

## Hon. Mr. Justice Charles Kajimanga



Hon. Mr. Justice Charles Kajimanga FCIArb obtained his LLB degree from the University of Zambia in 1983 and was admitted to the Bar in 1984. In 1993, he obtained his LLM degree from Cornell University (USA). He was appointed Judge of the High Court in 2002. In December 2015, he was appointed Judge of the Supreme Court.

Hon. Mr. Justice Kajimanga is a Fellow of the Chartered Institute of Arbitrators (England) and a member of the London Court of International Arbitration (African Users Council). Since 2006, he has been an approved tutor, examiner and assessor in arbitration courses offered by the Chartered Institute of Arbitrators in Zambia. He was the first Chairman of the Chartered Institute of Arbitrators Zambia Branch. He has presented papers at and attended arbitration conferences and seminars within and outside Zambia. Hon. Mr. Justice Kajimanga is a contributor of a chapter in a book entitled 'ARBITRATION IN AFRICA: A REVIEW OF KEY JURISDICTIONS' published by Sweet & Maxwell in 2016.

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# THE JUDICIARY

**THE ARBITRATION AGREEMENT AND STAY OF LEGAL PROCEEDINGS  
UNDER SECTION 10 OF THE ARBITRATION ACT No. 19 OF 2000**

**PAPER PRESENTED**

**BY**

**HON JUSTICE CHARLES KAJIMANGA FCIArb AT THE ANNUAL JUDICIAL  
CONFERENCE 2016, HELD AT AVANI VICTORIA FALLS RESORT,  
LIVINGSTONE FROM 14<sup>TH</sup> TO 18<sup>TH</sup> NOVEMBER, 2016**

## **PRESENTATION OUTLINE**

- ❑ **DEFINITION OF ARBITRATION AGREEMENT**
- ❑ **CHARACTERISTICS OF ARBITRATION AGREEMENT**
- ❑ **STAY OF LEGAL PROCEEDINGS UNDER SECTION**

**10 OF AA 2000**

# ARBITRATION AGREEMENT

## Definition

“an agreement **whether in writing or not**, by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not” (S. 2 (1))

- Definition envisages -
  - Written arbitration agreement
  - Oral arbitration agreement

## ARBITRATION AGREEMENT CONT...

### Other Jurisdictions

- Arbitration agreement valid only if in writing

E. g. Zimbabwe

Kenya

South Africa

Malawi

Tanzania

Rwanda

Uganda, etc

NY Convention - S. 30(1)(b) and Article II(2)

Second Schedule

# ARBITRATION AGREEMENT CONT....

## Form

- ❑ Arbitration clause in contract
- or
- ❑ Separate agreement - Submission agreement/*ad hoc* arbitration agreement

### Arbitration clause in contract

- ❑ Most common
- ❑ Looks to the future
  - ▶ Agreement to submit future disputes to arbitration
  - ▶ Not detailed

## ARBITRATION AGREEMENT CONT....

### ▶ Example

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration”

Clause may include:

- No of arbitrators
- Place of arbitration
- Language to be used in arbitral proceedings
- Governing law of the contract

## ARBITRATION AGREEMENT CONT...

### Separate agreement/Submission agreement

- ❑ Looks to the past
  - Deals with dispute that has already arisen
  - More detailed. Includes, *inter alia*:
    - Name(s) of Arbitrator(s)
    - Sets out matters in dispute



## ARBITRATION AGREEMENT CONT...

Example:

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### ARBITRATION AGREEMENT

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We the undersigned **HEREBY AGREE** to refer to arbitration a dispute that has arisen from a contract between us dated ... for the construction of ... and we **HEREBY APPOINT** Kachepa Foloko of KF Chambers to be Arbitrator in the reference.

The matters in dispute are as follows:

1. ...

2. ...

etc

## ARBITRATION AGREEMENT CONT...

### Agreement “in writing”

- ❑ Contained in a document signed by the parties
- ❑ Exchange of letters, emails
- ❑ Other means of communication which provide record of the agreement
- ❑ Exchange of statement of claim and defence in which existence of an agreement alleged by one party, is not denied by another
- ❑ Reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement

(S.9(2))

## ARBITRATION AGREEMENT CONT....

### Statutory Imposition/Arbitration Clauses

#### 1. Electricity Act Chapter 433

“... in default of agreement between the parties, the amount and application of such compensation shall be determined by Arbitration in accordance with the provisions of the Arbitration Act and for that purpose the parties shall be deemed to be parties to a submission in which the reference is to two arbitrators”

(S. 20)

## ARBITRATION AGREEMENT CONT....

### 2. Zambia Development Agency Act No. 11 of 2006

“Any dispute arising as a consequence of an investment under this Act shall be settled in accordance with the Arbitration Act” (S. 12)

