



CONSTRUCTION  
LAW  
INSTITUTE

# Construction Law **DIGEST**

Vol. 1  
**2025**



# Contents

<b>1</b>	Foreword from the Chairman
----------	----------------------------

---

## Articles

---

<b>3</b>	Employers Protection Under The 1999 And 2017 Fidic Redbook: Delay Damages.
----------	--

---

<b>12</b>	Contraction Variations In Construction Contracts: Law Practice And Procedure
-----------	--

---

<b>21</b>	The Role Of Architects In Ensuring Public Safety
-----------	--

---

## Cases

---

<b>27</b>	An oral contract can be inferred from the parties' conduct: <i>J. K. Patel v Spear Motors Ltd, Supreme Court of Uganda, SCCA No. 4 of 1991, delivered on 11 October 1991 [Seaton, JSC]</i>
-----------	--

---

<b>29</b>	A party awarded liquidated damages is stopped from being granted general damages: <i>Roko Construction Limited v Kobusingye Janet, High Court of Uganda (Commercial Division), HCMC No. 022 of 2021 delivered on 17 January 2022 [Stephen Mubiru, J]</i>
-----------	--

---

<b>31</b>	Adjudication decisions are final and capable of being executed only when a dissatisfied party does not commence Arbitration Proceedings within the contractually stipulated Timeline: <i>Uganda National Roads Authority v. TK Engineers Ltd &amp; Bank of Uganda Misc. Application No. 750 of 2019 (Arising from EMA 683 of 2019) High Court of Uganda (Execution and Bailiffs Division) delivered on 07 August 2019 [P. Basaza-Wasswa, J]</i>
-----------	---

---

<b>33</b>	Estoppel by conduct-Preventing Unjust Enrichment: <i>Arch. Joel Katerega &amp; Another v. Uganda Posts Ltd, High Court of Uganda (Commercial Division), HCCS No. 020 of 2010 delivered on 12 July 2012 [Hellen Obura, J]</i>
-----------	--

---

<b>35</b>	In the absence of a cross claim for damages for defects or omissions, a Plaintiff is entitled to the full contract price when a project has been substantially completed: <i>Kituni Construction Co. Ltd. v Julius Okeny, High Court of Uganda (Commercial Division), HCCS No. 0250 of 2004 delivered on 31 October 2007 [Yorokamu Bamwine, J]</i>
-----------	--

---

# Contents

- 37** An employer is under no obligation to vary the contract price under a fixed term contract: *Hydro Engineering Services Co. Uganda Ltd v. Thorne International Boiler Services Ltd, High Court of Uganda (Commercial Division), HCCS No. 0818 of 2003 delivered on 0 September 2008 [Yorokamu Bamwine, JJ]*
- 
- 39** A quasi contract is formed once a party retains and enjoys a benefit under a construction contract that was not part of the agreed terms of the contract: *BuildTrust Construction (U) Ltd v Martha Rugasira, High Court of Uganda (Commercial Division), HCCS No. 288 of 2005, delivered on 23 January 2008 [Geoffrey Kiryabwire, JJ]*
- 
- 41** A final certificate for payment is irreversible and concludes a contract: *Omega Construction Company Ltd v Kampala Capital City Authority, High Court of Uganda (Commercial Division), HCCS No. 780 of 2015, delivered on 28 August 2017 [Christopher Madrama Izama, JJ]*
- 
- 43** Substantial Completion of a lumpsum contract entitles the Contractor to full payment of the contract fees despite errors or omissions in the project: *Sietco v Noble Builders (U) Ltd, Supreme Court of Uganda, SCCA No. 31 of 1995, delivered on 03 March, 1997 [Coram: Wambuzi, C.J, Odoki, Tsekooko, JJSC]*
- 
- 45** “Pay Now, argue later”: Fraud as an exception: *Uganda Electricity Transmission Company Limited v. Citibank Uganda Limited and Others, High Court of Uganda (Commercial Division), High Court Miscellaneous Application No. 1397 of 2022, delivered on 22 December 2022 [Stephen Mubiru, JJ]*
- 
- 47** Court has jurisdiction to order for enforcement of an Adjudication Decision as a contractual obligation between the parties: *Debswana Diamond Company (Pty) Ltd v Liftoff Investments (Pty) Ltd, Court of Appeal Civil Appeal No. CACGG-292-23, delivered on 7 June 2024 [Coram: Lesetedi JA, Walia JA, Tebogo-Maruping JA]*
- 
- 50** Estoppel as a bar to a claim premised in Fraud: *Uganda National Roads Authority v. Dott Services Limited and Professional Engineering Consultants Ltd, Court of Appeal of Uganda, Civil Appeal No. 234 of 2021, delivered on 28 September 2022. [Coram: Musoke, Muzamiru-Kibeedi and Gashirabake, JJA]*
- 
- 53** Change in price as a result of quantities of work done does not necessitate an amendment required by Regulation 55 of the PPDA Regulations: *Uganda National Cultural Centre v. Ambitious Construction Company Limited, High Court of Uganda (Commercial Division), High Court Miscellaneous Cause No. 0067 of 2023, dated 16 August 2024 and delivered online (ECCMIS) on 21 August 2024 [Harriet Grace Magala, JJ]*

# Contents

- 55** Fraud overrides all technicalities: *National Social Security Fund & Another v Alcon International Ltd, Supreme Court of Uganda, Supreme Court Civil Appeal No. 15 of 2009 [2013] UGSC 4 delivered on 08 February [Coram: Odoki, CJ, Tsekooko, Katureebe, Kitumba and Kisaakye, JJSC].*
- 
- 58** Non interference by court in Arbitration Matters except as provided for under the Arbitration Laws: *Babcon Uganda Limited v Mbale Resort Hotel Limited, Supreme Court of Uganda, SCCA NO. 06 of 2016 delivered on 04 July 2017 [Coram: Katureebe, CJ; Arach-Amoko; Mwangusya; Opio-Aweri; Mwondha, JJSC]*
- 
- 60** A contractual obligation in respect to time is a condition precedent; breach of which entitles the aggrieved party to terminate the contract: *Damuco Investments Limited v Opportunity Bank (U) Limited, High Court of Uganda (Commercial Division), High Court Civil Suit No. 0589 of 2019 dated 15 October 2024. Judgment delivered via ECCMIS (online) on 12 November 2024 [Harriet Grace Magala, J]*
- 
- 62** Force Majeure is not an automatic wand to a defaulting party: *Zimwe Enterprises Hardwares and Constructions Limited v Attorney General, Court of Appeal of Uganda, Court of Appeal Civil Appeal No. 0116 of 2019 delivered on 30 August 2024 [Coram: Egonda-Ntende, Mulyagonja & Luswata, JJA]*
- 
- 64** Save for fraud, an on demand guarantee must be honored by the guarantor without regard to any dispute arising from the underlying contract: *VS Hydro Uganda Limited & 3 Others v Rwenzori Hydro (PVT) Limited & 3 Others, High Court of Uganda (Commercial Division), High Court Misc. Application No. 0030 of 2022 (Arising from Civil Suit No. 0022 of 2022) delivered on 13 March 2023 [Stephen Mubiru, J]*
- 
- 66** Part Performance is a bar to a defense of nonexistence of an Arbitration Agreement: *Mohammed Mohammed Hamid v Roko Construction Ltd, Supreme Court of Uganda, Supreme Court Civil Appeal No. 14 of 2015 delivered on 05 May 2017 [Coram: Katureebe, CJ; Tumwesigye; Arach-Amoko; Mwondha; Tibatemwa, JJSC]*
- 
- 69** Quantum Meruit as a remedy to an aggrieved contractor: *Mohammed Saru T/A Moonlight Transporters and Contractors V Jinja Central Division Council & the Attorney General High Court of Uganda (Commercial Division), High Court Civil Suit No. 223 of 2009 delivered on 17 August 2012 [Christopher Madrama, J]*
-



# Foreword From The Chairman



**RSU Victor B.O. Odongo,**  
**MCI Arb**  
Chairman, Construction Law Institute

It is with great honour that I present to you the inaugural issue of the Construction Law Institute Digest. This marks a significant milestone in our journey to foster a deeper understanding of construction law, provide a platform for dialogue and champion excellence within the built environment and legal sector.

The Construction Law Institute (CLI), incorporated in May 2020, was established with a clear vision: to foster a thriving and sustainable African construction industry. From its inception, the Institute has sought to address the critical need for specialized expertise in the complexities of construction, an industry pivotal to national development. Our mission remains steadfast— to bring together experts and professionals in advancing best practices in the construction industry through training, advocacy and research for the benefit of all stakeholders.

The governance of CLI is spearheaded by a diverse and experienced Board of Directors, comprising professionals with expertise across various disciplines relevant to construction law. Our Directors comprise the lawyers; David Kaggwa (Executive Director), Joan Kyomugisha, Kenneth Akampurira, Ronald Tusingwire and Asmahaney Saad; an Engineer, Ian Paul Bakiza; an Architect, Doryne Oburah Mbwire and two quantity surveyors, myself and RSU Kaheru Philip.

Since our inception, CLI has achieved several significant milestones. In 2023, we held our first two training programs: the “Principles of Construction Adjudication” in May and “The Practice of FIDIC Contracts” in September, which laid a strong foundation for our educational initiatives.

Building on this success, 2024 saw the "Effective Construction Claims" training in July and a series of webinars, namely:

- The Effect of the Amendments to the PPDA Regulations on the Construction Industry (presented by John Kalemera, Esther Kusiima, and Joan Kyomugisha) in March, 2024.
- Enforcement of Guarantees in Construction Contracts (presented by David Kaggwa and Isaac Ssekabanja) in May, 2024.
- The Role of Dispute Boards in Dispute Avoidance and Adjudication (presented by Eng. Ian Bakiza and RSU Kaheru Philip) in June, 2024.

- Navigating Project Management in Construction Contracts (presented by Philip Kaheru, Doryne Oburah Mbwire and moderated by Masaba Bridget Grace) in September, 2024.

In addition to these programs, 2024 was marked by other significant achievements, that is;

- Signing a Memorandum of Understanding with the Uganda Society of Architects on June 14, 2024 and initiating collaborative discussions with Cavendish University and Makerere University.
- The launch of the CLI Adjudication Rules and Panel during the "Effective Construction Claims" training in July 2024, which streamlined the adjudication process by establishing a panel of experienced professionals. By setting up a panel of experienced professionals and a clear framework, we made the adjudication process faster, fairer and more efficient—reinforcing CLI’s commitment to excellence in the construction industry.
- Notably, we gained accreditation from the Uganda Law Council to become a Continuing Legal Education (CLE) provider in September 2024. Building on this achievement, we are actively partnering with key professional bodies in the built environment to expand our impact.
- Completing the organization's governance and setting up a Secretariat.

This year, we are eager to expand our training offerings further and engage in more collaborative events with our partners, such as the Uganda Society of Architects. Our goal is to continue fostering partnerships with both local and international organizations and to advance thought leadership by facilitating research and discussions on critical issues, including emerging technologies, sustainability and innovation in construction and dispute resolution.

This digest embodies our commitment to communication, education and collaboration. It serves as a bridge between our members, stakeholders and the broader community, offering insights into industry trends, expert opinions and practical resources.

I would like to express my gratitude to the contributors of this digest, whose dedication and expertise have brought this vision to life. Special thanks go to Ann Namara Musinguzi and Paul Mukiibi, who meticulously edited the cases included in this digest. I am confident that this platform will become an invaluable resource for professionals in construction law and beyond, inspiring progress and collaboration in our field.

Let this digest be a symbol of our collective commitment to shaping a robust construction law landscape. Together, we will build not only structures but also systems that stand the test of time.

Happy reading!

RSU Victor B.O. Odongo, MCIArb  
Chairman, Construction Law Institute

## ■ Employers Protection Under The 1999 And 2017 Fidic Redbook: Delay Damages.



**DAVID KAGGWA,**

FCIArb, FICCP LLM  
( Construction Law & Arbitration )  
RGU Arbedeen

Most standard forms of construction contracts contain provisions that protect both the Employer and the Contractor in cases of breach of contract by either party. Such breaches of contract include but are not limited to delayed payments and delays in completion of the Project.

The Contractor's protection under the contract is an Extension of Time Clause, which cushions them from any liability accruing from not completing their contractual obligations in time due to a breach, delay, or impediment by the Employer.<sup>1</sup> On the other hand, the Employer is protected from Contractor breaches arising from the project's delay through the contractual remedy of **Liquidated Damages/Delay Damages**.

Liquidated Damages is a term used in the Joint Contracts Tribunal (JCT) Building Contracts, while Delay Damages is used in the FIDIC Rainbow Suite of Contracts. Both Delay Damages and Liquidated Damages refer to a contractually pre-agreed sum to which the Contractor is liable to pay the Employer should it fail to complete the Works by the Time for Completion indicated in the Contract or as extended by the Employer from time to time. These funds are typically deducted from what the Employer owes the Contractor for the work executed.

Clause 1.1.28 of the FIDIC Conditions of Contract for Construction for Building and Engineering Works designed by the Employer, 2017 ("The Redbook"), defines Delay Damages to mean the damages for which the Contractor shall be liable under Sub-Clause 8.8 [Delay Damages] for failure to comply with Sub-Clause 8.2 [Time for Completion]. Time for Completion is defined under Clause 1.184 to mean the time for completing the Works or a Section under Sub Clause 8.2 [Time for Completion], as stated in the Contract Data as may be extended under Sub-Clause 8.5 [Extension of Time for Completion], calculated from the Commencement Date. Commencement Date is defined under Clause 1.1.7 as the date for commencement of the works as stated in the Engineer's Notice issued under Sub-Clause 8.1 [Commencement of Works].

<sup>1</sup> The extension of time clause also preserves the Employer's right to issue Liquidated Damages.



Both the FIDIC 1999 Redbook and the FIDIC 2017 Redbook provide for a formula for calculation of the Delay Damages. Sub Clause 8.7 of the FIDIC Redbook 1999 provides that these delay damages shall be the sum stated in the Appendix to Tender, which shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over-Certificate. FIDIC 2017 Sub-Clause 8.8, states that Delay Damages is the amount stated in the Contract Data, which shall be paid for every day which shall elapse between the Time for Completion and the Date for Completion of the Works or Section. The Delay Damages are expressed in the Contract Data/Appendix to Tender as a percentage of the final Contract Price. These damages can also be capped at a maximum percentage of the final Contract Price.<sup>2</sup> The benefit of delay damages is that they avoid the complexity of proving and assessing the actual loss where a delay occurs.

As indicated, the purpose of an Extension of Time is to negate any claim for delay damages during the extended period. To avoid payment of delay damages, in case of an Employer caused delay, a Contractor must follow the Claims Procedure under Sub Clause 20.1 of FIDIC 1999 Redbook [Contractor's claims] and Sub Clause 20.2 of the FIDIC 2017 Redbook [Claims for Payment and/or EOT] and obtain an Extension of Time

The Procedure for filing an Employer's Claim for Delay Damages is provided for under Sub Clause 8.7 of the FIDIC 1999 Redbook. The Employer is required to issue a Notice subject to Sub Clause 2.5 [Employer's Claims]. The Notice is to be given as soon as practicable after the Employer becomes aware of the event or circumstances giving rise to the claim. Under the FIDIC 2017 Red book, the procedure is more detailed. Under Sub Clause 8.8 of the FIDIC 2017 Redbook, the Employer is required to give a Notice subject to Sub Clause 20.2 [Claims for Payment and/or EOT]. The notice is to be given as soon as practicable and not later than twenty-eight days after the Employer becomes aware or should have become aware of the event or circumstance..

---

<sup>2</sup> To note that under FIDIC 2017 Red book, that cap will not apply "in any case of fraud, deliberate default or reckless misconduct by the Contractor.



Before an Employer can levy a claim arising out of Liquidated Damages, there are four pertinent prerequisites that they must fulfill, which are; an explicit provision in a contract that allows a claim for delay damages and sets out the procedure for lodging the same, the contract must have a date for practical completion or a mechanism to extend such a date and the contract must include a mechanism for computation of delay damages. Most critically, the Employer is required to issue a Notice as a Condition Precedent to its claim for Delay Damages.

