THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE No. 0058 OF 2021

AYA INVESTMENTS (U) LIMITED.....APPLICANT

VERSUS

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA … RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a) Background;

Between the year 2007 and 2017, the applicant and the respondent entered into various Financial Credit Agreements to finance the construction of a hotel known as the "Pearl of Africa Hotel" located on land comprised in LRV 3556 Folio 8, Plots 7A1-9A1 and 10 Luggard Road and M32, Hill Road situate at Nakasero Hill, Kampala. The first Financial Credit Agreements is dated 13th August 2007 and the last dated 21st April 2017. The total principal sum lent on various dates under the six Financial Credit Agreements was US $ 81,765,318 which sum, inclusive of interest, stood at US $ 118,817,012 as at the 13th September 2017.

The parties also executed various security agreements during that period that were collateral to the Financial Credit Agreements. The Security Agreements are specifically governed by the Laws of Uganda and the High Court of Uganda has exclusive jurisdiction. Following a breakdown of the relationship between the applicant and the respondent, and after several correspondences between the parties, with the respondent faulting the applicant for being in continual default of the terms of the Financial Credit Agreements, the respondent on 13th September, 2017 issued a notice to the applicant recalling the outstanding loan sum then owed, which stood at US $ 118,817,012. The respondent further on the 14th September, 2017 issued a Notice of Default pursuant to Section 19 (2) of *The Mortgage Act No. 8 of 2009,* which was served on applicant's South African

Attorneys, Schindlers by the Respondent's Attorneys ENS Advocates in Uganda. The respondent effectively started recovery procedures under the Laws of Uganda against the securities.

The applicant's Attorneys, Schindlers, demanded that the dispute between the parties be referred to arbitration in terms with the relevant arbitration clauses contained in the Financial Credit Agreements but the respondent maintained all through that there were no arbitral issues and commenced foreclosure proceedings under the Securities Agreements. On 29th September, 2017, the applicant filed Misc. Application No. 230 of 2017 seeking interim measures of protection from the Commercial Division of the High Court of Uganda, pending South Africa arbitration in accordance with Section 6 of *The Arbitration and Conciliation Act*, and Misc. Application No. 1166 of 2017 in, seeking restraining orders. The applicant specifically sought to restrain the respondent from advertising the Hotel for sale pursuant to the mortgage securities or other foreclosure process including restraining the respondent from interfering with the management or operations of the Hotel business pending the disposal of the South Africa arbitration proceedings under the FCAs, which AVA stated it had commenced.

In the respondent's affidavits in reply thereto, it was contended that; there was no dispute in the Financial Credit Agreements that required arbitration, since the respondent was only exercising its rights under the various security instruments, had issued a notice of default in accordance with *The Mortgage Act* and Regulations of the Republic of Uganda calling upon the applicant to pay the entire outstanding sum. Nevertheless two orders were granted: a) a temporary injunction to restrain the respondent from doing adverse acts to the applicant in relation to the Financial Credit Agreements and the supporting security deeds; and b) an order to compel the parties to attend arbitration. The orders were pronounced by the Court on the 10th October 2017, in the presence of counsel for both parties, and have since then been extended on several occasions by this Court. In the subsequent ruling of 9th February 2018, the Court referred the dispute between the parties to arbitration in South Africa, which the Court expressly directed should commence forthwith.

Instead, considering that the respondent had disregarded the restraining orders and continued to threaten foreclosure by execution against the applicant's assets and its guarantors, the applicant on 22nd November, 2017 filed HCCS No. 937 of 2017 in the High Court of Uganda, Commercial Division, for contempt of court, defamation and libel, breach of contract, economic duress, unconscionability, general and special damages and aggravated damages arising therefrom, and

the costs of the suit. The respondent filed a defence to this suit indicating that the matters in dispute

relating to Financial Credit Agreements could only be tried and resolved in the contractually agreed South Africa arbitration. The applicant also filed Misc. Application No. 230 of 2017 whose ruling was delivered on 9th February 2018 when all the prayers and orders sought had been overtaken by events. In the meantime, the respondent on or about 31st January 2019, by letter to the Arbitration Foundation of South Africa (AFSA) requested for and commenced arbitration proceedings. The applicant considering those proceedings to have been commence in contempt of the orders of court abovementioned, declined to participate in the arbitral proceedings. On its part the respondent filed HC Misc. Application No. 204 of 2018, which sought to stay the suit pending the determination of the South Africa arbitration proceedings that had been earlier commenced and were continuing.

The applicant then sought interim order of stay of the High Court suit and specifically seeking to restrain the delivery by the High Court of the Ruling, which was ready for delivery, in HC Misc. Application No 204 of 2018. On 19th March 2019 in Court of Appeal Civil Application No. 57 of 2019, it was ordered that; a) the application for interim relief raised serious points of law, therefore the ruling was reserved to be delivered on notice. In the meantime; b) an interim order issued, restraining the High Court, Commercial Division, from proceeding with the hearing or determination of any matter in or arising out of Civil Suit No. 937 of 2017 until the determination of the application for an interim order; c) the status quo in or arising out of Civil Suit No. 937 of 2017 was to be maintained until the determination of this application for an interim order. The applicant has however, since that date never fixed the substantive application, CA Civil Application No. 57 of 2019, nor pursued the delivery of the interim order ruling that has now been pending for 2 (two) and a half years.

In the Arbitration Award, the respondent, as lender, was awarded against the applicant, as borrower, the sum of US $ 153,072,275 comprising the unpaid principal sum lent over the ten year period from August, 2007 to April, 2017 of US $ 81,765,318 and the unpaid interest thereon at the facility rate for the said ten-year period being US $ 71,308,957. The respondent was also awarded further interest from the date of the Award until payment in full. The amount

owed to the

30 respondent as at 30th September, 2020 stood at US $ 153,027,275. On 7th October, 2021, the applicant filed this application seeking to have declared null and void the South Africa arbitration

proceedings under Case No. 1.72.1, *Industrial Development Corporation of South Africa Limited v. AYA Investments (U) Limited* as well as to set aside the resultant South Africa Arbitration Award of Bruce Collins QC dated 11th September, 2021. On 16th December, 2021 pursuant to sections 35 and 43 of *The Arbitration Act*, the respondent applied for the registration of the Award as a decree of the Uganda High Court.

b) <u>The application;</u>

The application by Chamber Summons is made under the provisions of sections 34 (2) (a) (i), 34 (2) (a) (iii), 34 (b) (i) and (ii), and 34 (3) of *The Arbitration and Conciliation Act*; section 98 of *The Civil Procedure Act*, and rule 13 of *The Arbitration Rules*. The applicant seeks orders for; (i) a declaration that arbitration proceedings in Case No. 1.72.1, *Industrial Development Corporation of South Africa v. Aya Investments (U) Ltd* were commenced by the respondent in contempt of court, in violation of the principles of res *sub-judice*, public policy and thus the resultant award is illegal, null and void; (ii) the arbitral award made by Bruce Collins QC on 11th September, 2021 vide Case No. 1.72.1, *Industrial Development Corporation of South Africa v. Aya Investments (U) Ltd* be set aside; and (iii) the costs of the application be provided for.

