

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

MISCELLANEOUS CAUSE NO. 0080 OF 2021

5 **1. TMA ARCHITECTS** } **APPLICANTS**
 2. URBAN DESIGNERS (U) LTD }

VERSUS

PROME SONSULTANTS LIMITED

10 **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

15 On or about the 31st October, 2013 the applicants, the 1st applicant of whom is a company
incorporated in and under the laws of South Africa, and the respondent entered into a subcontract
for the design, consultancy and supervision for the Proposed Lubowa Housing Project. The
subcontract concerned the provision of civil, infrastructure, mechanical and electrical Ciil
Engineering services for that project, by specific reference to the preparation detailed design,
20 tender documentation, construction, supervision and post-construction supervision as detailed in
the main contract. Under clause 12 of the subcontract, the parties vested the arbitral jurisdiction
to receive, entertain and manage any disputes that arose from or in connection the said
subcontract in a single arbitrator appointed in accordance with the rules of the International
Chamber of Commerce (ICC). By that clause, the parties further agreed that the arbitration to be
25 conducted in Kampala. Subsequently on or about 4th December, 2017 the parties executed an
addendum to the said agreement regarding the services and their performance, the sub-contract
price, mode of payment, order of payment, and deletion of the clause on reimbursement of
disbursement.

30 When a dispute in connection with the subcontract arose between the parties and following the
failure by the parties to amicably settle the said dispute, the respondent on 18th December, 2019
filed a request for arbitration and later on 5th November, 2020 a statement of claim with the

International Centre for Mediation and Arbitration in Kampala (ICAMEK). On 30th January, 2020, the applicants filed a response to the respondent's statement of claim and subsequently an amended answer to the claim on 27th November, 2020. The respondent filed a response to the applicants' claim and response to the counterclaim on the 18th December, 2020. The arbitral proceedings began in November, 2020 but by way of an affidavit in reply filed on 18th January, 2021 the applicants objected to the jurisdiction of ICAMEK as well as the appointed Arbitrator to entertain and handle the arbitration. By a standard form submitted to the respondents on or about 30th January, 2020 the respondents proposed to the applicants "that the dispute be resolved under the ICAMEK Arbitration Rules, 2018." The applicants duly endorsed that form which was then submitted to ICAMEK which then sent to the parties a list of three names of proposed arbitrators, from which they were asked to select a sole arbitrator.

From that list, the respondent's preferred arbitrators were both rejected by the applicants while the applicants' preferred arbitrator was eliminated from the list. In accordance with Rule 16 (5) (d) of the ICAMEK Arbitration Rules, 2018 ICAMEK went ahead on 3rd March, 2020 to appoint Ms. Olivia Kyarimpa Matovu sole arbitrator. The parties were on 10th March, 2020 invoiced in a sum of US \$ 2,802 in administrative costs and arbitrators fees. The applicants on 16th June, 2020 indicated that their director at the time was out of the country and could not travel due to Covid19 travel restrictions. By a letter dated 9th July, 2020 the respondent was asked to foot the entire advance payment of US \$5,687 half of which was to be recovered from the applicants upon any award of costs by the arbitrator. The respondent made that payment on 20th August, 2020.

The arbitrator convened a virtual preliminary meeting on 15th October, 2020 during which the parties agreed to amend their pleadings and the timelines for doing so. The respondent filed its amended statement of claim on 5th November, 2020 while the applicants filed their answer to the claim on 27th November, 2020 containing a preliminary objection contending that ICAMEK had no jurisdiction to preside over or to decide the dispute. The respondent filed a response thereto on 18th December, 2020. At another preliminary meeting held on 22nd December, 2020 the parties agreed to address the arbitrator regarding the objection to jurisdiction, by way of affidavit and

written submissions. In her award on the preliminary objection to jurisdiction handed down on 5th October, 2021 the arbitrator decided that;

