

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)

ARBITRATION CAUSE NO. 0004 OF 2022

5 **(Arising from an arbitral award dated 28th January, 2022 in CAD/ ARB/No.06 of 2021)**

SMILE COMMUNICATIONS UGANDA LIMITED APPLICANT

VERSUS

1. ATC UGANDA LIMITED }

10 **2. EATON TOWERS UGANDA LIMITED } **

RESPONDENTS

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

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The applicant is a duly registered company licensed to carry on the business of providing telecommunications services in Uganda. The respondents are private limited liability companies duly licensed to provide passive infrastructure services to telecommunication service providers in Uganda. The applicant executed a Colocation Licence and Services Agreement with the 1st respondent during the year 2012 and a Master Space Tower Use Agreement with the 2nd respondent during the year 2013. Under both agreements, the applicant was provided with tower and ground space at the respondents' sites for the purpose of erecting telecommunications and other electronic, voice and data transmission equipment.

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Sometime during the month of July, 2018 a dispute arose between the applicant and the 1st respondent concerning execution of an amendment to the Colocation Licence and Services Agreement, with the applicant accusing the 1st respondent of obtaining the applicant's signature thereto by duress, undue influence and misrepresentation. Another dispute also arose between the applicant and the 2nd respondent regarding the Master Space Tower Use Agreement concerning the legality of the 2nd respondent's billing practices in relation to the consumption of power/electricity consumed by the applicant's equipment at the 2nd respondent's sites on ground,

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inter alia, that they did not conform to the laws regulating the generation, distribution and sale of electricity in Uganda.

While under the agreement with the 1st respondent the mechanism for dispute resolution was arbitration under the International Chamber of Commerce Rules to be conducted in London and
5 Kampala, under the agreement with the 2nd respondent arbitration was to be conducted under the same rules but in France. After the applicant was granted an interim order of protection by the High Court of Uganda restraining the respondents from switching off the power supply to the applicant's sites, the 1st respondent agreed to execute a deed of amendment to the dispute resolution clauses in their respective agreements, whereupon it was agreed that both disputes be
10 resolved jointly and under *The arbitration and Conciliation Act*, with the seat of arbitration in Uganda.

As at the date of commencing the arbitral proceedings, the applicant owed the respondents a sum of US \$ 786,889.18 and shs. 8,071,271,791.43, and throughout the arbitral proceedings, the
15 applicant continued to enjoy services rendered by the respondents but without making any payment at all. The total outstanding sum at the time of delivering the arbitral award was US \$ 513,141.29 and shs. 11,833,408,890/= which remains outstanding to-date

The applicant's case before the arbitrator against the 2nd respondent was that; (a) the Master
20 Tower Space Agreement, the First Side Letter together with the 2nd respondent's billing practices are illegal, irregular and unenforceable, (b) compensation of US \$ 468,000 arising from invoking of clause 20 of the Master Tower Space Agreement; (c) compensation of US \$ 379,528 being the estimated excessive power charges for the 26 sites leased by the applicant; (e) the applicant is entitled to compensation in the form of special damages totalling US \$ 200,000 being estimated
25 lost revenue; (f) the applicant is entitled to general damages for inconveniences suffered due to enforcement of illegal electricity charges, (g) punitive damages for the illegalities committed by the 2nd respondent, (h) a permanent injunction restraining the 2nd respondent from collecting the sums in dispute (i) interest in the monetary claims by the applicant.

30 The respondents denied all the allegations made by the applicant and counter-claimed against the applicant for: (a) an award of US \$ 283,353.63 and shs. 516,537,552/= being unpaid site rentals

owed by the applicant to the 2nd respondent; (b) unbilled amounts due to the 2nd respondent arising out of expiry of leases on 24 sites amounting to US \$ 503,535.55 and shs. 258,230,005/=; (c) general damages for breach of contract and costs of the counter-claim.

In an award handed down on 28th January, 2022 the arbitrator dismissed all the applicant's claims and found in favour of the respondents on all heads of the Counter-Claims raised. Particularly, the Arbitrator found that: - the Master Tower Space Agreement and the First Side Letter are neither illegal nor irregular and the charges and billing practices of the 2nd respondent are not discriminatory; the 2nd respondent is not in breach of the contract on account of the allegation of excessive and illegal power charges as submitted by the applicant. Besides, that applicant failed to prove that claim and it failed. In lieu of an order restraining the 2nd respondent from recovering its equipment at Twed Towers for a period of twenty-two (22) months, the Arbitrator instead awarded general damages for the loss and inconvenience suffered by the applicant as a result of the 2nd respondent's negligence.

The Arbitrator declined to grant punitive or exemplary damages since the applicant did not prove to his satisfaction that the practices of billing and the Master Tower Space Agreement and the First Side Letter were illegal. The Arbitrator did not find that the grant of punitive and general damages against the 2nd respondent was warranted. The Arbitrator declined to restrain the 2nd respondent with an injunction. On the whole the claim was dismissed with costs of the arbitration awarded against the applicant save for one item. The applicant's claim was otherwise dismissed while the respondent's prayers in the counterclaim were awarded.

The Arbitrator found in favour of the 2nd respondent on the Counter-Claim against the applicant and made the following awards: - the applicant was found to be in breach of its payment obligations under contract; the applicant was ordered to pay; - (i) the billed outstanding sums of US \$ 297,721.79 and shs. 384,156,173.10; (ii) the unbilled amounts due to expiry of leases on 25 sites amounting to US \$ 854,194.29 and shs. 570,216,264.67; (iii) general damages for breach of contract in the sum of US \$ 100,000; (iv) the costs for the Counter-Claim whose quantum was reserved for award on another date after taxation hearing.

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b. The application.

The application by Chamber Summons is made under the provisions of section 34 of *The Arbitration and Conciliation Act*, section 98 of *The Civil Procedure Act* and Rule 13 of *The Arbitration Rules*. The applicant seeks an order setting aside that arbitral award, on grounds that;

5 - there are errors apparent on the face of the record; it is contrary to public policy; it was procured by evident partiality in favour of the respondents; the dispute between the applicant and the 2nd respondent was not arbitrable; and it was made contrary to the provisions of *The Arbitration and Conciliation Act*; in that it was delivered beyond the statutory timelines and those set out in the arbitration agreement and the parties were not accorded equal treatment at the

10 point of delivery of the award.

It is the applicant's case that the award was made contrary to section 31 (1) of *The Arbitration and Conciliation Act*, which requires the arbitrator to render the award within a period of two months from the date of appointment. It was as well delivered beyond the timelines agreed upon

15 by the Arbitrator and the parties. It is contended that the Arbitrator was bound by the arbitration agreement which provided under Clause 2.3 that the arbitration shall be conducted and concluded within (ninety) 90 days from the commencement of the arbitration proceedings, unless the arbitrator at the preliminary hearing found it impracticable and/or necessary to extend timelines for conclusion of such arbitration. Similarly, under the agreement for appointment of

20 arbitrator made on 17th March, 2021 between the parties and the Arbitrator, it was also agreed that the arbitration was to be concluded within a period of 90 days from the date of commencement of arbitration or such time as the arbitrator and the parties would mutually agree upon.

25 Contrary to the arbitration Agreement and the appointment Agreement, the Arbitrator conducted and concluded the arbitration in a period of over ten (10) months. By the mutual agreement of the parties and the arbitrator, the award should have been delivered on the 10th December, 2021. However, on 9th December 2021, the Arbitrator unilaterally enlarged the time and undertook to deliver the award on the 22nd December, 2021. On that day, contrary to his own undertaking, the

30 Arbitrator again unilaterally enlarged the time. A month later, on 21st January, 2022, the arbitrator again unilaterally undertook to deliver the award by 2nd February, 2022. Unknown to

the applicant however, the award was delivered earlier than that date and the applicant only received notice of the same on 1st February, 2022 after the respondents had switched off the applicant's sites at the stroke of midnight on 1st February, 2022.

5 The applicant contends further that electricity in Uganda is a public utility and is highly regulated for the benefit of the public and therefore the award ought to have taken into consideration all the public policy considerations for the regulation of pricing, licensing, sale, consumption, computing, and overall use of electricity. Instead, the arbitrator found that the relationship between the applicant and the 2nd respondent was not regulated under the realm of
10 the Electricity Regulatory Authority but rather under *The Uganda Communications Act*, the entity that licensed both the applicant and the 2nd respondent and regulates their operation. The arbitrator further erroneously found that the quantity of power supplied by the 2nd respondent to the applicant does not fall under the threshold at given under section 51 (l) and Section) (q) of *The Electricity Act* but rather that it is just an additional service as per Section 5 of *The Uganda*
15 *Communications Act*.

The arbitrator further erroneously found that under rule 3 of *The Weights and Measures (Electrical Meters) Rules, 2015*, the bulk metering guidelines, *The Electricity (Primary (Grid Code) Regulations*; - a) do not apply to the relationship between the applicant and the 2nd
20 respondent; b) the standards and units of measure of electricity under the said regulations and established international standards i.e., kwh do not apply to the 2nd respondent when selling power to the applicant; c) the 2nd respondent as a bulk supplier of power docs not need to comply with the bulk metering guidelines; d) the transparency requirements regarding billing for power by the 2nd respondent under the above-mentioned laws and regulations do not apply to the 2nd
25 respondent.

The other error apparent on the face of the record is that the Arbitrator in making the award did not consider the submissions of the Applicant and did not make a balanced analysis of the evidence put before him by the applicant. The Arbitrator merely regurgitated the parties'
30 submissions and, in several instances, did not demonstrate that he considered the applicant's submissions in rejoinder. It is evident throughout the award that more reference and attention

was given to the evidence of the respondents without any justification and contrary to the law and procedural requirements. Failure to consider the submissions of both parties before reaching his decision is an error apparent on the face of the record which contravened principles of natural justice and public policy. The arbitrator exhibited partiality by considering the submissions in rejoinder filed by the 2nd respondent in determination of the issues arising and did not extend the same treatment to the applicant's submissions in rejoinder which for all intents and purposes was agreed upon in the schedule of submissions. The arbitrator further exhibited partiality by awarding orders to the 1st respondent that were not prayed for while simultaneously ignoring and neglecting to make a pronouncement on orders prayed for by the applicant.

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It is the applicant's further contention that disputes over electricity are not capable of resolution by arbitration and as such should be adjudicated upon by the Electricity Disputes Tribunal established under section 109 of *The Electricity Act* and Rule (4) of *The Electricity Disputes Tribunal Rules of Procedure*. The electricity dispute with the 2nd respondent as framed was on a question of law as to whether the power billing practices of the 2nd respondent of the applicant's consumption of power were illegal and contrary to the electricity laws and related regulations.

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c. The affidavit in reply;

By their joint affidavit in reply the respondents contend that the applicant, 1st respondent and 2nd respondent are licenced and regulated by Uganda Communication Commission (UCC). The 1st and 2nd respondents performed all their obligations under the Colocation Licence and Service Agreement and the Master Space Tower Agreement respectively by providing the applicant with the agreed services. Unfortunately, the applicant refused/failed to perform its payment obligations to the respondents for the services provided in accordance with the agreed terms.

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On 16th December, 2015 the applicant and the 2nd respondent entered into a First Side Letter to the Master Space Tower Agreement wherein the parties amended the Use Fee and provisions related to power agreed upon in the Master Space Tower Agreement. The agreements as executed by the parties were negotiated at arms-length by the parties' authorised personnel and signed willingly, by all the key personnel of the applicant without any form of duress, undue

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influence, misrepresentation and/or illegality. The Co-location Licence and Services Agreement was executed by the parties willingly in the presence of officials of the UCC without any form of duress, undue influence or misrepresentation. Upon execution of the amendment the 1st respondent performed its duties as agreed upon by providing services to the applicant and the applicant in turn refused/failed to perform its payment obligations as agreed upon by paying the 1st respondent for the services supplied and instead started claiming that the agreement was invalid.