**In the case of NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago),<sup>3</sup>** in reference to Sub Clause 2.5 of the 1999 FIDIC Redbook, the Court stated:

*“...it is hard to see how the words of clause 2.5 could be clearer. Its purpose is to ensure that claims which an employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given ‘as soon as practicable.’”*

*Whereas an Employer is obliged to issue a Notice to the Contractor and present a claim for Delay Damages before the Engineer who is obliged to issue a Determination under the FIDIC SC 3.5 (Red Book 1999), the Court had a different view in **J Murphy & Sons Ltd v Becht Energy Ltd**<sup>4</sup> wherein it stated that:*

*“The Employer’s right to delay damages was not conditional upon an agreement or determination by the Engineer, Sub-clause 8.7 sets out a self-contained regime for the trigger and payment of delay damages. A call on the bond would not be found to be fraudulent where the Employer believed it was entitled to delay damages under Sub-Clause 8.7, even though no entitlement had been determined under Sub-clauses 2.5 and 3.5.”*

---

<sup>3</sup> [2015] UKPC 37  
<sup>4</sup> [2016] EWHC 607



In ***Triple Point Technology Inc v PTT Public Company Ltd*** the Supreme Court in UK stated that Liquidated damages are payable up to the date of termination, with general damages available thereafter. In Uganda, however, the High Court had a different position in the case of *Roko Construction Limited v Kobusinge Janet*. The Court, while setting aside part of an Arbitral Award, held as follows:

Contrary to the widely believed myth that Delay Damages are meant to punish the Contractor for breach of contract, the FIDIC Conditions of contract cap the amount of Delay Damages that can be levied. The Courts have also further clarified that the amount of Delay Damages must be a reasonable estimate of the anticipated or actual loss caused to the Employer by the delay.

The UK Supreme Court laid down the test in ***Cavendish Square Holding BV v Talal El Makdessi***.<sup>5</sup> The test is whether the delay damages clause protects any legitimate business interest. If so, whether the clause is extravagant, exorbitant, or unconscionable. In cases where delay damages are proved to be unconscionable, such a clause may be declared by a Court to be unenforceable.

In ***Triple Point Technology Inc v PTT Public Company Ltd***<sup>6</sup> the Supreme Court in UK stated that Liquidated damages are payable up to the date of termination, with general damages available thereafter. In Uganda, however, the High Court had a different position in the case of *Roko Construction Limited v Kobusinge Janet*. The Court, while setting aside part of an Arbitral Award, held as follows:

*“Liquidated damages are a way of pre-estimating the loss that will be suffered, usually as a result of delay, at the time the contract is entered into. In this sense, liquidated damages provide certainty to both parties whose rights and liabilities are now fixed. A valid and mandatory liquidated damages clause which stipulates a positive amount of liquidated damages will evidence an intention by the parties that general damages cannot be claimed. The award of general damages on top of or in addition to liquidated and ascertained damages is a fundamentally erroneous proposition of law stated in the award such that a serious irregularity has occurred, which has caused substantial injustice to the Applicant.*”

---

<sup>5</sup> [2015] UKSC 67

<sup>6</sup> [2021] UKSC 29

It should be noted that in as much as liquidated damages are contractual and the parties' freedom to contract should be respected and upheld, the Courts shall intervene in instances where the amount agreed upon as liquidated damages is greater than what reasonably, considering the circumstances, should be paid. This is premised on the fact that the Employer's interest is to have the Contractor perform the Contract. The Employer cannot have an interest in simply punishing the Contractor.

If the amount to be paid as delay damages is greater than that which ought to have been paid, then it is a penalty.<sup>7</sup> A penalty is a contractual clause that imposes unreasonably high liquidated damages. Such damages represent a punishment for breach rather than a reasonable forecast of damages for the harm caused by the breach. A Contractor may challenge a Delay Damages clause if he argues that it is a penalty and not a genuine estimate of the losses that the Employer will incur as a result of delays.

In South Africa, under the Conventional Penalties Act,<sup>8</sup> the court can reduce the amount of Delay Damages that might be applicable if the Contractor can show that the Employer will be unjustly enriched if he receives the Delay Damages as specified in the Contract.

In the United Arab Emirates, the Court is empowered to vary the parties' agreement on Delay Damages to reflect the actual loss by reducing the Employer's claim or by setting them aside.

The Contractor bears the burden of proof to show that the penalty is out of proportion to the loss suffered by the Employer.

Further, in the case of **Grocon Constructions (Qld) Pty Ltd v Juniper Developer No. 2 Pty Ltd & Anor**<sup>9</sup> the Queensland Supreme Court held that in determining whether a rate of Liquidated Damages stipulated in a contract constitutes a genuine pre-estimate of the non-defaulting party's loss, consideration must be given to the parties' negotiations regarding Liquidated Damages. In this case, the Employer had provided the Contractor a detailed breakdown of its potential losses if practical completion of the project had not been achieved. The Court placed significant weight on the fact that both Juniper and Grocon were sophisticated commercial parties who were in receipt of expert legal advice and had equal bargaining power when negotiating the Contract. The Supreme Court held that the liquidated damages clause was a genuine pre-estimate of loss and, therefore, upheld it.

It is a trite construction law principle that in instances where an Employer has contributed to the delay for which it seeks Liquidated Damages, the Employer is prevented by their conduct from being granted Liquidated Damages. The 'prevention principle' is a legal doctrine that protects a contractor from liquidated damages for delays caused by the Employer. An Employer may not enforce a Delay Damages clause against a Contractor where the Contractor proves that the Employer prevented it from performing its obligations under the Contract. The rationale for the rule is that a party to a contract should not be permitted to profit from its own default.<sup>10</sup>

---

7. Dunlop Pneumatic Tyre Co. Ltd V New Garage and Motor Co [1915] AC 79

8. Act 15 of 1962

9. [2015] QSC 102

10. Brooking J in SMK Cabinets v Hili Modern Electrics Pty Ltd (1984) VR 391 described the prevention principle

The prevention principle was set out in **Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board**.<sup>11</sup> as thus:

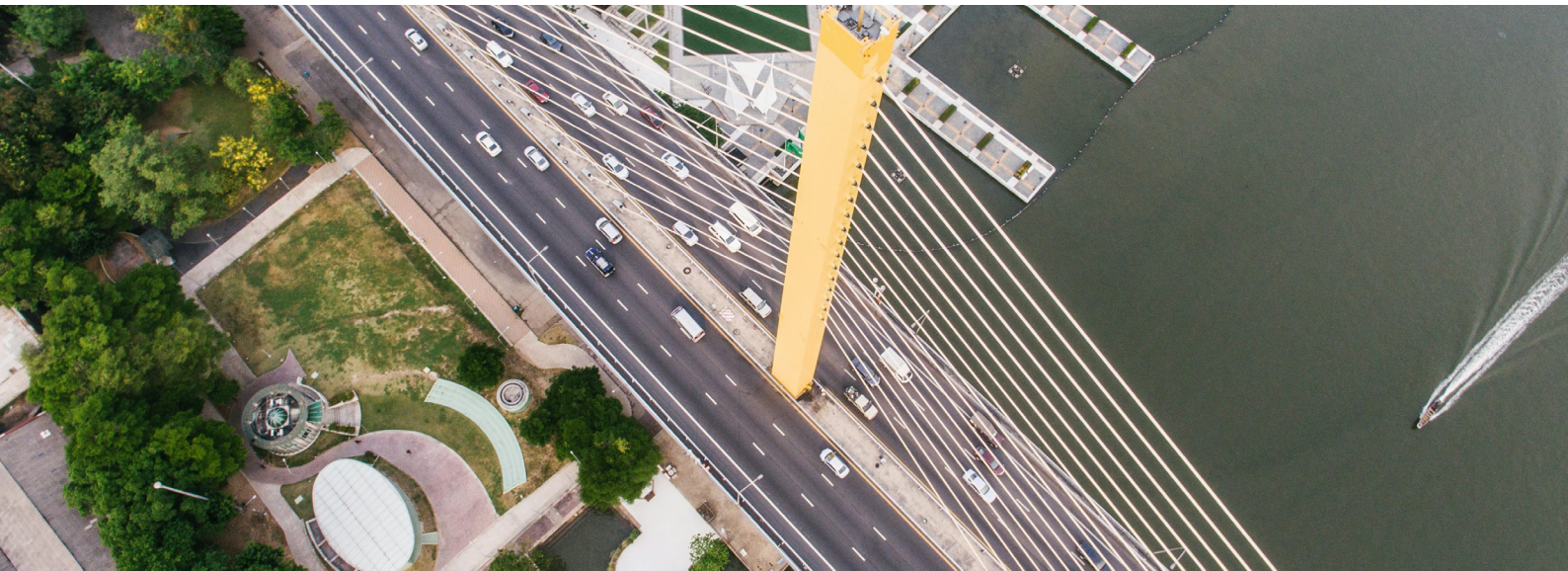
*“It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if the other party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time.”*

Lord Denning, in **Amalgamated Building Contractors Ltd v Waltham Holy Cross Urban District Council**,<sup>12</sup> in expounding on the Prevention Principle, stated that:

*“... the building owner cannot insist on a condition if it is his own fault that the condition has not been fulfilled.”*

A Contractor may rely on the prevention principle in cases of breach of contract by the Employer, such as failure to give access to the site (FIDIC 1999 and 2017 Red Book Sub Clause 2.1) or a delay in issuing designs or instructions (FIDIC 1999 and 2017 Red book Sub Clause 1.9). The prevention principle applies even when the employer’s actions are legitimate, such as issuing a variation instruction. (FIDIC 1999 Red book Sub Clause 13.1 and FIDIC 2017 Red book Sub Clause 13.3).

The prevention principle also applies when the Employer does not extend the contract or there are no contractual mechanisms to extend the Contract. In such a case, the Contractor may rely on the prevention principle and avoid paying delay damages.



11. [1973]2 AER 260

12. (1952) 2 AER 452

The FIDIC 1999 Red Book Sub Clause 8.4(e) and FIDIC 2017 Red Book Sub Clause 8.5 (e) allow a Contractor to Claim an Extension of Time for any delay, impediment, or prevention caused by or attributable to the Employer. The above clause was meant to provide a solution to the prevention principle in that a Contractor must claim for Extension of time when prevented. If not, this will safeguard the Employer's right to Delay Damages.

Where the Contract does not provide for how to deal with an Employer's delay or If the Engineer ignores the Contractor's request for an extension of time, the Employer will no longer be entitled to require the Contractor to complete the works by the contractual Time for Completion and time will be at large.

The principle of Time at Large was expounded upon in the case of **Miller v London County Council (1934)**, where the Court held thus:

*"...even if the clause had provided for an extension of time on account of the delay caused by the contractor, the failure in this case of the architect to extend the time would be fatal to the claim for liquidated damages. There had clearly been some delay on the part of the corporation. Accordingly, as the architect has not made 'by writing under his hand such an extension of time,' there is no date under the contract from which the defendant's liability to pay liquidated damages for delay could be measured. And therefore, none can be recovered."*

*When the Original Completion date ceases to apply, time will be at large, and the Contractor is required to complete the Works within a reasonable time. When time is at large, the Employer is not entitled to Delay Damages but to General Damages in case the Contractor fails to complete the works within a reasonable time. Reasonable time for completion is a matter of fact to be decided by a Court or Arbitrator when the claim arises, but the Contractor bears<sup>13</sup> the burden of proof. (Shawton Engineering Ltd v DGP International Ltd.)<sup>13</sup>*

---

13. [2006]BLR 1





## ■ Conclusion

In conclusion, a contractual clause on delay damages is the most critical remedy available for Employers in cases of breach by the Contractor. However, the same is not cast in stone. It should be reasonable and proportionate to the actual loss suffered. The Employer cannot benefit from it in situations where its actions have contributed to the delay in the completion of the contract and in circumstances where time is said to be at large.



## ■ Construction Variations In Construction Contracts: Law Practice And Procedure



**Eng. Bakiza Ian Paul**

MCI Arb, BCiv(MUK), R.Eng, M.U.I.P.E

**Road Development Manager  
UNRA**

Construction projects often face changes in the form of variations. These may be attributable to a multitude of factors arising from the unpredictable nature of project-specific risks, as well as inadequate scope clarity by the project owners during the tendering process.

Variations are changes, modifications or alterations to the agreed scope of works, such as drawings, specifications, bills of quantities, or employer's requirements.

Variations may also manifest as modifications to; the quantity of works in the schedules, quality defined in the specifications, dimensions in the drawings or reference documents.

The FIDIC suite of contracts defines variations as "...any changes to the work instructed or approved as a variation under clause 13 [Variations and Adjustments]. The PPDA conditions of contract place no operational definition of "variation", but instead the Public Procurement and Disposal of Public Assets (PPDA) Regulations define "change orders" and "contract amendments" with thresholds on the adjustments. Although the term "variations" is frequently referred to as used in both forms of contract, the lack of a clear operational definition increases the likelihood of disputes in the management of variations on contraction projects.

The distinction between changes to scope of works and variations under construction variations is not without controversy. Not all changes to the contract are variations, but variations inevitably result from changes in the contract.

---

<sup>1</sup> Lorem ipsum Lorem ipsumLorem ipsumLorem ipsum  
Lorem ipsum Lorem ipsumLorem ipsumLorem ipsum

The FIDIC suite of contracts defines variations as “...any changes to the work instructed or approved as a variation under clause 13 [Variations and Adjustments]. The PPDA conditions of contract place no operational definition of “variation”, but instead the Public Procurement and Disposal of Public Assets (PPDA) Regulations define “change orders” and “contract amendments” with thresholds on the adjustments. Although the term “variations” is frequently referred to as used in both forms of contract, the lack of a clear operational definition increases the likelihood of disputes in the management of variations on construction projects.

The distinction between changes to scope of works and variations under construction variations is not without controversy. Not all changes to the contract are variations, but variations inevitably result from changes in the contract.

Contract changes may well be within the anticipation of the parties prior to tender, and therefore the operation of such clauses shall not constitute a variation. This may occur when the quantities in the bill of quantities differ from those executed on-site, as per contractual drawings.

Contractors often have an implied duty under construction contracts to execute all scope that is indispensably necessary for the proper completion and/or functioning of the works, and such changes may not be interpreted as variations.<sup>1</sup>

The client’s power to omit works and instruct changes is not without limitation, such that the basic nature of the project should not be changed by an entire variation.<sup>2</sup>

Construction contracts contain variation clauses typically to allow a project owner to make changes to the scope without the need to go through the protracted and costly process of procuring a separate contract.

It is therefore crucial that the parties predefine and agree how any adjustments to the contract shall be affected whenever variations are encountered.

Notwithstanding the contract provisions for managing variations, significant disputes still subsist between the contracting parties regarding the interpretation and implementation of such clauses.

The objective of this article is to identify common challenges in the implementation of variation provisions in construction contracts and offer valuable guidance to prevent or address them.

The scope of construction contracts referred to herein are the FIDIC conditions of Contract (Red and Yellow Books) prepared by the International Federation of Consulting Engineers, and the PPDA conditions of contract for construction works prepared by the Public Procurement and Disposal of Public Assets Authority of Uganda.

---

1. Tharsis Sulphur & Copper Co v N’Elroy (1878) 3 App Cas 1040

2. Trustees of Stratfield Saye Estate v AHL Construction (2004) EWHC 3286



## ■ Authority to issue variations.

The authority to issue instructions or approve changes in construction contracts is typically outlined in the conditions of the contract and may only be carried out by the designated person. The Public Procurement and Disposal of Assets Regulations (PPDA regulations) bestow the responsibility to issue contract variations with the Project Manager, while the FIDIC suite of contracts place this responsibility with the Engineer. In this article, both the Project Manager and the Engineer shall be referred to as the Contract Administrator.

It is not uncommon for Contract Administrators to issue verbal instructions or such written instructions, which constitute significant changes to the scope of works.

Whenever a variation instruction is issued by the Contract Administrator, it is recommended that the Contractor formally requests written confirmation of such instructions and the specific method of valuation for payment, as well as any necessary adjustments to the contract period arising from these varied works. This ensures clear and accurate communication between all parties involved, and helps avoid potential discrepancies or delays in the project timeline.

If there is any dispute whether an instruction issued by a Contract Administrator constitutes a variation, it is suggested that this should be urgently referred to the Dispute Adjudication Board for a decision.<sup>3</sup>

---

3. FIDIC Red Book & Yellow Book (2017), Clause 21.4.1

Whenever changes to the agreed scope of works are encountered by a contractor, and such modifications constitute a variation as defined under the relevant contract provisions, the Contract Administrator shall have the authority to evaluate the adjustment to the contract price and extension to the period of implementation of the works. The scope of the Contract Administrator's authority shall only be exercised within the limits prescribed in the contract conditions.

The Contract Administrator shall not unreasonably withhold a decision, instruction, consent or approval or comments to the variation proposal submitted by the contractor, and the courts have held that "the delay in response allowed the contractor to accept the best available terms and to be compensated accordingly."<sup>4</sup>

---

## ■ Contract entitlement for adjustment of Contract Price

Variations may be issued by the Contract Administrator as an instruction or by request for a variation proposal from the Contractor. Variation provisions principally function to alter the Contractor's obligations as to what it will build, and the Contractor may not unilaterally vary the scope of works.

The Contract Administrator may instruct variations under the contract provisions or request for a proposal from the contractor, following which he shall approve, comment, agree or determine the modifications to the contract price and/or period of implementation in accordance with the contract provisions.

Variations may not only arise from the specific instruction for modifications to contract scope, but also from when a contractor encounters unforeseen physical site conditions.