5 It is not in dispute that there exists an arbitration clause between the respondents and the claimants.....The principle of party autonomy, which is one of the core principles in arbitration, is the backbone of arbitration. What is paramount is the parties' consent in writing which can be discerned from either an arbitration agreement in one document executed by the parties, or from correspondences whether by letter, telex, telegram or other means of telecommunication which provides a record of the
10 agreement. Therefore for an arbitration agreement to exist, it need not be embedded in one document where all parties sign; it can be in a series of correspondences or in a separate document which is incorporated by reference in an agreement signed by both parties..... On 30th January, 2020 the ICAMEK Variation Form signed by Christina Muwanga in the capacity of director of both respondents was filed at
15 ICAMEK.....The form indicated an election by the respondents that the dispute be resolved under the ICAMEK Rules, 2018. On the same date, a response to the claim and counterclaim was filed on behalf of the respondents.....The above process as highlighted above indicates consensus of the parties in my view.....I therefore find that the variation of the arbitration clause was valid and binding upon the parties...
20 the same adopted the ICAMEK Rules whereby the parties clothed ICAMEK with the authority to administer the dispute including the appointment of the Arbitrator. The Arbitral Tribunal therefore has jurisdiction to hear and determine this dispute. I hereby overrule the objections raised. The arbitration should therefore proceed into hearing of the merits of the dispute. The costs arising from these preliminary
25 objections shall abide the outcome of the main dispute in the arbitration.

By that decision, the arbitrator delivered an interim award on jurisdiction wherein she found that the arbitration clause had been varied by the parties, who thereby agreed to the ICAMEK arbitration; consequently the submission was valid and binding. The parties clothed ICAMEK
30 with jurisdiction to administer the dispute and to appoint the sole arbitrator in the matter. The sole arbitrator thus found that she had jurisdiction to preside over the dispute.

b. The application.

35 This application is made under the provisions of section 16 (6) of *The Arbitration and Conciliation Act*, section 33 of *The Judicature Act* and section 98 of *The Civil Procedure Act*.

The applicant seeks a determination of the question as to whether or not Ms. Olivia Kyarimpa Matovu, an Arbitrator, who was appointed by the International Centre for Arbitration and Mediation in Kampala (ICAMEK) has jurisdiction to handle a dispute between the parties to this application. It is the applicant's case that whereas the Arbitrator has ruled as a preliminary
5 question that she has jurisdiction, and the applicants are aggrieved by the said ruling on grounds that ICAMEK was not the institution appointed by the parties in their arbitration agreement or given any authority to receive, entertain or manage any arbitration arising therefrom. The applicant further contends that the Arbitrator was appointed by ICAMEK which has no jurisdiction over the dispute between the parties to receive, entertain or manage any arbitration
10 over any disputes arising from the agreement between the parties, that jurisdiction having been specifically vested by the parties in their agreement to the International Chamber of Commerce. Consequently, the Arbitrator wrongly ruled that the arbitration agreement had been varied by the parties to allow ICAMEK to administer the arbitration, whereas not.

15. The affidavit in reply;

By its affidavit in reply the respondent avers that the applicant consented to a variation of the arbitration agreement when it signified its consent to vary by ticking the option to vary contained in the request for arbitration. The respondent thereafter participated fully in the appointment of
20 the arbitrator. It is long after the arbitration had commenced in November, 2020 that the applicant objected to the jurisdiction of the arbitrator. There was a consensual variation of the submission to arbitration as was rightly found by the arbitrator.

d. Submissions of counsel for the applicant.

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M/s, Byenkya, Kihika & Co. Advocates on behalf of the applicants submitted that the arbitrator has no jurisdiction over the dispute between the parties because she was appointed by ICAMEK which has no jurisdiction to receive, entertain or manage any arbitration over any disputes arising from the agreement between the parties, that jurisdiction having been specifically vested
30 by the parties in their agreement to the International Chamber of Commerce. Clause 13.4 of the sub-contract provides that, "Any modification of this Sub-contract and its annexures shall not be

valid or binding unless made in writing and signed by the parties hereto.” Section 3 (2) of *The Arbitration and Conciliation Act* makes it mandatory that both parties to the contract have to sign any variation to the arbitration agreement. The purported variation slip is exactly the kind of extrinsic evidence that is inadmissible to contradict, alter or add to the express terms of the arbitration agreement. Since the variation slip was a form only signed by one of the parties, it is not enforceable and as such, ICAMEK does not have the jurisdiction to preside over this matter. The variation slip does not state any terms indicating that it is an agreement of those parties, does not state any consideration for the variation of the terms of the agreement and thus fails in every respect to qualify to be an agreement.