The applicant commenced the arbitration proceedings at the International Chamber of Commerce Court of Arbitration in bad faith and in order to deny the respondents payment for the services the applicant had consumed and continued to consume. The applicant applied for and was granted an interim order of protection on 5th February, 2021 and from that date to the time of delivery of the arbitral award did not make any payment to the respondents for the services supplied by the respondents despite the fact that it continued utilising their services. The applicant and the respondents executed a Deed of Amendment to the Dispute Resolution Clauses in their respective agreements and agreed to have arbitration in Uganda and in accordance with *The Arbitration and Conciliation Act*. The parties thereafter participated in the arbitration proceedings without any objection to the jurisdiction of the arbitrator or the procedure adopted and an arbitral award was made partially in favour of the respondents.

The award was not delivered beyond the timelines agreed upon by the Arbitrator and the parties as alleged. The schedule agreed upon by the parties was affected by the Covid-19 lockdown and that upon lifting of the lockdown the parties and the Arbitrator executed a revised arbitration schedule. Throughout the arbitration proceedings the adjournments were mutually agreed upon by the Parties and the Arbitrator. The parties and the Arbitrator could not fully comply with the revised schedule given the nature of witnesses called by the parties. One of the applicant's witnesses was not in the country and the process of organising video conferencing facilities exceeded the timelines scheduled for cross examination of the applicant's witnesses and in addition cross examination of all other witnesses exceeded the scheduled timelines. At all material time the arbitrator duly communicated to the parties the extension of time for delivery of the award and none of the parties objected to such extension.

The actions of the Arbitrator of extending time with notice to the parties was reasonable and in accordance with *The Arbitration and Conciliation Act* and the Agreement for Appointment of the Arbitrator. The applicant was not prejudiced in any way by the extensions for delivery of the award. The Arbitrator treated the parties equally throughout the arbitration proceedings and at the time of delivery of the award. The award was placed at CADER by the Arbitrator for the parties to collect as undertaken by the Arbitrator. Leaving the award at CADER for onward transmission to the parties on 31st January, 2022 does not in any way amount to unequal treatment of the parties and is not a ground for setting aside the arbitral award.

In arriving at the award, the Arbitrator put into consideration the pricing, licensing, sale, consumption, computing and use of electricity as raised in the pleadings, trial documents, witnesses, parties' submissions and legislations relied on by the parties. The Arbitrator in making his award addressed his mind to all the relevant laws and the award in favour of the 2nd respondent is not contrary to public policy as alleged. The Arbitrator considered the nature of the relationship between the Parties, the terms of the agreements between the parties, the laws regulating the relationship between the parties, the licensing regime of the parties, the evidence adduced by the parties among others and that the holding of the Arbitrator was not absurd, contrary to the law and public policy and there is no error apparent on the face of the record. The Arbitrator considered all the submissions of the parties and made a balanced analysis of the evidence adduced by all the parties. All the orders in the award were justified and in accordance with the evidence adduced by the Parties and the Arbitrator considered all the orders prayed for by the parties. There was no partiality by the Arbitrator in granting such orders. There is no evidence of bias and partiality on the part of the Arbitrator as alleged by the applicant and there is no ground to warrant the setting aside of the award.

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d. Affidavit in rejoinder;

By an affidavit in rejoinder, the applicant contends that the affidavit in reply contains general denials, is argumentative and provides no specific response to the issues at hand and to that end should be disregarded and the applicant be granted the relief sought. Any alleged default by the applicant was occasioned by the illegalities arising from the First Side Letter with the 2nd

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respondent and from the duress, misrepresentation and undue influence occasioned by the 1st respondent at the signing of the agreements giving rise to the dispute. It is not true that the ICC proceedings were commenced in bad faith since the underlying agreement between the 1st respondent and the applicant provided for arbitration by ICC in case of a dispute which there was. The Deed of Amendment for arbitration is what transferred the arbitration from ICC to CADER. The respondents cannot defend the arbitration process under CADER and dispute the one at ICC where the gist of the dispute was the same. Even if the arbitration at ICC had been commenced in bad faith (which it was not), it did not warrant the arbitrator's silence in respect of the claim for the refund of US \$ 5,000 which was paid to ICC as filing fees.

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Although by his CV, the Arbitrator disclosed that he had worked with M/s Katende, Ssempebwa & Co. Advocates between 1998-2000, which is over 20 years ago, during the period when the arbitration was being conducted, the said arbitrator wrote and published a book which he dedicated to that law firm who at the material time were the respondents' advocates. The dedication part of the book speaks to the depth of the personal relationship that the arbitrator had with the respondents' law firm. The arbitrator's deliberate choice to put this law firm right below family goes to further show that the arbitrator has a strong and ongoing relationship with the Respondents' counsel. Discovery that the arbitrator had published a book dedicated to the respondents' lawyers came after the arbitral award had been handed down and therefore forms sufficient grounds for setting aside and is evidence of bias.

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e. Submissions of counsel for the applicant.

M/s TARA Advocates, formerly Tibugwisa and Co. Advocates, on behalf of the applicant, submitted that the applicant has demonstrated the different violations arising from the award, these violations occurred in the making of the award and the applicant also further has demonstrated how the violation had caused actual and/or real prejudice against it. The claim against the 1st respondent revolved around its electricity billing practices. In fact, the specific broad issue for the arbitrator's determination as evidenced at paragraph 32 on Page 93 of the award was: whether the 2nd respondent's (ATC) electricity charges and billing practices for its sites are illegal, discriminatory and irregular? Clearly for determination of this issue, the

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Arbitrator's task was to consider the billing practices and charges of the 2nd respondent (ATC) and juxtapose them against the laws in Uganda on electricity billing and charging.

5 All matters to do with electricity, billing, methodology and measurement are governed by *The Electricity Act* and regulations and guidelines made thereunder with Electricity Regulatory Authority (ERA) as the primary regulator. The licensing regime by UCC is inconsequential and immaterial to the electricity dispute. To the extent that the arbitral award purports to uphold the 2nd respondent's power billing practices which inflate regulated electricity retail tariffs (which Government already considers prohibitively high) by a whopping 65% renders it in glaring
10 conflict with and contrary to public policy. All aspects relating to electricity even if relating to value addition must be done in accordance with the *Electricity Act of Uganda* and the regulations thereunder.

The applicant faulted ATC for breaching several provisions of the law including: - a) selling
15 power without a licence contrary to section 59 (1) of *The Electricity Act*; b) charging power using kW as opposed to kWh contrary to Section 75 (4) which requires all methodologies and procedures of tariff calculation to be approved by ERA contrary to Rule 3 of *The Weights and Measures (Electrical Meters) Rules, 2015* on the units of measurement of power (kWh); c) contravention of the Bulk Metering Guidelines under Guideline 8 which provide that tariff rates
20 and structures charges by Bulk metered customer (ATC) to the unit owner must be identical to tariff rates and structure as approved by ERA; d) Contravention of Regulation 12.2.1 and 12.2.3 of *The Electricity (Primary Grid Code) Regulations* on the contents of an electricity bill; contravention of section 75 (6) of *The Electricity Act* on discriminatory pricing. ATC does not sell power at the same price as UMEME which is their supplier, and by implication there is a
25 mark-up on the price provided by UMEME which in essence amounts to sale of electricity. The Applicant's contention is that since the 1st respondent sells power to the applicant at a premium, it ought to obtain a license, failure of which is a contravention of the law but also that all matters to do with electricity billing practices of ATC are regulated under *The Electricity Act* and as such ATC has to be compliant.

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The policy behind these laws is to promote efficiency, economy and safety, protect the interests of consumers in respect of charges, prices and other terms of supply of electricity and quality, liability, transparency for supply of services and to ensure widespread access to affordable modern energy. The main policy goal is to meet the energy needs of Uganda's population for social and economic development in an environmental sustainable manner. The 1st respondent's actions of selling power to the applicant at a mark-up of over 65% defeats the intention behind the energy policy whose objective is to ensure that electricity is affordable and accessible to all for the betterment of the country's developmental goals.

There is a deliberate reason why the author/Arbitrator chose not to put the respondents' lawyers under the acknowledgement section but instead chose to put them under the dedication section and it cannot be assumed that he intended to merely acknowledge them. If it had been his intention to merely acknowledge them, then he should have obviously included them under the acknowledgements section of the book. The acknowledgments section has a plethora of names and no prominence is paid to any. On the other hand, the dedication section which is only seven lines prominently displays the respondents' lawyers and draws special attention to them as intended by the author. The author cannot be said to have been mistaken to put M/s Katende Ssepembwa & Co. Advocates under the dedication section if in fact his only intention had been to merely acknowledge them. The Arbitrator's dedication of his book to the respondents' lawyers tells one thousand unspoken stories of the deep and personal relationship that they enjoy beyond what a CV could tell. This is of special concern because the authorship and publication of the book in issue happened in 2021 during the pendency of the arbitration proceedings. What is unsettling is that the arbitrator was concurrently arbitrating a dispute with the Respondents' lawyers M/s Katende Ssempebwa and in his private time, writing a book in which he was dedicating to the respondents' lawyers appearing before him.

The fact that the Arbitrator had previously worked with the respondents' lawyers close to twenty years ago as of itself does not impute apparent bias on his part. However, his act of dedicating his book to the said law firm, twenty years later, after such a long period of time is inexplicable without indicating a special and personal relationship enjoyed between the Arbitrator and the respondents' lawyers especially since the Arbitrator has since then worked at over ten other places which he did not deem necessary to dedicate his book to or even acknowledge. Until the

applicant learned of this book with its dedication, it had no reason to suspect that the Arbitrator had a deeper personal relationship with the respondents' lawyers and would never have appointed him as an Arbitrator because the book gives a more recent disclosure of the present relationship between the Arbitrator and the respondents' lawyers. A fair minded and informed observer would
5 conclude that there was a real possibility that the Arbitrator was biased.

Whether or not the Arbitrator was selected from amongst the five nominee Arbitrators and whether or not the applicant made no objection did not remove the on-going duty of disclosure from the Arbitrator. Besides, at the point of selection, there was nothing present or nefarious to
10 object to from the disclosure that the Arbitrator had worked at M/s Katende Ssempebwa & Co. Advocates over twenty years ago and the applicant could never have assumed that the Arbitrator was writing a book which he was dedicating to those very lawyers. That fact and the reasons why he was dedicating the book were only known to the Arbitrator and presumably the respondents' lawyers. Would the Applicant have objected to the appointment if it had known this fact? Yes!
15 The parties receiving the award on different timelines prejudiced the applicant who at that point could not even obtain any measure of protection after the respondents switched off its sites and to date the same remain off notwithstanding the merits of this application.

f. Submissions of counsel for the respondents.

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M/s Ortus Advocates together with M/s Katende, Ssempebwa & Co. Advocates on behalf of the respondents jointly submitted that as a general rule, the parties to arbitral proceedings must be bound by the arbitral award. An arbitral award cannot be reviewed or appealed except where parties provided for a right of appeal under the Arbitral Agreement. The Arbitral Agreement
25 between the applicant and the respondents does not provide for a right of appeal against the award. The arbitral award delivered on 28th January, 2022 is final and binding on the parties and is not appealable. This is a disguised appeal by which the applicant wants this Court to review the merits of the award. This is not legally tenable under section 34 of *The Arbitration and Conciliation Act*.

