THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

ARBITRATION CAUSES No. 0075 OF 2023 AND 0014 OF 2024 (Consolidated)

(Arising from London Court of International Arbitration (LCIA) Consolidated Arbitration No. 204602 of 2021)

1. MSS XSABO POWER LTD }
2. BRYAN XSABO STRATEGY CONSULTANTS (U) LTD } ..... APPLICANTS
3. MOLA SOLAR SYSTEMS (U) LTD }
4. CONSICARA GLOBAL INVESTORS LTD }
5. DR DAVID ALOBO }

VERSUS

GREAT LAKES ENERGY COMPANY NV ..... RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicants and the respondent entered into an investment and ancillary agreements for a power project in Uganda. By those agreements, the 2nd and 3rd applicants as the original shareholders of the 1st applicant, entered into a shareholders' agreement, a memorandum of understanding and an investment agreement in which the respondent as a lender, would become a shareholder in the project company upon paying for the shares so allotted to it. The respondent expended monies into the project and became a shareholder in the project company. The respondent was tasked to look for engineers to construct the solar power station at Kabulasoke, Gomba District, during which process a dispute arose when the 2nd and 3rd applicants accused the respondent of having inflated the cost of the engineering and construction component, to a tune of around US $ 6,000,000 without the knowledge of the project company, fellow shareholders and promoters of the project company. The applicants then rescinded the investment agreement on basis of which the respondent had become a shareholder in the project company and also revoked the allotment of shares to the respondent.

Pursuant to the arbitration clause in the investment agreement, the respondent commenced arbitral proceedings at the London Chamber of International Arbitration. The respondent also filed Miscellaneous Cause No. 17 of 2021 at the Commercial Division of the High Court of Uganda, seeking interim protective measures pending conclusion of the arbitral proceedings.

On 16th August, 2021 this Court issued an order of interim measures of protection, restraining the applicants and / or their respective agents, either by themselves or through their authorised officers and agents, from accessing and utilizing funds remitted by the Uganda Electricity Transmission Company Limited (UETCL) into any bank account of the 1st applicant including but not limited to the shillings account No. 01063626448460 and the US dollar account No. 02063616455284, both in the name of the 1st applicant, MSS Xsabo Power Limited, held at DFCU Bank Limited, Acacia Avenue (Mall) Branch, Kololo without the consent of the applicant, until final determination of London Chamber of International Arbitration Consolidated Arbitration No. 204602 at the London Court of International Arbitration.

By reason of the fact that on or about 1st March, 2022 in High Court Civil Suit No. 38 of 2022, the applicants entered into a consent judgment with a one Mr. Frank Abe, a Solicitor with Cameron Clarke Lawyers who represented the applicants as their counsel at the London Court of International Arbitration (LCIA), by which the applicants agreed to pay an undemonstrated, unascertained, unproven and un-apportioned (as between them) sum of legal fees being £ 717,156.00 to Mr. Frank Abe, out of the 1st applicant's funds, the respondent filed Miscellaneous Application No. 0611 of 2022 seeking a variation of that order. In a ruling delivered on 14th October, 2022 the order was varied thereby restraining the applicants, their servants, agents and persons claiming under them or from them as successors in title or creditors, from the attachment in execution of any decree, of amounts exceeding US $ 60,000 per month until full recovery, from the 1st applicant's bank accounts specified by the interim measure of protection order issued by this Court on 16th August, 2021, until the final disposal of the ongoing arbitration by the London Chamber of International Arbitration in Consolidated Arbitration No.204602, or unless the court orders otherwise upon application of the parties.

Subsequently the applicants filed *Misc. Application No. 1069 of 2022, MSS Xsabo Power Limited and 4 others v. Great Lakes Energy Company NV*, seeking a variation of that order given in Miscellaneous Cause No.17 of 2021 on 16th August, 2021 to enable the applicants withdraw a sum of £ 59,649 from the frozen bank accounts of the 1st applicant to meet venue hire and mediation fees at the London Chamber of International Arbitration. The Court having found that there was no relevant or sufficient change in circumstances or the operational costs of the applicants, the variation of the order sought was not justified. For that reason, the application failed and was on 26th September, 2022 accordingly dismissed with costs to the respondent.

By consolidated Arbitration Causes No. 0002 and 0005 of 2023 the respondent sought recognition and enforcement of the two partial awards handed down on 11th March, 2022 and 10th January, 2023 respectively, while the applicants sought to have them set aside on grounds that the first partial Award was in conflict with the public policy of Uganda. Recognition and enforcement of part of the first partial Award would therefore be contrary to the public policy of Uganda. On the other hand, the second partial Award too was in conflict with the public policy of Uganda, and therefore its recognition and enforcement would therefore be contrary to the public policy of Uganda. In the alternative, recognition and enforcement of both awards be denied.

In a ruling delivered on 24th April, 2023 the Court found the two partial awards could only be set aside at the seat of arbitration; the application for their recognition and enforcement had met the legal requirements in Uganda. The Court however found parts of the partial awards to be contrary to public policy in Uganda to the extent that the partial awards; compelled a continued business relationship between the parties, rather than an award of damages; the same aspects of the partial award of 10th January, 2023 constituted an improper and unenforceable fetter of public authority; and some aspects of the matters directed by the High Court Civil Division to be heard *denovo* by another Registrar of Companies, were the subject of some orders made in the first partial award. Consequently, to the extent that the specified orders of the partial awards declared unenforceable due to being in conflict with international public policy and the public policy of Uganda did not overlap with rest of the orders of the two partial awards sought to be enforced, the respondent was

granted leave to enforce only what was left of the two partial awards, excluding the orders outlined therein. The application for recognition and enforcement was therefore allowed only in part. The Arbitral Tribunal subsequently rendered its Final Award on 11th September. 2023. By that Award, the Tribunal concluded as follows;

N. OPERATIVE PART

279. Having carefully considered all of the evidence and submissions before it, and for the reasons set out above, the Tribunal finally ORDERS, DECLARES, DECIDES AND AWARDS as follows:

280. The Tribunal orders that:

280.1. The First, Second and Third Respondents shall forthwith pay to the Claimant USD 1,188,730 by way of damages together with simple interest at the rate of USD 3-month LIBOR plus 8% from 3 January 2019 to the date of payment.

280.2. The Respondents shall forthwith pay to the Claimant the amounts of GBP 1,194,599.83 and USD 165,860.98 by way of Legal Costs.

280.3. The Respondents shall forthwith pay to the Claimant the amount of GBP 208,930.36 by way of Arbitration Costs (less any amount already paid pursuant to the Debt Order).

280.4. The Respondents shall pay to the Claimant simple interest on the Legal Costs and Arbitration Costs awarded at paragraphs 280.2 and 280.3 above from the date of this Final Award until payment at the rate of USD 3-month LIBOR plus 8%.

280.5. The First, Second and Third Respondents are jointly and severally liable for the amounts due under paragraph 280.1 above.

280.6. All Respondents are jointly and severally liable for the amounts due under paragraphs 280.1-280.4 above.

281. The Tribunal declares that:

281.1. The First, Second and Third Respondents are in breach of Clause 6 of the Shareholders Agreement

as a consequence of their failure to repay the debt due to the Claimant.

281.2. All Respondents are in breach of Clause 8 of the Investment Agreement by reason of the wrongful dissipation of substantial funds belonging to the First Respondent.

281.3. The Claimant's liability for secret commission of USD 3,089,235 and USD 775,257 together with all interest thereon, for which the Claimant was held liable to the First Respondent at paragraph 293.6 of the First Partial Award, has been fully 'satisfied in the calculation of the amount due from the First, Second and Third Respondents to the Claimant as ordered at paragraph 280.1 above.

281.4. The Tribunal's declaration at paragraph 293.7 of the First Partial Award remains in force and is not affected by the terms of this Final Award.

282. All other claims and cross-claims made in this arbitration are hereby dismissed.

The "First, Second and Third Respondents" referred to in the abovementioned Final Award are, for purposes of this application, the 1st, 2nd and 3rd applicants respectively (i.e., (1) MSS Xsabo Power Limited, (2) Bryan Xsabo Strategy Consultants (Uganda) Limited, and (3) Mola Solar Systems (Uganda) Limited). The "Claimant" referred to in the abovementioned final award is, for purposes of this application, the respondent M/s Great Lakes Energy Company NV. Following applications by both parties for corrections in the final award pursuant to the LCIA Rules, the Tribunal rendered a correction decision on 4th November, 2023 amending the final award by way of a Memorandum, which Memorandum forms and is treated as part of that Final Award.

30b. <u>The cross-applications</u>.

Arbitration Cause No. 0014 of 2024 is by Notice of motion made under the provisions of section 33 of *The Judicature Act,* section 98 of *The Civil Procedure Act*, sections 34 (1) and 34 (2) (b) (ii) of *The Arbitration and Conciliation Act*; Rules 7 and 13 of *The Arbitration Rules*, and Article V

(2) (b) of *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958*. The applicants seek an order refusing the recognition and enforcement in Uganda, of the Final Arbitral Award of the London Court of International Arbitration (LCIA), rendered on 11th September, 2023 in Consolidated Arbitration No. 204602 of 2021.

It is the applicants' case that; - i) the Final Arbitral Award is in conflict with the law and public policy of Uganda; ii) the Final Arbitral Award adjudicated matters not contemplated by the parties or not falling within the terms or scope of submission to arbitration; ii) the recognition or enforcement of the Final Arbitral Award would be contrary to the law and public policy of Uganda. These grounds are premised on the fact that on 11th March, 2022 the Arbitral Tribunal rendered the First Partial Award, in which the LCIA adjudged the respondent to have breached a fiduciary duty, acted dishonestly and pocketed a secret commission from the project. On that basis, the respondent was found liable to pay to the 1st applicant the sum of US $ 3,089,235 and US $ 775,257 together with interest thereon, as repayment of secret commission. Liability for these sums was subject to the set-off of any amounts due from the 1st applicant to the respondent under one or more of the Agreements. The Tribunal undertook to determine the rate, period and quantification of interest payable and to address matters relating to set-off in the second phase of this arbitration. Similarly, the Tribunal undertook to determine the rate, period and quantification of interest on the amount payable by the 1st applicant to the respondent on the partial award, and to address matters relating to set-off in the second phase of this arbitration.