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Although section 3 (3) (b) of *The Arbitration and Conciliation Act* recognises an exchange of letters, a telex, a telegram or other means of telecommunication which provides a record of the agreement, “exchange of correspondence” connotes an exchange between the parties to the original contract. It can certainly not include correspondence by one party with an arbitral body that, in the first place not party to an agreement, and in the second place, was not granted any jurisdiction to receive an arbitration request by the arbitration contract. It is the arbitration clause that confers jurisdiction on an arbitrator. It is the arbitration clause that confers on any party a right to file a request for arbitration. Arbitration then cannot precede the agreement. Any agreement to amend the arbitration agreement had to precede the filing of a request for arbitration. Once ICAMEK received the request for arbitration and realised that it provided for arbitration under the ICC rule, it was put on notice that it had no authority to administer the arbitration, at that stage; its only choice was to reject the arbitration request outright. In light of the fact that ICAMEK had no jurisdiction to administer the arbitration under the ICC rules and in light of the fact that the arbitrator was not appointed in accordance with the ICC rules or under the auspices Court of Arbitration, it follows that the arbitral proceedings are null and void.

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25 e. Submissions of counsel for the respondent.

M/s Buwule & Mayiga Advocates, on behalf of respondent submitted that the respondent’s request for arbitration and variation of the arbitration agreement signed by the applicant’s chief executive is for all intents and purposes a written variation. The critical consideration is

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agreement between the parties. By the ICAMEK letter of 18th December, 2018, the proposal, the intention and implication of the variation was explained to the applicants. The relevant variation form was forwarded to the applicants whereupon it was signed by the applicant's Chief Executive on 30th January, 2020. Consideration may be found in the mutual surrender of rights or
5 the conferment of benefit on each party by the variation.

By participating in the selection of the arbitrator, the applicants unequivocally represented that they accepted the variation of the arbitration clause of the subcontract between them and cannot now be seen to say otherwise. All this was over a period of over a year, the present arbitration
10 claim having been filed in 2019. It is only following the applicants' change of counsel in late 2021 that the applicants purported to raise the objections that they should have raised over a year back in direct disregard of the filed consents to alter the arbitration clause and the agreement to submit to the jurisdiction of this tribunal and thereby conduct the present arbitration under the ICAMEK rules rather than the ICC rules. By their conduct and actions, the applicants are
15 estopped from denying the valid notwithstanding its informality or non-adherence to the strict letter of the law or the other terms of the contract pertaining thereto, such is valid and cannot then be challenged by the person making such representation. The applicant's conduct constituted a waiver of the requirements of Clause 13.4 of the contract. The respondent has already incurred costs towards the arbitration on basis of both the representation and the waiver.

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f. The decision.

Under the doctrine of *kompetenz-kompetenz*, the arbitral tribunal has the power to decide upon matters of its own jurisdiction (see *Golden Ocean Group Ltd v. Humpuss Intermoda
25 Transportasi Tbk Ltd and another* [2013] 2 Lloyd's Rep 421, [2013] 2 All ER (Comm) 1025). Any jurisdictional arguments remain matters for the tribunal to decide in accordance with the principle of *kompetenz-kompetenz*. Whereas a plea that the arbitral tribunal does not have jurisdiction should be raised not later than the submission of the statement of defence, and although a party is not precluded from raising such a plea because he or she has appointed or
30 participated in the appointment of an arbitrator (see section 16 (2) of *The Arbitration and*

Conciliation Act), the principle of *kompetenz-kompetenz* provides that courts should as far as possible avoid anticipating a decision that the tribunal is empowered to make.

