THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION [CADER]

MISCELLANEOUS APPLICATION NO.2 OF 2016
[CAD/ARB/NO/34 OF 2016]

ATTORNEY GENERAL ……APPLICANT

VERSUS

SINO AFRICA MEDICINES & HEALTH LIMITED …….... RESPONDENT

APPEARANCE

Applicant counsel.

Mr. Richard Adrole

Senior State Attorney [SSA] - Attorney General's chambers holding brief for Mr. Jeffrey Atwine.

Respondent counsel.

Mr. Enoth Mugabi - Enoth Mugabi Advocates.

RULING

The Application seeks orders for cancellation of the appointed arbitrator and costs of the Application.

NEGOTIATIONS AND MUTUAL CONSULTATION

SSA Mr. Jeffrey Atwine deposes in Paragraph 5 that no steps were taken to negotiate or mutually consult.

The Respondent's rebuttal deposition in Para.8 is that the Statutory Notice of Intention to Sue was served upon the Attorney General after collapse of numerous amicable discussions with the parent ministry.

The Respondent's deposition was not rebutted through a rejoinder Affidavit.

NEGOTIATION AND MUTUAL CONSULTATION

The Applicant deposes, in Paragraph 4, that no steps were taken to resolve the dispute either through negotiation or mutual consultation.

The Annex C copy attached to the Respondent's Affidavit shows that it was received on 17th January 2014.

The Civil Procedure and Limitation (Miscellaneous Provisions) Act, states that a Statutory Notice must indicate,

i) the name, description and residence of the intending plaintiff,
ii) court where the matter will be filed,
iii) facts giving rise to the dispute,
iv) relief claimed by the parties, and
v) value of subject matter.

The Respondent's deposes in Paragraph 8 that the Statutory Notice (also title Notice to Intended Defendant) was sent on 17th January 2014 (Annex C) after collapse of numerous amicable discussions with the Ministry of Defence officials.

Therefore, the duty lay upon the Applicant's counsel to critically peruse the contract document regarding the transaction reported in the Statutory Notice to ascertain that there existed no alternative dispute resolution clause.

As a matter of fact the duty to peruse the documentation to rule out alternative dispute resolution clauses rests upon all counsel; save that in this case the Respondent admits that the ADR clauses were pointed out to counsel nine hundred and forty nine days later (from date of service of Statutory Notice) on 23rd August 2016,

That said the Applicant did not file any evidence to rebut that Respondent's assertion that amicable discussions had collapsed. So it is taken as a given that indeed the amicable discussions, envisaged as the amicable attempts to negotiate the dispute or mutually consult in the ADR clauses did come to pass.

REMOVAL OF ARBITRATOR

The grounds for the Application and the supporting Affidavit deposed by Mr. Jeffrey Atwine, Senior State Attorney [SSA] state the premise of the Application as follows: -

1. The Applicant was not opposed to arbitration but had the right to participate in the process of selecting the arbitrator.
2. The Respondent rushed to file High Court Civil Suit No.463 of 2015 [HCCS No.463/2015] against the Applicant without having taken any steps to negotiate or engage in mutual consultation.
3. The decision appointing the arbitrator was made without first giving the parties an opportunity to agree on the arbitrator of their choice.
4. The compulsory appointment took away the parties freedom to agree on the arbitrator of their choice.

5. The applicant has never been availed a list of potential arbitrators to select from.
6. The parties were not given an opportunity to agree on the arbitrator,
7. The parties have freedom to agree on the number of arbitrators and procedure for appointment of arbitrator.

The Respondent's Reply Affidavit stated that,

1. The Applicant had been served with Statutory Notice following collapse of numerous amicable discussions with the parent ministry officials.
2. HCCS No.463/2015 has been filed on 20th July 2015 when the Agreements regarding arbitration were not known to Respondent's advocates.
3. The Applicant was served HCCS No.463/2015 on 21st July 2015 but filed filed the Written Statement of Defence on 12th August 2016, after many reminders.
4. That the arbitration agreements were brought to the Respondent's counsel attention on 23rd August 2016, which then triggered the application for compulsory appointment of arbitrators.
5. That the Respondent never alluded to reference of the matter to arbitration at any given time.
6. That Respondent did not oppose the Application for compulsory appointment of arbitrators.

DISPUTE RESOLUTION CLAUSE

The dispute resolution clause in issue states as follows,

> "10. Settlement of disputes
>
> 10.1 The Procuring and Disposing Entity and the Provider shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between the under or in connection with the Contract.
>
> 10.2 If the parties fail to resolve such a dispute or

> difference by mutual consultation within twenty-eight (28) days from commencement of such consultation, either party may require that the dispute be referred for resolution under the Arbitration law of Uganda or such other formal mechanism specified in the SCC."
>
> "GCC 10.2 Special Conditions
> The formal mechanism for resolution of disputes shall be: The Arbitration and Conciliation Act, Cap.4."

