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Legal Alert: Key Decision on Arbitration Law in Uganda.

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Courts and arbitration tribunals have 'concurrent' jurisdiction in relation to arbitration agreements, save that a court's jurisdiction in disputes involving an arbitration agreement is delineated by the provisions of ss. 5, 9 and 16 of the *Arbitration and Conciliation Act* Cap 4.

Courts and arbitration tribunals address different objections to arbitration agreements: *Vantage Mezzanine Fund II Partnership v. Simba Properties Investments Co Ltd & Another* [2021] UGCommC 23

Brief facts

The Applicant/Defendant brought an application seeking orders that the dispute between it and the Respondents/Plaintiffs in Civil Suit No. 988/2019 is the subject of a valid, binding and enforceable arbitration clause in an agreement between the parties and should be referred to arbitration as required under the *Arbitration and Conciliation Act* Cap 4. Further, it sought various orders regarding the civil suit (and applications that had been filed). In response, the Respondent contended the arbitration agreement was procured by undue influence, is devoid of certainty and *consensus ad idem* as to amount to a contract and is, therefore, inoperative and/or incapable of being performed. The issue to be determined was whether the matters raised in HCCS No. 988/2019 ought to be referred to arbitration in terms of the provisions of the *Arbitration and Conciliation Act*.

This Alert considers the ruling of the High Court (Commercial Division) in its examination of the jurisdiction of courts *vis-à-vis* arbitration and the relationship between sections 5, 9 and 16 of the *Arbitration and Conciliation Act*.

Ruling of the High Court.

The High Court rendered its ruling on June 16, 2021. In granting the application, the court examined the relationship between sections 5, 9 and 16 of the *Arbitration and Conciliation Act* and held:

(a) The essence of section 9 of the Act and its import is to oust the jurisdiction of court and to limit the extent to which court can intervene in matters governed by the Act.

(b) The jurisdiction given to a court under section 5 of the Act is not exclusive over that given to an arbitral tribunal under section 16 of the Act. A court and an arbitral tribunal have concurrent jurisdiction over an arbitration agreement.

(c) The hearing by the court envisaged under section 5 of the Act is to ascertain whether the arbitration agreement is null and void, inoperative, or incapable of being performed, or whether there is a dispute necessitating arbitration.

(d) Once a court finds that the arbitration agreement is not null and void, is not inoperative or incapable of being performed; and there is a dispute necessitating arbitration, the court shall refer the matter to arbitration. The court is not clothed with jurisdiction to inquire into the validity or otherwise of a contract in which an arbitration clause is embedded, as this is the preserve of the arbitral tribunal.

(e) The validity of an arbitration clause is not dependent on validity of the contract in which it is embedded and, in the presence of a valid arbitration clause, questions as to invalidity of the main contract do not impede reference to and consideration of a matter by an arbitral tribunal.

Reflections on the Court's ruling and decisions from other common law jurisdictions.

In its ruling, the High Court rightly held that a "court's jurisdiction is lawfully ousted where the mater falls within the ambit of the arbitral tribunal under the [Act]." This is harmonizing the relationship between sections 5, 9 and 16 of the *Arbitration and Conciliation Act*. Be that as is the case, while the Court provided a correct exposition of the arbitration law in Uganda, there are confusing aspects in its ruling that arise from mixing up and lack of clear exposition of concepts or principles of law in section 5 of the *Arbitration and Conciliation Act*.

Under section 5 of the Act, the court's obligation to refer matters to arbitration is qualified on two grounds—voidness, inoperativeness, and incapability of performance of the arbitration agreement (section 5(a)) and absence of an arbitrable dispute (section 5(b)). While it initially understood its role under section 5 as that of ascertaining the voidness, inoperativeness, and incapability of performance of the arbitration agreement, or absence of an arbitrable dispute, the court found itself dealing with the question of the *existence and validity* of the arbitration agreement. To understand some of the confusion, portions of the ruling are quoted as follows:

> The correct position of the law therefore appears to be … that in regard to determination of the question of *existence and validity of an arbitration agreement*, the court (under Section 5 ACA) and the arbitral tribunal (under Section 16 ACA) have concurrent jurisdiction. The determining factor is as to which of the forum the objection has been presented. But in as far as the question of *existence and validity of the arbitration agreement* is concerned, that is where the court's jurisdiction stops.
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> …
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> It follows therefore that where the question as to the *existence and validity of an arbitration agreement* has been brought before the court, if the court upon investigation finds that the arbitration clause *exists and is not invalid*, the court must refer the matter to the arbitral tribunal to investigate any other matters concerning the contract between the parties.

