

THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION  
[CADER]

CAD/ARB/004/2018

PILE CORPORATION LIMITED ----- APPLICANT

VERSUS

TWED PROPERTY  
DEVELOPMENT LTD ----- RESPONDENT

**REPRESENTATION**

Applicant

Mr. Galisonga Julius  
Galisonga & Co. Advocates.

Respondent

Mr. Jude Byamukama  
BNB Advocates.

**RULING**

The dispute between the parties relates to interpretation of the arbitration Clause 10 in the suit Agreement concluded on 7th July 2017.

The clause states “*Any dispute arising out of this Agreement shall be settled by arbitration and in case of failure of the arbitration shall be referred to courts of law*”.

The Application is premised on the fact that the Respondent ignored the Applicant’s notice of breach and later on the notice of nomination of arbitrators.

The Applicant’s **Annex C** notice letter stated as follows,

*“The Managing Director,  
Twed Property Developments Ltd  
P.O. Box 10963,  
Kampala.*

*Dear Sir,*

**RE: NOMINATION OF MEDIATORS**

*We act for pile Corporation Limited our client with instructions to address you as here under.*

*Paragraph 10 of the Service Agreement between yourselves and our client, clearly states that should any dispute arise, the same should be firstly settled by arbitration and it is therefore upon this background that we nominate **Mr. Isabirye John** and **Mr. Yiga Shafir** as mediators.*

*We propose that you agree on any of them so that we immediately write to him and he advises us on his charges.*

*We await your response.*

*Yours faithfully,  
**Galisonga & Co. Advocates”***

The Reply Affidavit deposed by Respondent’s Managing Director, opposes the Application because:-

1. The dispute is not the subject of a valid arbitration agreement.
2. The reference ‘**failure of arbitration**’ is inconsistent with the process and usual conduct of arbitration which (whatever the outcome) culminates in arbitral awards and not in failure.
3. The Annex C letter unequivocally demonstrates that intention was to appoint mediators as opposed to arbitrators **and our lawyers formally communicated to the Applicant that *the so called arbitration clause was inoperative.***
4. That Clause 10 does not constitute a valid arbitration agreement as envisaged by the Arbitration and Conciliation Act as it specifically provides for reference of the entire dispute (and not only points of law) to the courts of law making it inconsistent with Section 9 of the Arbitration & Conciliation Act and therefore further making any arbitral award that may arise from arbitration herein subject to challenge under Section 34 of the Arbitration Act.
5. That if the Applicant had clearly stated that it was initiating mediation proceedings, as opposed to arbitration, the Respondent Company would have happily participated in the process.

Submissions by both counsel followed what was already set out in the respective Affidavits.

To begin with, we must discard of notion introduced by counsel, which are not present in Clause 10, in particular the concept of appeals.

An appeal is a term of art, which first resides within the parties under the party autonomy umbrella. In this case the parties can write up an arbitration clause, which makes provision for appeals.

The **Centrotrade Minerals & Metal Inc. Versus Hindustan Copper Limited**<sup>1</sup>, is instructive. It is instructive to note the Indian Arbitration and Conciliation Act provisions are in *pari material* to the Ugandan Arbitration and Conciliation Act [hereafter referred to as the ACA].

Centrotrade Minerals & Metals Inc and Hindustan Copper Limited (HCL)(3) entered into a contract for the sale of copper concentrate, which was to be used in the HCL's Khetri plant. Differences arose between the parties regarding the dry weight of the goods and Centrotrade invoked the arbitration clause, which stated,

*"All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in effect on the date hereof and the results of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction."*

On 15th June 1999 an award was delivered under the rules of the Indian Council of Arbitration (ICA). Centrotrade appealed the ICA award by initiating proceedings before the International Chamber of Commerce (ICC) on 22nd February 2000. The ICC sole arbitrator tribunal delivered the award in 2001, upholding the validity of the arbitration clause and Centrotrade's claims. Centrotrade applied for enforcement of the ICC award, which was allowed by a single bench of the Calcutta High Court on 10th March 2004. HCL appealed this decision and, on 28th July 2004, the division

---

<sup>1</sup> <https://barandbench.com/wp-content/uploads/2016/12/Centrotrade-minerals-v.-Hindustan-copper.pdf>

bench declared the ICC award unenforceable as long as the ICA award stood. This judgment was challenged before a two judge bench of the Supreme Court, which referred the matter to a three judge bench in 2006 because of a difference in opinion.