In the second partial award handed down on 10th January, 2023 the Arbitral Tribunal declared that the sums found recoverable from the 2nd and 3rd applicants as outstanding loans were to bear interest accruing thereon at the rate of three (3) months LIBOR + 8% per annum net of taxes, calculated on a simple interest basis until the loans have been fully repaid. The Arbitral Tribunal rendered a Final Arbitral Award on 11th September, 2023 by which the 1st and 2nd applicants were ordered to pay the respondent US $ 1,188,730 by way of damages together with simple interest at the rate of US $ 3-month LIBOR plus 8% from 3rd January, 2019 to the date of payment. The applicants jointly and severally were ordered to pay the respondent GB £ 1,194,599.83 and US $ 165,860.98 by way of Legal Costs, and GB £ 208,930.36 by way

of Arbitration Costs (less any amount already paid). The Costs awarded were to bear interest from the date of the Final Award until payment at the rate of US $ 3-month LIBOR plus 8 %. The Tribunal did not determine the rate, period and quantification of the interest payable in the second phase of the arbitration, contrary to its undertaking in para 293.6 of the First Partial Award.

According to the Investment Agreement and the Shareholders Agreement, the parties expressly agreed that any dispute regarding whether the 1st applicant had funds available for the purpose of repaying US $ 1,188,730 being advance payment by the respondent to the 1st Applicant would be resolved by an ordinary resolution of the board of directors of the 1st Applicant, acting on the advice of a duly appointed auditor for that purpose, rendering their opinion with regard to the laws governing corporate insolvency in Uganda and not through arbitration, yet the Arbitral Tribunal made an award of US $ 1,188,730 which was therefore not contemplated by the parties or not falling within the terms of submission to arbitration, or is a decision on a matter beyond the scope of the submission to arbitration and should not be recognized and enforced by this court.

In the First Partial Award, the Tribunal found that the respondent breached a fiduciary duty when it deliberately and dishonestly concealed the terms of a secret commission from the applicant, given that the EPC cost was only US $ 18,050,000 but it inflated it to US $ 24,500,000 thereby leaving an amount of US $ 6,450,000 as secret commission. The Tribunal ordered the respondent disgorge itself from the secret commission. These findings are highlighted at pages 61-69 of the First Partial Award. In the Final Award (paragraphs 85 - 89), the Tribunal made it very clear that the respondent only invested US $ 24,081,000 in the project, inclusive of the secret commission. The Tribunal broke down the said invested amount, leaving a balance of US $ 1,188,730 which it considered to be in excess of what the respondent was required to invest in the applicant by way of equity. The Tribunal ordered the applicant to pay the said over investment US $ 1,188,730 as damages (see paragraph 280.1 page 66 of the final award) and yet this amount forms part of the secret commission of US $ 6,450,000 that the respondent was ordered to disgorge itself from.

The award of the Tribunal for the repayment of the said overinvestment of US $ 1,188,730 as damages, as mentioned in paragraph 280.1 at page 66 of the final award should not be recognized and enforced by this honourable court as doing so would amount to perpetuating fraud and money laundering which is against public policy of Uganda. The said award of US $ 1,188,730 is in direct conflict with the award in paragraph 281.4 of the Final award which maintained the order of the Tribunal at paragraph 293. 7 of the First partial award to the effect that all unpaid EPC price was unpaid secret commission for which it is the respondent who would be liable to the applicants. This court has already pronounced itself on the secret commission in its decision in Arbitration cause No. 0002 and 0005 of 2023 (consolidated) between the same parties (at page 31) that the respondent fortuitously performed part of the transaction contrary to the law when it factored in a secret commission whose recovery would involve acts of money laundering and that the respondent should not be enabled to reap the fruits of its own dishonest conduct.

The Arbitral Tribunal breached its duty to determine a rate of interest on the secret commission to be refunded by the respondent. This constitutes a violation of public policy in the following aspects: a) failure to treat the parties with equality, and/or discrimination, which is contrary to the arbitration law and *The Constitution*; b) failure of due process; c) expropriation of time value of money without compensation; d) unjust enrichment of the respondent guilty of dishonesty; an absurdity and a travesty of justice in conflict with the most basic notions of justice, fairness and morality; e) abuse of contractual and legal rights. The Arbitral Tribunal purported to award interest to the respondent at the rate of US $ 3-month LIBOR plus 8 %, which was phased out and is non-existent. The U.K Financial Conduct Authority announced on 5th March 2021 that immediately after 30th June, 2023 the 1-month, 3-month and 6-month US dollar LIBOR settings will no longer be representative and representativeness will not be restored.

The 1-month LIBOR, 3-month LIBOR and 6-month US dollar LIBOR settings were discontinued on 30th June, 2023 and are defunct. The Arbitral Tribunal omitted to address its mind to obsolescence of the US $ 3-month LIBOR settings in execution of its duty to render an enforceable award. The interest award of US $ 3-month LIBOR plus 8 % cannot be recognised or enforced by

this Court because: a) the USD 3-month LIBOR rate is obsolete; b) the interest rate is uncertain and ambiguous; c) the date of the 3-months US Dollar LIBOR setting is not specified; d) it raises further controversy as a question of fact; and (e) re-litigating and canvassing it in enforcement proceedings is against the public policy on finality of arbitration awards. This court cannot change or correct the final award by substituting the obsolete LIBOR rate with the novel synthetic and unrepresentative LIBOR setting.

To the contrary, by Arbitration Cause No. 0075 of 2023 which is by Chamber Summons made under the provisions of section 42 and 43 of *The Arbitration and Conciliation Act*; Rule 13 of *The Arbitration Rules*, and Articles III and IV of *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958*, the respondent seeks an order recognising as enforceable in Uganda, the Final Arbitral Award of the London Court of International Arbitration (LCIA), rendered on 11th September, 2023 be, and therefore that leave be granted to the respondent to enforce the aforesaid Award as a judgment / decree of the High Court of Uganda.

It is the respondent's case that it has since 2019 been involved in an arbitration with the applicants vide LCIA Consolidated Arbitration No. 204602 at the London Court of International Arbitration in a dispute arising out of the investment agreement and other ancillary agreements between the applicants and itself in respect of the "Kabulasoke Solar Power Project." in respect of which the applicant is an investor. In Arbitration Causes Nos. 002 and 005 of 2023 (*Great Lakes Energy Company NV v. MSS Xsabo Power Limited and others*), this Court has previously ordered enforcement of the two partial awards of the Arbitral Tribunal. The arbitral proceedings between the parties have since bee concluded and have resulted in the final award which the respondent now seeks to have this Court recognise and enforce. The respondent has supplied a certified copy of the final award as well as the duly certified copies of the arbitration agreements, pursuant to which the arbitration proceeded. There is nothing that prevents the final award from being recognised and enforced by this Court. It is in the interest of commercial justice that the final award of the Tribunal is recognised and enforced by this Court.

c. The affidavits in reply;

In the affidavit in reply to Arbitration Cause No. 0014 of 2024 sworn by a Solicitor, serving as a director of the respondent, the respondent contends that the application is without merit as it is a disguised appeal on the substantive merits of the dispute as determined in the Final Award in the arbitration. This Court cannot sit on appeal to review the substantive issues in dispute between the parties. The issues raised in the applicants' objection all constitute purported objections to the substantive findings and relief already determined in the arbitration. The finality of arbitral awards is a fundamental feature of arbitral proceedings, and it is not permissible for the applicants to seek to, in substance, appeal the findings and relief made in the Final Award. The applicants are bound by the Final Award and are obliged to abide by and comply with the decisions and orders of the Tribunal in good faith.

Clause 6.3 of the Shareholders' Agreement refers to an ordinary resolution being used in the event of a dispute "between the Company and any of the Shareholders relating to whether or not the Company has funds available for the purpose of repaying any advances in terms of clause 6.2." The Tribunal expressly noted at footnote 35 in the Final Award that there is no dispute as to whether the 1st applicant has funds available for this purpose and that the provisions of clause 6.3 of the Shareholders' Agreement therefore do not apply. The applicants' contention that the Tribunal's findings in the Final Award on the amount due to the respondent is an issue beyond the scope of the arbitration, is incorrect, embarrassingly vague and unparticularized and a clear attempt to circumvent the findings of the Tribunal, in circumstances where the applicants themselves contracted to refer this dispute to arbitration. The Applicants' contention in paragraph 9 of the supporting affidavit is therefore misguided and without basis.

In paragraphs 85 to 89 of the Final Award, the Tribunal summarised its findings from the First and Second Partial Awards as to the amounts invested by the respondent in the Kabulasoke project. The balance of US $ 1,188,730 is the amount paid by the respondent to the 1st applicant in excess of what it was required to invest in the 1st applicant and loan to the 2nd and 3rd respondents under

the Investment Agreement. In determining the damages to be awarded to the respondent, the Tribunal in paragraph 220 of the Final Award took into account the paid secret commission amount by setting it off from the amount due to the respondent. The Tribunal did not determine a rate of interest on the paid secret commission amount because such amounts have been set-off from the damages to be paid, that is to say, the Applicants have already been made whole for those amounts and there is therefore no loss to them on which interest would be paid.

A "synthetic" 3-month US dollar LIBOR rate is still published, specifically for scenarios of this nature in which parties have legacy contracts that refer to a 3-month US dollar LIBOR rate. On 3rd April, 2023, the UK Financial Conduct Authority announced that it had decided to require LIBOR's administrator, ICE Benchmark Administration Limited, to continue the publication of l-month, 3-month and 6-month US dollar LIBOR settings after 30th June 2023 using a 'synthetic' methodology. On 3rd July, 2023, the FCA announced that the US dollar LIBOR panel has now ceased. In doing so, it noted that l-month, 3-month and 6-month US dollar LIBOR settings will continue to be published using a synthetic methodology until at least September, 2024. Specifically, the FCA announced that it had designated the 1-month, 3-month and 6-month US dollar LIBOR settings as Article 23A benchmarks pursuant to the retained version of the Benchmarks Regulation. The synthetic US dollar LIBOR rate is intended to apply to legacy contracts that refer to US dollar LIBOR. The Final Award is therefore perfectly capable of being enforced. As at the date of the Final Award and the Applicant's instant application to this Court therefore, there is no uncertainty or ambiguity as to the applicable interest rates.