It is the applicant's case that the arbitration proceedings leading to the impugned award were commenced and conducted in complete contempt of the Orders of both the High Court and the Court of Appeal of Uganda. The applicant was unable to participate in the impugned arbitration proceedings because they were in contempt of the court orders. The impugned arbitration proceedings were majorly conducted during the Covid19 pandemic and even if the applicant had elected to present her objections to the said proceedings it was not possible for her officers to travel to South Africa and hire the services of a lawyer. The arbitral processes complained of and the entire award of Bruce Collins QC handed down on 11th September, 2021 violated the applicant's right to a fair hearing and violate the principle of *sub judice*, public policy. The impugned award renders nugatory all the reliefs sought by the Applicant in Civil Suit No. 937 of 2017 and the order of the Court of Appeal in Civil Application No. 57 of 2019 and is therefore null and

void. The

South African law firm of ENS Africa which represented the Respondent in the arbitration

proceedings is a founder member of AFSA which appointed the arbitrator and supervised the entire process and thus the proceedings could not be conducted in an impartial and fair manner.

The applicant contends further that the impugned arbitral processes were tainted with bias and thus the award is grossly prejudicial to the applicant. The impugned award deals with matters which are not arbitrable, to wit, a dispute regarding enforcement of a mortgage; which is a matter beyond the scope of arbitration. The impugned award is unconstitutional because it derogated the applicant's right to appoint an Attorney in South Africa to present her objections against the arbitration proceedings. This Court has wide powers to set aside the impugned arbitral award.

c) <u>The Affidavit in reply;</u>

By the respondent's affidavit in reply it is averred that the arbitration under the Financial Credit Agreements relates to the rights and obligations of the respondent as lender and the applicant as borrower including the claims and cross-claims related to the applicant's indebtedness to the respondent thereunder. It has always been the respondent's position that the rights under the mortgage securities, which are governed by Uganda law and in which the Uganda Courts have express jurisdiction, could not be the subject of the South Africa Arbitration Proceedings and these proceedings were limited to the indebtedness or otherwise of the applicant to the respondent or vice versa if the respondent were to be held to have breached the Financial Credit Agreements and liable to the applicant in damages in that regard. The applicant having failed to pursue its stay application, cannot in law now seek to set aside the Arbitration Award on the same grounds that it failed to advance in South Africa, the Arbitration Award now having been handed down.

All the Arbitration Proceedings were conducted electronically, including the first pre-arbitration meeting of the 14th August, 2020, and the applicant was informed by AFSA and invited by a shared link to each and every arbitration session. All filings in the arbitration were electronic and the arbitrator conducted the proceedings from Australia virtually.

d) Affidavit in rejoinder;

Throughout the impugned proceedings, the arbitrator refused and / or failed to render a ruling on the objections raised by the applicant concerning the contempt of the order of the Court of Appeal of Uganda by the Respondent by in initiating the arbitration. The arbitrator failed and / or refused to render a ruling on the objections raised by the applicant to the effect that the respondent had waived its right when it filed its written statement of defence in civil Suit No. 937 of 2017. The arbitrator further failed and / or refused to render a ruling on the prejudice the applicant would suffer by the conduct of the arbitration when the applicant lacked legal representation owing to the Covid19 related travel restrictions. The impugned arbitration proceedings were never conducted in a fair or impartial manner by the Arbitration Foundation of South Africa (AFSA) appointed arbitrator who elected to ignore the applicant's objections. The disputes submitted to arbitration were materially the same as the dispute being litigated under High Court Civil Suit No. 937 of 2017 but this objection was never investigated by the arbitrator. Initiation of the arbitration proceedings was intended to wholly dispose of High Court Civil Suit No. 937 of 2017 in contempt of court. The question whether or not the parties should go to for arbitration in South Africa was already a subject of judicial consideration pending before the Court of Appeal in Uganda. The arbitrator's silence and decision to proceed with the arbitration without due consideration of the Applicant's objections abovementioned and/or rendering a ruling on the same was an act of partiality which favoured the respondent.

The respondent's lawyers being one of the founding members of AFSA bestowed an advantage on both the lawyers and their clients to the prejudice of the applicant. The arbitrator deliberately turned a blind eye to the applicant's objections mentioned above with the sole intention to benefit the Respondent whose attorneys are one of its founder members. With the involvement of the said attorneys acting on behalf of the respondent, the arbitration proceedings could not be conducted in a fair and impartial manner. Due to the relationship between ENS Africa as founder member and AFSA creates an eminent interest for and in both entities, that there can never be an arms-length dealing between the Respondent's counsel, the Respondent and the arbitration body

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e) The submissions of counsel for the applicant;

Counsel for the applicant M/s Akampumuza & Co Advocates together with M/s Godfrey S. Lule Advocates, submitted that the respondent in a letter of 31st January, 2019 commenced arbitration when there was an interim order of the court. There was a suit to direct the parties to go to arbitration. It was Civil Suit 937 of 2017 filed on 22nd November, 2017. On 19th March, 2019 the applicant filed an application in the Court of Appeal for an interim order staying proceedings of the High Court. The applicant did not participate in the arbitration. They denied the existence for a dispute and therefore opted for litigation. They attempted to register the award by notification of the applicant by notice dated 16th December, 2021. The applicant opted not to participate. The applicant notified the tribunal of the grounds of objection. The dispute metamorphosed from the application to a suit. The order preserved the status quo and the respondent was aware. What was referred to arbitration was the entire suit. The arbitral award disposed of the entire complaint. It is contemptuous because it alters the status quo. The financial Credit agreements and the securities agreement are conjoined twins and cannot be severed. The applicant elected to litigate the issue in civil suit 937 of 2017. The respondent initially elected not to go to arbitration. The reply illustrates the reason why the applicant could not participate and the bias of the tribunal. Counsel Schindler had withdrawn at the time of the arbitration and so the applicant was not represented at the proceedings, which rendered the proceedings unjust

f) The submissions of counsel for the respondent;

Counsel for the respondents M/s MMAKS Advocates together with M/s ENSafrica Advocates, submitted that an order should be clear in its terms and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation. The persons to whom the court's order is directed must be left in no doubt as to what it is they must do, or abstain from doing, in order to comply with the order. The order should be so expressed that the person to whom it is directed should be able, by reading it and without more, at once to know what it is that he must do, or refrain from doing, in order to comply with its terms.

The first order is the order dated the 9th February 2018 of Her Lordship Alividza in Miscellaneous Cause No. 230 of 2017, which is a 180-day restraint against the advertisement for sale of the mortgage securities, which period has since lapsed. More pertinently, Justice Alividza's order directed the commencement of the South Africa Arbitration Proceedings, which proceedings have now been concluded with the issuance of the Arbitration Award. This order has never been appealed, reviewed or set aside and therefore still subsists. The second order is the continuation of the interim order in Miscellaneous Application No. 107 of 2018 issued initially by His Worship Festo Nsenga and extended by His Lordship Justice Wejuli Wabwire on the 15th March 2019. The said order restrained the advertisement for sale of the mortgage securities pending the final disposal of Miscellaneous Application 204 of 2018 in which the respondent sought a stay of the Uganda suit in light of the South Africa arbitration. The third order is the interim order of the Court of Appeal in CACA No. 58 of 2019. The said order restrained proceedings in H.C.C.S No. 937 of 2017 until the ruling in the substantive interim stay application. None of these orders restrained the South Africa arbitration proceedings and the question of contempt does not arise.