5 The determination of the question of the jurisdiction of a tribunal lies in its own domain, at least in the first instance, by virtue of the principle of “*Kompetenz-Kompetenz*” (see also section 16 (1) of *The Arbitration and Conciliation Act*), According to that doctrine, an arbitral tribunal has jurisdiction to consider and decide any disputes regarding its own jurisdiction, subject to, in certain circumstances, subsequent judicial review. This is one of the pillars of arbitration as it promotes party autonomy. Should the respondent maintain its objection in the proceedings, the
10 tribunal will make its own jurisdictional determination. Section 16 (6) of *The Arbitration and Conciliation Act*), categorically limits judicial review of the arbitrators’ decisions on jurisdiction, to thirty (30) days after receiving notice of that ruling, for any party aggrieved by the ruling by the arbitral tribunal as a preliminary question that it has jurisdiction.

15 Section 11 (3) (a) and (b) of *The Arbitration and Conciliation Act* provides an institutional, arbitration procedural framework, within which the arbitration proceedings will be concluded, in cases where by their submission to arbitration or otherwise, parties fail to appoint an arbitrator. In the case of three arbitrators, if a party fails to appoint the arbitrator within thirty days after receipt of a request to do so from the other party or if the two arbitrators fail to agree on the third
20 arbitrator within thirty days after their appointment; or in the case of one arbitrator, the parties fail to agree on the arbitrator, the appointment has to be made, upon application of a party, by “the appointing authority.” Resort will be had to this provision so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party. A
25 decision of the appointing authority in respect of a matter under this subsection is final and not subject to appeal (see section 11 (5) of the Act).

Arbitration being a matter of contract, the parties are not only entitled to fix the boundaries as to confer and limit the jurisdiction and legal authority of the arbitrator but are also free to agree on a
30 procedure of appointing the arbitrator or arbitrators. Arbitral jurisdiction derives from the parties’ consent contained in an arbitration clause. By virtue of section 11 (2) of *The Arbitration*

and Conciliation Act the parties are free to agree on a procedure of appointing the arbitrator or arbitrators. An arbitration clause, regardless of the instrument in which it exists, will usually contain the following: an explicit referral of disputes to arbitration; the governing law of the arbitration agreement; the seat of arbitration; the rules governing the arbitration; the number of
5 arbitrators and their method of selection; and if applicable, the institution governing proceedings or confirmation of ad hoc arbitration. In this regard, Clauses 12 and 13.4 of the subcontract in the instant case respectively provide as follows:

12, Settlement of Disputes / Applicable law / Arbitration with Third Parties.

10 12.1 Arbitration between the Parties

12. 1 .1 any dispute arising out of or connected with this Sub-Contract, its interpretation and performance, shall be amicably resolved between the Parties. Failing amicable resolution within 21 days, such dispute shall be resolved in arbitration in accordance with the Rules of Arbitration of the
15 international Chamber of Commerce (“ICC”) by a single arbitrator appointed in accordance with such Rules.

12. 1 .2 arbitration proceedings shall be conducted in Kampala, Uganda.

20 13.4 Entire Agreement / Modifications

This Sub-Contract represents the entire agreement and consents of the Parties hereto. All previous agreements, memoranda, understandings and communications, whether written or verbal, made or exchanged between the parties are hereby declared null and void: Any modification of this Sub-
25 Contract and its Annexes shall not be valid or binding unless made in writing and signed by all parties hereto.

The addendum signed on 4th December, 2017 amended clauses in the subcontract to do with; the services and their performance, the sub-contract price, mode of payment, order of payment,
30 deletion of the clause on reimbursement of disbursement. Therefore the addendum did not amend the arbitration clause. It is however contended by the respondent that the variation was amended at the time of submission of the dispute when the applicant expressed its consent to the variation by ticking the option to vary contained in the request for arbitration.

Under the theory of party autonomy, if two parties have the legal right to settle a dispute between themselves, then they can give jurisdiction to a third party to settle it for them. The parties have autonomy in determining the procedure to govern their arbitration and may select the national rules of any country, agree to their own rules or refer to the rules of an arbitration institution, failure of which the law of the arbitral seat will apply. In circumstances where the parties have agreed that their proceedings will be governed by institutional rules, the procedural discretion of the arbitrators warranted by those rules often renders an objection based on this ground weak. Courts are not prepared to police arbitrators' procedural decisions and a review on this basis is frequently limited.

