishonestly and without the knowledge of the respondents instructed ImMODO Power Africa, to inflate its costs by adding US \$ 6,450,000 as purported consultancy fees to be paid to M/s Long Red Technology Co. Ltd, which money would eventually end up with the applicant, when in fact no such services were rendered. The respondents also discovered that indeed M/s Long Red Technology Co. Ltd had already received part of payment amounting to  
30 US \$ 3,089,235 and were due to receive the balance.

On basis of that discovery, the Uganda Police Force investigated the applicant, its owners and associates and preferred charges of money laundering and cheating, vide Buganda Road Court criminal Case No. 4l of 2020 and on 4<sup>th</sup> November, 2019 the 1<sup>st</sup> Respondent passed a resolution revoking the Investment Agreement and the shares which were allotted to the applicant were re-

5 issued to the original shareholders of the 1<sup>st</sup> respondent, in that, the 2<sup>nd</sup> respondent's shares became 156.8 (80%) and the 3<sup>rd</sup> respondent's shares became 39.2 (20%). The applicant's beneficial owner Humphrey Kariuki Ndegwa and his co-accused absconded from Uganda and an international warrant of arrest was issued on 8<sup>th</sup> May, 2020 by the trial court.

10 On the 23<sup>rd</sup> January, 2020 the applicant instituted legal proceedings before the Registrar of Companies, against the 1<sup>st</sup> respondent, in which it sought the revocation and cancellation of the directors' resolution of 4<sup>th</sup> November, 2019 and for the register to be rectified so as to restore applicant as a shareholder and member of the 1<sup>st</sup> respondent with 96 fully paid up ordinary shares. On 26<sup>th</sup> June, 2020 the Registrar ordered that the impugned board resolution be expunged

15 from the register and for the register be rectified to reflect that the shareholding of the 1<sup>st</sup> respondent was; 96 ordinary shares belong to the applicant; 80 ordinary shares belong to the 2<sup>nd</sup> respondent and 20 ordinary shares belong to the 3<sup>rd</sup> respondent. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents appealed the decision to the Civil Division of the High court. On 7<sup>th</sup> July, 2021 the High Court set aside the orders of the

20 Registrar and directed that the matter be re-heard by a different Registrar.

In the meantime, on 11<sup>th</sup> March, 2022, the Arbitral Tribunal rendered the first partial Award in which it granted specific performance and inter alia ordered the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents to each perform their obligations under Clause 6.2 (b) of the Investment Agreement by delivering

25 to the applicant change of bank mandates of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, such change of bank mandates to include the applicant's nominees in respect of all bank accounts operated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The change of bank mandates had to be delivered to the applicant within 14 days of the applicant's confirmation of the names of its nominees. The arbitral Tribunal found that the applicant deliberately and dishonestly concealed the terms of the M/s Long Red

30 Consultancy Agreement from Xsabo and that such conduct constituted a breach by the applicant of its fiduciary duties to Xsabo. The Tribunal declared that the applicant is liable to pay to the 1<sup>st</sup>

respondent the sums of US \$ 3,089,235 and US 4 775,257 together with interest thereon, as repayment of secret commission.

To the extent that the respondents were ordered to deliver to the applicant change of bank mandates of the 1<sup>st</sup> and 2<sup>nd</sup> respondent, would amount to an illegal change in the control of the 1<sup>st</sup> respondent without the consent of ERA and thus contrary to the public policy of Uganda and would lead to revocation of the generation license for the project. Similarly the order to sign the application form to be submitted to ERA applying for consent to the transfer of shares in the 1<sup>st</sup> respondent to the applicant, and the associated change of controlling shareholder of the 1<sup>st</sup> respondent would be deemed a transfer of the licence for the Kabulasoke project. Determination by the Tribunal that the applicant fully paid up the 96 ordinary shares, when the same matter is pending before the High court of Uganda and before the Registrar of companies, is illegal, contrary to an explicit decision of the High Court; *sub judice*, and against public policy of Uganda. The second arbitral Award, to the extent that it orders that the respondents must sign share transfer forms for the call option shares without first obtaining the consent of ERA, forces the Respondents to break the law and risks the license being cancelled, with the consequence of affecting supply of electricity for the common good of all Ugandans and thus against public policy of Uganda.

The orders of specific performance, if recognised by this court would amount to compelling the continuance of an acrimonious and bitter relationship with a likelihood that the court will need to oversee the day-to-day relationship and have to referee constant disagreements between the parties. The orders of specific performance, if recognised by this court, would be difficult to supervise and enforce since it would require the court to constantly monitor the internal operations and corporate governance of the respondent due to the breakdown of the relationship of the parties to this dispute. The conduct of the respondent disentitles it to the remedies of specific performance as awarded by the arbitral Tribunal and the enforcement of those remedies would be contrary to the public policy and the laws of Uganda.

d) The submissions of counsel for the applicant:

Counsel for the applicant M/s S & L Advocates together with M/s Kashillingi, Rugaba & Associates advocates and Tax consultants, submitted that in the second partial award, the arbitral tribunal issued several declarations and orders, key among which is an order for specific performance of the respondents' Call Option Agreement within 28 days of the date of the second partial award, specific performance of the respondents' obligations under the Investment Agreement and the Shareholders' Agreement. The respondents have not yet complied with the orders for specific performance. The Respondents have never challenged the validity of both partial awards at the seat of arbitration. The respondents are bound by the partial awards and are obliged to comply with them by reason of the fact that arbitration by its nature is final and binding on the parties. To the extent that no such application has been made in the courts of the seat in respect of both awards, the awards stand and should be recognised and enforced by this Court as the Court in which enforcement is sought. The respondents had thirty days from receipt of the partial awards within which to object to recognition and enforcement of the first and second partial awards. The first partial award was rendered and received by the parties on 11<sup>th</sup> March 2022. The respondents did not lodge any objections to recognition and enforcement within the time prescribed by law. With regard to the second partial award, the respondents in amending their application seeking to set aside the partial awards and their objections to refusal of recognition and enforcement sought to introduce new grounds in support of their objections, albeit out of time. The respondents cannot amend to introduce new grounds which are barred by time limitation.

e) The submissions of counsel for the respondents:

Counsel for the respondents M/s Nambale, Nerima & Co. Advocates, submitted that there is a difference between jurisdiction to set aside an award that entails annulment, and to entertain an application for recognition and enforcement together with objections thereto as presented before this Court. The enforcing state has jurisdiction to refuse enforcement on the ground of public policy. The High Court has jurisdiction to satisfy itself whether the awards pass the test of public policy of Uganda, or in any event are enforceable at all. The 1<sup>st</sup> respondent is entitled to be heard on objections to enforcement. The time for lodgement of objections only starts to run upon service of notice of an application for recognition and enforcement, not from the time of

rendering the award. 5.34 (3) of *The Arbitration and Conciliation Act* prescribing one month for filing an application for setting aside, does not apply to lodgement of objections to an application for recognition under s. 35 of the Act. Omission to challenge validity, or to apply for setting aside, does not prejudice a party's right to lodge objections against recognition and enforcement.