Whenever an instruction to issue a contract variation is issued, and such variation results in the increase or decrease of the estimated quantity in the contract schedules, it is essential that the contractor notifies the Contract Administrator and that the Contract

Administrator assesses under what relevant clause the Contractor derives his entitlement for adjustment in rates. This is useful, because adjustments to contract price resulting from an increase or decrease in estimated quantities may only be enforceable if such changes were reasonably unforeseeable to an experienced contractor prior to the tender base date.

The Contractor shall carry out all such instructions properly issued in accordance with the contract. With this obligation also comes the right to receive payment for the works carried out. The client's or Contract Administrator's failure to provide necessary instructions for variation shall not prejudice the Contractor's right to fair compensation. This primarily arises from the common law "prevention principle," in which the client may not gain an advantage from their own breach of the contract.

---

4. Bremer Handelsgesellschaft mbH v Vanden Avenne Izegem (1978),

## ■ Scope of Variations

The Contract Administrator shall have only such power to issue variations within the general scope of the contract, i.e. that are necessary for the proper execution and or functioning of the works. Whenever the scope and extent of the varied works is completely outside the scope of the original contract, the Contractors may not be bound to accept the work as a variation.<sup>5</sup>

Whereas the procurement law in Uganda places no restriction on changes to the contract after the issuance of the taking over certificate, the FIDIC suite of contracts prohibits the Engineer from issuance of variation instructions after the issuance of the taking over certificate.<sup>6</sup>

Under the FIDIC suite of contracts, the contractor may reject the execution of the variations if; the scope of the variation is unforeseeable, the contractor cannot readily obtain the goods (plant, equipment, materials, or personnel), or the variation will compromise the contractor's ability to comply with the health and safety or protection of the environment.<sup>7</sup>

It has been held by the courts that the general law under construction contracts is that the client/employer does not carry an implied warrant for the constructability of the works. A contractor who enters such a contract must implement the scope it has agreed to, regardless of the complexity or difficulty of execution.<sup>8</sup>

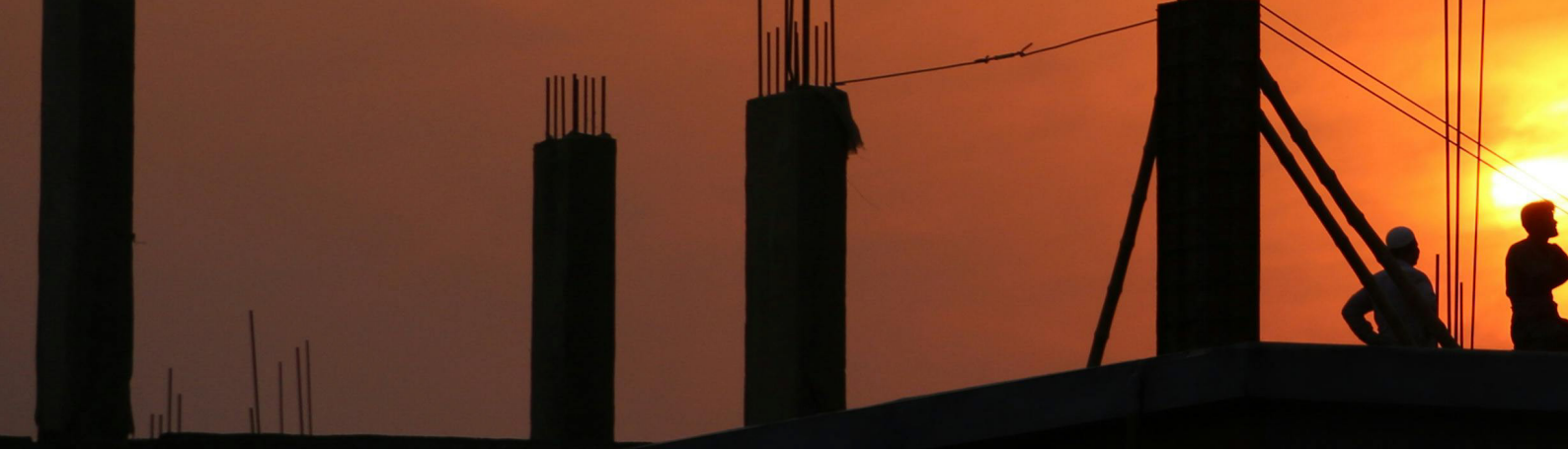
Variations under design and build contracts may be distinguished from those under a traditional contract, where the contractor simply builds to the employer's design. Under a design and build contract, the contractor may modify aspects of the works without altering the performance obligation in the contract, and therefore cannot be said to implement a variation.

It has been held by the courts that the general law under fixed price construction contracts is that the client/employer does not carry an implied warrant for the constructability of the works. A contractor who enters such a contract must implement the scope it has agreed to, regardless of the complexity or difficulty of execution.<sup>9</sup>

Whenever a contractor executes works instructed by the client or his representative (Contract Administrator) outside the original contract, the employer may be liable to pay compensation at a reasonable price in the form of restitution damages.



- 
5. Blue Circle Industries plc v Holland Dredging Co (UK) Ltd (1987) 37 BLR 40
  6. FIDIC Red Book & Yellow Book (2017), Clause 13.1
  7. FIDIC Red Book & Yellow Book (2017), Clause 13.1
  8. United States v Spearin, (1918) 248 U.S. 132
  9. Thorn v London Corporation (1876)- 1 App Cas 120



Construction contracts place an implied right on the contractor to carry out such works for which it has been contracted. However, the same contract conditions give the client the right/authority to omit scope of works. The right typically does not include the omission of scope to be undertaken by others.<sup>10</sup>

Whereas the Contract Administrator cannot unilaterally instruct variations that omit work from the contract scope for it to be done, the parties may jointly agree to omit some work scope, and the contractor can recover unutilised costs. If the omitted work is to be completed by another party, the contractor shall have the right to seek compensation for loss of profits and any other resulting losses or damages.

The governing law of the contract may also restrict the Contract Administrator's authority to instruct variations.

The procurement law of Uganda provides that a single amendment to a contract should not increase the original contract price by more than 15%, and the cumulative value of all amendments shall not increase the contract price by more than 25%.<sup>11</sup>

In common law jurisdictions, the contractor may refuse to carry out additional work or may be entitled to restitution payment if the work exceeds the limits of the contract or the law.

## ■ Issuance of Notices and Advance Warning

Many standard forms of construction contracts require the parties to issue notices or advance warning whenever they encounter events or circumstances that may adversely affect the contract, i.e., increase the Contract Price or delay the execution of the Works.

Whenever the parties encounter such circumstances that constitute variations, they should also ensure that all notices as required by the relevant contract provisions are issued in a timely manner to ensure that appropriate advance warning is given and any claims for additional payment and/or extension of time are not prejudiced by the delayed issuance of notices.

---

## ■ Methodology for valuation of Variations

While the contract provisions allow for adjustments to the contract price due to variations, they often do not clearly prescribe the specific method for such adjustments or valuation.

---

10. Abbey Developments Ltd v PP Brickwork Ltd (2003) CILL 2033

11. Public Procurement and Disposal of Assets Regulations, Regulation 54, 2023



It's not uncommon for contract disputes to emerge and escalate between the contracting parties and/or the Contract Administrator due to the interpretation or implementation of variation provisions in the contract.<sup>12</sup>

Contractor's unit rates are often referred to whenever valuing variations in construction contracts. On this basis, it is recommended to pay keen attention to the individual unit rates, not just the price, whenever negotiating or preparing tenders, because this will have the potential impact on the cost of the employer and contractor, if the original scope of work is varied.<sup>11</sup>

If the varied work items are similar to those contained in the bills of quantities and executed under similar conditions, then the valuation of the change shall typically be by utilizing rates of comparable items in the bills of quantities. In such circumstances, even where errors have been identified in the contractor's pricing, they remain applicable to the varied scope of works and shall not be adjusted except as provided under the contract.<sup>11</sup>

However, whenever the additional work is similar and executed under dissimilar conditions, the contract rate should be adjusted. If the varied work differs significantly from the contract or other schedules, a new rate should be derived from first principles.<sup>11</sup>

It is recommended that contractors submit a detailed breakdown of unit rates or other relevant schedule specified for valuation of variations and include all assumptions together with their bids. This typically forms the primary baseline for the adjustment of the contract price by the Contract Administrator and provides for equitable adjustment to the contract price.

It is also recommended that contractors keep and maintain accurate contemporaneous records of the costs actually incurred in the execution of these variations' instructions. These can provide an invaluable record for compensation or reimbursement of costs incurred because of the variation.<sup>13</sup>

However, it should be noted that a fair and reasonable adjustment to the contract price due to variations by the Contract Administrator may not only be restricted to actual costs incurred, but also include market assessment of costs.<sup>14</sup>

---

12. FIDIC Red Book & Yellow Book (2017), Clause 12.3

13. Seadrill Ghana Operations Ltd v Tullow Ghana Ltd (2018) EWHC 1640

## ■ Completeness of Variation Proposal

While instructions to vary the sequence or timing of execution of works may constitute a variation, modifications to the contract scope will often also require adjustments to the period of implementation of works.

The valuations pertaining to adjustments in the contract price constitute only one aspect of the variation proposal submitted by contractors.

Often, contractors fail to properly assess the potential impact of these changes on their productivity and the sequence of work execution. It is crucial to consider these aspects, as they can impact the resources and materials listed in the unit rate breakdown, which could ultimately impact the productivity and timeline for completing the varied scope of work.

To ensure a thorough understanding of the potential impacts of any changes on the project, it is highly recommended that the evaluation process consider all relevant aspects, including the potential cost implications, the methodology of execution, and the potential effects on the timeline for completion of the project.

## Conclusion

The effective management of variations in construction projects is a vital element in successful project delivery.

This however requires early detection through proactive risk management by project participants to evaluate the potential impact of project variations on project timelines and costs.

The parties to construction contracts should adopt contract forms that are flexible, coherent, consistent, fair, and unambiguous.

It is imperative that the parties to construction contracts appoint competent and experienced professionals who understand their rights, duties, obligations and responsibilities outlined in the contract provisions to prepare and administer their contracts.

It is also recommended to maintain clear and open communication channels between contracting parties to effectively collaborate and minimize any negative impacts or variations for successful project delivery.

---

Author:

### **Ian Paul Bakiza**

[Board Member – Construction Law Institute (CLI) |  
FIDIC Certified Contract Manager (FCCM) | Project Management Professional (PMP) | Member- Institute of Certified Claims Practitioners (MICCP) |  
Member- Chartered Institute of Arbitrators (MCIARB) | Licensed Dispute Resolution Board Practitioner (M-DRBF) | Registered Engineer (R.Eng) | Member – Uganda Institution of Professional Engineers (UIPE)



## ■ The Role Of Architects In Ensuring Public Safety And Compliance In Infrastructure Projects



**Arch. Jacqueline Namayanja**

President - Uganda Society  
Of Architects

To understand the responsibilities of a professional in the production of a final product that may have legal consequences, it is necessary to examine the professional's primary duties, the requirements for the end product, and the nature of the final product itself.

The objective of this article is to elaborate on the primary duties and responsibilities that architects hold in guaranteeing public safety in various infrastructure projects. Furthermore, it will also discuss the regulatory framework that governs their practice, as well as analyzing their active participation and contribution to the successful delivery of infrastructure projects

The architect is one of the numerous specialists participating in a construction project, contributing both innovative and technical proficiency to infrastructure projects.

Infrastructure simply put are systems and services. Any building project that is seeking to support a system or a service that is used by the public and targeting economic growth is an infrastructure project. Infrastructure projects include; transport systems (roads, bridges, railways, tunnels, among others) power and energy (dams, power farms, electricity plants) water, waste management , public recreation facilities and communication. All infrastructure projects involve planning, design, building/ execution and then for some; maintenance for a specified duration after completion of the project.<sup>1</sup> This process does not only run for public construction projects but for every construction project.

---

1. Some may simply be a maintenance requirement if already in existence.



Public infrastructure projects typically involve complex processes and require significant financial and human resources. Additionally, these projects may face various challenges, including budget overruns, delays, disputes, and technical difficulties. Other costs include; costs arising from hiring the right team, planning and design, the specified materials (construction) and the required construction processes and techniques, both legal and creative. Then of course, do not forget the Taxman!

After gaining an understanding of the fundamentals of infrastructure projects, we will now examine the team of professionals who provide consultation for these projects. This team includes architects, surveyors, engineers, environmentalists, lawyers, and insurance companies.

The role of the Architect is twofold: firstly, to bring aesthetic value through the creative function, and secondly, to ensure technical coherence among the various components that ultimately culminate in the final product. In designing any structure, the Architect prioritizes safety, functionality, beauty, and resilience in consideration of current and future environmental conditions.

All the experts on a project are governed by a set of regulations and ethics within which they operate. To note however that the most pertinent documentation on any infrastructure project is the framework of roles and administration, the Contracts! The consultants' contracts, main Contract and the sub contracts; all dependent on the nature, scope and financing circumstances of the project.

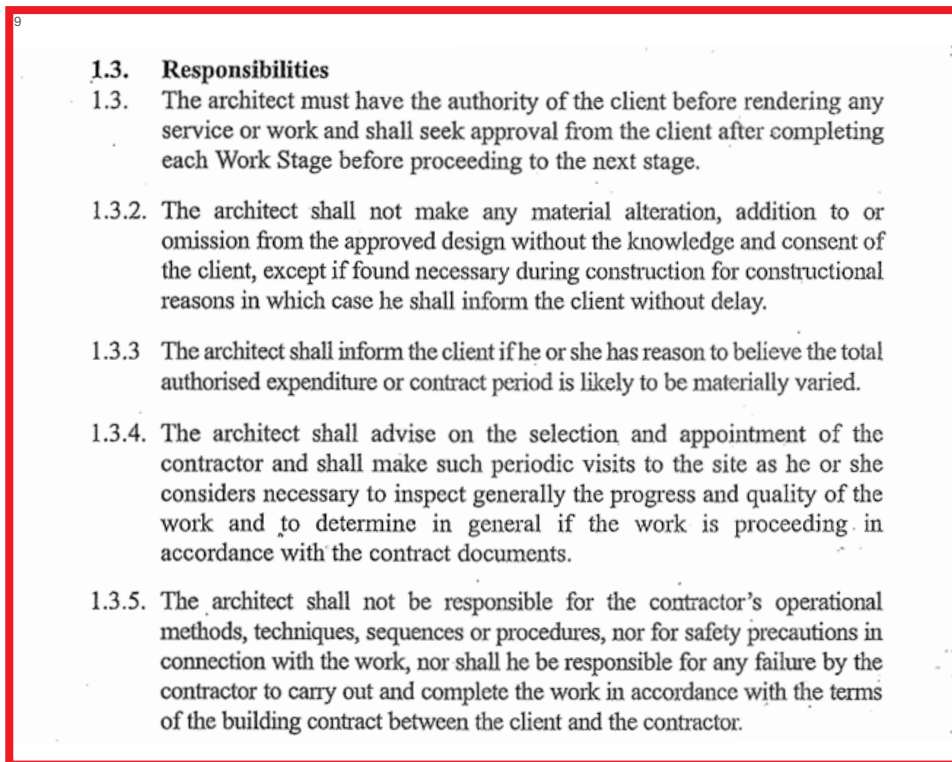


The Governing Regulations encompass a wide range of legislation, codes, and guidelines that are specifically designed to prioritize the overall safety, functionality, sustainability, accessibility, and resilience of any project. These guiding tools are crucial during the design stage as they ensure that all necessary standards of functionality and safety are met for any project undertaken by an Architect. This includes adhering to the building code of the respective country or region, following planning guidelines, and complying with various regulatory instruments.

Within the realm of the built environment, there exists a vast array of regulations, codes, and guidelines that serve as the guiding principles for professionals working in the industry. These regulations and codes are put in place to uphold the highest standards and practices, with the goal of ensuring the successful completion of any project by fulfilling all essential criteria. These rules cover a wide range of details, including but not limited to structural integrity, fire safety measures, energy efficiency and conservation, power safety, water and drainage systems.

Let us start at what the law requires the Ugandan Architect to fulfill on any project as a professional. According to the Architects Registration By-law of 2009, specifically the section on Conditions of Engagement and Scale of Fees, the following regulations are outlined

## ■ Section 1.3: Responsibilities



Part 2 of the By-Law then breaks down the stages of operation and the Architects tasks per stage and in particular, 2.1.2(D) and (E ) allude to contract documents, approvals by local authorities and (F) specifying permissions and requirements under those permissions , as well as supervisions among others.

In order for any permissions and approvals to be granted, it is imperative that the designs meet the necessary standards and codes. The implementation of these standards and codes serves the purpose of guaranteeing the project's safety, functionality, structural integrity, accessibility for both vulnerable and invulnerable individuals, and long-term sustainability. It is the architect's responsibility to ensure compliance with these standards by coordinating the design and implementation of the project with other professionals, in order to meet the needs of the end user within the parameters of these specific requirements.