The court is correct in its ruling that the *existence and validity* of an arbitration agreement is properly an issue to be addressed by an arbitral tribunal in a matter referred to arbitration. This arises from section 16(1) of the Act that clothes an arbitral tribunal with jurisdiction that includes "ruling on any objections with respect to the *existence or validity of the arbitration agreement*." This is the doctrine of *Competence-Competence* by which an arbitral tribunal has the competence to rule on its own jurisdiction, including determining all jurisdictional issues and the existence or validity of the arbitration agreement. However, the phrase "existence or validity of the arbitration agreement," as appears in section 16(1) of the Act, is not contained or used in section 5 of the Act. The phraseology in section 5 of the Act, as regards the court's jurisdiction in relation to an arbitration agreement, is "that the arbitration agreement is *null and void, inoperative or incapable of being performed*."

It is unclear whether the court deemed the phrase "null and void" to mirror and correlate to "validity" given the Respondents' claims of the arbitration agreement having been procured by duress and undue influence. However, in light of the Respondents' pleadings, the claim was on the premise the arbitration agreement was, as a result, inoperative or incapable of being performed. Undoubtedly, there is a correlation between the court's and an arbitral tribunal's jurisdiction in relation to an arbitration agreement. This is evident in a number of situations:

(a) *An arbitration agreement is impeached as having been procured by fraud or, as is the case before High Court, duress or undue influence*: While a court must determine whether this makes the agreement "null and void" for it to decline to refer the matter to arbitration, an arbitral tribunal must rule on the "validity" of the agreement.

(b) *Existence of an arbitration agreement is disputed*: A court must assess and determine that *prima facie* an agreement exists (e.g. whether it is in writing) and it may, depending on grounds of disputation, determine if it is "null and void, inoperative, or incapable of being performed" and decline to refer the matter to arbitration. On its part, an arbitral tribunal must rule on the "existence" of the agreement.

(c) *Dispute between the parties is beyond the scope of an arbitration agreement*: While a court must determine if there is an "arbitrable dispute" and, if not, it should decline to refer the matter to arbitration, an arbitral tribunal must likewise determine, as a jurisdictional issue, that the dispute before it is contemplated by the agreement.

Case law from common law jurisdictions is instructive on principles of arbitration in sections 5 and 16 of the *Arbitration and Conciliation Act* which, in fact, mirror provisions in arbitration legislation in those jurisdictions. Ouster of the court's jurisdiction in favour of the arbitration tribunal in relation to arbitration agreements is affirmed by both legislation and case law. In terms of the existence of an agreement, this is properly the purview of the arbitral tribunal. In *Assumption Sisters of Nairobi Registered Trustee v Standard Kebathi & Another* [2008] eKLR—in which the applicant challenged the existence of an arbitration agreement on basis of which the second respondent, as arbitrator, assumed jurisdiction of its dispute with the first respondent—the High Court of Kenya found the correspondences between the parties qualify to "form an arbitration agreement" and were a sufficient basis upon "which the Arbitrator, as confirmed by this court, could arrive at a conclusion that an arbitration agreement exists." In contrast, a court must consider whether an arbitration agreement is *null and void, inoperative or incapable of being performed*. In *Sun Life Assurance Co of Canada v CX Reinsurance Co Ltd* [2003] EWCA Civ 283—in which an arbitration agreement was included in treaty terms that were the subject of negotiations between the parties but never signed—the English Court of Appeal upheld the decision of the trial judge who was of the opinion there was no arbitration agreement concluded between the parties. In terms of the application for a stay of proceedings brought under section 9 of the *Arbitration Act* 1996, the trial judge found the agreement relied upon "null and void" within the meaning, and for the purposes, of section 9(4) of the Act.