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Section 13 (2) of *The Arbitration and Conciliation Act* provides that a party who intends to challenge an arbitrator, must within fifteen (15) days after becoming aware of the composition of the appointing authority or after becoming aware of any circumstances disqualifying the arbitrator send a written statement of the reasons for the challenge to the appointing authority; and unless the arbitrator who is being challenged withdraws from his or her office or the other party agrees to the challenge, the appointing authority shall decide on the challenge within a period of thirty days from receipt of a written statement.

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On the other hand, where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by the ruling may apply to the court, within thirty (30) days after having received notice of that ruling, to decide the matter (section 16 (6) of *The Arbitration and Conciliation Act*). The court may therefore intervene during the arbitration, before a final award is made, to stop the arbitration proceedings if the court upholds an objection raised to the arbitrator's jurisdiction. The arbitrator's freedom to decide his own jurisdiction thus does not exclude court control. This can be exercised either during an arbitration or later when a party seeks recognition or enforcement of the arbitral award. Under section 16 (6) of *The Arbitration and Conciliation Act*, a court retains the power to set aside the tribunal's decision on jurisdiction despite the *Kompetenz-Kompetenz* principle is codified.

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Jurisdiction pertains to the competence of a tribunal to adjudicate a particular case. In the context of arbitration, jurisdiction refers to the authority of an arbitral tribunal to make a decision

affecting the merits of the case (see *Republic of Sierra Leone v. SL Mining Ltd* [2021] EWHC 286 (Comm) at [18]; *BG Group v. Argentina* 572 U.S. 25 (U.S. S. Ct. 2014) and *BBA v. BAZ* [2020] 2 SLR 453). A challenge under sections 13 (2) and 16 (6) of *The Arbitration and Conciliation Act* must therefore be a challenge to the substantive rather than the procedural jurisdiction of the tribunal. Substantive jurisdiction relates to whether or not: (a) there is a valid arbitration agreement (b) the tribunal is properly constituted and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. Jurisdiction refers to the power of the tribunal to hear a case, whereas admissibility refers to whether it is appropriate for the tribunal to hear it. Where an issue relates to whether a claim can be brought to arbitration, the issue is ordinarily one of jurisdiction reviewable by Court, whereas if the issue relates to whether a claim should be heard by the arbitrators at all, or at least not yet, the issue is ordinarily one of admissibility, and the decision of a tribunal on the latter is final. Consequently, objections regarding pre-conditions to arbitration, like time limits and the fulfilment of conditions precedent to arbitration, are matters of admissibility not jurisdiction.

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The arbitral tribunal takes its jurisdiction to decide a particular dispute from the agreement between the parties. There is no inherent jurisdiction in an arbitral tribunal. An arbitral tribunal does not get its jurisdiction from any legislation. The scope of the tribunal's jurisdiction will be determined by the scope of the arbitration agreement, subject only to any mandatory legislative enactments governing the arbitration agreement. The arbitrator's jurisdiction is based on the will of the parties, whether expressed in a contract in general terms covering a future dispute or in a separate agreement covering an existing dispute. The authority to hear the parties and make an award exists only through the agreement of the parties. An arbitrator cannot claim to have power to decide if he or she has not been properly appointed.

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Arbitration is a matter of contract, and a party cannot be required to submit to an arbitrator or to arbitration, any dispute which he or she has not agreed so to submit. It is the respondent's contention that although under Clause 12.1 of the subcontract the parties had agreed that all disputes regarding the terms and the execution of the obligations in the contract were to be settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce ("ICC") by a single arbitrator appointed in accordance with such Rules, if any arose

following a laid out escalation process, the bargain was however altered by the consents to arbitrate under the ICAMEK rule by way of the variation form signed by the applicants' Chief Executive on 30th January, 2020.

5 It is trite that varying a legally binding contract can only be done by agreement between the parties to the contract. It can't be done unilaterally unless the original contract says one party can make changes without first seeking the agreement of the other party. A variation of an existing contract is itself a contract. This is because "whenever two men contract, no limitation self-imposed can destroy their power to contract again" (see *Beatty v. Guggenheim Exploration Co*
10 (1919) 225 NY 380, at 387-388). Parties have to consider though if they are negotiating a variation or what is in effect a new contract.