30 The arbitral award in this matter is not inconsistent with the Constitution, or, any laws of Uganda and it is not inimical to national interest or contrary to justice and morality. The critical issue that

the arbitrator was faced with whether the 2nd respondent was in the business of generating, distributing or selling electricity in order to be under the realm of the Electricity Regulatory Authority. The arbitrator, upon reviewing the contractual relationship between the parties, the licencing regime of the parties, the evidence adduced by the parties and testimonies of the parties
5 rightly found that the relationship between the parties was governed by the Uganda Communications Commission under *The Uganda Communications Act* and not the Electricity Regulation Authority. The arbitrator found that the relationship between the applicant and the 2nd respondent is for provision of telecommunication services and the supply of power is not the core business of the 2nd respondent. He further found that the 2nd respondent is licenced and in the
10 business of provision of passive infrastructure services. He further rightly found that the supply of power to the applicant's equipment was a value-added service and the parties agreed to the rate and the procedure for billing for this service.

There is no error apparent on the face of record. A clear analysis of the award clearly shows that
15 the arbitrator considered the submissions of both parties and the evidence adduced by the parties. The Arbitrator on each issue addressed the evidence adduced by both parties and the submissions of the respective parties. The fact that the arbitrator did not agree with the applicant's submissions or was not convinced by the evidence adduced by the applicant does not in any way amount to error apparent on the face of the record.

20 This was not an electricity dispute as alleged by the applicant. The dispute between the applicant and the 2nd respondent revolved around whether the First Side Letter to the Master Space Tower Agreement executed by the parties was null and void and whether the 2nd respondent was entitled to the outstanding balance for the power consumed by the applicant's equipment. The dispute
25 between the applicant and the 2nd respondent was arbitrable and the arbitrator had jurisdiction to entertain the same. The applicant having commenced the arbitration proceedings cannot turn around and argue that the dispute was not arbitrable. The applicant throughout the arbitral proceedings did not raise an objection to the jurisdiction of the arbitrator and fully participated in the arbitral proceedings. This clearly shows that this application has no merit and that it is only
30 aimed at frustrating the respondents.

It is not in dispute that the arbitrator when he was starting his legal career worked with M/s. Katende Ssempebwa & Company Advocates having been employed by the firm as an Associate over twenty years ago between 1998 and 2000. It is also not in dispute that the arbitrator disclosed his previous relationship with M/s Katende Ssempebwa & Company Advocates to both
5 parties at the earliest opportunity; which was before the commencement of the arbitration as required under Clauses 2(c) (ii) and (iii) of the Appointment of Arbitrator Agreement dated 26th March 2021. Even after this disclosure, the applicant did not object to his appointment and this can only imply that the applicant believed in the impartiality of the Arbitrator and was comfortable with his appointment thus waiving their right to object to his independence. The
10 book was dedicated to the arbitrator's late parents, wife, children and siblings and that the arbitrator merely acknowledged M/s Katende Ssempebwa & Company Advocates in its capacity as one of the law firms he had previously worked with at the start of his legal career.

It would be incredible and unrealistic for this Court to expect that an Arbitrator can be accused of
15 bias because he worked with a law firm twenty years ago with no other professional relationship with the said firm ever since the time he left. The Applicant has not furnished any evidence of a link between M/s Katende Ssempebwa & Company Advocates and Aristoc Booklex where the book is sold. The mere fact that the arbitrator found against the applicant is not a ground for imputing bias. The award of interest to the 1st respondent did not amount to bias as the award
20 was simply part of the arbitrator's chain of reasoning after he found that the Applicant had breached the contract by deliberately refusing to pay for the services they enjoyed from the 1st respondent.

Under section 31(1) of *The Arbitration and Conciliation Act*, an arbitrator may make an award
25 on or before any later day to which the arbitrator may in writing from time to time enlarge. The provision gives an arbitrator power to enlarge the time for making an award. The extensions in the timelines for the arbitral proceedings were mutually agreed upon by the parties and the arbitrator and this was in accordance with that provision. The Applicant was not prejudiced by these mutually agreed upon extension as she had an interim protection measure and was using
30 the respondents' services without paying throughout this period. The arbitrator did not deliver the award to the parties on different days as alleged. The parties picked the award on different

days and this did not prejudice any of the parties. The Arbitrator in a letter dated 24th January, 2022 undertook to leave the written award at CADER by 2nd February, 2022 and he took the award there on 31st January 2022. The award was picked by the respondents' clerk on 31st January, 2022 while the applicant picked the award on 1st February, 2022.

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g. The decision.

In considering matters arising from arbitration, the Court is at all time cognisant of the autonomy of the parties. 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. The court cannot review the merits of the tribunal's decision. Accordingly, courts will not evaluate whether the arbitral tribunal reached correct or incorrect factual or legal conclusions. Interpretation of the contract falls within the realm of the arbitrator and the Court will not interfere unless the reasons given by the arbitrator are found to be perverse or based on wrong proposition of law.

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. The provisions relevant to this application under section 34 (2) of *The Arbitration and Conciliation Act* set out the limited instances where a party can apply to set aside an arbitral award. The applicant in the instant case has raised seven grounds in this application in respect of which the relevant provisions of the Act state as follows;

- (2) An arbitral award may be set aside by the court only if—
- (a) the party making the application furnishes proof that—
 - (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; except that if the decisions on matters referred to arbitration can be separated from those

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not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside

- (vi) the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or;
- (vii) the arbitral award is not in accordance with the Act.

(b) the court finds that—

- (ii) the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or.
- (ii) the award is in conflict with the public policy of Uganda.

It is a settled law that this court cannot substitute its own decision for that of the arbitrator both on facts and law is final. These provisions were made clearly with a view to circumscribe to a narrow point, the objections that can be entertained where an arbitral award is assailed. An award is not subject to appeal or to any other remedy except those provided for in *The Arbitration and Conciliation Act*. It is on that account that the court will now proceed to consider the issue arising from this application.

- i. Whether the dispute between the applicant and the 2nd respondent was not arbitrable;

Where there is a valid agreement to arbitrate, all matters that fall within the scope of that agreement are to be arbitrated. 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*, an 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. 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. 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.

5 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
10 619). 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.

15 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 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
20 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.

Non-arbitrability connotes disputes that are not appropriate for or capable of settlement by
25 arbitration, or subject to arbitration. 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 for a; 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
30 circumstances (as set out above) are also excluded from the purview of arbitration.

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
5 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
10 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
15 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 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
20 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
25 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.
30 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 available to the courts or public tribunals, that does not mean the claim is automatically rendered non-arbitrable. It 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.

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When determining arbitrability of a dispute, the Court must consider first whether or not it is within the scope of the arbitration clause. According to section 10 of *The Arbitration and Conciliation Act*, the parties are free to agree on a procedure of appointing the arbitrator or arbitrators and to determine the number of arbitrators, provided that such number is not an even number. The 3rd February, 2021 deed of amendment to the Dispute Resolution Clauses relating to the Co-Location Licence and Services Agreement between Eaton Towers Uganda Limited and SMILE Communications Uganda Ltd and the Master Tower Space Use Agreement and the amendments thereto between ATC Uganda Limited and SMILE Communications Uganda Limited, provided as follows;

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2. DISPUTE RESOLUTION

- 2.1 with effect from the Effective Date, the parties consolidate and restate clauses 2.1.7 and 34 of the Co-Location Agreement and Master Tower Agreement respectively as follows: _
- 30 2.2 Any dispute arising out of, or in connection with, the Agreements, including the breach, termination or invalidity thereof (a “Dispute”), shall be amicably settled by the parties, each acting in good faith. If such amicable settlement is not possible within thirty (30) days of notice of the dispute by a Party to

the other party, such Dispute shall be finally settled in accordance with the arbitration laws of Uganda as per the Act and the Rules of CADER by a single arbitrator appointed in accordance with the Act and the Rules of CADER. The place of arbitration shall be Kampala, Uganda. The language of the arbitration shall be English. The thirty (30) days' notice period of the dispute shall not apply to disputes already brought to the attention of the parties at the signing hereof.

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2.3 The arbitration(s) shall be conducted and concluded within Ninety (90) days from the commencement of the arbitral proceedings unless the arbitrator in the preliminary hearing finds it impracticable and/or necessary to extend timelines for conclusion of such an arbitration.

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2.4 The award of the arbitrator shall be final and binding.

2.5 Nothing in this section shall prevent a party from seeking enforcement of an arbitration award issued in accordance with this section in any court. Notwithstanding anything in this section to the contrary, either Party may seek interim measure of protection or injunctive relief either through the arbitration process pursuant to this section or in any Court.

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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 arising out of, or in connection with, the Agreements, including the breach, termination or invalidity thereof,” the parties submitted to arbitration, all disputes, controversies, differences or claims that could arise between them, out of or in connection with, the Agreements.

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In the instant case, under the Master Tower Space Use Agreement, the 2nd respondent was under a contractual obligation to provide both AC and DC power to the applicant at its 26 sites. In terms of AC power, the 2nd respondent was required to provide both utility and generator power in case of a power failure. In terms of DC power the 2nd respondent was required to provide both grid and generator power and provide the rectifiers with batteries for additional back-up.

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Consequently in the ensuing arbitral proceedings, the applicant challenged the power charges levied against it by the 2nd respondent under the Master Tower Space Use Agreement of 10th

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October, 2013 as amended by the First Side Letter of 16th December, 2015 on grounds that they do not conform to the laws of Uganda, including the laws regulating Electricity. The applicant sought a declaration that the provisions of the Master Tower Space Use Agreement read together with the First Side Letter on Power charges coupled with the 2nd respondent's power billing practices were illegal, irregular and unenforceable and should be varied in accordance with the electricity laws of Uganda. The applicant thus sought compensation by way of refund of shs. 1,404,253,694/= or its equivalent in US Dollars (US \$ 379,528) being the estimated excessive power charges for the 26 sites leased by the applicant from the average margin of 65% and such other accruing sum.

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The pertinent issues raised by the parties were; whether the 2nd respondent's electricity charges and billing practices for its sites were illegal, discriminatory and irregular; and whether the applicant was in breach of its payment obligations to the 2nd respondent.

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The Arbitrator found that from the evidence on record that the 2nd respondent was in the business of providing passive infrastructure and that the supply of electricity to the applicant was just an added service. The applicant and the 2nd respondent fall under the mandate of the Uganda Communications Commission (UCC) and not the Electricity Regulatory Authority. The relationship between the applicant and the 2nd respondent is for provision of telecommunications services and the supply of power is not the core business of the 2nd respondent. Therefore *The Electricity Act* did not apply. The Arbitrator stated as follows;

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The supply of power to the Claimant's equipment is a value added service and the parties agreed to the rate and the procedure for billing for this service. The definition of Electricity under *The Electricity Act* does not fit or augur with the relationship between the Claimant and the 2nd respondent. The relationship of the Claimant and the 2nd respondent and the MSA and the FSL is not regulated under the realm of the Electricity Regulatory Authority but rather under the UCC Act the entity that licensed both the Claimant and the 2nd respondent and regulates their operations. Furthermore, the quantity of power supplied by the 2nd respondent to the Claimant does not fall under the threshold as given under of Section 51 (t) & section 3 (q) of *The Electricity Act* but rather it is just an additional service as per section 5 of *The Uganda Communication Act* and this is governed by UCC and not ERA. I find merit in the submissions of the Counsel for the 2nd respondent and consider that the

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relationship between the Claimant and the 2nd respondent is regulated by *The Uganda Communications Act* and not *The Electricity Act* and I so find.

5 In general, the fact that the subject matter of a dispute relates to telecoms will not affect its arbitrability. The question of the contractual validity of an arbitration agreement is separate to arbitrability of a subject-matter. As seen in the above extract, in circumstances where the Arbitrator was invited to consider whether the exercise of jurisdiction by the arbitral tribunal in relation to the claims made in the specific case would conflict with the exclusive jurisdiction of a court or other competent authority under applicable law, the Arbitrator opted to consider how
10 and by what legal regime the relationship between the Claimant and the 2nd respondent was regulated, yet it was necessary to consider whether the issues before him which related to public interest, public policy and mandatory laws had an impact on the arbitration of the specific dispute.