The arbitration clause is not elaborate and it is can be labeled a bare arbitration reference. All it does is acknowledge that the dispute resolution forum will be arbitration and the governing law shall be the Arbitration and Conciliation Act, Cap.4 (hereinafter referred to as the ACA).

Because it is a bare clause, it does not indicate the Applicant's "listed expectations", that,

1. the parties were bound to extract a list of arbitrators,
2. the location or method which would be deployed by the parties to solicit the names of potential arbitrators, or
3. the parties were bound to hold a meeting, where an agreement would be struck over the number of arbitrators and appointment concluded by the parties.

The Applicant's listed expectations are what would constitute the rules of arbitration agreed upon by the parties.

With hindsight it now emerges that the ADR clause does not make reference to any rules. It can also be seen that the parties hitherto the parties have not agreed upon any rules.

We then must fall back to the Act to determine if the listed expectations are a statutory prerequisite.

Neither S.11 ACA not other ACA provisions provide the listed expectations enumerated by the Applicant. The reason is because the scheme of the ACA, like the UNCITRAL Model Arbitration Law (from which the ACA is largely derived) or other arbitration legislation around the world, leaves it to the parties to carve out their own rules for conduct of the arbitration proceedings.

Arbitration rules, covering the listed expectations, may be concluded at the time the ADR clause is drawn up or when the dispute has arisen.

The ACA only provides default scenarios in the event that the parties are not able to agree on the subject matter highlighted in the ACA. So for example the language of arbitration is deemed by S.22(1) ACA, in the event that the parties did not designate the language to be used in arbitral proceedings.

Other matters may be covered which are beyond the default issues listed by the ACA.

For example rules regarding fees payable by the parties for cancellation of booked days is not covered by the ACA but can be agreed upon between the parties.

The parties with the aid of the internet can cut and paste clauses, such as the following which are available online a few seconds after keying in "cancellation fees in arbitration", on the web search engine www.google.co.ug,

> http://adrchambers.com/ca/arbitration/regular-arbitration/arbitration-fees/
>
> **Adjournment, Cancellation, or Settlement**
>
> If the arbitration is cancelled more than 30 calendar days before the commencement of the arbitration hearing, the cancellation fee will be $500 plus the hourly rate of the ADRC arbitrator(s) times

the number of hours spent by the arbitrator(s) prior to notification to ADR Chambers of the cancellation.

If the arbitration is cancelled or adjourned within thirty calendar days prior to the scheduled commencement of the arbitration hearing, the cancellation fee will be half of the amount of the deposit required to be posted (set out above). If the arbitration is cancelled within two weeks of the scheduled commencement of the arbitration hearing, the cancellation fee will be the full amount of the deposit required to be posted (set out above).

If the arbitrator is able to re-book the time scheduled for the arbitration with other paying work, the cancellation fee will be reduced by the amount received by the arbitrator (for arbitrations cancelled or adjourned within two weeks of the scheduled date) or by half of the amount received by the arbitrator (for arbitrations cancelled or adjourned within 30 days of the scheduled date).

Notification of Cancellations

All cancellation notices to ADR Chambers must be in writing and faxed to ADR Chambers: fax: (416) 362-8825; tel: (416) 362-8555 or 1-800-856-5154; or emailed to adr@adrchambers.com. Emailed cancellation notices are only valid upon ADR Chambers sending the parties a confirmation of receipt of the notice.

The parties may, after glossing through the international library, very well conclude a rule that "***no cancellation fees shall be claimed against any party for cancellation of booked days for any reason howsoever arising***".

It is also instructive to note that the statutory power to effect compulsory appointment of arbitrators is not encumbered by the listed expectation submitted upon by the Applicant.

S.11(4) ACA obligates the appointing authority to take the necessary measures, unless the party rules otherwise provide, for securing compliance with the procedure agreed upon by the parties.

On the other hand **S.11(6) ACA** stipulates that whilst appointing an arbitrator, due regard shall be paid to any qualifications listed by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. So for in ***Sino Africa Medicines & Health Limited versus Attorney General of Republic of Tanzania***, CAD/ARB/17/2015 much as the parties pleaded for a one-person tribunal so as to save on costs, the parties had bound themselves to the UNCITRAL Arbitration Rules which provided for three; CADER's only mandate under S.11(3) ACA was to enforce institution of the tribunal which the parties had failed to put in place.

In conclusion, I have not found any merit in the Application, because no rules were evidenced before me containing the listed expectations and further they do not exist within the S.11 ACA framework.

The Application is dismissed.

The Applicant shall bear the Respondent's costs of the Application.

Dated at Kampala on the **12th** day of **NOVEMBER 2016**.

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EXECUTIVE DIRECTOR