For a contract variation to amount to a "variation," elements of the original contract must remain in place. If the varied agreement departs from the original contract in an essential way, it may be
15 considered by the court to be a new agreement, such that the original contract is rescinded. A "variation" which is so substantial that it undermines the original purpose of the contract, will probably not be treated as a variation by the court. Instead, the court will consider the original contract to have been terminated and replaced by the new agreement. The common law imposes
20 no requirements of form on the making of contracts, the parties may agree informally to dispense with an existing clause which imposes requirements of form. Methods of varying a contract include: by deed; by formal written supplemental contract document; by exchange of email; verbally (but this can lead to contract disputes over whether there was a verbal agreement to vary or not); and by course of conduct.

25 In simple terms, a contract variation occurs when the parties agree to do something differently from the way they originally agreed, whilst the remainder of the contract otherwise operates unchanged. A valid variation usually has four key elements; (i) the parties must usually mutually agree to alter or modify the contract. In some circumstances the underlying contract might give one party a unilateral right to make certain limited changes, but agreement is normally necessary
30 (ii) the parties must intend the alteration/modification permanently to affect their rights. If there is no such intention, then the change is likely to amount only to a temporary forbearance or

concession, rather than a permanent variation of the contract; (iii) the parties must comply with any requirements as to the form of the variation. These could be specified by legislation, or set out in the original contract which is being varied. Where the law prescribes that certain types of contracts must be in writing, variations to those contracts must also therefore be in writing; and
5 (iv) the agreement to vary a contract will need to be supported by consideration - something of value must be given in exchange for the alteration. If there is no such consideration, then the variation will need to be effected by deed.

In order to amend the dispute resolution provisions of an existing contract, it is important for the
10 drafting of any deed of variation to clearly and expressly vary the original provisions (see *Surrey County Council v. Suez Recycling and Recovery Surrey Ltd [2021] EWHC 2015 (TCC)*). Therefore, parties may abandon the requirement of a formal writing to vary a written agreement only expressly or by necessary implication. Reliance on an estoppel would require, at the very least, some words or conduct unequivocally representing that the variation was valid
15 notwithstanding its informality (see *Rock Advertising Limited (Respondent) v. MWB Business Exchange Centres Limited (Appellant) [2018] UKSC 24*). If one party to a contract makes a promise to the other that his legal rights under the contract will not be enforced or will be suspended and the other party in some way relies on that promise, whether by altering his position or in any other way, then the party who might otherwise have enforced those rights will
20 not be permitted to do so where it would be inequitable having regard to all of the circumstances. The party arguing that the contract has been varied will need to show that there has been a clear pattern of behaviour that is inconsistent with the terms of the original contract, and consistent only with the parties having agreed to vary those terms. Put another way, a party will be unable to establish a variation by conduct if the parties would or might have acted exactly as they did in
25 the absence of any such agreed variation. The parties have to act in a way that shows that they are no longer following the term in the original contract and that they are following the contract variation instead.

Contract variations are typically opted for in situations where the circumstances have changed
30 since the original contract was signed. This could be because the needs of the parties have changed over time. The ICAMEK Variation Form was signed by the director of both applicants.

A document is executed by a company if either: (i) the company's common seal is affixed to it; or (ii) it is expressed to be executed by the company and is signed by: two authorised signatories (two directors or one director and the company secretary); or a director in the presence of a witness who attests to his signature. A contract which if made between private persons would by
5 law be required to be in writing, signed by the parties to be charged with, may be made on behalf of the company in writing executed by any person acting under its authority, express or implied (see section 50 (2) (a) of *The Companies Act, No. 1 of 2012*).