15 Had he properly directed himself, he would have found that “electricity” is defined as electric power generated from water, mineral oil, coal, gas, solar energy, wind energy, atomic energy or any other means (see section 3 (q) of *The Electricity Act*). Some of the electricity supplied to the applicant was generated by the 2nd respondent while some was a re-sale of that supplied by UMEME. Under section 59 (1) of *The Electricity Act* and by virtue of the definition of “retail
20 seller” by Regulation 2 of *The Electricity (Primary Grid Code) Regulations, 2003* as “a person who holds a licence for retail sales of electricity, or exempted from the requirement to obtain such a licence pursuant to the Act,” the sale of electricity requires a sale licence granted by the Electricity Regulatory Authority (ERA) which is a government agency that regulates, licenses, and supervises the generation, transmission, distribution, sale, export, and importation of
25 electrical energy in Uganda. A person who sells electricity to any premises except under the authority of or under an exemption given under the Act, commits an offence (see section 61 (b) of *The Electricity Act*).

Regulation 2 of *The Electricity (Primary Grid Code) Regulations, 2003* defines “retail sales” as
30 sales of electricity to consumer. The sale of electricity involves retailing of electricity from generation to the end-use consumer who has been connected to a distribution network. In essence the 2nd respondent was engaged in the re-sale of electric energy to the applicant; a type of sale

involving energy supplied to it by UMEME, and resold to the ultimate consumers, the applicant. Retail sales of electricity in Uganda too are regulated. Tariffs are prescribed by the Electricity Regulatory Authority on accordance with section 75 of *The Electricity Act* and *The Electricity (Tariff Code) Regulations, 2003* as well as under provisions of *The Electricity (Application for Permit, Licence and Tariff Review) Regulations, 2007*. Regulation 3 of *The Weights and Measures (Electricity Meters) Rules, 2015*, specifies the units of measurement for the sale of electricity as; (a) the watt hour; (b) the volt-ampere hour; or (c) the volt ampere reactive (var), and multiples and submultiples of such units. Even though it is not the core business of the 2nd respondent and served only as an added value to the contract with the applicant, the sale of electricity to the applicant was clearly subject to the legal regime regulating the sale of electricity in Uganda.

For reasons of public policy and public interest, and the energy sector being such a complex industry with substantial national importance, certain rights and obligations have become of fundamental importance with regard to corporations involved in the sector. They include the duty to serve, the requirement to set rates that are just and reasonable and a requirement not to discriminate unjustly between customers. With changing technology and the growing economic importance of this sector, energy regulators have been given broad power by government with wide-ranging policy objectives. It is for this reason that the generation, transmission, distribution, sale and use of electricity is highly regulated by statute. The generators, transmitters and distributors of electricity are all either privately owned or government-owned public utilities regulated by the government, through an independent regulatory Authority, regardless of ownership. That regulation includes the rates charged to customers, the quality of service and investment in new assets. In addition there are regulatory rules preventing market manipulation.

The traditional obligations of a public utility flow from a combination of case law and statutory provisions. A public utility must: set prices that are just and reasonable; not discriminate unjustly between customers; not set rates retroactively; not refuse to serve a customer; offer safe and reliable service; offer access to essential facilities; and not contract for rates different from the tariff rate. On the other hand, a public utility has certain rights. Specifically a public utility is entitled to: a fair rate of return; recover costs that are prudently incurred; a fair rate of return on

assets that are used and useful; and be free from competition in a service area. The rates are regulated because these are monopoly services and consumers are not protected by competition.

Parliament established the Electricity Regulatory Authority (ERA) with special expertise to
5 adjudicate on a narrow range of matters. Its expertise in regulatory matters therefore is
unquestioned. The generation, transmission, distribution, sale and use of electricity is a highly
specialised and technical area of expertise. It is also recognised that the relevant legislation
involves economic regulation of electricity as an energy resource, including setting prices for
electricity which are fair to the distributors and the suppliers, while at the same time are a
10 reasonable cost for the consumer to pay. This will frequently engage the balancing of competing
interests, as well as consideration of broad public policy. The challenge faced in energy disputes
in the choice between energy regulators and arbitrators is that these are two specialised
adjudicators, both with a high level of expertise.

15 On account of the foregoing, in determining whether or not the applicant sought some statute-
based reliefs that would invariably affect third parties or the public at large such as could only be
granted by the courts and public tribunals in the exercise of their powers conferred upon them by
the state, the Court will consider the following three factors: (a) whether the Electricity
Regulatory Authority possesses some special expertise that makes the case particularly
20 appropriate for its decision; (b) whether there is a need for uniformity of interpretation of the
type of question raised by the dispute; and (c) whether the case is important in relation to the
regulatory responsibilities of the Electricity Regulatory Authority. Considerable deference will
be given to the regulator when the issues concern interpretation of its home statutes, as opposed
to contractual obligations.

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Having done so, the Court finds that the facts in dispute are unique to the parties. The resolution
of this dispute is not important to the regulatory responsibilities of the Electricity Regulatory
Authority. The Electricity Regulatory Authority, as an energy regulator, has exclusive
jurisdiction of those areas for which it has issued a specific order. That would involve the rates or
30 the prices the licenced utilities can charge, yet the 2nd respondent is not a licensed public utility.
A public utility is an entity that provides goods or services to the general public, which the 2nd

respondent is not. The Electricity Regulatory Authority does not have special expertise in interpreting the Master Tower Space Use Agreement. The ascertainment of parties' intent when they execute a contract is a matter of case-by-case adjudication that does not involve the considerations of uniformity or technical expertise that, in other circumstances, might call for the
5 assertion of the Electricity Regulatory Authority's jurisdiction. The remedy or relief sought is one that only affects the parties to the arbitration. The matters in dispute relate to subordinate rights *in personam* arising from rights *in rem*, which have always been considered arbitrable. The dispute being of purely private contractual matters, the Arbitrator did not infringe the Electricity Regulatory Authority's jurisdiction. The arbitration involved a private dispute and was not
10 binding on any third party, including the Electricity Regulatory Authority. On basis of the facts of this case therefore, the Court is inclined to find in favour of arbitrability.

That notwithstanding, the utility business also involves contracts with third parties for the sale of electricity. Many of those contracts have arbitration provisions. Often disputes involving
15 regulated utilities present special problems for arbitrators. There can be conflicts in jurisdiction and issues of arbitrability. Both courts and arbitrator ordinarily grant deference to regulators, particularly regulators involved in regulating such a complex industry with substantial national importance. In most cases, an energy regulator will have the jurisdiction to make sure that the price set by the regulated utility is just and reasonable. What is clear though is that since the
20 Electricity Regulatory Authority (ERA) prescribes tariff under *The Electricity (Tariff Code) Regulations, 2003* intended to protect the public interest and ratepayers, private parties engaged in the marketing of electricity cannot escape regulation. In any event, arbitrators will not enforce contracts that are illegal or contrary to public policy. It was on that basis that counsel for the
25 applicant argued that jurisdiction over the dispute was by its nature vested in the Electricity Disputes Tribunal.

Public utilities must charge customers only as permitted by the utility's rate with the regulatory authority. In the United States, courts and regulators talk about the exclusive or primary jurisdiction of energy regulators. In US energy regulation, this relates to the concept of the filed-
30 rate doctrine. The doctrine simply means that if a commission has approved a rate, then the utility cannot create another rate by private agreement. That is, a utility cannot contract out of

regulation. Under the filed rate doctrine, any rate that is approved by the governing regulatory agency is *per se* reasonable in judicial proceedings. Therefore, if a regulatory authority determines that a rate is just and reasonable, a court does not approve a departure from that rate. Courts in the US have repeatedly applied the filed rate doctrine to bar actions by retail customers
5 whose claims hinge on rates in the Federal Energy Regulatory Commission (FERC)-regulated wholesale markets.

However in Uganda, a public tribunal only has the powers stated in its governing statute or those that arise by “necessary implication” from the wording of the statute, its structure and its
10 purpose. Although the Electricity Disputes Tribunal established under section 93 of *The Electricity Act*, has jurisdiction to hear and determine all matters referred to it relating to the electricity sector, that jurisdiction does not include the trial of any criminal offence or the hearing of any dispute that a licensee and any other party may have agreed to settle in accordance with their agreement (see section 109 (2) of the Act). The Act makes it crystal clear that all matters
15 relating to or incidental to the generation, transmission, distribution, sale and use of electricity, including the setting of rates, may be referred to the Electricity Disputes Tribunal, provided the parties to the dispute have not agreed to settle the same in accordance with their agreement, i.e. by a submission to arbitration.

20 By the exception found in section 109 (2) of *The Electricity Act*, the Act favours respect for the parties’ decision to arbitrate. The provision is designed to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so. Courts must be careful not to broadly construe areas as exempt from arbitration simply because they concern public utilities, as
25 this would undermine the legislative policy of encouraging arbitration.

Furthermore, a strict interpretation 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
30 as to which an arbitration agreement has been signed, and not otherwise. If the claims are distinct, the court must sever the action and 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. Claims that are not subject to arbitration may be stayed or proceed 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. Parties
5 must ordinarily arbitrate arbitrable claims and litigate non-arbitrable claims. Nevertheless, everyone recognises that parallel proceedings are not in the public interest; they simply increase delay and produce conflicting decisions.

In light of the diverse nature of telecoms disputes and their ability to touch on issues that are
10 either highly regulated or subject to state monopoly, matters that do not fall within the scope of the 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);
15 *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
20 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.

Even if the question as to whether the 2nd respondent’s electricity charges and billing practices for the applicant’s sites was illegal, discriminatory and irregular, had been considered non-
25 arbitrable, still it was 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. 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
30 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. Arbitrators dealing

with disputes involving regulated utilities, though have to apply the law applicable to those utilities. Those utilities have obligations established under legislation and court decisions interpreting that legislation. They are required to meet those standards.

5 Moreover, whereas a plea that the arbitral tribunal does not have jurisdiction should be raised not later than the submission of the statement of defence, and although a party is not precluded from raising such a plea because he or she has appointed or participated in the appointment of an arbitrator (see section 16 (2) of *The Arbitration and Conciliation Act*), the principle of *kompetenz-kompetenz* provides that courts should as far as possible avoid anticipating a decision
10 that the tribunal is empowered to make.

The determination of the question of the jurisdiction of a tribunal lies in its own domain, at least in the first instance, by virtue of the principle of “*Kompetenz-Kompetenz*.” According to that doctrine, an arbitral tribunal has jurisdiction to consider and decide any disputes regarding its
15 own jurisdiction, subject to, in certain circumstances, subsequent judicial review. This is one of the pillars of arbitration as it promotes party autonomy. Should the respondent maintain its objection in the proceedings, the tribunal will make its own jurisdictional determination. Such *prima facie* jurisdictional decisions are made after the initial exchange of written submissions when the respondent, in its answer. The tribunal may conduct a hearing on jurisdictional
20 questions, such as whether the arbitration agreement is no longer valid or whether there ever was a valid arbitration agreement in the first place. An objection may be upheld if the arbitration clause clearly refers to some other arbitrator or arbitration institute from the one presiding. It is well established that tribunals may, and should rule on their jurisdiction *proprio motu*, even in the absence of a jurisdictional challenge. The corollary of this principle is that a tribunal is not
25 bound by the parties’ legal positions on jurisdiction. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

Although there is no bar to the plea of jurisdiction being raised by way of an objection under
30 section 34 of *The Arbitration and Conciliation Act*, even if no such objection was raised under section 16, as both stages are independent of one another (see *M/s Lion Engineering Consultants*

v. *State of Madhya Pradesh and others* (2018) 16 SCC 758), a challenge to jurisdiction that is not based upon any inherent lack of jurisdiction in the arbitrator but upon the process of appointment or the reference or submission itself, is capable of waiver. In the instant case lack of inherent jurisdiction by the arbitrator is not part of the applicant's argument; since he was appointed in terms of the agreement, but the argument is that some of the issues submitted to the arbitrator were non-arbitrable. Jurisdictional objections based on process rather than inherent jurisdiction are capable of waiver. Where the jurisdictional objection is capable of waiver by the affected party, the failure to raise it before the arbitrator himself, signifies consent to the arbitrator's jurisdiction.