The roles of the Architect in infrastructure projects is governed by the law, the contract documents and statute. Such obligations include providing advise on the selection and appointment of a contractor to ensure that the works are proceeding in accordance with the contract documents. Furthermore, the Architect and other professionals involved will oversee the project to ensure adherence to legal requirements for approvals and permissions, as well as the implementation of appropriate occupational health and safety measures, drainage management, and overall public safety.

As previously stated, infrastructure projects pose numerous challenges, including budget overruns and contractual disputes among project stakeholders. In the event that the Architect is at fault, such as in cases where multiple variations arise due to inadequate documentation or issuance of site instructions, the Client or affected party may pursue legal action or alternative dispute resolution against them for negligence and failure to fulfill their professional obligations.

The Architect is obligated to prevent such issues from arising at the beginning, and therefore implements strict quality assurance measures and meticulous processes to professionally and promptly deliver the project. In the event that another team member experiences difficulties, the Architect may need to intervene or mediate (particularly if it is a prescribed role) in order to ensure that the project stays on schedule without incurring additional costs for the client.

In instances where the other stakeholders on the project disregard compliance with building and design codes or accepted professional practices, and it becomes evident that the consequences could impact the public safety potential of the project, it is the Architects' responsibility to bring it to the attention of the relevant parties for resolution. Whenever the final decision does not align with the Architect's duty and code of conduct as a professional, one may question the reason for remaining involved.





**An oral contract can be inferred from the parties' conduct:**

---

***J. K. Patel v Spear Motors Ltd, Supreme Court of Uganda, SCCA No. 4 of 1991, delivered on 11 October 1991 [Seaton, JSC]***

The case arose from a contractual dispute regarding construction services allegedly performed by the appellant for the respondent at Nakawa. The appellant claimed to have been orally engaged by the respondent in 1982 to undertake construction work at Plot M 428 Jinja Road, Nakawa, with an agreement that payments would be made in US dollars and that the appellant would be paid in a truncated manner; after completion of each stage of the works. According to the appellant, the work was completed in stages, and amounts due were recorded during evaluations conducted with representatives of the appellant, including their General Manager and architect. By February 1986, the appellant claimed a total balance of USD 303,700, of which USD 50,000 had been paid, leaving USD 253,700 unpaid. The respondent denied the existence of the alleged agreement, disputed the terms of payment, and contended that all obligations had been settled. At trial, the High Court dismissed the suit, finding that the contract terms were "vague and sketchy" and unenforceable and further made no order as to costs.

In the appeal decided by the Supreme Court of Uganda, the appellant contested the entire decision of the High Court in Civil Suit No. 1031 of 1988. The respondent, cross-appealed on grounds that no costs had been awarded to it.

The crux of the appeal was that the trial judge erred in law when he failed to address himself to the issues agreed upon by the parties, holding that the contract terms were vague, sketchy and unenforceable. The issues related to whether there was a contract and its terms, whether there was a breach and the remedies in the event of breach.

The Supreme Court found that the trial judge had misdirected himself in determining that the contract was too vague to be enforceable. The conduct of the parties led to the conclusion that an offer on definite terms had been made by one party and accepted by the other. The evidence of conduct included correspondence (e.g., valuation notes), payment made and a definite scope of work. The Court cited *Brogden v Metropolitan Railway Company* (1876–77) L.R. 2 App. Cas. 666 in emphasizing the importance of inferring a contract from conduct.

In respect to whether there was Breach of Contract by Non-payment, the Supreme Court expounded on the evidence principle of burden of proof.

The Supreme Court reiterated the position that the initial burden of proof lies with the person alleging and when this is discharged and a hearing starts, the burden shifts to the defendant(the respondent in this case). The Supreme Court relied on Phipps on Evidence, 12th Ed. p.6 para 95 wherein it was stated that:

*“.....it rests, before evidence is gone into upon the party asserting the affirmative of the issue; and it rests , after evidence is gone into , upon the party against whom the tribunal , at the time the question rises , would give judgment if no further evidence were adduced .....”*

It was the finding of the Supreme Court that the appellant had discharged the initial burden of proof by filing pleadings that established a case and the burden then shifted to the respondent. Conversely, the respondent failed to discharge the burden since it did not adduce evidence of payment to the appellant of monies due to him. It therefore followed that the respondent was in breach of contract.

The Supreme Court allowed the appeal, declaring that a valid contract existed, and held that the respondent had breached its payment obligations. The matter was remitted to the High Court for assessment of deductions averred by the respondent in order to ascertain how much exactly was owed to the appellant by the respondent. The cross-appeal on costs was also allowed, affirming the general rule that costs follow the event. To note however that the decision of the Court on this was moot seeing that the appeal had been allowed in its entirety.

This case is very crucial because it emphasizes the principle of “contract by conduct”. This principle effectively preserves the right to payment accruing to a contractor and any other party retained by an Employer in a construction project; regardless of the mode of contract formation. However, due caution should be taken especially in light of Section 9(5) of the Contracts Act Cap 284 which makes it mandatory for contracts above the sum of UGX 500,000(Uganda Shillings Five Hundred Thousand) to be in writing.

A party awarded liquidated damages is estopped from being granted general damages:

---

***Roko Construction Limited v. Kobusingye Janet, High Court of Uganda (Commercial Division), HCMC No. 022 of 2021 delivered on 17 January 2022 [Stephen Mubiru, JJ]***

In October 2014, Roko Construction Limited (the applicant) entered into a contract with Kobusingye Janet (the respondent) for the first phase of construction of Barracks Lane Service Apartments in Nsambya (now Mestil Hotel), at a contract price of USD 6,150,000. In April 2015, the parties agreed to execute the second phase of the project without a formal contract, later formalizing an additional contract in February 2016 for USD 933,979 for carpentry and joinery work on the same project. After completing the works, a dispute arose regarding sums due. The applicant claimed USD 481,590.58 for executed works, while the respondent countered with claims of breach of contract, seeking special and general damages exceeding the applicant's claim. Efforts to settle amicably failed, leading to the commencement of arbitral proceedings. On 5th April 2021, the arbitrator rendered her award, dismissing the applicant's claim entirely and awarding the respondent USD 492,264.19 in liquidated damages, USD 103,103.09 for rectification costs, USD 1,000,000 in general damages, and arbitration costs.

Roko Construction Limited sought to set aside the arbitral award under Section 34(1) and (2)(a), (vi), (vii) and b(ii) of the Arbitration and Conciliation Act(Cap 4 as it then was), citing the arbitrator's reliance on observations during a site visit, which allegedly exhibited partiality. They also argued that the award contravened public policy and exceeded the arbitrator's jurisdiction, particularly the award of both liquidated and general damages.

The high court reiterated the principle of impartiality as outlined in *Re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700 and affirmed that arbitrators must avoid even the appearance of bias. However, the arbitrator's use of observations from the site visit was deemed impartial and within procedural fairness, as per the *audi alteram partem* rule. The court concluded that no reasonable person could perceive bias, adding that no supplemental information was obtained during the site inspection that was outside the material submitted in evidence or that the observations made thereat were of a kind that was not readily available to the parties prior to the hearing. The ground of partiality was accordingly rejected.

In respect to the ground of Public Policy, court stated that the realm of public policy included an award which was patently illegal and contravened the provisions of Ugandan Law. It was the Court's finding that the award did not contravene Public Policy and hence rejected this ground.

**In regard to inconsistency with the Act, it was the applicant's submission that the arbitrator's decision was inconsistent with the Arbitration and Conciliation Cap 4 because it went beyond what the parties agreed should fall within the scope of the arbitrator, the arbitrator made decisions that are not in accordance with the terms of the contract and did not take into account the usages of the trade applicable to the transaction and that having awarded liquidated damages, the arbitrator erred in awarding general damages.**

This ground succeeded on only one aspect which was that the arbitrator erred in awarding general and liquidated damages. Court distinguished between general and liquidated damages Referencing *Hadley v. Baxendale* [1854] 9 Ex. 341 for the test of remoteness which must be satisfied before general damages can be granted and this test is whether the damages arose naturally from the breach or whether the damages were reasonably contemplated by both parties when they made the contract as being a probable result of the breach. The Court stated that general damages are what the law presumes to be the direct, natural or probable consequence that would have resulted from the defendant's breach of contract and are normally at large. To the contrary, liquidated damages are pre-agreed and are contractually fixed. The Court further found that inclusion of a rate of liquidated damages in a contract automatically precluded the grant of general damages. Because liquidated damages in this case were fixed by the contract, the grant by the arbitrator of both liquidated and general damages respectively was erroneous and inconsistent with the Arbitration and Conciliation Act Cap 4 because it was a fundamentally erroneous proposition of law that occasioned a serious irregularity that occasioned substantial injustice to the applicant.

The court in this case struck the delicate balance of upholding the fundamental principle of the finality of arbitral proceedings (Section 9 of the Arbitration and Conciliation Act) whilst also ensuring that the principle was not abused by intervening and setting aside the erroneous aspect of the Award; invoking its power to do so under Section 34(2)(a)(vii) of the Act.

**Adjudication decisions are final and capable of being executed only when a dissatisfied party does not commence Arbitration Proceedings within the contractually stipulated Timeline:**

---

***Uganda National Roads Authority v. TK Engineers Ltd & Bank of Uganda. Misc. Application No. 750 of 2019 (Arising from EMA 683 of 2019) High Court of Uganda (Execution and Bailiffs Division) delivered on 07 August 2019 [P.Basaza-Wasswa, JJ]***

In December 2013, the Uganda National Roads Authority (UNRA) entered into a contract with TK Engineers Ltd for the term maintenance of 21 selected national roads. Disputes arose during the contract's execution, leading to adjudication by Eng. Hans J.W.B. Mwesigwa, who ruled in favor of TK Engineers on January 30, 2019. TK Engineers registered this adjudication decision as an arbitral award in the High Court Commercial Division on January 31, 2019, and extracted a decree. On February 25, 2019, UNRA notified TK Engineers on February 25, 2019, that it had referred the matter to arbitration. Despite this, TK Engineers sought execution of the adjudication decision, and a garnishee order nisi was issued on July 4, 2019, attaching UGX. 10,171,743,704 from UNRA's account in the Bank of Uganda.

UNRA brought this application seeking to set aside the garnishee order, the adjudication decision's registration as an arbitral award, and its execution. The Crux of this application was whether the adjudication decision was final and binding.

It was the Court's finding that GCC 25.3 of the contract stipulated that the adjudicator's decision became final and binding only if neither party referred the dispute to arbitration within 28 days of the decision. UNRA referred the matter to arbitration within the 28-day period, as acknowledged in the agreed facts. The court found that arbitral proceedings commenced upon TK Engineers' receipt of UNRA's letter dated February 25, 2019, referring the dispute to arbitration and rejected the respondent's argument that arbitration proceedings did not commence within the stipulated timeline because the parties had failed to agree on an arbitrator to determine their dispute. The Court relied on Section 21 of the Arbitration and Conciliation Act(Cap 4 as it then was) which stated that arbitral proceedings commence when a request for arbitration is received by the other party.

This conclusion was reinforced by *Magezi & Anor v. Ruparelia* SCCA No. 16 of 2001 where the Supreme Court of Uganda relied on *Chitty on Contracts* 27 Ed. specifically Para. 12.039 which deals with general rules of construction of written agreement and states that:

*"The object of all construction of the terms of a written agreement is to discover therefrom the intention of the parties to the agreement."*

It was therefore the intention of the parties under GCC 25.3; that an adjudication decision could be considered final and binding only in the event that the aggrieved party did not commence arbitration proceedings within 28 days from the date of rendering of the decision. In the instant case, arbitration proceedings had been commenced within the contractually stipulated timeline and it therefore followed that the adjudication decision ceased to be final and binding. The Court thus found that the adjudication decision was illegally registered as an arbitral award because arbitration proceedings were still ongoing and the garnishee proceedings and subsequent garnishee order were a nullity because they were founded on an illegality. The registration of the adjudication decision as an arbitral award was thus set aside by the court together with the ensuing garnishee proceedings and order respectively.

This decision should however be contrasted with the persuasive case of *Debswana Diamond Company(PTY) Ltd V Liftoff Investments(PTY) Ltd*(Court of Appeal Civil Appeal No. CACGG-292-23) where the Court of Appeal of Botswana enforced the decision of the Dispute Adjudication Board(DAB). It stated thus:

*"I conclude therefore that in proper circumstances, DAB Awards may be referred to the High Court for enforcement. To that, I must add the caveat that courts should, as a general rule, be slow to enforce such awards and that judicial interference should be resorted to in exceptional circumstances only, such as where the contractual imperatives relating to resolution of disputes are found wanting."*

To note however that in this case, unlike the UNRA case, nearly one and a half years after the decision of the DAB, no arbitrator had been agreed upon and the court took this into account, albeit very cautiously, and declared the adjudication decision final and binding. Such exceptional circumstances have not yet been presented under Ugandan Courts and thus the decision in the UNRA case stands as the guide under Ugandan Construction Law on the finality or otherwise of an adjudication decision.

## Estoppel by conduct-Preventing Unjust Enrichment:

---

### *Arch. Joel Katerega & Another v. Uganda Posts Ltd, High Court of Uganda (Commercial Division), HCCS No. 020 of 2010 delivered on 12 July 2012 [Hellen Obura, JJ]*

In this case, the plaintiffs, Arch. Joel Katerega and Dr. Hannington Ssengendo, trading as Eco-Shelter & Environmental Consultants, brought a suit against Uganda Posts Limited for breach of contract. By a written agreement dated 26th September 2005, the plaintiffs were engaged to provide consultancy services for the refurbishment of Postel Building. Their scope of work included the preparation of architectural, civil, and structural drawings, as well as Bills of Quantities, detailed specifications, and other professional inputs. The contract sum was UGX 296,109,082 inclusive of VAT. The contract provided for a 20% advance payment contingent upon the plaintiffs providing a bank guarantee/insurance bond. The plaintiffs claimed that they partially performed the contract by submitting architectural designs and specifications, which the defendant utilized, including in its loan application to the East African Development Bank (EADB). However, they were not paid for their work, and their claim was substantiated by invoices totaling UGX. 128,066,655. The defendant argued that the contract was never performed and claimed it was abandoned because the plaintiffs did not advance the bank guarantee/insurance bond that they were required to advance and neither did the defendant advance to them the advance payment of 20% of the contract price. It was the plaintiffs' case that the contract was never abandoned because vide a letter dated 22nd December 2008, the defendants promised to pay the plaintiffs for their services. It was further the plaintiffs' case that the defendant waived the requirement of the bank guarantee/insurance bond when they asked the plaintiffs to commence the works without advancing them 20% of the contractual price as advance payment that they were required to do. By this conduct, the defendant not only waived the contractual requirement of the bank guarantee/insurance bond but was also estopped by its conduct from averring that the plaintiffs abandoned the contract. The court applied the doctrine of estoppel, as codified in Section 114 of the Evidence Act Cap 6(As it then was), which precludes a party from denying the truth of a matter it has previously represented, either by words or conduct, to another party's detriment. This principle was reinforced in Pan African Insurance Company (U) Ltd v. International Air Transport Association HCCS No. 667 of 2003, where the court held that a party is estopped from denying the truthfulness of a thing that it led another to rely upon.

It was the court's finding that the provision by the plaintiffs of the bank guarantee/insurance bond upon the 20% advance payment by the defendant was waived when the defendant asked the plaintiff to commence work without either the bank guarantee/insurance bond and without the 20% advance payment. The court further found that this waiver amounted to a variation of the contract which variation was contained in a letter dated 29th June 2006 that the defendant wrote to the plaintiffs asking them to commence work. It therefore followed that the defendant was estopped by its conduct from claiming breach and abandonment of contract by the plaintiffs. The Court in addition found that the contract was never abandoned but was partially performed relying on evidence which included correspondence between the parties which showed that the defendant had requested and received designs and specifications from the plaintiffs. Further, the plaintiffs' work was used to facilitate a loan application to EADB, indicating that the defendant benefited from the services rendered.

The court concluded that the defendant breached the contract by failing to pay for the plaintiffs' work. The plaintiffs demonstrated that they had performed 30% of the scope of the project and submitted corresponding invoices, which the defendant neither contested nor paid. Court further relied on the Specifications and Bills of Quantities respectively as prepared by the plaintiffs as evidence of the latter having partially performed the contract. The court rejected the argument of abandonment, observing that the defendant's termination notice and subsequent acknowledgment of outstanding amounts contradicted this claim.

The court's remedies to the plaintiffs were premised on the principle of quantum meruit. They cited the case of Alfa Insurance Consultants Ltd v Empire Insurance Group Supreme Court Civil Appeal No. 9 of 1994, where Manyindo, D.C.J. (as he then was) observed that the principle of quantum meruit is applied as a possible measure of restoration in case of unjust enrichment.