5 Neither does it set up an estoppel. The timelines for applications for setting aside are applicable to domestic awards where the High Court of Uganda is the court of the seat. The decision in *Roko Construction Ltd v. Mohammed Hamid* which interpreted section 34 (3) of the Act and confirmed the limitation period as one month from the date of receipt of the award dealt with a domestic award is inapplicable.

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The LCLA adjudged the applicant to have breached a fiduciary duty, acted dishonestly and pocketed a secret commission from the project. In para 237 and 241, the applicant was ordered to disgorge the secret commission together with interest thereon. The DPP sanctioned charges of money laundering and conspiracy to defraud against the applicant's beneficial owner, Humphrey Kariuki Ndegwa vide Buganda Road Court Criminal Case No. 41 of 2020. The accused absconded from Uganda and an international warrant of arrest was issued. Disgorgement does not take the character of punitive damages designed to punish an unlawful act or conduct. Public policy would deny enforcement of a foreign arbitral award if that enforcement would violate the forum state's most basic notions of morality and justice. The applicant inflated the cost of the project by a whopping US \$ 6,450,000 representing 25% of the total project cost. This obviously had an impact on the final tariff ultimately charged to the public. The sale and price of electricity is a sensitive sector whose control must be restricted to fit and proper persons. Recognition of the awards would in the circumstances be wholly offensive to the public on whose behalf judicial power is exercised under the Constitution.

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Section 45 of *The Electricity Act* as amended by *The Electricity (Amendment) Act 2022*, prohibits the transfer of a licence without the written consent of ERA. Transfer includes the acquisition of the control of the holder of a licence. Paragraph 1.4 of the General Conditions of the licence provides that it shall not be transferred or assigned without the prior written consent of the Authority under section 46 of *The Electricity Act*. Failure to comply with the terms of a licence is a criminal offence under section 83 of *The Electricity Act*. The impugned order of specific

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performance, if recognised and enforced, would require the 1<sup>st</sup> respondent to illegally pass and register resolutions for transfer of shares prior to obtaining consent of ERA. The award is contrary to public policy in as far as it purports to assume consent of ERA is a given yet it is not a rubber stamp of the arbitrator as that would fetter its jurisdiction to approve a transfer. Under section 46 (6) of *The Electricity Act*, ERA can withhold consent if it has reason to believe that the public interest would be prejudiced by the transfer. Directing a transfer subject to consent of ERA would violate public policy that vests it with the duty to vet and ensure unscrupulous investors do not acquire control over the supply of electricity. Specific performance cannot aid dirty hands to control power generation and sale to the public.

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The second partial award which it declared that 96 ordinary shares in the 1<sup>st</sup> respondent were validly issued, allotted to and paid up by the applicant, on which basis the respondents were ordered to take action, within 28 days so as to give the applicant a 60% shareholding in the 1<sup>st</sup> respondent, essentially ordered the 2<sup>nd</sup> and 5<sup>th</sup> respondents to remain joint venture partners of the applicant. This contravenes public policy of Uganda as contained in *The Anti Money Laundering Act*, which prohibits persons from knowingly doing business with money launderers. The applicant's scheme to embezzle under the guise of consultancy fees and transfer the illicit funds to offshore accounts held by nominees in Mauritius is on all fours with the definition of “money laundering” under *The Anti Money Laundering Act*. The law was enacted to combat turning illegitimately obtained property into seemingly legitimate property, which includes concealing or disguising the nature, source, location, disposition or movement of the proceeds of crime.

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Control of bank accounts cannot be directed in favour of a person adjudged to have engaged in illicit financial gain that contravenes the anti-money laundering legislation. If the applicant is allowed to take control of the bank accounts, they will be at liberty to remit the unpaid balance of the secret commission leaving the 1<sup>st</sup> respondent with the onerous task of pursuing them for compensation. The relationship between the parties has irretrievably broken down. In order to transfer the license, the respondents must state their honest opinion about the applicant by describing their relationship. That relationship is acrimonious, and the panics simply cannot do business together. If this Court allows the recognition and enforcement of the impugned awards, it will have to brace itself for constant supervision of enforcement, which is neither practical nor

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desirable. It is trite law that damages are the ordinary remedy for breach of contract. Specific performance is an equitable remedy which is given in exceptional circumstances where damages are inadequate. One of the reasons why specific performance is not awarded is if the supervision of the court is necessary.

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The Second partial arbitral award contains a finding that the US \$ 150,000 and US \$ 5 million loans be treated as equity in the 1<sup>st</sup> respondent. This is outside the terms of reference and beyond the scope of arbitration, as the applicant never pleaded it. What the applicant prayed for was repayment of the loan and interest.

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f) The decision:

It is a fundamental notion that parties generally commission arbitrators to read their contract and interpret it for them. Arbitrators are thus contractually empowered to provide the parties with a definitive interpretation of their agreement. It follows that parties are bound by an arbitral award and are obliged to abide by and comply with it. The substantive issues which the arbitrator(s) determined cannot be the subject of review by the courts because arbitration, by its nature is final.

20 An award is not subject to appeal or to any other remedy except those provided for in *The Arbitration and Conciliation Act*. By stating that “except as provided in this Act, no court shall intervene in matters governed by this Act,” section 9 of *The Arbitration and Conciliation Act* seeks to restrict the court’s role in arbitration. The section, clearly in mandatory terms, restricts the jurisdiction of the court to only such matters as are provided for by the Act. The provision epitomises the recognition of the policy of parties’ autonomy which underlies the concept of arbitration. Consequently, there are only three categories of measures under the Act which involve courts in arbitration namely; (i) such measures as involve purely procedural steps and which the arbitral tribunal cannot order and/or cannot enforce, e.g. issuing witness summons to a third party or stay of legal proceedings commenced in breach of the arbitration agreement; (ii) 25 measures meant to maintain the *status quo* like granting of interim injunctions or orders for preservation of the subject matter of the arbitration (interim measures of protection); and (iii) 30

such measures as give the award the intended effect by providing means for enforcement of the award or challenging the same (see *Coppee-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilizers Ltd* [1994] 2 All ER 465).