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A plea that the arbitral tribunal lacks jurisdiction or is exceeding the scope of its authority or that the issues before it are non-arbitrable has to be raised as soon as the matter alleged to be non-arbitrable is raised during the arbitral proceedings (see section 16 (3) of the Act), which issue it must decide as a preliminary question. It is only where the arbitral tribunal rules as a preliminary question that it has jurisdiction, that any party aggrieved by the ruling may apply to the court to decide the matter. Otherwise the Court has no jurisdiction to declare itself in respect of the tribunal's jurisdictional reach. A party cannot, in such a case, participate in the proceedings without demur and then seek to assail the validity of the proceedings in the face of an unfavourable award (see *Quippo Construction Equipment Limited v. Janardan Nirman Pvt. Limited* 2020 SCC OnLine SC 419 and *Salar Jung Museum and another v. Design Team Consultant Pvt. Ltd*, 2010 (1) ALT 435).

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According to section 4 of *The Arbitration and Conciliation Act*, a party who knows of any provision of the Act from which the parties may derogate or of any requirement under the arbitration agreement which has not been complied with, and yet proceeds with the arbitration without stating his or her objection to the noncompliance without undue delay or, if a time limit is prescribed, within that period of time, is deemed to have waived the right to object.

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Failure to participate in arbitral proceedings or raise objections thereto, including in relation to the the second category of non-arbitrability of the issues submitted to arbitration, will be considered a deemed waiver of such rights and will preclude the relevant party from raising such

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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. The applicant fully participated and let the arbitration proceedings conclude and culminate in an Award. 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.

10 In any event, the concept of jurisdiction as applied to courts differs from its application in arbitration. Whereas the Court's jurisdiction stems from sovereign power that a state exerts over private individuals, in arbitration it stems from the consent of the parties to select this or that person or entity to resolve their dispute. Arbitral jurisdiction derives from the parties' consent. Therefore in arbitration, lack of jurisdiction can be overcome by a fresh agreement between the parties (see Michael Waibel, "*Investment Arbitration: Jurisdiction and Admissibility*," (2014) 5
15 (4) Legal Studies Research Paper Series, 67-68 and p. 73). The term consent is inextricably linked to the idea of agreement and is, thus, implicated by the proposition that persons who consent to certain obligations are bound because they agree to be bound. The obligation is regarded as legitimate because it is chosen from within, rather than imposed from without.
20 Therefore in matter of arbitration, explicit consent on jurisdictional issues overrides shortcomings in the exercise of sovereign power in the process of appointment. In the instant case, by their mutual consent, the parties conferred jurisdiction upon the arbitrator, and submitted to him all matters now claimed to be non-arbitrable. For all the foregoing reasons, this ground is answered in the negative; the dispute between the applicant and the 2nd respondent was indeed
25 arbitrable.

ii. Whether errors apparent on the face of the record are a justification of setting aside the arbitral award;

30 Dispute-resolution decisions by arbitration are intensely contextual and depend upon many factors. Arbitrators normally undertake a rigorous process for finding facts and law based on

weighing testimony and documents, seeking the most reliable account of the controverted events giving rise to the claims. In examining the competing views of reality proposed by each side, arbitrators aim to get as near as reasonably possible to a correct picture of those disputed events, words, and legal norms that bear consequences for the litigants' claims and defences. They
5 recognise that some answers are better than others, even if perfection proves elusive. Such truth-seeking relies principally on documents, human recollection, and expert opinion.

The fact-finding process by an arbitrator can be summarised in three categories: production of evidence; admission or rejection of evidence; and evaluation or interpretation of evidence.
10 Production of evidence before the arbitrator is voluntary; it is up to the parties to produce whatever evidence they consider useful to their claims. In general, arbitrators have the power to receive every kind and form of evidence, and have attached to it the probative value it deserves under the circumstances of a given case. Arbitrators have broad discretion in the assessment of evidence so produced since they are not bound strictly by the rules on admissibility of evidence.
15 The standard of proof, relevance and admissibility of evidence are all decided by the arbitrator. The arbitrator being sole and final judge of fact, the Court is bound by the findings of arbitrator and cannot review them unless unsupported by evidence or unless appears from award itself that there was no evidence to support findings. It is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law, and whether or not his
20 findings of fact are supported by evidence. It may, however, be misconduct if there are gross errors in failing to hear or improperly receiving evidence.

Where arbitrators move into areas of public law, particularly regulatory law, and one of the parties before them is a regulated utility, then they should be aware of the special laws that apply
25 to the industry and to publicly regulated utilities in particular. With regard to arbitral decisions involving regulated public utilities, if the dispute involves the interpretation of a regulatory statute or regulatory principle and the arbitrator has failed to consider those laws and jurisprudence, the first authority a dissatisfied party should run to is not a court but the energy regulator that controls most of its actions. If the arbitrator has not considered the legislation or
30 has considered it wrongly, the regulator is likely to exercise primary jurisdiction.

Arbitral awards are not usually subject to review for legal error in the same way that lower court judgments are scrutinised in a hierarchical national legal system. Save for specified circumstances, parties take their arbitrator for better or worse both as to decision of fact and decision of law. Section 34 of *The Arbitration and Conciliation Act* does list mistake of law as a
5 ground for setting aside an award. Thus arbitrators bear a heavy burden to “get it right” on the law, since their mistakes cannot be corrected in an appellate chain. Courts can set aside an arbitral award only on the basis of manifest disregard of the law, one so manifestly erroneous as to cause substantial injustice as a component of public policy, as opposed to misapplying or misinterpreting the law. This is because Courts cannot give parties the use, and benefit, and
10 authority of the state's judicial process which exists solely to interpret and apply the law by giving effect to an agreement to ignore the law. If an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. The error of finding of fact having a bearing
15 on the award must be so patent and easily demonstrable without the necessity of carefully weighing the various possible viewpoints.

Besides errors which are manifestly erroneous and have caused substantial injustice, interpretations of the law by the arbitrators are not subject to judicial review for error in
20 interpretation, absent fraud, corruption or similar wrongdoing on the part of the arbitrators. Questions of law arising out of the award can only be the subject of an appeal where the parties have agreed in their submission to arbitration that an appeal by any party may be made to a court on any question of law arising out of the award (see section 38 (1) (b) of *The Arbitration and Conciliation Act*). When such an appeal is made, the jurisdiction of the court is limited to cases
25 where the arbitrators have either applied the wrong legal test to their factual findings, or at least have purported to apply the right test but have done so in a way that shows that they did not really understand the correct test.

One of the reasons many parties choose arbitration over litigation is the finality of the arbitral
30 award. The award is final and binding on all parties and cannot be set aside or modified by any court (for errors of law or otherwise) except upon the limited grounds provided by section 34 of

The Arbitration and Conciliation Act. A fundamental distinction has to be drawn between errors of law or fact, on the one hand, and procedural/jurisdictional irregularities, on the other. The setting aside process cannot be used as a mechanism for reversing alleged errors of law or fact but it is designed to deal with true jurisdictional errors. Mere error in the evaluation of evidence or misinterpretation of the law by the arbitrator, is never a ground for setting aside an award. The Court is not empowered to review the award as to whether the findings of fact rendered by the arbitrator are, on the entire record of said arbitration proceedings, supported by substantial evidence, and whether as a matter of law based on such findings of fact the award should be affirmed, modified or vacated.

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That the arbitrator did not make a balanced analysis of the evidence put before him by the applicant, that he failed to give due regard to the applicant's submissions in rejoinder, and erred in making wrong findings regarding the realm of the Electricity Regulatory Authority as contended by Counsel for the applicant, are not errors apparent on the record which are manifestly erroneous and have caused substantial injustice. The mere fact that the arbitrator erred in law or fact can be no ground for interference by the court and the award will be binding on the parties. This not being an appeal and there being no manifest gross error by failing to hear or improperly receiving evidence, nor a manifest disregard of the law, there is no basis for setting aside the award based on this ground.

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This ground is in the nature and tenor of an appeal. It calls for the court's re-appraisal of the evidence before the arbitrator, yet in proceedings of this nature it is not possible to re-examine the facts to find out whether a different decision can be arrived at. It is not permissible to a Court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings. This Court does not have the power to re-appreciate and re-evaluate the evidence produced before the arbitral tribunal and thereafter to judge if the findings of the arbitral tribunal are correct or wrong. Interpretation of a contract is a matter for the arbitrator on which a court ought not to substitute its own decision. If the arbitrator interpreted the terms of contract in a particular way based on the material before him and the evidence adduced before him, even if another view is possible to be taken on the same materials and evidence, the Court cannot interfere with the said findings of the learned arbitrator.

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The jurisdiction of the arbitrator includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Where parties have agreed to a final and binding process of arbitration, the courts will seek to uphold, and trust, that process to the fullest extent possible.

5 A Court proceeding under section 34 (2) of *The Arbitration and Conciliation Act* is not a court of appeal and errors of fact, if at all present, cannot be corrected by it. An arbitrator is the final judge of facts and it is not open to challenge that the arbitrator reached a wrong conclusion or has failed to appreciate facts or evaluated the facts in a skewed manner. An arbitral award will be confirmed even when the award does not conform to a court's sense of justice so long as the
10 arbitrator offers even a barely colourable justification for the outcome reached. Even where an arbitrator has made an error of law or fact, courts generally may not disturb the arbitrator's decision. Parties who, having willingly chosen to submit to arbitration, cannot be permitted to have the award set aside only because they are mystified by the result. A court must give deference to the decision of the arbitrator even if the arbitrator misapplied the substantive law in
15 the area of the contract. Court cannot interfere with the discretion of arbitrators unless the decision is obviously arbitrary, or perverse, or there is an obvious error of discretion.

It is settled law that where a finding is based on no evidence, or the arbitrator takes into account something irrelevant to the decision which he arrives at, or ignores vital evidence in arriving at
20 his decision, such decision would necessarily be perverse. A finding of fact is only perverse if it outrageously defies logic as to suffer from the vice of irrationality or is arrived at on no evidence. The applicant having failed to demonstrate that the decision is obviously arbitrary, or perverse, but only seeks the court's re-evaluation of the evidence, this ground of objection too fails. The issue is accordingly answered in the negative; there are no errors apparent on the face of the
25 record capable of justifying the setting aside of the arbitral award.

iii. Whether the arbitral award is contrary to public policy:

Tribunals must ensure that in the process they do not abandon the public policy element while
30 passing any award. The awards passed by the arbitral tribunals which are contrary or oppose to the public policy therefore, can be challenged before the judicial Courts and thereby also set

aside. 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 set aside an arbitral award only when it shocks the conscience of the Court to an extent that it renders the award unenforceable.

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According to section 34 (2) (b) (ii) of *The Arbitration and Conciliation Act*, a court can set aside an arbitral award if it finds that the award is in conflict with public policy since no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. Although the court should bow to the interpretation that the arbitrator has rendered, it is also the
10 function of the court to make certain that the enforcement of the arbitral award will not constitute a violation of law. Public resources should not be employed for the execution of awards that are injurious to public morality or interest. Being a mandatory rule that trumps the parties' contractual agreement, an award that is against public policy it is not void, yet it is unenforceable; hence considerations of public policy could prevent a lawful award from yielding
15 results.