If any of the three injunction orders above-referred had been intended to injunct the then ongoing South Africa arbitration, then that would have been expressly stipulated in clear terms. The injunctions did expressly stipulate a restraint on the foreclosure, advertising and sale of the mortgage securities over the land and building comprising the Hotel and there is no debate as to that having been restrained. The injunctions however did not restrain the continuation of the arbitration proceedings. As earlier mentioned, that is the norm as it is an extremely rare case for arbitrations where they are contractually stipulated to be injuncted as opposed to suits filed in violation of arbitration clauses which are routinely stayed/injuncted. None of the three orders above-referred or of the earlier orders in which they culminated restrained the South Africa arbitration proceedings and the question of contempt accordingly does not arise.

The applicant was given proper notice of the proceedings right from the initial Notice of Dispute right through to being served with the Statement of Claim, formally protesting jurisdiction, being updated as to the proceedings, writing to the arbitrator on various matters, receiving copies of the submissions and the evidence tendered, up to the Award. Rule 11.3 of the AFSA Rules provides

that failure by the respondent to submit an answer does not prevent the arbitration from proceeding.

If the Rules or the agreement between the parties requires the respondent to nominate an arbitrator and the respondent fails to do so, such failure is deemed to constitute an irrevocable waiver of the respondent of its right to nominate an arbitrator.

The only claims dealt with and upon which adjudication and awards were made were those that relate to the rights and obligations of the parties under the Financial Credit Agreements (such as repayment of indebtedness) and not claims that relate to the status/validity/enforceability or otherwise of the mortgages and other security deeds as the latter are indeed not arbitrable and are governed by Uganda law and justiciable only in the Uganda Courts. Commercial contracts occasionally give a unilateral right of arbitration. Sometimes they provide that claims by one party are to be subject of arbitration, whereas claims by the other are not. In other cases, one party has an option to call for arbitration, whilst the other party does not. Such clauses are recognised by the Court as binding.

AFSA, no different from UNCITRAL, LCIA, ICAMEK, and other arbitration bodies, formulates arbitration rules and runs a secretariat through which the administrative aspects of arbitration are managed through a secretariat. The arbitrators of AFSA, much the same as the arbitrators of any other arbitration body, are independent arbitrators appointed by the parties and it is the arbitrators who conduct the arbitration and not the secretariat. The applicant does not contend that the arbitrator, Bruce Collins QC, was biased. Rather, its contention is that the AFSA secretariat's relationship with ENS as a founder member with multiple others in the non-profit organisation that is AFSA creates the risk of bias of the independently appointed arbitrator. This to say the least is a stretch. It would imply that no award in an arbitration in which any of the several leading international law firms which assisted in the setting up of AFSA are involved would stand not

because of the law firm's relationship to the arbitrator but because of the law firm's relationship to the arbitration administrator. The same would apply to arbitrations in which the accounting firms' clients are involved. The applicant has not put forward any evidence as to bias of the arbitrator and absent that, the contention as to bias must fail and issue 4 must also be answered in the negative.

g) The decision;

Arbitrators are 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.

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

Therefore, any Court 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 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. Whether the application to set aside the arbitral award is competent before this Court.

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 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 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 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 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 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.

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The seat is the legal "home" of the arbitration. It is not necessarily the same as the physical location of any hearings (although hearings often take place in the same location as the seat). It is the legal home of the arbitration that determines which state's procedural laws will govern the arbitration, the role of national courts in supporting and supervising the arbitration, the availability of interim measures (e.g. freezing injunctions) any questions as the validity, scope and interpretation of the arbitration agreement and the grounds on which the validity of an arbitral award can be challenged or annulled. 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 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 [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 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 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*). 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.

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 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 the applicant liable 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 Arbitration* (6th Edition), para 10.05, (2015) Oxford University Press).

On the facts of the present case, it is clear that the seat of arbitration is Sandton, South Africa by reason whereof jurisdiction for setting aside the award exclusively vests in the courts of competent jurisdiction in South Africa. The application before this Court to set it aside is thus misconceived. There not being any evidence to suggest that any part of the award has been set aside at the seat of arbitration, the Court will now proceed to determine its enforceability in light of the rest of the objections raised.

ii. <u>Enforceability of the arbitral award</u>;

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 award handed down on 11th September, 2021 by Bruce Collins QC meets these formal requirements.

The following types of foreign 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 award handed down on 11th September, 2021 put an end to the arbitration and contains a final decision on the 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 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 respondent's application of 16th December, 2021 for the registration of the Award as a decree of this Court met these requirements.

iii. <u>The limitation period for proceedings opposing the recognition and enforcement of the international arbitral award</u>.

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 rules of procedure of the territory where the award is relied upon. South Africa became a contracting State to the Convention on 3rd May, 1976 while Uganda did so on 12th February, 1992. The Convention, adhered to by more than 160 nations, creates a general obligation for the Contracting States to recognise foreign arbitral awards as binding and to enforce them in accordance with their rules of procedure as laid down in Article III of the Convention.

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 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

30 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, especially when it is clear that the award debtors will not voluntarily comply with the award.

Whereas under section 34 (3) of *The Arbitration and Conciliation Act* an application for setting aside the arbitral award may not be made after one month has elapsed "from the date on which the party making that application had received the arbitral award." This provision 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. 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*.

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 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* allows an application 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." It 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 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, it they are refused, the award is enforced in the same manner as if it were a decree of the court.

Recognition of an award is a step preliminary to enforcement. It is the official confirmation that
30 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 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 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, 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 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 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
30 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 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. The award having been handed down on 11th September, 2021 and the respondents having filed and served upon the applicant a notice of the filing or registering of the award on 16th December, 2021, the applicants were within time when they filed this application on 7th October, 2021 objecting to its enforcement. In fact the objections were filed long before the respondent had filed its application for recognition and enforcement of the award.

iv. <u>Non-recognition for enforcement of the arbitral award on account of the dispute being non-arbitrable</u>.

It is a well-known principle though that arbitration is not legally permissible if the subject matter of the dispute is not arbitrable or if the dispute in question is not covered by a valid arbitration agreement. According to section 34 (2) (b) (i) of *The Arbitration and Conciliation Act*, a domestic arbitral award may be set aside by the court if the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda. Non-arbitrability concerns the

possibility of a

30 given controversy being submitted to arbitral solution. It connotes disputes that are not appropriate for or capable of settlement by arbitration, or subject to arbitration. Although parties may, if they

express the wish to do so, give jurisdiction to arbitrators to settle their disputes, however, the State retains the power to prohibit settlement of certain types of dispute outside its courts. Objective arbitrability is justified by the fact that certain disputes may involve sensitive issues which are considered to be addressed exclusively by the judicial authority of the state courts or tribunals.