The Indian Supreme Court three judge bench comprised of Justice Madan B. Lokur, Justice R.K. Agrawal and Justice D.Y. Chandrachud on 15th December 2016, resolved the first question ***Whether a settlement of disputes or differences through a two-tier arbitration procedure as provided for in Clause 14 of the contract between the parties is permissible under the laws of India?*** and held as follows,

**Para.7**

It was the contention of learned counsel for Centrotrade that the ‘*arbitration result*’ in India was not an award as conventionally understood with reference to arbitration, but merely a ‘*result*’ of arbitration given by an arbitration panel of the Indian Council of Arbitration and nothing more. We are not at all inclined to accept this interpretation. While Clause 14 of the contract may have used the expression ‘*arbitration result*’ and not the expression ‘*arbitration award*’ clearly the parties’ intention was that the ‘*arbitration result*’ would be an award or at least in the nature of an award rendered by the arbitration panel of the Indian Council of Arbitration. The proceedings before the arbitration panel were intended to be structured and held in accordance with the Rules of Arbitration of the Indian Council of Arbitration. The result of such proceedings would inevitably be an arbitration award, regardless of the nomenclature used by the parties. It is difficult to interpret the words ‘*arbitration result*’ other than meaning an arbitration award.

**Para.8**

We say this also because if the submission of learned counsel for Centrotrade were to be accepted, it would mean that if both the contracting parties were satisfied with the ‘*arbitration result*’ (or negatively put, if neither party was dissatisfied with the ‘*arbitration result*’) there would be no method of enforcing that ‘*arbitration result*’ should such enforcement become necessary. This would create a vacuum post the ‘*arbitration result*’. It is to avoid such a vacuum that ‘*arbitration result*’ must be understood to mean an award of the arbitration panel of the Indian Council of Arbitration and an award that could be enforced in accordance with the laws of India, that is, the Arbitration and Conciliation Act, 1996 (for short ‘the A&C Act’).

**Para.12**

The arbitration result in the present case has all the elements and ingredients of an arbitration award. Taking also into consideration the view expressed by the above authors, we have no hesitation in concluding that the '*arbitration result*' in the first part of Clause 14 of the contract must mean an arbitration award given by the arbitral panel of the Indian Council of Arbitration. To this extent we disagree with learned counsel for Centrotrade but agree with learned counsel for Hindustan Copper Limited (hereafter referred to as 'HCL').

**Para.13**

The alternative submission of learned counsel for Centrotrade is that in any event on being dissatisfied with the arbitration result, the second part of Clause 14 of the agreement entitles the aggrieved party to appeal to a second arbitration in London in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. However, according to learned counsel for HCL the second part of Clause 14 of the contract is contrary to the laws of India.

**Para.14**

In our opinion the plain language of Clause 14 specifically provides for a second arbitration, in the form of an '*appeal*' against the award of the arbitration panel of the Indian Council of Arbitration. We do not think it necessary to labour on this issue, given the express words used in Clause 14. For the record, we may note that learned counsel for HCL spent considerable time on explaining that the right to file an appeal can only be created by a statute and not by an agreement between the parties. This may be so in respect of litigation initiated in courts under a statute or for the enforcement of common law rights, but that does not prevent parties from entering into an agreement providing for non-statutory appeals so that their disputes and differences could preferably be settled without resort to court processes.

**Para.15**

However, what does require serious consideration is the submission of learned counsel for HCL that the provision for an appellate arbitration in Clause 14 is prohibited by the laws of India on three counts: the provisions of the A&C Act do not

sanction an appellate arbitration; there is an implied prohibition to an appellate arbitration in the A&C Act; and an appellate arbitration is even otherwise contrary to public policy. Appellate arbitration and the A&C Act.

**Para.16**

Before actually discussing the validity of an appellate arbitration in the context of the A&C Act, it might be mentioned that it is doubtful if HCL can even contend that an appellate arbitration is contrary to the laws of India. If this contention is accepted, then it could be argued that HCL entered into a contract with Centrotech fully conscious and aware that one of the provisions of the contract was contrary to the laws of India. This could amount to HCL playing a fraud on Centrotech and could have serious long-term implications and ramifications for international commercial contracts with an Indian party.