Public policy relates to the most basic notions of morality and justice. 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*
20 *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
25 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.

Public policy includes cases where arbitration is used as a means to cover up corruption, money
30 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
5 engaged, any public policy considerations were clearly outweighed by the interests of finality.

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
10 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
15 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
20 conscience of the Court.

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
25 tomorrow. Needless to say, such a fluid doctrine can be misused and is therefore treated with caution by the Courts. 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
30 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 5 366).

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. If the court is satisfied that enforcing the award is contrary to public policy, it will set the award aside. It is Counsel for the applicant's submission that to the extent that the arbitral award purports to uphold the 2nd respondent's power billing practices which inflate regulated electricity retail tariffs by a whopping 65% renders it in glaring conflict with and contrary to public policy, since all aspects relating to electricity even if relating to value addition must be done in accordance with the Electricity Act of Uganda and the regulations thereunder. 10 15 20

Indeed the role of a statute is to not merely to state the norms of law, but to influence case law and provide direction and restraint in Uganda's legal system. To the extent that an award may be contrary to the substantive provisions of statutes and the declared policy behind them, and in determining whether recognition and enforcement of an Award should be denied on the basis of illegality, the court will consider; (i) the purpose of the rule that is said to have been transgressed; (ii) other public polices which may be impacted by denying the claim; and (iii) whether it is proportionate to deny the claim. The degree of connection between the claim sought to be enforced and the illegality must be assessed; the greater the connection, the more carefully the courts will need to consider whether to enforce. The Court will then determine whether by 25 30

enforcing the award, the court will be encouraging, if not directing, the applicant to violate the law.

5 Having examined the legal regime regulating the licensing and control of activities in the electricity sector in matters regarding the generation, transmission, distribution, sale and use of electricity in Uganda, I am of the considered view that the target is those engaged in the sector as public utilities, whether state owned or privately owned. A public utility is an entity that provides goods or services to the general public. The public policy considerations for the regulation of pricing, licensing, sale, consumption, computing, and overall use of electricity are all directed at public utilities, which the 2nd respondent is not. It would therefore be erroneous if public policy considerations of that statutory regime are brought to bear upon a private contract between entities that are not engaged in sale and use of electricity to the general public. The balancing act between freedom of contract and clear and undeniable harm to the public must be resolved in favour of freedom of contract as there is no clear and undeniable harm caused to the public. The enforcement of the award would therefore not be tantamount to the court encouraging or directing the applicant to violate the law.

20 That the Arbitrator applied the law erroneously is not a matter of public policy. That the arbitration award is very different from the judgment a court would have rendered had the dispute been litigated, rather than arbitrated, and the reason being that the arbitrator did not correctly apply the law, cannot form the basis of a finding of violation of public policy. Neither *The Arbitration and Conciliation Act* nor the parties' agreement allows for the tribunal's decision to be questioned on the basis of an error of law or an arbitrator's wrong decision regarding the substantive law governing the merits of the case. For purpose of policy considerations, there is an important distinction between failing to apply the chosen law at all and applying the chosen law, but applying it incorrectly.

30 Manifest disregard of the law, as opposed to general errors of law, is a matter belonging to public policy and may be a proper basis for setting aside an award, where the disregard, misinterpretation or misapplication of the law was so gross or egregious as substantially to amount to failure to apply the proper law. As a general rule, this situation arises when two

criteria are met: (i) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and (ii) the law ignored by the arbitrator was well defined, explicit, and not subject to reasonable debate, yet it is clearly applicable to the case. A court's mere belief that an arbitrator misapplied the law will not justify setting aside an arbitral award. It must be more than
5 error or misunderstanding with respect to the law, or an arguable difference regarding the meaning or applicability of laws. Rather, the applicant is required to show that the arbitrator was aware of the law, understood it correctly, found it applicable to the case before him, and yet chose to ignore it in propounding his decision. This is not case where the Arbitrator ignored by the arbitrator are well defined, explicit, not subject to reasonable debate, and are clearly
10 applicable to the case. The applicant cannot rely on this as a ground for setting aside the award. The issue is accordingly answered in the negative; the arbitral award is not contrary to public policy.

- iv. Whether the arbitral award was made in a manner contrary to the provisions of
15 *The Arbitration and Conciliation Act*;
- v. Whether the arbitral award was delivered beyond the statutory timelines and those
set out in the arbitration agreement and the parties.
- vi. Whether the arbitrator failed in his duty to accord equal treatment to the parties at
the point of delivery of the award;

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To the extent that the three issues are procedural in nature, they will for purpose of convenience and avoidance of repetition be considered concurrently. A setting-aside application on account of the award being contrary to the provisions of *The Arbitration and Conciliation Act* is essentially a complaint only about the process followed in making the award. In *Genossenschaft*
25 *Oesterreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft mit Beschränkter Haftung* [1953] 2 All ER 1039; [1953] 1 Lloyd's Rep. 495, it was held that in order for an arbitration award to be enforceable by Court, the applicant must establish five things: (i) the conclusion of an arbitration agreement; (ii) the dispute fell within the terms of the arbitration agreement; (iii) the arbitrators were appointed in terms of the agreement; (iv) the award was
30 made by the arbitrators; (v) and the awarded amount has not been paid. A court will refuse to make the award an order of Court if on the record it is clear that the award for some reason is

vitiated by illegality. If one or more of the parties challenge(s) the arbitrators' jurisdiction, their decision-making power may become an issue.

An award can be set aside for not being in accordance with the Act when any of the following
5 occurs, namely; (i) when the appointment of the arbitrator(s) and the arbitration proceedings
were not done as per the agreement between the parties as well as the laws selected by the
parties; (ii) the applicant was not given proper notice of the appointment of an arbitrator or of the
arbitral proceedings, or was otherwise unable to present his or her case; (iii) the adversarial
principle was not respected; (iv) the composition of the arbitral tribunal or the arbitral procedure
10 was not in accordance with the agreement of the parties, or failing any such agreement, was not
in accordance with the Act; (v) the arbitral tribunal violated its mandate.

Not every violation of the Act will lead to a refusal of enforcement or setting aside of the award.
In addition to showing that a violation has taken place, a party seeking to set aside an award must
15 also establish two additional factors: (a) that the violation occurred in connection with the
making of the award, i.e., that there is a causal nexus between the violation and the aspect of the
award with which the party is aggrieved; and (b) that the violation caused actual or real prejudice
to the party. Though it need not show that the prejudice is substantial, the violation must have
substance and not be *de minimis*. Although an applicant does not need to show that the outcome
20 of the proceedings would necessarily or even probably have been different, it must show that,
had the breach not occurred, the arbitrator might well have reached a different conclusion from
that which he or she reached.

All mistakes in procedure committed by the arbitrator which have or may have unjustly
prejudiced a party are classified as "misconduct." Misconduct is used in the technical sense as
25 denoting irregularity, and not any moral turpitude or anything of that sort (see *London Export
Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd. (1958) A.W.L.R. 661*). Misconduct is
usually constituted by unintentional improper activities which prejudice the complaining party,
such as; - an arbitrator deciding an issue without any evidence being presented on the issue;
discussion of the matters with third persons; non-observance of the principles of natural justice;
30 delegating the decision making power; exclusion by two of the arbitrators of the third from
hearings or deliberations; a visit by one arbitrator alone to a construction site in violation of the

submission agreement along with the obtaining of additional information from one of the parties on the equipment used, which information influenced the award; the tribunal's failure to give the parties notice and a proper opportunity to consider and respond to a new point that ultimately affected the arbitrator's reasoning in the award, and so on.

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In order to intervene on basis of misconduct, the court must be satisfied that there may have been, not must have been, or that the irregularity may have caused, not must have caused, a substantial miscarriage of justice that would be sufficient to justify setting aside or remitting of the award. The applicant must show both an irregularity affecting the tribunal, the proceedings or
10 the award and that the irregularity has caused, or will cause, substantial injustice. Findings of the arbitrator on the factual matrix need not to be interfered with as the Court does not sit in appeal and the Courts are also refrained from re-appreciating or re-evaluating the evidence or the material before the arbitrator unless perversity is writ large on the face of the award or the award suffers from the vice of jurisdictional error, sanctity of award should always be maintained.

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Unless the parties have by their submission to arbitration decided otherwise, arbitrators have a discretion to determine the form in which an arbitration is conducted. An arbitrator though should ensure that the parties are aware of the arbitrator's powers and the procedure to be followed. Arbitration typically involves six stages; - preparation and introduction; presentation of
20 the parties' claims and defences; narrowing the issues; hearing of evidence; the concluding arguments; and the award. The purpose of first stage is to create confidence in the arbitrator and a climate that is conducive to the resolution of the dispute and to deal with any preliminary issues that may arise. The purpose of the fourth stage is to record the evidence led by the witnesses and to give each party the opportunity to question the witnesses and to challenge their testimony.

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The arbitrator must issue a written award, together with brief reasons, within the specified time period. Although the arbitrator need not address each and every matter on which he receives submissions, it is trite that an arbitrator must weigh the evidence as a whole taking account of the following factors; formulation of the contending versions and a weighing up of those versions to
30 determine which is the more probable, the credibility and reliability of the witnesses, and an assessment of the applicable rules in the light of those findings. It was argued by counsel for the

applicant that the parties receiving the award on different timelines prejudiced the applicant who at that point could not even obtain any measure of protection after the respondents switched off its sites and to date the same remain off notwithstanding the merits of this application, and therefore the award should be set aside.

5 .

Where the award has been made by the arbitrator in breach of the agreed procedure, the applicant is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have not agreed to be bound by an award made by the procedure in fact adopted (see *London Export Corporation Ltd v. Jubilee Coffee Roasting Co. Ltd. [1958] 1 W.L.R. 271 at 277*). It follows from the principle that arbitral jurisdiction derives from the parties' consent that the scope of the tribunal's authority also is limited by the parties' consent. An award may be remitted or set aside on the ground that the arbitrator, in making it, had exceeded his jurisdiction, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains
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15 decisions on matters submitted to arbitration may be enforced.

According to section 31 (8) of *The Arbitration and Conciliation Act*, after the arbitral award is made, a signed copy has to be delivered to each party. The making and delivery of the award are different stages of an arbitration proceeding. An award is made when it is authenticated by the
20 person who makes it; the date on which the arbitral award is passed is the date on which the signed copy of the award is delivered to the parties. This is a critical date as the period of filing of application under section 34 of the Act, the correction of computational errors, any clerical or typographical errors or any other errors of a similar nature (section 33 (1) (a) of the Act), termination of arbitration proceedings (section 32 (1) of the Act), as well as the period for filing
25 objections to the award, commences from this very date. Time begins to run "from the date on which the party making an application had received the arbitral award (see section 34 (3) of the Act). That the parties receiving the award on different timelines did not substantially affect those timelines. That delivery of the Award to the parties a day apart had the effect of depriving the applicant of the opportunity to obtain any measure of protection after the respondents switched
30 off its sites, is speculative.

Counsel for the applicant submitted further that the Award should be set aside by reason of having been delivered outside the agreed period of ninety days. Section 31 (1) of *The Arbitration and Conciliation Act* requires arbitrators to make their award in writing within two months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may, from time to time, enlarge the time for making the award. Unlike court proceedings, arbitrators derive their jurisdiction from the parties' agreement to arbitrate. Where a time limit is imposed within which the tribunal must make its award, failure to deliver an award within the specified time limit may mean that the parties' consent to arbitration has lapsed and any arbitration award issued after the deadline may be unenforceable.