Disputes that are incapable of being resolved in arbitration are in two categories; (i) matters that are reserved by the lawmakers to be determined exclusively by public fora; and (ii) matters which, by necessary implication, stand excluded from the purview of private fora, such as matters relating to inalienable sovereign and public interest functions of the state. Similarly actions affecting the rights of third parties under certain circumstances (as set out above) are also excluded from the purview of arbitration.

From this perspective, arbitrability refers to the objective arbitrability of the disputes, i.e., whether the national law imposes any restriction on the resolution of the dispute by the arbitral tribunal. A matter is considered to be non-arbitrable if mandatory laws provide that certain issues are to be decided only by courts. A common example of non-arbitrable matters is certain categories of disputes of a criminal nature, disputes relating to rights and liabilities which give rise to or arise out of criminal offences; matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; guardianship matters; insolvency and winding up matters; testamentary matters (grant of probate, letters of administration and succession certificate); and eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction. In the same vein, matters relating to special rights or liabilities which are; (i) created under a statute; or (ii) the determination of which lies within the exclusive jurisdiction of specific courts or tribunals (other than regular civil courts), are not arbitrable.

Within the second category are actions for enforcement of rights *in rem*, which are unsuited for arbitration and can only be adjudicated by courts or public tribunals. Traditionally all disputes relating to rights *in personam* are considered amenable to arbitration; and all disputes relating to rights *in rem* are required to be adjudicated by courts and public tribunals (see *Booz-Allen & Hamilton Inc v. Sbi Home Finance Ltd. and others, (2011) 5 SCC 532; 85 A.D.3d 502* and *Vimal*

30 *Kishor Shah and others v. Jayesh Dinesh Shah and others (2016) 8 SCC*). The Court did clarify that this is not an inflexible rule and that subordinate rights *in personam* arising from rights *in rem*

have always been considered arbitrable. For example so long as the dispute is of a civil nature, even allegations of fraud can be settled in arbitration.

A dispute is not arbitrable if it involves the enforcement of a right *in rem*. Functions of the state too being inalienable and non-delegable, are non-arbitrable as the state alone has the exclusive right and duty to perform such functions. State or sovereign functions cannot be made a direct subject matter of a private adjudicatory process. Unlike an order for damages, which is essentially inter parties and can be granted by the arbitral tribunal pursuant to its power derived from the consent of the parties to the arbitration, there are some statute-based reliefs that would invariably affect third parties or the public at large such that they can only be granted by the courts and public tribunals in the exercise of their powers conferred upon them by the state. Usually the establishment of special tribunals overrides the more general *Arbitration and Conciliation Act*.

However, just because a statutory claim may be redressed or remedied by an order that is only the available to the courts or public tribunals, that does not mean the claim is automatically rendered non-arbitrable. That; (i) relevant legislation is motivated by public policy considerations, (ii) there may be procedural complexity in referring the matter to arbitration, (iii) third parties may possibly be impacted, or (iv) there may be limitation on the power of the arbitrator to give full remedies may not be sufficient to preclude arbitration. The dispute may well straddle the line between arbitrability and non-arbitrability depending on the facts of the case, the manner in which the claim is framed, and the remedy or relief sought. The court must consider the underlying basis and true nature of the issue or claim, and not solely the manner in which it is pleaded (see *Tomolugen Holdings Ltd and another v. Silica Investors Ltd and other appeals [2015] SGCA 57*).

Where the remedy or relief sought is one that only affects the parties to the arbitration, the Court will be inclined to find in favour of arbitrability. On the other hand, where the dispute involves other persons who are not parties to the arbitration, or the arbitral award will directly affect third parties or the general public, or some claims fall within the scope of the arbitration clause and some do not, or there are overtones of insolvency, or the remedy or relief that is sought is one

that

an arbitral tribunal is unable to make, the Court will be inclined to find in favour non-arbitrability. In the instant case, no issues of objective non-arbitrability arise.

Where there is a valid agreement to arbitrate and no issues of objective non-arbitrability arise, all matters that fall within the scope of that agreement are to be arbitrated. The arbitration agreement decides the scope and extent of jurisdiction of the arbitrator. A claim may be considered non-arbitrable if it falls outside the scope of the parties' arbitration agreement, i.e. if the parties did not agree to submit it to arbitration. It is also non-arbitrable if no arbitration agreement as such was ever formed or, if formed, is nevertheless invalid under the applicable law. Furthermore, a strict interpretation of section 5 of *The Arbitration and Conciliation Act* through its plain meaning and the strong policy it reflects, requires courts to enforce the bargain of the parties to arbitrate. This would imply that courts should direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed, and not otherwise.

The categories of arbitrable disputes is not immutable, and conversely, it is not always a foregone conclusion that a widely drafted arbitration clause in a commercial transaction will invariably be upheld and enforced. Considerations such as whether all the parties consented to arbitration, and whether the relief sought could be given by a tribunal are likely to be key factors to the question of arbitrability. When determining arbitrability of a dispute, the Court must consider first whether or not it is within the scope of the arbitration clause.

Construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal (see *Premium Nafta Products Ltd v. Fili Shipping Co Ltd [2008] 1 Lloyd's Rep 619*). The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. Although courts generally favour arbitration, they will not compel the arbitration of claims that are outside the scope of the parties' agreement.

This type of presumption provides that a valid arbitration clause should generally be interpreted

expansively and, in cases of doubt, extended to encompass disputed claims. The clause should be
30 construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction (see *Fiona Trust &*

Holding Corp v. Privalov, [2007] UKHL 40). This means that a liberal way of construing arbitration agreements has to be pursued even in those cases where in general contract law the ambiguity could not be resolved through the application of traditional means of interpretation. Generally arbitrability is the norm and non-arbitrability the exception.

When determining arbitrability of a dispute, the Court must consider first whether or not it is within the scope of the arbitration clause. Clauses 29 and 30 of common to all six Financial Credit Agreements, contain dispute resolution and choice of law clauses which referred disputes between the parties under all six Financial Credit Agreements to South Africa arbitration and provide further that they are governed by South Africa law. They state as follows;

> ARBITRATION
>
> 29.1 Any dispute between the Borrower and JDC in regard to any matter arising out of this Agreement or its interpretation, or their respective rights and obligations under this Agreement or the cancellation of any one or more of them or any matter arising out of its or their cancellation, shall be submitted to and decided by arbitration in accordance with the rules of the Arbitration Foundation of Southern Africa, by an arbitrator agreed upon between the Borrower and JDC or, failing agreement within 10 (ten) days, on the application of any party, by an arbitrator appointed by that Foundation.
>
> 29.2 Unless otherwise determined by the parties, the arbitration shall be held in Sandton, South Africa.
>
> 29.6 Nothing in this clause 29 shall preclude IDC from seeking to obtain a summary judgment or any equivalent or similar order of court, in any court of competent jurisdiction, either in the Republic of South Africa or Uganda, on or in respect of any term or provision of this Agreement.
>
> JURISDICTION AND CHOICE OF LAW
>
> 30.1 All of the parties agree that this Agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa.