Companies can only perform acts through individuals and those individuals act on behalf of the
10 company. Whether or not a contract has been made on behalf of a company usually involves consideration of agency law, as applied by the courts in the context of companies. A company will only be bound by a contract if, at the time the contract was allegedly entered into, the board of directors or the individual, on whose acts the third party is relying to allege that a contract has
15 been entered into, was acting within the scope of its power or his authority as an agent of the company. A board of directors typically delegates powers not by expressly using the terms "delegation" and "powers" but by allocating management responsibilities to individuals and approving the appointment of individuals to named roles within the company. In the absence of limitations on the powers of the board, if the allocated management responsibilities or the performance of the role involves the individual acting so as to legally bind the company, the
20 individual will be an agent of the company with actual authority to bind the company. Ostensible authority was explained in *Hely-Hutchinson v. Brayhead Ltd [1968] 1 QB 549*, thus;

Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their
25 number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint
30 the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He

may himself do the “holding-out.” Thus, if he orders goods worth £1,000 and signs himself “Managing Director for and on behalf of the company,” the company is bound to the other party who does not know of the £500 limitation.....

5 There is no evidence to show that Ms. Christina Muwanga had the express authority to sign the ICAMEK Variation Form on behalf of any of the applicants: but she had such authority implied from the nature of her office as director of both applicants. That office in itself carried with it authority to enter into these contracts without the sanction of the board. That she had such authority may also be implied from the conduct of the parties and the circumstances of the case.
10 She acted as the *de facto* chief executive who made the final decision on any matter concerning the two applicants. Her signature on the ICAMEK Variation Form bound both applicants.

Counsel for the applicants argued that a submission to arbitration does not include correspondence by one party with an arbitral body that, in the first place is not party to the
15 agreement. However, a written arbitration agreement need not be signed, nor is there a requirement for the agreement to be contained within a single document, meaning that a variation to an agreement to arbitrate can comprise an exchange of communications in writing (section 3 (3) (b) of *The Arbitration and Conciliation Act*). However, the documents must be clear enough to evidence that the parties intended to incorporate an agreement to arbitrate (see
20 *Italian Delegation on Wheat Supplies v. Certain Exporting Houses (1925) 22 LI L Rep 673*). The written consent of both parties to submit their dispute to arbitration is the cornerstone of arbitration. Consent though does not require action by a counterparty to be fully operative. Consent is given in one of two ways; the most obvious way is a consent clause in a written agreement between the parties, but also it may be by means of a written unilateral
25 communication to the other party. The requirement that an arbitration agreement be in writing is regarded as satisfied if the content of the arbitration agreement is recorded in any written form by one or more of the parties to it, or by a third party with the authority of the parties to the agreement. The key factor is that the parties’ consent must be mutual, clear and unequivocal or unambiguous; a common subjective intent to submit disputes relating to the Contract to
30 arbitration. A party may therefore offer its consent to arbitration by way of its unilateral acts.

An arbitration agreement in a unilateral document is generally seen as enforceable under English law leading to the phrase “arbitration without privity” (see *Wyndham Rather Ltd v. Eagle Star and British Dominions Insurance Co Ltd (1925) 21 LIL Rep 214*). In a post-dispute agreement to submit to arbitration a party may provide a unilateral offer of consent to arbitration in a communication, which the other “perfects” with its own consent by bringing a claim. The only element of mutuality required for a valid arbitration agreement is the mutual consent of the parties at the point when they entered into a dispute resolution agreement. Subsequently, when the right to elect to arbitrate is exercised under that agreement, a specific (and separate) arbitration agreement would be created in relation to that dispute.

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Consideration for a variation may be found in the mutual surrender of rights or the conferment of benefit on each party by the variation. In the same vein, the practical benefit of contractual performance is valid consideration for the purposes of giving effect to a modification (see *Williams v. Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1 at 15-16*). If a person promises more than what they originally did under a contract, and they will get something more than what they were already legally entitled to under the contract, then they will receive a practical benefit and that additional offer will be binding on that person. When the legal obligations under the contract are not altered, a party still provides adequate consideration by offering a practical benefit, or obviating a practical disadvantage, in fact. In the instant case the variation increased the economic efficiency of the dispute resolution mechanism for both parties and that practical benefit constituted good consideration.