The general principle is that once a time limit or deadline lapses, the arbitrator no longer has the requisite jurisdiction to make a valid award (see *Ting Kang Chung John v. Teo Hee Lai Building Constructions Pte Ltd and others* [2010] SGHC 20; [2010] SLR 625). Parties to an arbitration do not bear the responsibility to monitor the timeline, nor are they under any duty to remind or prompt the arbitrator to keep within the timeline. Although remaining silent is not an option for the objecting party, but, be that as it may, a failure to raise an objection timeously does not extend the jurisdiction of the arbitrator automatically. If an arbitral award is not made either within the statutory time period or the extended period, then the mandate of the tribunal stands terminated as it becomes *functus officio* (see *Suryadev Alloys and Power Pvt. Ltd. v. Shri Govindaraja Textiles Pvt. Ltd*, AIR (2010) SC 640). No award can be passed after the mandate of the arbitrator has been terminated by effluxion of time.

Some courts have viewed failure to comply with time limits for the delivery of awards as a procedural matter. For example in *Sunway Creative Stones Sdn Bhd v. Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd and another* [2020] MLJU 658, the Arbitrator neither issued the award within the three-month statutory deadline nor notify both parties of any extensions to this timeline. Instead, the award was delivered on March 2019, almost 3.5 years late, in which the Arbitrator found in SCS's favour. Saliently, SCS's solicitors reminded the Arbitrator on four occasions between February, 2016 and December, 2018 on the need to deliver his Award in a timely manner. These reminders were copied to YTL's solicitors. YTL, however, did not send any such reminders nor raise concerns with the Arbitrator's non-compliance with the deadline.

Following YTL's non-payment of sums under the Award, SCS sought recognition and enforcement of the Award against YTL. In response, YTL applied to the Malaysian High Court to set aside the Award under Section 37 of *The Arbitration Act 2005*, which largely mirrors Article 34 of the UNCITRAL Model Law.

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The Malaysian High Court refused to set aside an arbitral award because the applicant had not challenged the arbitrator's jurisdiction and conduct when the issues arose during the arbitral proceedings. The Court emphasised that such lack of protest can be deemed a waiver of a party's right to set aside an arbitral award on the same grounds at a later date. The procedural ground failed as YTL did not protest the Arbitrator's delay in issuing the Award when it arose. By its silence, YTL was understood to have waived its right to rely on this procedural defect as a ground for challenge. The Court viewed this consistent with the waiver principle under provisions *in pari materia* with our section 4 of *The Arbitration and Conciliation Act*, which requires a challenging party to promptly raise procedural objections or lose the right to subsequently rely on them. Accordingly, YTL should have raised a plea to the Arbitrator that he lacked jurisdiction to deliver his Award soon after 1 September 2015, i.e. upon the expiry of the time limit to deliver the Award. Having failed to do so, YTL lost the right to rely on the same jurisdictional defect in setting aside proceedings.

20 To the contrary, other courts have viewed time limits for delivery of arbitral awards as a jurisdictional matter. For example in *Ken Grouting Sdn Bhd v. RKT Nusantara Sdn Bhd and another*, [2020] MLJU 1901, the Malaysian Court of Appeal dealt with the issue of an arbitrator's failure to deliver the arbitral award within the specified timeline, and whether this resulted in a loss of the arbitrator's jurisdictional mandate. The applicable rules required the arbitrator to deliver his award as soon as practical but not later than 3 months from his receipt of the last closing statement from the parties. As such, the deadline for the arbitrator to deliver his award was 26th April, 2016. The Rules expressly provided that if the arbitrator considered that more time was required, "such time frame for delivery of the award may be extended by notification to the parties." Without any attempt by the arbitrator to extend the timeline for delivery of the award, the arbitrator delivered his award on 10th March, 2017. Neither party raised any objection to the fact that the deadline for delivery of the arbitral award had passed.

However, on 27th March 2017, the respondent's solicitors wrote to the appellant's solicitors giving notice that they were objecting to the delivery of the Award beyond the timeline stipulated in the Rules.

5 The High Court Judge held that the failure to (a) deliver the Award within the time frame and (b) extend the deadline as provided before delivering the Award meant that the Award was delivered without mandate or authority, and was therefore delivered in excess of the arbitrator's jurisdiction. This led to the Award being set aside pursuant to provisions *in pari materia* with our section 34 (2) (a) (v) of *The Arbitration and Conciliation Act*, on the basis that the arbitral
10 procedure was not in accordance with the agreement of the parties. On appeal to the Court of Appeal, it was held that it was not an option for an arbitrator who conducts an arbitration under a time-sensitive arbitral regime to ignore, or be oblivious to, or be nonchalant to his duty and responsibility to deliver the award on time.

15 It is this Court's view that where the parties prescribe their own time limits in an arbitration agreement, such time-period can be extended only if the parties consent to the same. In cases where the parties have already taken recourse to enlarge the time period under an arbitration agreement, the arbitrator cannot exercise his or her power to extend such time, in the absence of consent of the parties (see *NBCC Limited v. JG Engineering Pvt. Limited (2010) 2, SCC 385*).
20 The arbitrator cannot exercise his or her power in extending the time fixed by the parties in the absence of the consent of both of them. An arbitrator is unable to unilaterally extend contractual time limits absent party consent and the arbitrator's mandate to make the award terminates upon the expiry of the time fixed by the parties. If the parties have fixed time-limit for rendering the award, the time-limit is extendable only by mutual consent. If consent for extension is denied by
25 one party, and, the award is not rendered within the time fixed, the mandate of the arbitrator terminates (see *Jayesh H. Pandya and another v. Subhtex India Ltd. and Others, (2020) 17 SCC 383*).

In the instant case, Clause 2.3 of the agreement provided that the arbitration had to be conducted
30 and concluded within (ninety) 90 days from the commencement of the arbitration proceedings, unless the arbitrator at the preliminary hearing found it impracticable and/or necessary to extend

timelines for conclusion of such arbitration. Similarly, under the agreement for appointment of arbitrator made on 17th March, 2021 between the parties and the Arbitrator, it was agreed that the arbitration was to be concluded within a period of 90 days from the date of commencement of arbitration or such time as the arbitrator and the parties would mutually agree upon.

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Contrary to the arbitration Agreement and the appointment Agreement, the Arbitrator conducted and concluded the arbitration in a period of over ten (10) months. By the mutual agreement of the parties and the arbitrator, the award should have been delivered on the 10th December, 2021. However, on 9th December 2021, the Arbitrator unilaterally enlarged the time and undertook to
10 deliver the award on the 22nd December, 2021. On that day, contrary to his own undertaking, the Arbitrator again unilaterally enlarged the time. A month later, on 21st January, 2022, the arbitrator again unilaterally undertook to deliver the award by 2nd February, 2022. The arbitrator was bound to make and publish his award within the time mutually agreed to by the parties, unless the parties consented to further enlargement of time. In circumstances of this nature, an
15 extension declared by the Arbitrator and not mutually agreed on by the parties, is ineffective. Where (a) the arbitration agreement prescribes a period within which the Award is to be passed and (b) the said period has expired and has not been extended by mutual consent of the parties, the award passed by the Arbitrator after effluxion of such period is bad in law and contrary to the agreed terms by which the parties as well as the Arbitrator are bound. This ground alone would
20 justify the setting aside of the Award. However, for completeness sake, the rest of the grounds will be considered.

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- vii. Whether the arbitral award was procured by evident partiality in favour of the respondents;

The most rudimentary requirement of arbitration proceedings is the independence, neutrality and
30 impartiality of the arbitrator(s) appointed by the parties. The right to an impartial and independent judge also exists in arbitration. As arbitration requires adjudication on rights of the

parties involved, principles of natural justice play a critical role in avoiding any potential risk of miscarriage of justice. “*Nemo iudex in causa sua*,” meaning that “no person should be a judge in his own cause,” is a cardinal principle of natural justice, regardless of whether the proceedings are judicial or quasi-judicial in nature. This principle intends to avoid any reasonable
5 apprehension of bias that may arise during any arbitral process.

When a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality (see section 12 (1) of *The Arbitration and*
10 *Conciliation Act*). “Independence” means that an arbitrator must be free from any involvement or relationship with any of the parties. “Impartiality” on the other hand deals with the arbitrator’s mental predisposition toward the parties or the subject matter or controversy at hand. It is the interior frame of mind that the arbitrator brings to the submission.

15 Procedurally, doubts as to independence or impartiality of the arbitrator have to be determined as a matter of fact in the facts of before the particular arbitrator (see section 13 of *The Arbitration and Conciliation Act*). If a challenge is not successful, and the arbitrator decides that there is no reasonable apprehension of bias or other justifiable grounds to doubt the independence or impartiality of the arbitrator, he or she must then continue the arbitral proceedings and make an
20 award. It is only after such award is made, that the party challenging the arbitrator’s appointment on grounds of partiality, may make an application for setting aside the arbitral award in accordance with section 34 (2) (a) (iv) of *The Arbitration and Conciliation Act*, on the aforesaid ground.

25 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
30 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
5 duty to disclose.

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
10 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."

Arbitrators are often selected by the parties precisely because of their expertise in the relevant
15 field. Many businessmen desire such a forum so that their dispute may be considered within the context of their own commercial environment. Often arbitrators bring to their position expertise acquired from past associations with the industry which they now must adjudicate. Arising from their many years of experience in the industry will be many close alliances and friendships. Since arbitrators are inherently part of the business world, and considering that arbitration often
20 involves a trade-off between arbitrator impartiality and expertise on one hand, and the fact that arbitration is voluntary in nature on the other, actual partiality or bias occurs where the arbitrator has a substantial interest in the dispute. In other words, the lesser ethical standard for arbitrators is seen as the result of a trade-off between impartiality and expertise, which parties choose when they feel it is to their benefit.

25 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
30 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
5 provide an economic or emotional stake in the outcome of the case.

Arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. No finding of actual bias will be made where the arbitrator's
10 connection or relationship is too attenuated for any reasonable person to believe the arbitrator acted with partiality towards the applicant during the arbitration in question.

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
15 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, notions such as “proximity” and “intensity” will be invoked to evaluate allegedly disqualifying links or prejudgment. Because arbitrators are
20 often experts within their respective fields, they have many more potential conflicts of interest than judicial officers. Therefore arbitrators should not be held to the same standards of judicial decorum as that applicable to judicial officers. Consequently the standard of bias disqualification applicable to judicial officers does not establish evident partiality on the part of an arbitrator. In arbitration, both parties make an informed decision about the arbitrator's ability to act as an
25 impartial adjudicator to their dispute.

An appearance of partiality or a reasonable impression of partiality in arbitration occurs where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. While the approach does not require actual prejudice, it does insist that any
30 appearance of partiality be “reasonable” in order to vacate an arbitration award. This requires an objective assessment in a fact-sensitive, case-by-case inquiry into each dispute with little

predictability as to future outcomes, of whether a reasonable person would believe that an arbitrator was partial to a party to the arbitration. The test is whether the circumstances could properly cause a reasonably well-informed person to have a reasonable apprehension of a biased appraisal or judgment by the arbitrator, however unconscious or unintentional it might be. This entails a sufficiently obvious bias that a reasonable person would easily recognise. The applicant must not only provide proof of the improper conduct creating the appearance of partiality of the arbitrator, but also that the improper conduct affected the award that was ultimately decided upon.

10 In *Re Medicaments and Related Classes of Goods (No 2)*; *Director General of Fair Trading v. Proprietary Association of Great Britain and Proprietary Articles Trade Association* [2001] 1 WLR 700, the court summarised the principles to be derived from this line of cases as follows:

15 (1) If a [the arbitrator] is shown to have been influenced by actual bias, his decision must be set aside. (2) Where actual bias has not been established the personal impartiality of the [the arbitrator] is to be presumed. (3) The Court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the [the arbitrator] might not have been impartial. If they do the decision of the [the arbitrator] must be set aside. (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the Court. (5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice.