**Para.25**

We are unable to appreciate how these provisions come to the aid of learned counsel for HCL. Sub-section (1) of Section 34 of the A&C Act entitles a party to an arbitration to approach a court "*only by an application*" for setting aside an award. This is sought to be read by learned counsel in a different way to suggest that an award can be set aside only by a court, thereby excluding a two-tier arbitration procedure. If the contention of learned counsel were to be accepted, we would perforce have to read the sub-section quite differently by repositioning the word "*only*" and the sub-section to read: "Recourse only to a Court against an arbitral award may be made by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)." Or "Recourse against an arbitral award may be made only to a Court by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)." We are afraid we cannot read or redraft the statute in the manner suggested by learned counsel.

**Para.27**

In our opinion, on a combined reading of sub-section (1) of Section 34 of the A&C Act and Section 35 thereof, an arbitral award would be final and binding on the parties unless it is set aside by a competent court on an application made by a party to the arbitral award. This does not exclude the autonomy of the parties to an arbitral award to mutually agree to a procedure

whereby the arbitral award might be reconsidered by another arbitrator or panel of arbitrators by way of an appeal and the result of that appeal is accepted by the parties to be final and binding subject to a challenge provided for by the A&C Act. This is precisely what the parties have in fact agreed upon and we see no difficulty in honouring their mutual decision and accepting the validity of their agreement.

**Para.28**

The fact that recourse to a court is available to a party for challenging an award does not ipso facto prohibit the parties from mutually agreeing to a second look at an award with the intention of an early settlement of disputes and differences. The intention of Section 34 of the A&C Act and of the international arbitration community is to avoid subjecting a party to an arbitration agreement to challenges to an award in multiple forums, say by way of proceedings in a civil court as well under the arbitration statute. The intention is not to throttle the autonomy of the parties or preclude them from adopting any other acceptable method of redressal such as an appellate arbitration. In this context, the view expressed in the **Analytical Commentary On Draft Text of A Model Law on International Commercial Arbitration - Report of the Secretary-General**<sup>2</sup> is quite relevant. This commentary deals, *inter alia*, with Article 34(1) of the Model Law on International Commercial Arbitration<sup>3</sup> and it is stated as follows:

**"1. Existing national laws provide a variety of actions or remedies available to a party for attacking the award.** Often equating arbitral awards with local court decisions, they set varied and sometimes extremely long periods of time and set forth varied and sometimes long lists of grounds on which the award may be attacked. Article 34 is designed to ameliorate

---

<sup>2</sup> Eighteenth Session, Vienna, 3-21 June 1985, A/CN.9/264 (25<sup>th</sup> March 1985)

<sup>3</sup> Article 34. Application for setting aside as exclusive recourse against arbitral award

(i) Recourse to a court against an arbitral award made [in the territory of this State] [under this Law] may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

this situation by providing only one means of recourse available during a fairly short period of time and for a rather limited number of reasons.

2. The application for setting aside constitutes the exclusive recourse to a court against the award in the sense that it is the only means for actively attacking the award, i.e. initiating proceedings for judicial review..... Finally, **article 34(l) would not exclude recourse to a second arbitral tribunal, where such appeal within the arbitration system is envisaged (as, e.g., in certain commodity trades).**"<sup>4</sup> [Emphasis supplied by us].

#### **Para.29**

Similarly, the **Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006**<sup>5</sup> also affirms this position in the following words:

a. Application for setting aside as exclusive recourse.

**45. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question.** Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34 (3)). In regulating "recourse" (i.e., the means through which a party may actively "attack" the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e.,

---

<sup>4</sup> A/CN.91264, 25 March 1985

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V85/267/01/PDF/V8526701.pdf?OpenElement>

<sup>5</sup> [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07 .pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf)



an organ of the judicial system of a State). **However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).**” [Emphasis supplied by us].

**Para.34**

It is therefore quite clear that the "*final and binding*" clause in Section 35 of the A&C Act does not mean final for all intents and purposes. The finality is subject to any recourse that an aggrieved party might have under a statute or an agreement providing for arbitration in the second instance. The award is binding in a limited context.