In effect, a court must apply the proper principles in provisions of the arbitration law. Section 9(4) of the English *Arbitration Act* 1996 mirrors section 5(a) of Uganda's 2000 Act.

The other principles in section 5 of Uganda's Act—on the inoperativeness and incapability of performance of the arbitration agreement—have likewise found exposition in the case law. In *Downing v Al Tameer Establishment* [2002] EWCA Civ 721—in which the defendant denied the existence of any contractual relationship and the plaintiff, having accepted the defendant's repudiation of the agreement (including the arbitration agreement), commenced proceedings in court—the English Court of Appeal, having considered the repudiation of the arbitration agreement, refused the defendant's application for a stay of court proceedings. The Court of Appeal held that "the arbitration agreement … is 'inoperative' for the purposes of s. 9(4) of the 1996 Act."

In contrast, in *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & Others* [2019] QSC 173, the plaintiff argued that claims against the three defendants risked being determined by court and arbitration as different forums as to render the arbitration agreement "incapable of being performed". The Queensland Supreme Court rejected an application for stay and noted that the term in section 8(1) of the *Commercial Arbitration Act* 2013 related to the capability of parties to perform an arbitration agreement rather than mere difficulty or inconvenience or delay in doing so. The Queensland Supreme Court stated that:

> *"Mere inconvenience, such as might arise if the claims against the second and third defendants were permitted to be actively pursued in the court, at the same time as the arbitration of the claim against the first defendant, does not render the arbitration agreement "incapable of being performed."*

Section 8(1) of Queensland's 2013 Act mirrors section 5(a) of Uganda's 2000 Act.

In terms of the second ambit of section 5 of Uganda's Act—as regards absence of an arbitrable dispute—this seems not to have been a concern before the High Court since the Respondents conceded to the existence of a dispute. For clarity, existence of a dispute in itself does not make the dispute an "arbitrable dispute." That said, case law is rich on this ambit of section 5 of the Act that should inform future decisions in Uganda—from *University of Nairobi v NK Brothers Ltd* [2009] 1 EA 439 (Kenya Court of Appeal considered the arbitrable dispute in construction contracts to include certified contractual amounts, interest, etc. sufficient to cause the suit to be referred to arbitration) to the recent *Cheung Shing Hong Ltd v China Ping An Insurance*

(Hong Kong) Co Ltd [2020] HKCFI 2269 (Hong Kong High Court found the arbitrable dispute in an insurance policy, upon the proper construction of the dispute resolution (DR) clause, to cover both issues of liability and quantum, and thus granted stay of the proceedings in favour of arbitration). The provisions of arbitration legislation involved are section 6(1)(b) of Kenya's *Arbitration Act* 1995 and section 20(1) of Hong Kong's *Arbitration Ordinance* Cap 609. These mirror section 5(b) of Uganda's 2000 Act.

It is evident from these decisions that the question of the existence of an "arbitrable dispute" calls for a proper construction of arbitration agreements or clauses (often in terms of "good commercial sense"). Additionally, courts are likely to defer to the presumption in favour of "one-stop" jurisdiction and have all the disputes or differences resolved by arbitration. In that sense, if the parties intend that specific disputes should be adjudicated in different forums, clear language must be used to spell out such intention in the arbitration agreement or clause.

Conclusion.

The ruling of the High Court examined the relationship between the jurisdiction of court and arbitral tribunals in relation to arbitration agreements. It reiterated the limited character of court's intervention in arbitration-related matters in terms of section 9 of the *Arbitration and Conciliation Act*. Further, the ruling underscores the fact that court is required to conduct a hearing of an application as envisaged under section 5 of the Act—however, as analysis in this Alert establishes, a court's inquiry is to ascertain voidness, inoperativeness, and incapability of performance of an arbitration agreement, or the absence of an arbitrable dispute. In a sense, the court's ruling affirms the concurrent jurisdiction by a court and an arbitral tribunal over an arbitration agreement. As this Alert clarifies, a court's role is to ascertain the *prima facie* existence of an arbitration agreement; however, in ruling that the *existence and validity* of an arbitration agreement (and other contractual matters) is properly an issue to be addressed by an arbitral tribunal in a matter referred to arbitration, the High Court highlights the doctrine of *Competence-Competence* in Uganda's arbitration law.

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