The question whether and which disputes are covered by an arbitration agreement must be determined by interpreting the agreement pursuant to the *in favorem* rule of construction. The arbitration agreement must be construed in good faith with a view to preserve its validity and to

uphold the will of the parties expressed therein to have their dispute decided by arbitration and not by courts. By the expression "Any dispute ……. in regard to any matter arising out of this Agreement or its interpretation, or their respective rights and obligations under this Agreement or the cancellation of any one or more of them or any matter arising out of its or their cancellation," the parties submitted to arbitration, all disputes, controversies, differences or claims that could arise between them, out of or in connection with, the six Financial Credit Agreements.

A privately appointed arbitrator has no inherent jurisdiction. His or her jurisdiction comes only from the parties' agreement. The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding. An arbitrator has the authority to decide not just the disputes that the parties submit to him or her, but also those matters that are closely or intrinsically related to the disputes.

By the respondent's Statement of Claim dated 21st January 2019 the respondent sought to recover from the applicant; payment of the sum of US $ 30.924,179.16, interest thereon at the CIRR plus 3% per annum from 2nd November 2018 to date of payment, the costs of the arbitration, and further or alternative relief under "Claim A"; payment of the sum of US $ 34,761,687.11, interest thereon at 2% above the Libor rate plus 350 basic points per annum from 1st November 2018 to date of payment, the costs of the arbitration, and further or alternative relief under "Claim B"; payment of the sum of US $ 14,486,714.14, interest thereon at the Libor rate plus 8.5% per annum from 1st November 2018 to date of payment, the costs of the arbitration, and further or alternative relief under "Claim C"; payment of the sum of US $ 20,965,929.73, interest thereon at the Libor six months plus 10.5% per annum from 1st November 2018 to date of payment, the costs of the arbitration, and further or alternative relief under "Claim D"; payment of the sum of US $ 28,194,439.93, interest thereon at the Libor rate plus 12.5% per annum from 1st November 2018 to date of payment, the costs of the arbitration, and further or alternative relief under "Claim E"; and in respect of "Claim F," it was averred that in breach of the Sixth FCA the applicant has not paid the instalment of US $ 168,750 on due date, 1st July 2018, or at all, nor has it paid any part thereof. That breach is continuing.

Whereas the respondent sought the above-mentioned sums as due and owing under the six Financial Credit Agreements, in application, No. 17874/19, filed by the applicant in in the High Court of South Africa, Gauteng Local Division, Johannesburg the applicant contended that even though the pivotal feature of the financial model agreed upon by the parties specified dates when the applicant would make draw-downs, sometime in February 2008 after the second drawdown, the respondent began acting unconscionably and in breach of the Financial Credit Agreements. The applicant contended that the respondent neglected, failed, delayed or refused to fulfil its obligations under the Financial Credit Agreements; in particular the obligation to process drawdowns and make disbursements in a timeous manner, and instead, unilaterally sought to introduce a number of novations into the operation of the Financial Credit Agreements that had not been contemplated or agreed between the applicant and the respondent nor reduced to writing that on one occasion resulted into a 20 months delay in disbursement; refusal, neglect, or failure to honour the applicant's drawdown requests, citing as the reason "'adverse media publicity," which reason was alien to the Financial Credit Agreements.

The applicant contended that although it is obliged to repay the respondent, that obligation was inextricably linked to the respondent's performing its obligations properly so that the project might be completed successfully since the applicant's ability to repay the loans was dependent on the successful completion of the project in order for the Kampala hotel to generate an income. The respondent's breach of the Financial Credit Agreements had resulted in cost over-runs in the project implementation, which had the effect of increasing the overall cost of the project beyond what had been planned. The applicant as a result claimed to have suffered a monthly loss of cash flow of US $ 916,666 for every month that the respondent neglected, failed, delayed, or refused to fulfil its disbursements obligations under the Financial Credit Agreements.

For purposes of a submission to arbitration, a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons. Different views of parties in respect of certain facts and situations become a "divergence" when they are mutually aware of their disagreement. It crystallises as a "dispute" as soon as one of the parties decides to have it solved, whether or not by a third party. It is not sufficient for one party to a suit to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute

any more than a mere denial of the existence of the dispute proves its nonexistence nor is it adequate to show that the interests of the two parties to such a case are in conflict. It is a matter for objective determination. The two sides must be shown to hold clearly opposite views concerning the question of the performance or non-performance of their contractual obligations. It must be shown that the claim of one party is positively opposed by the other. Even an unanswerable claim will not mean that a dispute or difference does not exist unless there is a clear and unequivocal admission of liability and quantum.

A dispute must relate to clearly identified issues and must have specific consequences in order to serve as a basis for arbitration. The existence of a dispute presupposes a certain degree of communication between the parties before the initiation of proceedings, in which the parties expressed clearly opposing views concerning their contractual obligations. The matter must have been taken up with the other party, which must have opposed the claimant's position. A dispute will be characterised by a certain amount of communication demonstrating opposing demands and denials. The difference of views must have formed the subject of an active exchange between the parties under circumstances which indicate that the parties wish to resolve the difference, be it before a third party or otherwise. It is the type of claim that is put forward and the prescription that is invoked that decides whether a dispute is arbitrable or not. In the instant case, the dispute was whether either the applicant or the respondent was liable to the other under any of the six Financial Credit Agreements and, if so, in what amount.

In the award of Bruce Collins QC dated 11th September, 2021 the only claims dealt with and upon which adjudication and awards were pronounced, were those that relate to the rights and obligations of the parties under the six Financial Credit Agreements and not claims that relate to the status/validity/enforceability or otherwise of the mortgages and other security deeds, as the latter are indeed not arbitrable and are governed by Uganda law and justiciable only in the Uganda Courts. Although the security agreements were collateral to the Financial Credit Agreements, they did not incorporate the arbitration clause.

30 The question of whether an arbitration agreement is incorporated into a collateral contract is fundamental as it determines whether the parties are required to proceed to resolve their dispute

by arbitration rather than court proceedings. For parties to have agreed on arbitration as the dispute resolution tribunal or forum, there needs to be something in the collateral contract documents that shows or demonstrates an express or conscious agreement that arbitration was the ultimate dispute resolution process (see *Walter Llewellyn & Sons Ltd v. Excel Brickwork Ltd [2010] EWHC 3415 (TCC)* and *Barrier Ltd v. Redhall Marine Ltd [2016] EWHC 381 (QB*). Parties are free to agree to incorporate any terms they choose by any method they choose. Courts have generally held that to incorporate the arbitration clause from one contract to another express reference is required.

The courts are willing to find that general words of incorporation are sufficient where parties had notice of the terms of the underlying agreement because they were standard terms (see *Modern Building (Wales) Ltd v. Limmer & Trinidad Co Ltd [1975] 1 W.L.R. 1281; [1975] 2 Lloyd's Rep. 318*; *Secretary of State for Foreign and Commonwealth Affairs v. Percy International & Kier International (1998) 65 Con. L.R. 11* and *Roche Products Ltd v. Freeman Process Systems Ltd (1996) 80 B.L.R. 10*). Express words are required when the parties did not have notice (see *Thomas v. Portsea [1912] A.C. 1; Skips A/S Nordheim v. Syrian Petroleum Co and Petrofina SA (The Varenna) [1984] Q.B. 599; [1984] 2 W.L.R. 156* and *Federal Bulk Carriers Inc v. C Itoh & Co Ltd (The Federal Bulker) [1989] 1 Lloyd's Rep. 103*). In the instant case, there are neither general nor specific words in the security agreements that make reference to the arbitration clause in any of the six Financial Credit Agreements. The disputes arising under the various security agreements therefore are not within the ambit of the arbitration agreement contained in any of the six Financial Credit Agreements.