**Para.35**

Unless this interpretation is accepted, a second instance arbitration would be per se invalid in India. This would be going against the grain of a long line of decisions rendered by various courts in the country which have accepted the validity of a two-tier arbitration procedure under institutional rules and have not taken the view that a two-tier arbitration procedure is *per se* invalid. Reference in this regard may be made to a somewhat recent decision rendered in ***Shri Lal Mahal Ltd. v. Progetto Grano Spa***, 2013(4) R.C.R.(Civil) 105 : (2014) 2 SCC 433 wherein an award by the Board of Appeal of the Grain and Feed Trade Association, London was considered and upheld. Similarly in ***Subhash Aggarwal Agencies v. Bhilwara Synthetics Ltd.***, (1995) 1 SCC 371 decided under the Indian Arbitration Act, 1940] the decision of an appellate Tribunal constituted under the Delhi Hindustan Mercantile Association Rules and Regulations was under consideration. Several other instances could be cited but that is not necessary. There are several decisions of several High Courts to the same effect and we see no error in the implicit acceptance of the general principle of two-tier arbitrations.

**Party autonomy**

**Para.36**

Party autonomy is virtually the backbone of arbitrations. This Court has expressed this view in quite a few decisions. In two significant passages in ***Bharat Aluminium Company v. Kaiser***

*Aluminium Technical Services Inc.*,<sup>6</sup> this Court dealt with party autonomy from the point of view of the contracting parties and its importance in commercial contracts. In paragraph 5 of the Report, it was observed:

**"Party autonomy being the brooding and guiding spirit in arbitration,** the parties are free to agree on application of three different laws governing their entire contract - (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as "curial law". The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*,<sup>7</sup> which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent *Reliance Industries Ltd. v. Union of India*,<sup>8</sup>" [Emphasis supplied by us].

Later in paragraph 10 of the Report, it was held:

"In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of

---

<sup>6</sup> (2016) 4 SCC126, Hon'ble Judges/Coram: Anil R. Dave, Kurian Joseph and Amitava Roy, JJ.

<sup>7</sup> (1998) 1 SCC 305

<sup>8</sup> 2014(3) R.C.R.(Civil) 458 : (2014) 7 SCC 603

documents like wills, it is simply intention alone of the executor that is relevant. **In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grund norm,** how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement." [Emphasis supplied by us].

**Para.40**

Be that as it may, the legal position as we understand it is that the parties to an arbitration agreement have the autonomy to decide not only on the procedural law to be followed but also the substantive law. The choice of jurisdiction is left to the contracting parties. In the present case, the parties have agreed on a two tier arbitration system through Clause 14 of the agreement and Clause 16 of the agreement provides for the construction of the contract as a contract made in accordance with the laws of India. We see nothing wrong in either of the two clauses mutually agreed upon by the parties.

**Public policy and two-tier arbitrations**

**Para.41**

The question that now arises is the interplay between public policy and party autonomy and therefore whether embracing the two-tier arbitration system is contrary to public policy.

**Para.44**

For the present we are concerned only with the fundamental or public policy of India. Even assuming the broad delineation of the fundamental policy of India as stated in *Associate Builders* we do not find anything fundamentally objectionable in the parties preferring and accepting the two-tier arbitration system. The parties to the contract have not by-passed any mandatory provision of the A&C Act and were aware, or at least ought to have been aware that they could have agreed upon the finality of an award given by the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of

the Indian Council of Arbitration. Yet they voluntarily and deliberately chose to agree upon a second or appellate arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. There is nothing in the A&C Act that prohibits the contracting parties from agreeing upon a second instance or appellate arbitration - either explicitly or implicitly. No such prohibition or mandate can be read into the A&C Act except by an unreasonable and awkward misconstruction and by straining its language to a vanishing point. We are not concerned with the reason why the parties (including HCL) agreed to a second instance arbitration - the fact is that they did and are bound by the agreement entered into by them. HCL cannot wriggle out of a solemn commitment made by it voluntarily, deliberately and with eyes wide open.