In the affidavit in reply to Arbitration Cause No. 0075 of 2023 sworn by the 1st 2nd and 3rd applicant's Company Secretary, it is contended that on 11th March, 2022 the Arbitral Tribunal rendered the First Partial Award, where the LCIA adjudged the respondent to have breached a fiduciary duty, acted dishonestly and pocketed a secret commission from the project. The First Partial Award stated that the applicant disgorge itself of the secret commission illicitly earned from this scheme together with interest thereon. The Arbitral Tribunal undertook and reiterated its duty to render a later award specifying a rate of interest on the refund of secret commission.

Whereas in the Final Award the Tribunal awarded the respondent damages after set off of the secret commission of US $ 3,089,235 and US $ 775,257 which the applicant was liable to repay to the 1st applicant under para 292.3 of the First Partial Award, it did not determine the rate, period and quantification of the interest payable in the second phase of the arbitration as undertaken in para 293.6 of the First Partial Award. Although it awarded interest on damages and costs payable by the applicants, it did not discharge its duty to determine a rate of interest on unpaid secret commission, and set it off, a duty it had specifically reserved for a further award.

The Arbitral Tribunal purported to award interest to the applicant at the rate of US $ 3-month LIBOR plus 8%, which was phased out and is non-existent. The U.K Financial Conduct Authority announced on 5th March, 2021 that immediately after 30th June 2023, the l-month, 3-month and 6-month US dollar LIBOR settings will no longer be representative and representativeness will not be restored. The interest award of US $ 3-month LIBOR plus 8% cannot be recognised or enforced by this Court because: a) the US $ 3-month LIBOR rate is obsolete; b) the interest rate is uncertain and ambiguous; c) the date of the 3-months US Dollar LIBOR setting is not specified; d) it raises further controversy as a question of fact; e) re-litigating and canvassing it in enforcement proceedings is against the public policy on finality of arbitration awards.

In the Final Arbitral Award, the Tribunal rendered a decision on the dispute between the 1st applicant and the respondent on the issue whether the 1st applicant had funds available for the purpose of repaying US $ 1,188,730 being advance payment by the applicant to the 1st applicant and yet, according to the Investment Agreement and the Shareholders Agreement, the parties expressly agreed that any such dispute would be resolved by an ordinary resolution of the board of directors of the 1st applicant, acting on the advice of a duly appointed auditor for that purpose, rendering their opinion with regard to the laws governing corporate insolvency in Uganda and not through arbitration.

d. Submissions of counsel for the applicants;

M/s Nambale, Nerima & Co. Advocates together with M/s Makada and Partners, Advocates and Solicitors, on behalf of the applicants submitted that violation of the principle of equal treatment regards the promise of the Tribunal to compute interest on the secrets commission. The Tribunal did not compute the interest. It however awarded the respondent interest on the sums payable by the applicants. The principle of equal treatment is not limited to procedure; it covers the merits as well. Not honouring it increased the amount payable by the applicants without off-setting the amount in quantum of interest. It points to failure to treat the parties equally. As regards the rate awarded, LIBOR was phased out three months before the award. It presents a challenge in enforcement. The Court cannot substitute a rate for another, the case of *Franek Jan Sodzawiczny v. Simon John Mcnally [2021] EWHC 3384 (Comm)*, it was held that if the relief granted by the award is not sufficiently or clearly stated, that will be a reason to refuse enforcement; where it requires elaboration or refinement. The principal sum awarded started from the so-called investment of the respondent. The Tribunal found and the Court confirmed in its ruling in respect of the partial award that it included an inflated EPC contract price. It was as a result of a secret commission. It would be contrary to public policy to use the so-called investment as a basis for an award contrary to public policy. The court shroud refuse recognition of the interest and the sum of US $ 1,188,730. The costs and the arbitration fees were awarded. Counsel prayed for the costs of the application and for a consequential order unfreezing the account; it should be vacated in light of the final award having bene issued.

The equity investment is not separable from the power plant investment. There is no separate equity investment. The financing is the equity investment. The amount of US $ 2.5 million that had not been paid was not considered by the Tribunal. Article 5 of *The Convention* allows for objection on any of the grounds, even if not raised at the seat. The regulator in the UK replaced LIBOR with the synthetic methodology. The statute does not apply to arbitral awards. The rate is not in existence by virtue of the discontinuation. The LIBOR rate and the synthetic rate are different and the latter is not representative. The deponent is part of the respondent as solicitor,

director of the applicant whose experience is unknown. The fact left is that the rate was phased out. There was no computation and offsetting of the interest accruing to the applicant. Para 220 takes into account the amount due on the secret commission not the interest. Para 280.3 of the final award. Being a liquidated amount and an offset, there must be calculation not a mere taking into account. Section 6 of the Act is for interim measures. It would be a violation of section 9 of the Act. Post award relief cannot be interim.

e. Submissions of counsel for the respondent.

M/s S & L Advocates together with M/s Kashillingi, Rugaba and Associates, Advocates & Tax Consultants, on behalf of the respondent submitted that the objection to enforcement seeks to re-litigate the issues determined on merit by the tribunal in respect of all the grounds. Secret commission, the amount is in the EPC contact price which was 24 million dollars. Para 243 -246 the amount was US $ 3,089,235. The equity investment at para 85 – 89 of the Final Award that the respondent had over invested in the project and based on its consideration of evidence and computation of what was due to the parties it found US $ 1,188,730 dollars as excess. The US $ 25,255,808 which was un paid commission. The amount should be declared as enforceable. This is elucidated in Para 12 – 24 of the skeleton arguments.

Regarding equal treatment, the amount was set off. Para 293 of the Tribunal declared the respondent liable to pay the 1st applicant the sums of the secret commission together with interest. In the Final Award the Tribunal determined that the amount which was due to the applicants had been set off at para 220 of the Final Award therefore there was no need trio determine the rate of interest. The Court cannot revisit the merits. LIBOR para 38 – 46 of the affidavit in reply of Kien. Clause 2.5 of the investment agreement provided for that rate, it transitioned to legacy contracts which include the one from which the arbitration arose. The applicant relies on announcement from the same body. The one relied upon by the respondent is more recent. Article 27 of *The Convention* allows for correction. It was not done within the 28 days provided for by the rules. They had a window under the law of England to challenge it on that account, under section 70 of

the English Act. Counsel opposed the application for unfreezing the account, and argued that the asset should be preserved until the enforcement. Footnote 25 of the final award the Tribunal has said it is sufficient to pay off the respondent.

f. The decision.

Section 31 (4) of *The Arbitration and Conciliation Act* provides that an arbitral award shall be made in writing and be signed by the members of the arbitral tribunal. After the award is made, a signed copy is required to be delivered to each party. Section 31 (6) of the Act too provides that the arbitral award shall state the reasons on which it is based unless the parties have agreed that no reasons are to be given, or the award is an arbitral award on agreed terms. Additionally, the award is required to state the date and place of arbitration. The award handed down on 11th September. 2023 by the Arbitral Tribunal constituted by Messrs Christopher Newmark (presiding), Edward Poulton and Nathan Searle, meets these formal requirements.

An application to enforce an award as a decree of court cannot be made until the expiration of ninety days after notice of the filing or registering of the award has been served upon the respondent (see Rule 7 (1) of *The Arbitration Rules*). The respondent's application for the registration of the Award as a decree of this Court filed on 19th October, 2023, has met these requirements. Therefore, save for a successful objection based on one or more of the nine grounds specified in Article V of *The New York Convention* prescribes, the Final Arbitral Award may be recognised and enforced in Uganda.

i. General principles;

Foreign final arbitral money awards, awards containing injunctions, declaratory awards, and awards granting provisional measures, are all enforceable in Uganda. On the facts of the present case, the award handed down on 11th September, 2023 put an end to the arbitration and contains a final decision on the issues in dispute between the parties. Where an award is not honoured

voluntarily, section 42 of *The Arbitration and Conciliation Act* requires the enforcing party of a *New York Convention* award to seek recognition and enforcement pursuant to section 35 of *The Arbitration and Conciliation Act*. The application must be supported by; (i) the original arbitration agreement and award, or certified true copies thereof; (ii) the original arbitration agreement or a duly certified copy of it; and (usually) (iii) a statement either that the award has not been complied with, or the extent to which it has not been complied with at the date of the application.

The central objective of *The New York Convention* is to facilitate enforcement of foreign arbitral awards by subjecting the enforcement to a limited number of conditions. Provided that both the country in which the award was ordered and the country in which the enforcement will take place are signatories to the Convention and the arbitration award meets the Convention's basic requirements e.g. it is in writing and is signed, the award will be recognised as binding and can be enforced by the party in any other signatory states with the assistance of the local courts.

Article V (1) of *The New York Convention* prescribes grounds that need to be proven by a party to successfully resist enforcement of an award. It provides that enforcement of the award may be refused if: (i) a party to the arbitration agreement was under some incapacity; (ii) the arbitration agreement was invalid; (iii) the procedure before the arbitral tribunal was affected by procedural unfairness; (iv) the award deals with issues falling outside the scope of the submission to arbitration; (v) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, absent such an agreement, the law of the arbitral seat; (vi) the award has not yet become binding on the parties; or (vii) the award has been set aside in the country where it was made. While Article V (2) (a) thereof provides that enforcement of an award can be refused if the subject matter is not capable of being arbitrated under the laws of the enforcing state, Article V (2) (b) provides further that an award may be denied enforcement if it is contrary to the public policy of the state in which enforcement is sought.