In conclusion, the court declared that the Consultancy Services Agreement was partially performed and breached by the defendant. The plaintiffs were awarded special damages, general damages, interest, and costs, affirming their entitlement to compensation for services rendered under the contract. This case underscores the fundamental requirement for restitution in cases where one has been unjustly enriched. As was stated by the Supreme Court of India in the case of In Mahabir Kishore and others vs. State of Madhya Pradesh, 1990, AIR 313, the Supreme Court India held that;

*"The principle of unjust enrichment requires; first, that the Respondent has been "enriched "by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiff and thirdly that the retention of the enrichment is unjust, this justifies restitution".*

The ruling of the Court in this case shall go a long way in deterring non payment by employers especially in situations where the aggrieved party has partially performed on a construction contract. Principles of good justice demand that in such cases where a benefit has been enjoyed by the employer, it is only just and proper that the party who has performed the service is restituted and more importantly where the employer is by its conduct estopped from averring otherwise.

**In the absence of a cross claim for damages for defects or omissions, a Plaintiff is entitled to the full contract price when a project has been substantially completed:**

---

***Kituni Construction Co. Ltd. v. Julius Okeny, High Court of Uganda (Commercial Division), HCCS No. 0250 of 2004 delivered on 31 October 2007 [Yorokamu Bamwine, JJ]***

The plaintiff, Kituni Construction Co. Ltd., claimed recovery of UGX. 102,528,500 as special damages, interest, and costs of the suit. The claim arose from a contract dated March 28, 2003, where the plaintiff was engaged to construct a petrol station on the defendant's land in Soroti. The agreed-upon price was UGX. 102,528,500. The plaintiff alleged that the defendant breached the agreement by refusing to pay the contract price. The defendant denied the claim, arguing that the work was not executed as agreed and it was abandoned after the first phase, before the roofing stage, which violated the terms of the contract. Notably, the contract was a lump-sum contract but payments were to be made in installments, beginning with UGX. 50 million disbursed four weeks after the commencement of work.

The court found that the contract was breached by the defendant. It rejected the argument of the defendant that the plaintiff did not execute the works as per the contractually agreed upon specifications in relation to certain material. The rationale for this was that the defendant never at any time objected to the change and he was therefore estopped because by virtue of his conduct which was proved through the uncontroverted circumstantial evidence as orally presented by the plaintiff's witnesses, he consented to the variation by the plaintiff. Court emphasized that a person who stands by and keeps silence when he observes another person acting under a misapprehension or mistake, which by speaking he would have prevented by showing the true state of affairs, can be estopped from later alleging the true state of affairs. He is estopped from denying the variation. The court thus found the defendant culpable for breach of contract by asking the plaintiff to stop works which were near completion and also by failing to pay the sum owed to the plaintiff.

Court further ruled that the plaintiff was entitled to the full contract price notwithstanding that the works had not been fully completed. Court relied on the principle of substantial completion and stated that the plaintiff had substantially completed the works which were at roofing level when it was asked to stop by the plaintiff and it was therefore entitled to the full contract price. The only remedy available to the defendant was a cross claim for defects and omissions or alternatively set them up in diminution of the price.

The court concluded that the defendant was responsible for breaching the contract and ordered compensation in full to the plaintiff. The plaintiff was also awarded interest and costs of the suit.

The Society of Construction Law Delay and Disruption Protocol, 2nd Edition, February 2017, Page 70, defines Substantial Completion as the completion of all the construction work that has to be done, subject only to very minor items of work left incomplete.

Substantial completion has further been defined as the stage in the progress of the work when the work or designated portion is sufficiently complete in accordance with the contract documents so that the owner can occupy or use the work for its intended purpose(Stone Crushing(U) Limited V Roko Construction Limited Civil Suit No. 0665 of 2017, Page 7).

This is a core principle of construction law which strikes a balance between the contractor's right to payment and the owner's right to a defect-free project. As long as the owner can occupy or use the work, then the contractor is entitled to the full contract price; subject to the employer's right to cross claim for any defects or omissions.

---

**An employer is under no obligation to vary the contract price under a fixed term contract:**

---

***Hydro Engineering Services Co. Uganda Ltd v. Thorne International Boiler Services Ltd, High Court of Uganda (Commercial Division), HCCS No. 0818 of 2003 delivered on 30 September 2008 [Yorokamu Bamwine, JJ]***

The plaintiff, Hydro Engineering Services Co. Uganda Ltd (HESCO), filed a suit seeking recovery of USD 64,606.67 from the defendant, Thorne International Boiler Services Ltd (TIBS), for unpaid contractual dues, together with interest, general damages, and costs of the suit. The defendant, in its written statement of defence, denied the plaintiff's claim and asserted that the contract price was fixed at USD 139,105 inclusive of VAT, and that the plaintiff was fully paid as agreed. The defendant counterclaimed USD 24,245.55, alleging that the plaintiff failed to complete the contract, necessitating completion at the defendant's expense.

Justice Yorokamu Bamwine meticulously analyzed the nature of the contract between the parties. He elucidated the difference between entire and divisible contracts with payment in respect to the former being pegged on complete performance of the contract as opposed to the latter wherein payment was on a prorated basis; after completion of each stage of a contract. The only exception regarding payment in respect to an entire or lumpsum contract was where the contractor had substantially completed the works. In this case, the correspondence between the parties, including the Bills of Quantities, revealed that the price agreed upon was fixed at USD 139,105. The judge concluded that because of this, the contract was a fixed price contract. In the same vein, the court further addressed the plaintiff's claim for additional sum being sums due as VAT and found that they were not tenable because the fixed contract price of USD 139,105 was VAT inclusive.

The court further found that the defendant was under no obligation to vary the contract price when it was approached by the plaintiff for renegotiation owing to extra works since this was a fixed price contract and the plaintiff had the contractual responsibility to complete it at the contractually agreed price so by terminating the contract when asked to vary its terms, the defendant was in breach of contract. Finally court found that on a balance of probabilities, the plaintiff had completed over 90% of the work under the contract before they were unreasonably ordered off the site and therefore, the plaintiff was entitled to the balance on the contract price by virtue of the doctrine of substantial completion.

In respect to the defendant's counterclaim for breach of contract arising from the additional costs that the defendant incurred in completing the contract, the court rejected this argument on grounds that the termination was done in bad faith and therefore the extra costs accrued by the defendant were self-inflicted.

The Court dismissed the defendant's counterclaim in toto, granted the plaintiff the balance on the contract price, interest and half the costs of the suit.

This case underscores critical aspects of contract law in construction projects, particularly regarding fixed-price contracts and the performance obligations thereunder in respect to payment, including the implications of partial or non-performance.

Cognizance is taken of the burden of proof which shifts to the defendant once the plaintiff has ably proved a cause of action (Section 102 of the Evidence Act Cap 8). To note however that the plaintiff did not adduce evidence to demonstrate substantial completion but court nevertheless ruled that on a balance of probabilities, the plaintiff had demonstrated that they had substantially completed the contract. This decision may create challenges in future disputes especially because substantial completion is premised on restitution to the contractor and prevention of unjust enrichment to the employer. Absence of evidence of unjust enrichment may lead to cases of unfair restitution with the ultimate result of prejudice to the employer.

---

**A quasi contract is formed once a party retains and enjoys a benefit under a construction contract that was not part of the agreed terms of the contract:**

---

## **BuildTrust Construction (U) Ltd v Martha Rugasira, High Court of Uganda (Commercial Division), HCCS No. 288 of 2005, delivered on 23 January 2008 [Geoffrey Kiryabwire, J]**

In this case, BuildTrust Construction (U) Limited, the plaintiff, brought a suit against Martha Rugasira, the defendant, seeking recovery of UGX. 63,353,571 as the unpaid balance for renovation works on the defendant's residential property at Plot 13, Luthuli Avenue, Bugolobi. The parties had entered into a written agreement on 20th June 2002, providing for a fixed price of UGX. 115,000,000 based on bills of quantities. The contract stipulated that any variations in scope would require the defendant's written instructions. The plaintiff alleged that the defendant issued verbal instructions for additional work, which resulted in an increased contract price of UGX. 220,696,325. Upon disagreement over this figure, the parties engaged an independent valuer, M/s. Barker, Barton & Lawson (BBL), who assessed the works at UGX. 198,832,579. The plaintiff, having received payments totaling UGX. 135,500,000, sought the balance of UGX. 63,353,571 as certified by BBL. The defendant denied that the contract was varied to the extent claimed by the plaintiff. She argued that all variations required her written approval, which she had given only selectively by endorsing the associated costs. The defendant further alleged breaches of the contract by the plaintiff, including failure to complete specific works and delays in completion, which led her to counterclaim for losses amounting to UGX. 64,271,000, including lost rental income and costs for rectifying incomplete works.

Court found that the contract was varied as admitted by the defendant in her pleadings where she conceded that she sanctioned some additional works. Court further found that the defendant's contestation of variations could not stand because she enjoyed the benefits therefrom and thus she was estopped from claiming that they were outside the term of the contract and in addition, by enjoying the benefits, a quasi contract had been created. The plaintiff was thus entitled to compensation arising from the quasi contract. In respect to quantum of the compensation, court relied on an independent valuation that the defendant had commissioned prior to filing of the suit. Because the plaintiff did not contest the results of the independent valuation, court held that the findings arising therefrom were binding on the parties since neither party had contested them.

It relied on Article 126 of the Constitution which promotes reconciliation between parties and the case of Muhammed Mohammed Al Hassan V Ibrahim Al Gasim HCCS No. 504 of 2005(unreported) wherein Court honored the agreement between the parties that was facilitated by their fellow Sudanese Community. Court thus granted the plaintiff UGX 63,353,571 which was the unpaid balance arising from the final account of the independent valuer. Court further granted the plaintiff general damages, interest on both the outstanding sum & general damages and costs in the main suit.

In respect to the counterclaim, it was the counterclaimant's case that the date of completion of the project was November 2022. According to the report of the independent valuer, the project was substantially completed on 6th September 2003 and thus it was 10 months past the initial date of completion.

Court rejected this argument stating that "time was at large" after November 2022. Court relied on the case of Walji Jetha Kanji & Others V Elias Freed [1959] EA 1071 where it was held by the Court of Appeal that ordering additional work set the completion time at large but the appellants were under an obligation to complete the work within a reasonable time. In this case, court found that according to the evidence adduced, the reasonable date of completion was 9th March 2003; the last date of completion as indicated by the plaintiff. Court applied the "reasonability test" and found that the project should have been completed by that date. In relying on the date of 9th March 2003, court took into account the renovations and additional works respectively that the plaintiff had to carry out. Court thus held that the project was delayed by six months as opposed to the ten months that the independent valuation report had indicated. Court thus awarded the defendant damages for the delay in completion to the tune of USD 12,000 which was a foreseeable loss arising from failure to rent out her house for six months with the rent of each month being USD 2000. The defendant was further awarded general damages for UGX 2,000,000 as well as interest on each award.

The judgment illustrates the importance of adhering to contract management principles in construction projects, emphasizing the need for clear documentation of variations and the legal implications of benefiting from unauthorized works under quasi-contract principles. This case further reinforces the court's role in promoting equitable solutions and reconciliation, as highlighted in Article 126 of the Constitution of the Republic of Uganda, 1995.

---

**A final certificate for payment is irreversible and concludes a contract:*****Omega Construction Company Ltd v Kampala Capital City Authority, High Court of Uganda (Commercial Division), HCCS No. 780 of 2015, delivered on 28 August 2017 [Christopher Madrama Izama, J]***

On December 30, 2011, the Plaintiff and the Defendant entered into a contract to upgrade drainage black spots under Contract No. KCCA/WRKS/2011-2012/002664 for a contract sum of UGX 4,181,073,515. The Project Manager named in the Contract was the Director Engineering and Technical Services in the Defendant. On 25th April 2012, the Defendant delegated all the authority, duties and functions under the contract to Messrs Architect Consults(U) Ltd in Association with Wanjohi Consulting Engineers(“Architect”) without any reservations save with regard to Traffic Flow Plans which required the Employer’s approval. It is the Plaintiff’s case that it completed the works, and several interim payment certificates (IPCs) were issued by the Project Manager. However, disputes arose when KCCA allegedly failed to pay all the IPCS in full.

The Plaintiff claimed that this failure constituted a fundamental breach of contract and terminated the contract under General Conditions of Contract (GCC) 59.1 and 59.2(d). Following termination, the Project Manager issued a final certificate on January 23, 2015, certifying that the Defendant owed the Plaintiff a sum of UGX 3,670,455,850. Subsequently, the Defendant issued its own termination and declined to pay the sum due and owing to the Plaintiff only depositing UGX 970,158,313 into the Bank Account of the Plaintiff upon being issued with a notice of intention to sue. In November 2015, the Plaintiff instituted this suit against the Defendant for breach of contract which entitled the former to the sum of UGX 4,187,692,874 which sum included damages for financial losses, loss of opportunities, inconvenience and for late payment of the debt. The Defendant in opposition to the amount claimed; stated that the final certificate relied upon by the Plaintiff was not the final one because it contained errors and inconsistencies and that the final certificate was that issued subsequently by the Defendant. In rejoinder, the Plaintiff stated that the final certificate that it relied on was issued by the Project Manager duly appointed by the Defendant as its Agent and Administrator of the Contract between the parties and secondly, that once a final certificate is issued by a Project Manager, it was conclusive and determined the contract.

The central issue was whether payment should be based on the original certificates issued by the Project Manager or revised certificates created by the Defendant. This revolved around whether the Defendant, as the Employer, had the authority to revise or reject certifications issued by the Project Manager in the face of a final certificate.

Court found that a final certificate presents the final position after reconciliation of all accounts between the parties and any deductions ought to be made prior to the issue of the final certificate. Court further found that a final certificate is a document authored and issued by the Employer who had to ensure that all necessary deductions including advance payments and liquidated damages if at all were made before issuing the same to the Contractor. Further, that according to the statutory legislation, before a final certificate was issued, in the event that the request for payment contained errors, the request would be rejected and the errors brought to the attention of the contractor who was then required to address them and submit a fresh request for payment. The Employer did not have the discretion to amend a request for payment as the Defendant did in this case and thus the final certificate as issued by the Defendant was rejected because it was issued contrary to the terms of the contract. In addition, that once a final certificate was issued, the contract was concluded and the sum therein became a debt due and payable to the Plaintiff and the Defendant in the event that it claimed any monies from the Plaintiff had a right to file a counterclaim or set off; which right it did not exercise.

Finally, court held that the Project Manager was the duly appointed Agent of the Defendant to manage the contract and according to the terms of the contract was vested with the responsibility of verifying and issuing all certificates; including final certificates. In the premise, the Defendant, after its Agent had issued a final certificate, was estopped pursuant to Section 114 of the Evidence Act Cap 6 from rejecting the same and issuing another. The court thus found that the Defendant, by refusing to pay the sum contained in the final certificate, was in breach of contract between the parties and therefore it was mandated to pay the sum certified in the final certificate as issued by the Project Manager together with interest for late payment at the rate prescribed in the contract.

The Court in this case underscored the extra caution and due diligence that must be undertaken before a Final Certificate is issued since an Employer is estopped, once the same is issued, from recalling it on grounds of inconsistencies and errors. The court in addition emphasized the fundamental role of “Agent of Employer” that a Project Manager holds with the ultimate result of their acts no matter how irrational, recognized as binding on the Employer. An Employer is thus advised to exercise due care when making an appointment for this role.

**Substantial Completion of a lumpsum contract entitles the Contractor to full payment of the contract fees despite errors or omissions in the project:**

---

*Sietco v Noble Builders (U) Ltd, Supreme Court of Uganda, SCCA No. 31 of 1995, delivered on 03 March, 1997 [Coram: Wambuzi, C.J, Odoki, Tsekooko, JJSC]*

This case arose from a building contract between the appellant; a Chinese corporation engaged in road construction, and the respondent; a limited liability building company engaged in construction business in Uganda. The appellant had been contracted by the United Nations Development Programme (UNDP) to construct an office block and residential estate in Kampala and subsequently subcontracted the work to the respondent. The respondent filed a suit claiming the balance owed under the subcontract, while the appellant filed a counterclaim alleging that work was either not done or poorly executed, resulting in breach of contract. The High Court awarded the respondent over USD 1,200,000 and dismissed the counterclaim for over USD 1,700,000. Dissatisfied, the appellant appealed the decision to the Supreme Court on 17 grounds with the major ones being in respect to the finding by the trial court that the respondent had substantially completed the works, the finding by the trial court that the appellant was not entitled to delay damages and the dismissal of its counterclaim.