**Para.45**

We decline to read the A&C Act in the manner suggested by learned counsel for HCL and hold that the arbitration clause in the agreement between the parties does not violate the fundamental or public policy of India by the parties agreeing to a second instance arbitration. It follows from our discussion that the award which is required to be challenged by HCL is the award rendered on 29th September, 2001 by the arbitrator in London.

Conclusion

**Para.46**

In view of the above, the first question before us is answered in the affirmative. The appeals should be listed again for consideration of the second question which relates to the enforcement of the appellate award.”

It secondly resides under S.38(1)(b) and S.38(2) ACA, where parties can positively in writing, pursuant to S.3(2) ACA, take up the right of appeal envisaged within the confines of S.38 ACA.

Neither party evidenced the agreed appeal-clause, which impacted on Clause 10 of the suit agreement.

I turn to interpretation of Clause 10.

Does it mean mediation or arbitration?

No evidence of prior conduct or communication between the parties leaving any evidential trail of parties state of mind was placed on record.

The mix up between mediation and arbitration is pinned down to the applicant's advocate communication which talks of "*settlement by arbitration*" and "*nomination of mediators*".

We resolve this by noting that an advocates error cannot infect a contractual clause one way or the other, because the clause speaks for itself.

The essence of an arbitration clause is defined by S.2(1)(c) ACA, which states that,

“ ‘arbitration’ means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”

S.2(1)(c) ACA informs us that the definition is with regard to the process of submission but not the detail, such as we have seen above in the *Centrotrade* which is left for completion under the party autonomy umbrella.

In *Delta Industrial Equipemnt Ltd versus Uchumi Supermarkets Ltd*, CAD/ARB/12/14 it was held that the effect of S.2(1)(c) ACA is to cure any defect created by a terse or rambling dispute resolution clause.

In this case the intention of the parties is properly captured by separating "*in case of failure of the arbitration shall be referred to courts of law*" since '**and**' is a continuation of the specific subject matter of failure.

The effect of and is severance.

So far no proof of failure was evidence.

In the same vein S.9 ACA is relevant when considering the Court's jurisdiction which did not arise before me.

S.34 AC is also not relevant to the extent that no award has been evidenced for my consideration.

Lastly, it has to be reiterated that the creation of an arbitral tribunal ideally requires mutual effort by both counsel.

In ***Roko Construction Ltd v. Aya Bakery (U) Ltd***, CAD/ARB/10/2007, it was further observed that,

“The Respondent’s failure to co-operate, in the appointment of the arbitrator, does not augur well, in light of the dual obligation, imposed upon all parties under the arbitration clause, which was wisely expounded by Lord MacMillan sixty five years, in the House of Lords, in ***Heyman v Darwins***, [1942]All E.R. 337, 347D as follows,

“I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake to each other hinc inde; but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which one the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution.”

In ***B.M. Steels v. Kilembe Mines***, CAD/ARB/10/2004, set out the normative behavior in relation communication on the appointment of arbitrators, as follows,

“It is prudent to point out at this stage three possible courses of action which could have been taken by the Respondent:

1. First the Respondent would have consented to the Arbitrator suggested by the Applicant with a view of having a one-person arbitral panel.
2. Secondly the Respondent would oppose the Applicant’s nomination by indicating another Nominee Arbitrator whilst inviting the Applicant to consent to the Respondent’s nomination with a view to having a one-person arbitral panel.
3. Thirdly the Respondent would oppose or consent to the Applicant’s nomination. Nevertheless the Respondent would then proceed to indicate another Nominee chosen by the Respondent and invite the Applicant to consent to the second nomination person with a view of having a two person tribunal.”

It is not right to take advantage of Applicant's **Annex C mediation** error, since respondent's counsel would by short circuit be shirking the responsibility to set up the tribunal, within the mutual obligation ruled upon in the **Heyman** and **BM Steels** enclave.

Therefore it is not right to take it that counsel's letter, which introduces the *mediation* concept can infect the contractual clause, which neither of the parties have suggested was amended or rectified to cure any shortfall.

In any event no High Court order emanating from S.5 ACA proceedings was tabled before me evidencing a court decision that the clause had been found inoperative.

I find merit in the Application and appoint the arbitrator.

Applicant is awarded costs of the Application.

Dated at Kampala on **9th February 2018**.

.....  
**EXECUTIVE DIRECTOR**