The phrase "may be refused ...only if" under that Article constitutes limitation enumeration of the grounds for refusal enforcement of arbitral awards. In order to discourage erroneous domestic

conditions for the enforcement of foreign awards, the list of grounds specified in Article V is exhaustive, and precludes review of the merits of the award. In light of the pro-enforcement policy behind the Convention, the Courts tend to construe those grounds narrowly and exhaustively, so as not to undermine the finality and enforceability of awards. Only if the existence of the grounds for non-enforcement would seriously injure fundamental justice and morality, will recognition and enforcement be refused.

ii. Whether the Final Award deals with issues falling outside the scope of the submission to arbitration;

It is the applicants' case that according to the Investment Agreement and the Shareholders Agreement, the parties expressly agreed that any dispute regarding whether the 1st applicant had funds available for the purpose of repaying US $ 1,188,730 being advance payment by the respondent to the 1st applicant would be resolved by an ordinary resolution of the board of directors of the 1st applicant, acting on the advice of a duly appointed auditor for that purpose, rendering their opinion with regard to the laws governing corporate insolvency in Uganda and not through arbitration, yet the Arbitral Tribunal made an award of US $ 1,188,730 which was therefore not contemplated by the parties or not falling within the terms of submission to arbitration, or is a decision on a matter beyond the scope of the submission to arbitration.

Construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal (see *Premium Nafta Products Ltd v. Fili Shipping Co Ltd [2008] 1 Lloyd's Rep 619*). The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. A privately appointed arbitrator has no inherent jurisdiction. His or her jurisdiction comes only from the parties' agreement. The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding. An arbitrator has the authority to decide not just the

disputes that the parties submit to him or her, but also those matters that are closely or intrinsically related to the disputes. Although courts generally favour arbitration, they will not compel the arbitration of claims that are outside the scope of the parties' agreement.

The *in favorem* rule of construction provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. Any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defence to arbitrability. 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 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.

The relevant provisions of the parties' "Shareholders' Agreement," signed on an unspecified date during the year 2017, provide as follows;

> 6.2 Subject to clause 6.3, the advances (including any interest thereon) shall be repaid when the Company has funds available for that purpose, having regard to its future liabilities and commitments, whether of an actual or contingent nature, in the following order of preference:
>
> 6.3 In the event of there being a dispute between the Company and any of the Shareholders relating to whether or not the Company has funds available for the purpose of repaying any advances in terms of clause 6.2, any such dispute shall be determined by an ordinary resolution of the Board of Directors of the Company acting on the advice of a duly appointed auditor for that purpose rendering their opinion with regard to the laws governing corporate insolvency in Uganda:

On the other hand, the relevant clause of the parties' "Investment Agreement," signed on 30th April, 2017 provides as follows;

16 GOVERNING LAW AND DISPUTE RESOLUTION

16.1 This Agreement shall be governed by and construed in accordance with the Laws of Uganda.

16.2 In case of any difference or dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination "a Dispute", any Party may give notice to the other Party setting out particulars of the Dispute. The Parties agree to discuss in good faith the Dispute so notified for a period of 15 days. No Party shall commence arbitral proceedings within that 15 days' period.

16.3 Any dispute which is not resolved in accordance with the above clause 11.2 shall be referred to and resolved by arbitration in accordance with the rules and procedure of the London Court of International Arbitration

16.4 The seat of the arbitration shall be Nairobi Kenya.

16.5 The language of the arbitration proceedings, any decisions or awards of the arbitrators and all documents prepared, filed or submitted for the purposes of said proceedings will be in English.

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 or other mechanism. By the expression "any difference or dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination," the parties submitted to arbitration, all disputes, controversies, differences or claims that could arise between them, out of or in connection with the Investment Agreement.

For purposes of a submission to arbitration, a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons. Different views of parties in respect

of certain facts and situations become a "divergence" when they are mutually aware of their disagreement. It crystallises as a "dispute" as soon as one of the parties decides to have it solved, whether or not by a third party. It is not sufficient for one party to a suit to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence nor is it adequate to show that the interests of the two parties to such a case are in conflict. It is a matter for objective determination. The two sides must be shown to hold clearly opposite views concerning the question of the performance or non-performance of their contractual obligations. It must be shown that the claim of one party is positively opposed by the other. Even an unanswerable claim will not mean that a dispute or difference does not exist unless there is a clear and unequivocal admission of liability and quantum.

Although un-dated, by virtue of the fact that the Shareholders' Agreement in its clause 1.1.9. references a "Shareholder, who is the investor for the project by virtue of an Investment Agreement dated the 30th of April. 2017" implies that the former was signed after the latter. The question then is whether the arbitration agreement in the Investment Agreement was incorporated into the subsequent Shareholders' Agreement. This question is fundamental as it determines whether the parties were required to proceed to resolve their dispute "relating to whether or not the Company has funds available for the purpose of repaying any advances in terms of clause 6.2" of the Shareholders' Agreement, by arbitration rather than by ordinary resolution of the Board of Directors of the Company.

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

agreement to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement (see *Sea Trade Maritime Corp v. Hellenic Mutual War Risks Association (Bermuda) Ltd ("the Athena"), [2006] EWHC 2530 (Comm*) and *Sea Trade Maritime Corp v. Hellenic Mutual War Risk Association (Bermuda) Ltd and others ("The Athena") (No 2) [2007] 1 Lloyd's Rep. 280*).

In the instant case, despite being aware of the arbitration clause contained in Clause 16 of the Investment Agreement at the time they executed Shareholders' Agreement, the parties neither expressly nor consciously incorporated it into the latter. They instead created a different mechanism for resolution of specific disputes relating to whether or not the Company has funds available for the purpose of repaying any advances. The reference to the Investment Agreement contained in clause 1.1.9 of the Shareholders' Agreement is not such as to make the arbitration clause contained in Clause 16 of the Investment Agreement, a part of the Shareholders' Agreement. Moreover Clause 16.1 of the Shareholders' Agreement states expressly that it constitutes the whole agreement between the parties relating to the subject matter thereof and, if applicable, supersedes any written or oral agreement concluded between them in relation to the subject matter contained therein. Therefore, disputes relating to whether or not the Company has funds available for the purpose of repaying any advances are outside the submission to arbitration.

That notwithstanding, matters that do not fall within the scope of the arbitration agreement will be arbitrated if they are "inextricably interwoven" with the arbitrable ones (see *Cohen v. Ark Asset Holdings, 268 A.D.2d 285, 286 (1st Dept. 2000)*; *Lake Harbor Advisors, LLC v. Settlement Servs. Arbitration and Mediation, Inc., 175 A.D.3d 479 (2d Dept. 2019)*; *Monotube Pile Corp. v. Pile Foundation Constr. Corp., 269 A.D.2d 531 (2d Dept. 2000)* and *Protostorm, Inc. v. Foley & Lardner LLP, 193 AD3d 486 (1st Dept 2021*). A non-arbitrable issue therefore can be decided in an arbitration when it is inextricably intertwined with an arbitrable issue, particularly where the determination of the arbitrable claim may dispose of the non-arbitrable claim. Thus, by arbitrating both the arbitrable issue and the non-arbitrable, the interests of judicial economy are served and the risk of inconsistent results avoided.

In the instant case, the scope of the dispute submitted for the Tribunal's determination is defined in paragraphs 13 to 15 of the Final Award in the following terms;

> 13. The dispute which has fallen for determination in this arbitration ("the Dispute") arises out of the [Applicants'] decision in 2019 to treat the Investment Agreement, as well as the related agreements comprising the Call Option, the Shareholders' Agreement, the USD 100,000 Dr Alobo Loan, the USD 150,000 Loan, the USD 5m Loans, the Personal Guarantees, the 100% Share Charge), the 20% Share Charge, 80% Share Charge and the Bryan Xsabo Share Charge ("the Ancillary Agreements") as void *ab initio*. As a consequence of this decision, the [Applicants] considered themselves to be released from all obligations under the Investment Agreement and the Ancillary Agreements (collectively "the Agreements").
>
> 14. The [Applicants'] stated reason for this decision was Dr Alobo's discovery that the [Respondent], in conjunction with its ultimate beneficial owner, Mr Kariuki, and others, had conspired to defraud the [Applicants] by dishonestly inflating the true cost of the Project and secretly siphoning USD 6,125,000 back to themselves. The [Applicants'] cross-claims sought confirmation that the Agreements had been validly rescinded and relief designed to achieve restitutio in integrum.
>
> 15. The [Respondent] denied any such conspiracy and maintained that the Agreements remain in full force and effect. Its claims arise from the [Applicants'] failure to comply with their various obligations to the [Respondent] under the Agreements 17 as a result of which the [Respondent] has not received the equity investment in Xsabo to which it would have been entitled, and/or has not been repaid under the various loans in accordance with their terms.
>
> 99. Accordingly, the Tribunal finds that the amount of USD 1,188,730 loaned to the First [Applicant] by the [Respondent] was repayable under the Investment Agreement and Shareholders Agreement, together with interest at USD 3M LIBOR + 8%, as soon as the First [Applicant] had sufficient available funds to do so and such payment would have been made in priority to any profit distributions to the [Respondent].

> 100. There is currently estimated to be at least USD 1.8 million in the First [Applicant's] bank account and which are presently subject to a freezing order of the Ugandan Courts granted in aid of this arbitration. In these circumstances, the Tribunal finds that there are sufficient funds of the First [Applicant] available to repay the loan advanced by the [Respondent] of USD 1,188,730, together with interest at USD 3M LIBOR + 8%.

In the first place, the primary instruments for demarcating matters in dispute in an arbitration are the parties' own written submissions to the Tribunal. When determining whether an issue was "live" and within the scope of parties' submission, the Court will consider: (i) the parties' pleadings; (ii) any agreed list of issues; (iii) opening statements; (iv) evidence adduced; and (v) closing submissions. It is trite that an issue which surfaces in the course of arbitration and which is known to all the parties, is within the scope of submission to arbitration, even if it is not part of any memorandum of issues or pleading, provided it concerns an ancillary matter (see *CIZ v. CJA [2021] SGHC 178* and *TMM Division Maritama SA de CV v. Pacific Richfield Marine Pte Ltd [2013] 4 SLR 972 at para [52*]. Accordingly, there must be some reference in the pleadings to the claim, defence, or issue that the tribunal eventually decided upon. It is evident from the above extracts in paragraphs 13 to 15 of the Final Award, that both parties adverted to the Shareholders' Agreement during the arbitral proceedings as a necessary reference in resolving the dispute that had arisen under the Investment Agreement.