The Supreme Court concurred with the trial court's finding that Noble Builders had substantially performed its contractual obligations. Court on reaching this finding relied on the case of *H. Dakin & Co. Ltd. v Lee* [1916] 1 KB 566 wherein Ridley J, in explaining the rationale for substantial completion, inter alia stated that as long as work has been substantially completed and the defendant has had the benefit of it for example living in the house, the defendant must pay for the received benefit. The Judge in the Dakin case further stated that the only exception to payment were instances where the contractor had refused to complete their work, entire change in scope or if the work done was of no use to the defendant. In the instant case, the appellant asked the respondent to leave the site and indicated that it would take over the remaining works. Further, by the time the respondent left site, part of the units and office block were occupied by UNDP Staff and it was therefore the court's finding that by the time the respondent left the site, it had performed virtually the entire contract and in the event that there were defects, the respondent had the obligation to rectify them provided that they were brought to its notice.

In respect to the ground relating to delay damages, court held that the appellant was not entitled to them because of a communication from the appellant that the decision of the Project Engineers on this issue would be final and binding. The Project Engineers explicitly waived all penalties and the court held that this amounted to a variation of the clause relating to penalties and hence the respondent was not liable for the same.

In respect to the ground of appeal regarding the dismissal of its counterclaim, the court agreed with the trial judge's interpretation of "tricks" in the pleadings as a claim based on fraud and held that the appellant failed to plead particulars of fraud, as required under Order 6 Rule 2 of the Civil Procedure Rules SI 71-1.

The court allowed the respondent's cross-appeal on interest, holding that interest should accrue from the date of filing the suit under Section 26(2) of the Civil Procedure Act. This aligned with the principle in *Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd. (No. 2)* [1970] EA 469 that interest compensates for being kept out of money due.

The appeal was dismissed, and the judgment of the High Court was upheld with modifications to the interest award. Noble Builders was entitled to recover the contract balance, interest from the date of filing, and costs of the appeal and cross-appeal.

As aptly stated by the learned trial judge, as long as the errors and omissions are minor and do not affect the Employer's use or occupation of the property, then the contractor shall be entitled to full payment of the monies due; subject to rectification of any defects.

---

**“Pay Now, argue later”: Fraud as an exception:**

---

**Uganda Electricity Transmission Company Limited v. Citibank Uganda Limited and Others, High Court of Uganda (Commercial Division), High Court Miscellaneous Application No. 1397 of 2022, delivered on 22 December 2022 [Stephen Mubiru, J]**

The case arose from a Power Purchase Agreement executed on 20th April 2018 between the applicant, Uganda Electricity Transmission Company Limited (UETCL), and the second respondent, Electromaxx Uganda Limited (Electromaxx), wherein the applicant undertook to purchase 50 MW of electricity generated from the 2nd respondent. The agreement was for a duration of six years. One of the securities required under this agreement was a performance guarantee. To this end, the 2nd respondent obtained a performance guarantee from the 1st respondent, Citibank Uganda Limited, for \$1,802,089 on 19th October 2021, in favour of the 2nd respondent. On 28th December 2021, a new guarantee for \$1,094,479 was issued by the 1st respondent to the third respondent, Maxol Uganda Limited, based on an alleged novation of the Power Purchase Agreement by the 2nd respondent in favour of the 3rd respondent. Vide a letter dated 3rd October 2022, the 3rd respondent called on the guarantee on account of default by the applicant of its payment obligations under the Power Purchase Agreement. UETCL denied knowledge of this novation and asserted that it never instructed the 1st respondent to issue the performance guarantee dated 28th December 2021 in favour of the 3rd respondent and the agreement that it had with the 2nd respondent was never novated to the 3rd respondent. Subsequently, the applicant filed a temporary injunction wherein it sought a temporary injunction restraining the 1st respondent from effecting the call on the guarantee on the sole ground of fraud.

The Court held that Novation requires the explicit consent of all parties, including the transferor, transferee, and original obligee, which was absent in the present case. The court further found that in the absence of this tripartite agreement, there was no novation created. In addition, it was the court's findings that the documents on which the call of the document was premised were invoices from the 3rd respondent to the 2nd respondent relating to the supply of fuel by the latter to the former and not related to power purchase.

It was therefore the court's finding that the applicant had demonstrated a prima facie case of fraud as an exception to cashing of an on demand guarantee and granted the temporary injunction restraining the cashing of the bank guarantee taken out in favour of the 3rd respondent.

Court took cognizance of the autonomy, independence and documents principles of on demand guarantees which require that banks enforce the same without any reliance or consideration of the underlying contract between the beneficiary and principal or any other issue outside the deed of guarantee, provided that the call meets the conditions stipulated in the guarantee deed, but stated that in exceptional circumstances, these principles would be disregarded especially where there was fraud by either party to the guarantee. In the instant case, the 3rd respondent never adduced evidence to show that it was privy to the Power Purchase Agreement which was the subject of the guarantee and the invoices that it presented related to default by the 2nd respondent in respect to the Fuel Supply Agreement that it effected with the 3rd respondent.

No proof of default by the applicant under the Power Purchase Agreement was presented. It is therefore on this premise that the court granted the temporary injunction; halting the cashing of the bank guarantee, stating that the application satisfied all the requirements that must be satisfied before a temporary injunction can be granted and there are; a prima facie case with a triable issue, irreparable harm to the applicant especially in regard to its reputation and balance of convenience in favour of the applicant. The court emphasized the independence principle of on demand guarantees which are premised on a "pay now, argue later" principle but recognized exceptions for fraud and illegality.

The judgment reflects the court's approach to balancing the principles of autonomy in banking guarantees with the need to address fraud and maintain equitable justice in commercial transactions,; especially in instances where the commercial and reputational image of the contractor are at stake.

---

**Court has jurisdiction to order for enforcement of an Adjudication Decision as a contractual obligation between the parties:**

---

***Debswana Diamond Company (Pty) Ltd v Liftoff Investments (Pty) Ltd, Court of Appeal Civil Appeal No. CACGG-292-23, delivered on 7 June 2024 [Coram: Lesetedi JA, Walia JA, Tebogo-Maruping JA]***

In or about October 2020, Debswana Diamond Company (the Appellant) engaged Liftoff Investments (the Respondent) to construct a new tailings leg-golf at Plant 2 in Orapa. The contract, valued at P40,914,308.12 exclusive of VAT, was governed by the International Federation of Consulting Engineers (FIDIC) Conditions of Contract (First Edition, 1999), as amended to modify dispute resolution provisions. A dispute arose in relation to the grasshopper and shuttle conveyor facility specifically regarding the payment of an interim valuation certificate. The parties referred the matter to the Dispute Adjudication Board (DAB), which issued a fully reasoned decision on 20 January 2023. The DAB ordered the Appellant to pay P38,511,246.89 with simple interest at the Bank of Botswana discount rate (3.75%) from 14 June 2021. Despite this, the Appellant refused to comply with the DAB's decision, prompting the Respondent to lodge a notice of dissatisfaction pursuant to GCC 20.4 of the FIDIC Conditions of Contract which required a party in whose favour the DAB had issued a decision, to issue a notice of dissatisfaction in instances where the other party refused to honor the decision of the DAB. Still pursuant to the FIDIC Conditions of Contract, the parties engaged in amicable settlement discussions as a precursor to the commencement of arbitral proceedings. The attempt at amicable settlement proved inconclusive.

On 21st March 2023, the respondent filed a notice of motion in the High Court of Botswana; seeking that the Adjudication Decision be enforced against the Appellant as an obligation arising out of a contract. In opposition to the application, the appellant averred that the same was premature in light of the contractual clause which required a party who was aggrieved with the other's party's failure to honor a decision of the DAB; to commence arbitration proceedings. It was the appellant's case that arbitration proceedings had commenced and it was therefore premature for the respondent to bring the application for enforcement. The respondent further filed an application to stay the proceedings of enforcement of the Adjudication decision; pending the referral and determination of the dispute by an arbitrator.

The High Court identified two primary issues for determination in addition to the appellant's application for stay: whether the court had jurisdiction to hear the application and whether the court could grant the orders sought by the Respondent in respect to enforcing the Adjudication decision as an obligation arising out of contract between the parties. In respect to the application for stay, it was the Court's finding that no arbitrator had been appointed and hence the matter could not be stayed because there were no pending arbitration proceedings before any arbitrator. In respect to the two primary issues for determination, it was the Court's finding that it was vested with the mandate to make "appropriate orders" and to that end held that the Adjudication decision was binding in the interim pending final resolution in the arbitration. The Court further ordered the appellant to specifically perform its contractual obligation and pay the sum as adjudged by the Adjudicator. The appellant was ordered to pay the sum within thirty days as opposed to the five day period sought by the respondent. It is pertinent to note that the appeal was heard more than a year after the DAB Award; but no arbitrator had been appointed nor was there any application pending for the appointment of one.

The appellant being dissatisfied appealed to the Court of Appeal. Among the grounds of its appeal were; that the High Court erred in dismissing the application for stay of execution on grounds that there was no pending arbitration. The appellant further stated that in the alternative, the High Court should have referred the dispute to arbitration since the appellant was willing to participate in the same. Further, that the parties' agreement had not ousted the court's jurisdiction, specifically the right to compel either party to comply with the terms of the contract and the decision of the arbitrator. The appellant in addition argued that the parties had executed a contract based on the FIDIC Conditions of Contract which had no provision permitting parties to a contract to submit to the jurisdiction of courts which was unlike the Joint Building Contracts Committee(JBCC) whose general conditions of contracts permitted the parties to submit to the jurisdiction of courts. The Court of Appeal rejected this argument; reasoning that it was irrelevant to rely on a JBCC Model Contract without referencing the exact edition and specific conditions relied upon since certain editions of the JBCC Model Contract mirrored the FIDIC Conditions of Contract in relation to arbitration being the full and final remedy for a party dissatisfied with the decision/non adherence to the decision of a DAB.

The crux of the appeal was finally reduced to one ground which was; whether a successful party before a DAB could apply for enforcement of the DAB decision before submitting the dispute to Arbitration which was a prerequisite pursuant to GCC 20.6 of the FIDIC Conditions of Contract. It was the respondent's case that the High Court of Botswana was vested with the jurisdiction to enable a party enforce its contractual rights arising from a FIDIC type of contract where a party failed to make prompt payment following a DAB decision.

The Court of Appeal agreed with the Respondent stating that despite the provisions of the FIDIC Conditions of Contract which provided for arbitration as final and binding after dissatisfaction/noncompliance with the decision of a DAB, in the instant case, no step had been taken to appoint an arbitrator almost a year and a half later after the decision of the DAB in addition to resultant delays when the process of arbitration commenced which delays were pursuant to the amended FIDIC Conditions of Contract which provided that the appointment of an arbitrator had to be made in South Africa. It was the court's finding that these circumstances required the exceptional intervention of Court and to that end, the court upheld the decision of the High Court in respect to enforcement of the DAB decision as a contractual obligation that was binding in the interim until overturned by an arbitral award. In reaching its decision, The Court of Appeal relied on persuasive South African and Namibian authorities supporting judicial enforcement of DAB decisions; including *Esor Africa (Pty)/Frankie Africa(Pty) Ltd Joint Venture v Bombela Civils Joint Venture(Pty) Ltd* Case No. 12/7422 (Unreported, South Gauteng High Court) and *Zillion Investment Holdings (Pty) Ltd v Salz Gossow (Pty) Ltd*(SA 17 of 2017) NASC (17 April 2019).

Suffice to note that in this decision, the Court of Appeal emphasized that it is only in exceptional circumstances that the Court shall intervene in circumstances where a party applies to it for enforcement of a DAB decision. The exceptional circumstance in this case was the inordinate delay in respect to the appointment of an arbitrator.

In Uganda, when faced with a similar case, the High Court of Uganda in the case of *Uganda National Roads Authority v. TK Engineers Ltd & Bank of Uganda* Misc. Application No. 750 of 2019 (Arising from EMA 683 of 2019) where the High Court declined to enforce the DAB decision as one arising out of a contractual obligation because the parties had commenced arbitration. The garnishee order as issued by the Registrar was thus set aside as well as the registration of the adjudication decision as an arbitral award.

This case highlights the thin line between honoring the terms of a contract on the one hand and ensuring that the ends of justice are met with a party recovering what is due to it, on the other.

---

## Estoppel as a bar to a claim premised in Fraud:

---

### **Uganda National Roads Authority v. Dott Services Limited and Professional Engineering Consultants Ltd, Court of Appeal of Uganda, Civil Appeal No. 234 of 2021, delivered on 28 September 2022. [Coram: Musoke, Muzamiru-Kibeedi and Gashirabake, JJA]**

Sometime in 2010, The appellant, Uganda National Roads Authority (UNRA), entered into contracts with the 1st respondent, Dott Services Limited, for the construction and maintenance of two roads: the Tororo-Mbale Road (49km) and the Mbale-Soroti Road (103km). These contracts stipulated completion within 18 months from the commencement date which was November 21,2010. Delays attributed to UNRA in providing necessary project materials and access to sites led to claims for compensation by Dott Services on the ground that each of the road works had been delayed by 509 days.

The claims, initially totaling UGX.45,556,811,050, were reviewed by a consultant (2nd respondent),Professional Engineering Consultants Ltd (PEC), and reduced to UGX 33,204,834,600. Upon subsequent discussions with the 1st respondent, the appellant further reduced the claims to UGX. 29,858,532,068, to which amount the 1st respondent consented and the money was paid to it by the appellant. It was the appellant's case that in 2016, it conducted an internal audit in respect of the amount of compensation paid to the 1st respondent and according to the auditor, the 1st respondent was only entitled to be paid UGX 8,833,252,755.67. It is in this premise that the appellant filed the suit at the High Court for money had and received with an alternative prayer premised on fraud (As against the 1st respondent) and as against the 2nd respondent; claims premised in professional negligence and breach of contract respectively. It was the averment of the respondent; contained in each of their defenses, that the compensation as paid to Dott was justified and properly assessed.

The Case against the respondents was dismissed in toto. The High Court agreed with the respondents that the 1st respondent's compensation was contractually justified since the delays that were presented by the 1st respondent amounted to compensation events in the contracts for the respective roads and it therefore followed that the 1st respondent was not fraudulent.

The Court further absolved the 2nd respondents of all claims relating to professional negligence and breach of contract; holding that the 2nd respondent not only acted as the agent of the appellant but also exercised all due care and skills in evaluating the claims of the 1st respondent.

Being dissatisfied with the decision of the High Court, the appellant appealed to the Court of Appeal against the entire decision of the High Court. It was the court's finding that the delay events as stated by the 1st respondent amounted to Compensation Events pursuant to GCC 44 of the General Conditions of Contract for each Contract. The court further found that GCC 44.2 of the General Conditions of Contract for each Contract covered situations where the contractor claimed that the compensation events justified an extension of the intended completion date whereas GCC 44.3 envisaged a situation where the contract price would be increased in situations where demonstrable evidence had been provided to show that the delay event warranted change in contract price. The court rejected the averment of the appellant that because the parties signed an addendum to the respective contracts, that amounted to an acceleration of contract and hence no compensation to the 1st respondent. Court found that there was no acceleration of the contracts because acceleration applies in instances where the Employer wants the Contractor to finalize before the intended project completion date which was not the case in this matter.

Most importantly, court held that the appellant was estopped from claiming that the respondents were fraudulent because they not only further reduced the sum as proposed by the 2nd respondent who was their agent but vide a letter dated 5th May 2015, the appellant communicated the findings from its "independent financial assessment" of the compensation as due to the 1st respondent and advised that it was processing the same. It therefore followed that in the premise, through its conduct, the appellant was estopped from asserting otherwise. The court dismissed the appeal relating to "Money had and Received" stating that money can only be recovered under the doctrine of "Money had and Received" if it was received without lawful consideration. In this case, the money was part of a valid contractual obligation and thus this claim failed. The court further dismissed the appeal premised on fraud and professional negligence; emphasizing that allegations of fraud require strict proof, as established in *Zaabwe v. Orient Bank* (Supreme Court Civil Appeal No. 4 of 2006). In the instant case, the appellant failed to demonstrate fraudulent conduct by either of the respondents. Similarly, claims of professional negligence against the 2nd respondent were dismissed. The court thus found that there was no negligence because the appellant did not act on the recommendations of the 2nd respondent but was rather guided by its independent calculations in paying the compensation to the 1st respondent.

The Court dismissed the appeal, affirming the High Court's judgment that the payment to the 1st respondent was justified and that there was no fraud or professional negligence by the respondents. Costs were awarded to the respondents.

In this case, Court instrumentally emphasized the necessity to uphold contractual obligations through using the objective meaning of the language which the parties have used. This case offers protection to parties to a construction project that the courts in resolving disputes brought before it shall be guided by the literal interpretation of the contract governing the parties' relationship. Court further highlighted the important doctrine of Estoppel as provided for in Section 114 of the Evidence Act Cap 8 which prohibits an innocent party who has acted on the averment of another from suffering loss as a result of the other part retracting on its promise. This protection is most fundamental in construction contracts and projects where contractors incur huge costs and expenses often times at the behest of the employer and under the assumption as guided by the employer that the same shall be reimbursed.

