

THE REPUBLIC OF UGANDA

**THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION
[CADER]**

CAD/ARB/NO.05 OF 2017

PENTA CONSULTING LTD APPLICANT

VERSUS

UGANDA TELECOM LIMITED RESPONDENT

Applicant counsel.

Arthur Ssempebwa - Katende, Ssempebwa & Co. Advocates.
Assisted by Edwin Wabwire

Respondent counsel.

Irene Nuwabine
Holding brief for Rashid Kibuka - Legal Department, UTL.

RULING

1. The dispute resolution clause in issue, arises from the Technical Support Agreement [TSA] concluded by the parties on 14th October 2014.

It states as follows,

“ DISPUTE RESOLUTION

11.1 In the event of any dispute, claim or controversy arising between the parties (hereinafter referred to as the ‘dispute’), concerning this Agreement, the parties may at any time, without prejudice to other proceedings, seek to settle the dispute in accordance with the laws of Uganda, by one arbitrator appointed in accordance with the Ugandan laws. The arbitration shall be held in Kampala, Uganda and shall be conducted in English.

11.2 If the parties do not agree to refer the dispute to any means of alternative dispute resolution they may proceed to litigation in the Ugandan courts, in which event the parties consent to the jurisdiction of the Courts of Uganda.”

2. The Respondent opposes the Application on the following grounds:-
 - a. The arbitration clause is no longer binding since the contract expired on 14th October 2014;
 - b. The respondent is yet to exercise the right to appoint a skilled arbitrator, which renders the current application premature; and
 - c. The matter must be referred to court in light of the parties “... *failure to agree on ADR*”.

WHETHER THE ARBITRATION CLAUSE IS BINDING

3. The Respondent has not proved that an expiry term exists within the arbitration agreement.
4. It is now settled law that an arbitration agreement is separate from the subject matter contract.

5. **Section 3(1) Arbitration and Conciliation Act, Cap.4 [ACA]** sets this standard as follows,

“3. Form of an arbitration agreement.

(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.”

6. **Section 3(1) ACA** stipulates that the arbitration agreement may be enclosed within an existing contract or captured in a different agreement which is distinct from the subject matter contract.
7. It is evident from this provision that the existence of an arbitration is governed by the **ACA** and not by the **Contracts Act No.7 of 2010**.
8. I therefore find that the arbitration agreement is binding upon the parties.

RESPONDENT’S EXERCISE OF RIGHT TO APPOINT ARBITRATOR

9. The Applicant’s notice of reference to arbitration, states as follows,

“7th November 2016.

The Managing Director
Uganda Telecom
Telephone House
Plot 2A-4A Speke Road
Kampala.

Attn: Mr. Mark Shoebridge

Dear Sir,

**RE: REFERENCE OF DISPUTE BETWEEN PENTA
CONSULTING AND UGANDA TELECOM TO
ARBITRATION**

... The purpose of this letter is to have this dispute referred to arbitration in accordance with Clause 11.1 of the Agreement.

Our client further in accordance with Clause 11.1 of the Agreement henceforth proposes either **XXXX** or **YYYY** to be appointed the arbitrator to this dispute.

Please communicate your acceptance or rejection of either of the above persons as an arbitrator. If you are dissatisfied with the persons proposed as an arbitrator, you are entitled to nominate a person as an arbitrator. If our client fails to hear from you within fourteen (14) days from receipt of this letter, our Client shall proceed to have this matter determined with or without your involvement as provided for under the Arbitration and Conciliation Act.”

10. The Respondent contends that it has not yet exercised the right to appoint the arbitrator because the notice letter was addressed to the Managing Director and not the Respondent’s Chief Legal Counsel as stipulated by **Clause 13 TSA**.
11. This error it is submitted has affected the Respondent’s right to appoint the arbitrator.
12. It is not disputed that the notice to refer to arbitration was served upon the Respondent on 7th November 2016.
13. The Respondent’s reply to this Application was filed on 8th February 2017. It is presumed that the Application bearing the notice to refer to arbitration was received by the Respondent’s legal department on or before 8th February 2017.
14. This Application was set for hearing on 13th February 2017.
15. The question then arises as to what measures the Respondent’s Legal Department took up so as to put in place the arbitral tribunal.
16. The Affidavit in Reply does not provide any information regarding the Respondent’s contribution to formulation of the arbitral tribunal.

17. I say this because an arbitration agreement, unlike other agreements imposes a mutual obligation upon both parties to participate in the appointment of the arbitral tribunal.
18. In ***B.M. Steels v. Kilembe Mines***, CAD/ARB/10/2004, Catherine Muganga set out the normative behavior in relation communication on the appointment of arbitrators, as follows,

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

First the Respondent would have consented to the Arbitrator suggested by the Applicant with a view of having a one-person arbitral panel.

Secondly the Respondent would oppose the Applicant’s nomination by indicating another Nominee Arbitrator whilst inviting the Applicant to consent to the Respondent’s nomination with a view to having a one-person arbitral panel.

Thirdly the Respondent would oppose or consent to the Applicant’s nomination. Nevertheless the Respondent would then proceed to indicate another Nominee chosen by the Respondent and invite the Applicant to consent to the second nomination person with a view of having a two person tribunal.”

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

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

“I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake to each other *hinc inde*; but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises

with regard to the obligations which one the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution.”

The Respondent’s silence or failure to co-operate in the appointment of an arbitrator is also forfeiture of the right to participate in constituting the arbitral tribunal.”

20. It is against this background, that I find it not proper for the Respondent to seat upon the Applicant’s errors and abdicate it’s own responsibility to put in place the arbitral tribunal.
21. In conclusion the Respondent is not right to indulge in the Applicant’s failure to post the notice of reference to arbitration to the designated officer in **Clause 13.1 TSA**.

REFERENCE TO COURT

22. The Respondent submits that the Applicant’s only remedy is to submit to court given the failure between the parties to refer to any means of alternative dispute resolution [**ADR**].
23. Clause 11.1 with great precision vests the parties with the right to refer to arbitration.
24. On the other hand Clause 11.2 merely opens up the future to possible reference to other means of **ADR**, which may come to the knowledge of the parties. Until such time, then the concise stipulations of Clause 11.1 are binding upon the parties.
25. Neither party has evidenced any attempt to refer to other means of ADR.
26. Contrary to the Respondent’s submissions, the statutory relief provided by Section 11 ACA, which cures the failure by the parties to put in place the arbitral tribunal, is not one which can be waived by any party.
27. Therefore CADER has jurisdiction to consider this Application, given that the arbitration clause is still subsisting.

CONCLUSION

28. I find that the Application has merits and grant the prayer for the compulsory appointment of an arbitrator.

29. Each party to bear its own costs.

Dated at Kampala on the 22nd day of February 2017.

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EXECUTIVE DIRECTOR