In arbitration, the autonomy of the parties is kept at the highest pedestal. Therefore, any Court  
5 adjudicating upon the validity of an arbitral award is not to function as an appellate Court, but merely is to decide upon the legality of the validity of the arbitral award. When a court reviews an arbitration award, it should not concern itself with the merits of the determination. If the arbitrator has acted within his or her jurisdiction, has not been corrupt and has not denied the parties a fair hearing, then the court should accept his or her reading as the definitive  
10 interpretation of the contract even if the court might have read the contract differently. Save for specified circumstances, parties take their arbitrator for better or worse both as to decision of fact and decision of law.

i. The application to set aside the two international partial arbitral awards.

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Arbitral awards are subject to very limited judicial oversight. With regard to domestic arbitral awards, section 34 (2) of *The Arbitration and Conciliation Act* sets out the limited instances where a party can apply to set aside an arbitral award, including; - a party to the arbitration agreement having been under some incapacity; the arbitration agreement is not valid under the  
20 law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda; the party making the application not having been given proper notice of the appointment of an arbitrator or of the arbitral proceedings or not having been able to present his or her case; the arbitral award dealing with a dispute not contemplated by or not falling within the terms of the reference to arbitration or containing decisions on matters beyond the scope of  
25 the reference to arbitration; the composition of the arbitral tribunal or the arbitral procedure not having been in accordance with the agreement of the parties; the arbitral award having been procured by corruption, fraud or undue means or there being evident partiality or corruption in one or more of the arbitrators; the arbitral award not being in accordance with the Act; the subject matter of the dispute not being capable of settlement by arbitration under the law of  
30 Uganda; and the award being in conflict with the public policy of Uganda.



With regard to international arbitral awards, Part III of *The Arbitration and Conciliation Act* that guides the enforcement of New York Convention awards is silent concerning the grounds for setting aside international arbitral awards. It is trite though that the grounds for setting aside arbitral awards are set out in the law of arbitration at the place of arbitration, the “seat” which  
5 establishes the link between an arbitration procedure and a given legal order. As a matter of principle, the choice of the seat of the arbitration determines the judicial control of the awards. The principle of party autonomy in arbitration means that, where the parties agree on a country as the seat of arbitration, they also agreed to the application of the relevant laws of that country and the supervisory role of her courts over their arbitration. The choice of the seat therefore  
10 determines the grounds of annulment. *Lex arbitri*, i.e. the law which governs the arbitration, is the standard by which the validity of the arbitral proceedings and the ensuing awards are evaluated.

As regards the jurisdiction to set aside international arbitral awards, Article V (1) (e) of the *New York Convention, 1958* provides that an award may be denied recognition and enforcement if it  
15 has been “annulled by the courts of the arbitral seat.” This provision recognises the courts of “the country in which, or under the law of which” an award was made, are the courts where an application to set aside or suspend an award may appropriately be made (see *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*  
20 [2011] 1 All ER 485; [2011] 1 AC 763; [2010] 2 Lloyd’s Rep 691; [2010] 3 WLR 1472). The supervisory courts are the courts of the seat.

It is well established in international commercial arbitration that the courts at the seat of arbitration will have supervisory jurisdiction over the arbitral proceedings, including hearing any  
25 challenges to the validity of the arbitral award (see *Minister of Finance (Incorporated) and 1Malaysia Development Berhad v. International Petroleum Investment Company and Aabar Investments PJS* [2019] EWCA Civ 2080; *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and others* (2017) 7 SCC 678; *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552; *Enercon (India) Ltd. v. Enercon*  
30 *GmbH*, (2014) 5 SCC 1 and *Reliance Industries Ltd. v. Union of India*, (2014) 7 SCC, 603). Once a seat of arbitration has been decided upon and fixed, it is akin to a clause of exclusive

jurisdiction. It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award (see *C v. D* [2007] EWCA Civ 1282; [2008] 1 Lloyd's Rep 239; [2008] 1 All ER (Comm) 1001; [2007] All ER (D) 61).

5 Therefore, an award which is valid in accordance with the laws at the seat of arbitration can be enforced under the *New York Convention, 1958* which obliges contracting states to recognise and enforce foreign awards and arbitration agreements. The Courts of competent jurisdiction within whose jurisdiction the seat of arbitration is situate, will have exclusive jurisdiction in matter of arbitration, except for the purpose of execution of the award, which can be done at any the place  
10 where the award is likely to be satisfied. It follows that a challenge to an award (usually) takes place in the courts of the seat of the arbitration and it is an attempt by the losing party to invalidate the award on the basis of the statutory grounds available under the law of the seat, while actions opposing enforcement may take place in any jurisdiction in which the winning party seeks to enforce an award (see Nigel Blackaby et al. *Redfern and Hunter on International*  
15 *Arbitration* (6<sup>th</sup> Edition), para 10.05, (2015) Oxford University Press).

On the facts of the present case, it is clear that the seat of arbitration is London by reason whereof jurisdiction for setting aside the partial awards exclusively vests in the courts of competent jurisdiction in London. It is for that reason that in an *ex-tempore* ruling delivered  
20 herein on 15<sup>th</sup> March, 2023 that part of the respondents' application in Arbitration Cause No. 0005 of 2023 that sought orders setting aside the two partial awards handed down on 11<sup>th</sup> March, 2022 and 10<sup>th</sup> January, 2023 respectively, was struck out and that part of it seeking to oppose the enforcement of the two partial awards was consolidated with Arbitration Cause No. 0002 of 2023. There not being any evidence to suggest that any of the partial awards has been set aside at  
25 the seat of arbitration, the Court will now proceed to determine their enforceability in light of the objections raised.

ii. Enforceability of the two international partial arbitral awards;

30 Section 31 (4) of *The Arbitration and Conciliation Act* provides that an arbitral award shall be made in writing and be signed by the members of the arbitral tribunal. After the award is made, a

signed copy is required to be delivered to each party. Section 31 (6) of the Act too provides that the arbitral award shall state the reasons on which it is based unless the parties have agreed that no reasons are to be given, or the award is an arbitral award on agreed terms. Additionally, the award is required to state the date and place of arbitration. The two partial awards handed down  
5 on 11<sup>th</sup> March, 2022 and 10<sup>th</sup> January, 2023 respectively meet these formal requirements.

Subject to the parties' agreement to the contrary, the arbitral tribunal has the power to make more than one award at different times in the arbitral proceedings. Parties to an arbitration may wish to make an application to the arbitral tribunal for an award to be made on a specific issue that forms  
10 part of the claim, before the final award is made that addresses all the issues in the dispute. Such an award, dealing with only some of the issues in dispute, is commonly known as a “partial award.”