---

**Change in price as a result of quantities of work done does not necessitate an amendment required by Regulation 55 of the PPDA Regulations:**

---

*Uganda National Cultural Centre v. Ambitious Construction Company Limited, High Court of Uganda (Commercial Division), High Court Miscellaneous Cause No. 0067 of 2023, dated 16 August 2024 and delivered online (ECCMIS) on 21 August 2024 [Harriet Grace Magala, J]*

On 7th August 2017, Uganda National Cultural Centre (the Applicant) and Ambitious Construction Company Limited (the respondent) entered into a contract for the renovation of the National Theatre premises at a total fixed price of UGX. 3,029,323,269 (inclusive of VAT). Disputes arose over outstanding payments under the contract, prompting the respondent to initiate adjudication proceedings. The Adjudicator issued an ex parte Adjudication decision on 4th April 2022, inter alia finding the applicant in breach of the contract and awarding the respondent UGX. 1,294,427,629 plus interest at 21% per annum from date of breach. Dissatisfied, the applicant referred the matter to arbitration before a sole arbitrator. The Arbitrator was ready to deliver the Award on 5th May 2023 but withheld its delivery until 26th May 2023 due to unpaid arbitration fees by the applicant when it delivered the award in favour of the respondent. The respondent then filed for recognition and enforcement of the Award. The Applicant subsequently filed the current application to set aside the Arbitral Award, citing breaches of public policy.

The respondent opposed the application and in addition raised a preliminary objection that the application to set aside the Award was filed out of time because more than 30 days had passed since it was delivered on 5th May 2023. In respect to the preliminary objection, the court overruled the same; stating that the 30 days for filing an application to set aside the exparte Award started to run on 26th May 2023 when the Arbitrator delivered it as opposed to 5th May 2023 when the Arbitrator communicated that the Award was ready but he did not deliver it because of pending fee payment by the applicant.

In respect to public policy as a ground for setting aside the Award, it was the applicant's position that the Arbitral Award violated public policy, referencing Regulations 54 and 55 of the Public Procurement and Disposal of Public Assets (PPDA) (Contracts) Regulations, 2014, and Section 43 of the Public Procurement and Disposal of Public Assets Act, 2003.

The Applicant claimed the contract price unlawfully increased by 20.25% without a required amendment since the variations were above 0.1% and a cumulative increase beyond 1% and this increase in variations without an amendment to the contract to provide for the variations was contrary to the PPDA Regulations specifically Regulation 54. That further, the Arbitrator in his Award had acknowledged the need for an amendment which had not been done but he still went ahead to sanction a statutorily prohibited contract sum variation of UGX 3,642,800,207.6. It was further the Applicant's case that even if there had been an amendment to the contract, the same would still be illegal because a contract increase beyond 15% of the original contract sum was statutorily illegal without a formal contract amendment of the contract price.

The Court relied on ***Roko Construction Ltd v. Kobusingye Janet (HCMC No. 22 of 2021)*** to emphasize that the High Court's role in arbitration matters is limited to reviewing legality, not functioning as an appellate court. The Court also considered the principle of public policy as articulated in ***Egerton v. Earl of Brownlow [1853] Eng R 885***, determining that public policy violations must involve fundamental breaches of law or morality.

Justice Harriet Grace Magala concluded that the Award did not conflict with public policy. The Arbitrator had adhered to the PPDA Regulations, the contractual terms, and equity principles. The alleged violations of public policy were unfounded, as the increased contract price reflected agreed-upon changes in work quantities. Court further found that there was no need for a contract amendment under Reg. 55 of the PPDA(Contracts) Regulations since the sums payable accrued from the quantity of work done by the Respondent as the contract in issue was an admeasurement contract. Court further held that the Applicant should have raised any issue in respect to the Interim Certificates at the time that they were presented and not many months after. In addition, court took cognizance of all the previous Interim Certificates that had been paid without the applicant raising any issue.

On the second issue, the Court held that the Applicant's application to set aside the Award lacked merit. The Respondent was entitled to enforce the Arbitral Award under Section 36 of the Arbitration and Conciliation Act. Costs were awarded to the Respondent, consistent with Section 27(1) of the Civil Procedure Act and the decision in ***Uganda Development Bank v. Muganga Construction Co. Ltd [1981] H.C.B. 35***.

The application to set aside the Arbitral Award was dismissed. The Respondent was awarded costs and granted leave to enforce the Arbitral Award, which remained valid and binding.

A grey area in respect to whether the amendments required in Regulation 55 of the PPDA Regulations apply only to lumpsum contracts remains. This is an issue that court did not specifically address, correctly relying on the applicant's conduct of prior payment of interim certificates as its ratio decidendi but not handling the critical issue of amendment as raised by the applicant. This still remains the elephant in the room.

**Fraud overrides all technicalities:**

---

*National Social Security Fund & Another v Alcon International Ltd, Supreme Court of Uganda, Supreme Court Civil Appeal No. 15 of 2009 [2013] UGSC 4 delivered on 08 February [Coram: Odoki, CJ, Tsekooko, Katureebe, Kitumba and Kisaakye, JJSC].*

- **Principle:** *The importance of adhering to principles of privity of contract, proper arbitration procedures, and the legal consequences of fraud in contractual relationships.*

This appeal was premised on a dispute arising from a building contract. The appeal was brought against the decision of the Court of Appeal, which upheld the decision of the Trial Judge to refer the dispute to arbitration. The Court of Appeal further upheld the arbitral award which was issued in favour of Alcon International Ltd.

The background of the case reveals that on July 21, 1994, Alcon International Ltd (Kenya) entered into a contract with the 1st appellant to complete the construction of Workers' House in Kampala. The 2nd appellant was appointed as the project architect. Due to extensive variations, a supplementary contract was signed on June 8, 1996, and the project timeline was extended to May 31, 1998. However, disputes arose, and NSSF terminated the contract on May 15, 1998, citing defaults allegedly committed by the respondent which the latter denied.

On 30th November 1998, the respondent filed Civil Suit No. 1255 of 1998 against the appellants jointly for wrongful termination of the contract. The respondent further alleged that the 1st appellant failed to utilize arbitration as the contractually provided for remedy pursuant to Clause 36 of the contract. The High Court ordered a stay of proceedings and referred the matter to arbitration. The arbitrator ruled in favor of the respondent, awarding damages for wrongful termination. The 1st appellant contested the Arbitral Award and applied to set it aside on grounds that there were errors of law on the face of the record, that the arbitrator misconducted himself thus the arbitration was improperly procured.

Dissatisfied, the appellants appealed to the Court of Appeal. The grounds of appeal included; that the learned judge erred in law in staying the suit and in referring the matter to arbitration, the learned judge erred in law and fact in not holding that the arbitration was improperly procured and in holding that there were errors on the face of the record. The appellants appealed to the Supreme Court on 15 grounds which were reduced to 4 during the hearing. The crux of the appeal was that the respondent did not have a cause of action against the appellants because the respondent did not contract with them. It therefore followed that all the actions taken including filing the suit and arbitration (and the resultant award) respectively were premised on fraud by the respondent because it was not a party to the contract in issue. It was the respondent's case that there had been an "informal assignment" by the original contractors of its responsibilities under the contract and the respondent was thus the proper party to prosecute the suit; including commencing the arbitral proceedings.

The Supreme Court, relying on *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] AC 85, emphasized that an assignment of contractual rights requires the consent of the other party. The Supreme Court found that in the case before it, there was no valid assignment from Alcon Kenya; which signed the contract with the 1st appellant, to the respondent and this rendered all actions by the respondent in respect to the contract unsustainable and unlawful because it had no locus standi.

In reference to whether the arbitral award was procured illegally or contrary to public policy, the Court referenced *Makula International Ltd v His Eminence Cardinal Nsubuga* [1982] HCB 11, reaffirming the principle that fraud vitiates all. It was found that the respondent had fraudulently misrepresented itself as being the party with whom the 1st appellant had signed the contract whereas not, and to this end, misleading both the courts and the arbitrator. The arbitral award was on this premise set aside for being contrary to public policy. Court took cognizance of the expiration of the timelines within which to file an application to set aside an award vide Section 34 of the Arbitration Act Cap 4 (Formerly Section 12 of the Arbitration Act Cap 55) but stated that fraud and illegalities arising therefrom postpone the commencement of the period of limitation.

It was further the appellant's case that the trial Judge had erred in referring the matter to arbitration because the reference was made without jurisdiction. The Supreme Court held that the trial judge erred in referring the matter to arbitration under Section 5 of the Arbitration and Conciliation Act Cap 4 without an application by either party. It emphasized that arbitration must follow statutory procedures, and a court cannot invoke inherent jurisdiction where statutory provisions exist. In the instant case, not only had an application not been made by either party but because there was failure to make an application hence the parties not being heard on the issue of referral of the arbitration, the respondent who was never privy to the contract and the 2nd appellant as well were erroneously given audience before the Arbitral Tribunal. This would not have been the case had the Judge followed the statutory provisions as opposed to invoking the inherent powers of the Court.

In conclusion, the Supreme Court allowed the appeal, set aside the arbitral award, and remitted the case to the High Court for trial.

The Court underscored the importance of adhering to principles of privity of contract, proper arbitration procedures, and the legal consequences of fraud in contractual relationships; including in instances where a contract contains an arbitration clause and in instances where there are clear timelines to set aside an arbitral award. The court reiterated the age-old principle that fraud and illegality once brought to the attention of court overrides all procedure and limitation periods.

---

## Non interference by court in Arbitration Matters except as provided for under the Arbitration Laws:

---

### *Babcon Uganda Limited v Mbale Resort Hotel Limited, Supreme Court of Uganda, SCCA NO. 06 of 2016 delivered on 04 July 2017 [Coram: Katureebe, CJ; Arach-Amoko; Mwangusya; Opio-Aweri; Mwendha, JJSC]*

The dispute in this case arose out of a construction contract between Babcon Uganda Limited (the appellant) and Mbale Resort Hotel Limited (the respondent). Under the contract, the appellant was to construct an annex to the existing hotel for a sum of UGX 666,337,984, with practical completion set for October 30, 2007. However, on October 2, 2007, the respondent terminated the contract, leading to a dispute which was referred to arbitration. On April 18, 2010, the arbitrator rendered the award in favour of the appellant and granted it UGX 1,712,880,153.34. Dissatisfied with this decision, the respondent applied to the High Court to set aside the award.

The High Court partially set aside the award under Section 34 of the Arbitration and Conciliation Act (ACA). Dissatisfied, the appellant appealed to the Court of Appeal, which upheld a preliminary objection that the appeal was incompetent on grounds that the appellant had no right of appeal to the Court of Appeal since the decision of the High Court was made under Section 34 of the ACA. Dissatisfied, the appellant appealed to the Supreme Court. The respondent yet again raised a preliminary objection on a point of law to the effect that the appeal was improperly before the court because pursuant to Section 6(1) of the Judicature Act, an appeal as of right to the Supreme Court only arose concerning cases where the High Court was exercising its original jurisdiction which was not the position in this case since the dispute was first handled by an arbitrator. In reply, the respondent stated that the appeal was of right because the High Court exercised unlimited original jurisdiction since it considered a decision arising from a tribunal which is not considered a court of judicature.

Justice Faith Mwendha, delivering the lead judgment, upheld the preliminary objection that the appeal was improperly before it. The Court emphasized that the High Court, when deciding applications under Section 34 of the ACA, does not exercise original jurisdiction but rather "other jurisdiction" conferred by the ACA and recognized under Section 14(1) of the Judicature Act. Section 6(1) of the Judicature Act, which allows appeals as of right from original jurisdiction matters, was therefore inapplicable because the original jurisdiction had been exercised by the arbitral tribunal consisting of a sole arbitrator.

The Supreme Court relied on the statutory framework of the ACA, particularly Sections 9, 34 and 38. Section 9 limits court intervention in arbitral matters except as provided under the Act, Section 34 permits recourse against an arbitral award only by application for setting it aside on the grounds stipulated in the Section. It was further noted that the ACA does not contemplate appeals beyond what is expressly provided for under Section 38 which provides for appeals on points of law only when the parties have agreed which was not the case in this dispute.

In conclusion, the Supreme Court found no merit in the appeal, upheld the decision of the Court of Appeal, and dismissed the appeal with costs.

The judgment reinforced the sanctity and sovereignty of Arbitration as a mode of dispute resolution and one of its bedrock principles which is non intervention by the courts unless otherwise prescribed by the ACA. This decision by the Highest Judicial Organ is a welcome comfort to players in the construction industry; an industry which by the nature of its unique disputes requires an expert to handle the same; hence the provision of an arbitration clause in almost every construction contract.

---

**A contractual obligation in respect to time is a condition precedent; breach of which entitles the aggrieved party to terminate the contract:**

---

*Damuco Investments Limited v Opportunity Bank (U) Limited, High Court of Uganda (Commercial Division), High Court Civil Suit No. 0589 of 2019 dated 15 October 2024. Judgment delivered via ECCMIS (online) on 12 November 2024 [Harriet Grace Magala, J]*

The Plaintiff, Damuco Investments Ltd, entered into two contracts with the Defendant, Opportunity Bank (U) Ltd, on 7 th March 2018. The first contract was for constructing fifteen ATM rooms, and the second was for painting the Defendant's branches. The ATM construction contract was subsequently varied by an addendum dated 5 th June 2018. However, the Defendant terminated the ATM construction contract on 23 rd July 2018, alleging delays by the Plaintiff in meeting the agreed timelines. The Plaintiff sought special damages amounting to UGX 112,253,237.09, general damages, interest, and costs, alleging breach of both contracts by the Defendant. The Defendant denied the allegations and counterclaimed for UGX 122,281,063.68 as contractual penalties, UGX 101,454,432 as special damages, general damages, interest, and costs.

The Court found that the Defendant did not breach the contracts. The evidence showed that the Plaintiff failed to complete the ATM construction works within the agreed timelines as stipulated in the addendum to the contract, which set a completion deadline of 15 days from 11 th June 2018. Further, the Plaintiff was estopped from relying on earlier contract terms, as the addendum overrode those provisions. The Court further found that the Defendant's termination of the ATM construction contract was justified under Section 33 of the Contracts Act, 2010(As it then was), which mandates performance of contractual obligations unless dispensed with under the law.

In regard to a probable estoppel by conduct, it was the Court's finding that whereas the Plaintiff remained on the premise after the expiry of the contract and the Defendant sent the termination notice after the time period had expired, this did not amount to waiver of the limitation of time of performance because it did not satisfy the two requirements of waiver as set out in the case of M & B Engineers Ltd V UNRA and another CACA No. 316 of 2021 because there was no written agreement to that effect nor any implied agreement through the conduct of the Defendant towards the Plaintiff.

Regarding the painting contract, there was no evidence of its termination by the Defendant. The Court held that the two contracts were distinct and could be executed independently. Thus, the Plaintiff's claim that the termination of one contract automatically terminated the other was unsubstantiated.

The Plaintiff was found liable for breach of the contracts. The Court stated that the Plaintiff admitted delays in completing the ATM construction works and failed to provide evidence of effective communication about its challenges. Further, the Court, relying on *Charles Richards Ltd v Oppenheim* [1950] All E.R 420, argued that despite the extension of time, the Plaintiff failed to meet the revised deadlines and this amounted to a breach.

The Court also held that under Clause 2.2 of the addendum, the Plaintiff agreed to a penalty of 1% of the total contract sum for every day of delay, which the Defendant was entitled to enforce under Section 62(1) of the Contracts Act, 2010 and that this did not amount to an unconscionable penalty.

The Court dismissed the Plaintiff's claims and entered judgment in favor of the Defendant on the counterclaim. The Plaintiff was held liable for breach of contract, and the Defendant was entitled to the contractual penalty, refund, interest, and costs.

The judgment underscores the critical principle of a "time clause" in a contract being a condition which warrants termination of contract in the event of breach.

**Force Majeure is not an automatic wand to a defaulting party:**

---

***Zzimwe Enterprises Hardwares and Constructions Limited  
v Attorney General, Court of Appeal of Uganda, Court of Appeal  
Civil Appeal No. 0116 of 2019 delivered on 30 August 2024******[Coram: Egonda-Ntende, Mulyagonja & Luswata, JJA]***

This appeal arose from the decision of the High Court of Uganda (Mugenyi, J.) in Civil Suit No. 809 of 2014. The appellant, Zzimwe Enterprises, Hardware & Construction Limited, filed a suit against the respondent, the Attorney General, for general, punitive, and exemplary damages, claiming loss of income arising from detinue of its construction equipment. This dispute stemmed from a 2008 contract awarded to the appellant for rehabilitating the Kalapata-Piire Road under the Karamoja Roads Development Programme. Despite extensions, the appellant failed to complete the works, leading to contract termination by the respondent in November 2010. The respondent retained the appellant's equipment, citing provisions of the contract, prompting the appellant to seek legal redress.