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Counsel for the applicants further submitted that arbitration cannot precede the agreement, such that any agreement to amend the arbitration agreement had to precede the filing of a request for arbitration. While this may be true considering that where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced when one party serves on the other party notice requiring them to appoint an arbitrator or to agree to the appointment of an arbitrator, it is possible for a company to ratify an appointment by conduct. Ratification validates the acts of any purported agent previously lacking authority, from the point in time when the acts took place and is, therefore, “equivalent to an antecedent authority” (see *Koenigsblatt v. Sweet [1923] 2 Ch 314*). Every ratification is dragged back and treated as equivalent to a prior

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authority. In any event, the variation was effected on 30th January, 2020 while the arbitrator was appointed on 3rd March, 2020. Jurisdiction of an arbitrator depends upon the consensus of the parties as expressed in the arbitration agreement, and by that date of appointment of the arbitrator, the parties had by the variation struck consensus that the dispute was to be resolved
5 under the ICAMEK Arbitration Rules, 2018 pursuant to which they had already filed their respective pleadings, which they proceeded to update by amendment.

Challenges are sometimes used to attempt to delay and/or to frustrate the arbitration. It is not unknown for a party to seek to delay the arbitral process by raising unwarranted objections to a
10 nominated arbitrator, or to derail the process entirely by a late application to remove an arbitrator midway through the case (invariably when previous interim or procedural decisions have been adverse to the applicant). When dealing with such challenges, a balance must be struck between responding fairly to legitimate concerns, while seeking to discourage frivolous complaints and the disruption that flows from them. A party to an arbitration proceeding can object to the
15 jurisdiction of the tribunal on or before the submission of the statement of defence. All objections to the jurisdiction of an arbitral tribunal based on irregular appointment must be taken no later than the submission of the statement of defence.

To discourage eleventh hour challenges and ensure parties bring forward challenges as early as
20 possible, time limits are set. By virtue of section 13 (3) of *The Arbitration and Conciliation Act* if a party appointed the arbitrator or participated in the selection, the party may only challenge the arbitrator within fifteen (15) days after becoming aware of the composition of the appointing authority or for reasons of which the party became aware after the appointment was made. Accordingly, if a party challenges the arbitrator's jurisdiction, the arbitrator should consider
25 whether the challenge was made within the time limit specified. Where a party becomes aware of a given matter after the time limit, an arbitrator should consider whether a make a timely challenge such that the challenge is made late and there is no good reason for the delay, or whether the party's position is inconsistent with an earlier stance, could result in a finding of waiver (see *Rail India Technical and Economic Services Ltd v. Ravi Construction, Bangalore,*
30 *2003 (4) RAJ 394 (Kar)*).

In the instant case, the applicants, through their director, signed and submitted the ICAMEK Variation Form on 30th January, 2020, as well as a response to the respondent's statement of claim on the same day, without incorporating any challenge to the jurisdiction of the appointing authority. By a letter dated 5th February, 2020, ICAMEK invited the applicants to participate in the nomination of the arbitrator and furnished the applicants with three names to choose from. By a letter dated 3rd March, 2020, ICAMEK notified the applicants of the appointment of Ms. Olivia K. Matovu as sole arbitrator. The challenge to her jurisdiction was not raised until 27th November, 2020 which is over eight months since the appointment of the arbitrator. The reasons advanced for the challenge are of a nature such as the applicants must have been aware of immediately after notification of the appointment. There is no explanation as to why the challenge was not raised within 15 days of notification of that appointment. The arbitrator erroneously failed to address her mind to the question as to whether there were special circumstances justifying the failure to meet the time limit. This was clearly a belated challenge that ought to have been rejected out rightly.

From 30th January, 2020 up until 27th November, 2020 there is a clear pattern of behaviour that is inconsistent with the terms of the original arbitration clause, and consistent only with the parties having agreed to vary those terms. The applicants acted in a way that shows that they were no longer following the term in the original arbitration clause, but following the contract variation instead. On the facts of this case, choice of forum and procedure was an ancillary logistical concern which the parties varied when the dispute arose. Arbitration is a creature of contract and courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted. It is for that reason that the application is dismissed. The costs of the application are to abide the outcome of the arbitration.

Delivered electronically this 27th day of February, 2023
Mubiru.....

.....**Stephen**

Stephen Mubiru
Judge,
27th February, 2023.