In resolving that dispute, the Tribunal stated at paragraph 78 of the Final Award that "it is clear from the words "Subject to the provisions of the Shareholders Agreement" that compliance with the terms of the Shareholders Agreement with respect to distributions and funding must be considered in determining whether there has been a breach of Clause 8.1 of the Investment Agreement. The Shareholders Agreement also details how and when advances from the Claimant are to be repaid, and is therefore relevant in establishing what if any payments are due pursuant to the Account." The Tribunal in essence found the non-arbitrable issue to be inextricably intertwined with the arbitrable issues.

The Tribunal then went ahead and cited the relevant clauses 5 and 7 of the Shareholders Agreement, whereupon it observed at paragraph 80 of the Final Award that It followed from those provisions, if the applicants caused funds belonging to the 1st applicant, that would otherwise contribute towards profits that would become distributable to the Shareholders under Clause 8.1 of the Investment Agreement and Clause 7 of the Shareholders Agreement, to be wrongfully distributed or dissipated other than in the ordinary course of the 1st applicant's business, that would amount to a breach of Clause 8. Whether any such breach would have caused loss to the respondent as at the time of that Final Award, would depend on whether any distribution to the respondent would already have been made in the relevant period had it not been for the breach.

Following a detailed analysis, the Tribunal concluded at paragraph 217 of the Final Award that "even if the applicants had fully complied with the Agreements, taking account of the depreciation expense, the 1st applicant would have made a loss (rather than a profit) and accordingly there would have been no profits available for distribution in respect of the Account Period. In such circumstances, there are no damages payable to the respondent on the basis it has claimed, namely that it would have received dividends on profits accrued during the Account Period."

It emerges from the foregoing that although disputes relating to whether or not the Company has funds available for the purpose of repaying any advances are outside the submission to arbitration, that dispute was inextricably interwoven with the arbitrable ones. When it is impractical, if not impossible, to separate out non-arbitrable claims from the arbitrable claims, a Tribunal is justified to consider the non-arbitrable claims alongside the arbitrable ones, in order to preserve its exclusive jurisdiction arising out of the submission to arbitration. Therefore, that the Final Award deals with issues falling outside the scope of the submission to arbitration, is not a ground for refusing recognition and enforcement of the Final Award in the circumstance of this case.

iii. Whether the Final Arbitral Award is in conflict with the law and public policy of Uganda;

The concept of public policy cannot become a trap door to allow the control of the substantive decision adopted by the arbitrators. The generally accepted view is that the public policy exception must be interpreted narrowly (see Maurer, A.G., *The Public Policy Exception under the New York Convention*, 2013, pp. 64-66; Born, G., *International Arbitration: Law and Practice*, 2nd ed., 2015, p. 409; *Richardson v. Mellish, 130 Eng. Rep. 294, 303 (Ex. 1824)*; *Janson v. Driefontein Consolidated Mines [1902] A.C. 484, at 491*; *Fender v. St. John-Mildmay [1938] A.C. 1* and *Libyan American Oil Company (LIAMCO) v. Socialist People's Libyan Arab Republic Jamahirya, (formerly Libyan Arab Republic), (1981) 20 ILM 1*). Public policy is therefore understood to be the set of public, private, political, moral and economic legal principles which are absolutely mandatory for the preservation of society in a given nation and at a given time, and from a procedural point of view, public policy is configured as the set of necessary formalities and principles of our procedural legal system, so that an arbitration that contradicts any or some of such principles may be declared as null for the violation of public policy.

Accordingly, not all contravention of public policy falls within the scope of "the public policy exception" and mere violation of domestic public policy may not suffice to justify non-enforcement. Different degrees of required inconsistency with public policy have been applied worldwide. Examples include that the violation must be "clear," "concrete," "evident" or "patent," "blatant," "manifest," "obvious and manifest," "flagrant," "particularly offensive," "severe," "intolerable," "unbearable," "repugnant to the legal order," etc. Public policy thus relates to the most basic notions of morality and justice. A set of economic, legal, moral, political, and social values considered fundamental by a national jurisdiction.

It manifests the common sense and common conscience of the citizens as a whole; "the felt necessities of the time, the prevalent moral and political theories, intuitions…." (See Oliver Wendell Holmes, Jr., *The Common Law* (1881) at p. 1). Public policy is "that principle of law

which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed . . . the policy of law or public policy in relation to the administration of the law" (see *Egerton v. Earl of Brownlow [1853] Eng R 885, (1853) 10 ER 359*). Certain acts or contracts are said to be against public policy if they tend to promote breach of the law, of the policy behind a law or tend to harm the state or its citizens (see *Cooke v. Turner (1845) 60 Eng. Rep. 449 at 502*). The definition of public policy represents a certain topic that affects public benefit and public interest.

Although public policy is a most broad concept incapable of precise definition, an award could be set aside under the Act as being inconsistent with the public policy if it is shown that either it was: (a) inconsistent with the Constitution or other laws of Uganda, whether written or unwritten; or (b) is inimical to the national interest of Uganda or; (c) is contrary to justice and morality. The first category is clear enough. In the second category would be included, without claiming to be exhaustive, the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Uganda. In the third category would be included, again without seeking to be exhaustive, such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals (see *Christ for All Nationals v. Apollo Insurance Co. Ltd [2002] 2 EA 366*).

Public policy includes cases where arbitration is used as a means to cover up corruption, money laundering, exchange control fraud or other criminal activity. In some cases, though, the public interest in the finality of arbitration awards will outweigh an objection to enforcement on the grounds that the transaction was "tainted" by fraud (see for example *Sinocore International Co Ltd v. RBRG Trading (UK) Ltd [2018] 2 Lloyd's Rep 133*). There is no public policy to refuse the enforcement of an award based on a contract during the course of the performance of which there has been a failed attempt at fraud. In that case it was found that even if public policy were engaged, any public policy considerations were clearly outweighed by the interests of finality.

Among the principles that can be considered as belonging to public policy within the meaning of section 34 (2) (b) (ii) of the Act, are; the prohibition against abuse of contractual or legal rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition against discrimination, the principle of proportionality and the protection of minors and other persons incapable of legal acts. An award will be set aside when it is incompatible with public policy not just because of its reasons, but also because of the result to which it gives rise. The generally accepted view though is that the public policy exception must be interpreted narrowly, or else it can be used opportunistically by award debtors as a gateway to review the merits of the award. It is limited to those imperative or mandatory rules, from which the parties cannot derogate. If the court is satisfied that enforcing the award is contrary to public policy, it will set the award aside.

Consequently, an award will be considered to be in conflict with public policy if, inter alia; (i) the making of the award was induced or affected by fraud or corruption; or (ii) it is in contravention of the fundamental policy of the Constitution or other laws of Uganda; or (iii) it is in conflict with the most basic notions of morality or justice, including acts which would be generally detrimental or harmful to the citizens of the county (the general public), e.g. promotion of unlawful conduct and breach of law. In other words, "public policy" covers only fundamental principles that are widely recognised and should underlie any system of law according to the prevailing conceptions in Uganda. The invoked principle of public policy does not need to be universally recognised, as the Courts in Uganda are willing to maintain, and defend, if necessary, the fundamental values strongly embedded in the Ugandan legal tradition, even if such values are not necessarily shared in other (equally important) parts of the world. Therefore, an award warrants interference by the Court under section 34 (2) of The Arbitration and Conciliation Act only when it contravenes a substantive provision of law or is patently illegal or shocks the conscience of the Court.

Tribunals must ensure that in the process they do not ignore the public policy element while passing any award. It has been argued in some jurisdictions that Courts when considering the public policy exception under Article V (2) (b) of *The New York Convention, 1958* should be

concerned only with “international public policy” as opposed to “domestic public policy,” (see for example *Parsons and Whittemore Overseas Co., Inc. v. Société générale de l’industrie du papier (RAKTA). 508 F. 2d 969 (2d Cir. 1974*). However, the article does not explicitly specify any specific type of public policy, referring only to public policy of the country where recognition and enforcement of an arbitral award is sought. International public policy reflects only those notions of morality and justice which exist in all legal systems, which are relevant in the international context in the requirements of international trade; principles common to all civilised nations.

It follows that a mandatory rule of domestic law does not necessarily prevail in international matters. International public policy is an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora. It is triggered by a type of behaviour that is contrary to principles whose ethical and legal bases are supported by a general consensus of the international community. International public policy derives from the convergence of national laws, international conventions, arbitral case law and scholarly commentary on fundamental economic, legal, moral, political, and social values. Examples of notions of morality and justice that exist in all legal systems, which are relevant in the context of international trade are; - contractual practices aimed at facilitating drug trafficking, the traffic of arms between private persons, contracts aimed at favouring kidnapping, murder, or generally the subversions or evasion of the imperative laws of a sovereign State, or violations of human rights; contracts violating embargos of economic sanctions recommended by international organisations.

Although matters of public policy in relation to international arbitral awards are to be determined based on the vital interests not only of the national community to which the judge belongs but also of a broader, regional or universal, international community (see *Regazzoni v. Sethia [1958] AC 301; [1957] 3 All ER 286*), but also since no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good, it is also the function of the court to make certain that the enforcement of the arbitral award will not constitute a violation of municipal law. Public resources should not be employed for the execution of awards that are injurious to public morality or interest.

The awards passed by arbitral tribunals which are contrary or opposed to both domestic and international public policy therefore, can be challenged before the Courts of law and thereby denied recognition and enforcement. The realm of public policy includes an award which is patently illegal and contravenes the provisions of Ugandan law. Not all public policy falls within this exception; this ground may only be invoked in serious cases only. Judicial interference on ground of public policy violation can be used to refuse the recognition of and enforcement an arbitral award, or any part of it, only when it shocks the conscience of the Court to an extent that it renders the award unenforceable in its entirety, or in part. Public policy is construed narrowly and applied only where enforcement would violate the most basic notions of morality and justice. The grounds advanced by the applicants address both procedural and substantive public policy issues, which the Court will now proceed to consider.

a. Failure to treat the parties with equality, and/or discrimination,
b. Failure of due process;

These two limbs of the applicant's argument will be considered concurrently because they address procedural public policy issues. *The New York Convention* does not have explicit provisions on equal treatment but it is widely understood to be inferred under Article V (1) (b) which permits Sates to refuse recognition and enforcement of awards where the "party against whom the award is invoked was not given proper notice of appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. Similarly, procedural grounds relating to public policy may be raised as a ground for inconsistency with public policy under Article V (2) (b) of *The New York Convention*. Otherwise, section 18 of *The Arbitration and Conciliation Act* imposes a duty upon arbitrators in domestic arbitrations to treat the parties with equality, giving each party reasonable opportunity for presenting his or her case.