Enforcement is only available in respect of final awards. Preliminary pre-award decisions such as  
15 decisions on jurisdiction, provisional measures, arbitrator challenges and procedural orders are not “awards” that can be enforced in themselves. A partial award is one that partially resolves the merits of the case, i.e., it does not rule on all the points in dispute, but on some or some of them whose resolution can be anticipated. Most arbitral rules expressly permit the issuance of a broad array of substantive arbitral decisions, such as orders, rulings, final awards, partial final awards,  
20 interim awards, and interim measures. A decision that resolves incidental or procedural questions, such as jurisdiction, standing, limitation or applicable law, but does not resolve all or part of the subject-matter of the dispute, and therefore is not a partial award. Only an award that decides on a part of the subject-matter of the dispute can be considered a partial award. A partial award does not put an end to the arbitration but contains a final decision on one or several issues  
25 in dispute.

In determining whether or not a decision is an award for the purposes of enforcement, the courts have considered a number of factors including: the substance (not the form) of the decision; the nature of the issues with which the decision deals, e.g., decisions on the substantive rights and  
30 obligations of the parties are likely to be dealt with in the form of an award; whether the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the

tribunal *functus officio*, either entirely or in relation to that issue or claim; the tribunal’s description of the decision, which is relevant but not determinative; and how a “reasonable recipient” would consider the objective attributes of the decision (e.g., the tribunal’s description of the decision, formality of the language used, and level of detail with which the tribunal has expressed its reasoning) including whether they would view the decision as satisfying the formal requirements for an award under the applicable law and relevant arbitration rules (see *ZCCM Investments Holdings Plc v Kansanshi Holdings Plc & another* [2019] EWHC 1285 (Comm), at para 40 and *The Republic of Uganda v. Rift Valley Railways (Uganda) Ltd & others* [2021] EWHC 970 (Comm), at paras 46 to 47). The courts look at the substance of the tribunal’s decision and not the label.

The arbitral tribunal may also make more than one award, for example, the award may have been rendered only in respect of one part of the matter. As long as this award finally disposes of that particular aspect of the matter, this is a partial award, and is enforceable too. A partial award *stricto sensu*, is that by which the arbitral tribunal decides a limited part of the claims submitted to the arbitrators or one of the various claims in dispute. It is distinguished from an interlocutory award, which decides one or several preliminary issues, whether procedural or on the merits. Partial awards can be subject to enforcement measures provided that they decide on an issue that can be separately subject to enforcement proceedings and the procedure for enforcing an arbitral award is followed.

A partial award may be enforced immediately as a final award would be because it constitutes an award falling within the scope of section 36 of *The Arbitration and Conciliation Act*. Partial awards that dispose some, but not all issues in the arbitration are enforceable in the same way as a final award. Interim or provisional awards (such as an order to make an interim payment on account of costs of the arbitration) are not enforceable. It is therefore sensible to secure a final partial award whenever possible, instead of an interim or provisional award. A partial award is final in respect of the claims it addresses, but interim in the sense that the tribunal remains seized of matters within the reference which have not yet been determined (see *Emirates Trading Agency Llc v. Sociedade De Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm). According to Article 26.1 of the LCIA Court Rules, the arbitral tribunal may make separate

awards on different issues at different times, including interim payments on account of any claim, counterclaim or cross-claim (including Legal and Arbitration Costs under Article 28). Such awards are declared as having the same status as any other award made by the arbitral tribunal.

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The following types of foreign partial and final arbitral awards are enforceable in Uganda: money awards, awards containing injunctions, declaratory awards, and awards granting provisional measures. On the facts of the present case, the two partial awards handed down on 11<sup>th</sup> March, 2022 and 10<sup>th</sup> January, 2023 respectively, decided parts of the subject-matter of the  
10 dispute and can therefore be considered partial awards. Although they did not put an end to the arbitration, both contain a final decision on several issues in dispute between the parties. Where an award is not honoured, section 42 of *The Arbitration and Conciliation Act* requires the enforcing party of a New York Convention award to seek recognition and enforcement pursuant to section 35 of the Act. The application must be supported by; (i) the original arbitration  
15 agreement and award, or certified true copies thereof; (ii) the original arbitration agreement or a duly certified copy of it; and (usually) (iii) a statement either that the award has not been complied with, or the extent to which it has not been complied with at the date of the application. The application has met these requirements.

20       iii.   The Limitation period for proceedings opposing the recognition and enforcement of the two international partial arbitral awards.

According to Article III of *New York Convention, 1958* each Contracting State is under an obligation to recognise arbitral awards as binding and to enforce them in accordance with the  
25 rules of procedure of the territory where the award is relied upon. However, both the Convention and Part III of *The Arbitration and Conciliation Act* are silent on the applicable time limitations (if any) for filing an application to recognise and enforce an arbitral award. This is when national laws come into play, pursuant to Article III of the Convention. Article III of the Convention stipulates that national “rules of procedure” apply, so long as they do not impose “substantially  
30 more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of

domestic arbitral awards.” Considering that actions to enforce an arbitral award may not be brought after the expiration of six years from the date on which the cause of action arose (see section 3 (1) (c) of *The Limitation Act*), ideally, award-creditors should initiate enforcement proceedings promptly, if not forthwith, at least within the time limits stipulated for enforcement,  
5 especially when it is clear that the award debtors will not voluntarily comply with the award.

However, rule 11 of *The Arbitration Rules* (First Schedule to the Act) provides that an application to enforce an award as a decree of court under section 35 of the Act is not to be made, if no objections to the award are lodged, until the expiration of ninety days after notice of  
10 the filing or registering of the award has been served upon the party against whom the award is to be enforced, and if objections are lodged, until the objections have been dealt with by the court. Similarly Rule 7 (1) of *The Arbitration Rules* confers upon any party who objects to an award filed or registered in the court, within ninety (90) days after notice of the filing of the award has been served upon that party, to apply for the award to be set aside and lodge his or her  
15 objections to it, together with necessary copies and fees for serving them upon the other parties interested. Where the time for making objections against the arbitral award has expired, or those objections having been made, if they are refused, the award is enforced in the same manner as if it were a decree of the court.

20 The implication is that a period of a minimum of ninety days must elapse after notice of the filing or registering of the award has been served upon the award-debtor, during which any application for annulment should be filed with the court. Such application when filed must be heard and disposed of, before the Court proceeds to recognise and enforce the award as its decree.

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It is argued that by counsel for the applicant that the first partial award having been handed down on 11<sup>th</sup> March, 2022 the respondents were out of time when they filed their objections thereto on  
7<sup>th</sup> February, 2023. This is premised on the fact that under section 34 (3) of *The Arbitration and Conciliation Act* an application for setting aside the arbitral award may not be made after one  
30 month has elapsed “from the date on which the party making that application had received the arbitral award.” This provision though is applicable only to domestic awards, since *lex loci*

*arbitri* and the Courts of competent jurisdiction at the seat of the arbitration have exclusive jurisdiction over proceedings for the annulment or setting aside of foreign arbitral awards.