The High Court dismissed the appellant's claims, prompting this appeal, where five grounds were raised, including whether the respondent was justified in retaining the appellant's equipment and whether the trial court erred in declining to award damages.

The crux of the appellant's case; both at the High Court and the Court of Appeal was that it was prevented by Force Majeure from the timely completion of its obligations. The Force Majeure resulted to adverse weather conditions and insurgency respectively. The appellant conceded that the contract that it had executed with the respondent did not contain a Force Majeure Clause but however asserted that Force Majeure is implied in contracts under English law. However, the Court noted that this notwithstanding, the appellant failed to prove that the alleged impediments rendered performance impossible. To the contrary, the evidence that was adduced at the Court of Appeal indicated consistent non performance by the appellant and that further, the alleged impediments were never brought to the attention of the respondents as the appellant was contractually required to do.

In respect to retention of the appellant's equipment by the respondent, the Court rejected the argument of the appellant that the respondent was supposed to retain the equipment merely for the purposes of valuing and ascertaining how much the same was worth for the purposes of reducing the monies due to the respondent on termination of the contract. The premise for this rejection was the contract executed by the parties provided that on termination of the contract for breach, it was deemed that all property, machinery and equipment on site was deemed to be the property of the employer. It therefore followed that the respondent was contractually entitled to retain the equipment.

The appeal was dismissed in toto and the respondent was awarded costs both in the High Court and the Court of Appeal respectively.

This case is a welcome addition to the jurisprudence especially relating to Force Majeure and the extent to which the same can be relied upon by a party. Clear parameters were emphasized to avoid any evasion of responsibilities under the defense of Force Majeure.

---

**Save for fraud, an on demand guarantee must be honored by the guarantor without regard to any dispute arising from the underlying contract**

---

*VS Hydro Uganda Limited & 3 Others v. Rwenzori Hydro (PVT) Limited & 3 Others, High Court of Uganda (Commercial Division), High Court Misc. Application No. 0030 of 2022(Arising from Civil Suit No. 0022 of 2022) delivered on 13 March 2023[Stephen Mubiru, JJ]*

On February 9, 2017 and March 31, 2017 respectively, three separate Engineering, Procurement, and Construction (EPC) Turnkey Contracts were executed between the applicants and the 1st respondent for the Nyamagasani I, Nyamagasani II, and Kakaka Hydropower Projects in Kasese District. These contracts required the 1st applicant to secure advance payment and performance guarantees from the 4th respondent, UAP Old Mutual Insurance Uganda Limited, for repayment of a sum advanced under a loan facility. The loan facility was to the tune of \$3,000,000 vide a facility letter dated 11th August 2020. Consequently, the 4th respondent issued various performance and advance payment bonds respectively. The dispute arose when calls were made on the performance and advance bonds respectively on the ground of breach of contract which included failure to extend bond periods 28 days before expiry and alleged incomplete project works. The applicants contested the calls, arguing that the bonds were amortized, projects were completed and commercial operations had commenced. They sought a temporary injunction to restrain payment under the bonds pending resolution of the main suit.

In respect to the ground relating to the need to prove that there existed serious questions to be tried before a temporary injunction could be granted, the court found the applicants had established serious questions to be tried, including whether the respondents' calls on the bonds adhered to the terms requiring specific documentation and whether the guarantees were conditional or on-demand.

In respect to whether the applicants would suffer irreparable harm if the injunction was not granted, The court acknowledged the potential reputational and commercial damage to the applicants if the bonds were called unjustly. Citing cases such as Barclay Mowlem Construction Ltd v. Simon Engineering (Aust) Pty Ltd (1991) 23 NSWLR 451, it noted that calling performance guarantees could irreparably harm contractors' reputations and financial standings, which damages may inadequately address. However, in respect to the case before it, Court found that the applicants had not adduced any evidence to prove the irreparable harm to their commercial reputation that they would suffer if the temporary injunction was not granted.

In respect to whether the call on the guarantee could be injunctioned as a result of fraud committed by the respondents, the court stated that before a call on an on demand guarantee can be injunctioned on grounds of fraud or unconscionability, an applicant must show among other things that the conduct of the beneficiary is against all manner of moral conscience, that the fraud committed by the beneficiary is of such nature that it destroys the entire underlying transaction and that the person committing the fraud could not honestly have believed in the validity of their demand under the guarantees. It was the court's finding that in respect to the Advance Payment Bonds, the applicants had not proved the existence of fraud on the parameters as set out by the Court because contrary to the applicants' averment that the call was fraudulent because the entire amount had been called upon whereas not, the applicants had not adduced evidence to show that they regularly updated the 3rd respondent, as they were required to do, in respect to the reducing guarantee amounts and that secondly, the core principle of an on demand guarantee is that the guarantor is not concerned about the underlying transaction between the beneficiary and the contractor. It therefore followed that the calls in respect to these bonds had been lawfully made.

In respect to the two performance guarantees, court found that because the work secured by the said guarantees had been substantially and properly performed, it was unconscionable for the 1st-3rd respondents to make calls on the same and court thus found that a strong prima facie case of unconscionability has been established which warranted the grant of a temporary injunction. In respect to "balance of convenience"; a ground that courts must consider before granting a temporary injunction, because the applicants had made out a strong prima facie case of an unfair or unconscionable calling of the two performance guarantees, court found that the balance of convenience was on the applicants.

Court thus granted the temporary injunction in respect of the two performance guarantees. However, in respect to the three Advance Payment Bonds, the application for the temporary injunction stood dismissed in toto because the applicants had failed to prove fraud or unconscionability as grounds for injunctioning the call.

To note that this case should be contrasted with the earlier case of Uganda Electricity Transmission Company Limited v. Citibank Uganda Limited and Others, High Court of Uganda (Commercial Division), High Court Miscellaneous Application No. 1397 of 2022, delivered on 22 December 2022, the same Court injunctioned the call on the guarantees in toto because the applicant had proved that the call on the guarantee was premised on fraud because the respondents stated that the contract in issue had been novated whereas not and also the applicant was not a party to the contract from which the call had said to have arisen.

The court in this case upheld the autonomy principle of guarantees in declining to grant an injunction against the Advance Payment Bonds. The autonomy principle is to the effect that a guarantee is totally independent from the underlying contract and only in exceptional cases, can a call on the same be injunctioned. The ruling of the court in this case provides comfort to employers for whom the guarantee is a financial buffer against contractors who fail to meet their contractual end of the bargain.

## Part Performance is a bar to a defense of nonexistence of an Arbitration Agreement:

---

*Mohammed Mohammed Hamid v Roko Construction Ltd, Supreme Court of Uganda, Supreme Court Civil Appeal No. 14 of 2015 delivered on 05 May 2017 [Coram: Katureebe, CJ; Tumwesigye; Arach-Amoko; Mwondha; Tibatemwa, JJSC]*

The appellant entered into a construction contract with the respondent for the construction of a residential house at Plot 43 B Windsor Close, Kololo, Kampala, for a sum of UGX 1,100,000,000, excluding VAT. While the appellant paid part of the construction sum and both parties signed the bills of quantities, the appellant failed to return a signed copy of the Articles of Agreement. The respondent carried out substantial work but suspended construction and later terminated the contract due to the appellant's failure to pay. The respondent initiated arbitration proceedings pursuant to clause 36 of the agreement.

The arbitrator awarded the respondent UGX 584,430,571, with interest at 18% per annum from the date of filing the claim until full payment, general damages of UGX 100,000,000 with interest of 18% per annum from the date of the award until payment in full and taxed costs amounting to UGX 92,507,410. Dissatisfied, the appellant filed an application in the High Court to set aside the award. The High Court set aside the arbitral award on grounds that the arbitration clause had been deleted from the building contract and thus the arbitrator lacked jurisdiction. On appeal by the respondent, the Court of Appeal overturned the High Court's decision and reinstated the arbitral award, holding that the appellant's application fell under Section 16, not Section 34, of the Arbitration and Conciliation Act (ACA). The appellant subsequently appealed to the Supreme Court that returned the file to the Court of Appeal to constitute a different Coram to hear and decide the appeal since the judgment arising from the appeal had been written by a Coram different from the one that had heard it. The new Coram quashed the decision of the High Court and reinstated the award. The appellant then appealed to the Supreme Court.

The Supreme Court considered five grounds of appeal which are summarized as follows; that the learned Justices of the Court of Appeal erred in law when they held that there was a written arbitration agreement, that the learned Justices of the Court of Appeal erred in law when they held that the application to set aside the arbitration award was made out of time and that the learned Justices of the Court of Appeal erred in law when they held that the appeal that was brought before them was competent.

In respect to whether there was a written arbitration agreement, Court found that basing on the evidence on record, the appellant had conceded that the arbitration clause had not been deleted from the contract. The Supreme Court's further finding was premised on the doctrine of part performance where in the instant case, in as much as the contract between the parties had not been signed, there was part performance of the same which was a bar to any averment that there was no arbitration clause because the contract had not been signed. In reaching this conclusion, the Court cited Credit Finance Corp Ltd v Ali Mwakasanga [1959] E.A. 79 and Roko Construction Ltd v Kakira Sugar Works Ltd ARB Cause No. 7 of 2007, emphasizing that part performance can validate an unsigned contract where both parties have acted upon its terms. This ground therefore failed.

In respect to whether the application to set aside the arbitration award was made out of time, Court relied on Section 34(3) of the Arbitration & Conciliation Act Cap 4(As it then was) which provided that an application to set aside an arbitral award must be made within one month of receiving the arbitral award. The Court rejected the appellant's reliance on Rule 7(1) of the Arbitration Rules which were contained in the First Schedule to the Arbitration Rules, holding that statutory provisions under Section 34(3) of the Arbitration and supersede the rules. The Court emphasised the principle from Makula International Ltd v Cardinal Nsubuga & Anor (1982) HCB 11, where it was held that courts have no residual jurisdiction to extend statutory timelines. Court further stated that it was apparent that the application to set aside the award had been filed way out of time stipulated under Section 34 of the Arbitration & Conciliation Act and thus this ground of appeal failed.

In respect to whether the appeal before the Court of Appeal was incompetent, it was the appellant's argument that the appeal to the Court of Appeal was incompetent under Section 66 of the Civil Procedure Act Cap 71 as it then was. Section 66 concerned appeals from the decree or any part of the decree and from orders of the High Court to the Court of Appeal. The Supreme Court disagreed with the Court of Appeal's reliance on Section 66 CPA, stating that appeals under the Arbitration & Conciliation Act must be governed by Section 38(3) of the Arbitration & Conciliation Act which provides that an Appeal shall lie to the Court of Appeal against a decision of the Court in respect to setting aside the award if the parties have so agreed that an appeal shall lie and the Court grants leave to appeal or where the Court fails to grant leave, the Court of Appeal may exercise any of the powers which the Court could have exercised under subsection 2. The Court found that the High Court had properly granted leave to appeal, satisfying the requirements of Section 38(3). This finding was premised on the fact that after the delivery of the Ruling by the High Court, the respondent applied for leave to appeal to Court of Appeal and Counsel for the Appellant did not object. Court thus found that the Appeal was competent before the Court of Appeal by virtue of section 38(3) of the Arbitration & Conciliation Act and not Section 66 of the Civil Procedure act.

Because four of the grounds raised by the appellant had failed, the decision of the Court of Appeal was dismissed with costs to the respondent.

In this case, the Supreme Court rightly relied on Section 9 of the Arbitration & Conciliation Act Cap 4(As it then was); which limits Court intervention in arbitral matters to instances stated in the Act and thus held that an application to set aside an arbitral award must be filed within 30 days from the date of delivery of the award and also by stating that an appeal from an arbitral award was limited as set out in the Arbitration & Conciliation Act. This promotes the principle of “Autonomy” which is the bedrock principle governing Arbitration and which enables the parties who have chosen arbitration as a mode of dispute resolution; as is often the case in construction contracts, to conclude resolution of their disputes with limited Court interference.

However, the jury is still out as to whether in this case, the parties properly fulfilled the terms under Section 38 relating to an appeal from an application to set aside an arbitral award especially in light of the case of Babcon Uganda Limited V Mbale Resort Hotel Ltd Civil Appeal No. 06 of 2016, where the same Court, when faced with similar facts arising from a Preliminary Objection that the appeal was improperly before it because the parties had not agreed that questions of law be referred to it which was a prerequisite under Section 38 of the Arbitration & Conciliation Act, upheld the preliminary objection and dismissed the appeal stating that there was no automatic right of appeal to the Supreme Court.

---

## Quantum Meruit as a remedy to an aggrieved contractor

---

### *Mohammed Saru T/A Moonlight Transporters and Contractors V Jinja Central Division Council & the Attorney General High Court of Uganda (Commercial Division), High Court Civil Suit No. 223 of 2009 delivered on 17 August 2012 [Christopher Madrama, JJ]*

The plaintiff, brought a suit against the defendant for recovery of UGX 283,653,587 or quantum meruit for construction works it carried out for the defendant, interest, and costs. The claim arose from a contract dated 12th June 2003 where the defendant engaged Messrs Building Services Ltd for the construction of its office block. Messrs Building Services later assigned the contract to the plaintiff for a total consideration of UGX 523,523,370 exclusive of VAT. The plaintiff substantially performed the contract but was later halted by the defendant on the recommendation of the Inspector General of Government (IGG). The plaintiff was however directed to guard the building and properties therein. In April 2008, the Ministry of Works and Transport valued the works done by the Plaintiff and recommended that the cheapest way of closing the contract was to negotiate an amicable settlement with the plaintiff and it is on this recommendation that the plaintiff agreed to hand over site to the defendant and the defendant agreed to verify the plaintiff's claims for payment. Further, the contract was mutually terminated through a memorandum of understanding, the plaintiff handed over the premises and demanded for payment of UGX 283, 653, 587 from the defendant who declined to pay hence the suit. To note however that during hearing of the case, the plaintiff abandoned part of its claim and settled for UGX 153,269,833(Which was the sum arising from a report made by the Building Department of the Ministry of Works & Transport).

In its defense, the defendant denied all claims and stated that the suit was barred by statute specifically the Civil Procedure and Limitation(Miscellaneous Provisions) Act Cap 72 and the Inspectorate of Government Act 2002(As it then was). That further the recommendations of the Inspector General of Government could not be overruled by a recommendation from the Ministry of Works and Transport, that there was no legal & enforceable contract between the parties under the provision of the Local Governments Act and finally, that the executed works were not in accordance with the contract if any and thus the defendant was not liable to pay for them. The Inspectorate of Government joined the suit as a third party upon application by the defendant but was later on substituted with the Attorney General since the former was not a body corporate.

**During scheduling, the parties agreed to two issues which were;** the quantum of damages the plaintiff was entitled to and who was liable to pay the plaintiff. To note that the defendant admitted liability to the plaintiff to the tune of UGX 6,364,238 and judgment on admission to this effect was entered. The sum in contention was now UGX 146,905,595.

In respect to the issue of liability, the defendant argued that the contract was terminated following the IGG's recommendations and, therefore, liability should not rest with them. However, the court noted that the IGG's role was advisory, leaving the local authority responsible for implementing the recommendations in line with the contract and applicable law. The court found that the defendant failed to comply with clause 25 of the contract executed between the parties regarding termination and opted instead for mutual termination via the Memorandum of Understanding executed by the parties. It therefore followed that the defendant's failure to verify and settle the claims as agreed in the Memorandum of Understanding rendered it liable.

In respect to the issue of quantum, court found that the Ministry of Works had recommended the payment of UGX 6, 364,238 as the outstanding sum to the plaintiff and had further recommended UGX 146,905,595 as compensation costs but subject to negotiations between the parties. It was the court's finding that the plaintiff remained on the site at the instance of the defendant incurring costs as a result which were; maintenance of site for 34 months, costs of idle labour and plant equipment respectively, head office costs and demobilization costs. These were granted premised on the principle of quantum meruit but the claim for loss of profit was declined because it was contrary to the principle of quantum meruit. The court further awarded interest and costs.

In arriving at its decision, the court emphasized the doctrine of quantum meruit, which entitles a party to reasonable remuneration for services rendered, even in quasi-contractual scenarios. Citing Cheshire and Fifoot's Law of Contract, the court determined that the plaintiff was entitled to compensation for maintaining the site for 34 months and other related costs incurred at the defendant's request. The judgment highlights the importance of adhering to contract terms and the liability of local authorities in implementing recommendations of oversight bodies.; which implementation must be in line with the contract executed between the concerned parties.

# Construction Law **DIGEST**

---

Compiled And Edited By;



**PAUL MUKIIBI**

Senior Partner  
Mukiibi & Kyeyune Advocates



**DAVID KAGGWA**

FCI Arb, FICCP LLM  
Senior PARTner  
Kaggwa & Kaggwa Advocates



**ANN NAMARA MUSINGUZI**

MCI Arb  
Managing Partner  
Namara Musinguzi & Co Advocates