The concept of equality in both international and domestic arbitration means providing the parties the opportunity to present their claim, defence, and evidence so that neither side is in a weak position against the other. The concept of equality clearly encompasses the notions of non-

discrimination and non-arbitrariness. At its core, is the legitimate expectation of a party appearing before a Tribunal, that it has the right to be protected from arbitrary, discriminatory or unfair treatment. It imposes a duty upon the Tribunal to be neutral, independent, impartial and fair towards the parties to the dispute. While complaints concerning equal treatment will result in setting aside proceedings at the seat of arbitration, any award that is in breach of this principle would be refused recognition and enforcement on grounds of public policy.

Courts must ensure, before ordering that any arbitration award is to be enforced by them and the state, that the award was obtained in a manner that was, at the very least, procedurally fair. Determining whether or not proceedings are fair, according to established case law, must be assessed by reference to the proceedings as a whole. It was counsel for the applicants' submission that the guarantee of treating parties with equality not only applies to the proceedings as such, but also extends to the appraisal of evidence and assessments of the heads of claim and cross-claims. It is in that regard that counsel presented the argument that failure by the Tribunal to determine the rate, period and quantification of the interest payable to the applicants, contrary to its undertaking in both the First and Second Partial Awards, yet going ahead to award interest to the respondent, is discriminatory, constitutes a failure to treat parties with equality, and is a violation of public policy.

An inherent characteristic of the arbitral process is the tribunal's adjudicative role and responsibility for establishing and implementing the procedures necessary to resolve the parties' dispute. Arbitral tribunals have broad discretion over the conduct of proceedings, because they are not generally bound by formal rules of procedure and evidence. A party seeking to vacate an arbitration award based upon some purported error in the arbitrator's admission or appraisal of evidence must, therefore, demonstrate a fundamental flaw in that process, in effect denying a fair hearing as opposed to the outcome. The standard of review of arbitration procedures, the appraisal of evidence and assessment of awards is merely whether a party to an arbitration has been denied fundamentally, a fair hearing. It is enough if each issue was effectively addressed, whether interlocutory/preliminary, substantive, or evidential. The standard is met if for each issue the facts

and law are identified; the application of the law to the facts is explained, and a conclusion on the resulting liability and quantum is clearly articulated.

Arbitration is chosen by international businesspersons in order to provide commercially sensible and practical resolutions to cross-border commercial disputes. This permits and indeed requires dispensing with many of the procedural protections that are designed for domestic litigation involving individual litigants, and instead adopting procedures that will achieve commercially practicable results. It is a choice of the parties that trades the procedures and opportunity of appeal available in litigation, for simplicity, informality, and expedition. Parties agree to arbitrate their international disputes with the objective of obtaining fair and neutral procedures which are flexible, efficient, and capable of being tailored to the needs of their particular dispute, without reference to the formalities and technicalities of procedural rules applicable in national courts. This objective is facilitated by the minimal scope that is permitted for judicial review of arbitral awards and other decisions by the arbitrators, a legal regime under which the parties exchange the safeguards of appellate review for the benefits of speed, economy, and finality.

The restrictive scope of review under the public policy exception is meant to discourage courts from refusing enforcement of international awards on the basis of a Tribunal's error of law or of fact, whereby decisions perceived to be inappropriate on the merits will not be recognised or enforced. Broadly speaking, the non-enforcement of awards is justifiable only if there are serious procedural defects but not further into the substance of the dispute. A key aspect of the current arbitral system is that arbitrators' decisions are subject to extremely limited judicial review. Mathematical computations as well as the propriety of arbitral awards are of the nature of factual questions. Such questions exist when doubts or differences arise as to the truth or falsity of alleged facts; when there is need for the calibration of the evidence, considering mainly the credibility of witnesses and the existence and the relevancy of specific surrounding circumstances, their relation to each other and to the whole, and the probabilities of the situation. The courts cannot substitute their opinion for that of the Tribunal on such matters. It must be remembered that even if a court

disagrees with the way in which the Tribunal has weighed the evidence and reached its conclusions, it cannot substitute its opinion for that of the tribunal.

In the instant case, that the Tribunal at the first partial award stage of 11th March, 2022 undertook to "determine the rate, period and quantification of interest payable and [to] address matters relating to set-off in the second phase of this arbitration," and at the second one of 10th January, 2023 decided that "all matters left outstanding in [this aspect] of the First Partial Award [was further] reserved for a further award in the arbitration," and yet when it came to the Final Award the Tribunal simply stated that "liability for the secret commission together with all interest thereon has been fully satisfied in the calculation of the amount due from the 1st, 2nd and 3rd applicants to the respondent," by itself does not support the argument of a failure to compute and award the same to the applicant, nor a selective and discriminatory award of interest to the respondent.

Whereas arbitral awards may be denied recognition if basic requirements of procedural fairness have not been satisfied, arbitral Tribunals will not be held to the standards of evaluation of evidence applicable to courts. Once a Tribunal has applied the established principles of law in the assessment or evaluation of evidence adduced before it, the court will have no viable justification to interfere with the decision notwithstanding the style adopted in the procedure of the evaluation. Whereas assessment of evidence is an evaluation of its logical consistency, and this should be reflected in the judgment, variations in the style of evaluation of evidence by one Tribunal from another, are inevitable.

In addressing the issue of liability for the secret commission together with all interest thereon, the Tribunal was dealing with an item of pecuniary damages, which are economic losses that can be easily quantifiable. The amount due from the 1st, 2nd and 3rd applicants to the respondent is similarly placed in the category of pecuniary damages, against which the amount due as secret commission together with all interest thereon, had to be offset. A set-off counterbalances the Claimant's claim by asserting a claim for a related or ascertained sum. Through adjustment, a set-off either eliminates or reduces the Claimant's claim for monetary recovery. As far as common

law is concerned a set-off has to be of an ascertainable amount (see *Saahib Enterprises Ltd. v. Olam Uganda Ltd. H. C. Civil Suit No. 180 of 2009*). A set-off may be performed only when the other party's obligation is ascertained both as to its existence and as to its amount. It follows therefore that ordinarily, the amount to be set-off has to be ascertained or quantified first, then by mutual deduction, both obligations are discharged up to the amount of the lesser obligation. The obligations of both parties are discharged to the extent of the set-off, as if two reciprocal payments had been made.

Where two parties have financial claims against each other, rights of set-off allow one party to deduct or "off-set" their debts or liabilities against monies owed by the other party and only pay the remaining balance. In the instant case, the Tribunal found as a fact that the 1st applicant paid US $ 27,914,492 under the EPC contract dated 27th November, 2017, of which US $ 3,864,492 was a secret commission for the respondent. The Tribunal having ascertained the existence of the applicant's obligation, but without expressly on record determining the rate, period and quantification of interest payable thereon, or thereby quantifying the amount to be set-off, stated that the sum due from the respondent to the 1st, 2nd and 3rd applicants which it had undertaken to off-set, had "been fully satisfied in the calculation of the amount due" from the 1st, 2nd and 3rd applicants to the respondent.

Set-off in generic sense recognises the right of a debtor to adjust the smaller claim owed to him against the larger claim payable to his creditor. It certainly is not possible to exercise set-off if the obligation is not ascertained as to its amount. It is evident from the expression "been fully satisfied in the calculation of the amount due" contained in the Final Award, that the Tribunal engaged in a mathematical calculation involving a set-off, before determination of the amount due from the 1st, 2nd and 3rd applicants to the respondent, except that the said calculation adverted to by the Tribunal, is not reflected on record in the expected detail. The relevant parts of the award in this respect are the following;

87. This leaves a balance of USD 5,053,222.

88. From this amount, USD 3,864,492 must be set-off for the secret commission owed by the Claimant to the First Respondent as per paragraph 293.6 of the First Partial Award.

89. This leaves a figure of USD 1,188,730, which is in excess of the amount that the Claimant was required to invest by way of equity to acquire shares in the First Respondent and to loan to the Second and Third Respondents under the Investment Agreement. Accordingly, the USD 1,188,730 represents an amount advanced by the Claimant to the First Respondent in addition to the amount the Claimant was required to pay to subscribe for equity in the First Respondent under the Investment Agreement.

99. Accordingly, the Tribunal finds that the amount of USD 1,188,730 loaned to the First Respondent by the Claimant was repayable under the Investment Agreement and Shareholders Agreement, together with interest at USD 3M LIBOR + 8%, as soon as the First Respondent had sufficient available funds to do so and such payment would have been made in priority to any profit distributions to the Claimant.

101. The failure by the First Respondent to repay the USD 1,188,730 together with accrued interest constitutes a breach of the obligations of the First Respondent under the Shareholders Agreement. The failure of the Second and Third Respondents (as parties to the Shareholders Agreement) to procure the First Respondent to repay the USD 1,188,730 together with accrued interest also constitutes a breach of the obligations of the Second and Third Respondents under the Shareholders Agreement.

102. The Tribunal therefore finds that the First, Second and Third Respondents should pay damages to the Claimant in the sum of USD 1,188,730 plus simple interest at USD 3M LIBOR + 8%.

103. Interest shall run from 3 January 2019, being the date on which the Claimant advanced the funds to the First Respondent", until payment.

188. The task of the Tribunal in assessing damages is to put the Claimant in the position it would have been if the contract (i.e. the Investment Agreement and Shareholders Agreement) had been fully performed. Thus, to compensate the Claimant in damages, the Tribunal must determine what dividends, if any, would have been paid to the Claimant as at the date of this Final Award (taking into account the

Tribunal's findings in respect of the Account Period) if the Agreements had been fully performed in accordance with their terms.

220. The calculation of this amount to be repaid to the Claimant takes into account the amount due from the Claimant in respect of the secret commission (see paragraph 293.6 of the First Partial Award). Accordingly, no further relief is due to the Respondents of that secret commission.