In respect of domestic awards, while section 34 (3) of *The Arbitration and Conciliation Act* limits the period for seeking the setting aside (annulment) of an award, rules 7 (1) and 11 of *The Arbitration Rules* limit the period of time for raising objections to “recognition and enforcement.” However, in *Roko Construction Ltd v. Mohammed Hamid C.A. Civil Appeal No.51 of 2011*, where an application made to set aside an arbitral award six months after the date the award was delivered by the arbitrator in presence of the lawyers of the parties, the court of appeal found the application incompetent and that it was time barred and a nullity in the law. The Court of Appeal held that an application to set aside an arbitral award must be made within one month from the date the award was received by the party. In *Uganda Lottery Ltd. v. Attorney General, H. C. Misc. Cause No. 627 of 2008* and *Katamba Phillip and three others v. Magala Ronald, H. C. Arbitration Cause No 03 of 2007*, the Court found that rules 7 (1) and 11 of *The Arbitration Rules* to be contrary to section 34 (3) of *The Arbitration and Conciliation Act* and to that extent, the provisions of the Act prevail over the Rules.

While setting aside or annulment is only concerned with the basic legitimacy of the process leading to the award but not with its substantive correctness and results in the legal destruction of the award without replacing it, objection to enforcement seeks to prevent the enforcement of the award as if it were a final judgment of a court. That notwithstanding, rule 7 (1) of *The Arbitration Rules* allows an application “for the award to be set aside” and for the lodgement of “objections to it” to be made within “ninety days” after notice of the filing of the award has been “served upon that party.” With regard to applications for setting aside the award, to the extent that the rule contradicts the period of “one month” from the date on which the party making that application had “received the arbitral award,” this Court has previously decided that the Act prevails. The implication is that upon effluxion of the one month period from the date the arbitral award is received, an applicant is precluded from seeking to have the award annulled.

On the other hand, recognition is a step preliminary to enforcement. It is the official confirmation that the award is authentic. The recognition of an award has the effect of rendering it *res judicata*

in the country concerned. This means that the claim on which the award has decided must not be the subject of another proceeding before a domestic court or arbitral tribunal. After recognition, the award is a valid title for execution. Recognition as a preliminary step to execution may be useful even if there are no immediate prospects of an execution because there are no available  
5 assets in the State where recognition is sought. Recognition will produce effects in the forum, including; (i) preventing the re-litigation of the same issues or claims; and (ii) offering recourse to public force to execute the orders in the award, if necessary. Once recognition has been obtained, execution will be easier should assets become available at a later stage. For the awards enforceable under the *New York Convention*, after the party seeking to enforce the award serves  
10 notice of the application to enforce, and the other party files grounds for objecting to the request, the award cannot not be recognised and enforced until after the objections are finally disposed of.

Article V of *New York Convention, 1958* sets out the limited instances where recognition and enforcement of an award may be refused at the request of the party against whom it is invoked,  
15 including; - a party to the arbitration agreement having been under some incapacity; the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda; the party making the application not having been given proper notice of the appointment of an arbitrator or of the arbitral proceedings or not having been able to present his or her case; the arbitral award dealing with a dispute not  
20 contemplated by or not falling within the terms of the reference to arbitration or containing decisions on matters beyond the scope of the reference to arbitration; the composition of the arbitral tribunal or the arbitral procedure not having been in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of Uganda; the award has not yet become binding on the parties, or has been set aside or suspended by a competent  
25 authority of the country in which, or under the law of which, that award was made; the subject matter of the dispute not being capable of settlement by arbitration under the law of Uganda; the recognition or enforcement of the award would be contrary to the public policy of Uganda. In relation to an enforcement challenge, Article V expressly states that enforcement is restricted to the exclusive grounds set out therein.



Although the majority of the grounds upon which recognition and enforcement of an award may be refused at the request of the party against whom it is invoked, are similar to those forming the basis upon which a domestic award may be set aside, rule 7 (1) of *The Arbitration Rules* allows “objections to” the recognition and enforcement of international arbitral awards to be made within “ninety days” after notice of the filing of the award has been “served upon that party.”

Despite the fact that the majority of the grounds upon which recognition and enforcement of an award may be refused are similar to those on basis of which it may be set aside, a successful objection does not result in setting aside the award, but only prevents its recognition and enforcement as a judgment of this Court. While similar grounds and arguments may be canvassed in the two sets of proceedings (for annulment on the one hand, and for opposing recognition and enforcement on the other), the available time limits, the nature of the arbitral awards forming the subject of the processes (as between domestic and foreign awards), the events that trigger those time limits, the purpose and possible outcomes, are different.

The applicant on 16<sup>th</sup> January, 2023 filed the current application for recognition and enforcement of the two partial arbitral awards handed down on 11<sup>th</sup> March, 2022 and 10<sup>th</sup> January, 2023 respectively. Although the first partial award was handed down on 11<sup>th</sup> March, 2022 the respondents were not out of time when on 7<sup>th</sup> February, 2023 they filed their objections to the recognition and enforcement of both partial awards, since the objections were made within “ninety days” after notice of the filing of the application for recognition and enforcement of the two partial award has been “served upon” the respondents. Section 34 (3) of *The Arbitration and Conciliation Act* is in respect of applications for setting aside domestic arbitral awards, and not to objections to applications for recognition and enforcement of foreign awards, which are enforceable under the *New York Convention*. This objection is accordingly overruled.

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- iv. Non-recognition for enforcement of the two international partial arbitral awards on account of being in conflict with public policy of Uganda.

One of the primary advantages of international arbitration as compared to litigation is the enforceability of arbitration awards internationally. However according to Article V (2) (b) of *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

(New York, 10 June 1958), recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country. Similarly section 34 (2) (b) (ii) of *The Arbitration and Conciliation Act*, a court can set  
5 aside a domestic arbitral award if it finds that the award is in conflict with public policy.

Public policy is a troublesome concept. It is necessarily open-ended, and defies attempts to distil from it clear or comprehensive principles. It is also not immutable: it ebbs and flows with the times. What is censured today, as being against the public interest, may be condoned  
10 tomorrow. Needless to say, such a fluid doctrine can be misused and is therefore treated with caution by the Courts. The concept of public policy cannot become a trap door to allow the control of the substantive decision adopted by the arbitrators. the generally accepted view is that the public policy exception must be interpreted narrowly (see Public policy is therefore understood to be the set of public, private, political, moral and economic legal principles which  
15 are absolutely mandatory for the preservation of society in a given nation and at a given time, and from a procedural point of view, public policy is configured as the set of necessary formalities and principles of our procedural legal system, so that an arbitration that contradicts any or some of such principles may be declared as null for the violation of public policy.