20 The court must therefore first ascertain all the circumstances which have a bearing on the suggestion that the arbitrator was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the arbitrator was biased.

30 Impartiality is usually defined by the absence of prejudice. The test for apparent bias is “whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased” (see *Porter and Weeks v. Magill* [2002] 2 WLR 37; [2002] 2 AC 357; [2002] 1 All ER 465). The fact that the observer has to be “fair-minded and informed” is important. The informed observer can be expected to be aware of the legal

traditions and culture of this jurisdiction (see *Taylor v. Lawrence* [2002] 2 All ER 353 at p.370, para 61).

5 The question for the court is whether the grounds raised, taken together with any other relevant factors, would have led the fair-minded and informed observer, having considered the facts, to conclude that there was in fact a real possibility that the arbitrator was biased. The test has been formulated in terms of the existence of a “real danger of bias.” The test was articulated in *R. v. Gough* [1993] AC 646 and followed in *Laker Airways Inc v. FLS Aerospace Limited* [1999] 2 Lloyd’s Report 45 at pp.48-49, to the effect that:

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The Court should ask itself whether, having regard to the relevant circumstances, there was a real danger of bias on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour the case of a party to the issue under consideration by him.

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Because arbitration is a form of adjudication, albeit a private one, it is important that the final outcome be the result of an impartial process in which all sides have been fully heard. An arbitral tribunal must not only be fair-minded, but also be perceived by the parties as such. For the parties to accept the outcome of an arbitration, even if it runs against them, they must be confident that those who sit in judgement do so fairly and with an open mind.

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When deciding whether bias has been established, the court personifies the reasonable man. The court considers on all the material which is placed before it whether there is any real danger of unconscious bias on the part of the decision maker. This is the case irrespective of whether it is a judge or an arbitrator who is the subject of the allegation of bias. Not only must the procedure be conducted fairly, but the parties, particularly the one losing, must also perceive it as such. As Lord Hewart in *R. v. Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256, said “it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.” However, save in the case where the appearance of bias is such as to show a real danger of bias, apparent or unconscious bias is insufficient; for if despite the appearance of bias the court is able to examine all the relevant

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material and satisfy itself there was no danger of the alleged bias having in fact caused injustice, the impugned decision will be allowed to stand.

For example in *AT&T Corporation v. Saudi Cable Co* [2000] 2 All E.R. (Comm) 625, a claimant
5 brought an appeal before the English courts seeking to remove the chairman of the ICC and to set aside the award on the basis of bias and misconduct under section 23 of the English Arbitration Act 1950 following a dispute arising from bids announced by the Saudi Arabian Ministry of Post Telephone and Telegraph for improvement of country's telecommunication system. The claimant argued that the third arbitrator and chairman of the tribunal was biased
10 because of his non-disclosure of the fact that he had occupied non-executive directorship in a rival telecommunications firm. The Court of Appeal upheld the lower court's findings and noted that there were no grounds to establish an apparent bias or misconduct on the part of the third arbitrator and chairman of the ICC tribunal. In particular, the court held that there was no real danger of bias or misconduct in that case. So, in the absence of bias or misconduct, it would be
15 inappropriate to set aside the ICC's award.

The Court was able to come to that conclusion, for among other reasons, because; - the arbitrator was an extremely experienced lawyer and arbitrator who, like a judge, was both accustomed to and could be relied on to disregard irrelevant considerations; any benefit which could indirectly
20 accrue to the arbitrator as a result of the outcome of the arbitration would be of such minimal benefit to him that it would be unreasonable to conclude that it could influence him; his involvement with the other party as a result of his non-executive directorship was limited. It was accurately described as an incidental part of his professional life; he did not attach importance to his involvement with that party. This was illustrated by his readiness to resign his directorship
25 when he was challenged by the claimant; and he conducted himself in the course of the arbitration in a manner which provided no support for any suggestion that he was prejudiced and the contrary has not been suggested.

It is the applicant's case in the instant application that Although by his CV, the Arbitrator
30 disclosed that he had worked with M/s Katende, Ssempebwa & Co. Advocates between 1998-2000, which is over 20 years ago, during the period when the arbitration was being conducted,

the said arbitrator wrote and published a book which he dedicated to that law firm who at the material time were the respondents' advocates. The dedication part of the book speaks to the depth of the personal relationship that the arbitrator had with the respondents' law firm. The arbitrator's deliberate choice to put this law firm right below family goes to further show that the arbitrator has a strong and ongoing relationship with the Respondents' counsel. It is insinuated that the arbitrator was all along predisposed or prejudiced against the applicant, the discovery of which fact came to the applicant's attention only after the arbitrator had published a book dedicated to the respondents' lawyers came after the arbitral award had been handed down. It is submitted therefore that this forms sufficient grounds for setting aside and is evidence of bias.

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Counsel for the respondent disagrees and argues that it is not in dispute that the arbitrator when he was starting his legal career worked with M/s. Katende Ssempebwa & Company Advocates having been employed by the firm as an Associate over twenty years ago between 1998 and 2000. Which fact he disclosed to both parties at the earliest opportunity; which was before the commencement of the arbitration as required under Clauses 2(c) (ii) and (iii) of the Appointment of Arbitrator Agreement dated 26th March 2021. Even after this disclosure, the applicant did not object to his appointment and this can only imply that the applicant believed in the impartiality of the Arbitrator and was comfortable with his appointment thus waiving their right to object to his independence. The book was dedicated to the arbitrator's late parents, wife, children and siblings and that the arbitrator merely acknowledged M/s Katende Ssempebwa & Company Advocates in its capacity as one of the law firms he had previously worked with at the start of his legal career.

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An arbitrator is under a continuing duty to disclose any circumstances which, from the perspective of a reasonable third person, are likely to give rise to justifiable doubts as to his or her impartiality or independence (see section 12 (1) of *The Arbitration and Conciliation Act*). An arbitrator is under a duty to disclose all circumstances which may reasonably call into question his or her independence in the mind of the parties and should particularly inform the parties of any relationship which is not common knowledge and which could be reasonably expected to have an impact on his judgment in the parties' eyes. The arbitrator must, as a general rule, disclose three sets of circumstances: (i) a prior involvement in the dispute in some other

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capacity; (ii) any direct or indirect financial interest in the outcome of the dispute; and (ii) any past or present relationship with a party, an affiliate of a party, counsel to a party, another arbitrator, a witness or expert. Anticipated future relationships during the course of the proceedings should also be disclosed. Once an arbitrator makes a disclosure, there are two possibilities: a party must either promptly challenge the arbitrator, within a period of 15 days after becoming aware of the circumstances, or be deemed to have waived any future objection based on the facts and circumstances covered by that disclosure. *In Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48; [2020] 3 WLR 1474, it was held that;

An arbitrator, like a judge, must always be alive to the possibility of apparent bias and of actual but unconscious bias. ... One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias. Such disclosure allows the parties to consider the disclosed circumstances, obtain necessary advice, and decide whether there is a problem with the involvement of the arbitrator in the reference and, if so, whether to object or otherwise to act to mitigate or remove the problem

The duty of disclosure is rooted in the arbitrator's pre-eminent duty to be impartial and independent of the parties, and to remain so throughout the proceedings. Just as the duty of impartiality and independence is a continuous one, so is the duty of disclosure. The duty is triggered when a person is approached in connection with his or her possible appointment as an arbitrator, and then continually throughout the proceedings if new facts and circumstances emerge (see *Halliburton Company v. Chubb Bermuda Insurance Ltd*, [2021] AC 1083; [2021] 2 All ER 1175; [2020] 3 WLR 1474). If any new circumstances arise that may influence his impartiality or independence, or those that may create in the mind of a reasonable person the perception that there is a real danger of bias on the part of the arbitrator in question, in the sense that he or she might unfairly regard (or have unfairly regarded) with favour or disfavour the case of a party to the issue under consideration by him or her, he or she should disclose them.

A book dedication is a statement that tells the reader, for whom the author has written a book. It is usually the person or people who inspired the book, or to the memory of a loved one or to a cause or idea about which they are passionate. It is an expression of friendly connection, a mutual and equal emotional bond, by the author towards another person; of someone who likes and wishes to do well for someone else and who believes that these feelings and good intentions

are reciprocated by the other party. Although all friendships have mutual involvement as a common characteristic, they vary in degree from those of the greatest intimacy that emphasise equality and reciprocity, and require from each partner an affective involvement in the total personality of the other, to an acquaintance more or less casual. They may involve a wide range
5 of experience of feeling or emotion, ranging from suffering to elation, from the simplest to the most complex sensations of feeling, and from the most normal to the most pathological emotional reactions.

For friendships to work, both parties have to be mutually engaged in the relationship. This does
10 not mean that friends have to talk on a daily, weekly, or even monthly basis for them to be effective. Many people establish long-term friendships with individuals they don't get to see more than once a year or even once a decade. The occasional encounters are strong enough to keep these long-term friendships healthy and thriving. All friendships have affective components, but not all friendships will exhibit or express affect in the same ways. Some
15 friendships may exhibit no physical interaction at all, but this doesn't mean they are not intimate emotionally, intellectually, or spiritually. The depth of human relationships is not gauged only from their duration but also from their intensity. One of the means to obtaining an insight into this deep and mysterious thought process is the observation of patterns of behaviour that many people often exhibit.

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An arbitrator bears the duty to remain impartial and independent of the parties at the time of accepting an appointment to serve and to remain so until the final award has been rendered or the proceedings have otherwise finally terminated. The fact that a legal practitioner employed by a firm of advocates as an Associate at the inception of his career over twenty years ago for only
25 two years, between 1998 and 2000, deemed it important to dedicate his publication on the Law of Evidence to that firm, after having worked in more or less ten other places since then, and moreover during the process of an arbitration where one of the parties was represented by that law firm, speaks volumes of the intensity of his affectionate interaction with that firm. Much as that book dedication may have been purely in response to a past fond memory, it may equally be
30 perceived by a reasonable person as a manifestation of a conscious or a sub-conscious influence on his impartiality or independence by the law firm representing the other party.

An arbitrator must not only be impartial but must also avoid the appearance of any inability to be impartial. An arbitrator must avoid all such activities where his or her impartiality might reasonably be questioned. An appearance of inability to be impartial occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the Arbitrator's honesty, integrity, impartiality, temperament, or fitness to serve as Arbitrator over the matter in issue is impaired. Although dispute resolution, including arbitration, takes place in the real world with imperfect institutions and humans, acting in good faith, by that dedication made during the course of the arbitration at hand, the arbitrator sunk below the requisite degree of honesty, fairness, impartiality, independence and trust that underpin a valid arbitral award.

Doubts as to independence or impartiality of an arbitrator are justifiable if they give rise to an apprehension of bias in the eyes of an objective, reasonable observer. Appearance and perception often triumph over substance and reality. Confidence in the propriety of an arbitral award is eroded by improper conduct of an arbitrator, especially conduct that creates the appearance of any inability to be impartial. Arbitrators must avoid any behaviour which, in fact or perception, reflects adversely on their impartiality. An award may be set aside for the arbitrator having created a perception of partiality, even where no actual bias occurred. The issue therefore is answered in the affirmative; the award is vitiated by a reasonable apprehension of partiality on the part of the arbitrator.

In the final result, the application succeeds only on two grounds, namely; - the award is bad in law and contrary to the agreed terms by which the parties as well as the Arbitrator are bound, it having been handed down by the Arbitrator after effluxion of the agreed period; and it is also vitiated by a reasonable apprehension of partiality on the part of the arbitrator. For these two reasons, the award is hereby set aside with costs to the applicant.

Delivered electronically this 11th day of April, 2023
Mubiru.....

.....**Stephen**

Stephen Mubiru
Judge,
11th April, 2023.

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