Where the claims arising from the main contract and from the collateral contracts are distinct, the court must allow the non-statutory claims to go to arbitration because the findings of the arbitrator will neither encroach upon nor duplicate the findings of the trial court. Parties must ordinarily arbitrate arbitrable claims and litigate non-arbitrable claims. Claims that are not subject to arbitration may be stayed or proceed with separately in litigation based on the discretion of the trial court despite that fact that it may lead to bifurcated proceedings and perhaps redundant

efforts to litigate the same factual questions twice. Matters that do not fall within the scope of the

30 agreement will not be arbitrated, unless they are “inextricably interwoven” with the arbitrable ones, in which case “the proper course is to stay judicial proceedings pending completion of the

arbitration, particularly where … the determination of issues in arbitration may well dispose of non-arbitrable matters" (see *Cohen v. Ark Asset Holdings, 268 A.D.2d 285, 286 (1st Dept. 2000)*; *Lake Harbor Advisors, LLC v. Settlement Servs. Arbitration and Mediation, Inc., 175 A.D.3d 479 (2d Dept. 2019); Monotube Pile Corp. v. Pile Foundation Constr. Corp., 269 A.D.2d 531 (2d Dept.*

2000) and *Protostorm, Inc. v. Foley & Lardner LLP, 193 AD3d 486 (1st Dept 2021)*. A non-arbitrable issue therefore can be decided in an arbitration when it is inextricably intertwined with an arbitrable issue, particularly where the determination of the arbitrable claim may dispose of the non-arbitrable claim. Thus, by arbitrating both the arbitrable issue and the non-arbitrable, the interests of judicial economy are served and the risk of inconsistent results avoided.

Nevertheless, everyone recognises that parallel proceedings are not in the public interest; they simply increase delay and produce conflicting decisions. Even though the questions arising under the various security agreements are non-arbitrable, still had they been so inextricably interwoven with the rest of the matters in issue between the parties as to be amenable to determination by the Arbitrator alongside the arbitrable ones, failure to participate in arbitral proceedings or raise objections thereto, will be considered a deemed waiver of such rights and will preclude the relevant party from raising such objections in subsequent proceedings. There is no difference between an objector before Court who did not participate in the arbitration proceedings and one who participates but did not raise objection of jurisdiction. Both are precluded from raising it before the Court. In the instant case, at no stage were objections in respect of non-arbitrability of any of the claims raised by the applicant before the arbitrator. In light of section 4 of *The Arbitration and Conciliation Act*, the applicant must be deemed to have waived all such objections and is now precluded from raising any objection on the point.

v. <u>Non-recognition for enforcement of the arbitral award on account of the arbitral proceedings having been in contempt of restraining orders of the High Court and Court of Appeal.</u>

"Contempt of court" is a generic expression descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from

availing themselves of it for the settlement of their disputes (see A. *G v. Times Newspapers Ltd.*

[1974] A.C. 273 at 307). In law, contempt of court is defined as an act or omission tending to "unlawfully and intentionally violate the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it" (see *Principles of Criminal Law* 1 ed (Juta, Cape Town 1991) at 627; *R v. Almon (1765) 97 ER 94 at 100; Ahnee and others*

v. Director of Public Prosecutions [1999] 2 WLR 1305 (PC) and *R v. Metropolitan Police Commissioner, Ex parte Blackburn (No 2) [1968] 2 All ER 319 (CA*). The recognition given to contempt is not to protect the tender and hurt feelings of the judge, rather it is to protect public confidence in the administration of justice, without which the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed.

Wilful disobedience to any judgment, decree, direction, order or other process of a court or wilful breach of an undertaking given to a court or the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) or any matter or the doing of any other act whatsoever which scandalises or tends to scandalise, or lowers or tends to lower the authority of,

any court; or prejudices or interferes or tends to interfere with, the due course of any judicial proceeding; or interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner, will constitute contempt of court.

To be found in contempt, it must be proven that the party accused: (i) knew the order existed, (ii) had the ability to comply with the order but violated it knowingly, and (ii) lacks just cause or excuse for the violation. Civil contempt is a strict liability violation; all that must be proved is that the order was served on the respondent, and that a prohibited action (or a failure to carry out an order) occurred. Once the applicant has proved noncompliance with the court's order, by showing the existence of the order and the respondent's noncompliance, the burden then shifts, and the

potential contemnor must prove inability to comply or justifiable cause.

A person should know with complete precision what it is they are required to do or abstain from doing. The order should therefore be as definite, clear and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it. It should plainly

indicate

30 to the respondent all of the acts which he or she is restrained from doing, without calling on him or her to make inferences about which persons may well differ (see *Alken Connections Limited v.*

Safaricom Limited and 2 others, Nairobi Miscellaneous Application 450 of 2012 [2013] eKLR). In none of the orders referenced as having been violated when the respondent initiated arbitral proceedings is there a definite, clear and precise prohibition or restraint against commencing or proceeding with arbitration. To the contrary, as part of the temporary injunction order issued on 9th February 2018 in Miscellaneous Cause No. 230 of 2017, the Court directed that the parties should expeditiously refer their dispute to arbitration, and in any event, the order was to last 180 days. The order of restraint had had not come into force by the time the respondent issued the notice to arbitrate on 2nd February 2018. The court endeavoured to hold parties to their contractual bargain as reflected in the arbitration clause. The order could not be violated retrospectively.

As regards all orders issued subsequent to 9th February 2018, by virtue of section 5 (1) of *The Arbitration and Conciliation Act*, once a dispute is referred to arbitration, proceedings in Court are stayed. The mandatory nature of a stay of legal proceedings under this section precluded the parties from henceforth litigating all differences between them concerning their rights and obligations under the six Financial Credit Agreements. They could only litigate differences between them concerning their rights and obligations under the various collateral security agreements. The orders made subsequent to 9th February 2018 preserved the status quo only regarding the various collateral security agreements. In any event, section 5(2) of *The Arbitration and Conciliation Act* provides that notwithstanding that an application has been brought for stay of proceedings and referral for arbitration, and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made. This rule is meant to protect arbitration from dilatory tactics, thus preventing the mere filing of a legal action from postponing the commencement or continuation of the arbitration process while the issue is pending before a court. Moreover section 9 of *The Arbitration and Conciliation Act* prohibiting Courts from intervening in matters submitted to arbitration, except to the extent allowed by the Act, implies that courts cannot issue orders stopping an arbitral process.