20 Public policy relates to the most basic notions of morality and justice. A set of economic, legal, moral, political, and social values considered fundamental by a national jurisdiction. It manifests the common sense and common conscience of the citizens as a whole; “the felt necessities of the time, the prevalent moral and political theories, intuitions....” (See Oliver Wendell Holmes, Jr., *The Common Law* (1881) at p. 1). Public policy is “that principle of law which holds that no  
25 subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed . . . the policy of law or public policy in relation to the administration of the law” (see *Egerton v. Earl of Brownlow* [1853] Eng R 885, (1853) 10 ER 359). Certain acts or contracts are said to be against public policy if they tend to promote breach of the law, of the policy behind a law or tend to harm the state or its citizens (see *Cooke v.*  
30 *Turner* (1845) 60 Eng. Rep. 449 at 502). The definition of public policy represents a certain topic that affects public benefit and public interest.

Although public policy is a most broad concept incapable of precise definition, an award could be set aside under the Act as being inconsistent with the public policy if it is shown that either it was: (a) inconsistent with the Constitution or other laws of Uganda, whether written or  
5 unwritten; or (b) is inimical to the national interest of Uganda or; (c) is contrary to justice and morality. The first category is clear enough. In the second category would be included, without claiming to be exhaustive, the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Uganda. In the third category  
10 would be included, again without seeking to be exhaustive, such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals (see *Christ For All Nationals v. Apollo Insurance Co. Ltd* [2002] 2 EA 366).

Public policy includes cases where arbitration is used as a means to cover up corruption, money laundering, exchange control fraud or other criminal activity. In some cases though, the public  
15 interest in the finality of arbitration awards will outweigh an objection to enforcement on the grounds that the transaction was “tainted” by fraud (see for example *Sinocore International Co Ltd v. RBRG Trading (UK) Ltd* [2018] 2 Lloyd’s Rep 133). There is no public policy to refuse the enforcement of an award based on a contract during the course of the performance of which there has been a failed attempt at fraud. In that case it was found that even if public policy were  
20 engaged, any public policy considerations were clearly outweighed by the interests of finality.

Among the principles that can be considered as belonging to public policy within the meaning of section 34 (2) (b) (ii) of the Act, are; the prohibition against abuse of contractual or legal rights, the principle of good faith, the prohibition of expropriation without compensation, the  
25 prohibition against discrimination, the principle of proportionality and the protection of minors and other persons incapable of legal acts. An award will be set aside when it is incompatible with public policy not just because of its reasons, but also because of the result to which it gives rise. The generally accepted view though is that the public policy exception must be interpreted narrowly, or else it can be used opportunistically by award debtors as a gateway to review the  
30 merits of the award. It is limited to those imperative or mandatory rules, from which the parties

cannot derogate. If the court is satisfied that enforcing the award is contrary to public policy, it will set the award aside.

Consequently, an award will be considered to be in conflict with public policy if, *inter alia*; (i) 5 the making of the award was induced or affected by fraud or corruption; or (ii) it is in contravention of the fundamental policy of the Constitution or other laws of Uganda; or (iii) it is in conflict with the most basic notions of morality or justice, including acts which would be generally detrimental or harmful to the citizens of the county (the general public), e.g. promotion of unlawful conduct and breach of law. In other words “public policy” covers only fundamental 10 principles that are widely recognised and should underlie any system of law according to the prevailing conceptions in Uganda. The invoked principle of public policy does not need to be universally recognised, as the Courts in Uganda are willing to maintain, and defend if necessary, the fundamental values strongly embedded in the Ugandan legal tradition, even if such values are not necessarily shared in other (equally important) parts of the world. Therefore, an award 15 warrants interference by the Court under section 34 (2) of *The Arbitration and Conciliation Act* only when it contravenes a substantive provision of law or is patently illegal or shocks the conscience of the Court.

Manifest disregard of the law, as opposed to general errors of law, is a matter belonging to public 20 policy and may be a proper basis for setting aside an award, where the disregard, misinterpretation or misapplication of the law was so gross or egregious as substantially to amount to failure to apply the proper law. The role of a statute is to not merely to state the norms of law, but to influence case law and provide direction and restraint in Uganda’s legal system. To the extent that an award is contrary to the substantive provisions of applicable statutes and the 25 declared policy behind them, to such an extent that by allowing the enforcement of an award the court would be encouraging, if not directing, the applicant to violate the law, enforcement will be refused.

As a general rule, this situation arises when two criteria are met: (i) the arbitrator knew of a 30 governing legal principle yet refused to apply it or ignored it altogether, and (ii) the law ignored by the arbitrator was well defined, explicit, and not subject to reasonable debate, yet it is clearly

applicable to the case. A court's mere belief that an arbitrator misapplied the law will not justify setting aside an arbitral award. It must be more than error or misunderstanding with respect to the law, or an arguable difference regarding the meaning or applicability of laws. Rather, the applicant is required to show that the arbitrator was aware of the law, understood it correctly,  
5 found it applicable to the case before him, and yet chose to ignore it in propounding his decision with the result that by allowing the enforcement of the award the court would be encouraging, if not directing, the applicant to violate the law.

Tribunals must ensure that in the process they do not ignore the public policy element while  
10 passing any award. It has been argued in some jurisdictions that Courts when considering the public policy exception under Article V (2) (b) of *The New York Convention 1958* should be concerned only with "international public policy" as opposed to "domestic public policy," (see for example *Parsons and Whittemore Overseas Co., Inc. v. Société générale de l'industrie du papier (RAKTA)*. 508 F. 2d 969 (2d Cir. 1974). However the article does not explicitly specify  
15 any specific type of public policy, referring only to public policy of the country where recognition and enforcement of an arbitral award is sought. International public policy reflects only those notions of morality and justice which exist in all legal systems, which are relevant in the international context in the requirements of international trade; principles common to all civilised nations.. It follows that a mandatory rule of domestic law does not necessarily prevail in  
20 international matters.

International public policy is an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora. It is triggered by a type of behaviour that is contrary to principles whose ethical and legal bases are supported by a general consensus of the international community. International public policy derives from the convergence of national  
25 laws, international conventions, arbitral case law and scholarly commentary on fundamental economic, legal, moral, political, and social values. Examples of notions of morality and justice that exist in all legal systems, which are relevant in the context of international trade are; - contractual practices aimed at facilitating drug trafficking, the traffic of arms between private persons, contracts aimed at favouring kidnapping, murder, or generally the subversions or  
30 evasion of the imperative laws of a sovereign State, or violations of human rights; contracts violating embargos of economic sanctions recommended by international organisations.

