

THE REPUBLIC OF UGANDA
THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION
[CADER]

CAD/ARB/NO.29 OF 2011

ENOS K. TUMUSIIME APPLICANT

VERSUS

TECHNO THREE UGANDA LTD RESPONDENT

REPRESENTATION

Applicant Counsel
Kenneth Akampurira – Akampurira Advocates

Respondent Counsel
Ronald Oine – Tumusiime, Kabega & Co. Advocates.

RULING

1. This application is made under **Section 11(4)(a)-(b)** and **Rule 13 First Schedule, Arbitration and Conciliation Act** [hereinafter referred to as the **ACA**].
2. The applicant prays that CADER appoints the arbitrator to preside over the dispute and costs of the application are granted, owing to non-compliance with the agreed procedure for appointment of the arbitrator, either by the Respondent or the appointing authorities President East Africa Institute of Architects [hereinafter referred to as the **EAIA**] and Uganda Society of Architects [hereinafter referred to as the **USA**].
3. The respondent is opposed to the application because ultimately the arbitrator was appointed President USA and not the President EAIA as originally envisaged by Article 36 of the Building Contract [hereafter referred to as the **BC**].
4. The common facts between the parties are set out in Paragraphs 5. to **7.** below.
5. The parties signed the BC on 28th April 2009 for completion of an office block, show room and road access.
6. In relation to appointment of the arbitrator, the events set out in Table 1 below transpired.

TABLE 1

Item	Date	Event
i.	28-Feb-2017	The respondent declared a dispute had arisen and nominated three arbitrators pursuant to Clause 36 BC . This list was copied to the applicant.
ii.	2-Mar-2017	The applicant rejected the respondent's nominees and

		issued a new list in the counter proposal.
iii.	4-Apr-2017	The respondent wrote to the President USA to provide evidence of the delegation mandate from the President EAI A .
iv.	28-Apr-2017	The President USA , appointed arbitrator XYG , pursuant to the request lodged by the Applicant's counsel, under letter Ref:USA/18/PS/17/184. This appointment was subject to notification of objections by either party.
v.	3-May-2017	The applicant objected to the appointment of arbitrator XYG effected by President USA, for want of jurisdiction.
vi.	3-May-2017	The respondent confirmed acceptance of arbitrator XYG's appointment.
vii.	3-May-2017	The applicant filed this Application for statutory relief culminating in the compulsory appointment of an arbitrator.
viii.	4-May-2017	Applicant received respondent's 4-April-2017 letter requesting evidence that President EAI A had delegated appointment powers to the President USA.
Item	Date	Event
ix.	15-May-2017	President USA acting on President EAI A delegation letter dated 27th April 2017 appoints arbitrator XYG under letter Ref:USA/18/PS/17/190.
x.	16-May-2017	Respondent's counsel objects to reappointment of arbitrator XYG.

7. The arbitration clause, in issue, states as follows,

“**36(1)** Provided always that in case any dispute or difference shall arise then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a written

request to concur in the appointment of an Arbitrator, a person to be appointed on the request of either party *by the President for the time being of the East Africa Institute of Architects who will when appropriate delegate such appointment to be made by the Chairman or Vice-Chairman of the local (National) Society of Architects.*”

DECISION

8. The Applicant deposed, in Para.11 Affidavit in Rejoinder, that the EAIA letter (Respondent’s Opposition Affidavit - Annex G) delegating the appointment powers to the President USA was never copied to him.
9. It was conceded that the Respondent only accessed Annex G, after this Application had been filed.
10. With this concession, we now know with hindsight that: -
 - a. The Respondent rightly invoked the Art.36(1) BC, when requesting the Applicant to concur in the appointment of the arbitrator from the nominees listed [**28-Feb-2017**].
 - b. The Applicant was equally right to counter propose another list of nominees for the Respondent’s consideration [2-March-2017]
 - c. The Respondent erred in not replying to the Applicant’s counter proposition list – see [Clemens Fehr v. Prof. George Kanyeihamba \(CAD/ARB/09/06\) \[2007\] UGCADER 2 \(4 January 2007\).](#)
 - d. The Respondent’s emails to the President EAIA to appoint an arbitrator, on **11-March-2017**, **17-March-2017** and **30-March-2017** [Annex C – Opposition Affidavit] were not copied to the Applicant.

- e. The Respondent in a letter dated **3-April-2017** Ref: Lt/1029/ak/KA/17, requested the President USA to pursue the President EAIA to delegate the EAIA arbitrator appointment powers.

The pertinent parts state,

“... This left us the second option provided under the same clause and that is to write to the President of the East African Institute of Architects to delegate to the Uganda society of Architects to nominate an independent arbitrator.

We approached the Society and obtained the email address of the President of East African Society and we have so far sent him 3 emails and no response has been received from the President.

We now seek the indulgence of the Society of the Uganda Architects to engage with the President of the East African Society to delegate or mandate the President of the Uganda society to appoint an independent Arbitrator to hear our client’s claim and settle the same as provided under clause 36 of the Standard Agreement and Schedule of Conditions of Building Contract (with Quantities) ”.

Close scrutiny of Para.36(1) reveals that first and foremost the power to appoint the arbitrator resides with the President EAIA.

This power is only vacated when the President EAIA deems it fit to delegate the appointment powers to the Chairman or Vice-Chairman of the local (National) Society of Architects.