281.3. The Claimant's liability for secret commission of USD 3,089,235 and USD 775,257 together with all interest thereon, for which the Claimant was held liable to the First Respondent at paragraph 293.6 of the First Partial Award, has been fully satisfied in the calculation of the amount due from the First, Second and Third Respondents to the Claimant as ordered at paragraph 280.1 above.

The implication is that the Tribunal found the sum of US $ 3,089,235 and US $ 775,257 to have constituted a secret commission which at paragraph 88 of the Final Award, it deducted from US $ 3,864,492 by way of off-set. It is the applicants' case that the Arbitral Tribunal set-off the secret commission from the damages awarded to the respondent but did not set-off the interest on the said secret commission as had been promised in the First Partial Award. It would appear from the relevant part of the Final Aeard cited above though that what the Tribunal omitted to do was to demonstrably apply a specific rate of interest, over a specified period and added onto that secret commission, before making the off-set. It simply stated that "the Claimant's liability for secret commission…...together with all interest thereon…… has been fully satisfied in the calculation." Although it would have been desirable to have the actual figures of that accrued interest reflected on record, its assertion that it had done so, however cannot be disproved by mere counter-assertion.

Mathematical calculations, more specifically actuarial calculations, are an exact science in their own right. Although an obvious accounting mistake by an arbitrator, which leads to substantial injustice, may form the basis of a finding breach of the duty of fairness (see for example *Ducat Maritime Ltd v. Lavender Shipmanagement Inc [2022] EWHC 766 (Comm*), and probably by extension, a finding of failure to treat the parties with equality, the mistake must be glaringly obvious. Only gross and obvious accounting, computational or arithmetical mistakes, may justify

such a finding. In the instant case, the Tribunal's claim to having fully satisfied the accrued interest component on the secret commission in the offset, and as part of its calculation of the amount due from the from the 1st, 2nd and 3rd applicants to the respondent, has not been disproved. It has not been demonstrated that if the Tribunal had had an opportunity to address the alleged computational mistake, it might well have produced a significantly different award and outcome.

It frequently occurs in practice that arbitral awards contain certain minor, or sometimes, more significant, mistakes, ambiguities or omissions. Typical examples include incorrect mathematical calculations of amounts owed, failures by the arbitrator to address certain arguments, claims or evidence, or simply inverting the description of the parties (designating claimant as respondent and *vice versa*). While these errors usually concern minor and incidental issues, certain types of errors might also arise which can have an impact on the outcome. It is errors which impact on the outcome, the correction of which would have produced a significantly different award and outcome, that may occasion the Court's intervention.

The focus of an alleged breach of the duty to treat the parties with equality, requires an enquiry into whether there has been a failure of due process, not whether the tribunal has reached the correct answer free of mistakes, ambiguities or omissions. In particular, accounting mistakes, arithmetical mistakes, illogicality or irrationality of the Tribunal's reasoning do not, in and of themselves, render an arbitral award open to challenge. The Courts may refrain from intervening even if the Tribunal has not come to the right or correct answer, save where the error shows manifestly that the Tribunal failed to conduct the proceedings fairly. Purely arithmetic and calculation component mistakes in arbitral awards are addressed by way of applications for correction. Pursuant to Article 27.1 of the LCIA Rules, 2020 within 28 days of receipt of any award, the parties may request the Tribunal to correct certain types of errors, namely "any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature." The applicants invoked that procedure and indeed corrections were made to the Final Award. It is curious that they never at that stage raised this ground which is now fortuitously and, in a manner, smacking of afterthought, being raised to prevent recognition and enforcement.

Moreover, the expression made by the Tribunal to the effect that "the Claimant's liability for secret commission…...together with all interest thereon…… has been fully satisfied in the calculation" is a reflection of the Tribunal's thought process with regard to the applicant's claim viz-a-viz that of the respondent, by off-setting the applicant's claim, inclusive of the actual sum of the secret commission together with the accrued interest thereon, against that of the respondent. The principle guiding the tribunal's thought process at that point cannot be impugned on the basis of a failure to treat the parties with equality in its thought process. The implication is that any shortcomings in the actual application of the correct principle guiding the Tribunal's thought process, if it resulted in accounting or arithmetical mistakes, may then only be impugned as a slip or an oversight that is amenable to the process of correction.

An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact at law. Where however the reasoning or conclusion in an award goes beyond mere faults or incorrectness and constitutes a palpable inequality that is so far reaching and outrageous in defiance of logic or accepted moral standards that a fair-minded person would consider that the conception of justice would be intolerably hurt by the award, then it will be contrary to or against public policy. The nature of the accounting or arithmetical mistakes raised by the applicants in the instant case, are not a manifestation of palpable inequality justifying denial of recognition and enforcement.

By raising the ground of failure to treat the parties with equality, but only within the context of the Tribunal's appraisal of evidence and assessments of the heads of claim and cross-claims, specifically in the form of a supposed incorrect mathematical calculations of amounts owed as subject to set-off, the applicants seek to attack the Tribunal's findings of fact and evaluation of the evidence on the basis of procedural unfairness, yet there is neither a gross nor obvious fault in the Tribunal's thought process in dealing with the cross-claims. Moreover, it is not manifestly or blatantly evident that the Tribunal made an error in computation, and even if such error occurred, it is not one that shows manifestly that the Tribunal failed to conduct the proceedings fairly, or to uphold its duty to treat the parties with equality. Therefore, none of the two faults has been

established as constituting a ground for refusing recognition and enforcement of the Final Award in the circumstance of this case.

c. Expropriation of time value of money without compensation;
d. Unjust enrichment of the respondent who is guilty of dishonesty;
e. Abuse of contractual and legal rights.

These three limbs of the applicant's argument will be considered concurrently because they address substantive rather than procedural public policy issues. Substantive public policy pertains to the contents of the award. It relates to the subject matter of the award and whether it violates the fundamental laws and principles of the state where it is challenged or is sought to be recognised and enforced. Since arbitration is based on a contractual agreement and party autonomy principle, neither expandable judicial review authority nor supplemental review should be permitted because the basic principle of arbitration is party autonomy. Accordingly, no review of the merits of the awards is permissible under the exclusive nature of Article V of *The Convention* (see *Gol Linhas Aereas SA v. Matlin Patterson Global Opportunities Partners (Cayman) and others (Cayman Islands) [2022] UKPC 21*). The narrow construction of the objections to enforcement is in keeping with the Convention's object and purpose of facilitating the enforcement of foreign arbitral awards.

Breach of substantive public policy, to the extent that it often calls for review the merits of the case, is rarely a ground for refusal to recognise and enforce a foreign arbitral award. Assessing public policy in light of reference to fundamental principles, in fact, leads to the review on the merits of the dispute. Examples of cases in which substantive public policy challenges were exceptionally upheld involved the following: grant of unlawful relief, punitive damages or excessive interest by the arbitral tribunal; involve criminal offences such as bribery and corruption; breaches of statutory provisions; violations or affect constitutional rights and freedoms of citizens, of rules on consumer protection, foreign exchange regulation or bans on exports; violations of core constitutional values such as the separation of powers and sovereignty of Parliament; or when the award was regarded as contrary to the national interest of the forum State.

On the facts of this case, reference to uncompensated expropriation is misplaced. Expropriation is the act of a government claiming privately owned property against the wishes of the owners, ostensibly to be used for the benefit of the overall public. States have a sovereign right under international law to take property held by nationals or aliens through nationalization or expropriation for economic, political, social or other reasons. In order to be lawful, the exercise of this sovereign right requires, under international law, that the following conditions be met: (a) property has to be taken for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law; (d) accompanied by compensation. In such cases, in order to account for the time value of money, the foregone cash flow must be brought forward to the date of the Award by appropriate interest. The matter addressed in the Final Award do not involve government claiming property privately owned by the applicants against their wishes.

Similarly, what the applicants refer to as unjust enrichment of the respondent who is guilty of dishonesty, was addressed appropriately by the tribunal when it made an order of disgorgement. An order of disgorgement is in itself a remedy requiring a party who profits from illegal or wrongful acts to give up any profits they made as a result of that illegal or wrongful conduct. The purpose of this remedy is to prevent unjust enrichment and make illegal conduct unprofitable. Funds that were received through illegal or unethical business transactions are disgorged, or paid back, often with interest and/or penalties to those affected by the action. At paragraph 237 the Final Award the Tribunal observed that "as set out in paragraphs 192, 206 and 207 above, it is common ground between the Parties that the appropriate relief in cases of secret commissions paid in breach of fiduciary duty is an order for the commission to be repaid/disgorged in restitution or compensation for losses suffered in tort."

Courts are prepared to refuse the recognition and enforcement of an arbitral award if the requisite high thresholds are established; involving the basic principles or values upon which the foundation of society rests. This is because it is well established that the enforcement court does not reevaluate the factual circumstances established by the arbitral tribunal. The errors made by the arbitrator on

facts and law have to be so egregious and cause an outcome which is so unfair and unjust, that the court cannot ignore the errors as enforcement of the award made would be repugnant.

To the extent that this category of objections raised by the applicants is premised on the argument that the Arbitral Tribunal breached its duty to determine a rate of interest on the secret commission to be refunded by the respondent, the frailty of that foundation has already been addressed while dealing have been procedural public policy issues. Although important, the notions forming the basis of this category of objections do not form a part of the set of public, private, political, moral and economic legal principles which are absolutely mandatory for the preservation of Uganda's society. They do not qualify as violations of the foundations of the legal order, system and morality of Uganda, and therefore are not public policy violations. They are not within the category of the most basic and explicit principles of justice and fairness. Enforcement of the arbitral award will not result in violation of any requirements of fundamental legislation. In the circumstance of this case, the grounds therefore do not rise to the level of established exceptional circumstances and accordingly, do not qualify as a basis upon which prayers for refusing recognition and enforcement of the Final Award can be sustained.

f. Whether the award of interest to the respondent at the rate of US $ 3-month LIBOR plus 8%, which was phased out and is non-existent offends public policy and renders the award unenforceable.