It was argued by counsel for the applicant that the dispute between them metamorphosed after the submission to arbitration, necessitating resort to litigation. Further, that by fling defences to the suits so filed, the respondent waived its right to arbitrate. In the first place, it has not been

demonstrated how the differences between the parties concerning their rights and obligations under

the various collateral security agreements changed in character so as to fall outside the scope of the arbitration clause and the referral already made and sanctioned by Court. As regards the alleged waiver, it is constituted by the deliberate intentional and unequivocal release or abandonment of the right that is later sought to be enforced. Arbitration requires the agreement of both parties. The arbitration mechanism being the product of the agreement of parties, they must have the power to vary or annul same. There are two types of waiver: express and implied. Express waiver occurs when a party affirmatively decides or indicates that it wants to pursue the matter in a judicial forum as opposed to arbitration. Where parties have previously agreed to arbitrate future disputes, they can expressly agree to waive that requirement to enable the courts to determine the dispute. If parties reach such agreement, it is preferable to have it in writing in the event that one of the parties decides to change its position.

On the other hand, implied waiver occurs when a party subject to or seeking to compel arbitration substantially invokes the litigation process and causes prejudice to the other party. A waiver of arbitration by conduct ought not to be readily inferred. Such a waiver has to be clear and unambiguous so as to avoid doubts about the intent of the party to waive the right. The party must have undertaken a substantial act or procedure which clearly reveals the party's intent to waive the right to arbitrate. Participation in the early stage of litigation ought not readily to ground a waiver determination. In contrast, progression of the litigation with the willing participation of both parties to an intermediate stage or advanced stage, should be deemed a waiver. Hence it is the judicial litigation of the merits of arbitrable issues which waives a party's right to arbitration (see *Perry Homes v. Cull, 258 S.W.3d 580 (Tex. 2007); Kalai v. Gray, 109 Cal. App. 4th 768; Saint Agnes Medical Center v. PacifiCare of California, 31 Cal. 4th 1187* and *Ehleiter v. Grapetree, 482 F.3d 207*). Waiver must be decided on a case-by-case basis, and that court should look to the totality of the circumstances. The Court will also consider whether the movant was plaintiff (who chose to file in court) or defendant (who merely responded).

Waiver of the right to arbitrate is assessed through a number of factors, including: (i) whether the party's actions are inconsistent with the right to arbitrate; (ii) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (iii) whether a party either requested arbitration

enforcement close to the trial date or delayed for a long period before seeking a stay; (iv) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;

(v) whether important intervening steps (e.g., taking advantage of judicial discovery procedures not available in arbitration) had taken place; and (vi) whether the delay affected, misled, or prejudiced the opposing party. No one of these factors predominates and each case must be examined in context. In the instant case, the respondent is a defendant who merely responded to the applicant's filing of the suit. No pre-trial step has been taken in the suit that goes to the merits of the dispute. Since it is the judicial litigation of the merits of arbitrable issues which waives a party's right to arbitration, and the suit in issue has not gone beyond the pleadings stage, I find that

the respondent never waived, expressly or by conduct, it's right to compel arbitration.

vi. Non-recognition for enforcement of the arbitral award on account of violation of the right to a fair hearing.

Article V (1) (b) of *The New York Convention, 1958* provides that the recognition and enforcement of the award may be refused if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. Similarly in the case of domestic arbitration section 34 (2) (a) (iii) of *The Arbitration and Conciliation Act* allows for setting aside and arbitral award where the party making

the application furnishes proof that he or she was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or was unable to present his or her case. Arbitrators have a duty to render a valid and enforceable award, in case of the other party's failure to participate. This includes ensuring that the other party has been properly notified of the commencement of the arbitration proceedings and has received the Request of Arbitration/Notice of Arbitration. This

also applies to other procedural steps during the course of an arbitration. The arbitrator also needs to ensure that the other party has been given a fair opportunity to present its case and, if it decides, to start participating at any given moment.

In practice, ensuring that the other party has received all notifications, documents and
30 correspondence related to the case can easily be proven from the record together with proof of delivery. In the instant case the arbitration proceedings commenced on the 2nd February 2018 when

the respondent issued a Notice of Dispute. Upon issuance of that notice, Schindlers Attorneys in South Africa confirmed that they would obtain instructions from their client, the applicant, on defending the Arbitration Proceedings. M/s Akampumuza & Co. Advocates in Uganda was copied in on the email correspondence. This was two years prior to the onset of the Covid19 Pandemic in

February, 2020. On the 21st January 2019, the respondent issued the Statement of Claim in the Arbitration Proceedings which was served on the applicant on the 16th April, 2019. The applicant's South Africa advocates, Schindlers Attorneys, responded to the Tribunal on the 17th April 2019 confirming that they act for and on behalf of the applicant and advising that they had been instructed by the applicant to apply to the South Africa Court to stay the Arbitration Proceedings

on the basis that the Arbitration Proceedings mirror the Uganda H.C.C.S No. 937 of 2017 and that they were commenced and are being continued in contempt of the Uganda High Court restraining orders.

On 21st May 2019, the applicant filed a detailed substantive application, No. 17874/19, in the High Court of South Africa, Gauteng Local Division, Johannesburg, seeking an order to stay the Arbitration Proceedings on the basis of alleged contempt of the Uganda Court orders and on the basis of the Uganda High Court's Civil Suit No. 937 of 2017. The respondent file an affidavit in reply thereto dated the 22nd June 2020. The applicant did not pursue the South Africa stay of arbitration application despite being continually made aware of the continuation of the Arbitration

Proceedings by being copied by the Tribunal, at the arbitrator's direction at every step of the proceedings. The parties held settlement negotiations in 2019 until June 2020 in an attempt to settle the arbitration dispute but no settlement was reached. On the 22nd June 2020, the respondent advised the Tribunal and the applicant that it would be proceeding with the Arbitration Proceedings and various correspondences were exchanged between the parties regarding the continuation of

the Arbitration Proceedings.

By an email dated the 16th July 2020, the Tribunal's Registrar, Julia Le Roux, inquired of the applicant as to whether Schindlers Attorneys still represented the applicant in the arbitration

proceedings. By an email to the Tribunal dated the 17th July, 2020 from one of the applicant's
30 advocates on record, a Senior Partner with Akampumuza & Co. Advocates, the applicant confirmed that Schindlers Attorneys still represented them in the Arbitration Proceedings.

Subsequently by a letter dated 31st August, 2020 transmitted to the Tribunal, that senior Partner indicated that they would not participate further in the Arbitration on account of the proceedings being in contempt of court orders issued in Uganda. In spite of that letter, the applicant continued to communicate with AFSA and the arbitrator subsequent thereto including a later dated the 17th September, 2020 which contained substantive legal and procedural submissions to the arbitrator on several aspects of the arbitration claim.