- f. The Respondent's letter to President USA to shed light on the powers delegated by President EAIA is dated 4-April-2017, but was served upon the Applicant on 4-May-2017.
- g. The President USA first appointed arbitrator XYG on 28-April-2017 (Ref: USA/18/PS/17/184) and again on 15-May-2017 (Ref: USA/18/PS/17/190).

The 28-April-2017 letter states,

*“This nomination and proposed fee will be acceptable to both parties if no objection is received from either party within **seven (7) calendar** days with effect from the date of issuance of this letter”.*

- 11. The 28-April-2017 letter informs the Applicant of the right to object to the appointed arbitrator within seven calendar days; the 15-May-2017 appointment is silent on this aspect.
- 12. The 28-April-2017 letter does not indicate where the objection right is derived from.
- 13. Silence regarding the objection right in the 15-May-2017 letter leaves one pondering as to whether it is a discretionary right vested in the appointing authority. If so, then on what basis? In any event it ought to be based on written rules, which are known to the parties.
- 14. We presume that the 28-April-2017 letter from the President USA, in stating the objection right, was minded, that it is was a right for either party under **Section 4 ACA** to immediately protest any derogation from Clause 36BC stipulations.

Section 4 ACA commands that immediate failure to protest results in recognition of a statutory waiver, which estops the aggrieved party from using any derogation to reverse anything in the arbitration process.

We therefore safely assume that it is recognition of the statutory right, which explains why the second appointment letter did not restate the **Section 4 ACA** objection rights.

15. Whereas Article 3 BC indicates other accompanying documents are the Contract Drawings, the unpriced Bills of Quantities and the Contract Bills, there is nothing evidenced by the parties which suggests that Article 36 BC has to be read in conjunction with any other documentation.
16. It is difficult to envisage a plausible situation, which explains why the Respondent's email requests escaped the attention of the distinguished Institute officers operating the two EAIA email addresses (hoc@eaia.online and info@eaia.online).
17. The anomaly however is traced back to the Respondent's unilateral email communication to the EAIA.
18. The Applicant's deposition, in Paragraph 11 Affidavit in Rejoinder explains the inconvenience occasioned as follows,

“That the alleged letter by the President of the East African Institute of Architects (Annex “G”) to Mr. Singh's Affidavit was never delivered to me and does not show who moved the President of the East African Institute of Architects to delegate the authority of appointing the arbitrator to the President of the Uganda Society of Architects”.

19. These omissions are grave given that each party is obligated by **Section 18 ACA** to afford equal treatment to the opposite party. The provision states,

“18. Equal treatment of parties.

The parties shall be treated with equality, and each party shall be given reasonable opportunity for presenting his or her case.”

20. **Section 18 ACA** is a generic provision, which demands that the Applicant was to be put on notice regarding every single right arbitration clause right invoked by the Respondent.
21. The respondent’s unilateral email communication to the President EAIA, violated the **Section 18 ACA** equality imperative.
22. By extension the Applicant was owed a response by the President USA, when he filed an objection regarding the jurisdictional excess exhibited when appointing arbitrator XYG on 28-April-2017.

This duty extended to the necessity why it was not available under the 15-May-2017 letter re-appointing arbitrator XYG.

23. Therefore the equality imperative, placed the President EAIA and President USA, on duty to notify the Applicant of: -
 - a. receipt of the Respondent’s request to appoint an arbitrator,
 - b. the basis upon which either USA or EAIA would proceed to consider the request the Respondent’s appointment of an arbitrator,
 - c. the assurance that delegation of powers to President USA to appoint an arbitrator was the result of independent exercise of discretion determining that indeed appropriate circumstances to do so had indeed arisen, and
 - d. the reasons as to why the President EAIA considered it “appropriate to delegate the appointment powers to the President USA,

Taking Paragraphs 23 (b) and (c) together, recital of the background facts known to either the President EAIA or President USA would serve as full disclosure and a transparency standard recording circumstances under which either office would proceed to effect the appointment of arbitrator XYG on 15-May-2017.

To this extent the envisaged recitals ought to have recorded the circumstances under which the administrative oversight had been redressed and prompt corrective action taken by either the President EAIA or President USA.

24. I find under **Section 11(4)(a) ACA** that the Respondent:-

- a. failed the equality imperative of placing the Applicant on notice that the right to request the President EAIA to appoint an arbitrator had been invoked, and
- b. triggered the missteps between the offices of the President EAIA and President USA.

25. I find under **Section 11(4)(c) ACA** that the:-

- a. the President USA unfortunately on every occasion did not take into account the **Section 18 ACA** equality imperative and left the Applicant in the dark;
- b. the office of President USA, did not take prompt corrective action in notifying the parties that the Respondent's 3-April-2017 letter application was wrongly addressed and was administratively re-routed for the proper attention of the President EAIA;
- c. the President EAIA did not elucidate the appropriate circumstances, which warranted delegation of appointment of the arbitrator powers to the President USA. Here I have in mind the best practice of recitals

disclosure and equality imperative envisaged under **Section 18 ACA**;
and

d. offices of the President EAI and President USA erred in not simultaneously notifying both parties on the steps taken in activating the arbitration clause mechanism.

26. It is against this background that I find it necessary given the significant passage of time, since 3-February-2017 when the Respondent served the Applicant with a demand notice and later on 28-February 2017 with notice of appointment of arbitration, that I proceed to grant the statutory relief sought for the compulsory appointment of an arbitrator.

27. The application is granted costs of the Application.

28. The appointed arbitrator shall be listed in the consequential ruling.

Dated at Kampala on the 4th of June 2017.

**JIMMY MUYANJA
EXECUTIVE DIRECTOR
CADER**