Although matters of public policy in relation to international arbitral awards are to be determined based on the vital interests not only of the national community to which the judge belongs but also of a broader, regional or universal, international community (see *Regazzoni v. Sethia* [1958] 5 AC 301; [1957] 3 All ER 286), but also since no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good, it is also the function of the court to make certain that the enforcement of the arbitral award will not constitute a violation of municipal law. Public resources should not be employed for the execution of awards that are injurious to public morality or interest.

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The awards passed by the arbitral tribunals which are contrary or opposed to both domestic and international public policy therefore, can be challenged before the Courts of law and thereby denied recognition and enforcement. The realm of public policy includes an award which is patently illegal and contravenes the provisions of Ugandan law. Judicial interference on ground 15 of public policy violation can be used to refuse the recognition of and enforcement an arbitral award, or any part of it, only when it shocks the conscience of the Court to an extent that it renders the award unenforceable in its entirety, or in part.

Counsel for the respondents submitted that considering the fact that the applicant was ordered 20 to disgorge the secret commission together with interest thereon, and that the DPP sanctioned charges of money laundering and conspiracy to defraud against the applicant's beneficial owner, recognition of the awards would in the circumstances be wholly offensive to the public on whose behalf judicial power is exercised under the Constitution.

25 It is hardly in doubt that the international condemnation of bribery, corruption and money laundering may be characterised as either the application of a general principle of law “recognised by civilised nations,” or as the recognition of a “substantive law of necessary application” in international trade and commerce (see *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7 and *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case 30 No. ARB/98/4). The prohibition of such behaviour is not only provided for (if not always effectively enforced) by the domestic laws of most States, but also the reprehensible character of

such practices also appears from a series of international instruments. If a contract is to be held to be unenforceable, it should be because from the beginning it was tainted so that the courts of this country will not assist either party to enforce it. However where the object of the contract was not contrary to mandatory or public law rules, as well as contrary to morality, it cannot be found to be entirely or absolutely null and void so as to render an award for its enforcement invalid. Contracts fortuitously performed contrary to the law arise in situations where neither the contract *per se* nor its content is illegal, but some aspect of its performance has been developed in such a way as to make it contrary to the law; the illegal act does not form part of the contract, but simply happens.

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The law does not protect any business transaction, but only those that are consistent with our social and economic condition. It can be argued that case law, in the broad sense of the word, rejects those contracts that are contrary to law, morality, good morals or public policy, on the understanding that there is an inherent limit to contractual freedom which derives from the fact that neither can a legal system enshrine something that violates its own principles nor tolerate acts that contravene the law. For contracts fortuitously performed contrary to the law, the acts contrary to law, morality, good morals or public policy do not affect the validity of the contract, yet they can determine sanctions for the subjects who contravene the law. If only some aspect in its performance are illegal such that the contract is illegal only in part, the rest remains valid, unless this is deemed unreasonable after taking all the circumstances of the case into consideration. The circumstances that can be taken into account include considering whether or not the contract has an independent life without the invalid part, whether or not the parties would have wanted a contract only with the valid part, and evaluating the impact of partial ineffectiveness on the balance between the respective obligations of the parties.

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In the instant case, the business transactions between the applicant and the respondents had the legitimate and lawful objective of financing the development and maintenance of a 20 MW capacity solar photovoltaic generator facility at Kabulasoke, Gomba District. They are not contracts of the type that is condemned by public decency and morality. It only happened that the applicant fortuitously performed parts of the transactions contrary to the law, when it factored in a secret commission whose recovery would involve acts of money laundering. A court will sever

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an illegal component of a contract and enforce the remainder of an otherwise valid contract, but only where the illegal component is not an essential part of the agreed exchange.

If the court believes that the illegal component is not essential, that the parties would have made the agreement even without it, the court will sever the component and enforce the remainder of the contract (see *Zerbetz v. Alaska Energy Center*, 708 P.2d 1270 (1985)). In a situation like this, care must be taken to see that one party is not thereby enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other. I find that disgorgement having been directed by the arbitral award, the remaining part of the transactions is valid for it can be reasonably performed without the invalid or ineffective part. The recognition and enforcement of the entire award therefore cannot be refused on account only of the applicant's secret commission and money laundering practices in securing it.

That notwithstanding, as a matter of public policy in most cases damages will be an adequate remedy for breach of contract if the innocent party would then be adequately compensated by damages based on the difference between the price of performance in the original contract and the price agreed in the substitute contract. In order to establish that damages are not adequate, the innocent party will generally have to evidence either that; (a) the subject matter of the contract is rare or unique; or (b) damages would be financially ineffective. The arbitral tribunal apparently did not give sufficient consideration for the public policy reasons behind this requirement before it made orders compelling a continued relationship between the parties.

The court on its part is reluctant to interfere with personal liberties by compelling a continued relationship between unwilling parties to a commercial transaction. A party is not entitled to specific performance of a contract where the specific performance will produce hardships which would not have resulted if there was no specific performance (see section 64 (2) (b) of *The Contract Act, 2010*). It follows that the court will be reluctant to supervise continual obligations in contracts (see *Co-Operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* [1998] AC 1), especially where the applicant is guilty of inequitable conduct. Unless the subject-matter is unique or at least an acceptable substitute is not readily available in the market, the agreements in issue not being of that type, damages would be an adequate remedy. Awards granting specific performance will therefore generally not be enforced as a matter of course, absent evidence that



the subject-matter of the underlying contract is unique to the extent that a substitute would not be readily available. It is on that account that this Court finds the following order in the first partial award handed down on 11<sup>th</sup> March, 2022 to be unenforceable for being contrary to the public policy of Uganda;

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93.5. Orders the Second, Third, Fourth and Fifth Respondents to each perform their obligations under Clause 6.2(b) of the Investment Agreement by delivering to the Claimant change of bank mandates of the First and Second Respondent, such change of bank mandates to include the Claimant's nominees in respect of all bank accounts operated by the First and Second Respondent. The change of bank mandates shall be delivered to the Claimant within 14 days of the Claimant's confirmation of the names of its nominees.