It is evident therefore that the applicant was never prevented by the Covid19 Pandemic from participating in the arbitral proceedings but rather took a conscious decision not to. Parties who signed a binding arbitration agreement are, in principle, bound by its terms. Once a dispute arises and a claimant commences arbitration proceedings against a respondent, a general assumption is that the parties will cooperate and actively participate in the proceedings. When the other party, usually the respondent, simply refuses to participate in arbitration proceedings, either from the beginning of the arbitration or at later stages, regardless of the reasons behind a respondent's decision not to participate, most arbitration rules provide that in the absence of a respondent's participation, the arbitration proceedings will nevertheless continue on an ex parte basis. The ICC Rules, Article 6(8) provides, "If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure." Similar provisions are also provided for in the LCIA Rules, Article 15.8; SIAC Rules, Rule 20.9;
UNCITRAL Rules, Article 30; SCC Rules, Article 35.2, to name just a few. Similarly with regard to domestic arbitration, section 25 (b) of *The Arbitration and Conciliation Act* provides that where the respondent fails to communicate his or her statement of defence, the arbitral tribunal shall continue the proceedings without treating the failure by itself as an admission of the claimant's allegations.

It is therefore a well-established principle of international arbitration that arbitrators have an inherent power to continue arbitration proceedings when the other party refuses to participate, and to render an *ex parte* award once satisfied that the non-participating party has no acceptable excuse for its non-participation, and after recording in writing all procedural steps and efforts to include
that party in the proceedings. Such efforts to include the non-participating in the proceedings

should be recited in that award. Abitrators should not simply accept the contentions of the

participating party without enquiry. They should include reference to any contentions, however raised, by the non-participating party but they should not advocate for the non-participating party by arguing its case. If the burden of proving any of the contentions rests on the non-participating party, it may be appropriate to decide that the point could not succeed because of the absence of evidence from the non-participating party. If, however, the contention goes to some feature of the case being advanced by the participating party, it may be appropriate to put the point to the participating party to seek its answer and refer to that answer in any subsequent reasoned award.

Arbitrators should ensure that the non-participating party is given a fair opportunity to enter in the arbitration in order to present its case and to comment on the arguments and evidence submitted by the opposing party. For these purposes, arbitrators should copy all parties including the non-participating party in all correspondence and send them and also instruct the participating party to send them, copies of all notices, procedural orders, directions and submissions, to avoid challenges on the grounds that the non-participating party was not given proper notice. If arbitrators consider it appropriate, they may extend any deadlines in order to give a further opportunity to the non-participating party to participate.

Therefore, a party who though repeatedly written to, does not appear before the arbitrator and allows the proceedings to go ahead *ex parte*, cannot later claim not to have been given an opportunity of being heard (see *The Pendrecht [1980] 2 Lloyd's Rep 56*; *Bernuth Lines Ltd v. High Seas Shipping Ltd [2005] EWHC 3020; M/s. Blue Horse Services and others v. M/s. Capfloat Financial Services Private Limited, 28 September, 2022* and *M/s Amardeep Prakashan v. M/s Siddharth Tradex (P) Ltd and another, 2016 Latest Caselaw 7055 Del*). A party who agrees to arbitrate cannot avoid an adverse arbitration award by ignoring the arbitration proceedings (see *Merchant Cash & Capital, LLC v. Ko, Case No. 14 Civ. 659*). In a nutshell, ensuring that the other party was duly and timely notified about each and every step of the arbitration proceedings and received every single document submitted on the record is a sufficient answer to challenges of this nature at the enforcement stage. On the facts of this case, the applicant was given a fair opportunity to participate in the proceedings and elected not to do so. The applicant was not denied a fair

hearing.

vii. Non-recognition for enforcement of the arbitral award 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 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 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 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.

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

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. 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 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 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 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 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 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 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) 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 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 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.

Tribunals must ensure that in the process they do not ignore the public policy element while 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 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 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 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 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] 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.

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 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 AFSA secretariat's relationship with ENS Advocates as a founder member with multiple others in AFSA creates the risk of bias of the independently appointed arbitrator, such that recognition of the award would in the circumstances be wholly offensive to the public policy of Uganda that guarantees parties the right to dispute resolution by an impartial tribunal.

Any tribunal permitted by law to adjudicate disputes and controversies not only must be unbiased but also must avoid even the appearance of bias. One of the most crucial aspects of the arbitrator's role is neutrality. Independence and impartiality constitute the core of arbitrator integrity. The lack of independence may create an imperfect arbitration, but prejudgment renders the process a sham formality, an unnecessary social cost. Upon appointment, an arbitrator has the duty to run a conflict check prior to the commencement of the arbitration and disclose the results to the parties. This enables the parties to make an informed decision as to the arbitrator's partiality, thereby minimising the risk of the award being set aside later on account of the arbitrator evident partiality.

Any connection or relationship an arbitrator has with the parties or the subject matter of the dispute that might give rise to an impression of possible bias must be disclosed. Thus, knowledge of a potential conflict triggers either the duty to investigate or the duty to disclose.

The rule against bias is one of the fundamental principles of natural justice which applies to all judicial and quasi-judicial proceedings. Impartiality requires that the arbitrator should not sit in a proceeding in which he or she is interested, or is perceived to be interested financially, personally or otherwise. Partiality encompasses both an arbitrator's explicit bias toward one party and an arbitrator's inferred bias when an arbitrator fails to disclose relevant information to the parties. Evident partiality may be manifested by: (i) "actual partiality or bias;" or (ii) an "appearance of partiality;" or a "reasonable impression of partiality." While "actual bias" denotes a demonstrable situation where an arbitrator has been influenced by partiality or prejudice in reaching his decision, "apparent bias" denotes existence of a reasonable apprehension that the arbitrator may have been, or may be, biased. The test for the latter is whether the circumstances create room for justifiable apprehensions of bias.

Since it would be unrealistic to expect arbitrators to sever all ties with the business world, it is equally unrealistic to apply the judicial standard of impartiality to arbitrators. In fact to do so might undermine arbitration as an alternative dispute mechanism since it would encourage the appointment of those who have never been actively involved in the field. If arbitrators must be completely sanitised from all possible external influences on their decisions, only the most naïve or incompetent would be available. Consequently such interest must be direct, definite, and capable of demonstration rather than remote, uncertain or speculative. It means actual, discernible inclination to favour one party; a predisposition to a particular point of view which might affect the result. This will take the form of personal prior knowledge they may have of the facts of the dispute, or known direct or indirect financial or personal interest in the outcome of the arbitration, including any known existing or past financial, business, professional or personal relationships, any such relationships with their families or household members or their current employers, partners, or professional or business associates, which might reasonably affect impartiality or lack of independence in the eyes of the parties. There should be persuasive evidence of partiality, rather than mere speculation or possibility or a vague appearance of bias. No arbitrator should have links with either side that provide an economic or emotional stake in the outcome of the case.

The concept of “bias” or “partiality” concerns the inclination of an arbitrator, either in favour of one of the parties or in relation to the issues in dispute. It has not been demonstrated that the mere fact that the arbitrator belongs to a founder member firm of the appointing body, AFSA, created in him an inclination, either in favour of one of the parties or in relation to the issues in dispute, or a direct and definite interest in the outcome of the arbitration. The arbitrator did not have any past or present business relationship with either party. Neither has lack of independence nor lack of impartiality been demonstrated. The arguments of counsel are at best, uncertain and speculative.

In conclusion, since the application has failed on all grounds, it is hereby dismissed with costs to the respondent.

Delivered electronically this 15th day of May, 2023 ……**Stephen**

Mubiru……..

Stephen Mubiru
Judge,
15th May, 2023.