This limb of the applicant's argument too raises a substantive public policy issue, as opposed to a procedural one. It is common ground between the parties that the U.K Financial Conduct Authority announced on 5th March, 2021 that immediately after 30th June 2023, the l-month, 3-month and 6-month US dollar LIBOR settings will no longer be representative and its representativeness will not be restored. While the applicants contend that the effect of that announcement renders the Final Award handed down on 11th September, 2023 uncertain and ambiguous for pegging the award of interest onto an obsolete mechanism for its calculation, it is the respondent's case that a "synthetic"

3-month US dollar LIBOR rate replaced it and is still published, specifically for scenarios of this nature in which parties have legacy contracts that refer to a 3-month US dollar LIBOR rate.

It is not uncommon for awards to suffer from lack of clarity or be riddled with mistakes that render them problematic in terms of enforcement. The general rule is that inconsistency or ambiguity in the operative parts of an award might require remission to the arbitrator or umpire to enable him to resolve such inconsistency, since it would not be right to enforce an award in an ambiguous or inconsistent form (see *Moran v. Lloyd's [1983] QB 542; [1983] 2 All ER 200* and *Xstrata Coal Queensland P Ltd (Company Number 098156702) (aka Rolleston Coal Holding PTY Ltd) and another v. Benxi Iron & Steel (Group) International Economic & Trading Co Ltd [2020] EWHC 324 (Comm*). If the terms of the award are such as to render enforcement by the court's processes inappropriate without some form of elaboration or refinement, then, save in cases of true slips or changes of name, enforcement will be refused (see *Franek Jan Sodzawiczny v. Simon John Mcnally [2021] EWHC 3384 (Comm)* and *Alegrow SA v. Yayla Argo Gida San ve Nak A.S [2020] EWHC 1845 (Comm*). However, the court should not be astute to find difficulties of construction of awards where none really exist. Therefore, in cases of uncertainty the Court will so far as possible, construe the award in such a way as to make it valid rather than invalid (see *MRI Trading AG v. Erdenet Mining Corporation LLC [2013] 1 Lloyd's Rep 638*), but in doing so the Court should be careful not to give an award a meaning which plainly was not intended by the Tribunal.

An award is uncertain or ambiguous as to its effect where it is open to being misunderstood by an enforcing court, rendering it impossible or difficult to enforce; when it is subject to multiple interpretations likely to cause substantial injustice in enforcement. If of the competing interpretations, only one can reasonably be applied so as to give effect to the true intention of the Tribunal, then the Court will so far as possible, construe the award in such a way as to make it valid rather than invalid, by adopting that as the only interpretation that can be reasonably applied. The question here is whether when it handed down its Final Award on 11th September, 2023 pegging its awards therein of interest to the respondent, onto the USD 3-month LIBOR plus 8% yet its hitherto character of being representative of an interbank lending market, had been

previously phased out on 30th June, 2023 and replaced by an unrepresentative "synthetic" character, the Tribunal introduced an ambiguity into the Final Award which renders it impossible or difficult to enforce, and hence its recognition and enforcement will be against public policy.

The London Interbank Offered Rate (LIBOR) was a long-established global benchmark standard interest rate, representative of the rate at which major global banks lent to one another in the international interbank market for short-term loans. It is not in dispute that the US dollar LIBOR bank panel ended on the 30th June 2023. Before its abolition, the daily rate was determined by a method known as the trimmed average, which involved taking out the highest and lowest figures of what the major global banks would charge other banks for short-term loans, then calculating the average from the remaining numbers. It is further not in dispute that it has since been replaced, until 30th September, 2024 by a synthetic US dollar LIBOR rate. It so happens that synthetic LIBOR is not representative of an interbank lending market. It is calculated by using the relevant CME Term SOFR Reference Rate plus the respective ISDA fixed spread adjustment.

When on 3rd April, 2023, the UK's Financial Conduct Authority announced its decision to publish synthetic US dollar (USD) LIBOR as a temporary solution for tough legacy contracts referencing USD LIBOR outside the United States, it also stated that the synthetic USD LIBOR can only be used by legacy contracts with no other means to fall back; those that genuinely have no or inappropriate alternatives and no realistic ability to be renegotiated or amended. The relevant legislation implementing that policy provides that any references to LIBOR, in a contract or arrangement, should be "deemed" to be the synthetic form since inception of the contract, regardless of how references to LIBOR are expressed. The FCA has reiterated that, while in its view synthetic LIBOR settings are a fair and reasonable approximation of what "representative LIBOR" might have been, had it continued to exist, they are not representative of the markets that the original LIBOR settings were intended to measure. As a result, any contracts with non-representativeness fallbacks will be triggered when 1-, 3- and 6-month USD LIBOR panels ceased at the end of June 2023, notwithstanding the continued publication of these settings on a synthetic basis.

Therefore, what happened in fact is that after 30th June, 2023 the hitherto "representative" USD LIBOR regime was replaced by a "synthetic" USD LIBOR regime that is to remain in operation until 30th September, 2024. In essence what happened is not the abolition of the USD LIBOR regime, but rather its representative character was terminated and replaced by a synthetic character. Whereas before 30th June, 2023 the rates were based on the international interbank market for short-term loans, thereafter until 30th September, 2024 the rates continue to be published, but this time round based on a synthetic form deemed to be a fair and reasonable approximation of what "representative LIBOR" might have been, had it continued to exist. Ceasing to be representative of the international interbank lending market therefore cannot be interpreted as having rendered the USD LIBOR regime obsolete or non-existent; it continues until 30th September, 2024, albeit using an alternative methodology of determination. The FCA has compelled the ICE Benchmark Administration (IBA) to continue publication of synthetic USD LIBOR until 30th September, 2024.

The Tribunal's adoption of the US dollar LIBOR in its award of interest in the instant case, can be traced back to the fact, as reflected in paragraph 97 of the Final Award, that the respondent entered into an agreement with the 1st applicant during the month of July, 2018 for the respondent to provide a USD 10 million loan facility to the 1st applicant, which agreement provided for an interest rate of 3-month LIBOR + 8%. That agreement is in fact a legacy contract in the sense that It is a hard legacy contract with no other means to fall back. It genuinely has no or has inappropriate alternatives and no realistic ability to be renegotiated or amended. It is the type of contract that is targeted by the synthetic US dollar LIBOR. When the Tribunal subjected its awards of interest to the 3-month LIBOR + 8%, it never made the distinction between the "representative" USD LIBOR or the "synthetic" USD LIBOR regime. It is the argument that the rate was phased out, is defunct, obsolete and non-existent which seeks to introduce ambiguity, where none in fact exists.

Consequently, this aspect of the Final Award is not open to being misunderstood by an enforcing court, such as will render it impossible or difficult to enforce. Clearly the 3-month LIBOR + 8% rate awarded is not subject to uncertainty or ambiguity, and neither is it susceptible to multiple interpretations likely to cause substantial injustice in enforcement. There is only one ICE

Benchmark Administration (IBA) publication of synthetic USD LIBOR in place, in accordance with which enforcement will ensue, applying the relevant rates in force at the relevant period. In conclusion therefore, enforcement of the 3-month LIBOR + 8% rate awarded is neither against public policy nor does it render the award unenforceable for uncertainty or ambiguity.

In final conclusion, all the grounds of objection against the recognition and enforcement of the Final Award advanced by the applicants having been unsuccessful, Arbitration Cause No. 0014 of 2024 is dismissed with costs to the respondent. The objections to recognition and enforcement of the Final Award advanced by the applicants having been dismissed, Arbitration Cause No. 0075 of 2023 is allowed with costs to M/s great lakes energy company NV. Consequently, leave is hereby granted to M/s great lakes energy company NV to enforce the Final Award in the same manner as a judgement or order of this court. The costs of the application shall be recovered as part of the costs or execution of the award.

g. Whether the interim measures of protection should be extended.

Interim measures of protection have the objective purpose of ensuring that the time needed to establish the existence of the parties' right does not in the end have the effect of irremediably depriving the right of substance, by eliminating any possibility of exercising it. Just like section 6 of *The Arbitration and Conciliation Act* authorises Court, Article 25 (1) of the LCIA Institutional Rules authorises an LCIA tribunal to order specified types of provisional measures (including security for claims, preservation or sale of disputed property, and any other relief which could be made in a final award), subject to contrary agreement by the parties. The purpose of interim measures of protection is to achieve the fundamental objective of every legal system, the effectiveness of judicial protection. The aim of interim protective measures is to preserve parties' rights, both substantive and procedural, pending the decision on the merits.

By this Court's ruling of 18th August, 2023 in Miscellaneous Application No. 1041 of 2023 between the same parties, it was decided that the interim protective measures order of this Court

dated 16th August, 2021 and as subsequently varied on 14th October, 2022 was to remain in force "until the final award of the London Court of International Arbitration LCIA Consolidated Arbitration No. 204602 becomes enforceable as a decree of this Court." The Court having M/s great lakes energy company NV to enforce the Final Award in the same manner as a judgement or order of this court, the protective measures have lapsed.

Once a dispute has been resolved in arbitration, the measures of protection that can be granted are only those intended to safeguard the fruit of the arbitration until the eventual enforcement of the award. By virtue of section 6 of *The Arbitration and Conciliation Act*, this court's jurisdiction in granting interim measures of protection is limited to situations "before or during arbitral proceedings." Section 9 of the Act forbids the Court from intervening in matters governed by the Act except as provided in the Act. Ther being no provision permitting this Court to grant post-arbitration interim measure of protection, it cannot extend the interim protective measures order of this Court dated 16th August, 2021 and as subsequently varied on 14th October, 2022 beyond the date of delivery of this ruling.

Following an order granting leave for the enforcement of an arbitral award in the same manner as a judgement or order of this court, the reliefs of the nature sought by the respondent can only be obtained in accordance with the post-judgment procedures provided for under the relevant provisions of *The Civil Procedure Act* and *The Civil Procedure Rules*. Preventing the award debtor from dissipating its assets where there is a real risk that it might do so, or that it might move the assets around to frustrate attempts to satisfy the final award, can be achieved only in that context. There currently is no application of that nature before the Court to justify such intervention. The application for such relief therefore is premature.

Delivered electronically this 18th day of April, 2024

……Stephen Mubiru……

Stephen Mubiru
Judge,
18th April, 2024.