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15 Furthermore, it is not disputed that the Civil Division of the High Court on 7<sup>th</sup> July, 2021 delivered judgment in Company Cause No. 13 of 2020 setting aside the orders of the Registrar of Companies, reversing the decision of the 1<sup>st</sup> respondent's board of directors in relation to its shareholding, and directed the re-hearing of the applicant's complaint before a different Registrar. The re-hearing directed by Court is yet to be concluded yet some aspects of the same matters are the subject of the two partial awards now in issue. It is a matter of public policy that an international arbitral award that conflicts with a local judgment may not be entitled to recognition, especially where the conflict relates to an issue of public policy. It is on that account that this Court finds the following order in the first partial award handed down on 11<sup>th</sup> March, 2022 to be unenforceable for being contrary to the public policy of Uganda;

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25 293.2. Declares that the Call Option Agreement has not been suspended, revoked, rescinded or terminated, is not an illegal contract, null or void *ab initio*, and is valid, of full effect and enforceable.

Similarly, it is on the same account and on account of constituting undue interference with personal liberties by compelling a continued relationship between unwilling parties to a commercial transaction, as well as for the reason that they require the Court to supervise continual obligations in contracts where the applicant is guilty of inequitable conduct, that this Court finds the following orders in the second partial award handed down on 10<sup>th</sup> January, 2023 to be unenforceable for being contrary to the public policy of Uganda;

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- 271.1.1 The 96 ordinary shares in the First Respondent which were the subject of its board resolution of 6 July 2017, were validly issued and were properly allotted to and paid up by the Claimant.
- 5 271.1.2 The amounts loaned by the Claimant under the USD 5m Loan and the USD 150,000 Loan are to be treated as equity contributions by the Claimant in the First Respondent under the terms of the Investment Agreement.
- 10 271.1.3 The Claimant has, by its letter dated 9 October 2019, served a valid and effective Call Option Notice on the Second, Third, Fourth and Fifth Respondents.
- 271.1.4 The Respondents are in breach of the Call Option Agreement.
- 271.1.5 As a result of the Respondents' breaches of the Investment Agreement found by the Tribunal in its First Partial Award and of the Call Option Agreement, the Claimant is entitled to enforce the full extent of its rights under any or all of the Share Charges.
- 15 271.2 By way of specific performance of their obligations under the Call Option Agreement, the Respondents are ordered to take the following actions within 28 days of the date of this Second Partial Award:.
- 20 271.2.1 The First Respondent pass a directors' resolution authorising: (i) the transfer of shares in the First Respondent; and (ii) the submission of an application to the Ugandan Electricity Regulatory Authority ("ERA") to obtain ERA's consent for this transfer of 21 ordinary shares in the First Respondent to the Claimant (or such proportion as is required to give the Claimant a 60% shareholding in the First Respondent) and change of control in compliance with Section 46 of the Ugandan Electricity Act 1999 (as amended);
- 25 271.2.2 The Second Respondent sign the application form (Form C) to be submitted to ERA applying for consent to the transfer of shares in the First Respondent to the Claimant, the associated change of controlling shareholder of the First Respondent and the consequential, deemed transfer of the licence for the Kabulasoke project, and provide that signed Form C to the Claimant;
- 30 271.2.3 The Claimant pay UGX 21,000,000 to the Second Respondent in respect of the Call Option Price;
- 35 271.2.4 the First Respondent pass a directors' resolution approving the transfer of the Call Option Shares (as defined in the Call Option Agreement) to the Claimant;
- 271.2.5 the Second Respondent sign a share transfer form to transfer the Call Option Shares to the Claimant and provide that signed share transfer form to the Claimant for its counter-signature;

271.2.6 the First Respondent file the fully-signed documents identified in paragraphs 271.2.2 and 271.2.4 above with the Ugandan Registrar of Companies (the “Registrar”); and

271.2.7 all Respondents take any and all other steps required to give effect to the transfer of the Call Option Shares to the Claimant, including to (i) obtain consent from ERA for a change of control in the First Respondent; and (ii) ensure that the transfer of the Call Option Shares to the Claimant is approved and registered by the Registrar.

271.3 By way of specific performance of their obligations under the Investment Agreement and the Shareholders Agreement, the Second to Fifth Respondents are ordered to procure that the First Respondent allots (and the First Respondent is ordered to allot), within 28 days of the date of this Second Partial Award, the following Redeemable Preference Shares to each of the Second Respondent, Third Respondent and the Claimant:

Party	Redeemable Preference Shares (net of windfall)
Mola	USD 1,355,588
Bryan Xsabo	USD 5,422,350
GLE	USD 11,916,907

Furthermore, the same aspects of the award constitute an improper and unenforceable fetter of public authority. The test of public policy is not what the Tribunal did or contemplated doing in order to enforce the parties’ agreement, or even the result of its enforcement; it is whether the award as made has a tendency to evil, to be against the public good, or to be injurious to the public. It is an established principle of law, based on public policy, that neither the government nor a public authority can by contract disable itself or its officer from performing a statutory duty or from exercising a discretionary power by or under a statute by binding itself or its officer not to perform the duty or exercise the discretion in a particular way in the future. Just as a contract is invalid to the extent that it purports to fetter future executive action (see *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500; *William Cory & Son Ltd v. London Corp* [1951] 2 KB 476 (CA); *York Corp v Henry Leetham & Sons Ltd* [1924] 1 Ch 557; *Searle v. Commonwealth of Australia* [2019] NSWCA 127; *Attorney-General (NSW) v. Quinn* (1990) 170 CLR 1 at 18 and *Ansett Transport Industries (Operations) Pty Ltd v. Commonwealth* (1977) 138 CLR 54 at 74-5), so should an arbitral award that has a similar effect, since arbitration cannot be used as a means to fetter future executive action.

A review of section 10 of *The Electricity Act* shows that the Legislature intended the Electricity Regulatory Authority to have ultimate authority over the licencing of public entities involved in the generation, transmission, distribution, sale and use of electricity, and the general licensing and control of activities in the electricity sector. The tendency of those aspects of the award to inhibit or pose a significant restriction on the Electricity Regulatory Authority in the performance of its duties in deciding how to accomplish the policy goals of the Act, is objectionable. It is on that additional account that this Court finds those orders in the first partial award handed down on 11<sup>th</sup> March, 2022 outlined above, to be unenforceable for being contrary to the public policy of Uganda.

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Article V (1) (c) of the *New York Convention, 1958* permits the court of enforcement to declare the award at least partially enforceable if different decisions can be distinguished within the award. To the extent that the specified orders of the partial awards declared unenforceable due to being in conflict with international public policy and the public policy of Uganda do not overlap with rest of the orders of the two partial awards sought to be enforced, the applicant may enforce only what is left of the two partial awards, excluding the orders outlined above. The application for recognition and enforcement is therefore allowed only in part. To the extent that the application has succeeded only in part, the applicant is awarded half the cost of the consolidated application.

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Delivered electronically this 24<sup>th</sup> day of April, 2023  
**Mubiru**.....

.....**Stephen**

Stephen Mubiru  
Judge,  
24<sup>th</sup> April, 2023.

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