# ARBITRATION AGREEMENT CONT...

## Characteristics

- ❑ Include the following:
  - Separate/independent of underlying contract  
(Separability/Severability doctrine)
  - Survives termination of underlying contract
  - An agreement in an agreement

## ARBITRATION AGREEMENT CONT...

- Doctrine of separability recognized in AA 2000 under Article 16 (First Schedule) as follows:

“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. **For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of other terms of the contract...**”

## ARBITRATION AGREEMENT CONT...

“... an arbitration clause in a contract... is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other... but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties, that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution...” (Lord Macmillan in *Heyman and Another v Darwins Limited* [1942] 1 ALL ER 337, [1942] AC 356  
See also *Paal Wilson & Co. A/S v Partenreederei Hannah Blumenthal, The Blumenthal* [1983] 1 ALL ER 34

### Stay of Legal Proceedings under S.10

“A court before which legal proceedings are brought in a matter which is a subject of an arbitration agreement **shall**, if a party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is **null and void, inoperative or incapable of being performed**” (S. 10(1))

- ❑ Section makes it mandatory for trial courts to refer parties to arbitration where there is a valid arbitration agreement



## STAY OF LEGAL PROCEEDINGS CONT...

### Null and void

- Underlying contract null and void *ab initio* (invalid from outset)
  - ▶ *Maxim ex nihilo nihil fit* (from nothing nothing comes) best explains the rationale
- If dispute not arbitrable under S. 6(2):
  - (a) An agreement contrary to public policy
  - (b) A dispute which in terms of any law, may not be determined by arbitration

## STAY OF LEGAL PROCEEDINGS CONT...

- (c) A criminal matter or proceeding except in so far as permitted by written law and unless the court grants leave for the matter or proceeding to be determined by arbitration
- (d) A matrimonial cause
- (e) A matter incidental to a matrimonial cause unless the court grants leave ...
- (f) The determination of paternity, maternity or parentage of a person
- (g) A matter affecting the interests of a minor or an individual under a legal incapacity...

# STAY OF LEGAL PROCEEDINGS

## Inoperative

- If previously valid but has ceased to have effect

E.g. - arbitration agreement had a fixed duration which has since expired (Nyambe v Total Zambia Ltd SCZ Judgment No. 1/2015)

- Dispute between same parties already decided by a court or arbitral tribunal (*res judicata*)

## STAY OF LEGAL PROCEEDINGS CONT...

### Incapable of being performed

- ❑ Arbitration clause makes it impossible for arbitration to proceed due to a physical or legal impediment

Eg - If badly drafted (“pathological arbitration clause”)

“The Agreement and this addendum shall be construed in all respects in accordance with the Laws of the Netherlands and for this purpose the parties hereby submit themselves to the jurisdiction of the courts of the Netherlands and in particular to the Arbitration Act of the Netherlands”

## STAY OF LEGAL PROCEEDINGS CONT...

In rejecting application for a stay of legal proceedings, Judge stated that:

“In my firm opinion, this ‘arbitration agreement’ is... incapable of being performed as it provides for the settlement of disputes between the parties by both litigation and arbitration at the same time. This is a classic example of a ‘pathological arbitration clause’ which does not amount to an arbitration agreement at all”

(Flodac BV v Wangwa Roses Ltd, 2009/HPC/137 (Unreported))

## STAY OF LEGAL PROCEEDINGS CONT...

### Other Examples of Pathological Clauses

“All disputes under the agreement shall be resolved through arbitration in accordance with the arbitration rules of the London Chamber of Commerce, **by one or more arbitrators, except in relation to technical matters which are to be submitted to an expert for resolution”**

## STAY OF LEGAL PROCEEDINGS CONT...

“Any dispute between the parties shall be referred to an **association arbitrator** under the Arbitration Act of Zambia, and the Chairman of **the law of Zambia**, or his nominee will be the sole arbitrator”

## STAY OF LEGAL PROCEEDINGS CONT...

### Court Decisions

#### □ High Court

#### 1. **Yougo Ltd v Pegasus Energy (Z) Ltd - 2004/HPC/0299 (Unreported)**

“... The only situation under which the court will not refer the matter to arbitration is where the court finds that the agreement is null and void, inoperative or incapable of being performed.

In this case the Plaintiff has not demonstrated that the agreement is null and void, inoperative or incapable of being performed”



## STAY OF LEGAL PROCEEDINGS CONT...

### 2. **Leopard Ridge Safaris Ltd v Zambia Wildlife Authority - 2005/HP/0665 (Unreported)**

“... This section is clear and mandatory except where it is shown that the agreement is null and void, inoperative or incapable of being performed

This agreement has not been shown to be null and void and it is certainly not incapable of being performed”

## STAY OF LEGAL PROCEEDINGS CONT...

### Supreme Court

1. **Leopard Ridge Safaris Ltd v Zambia Wildlife Authority (2008) Z. R. 97)**

“... since the application for leave was before the court and in consideration of the respondent’s application for a stay of the proceedings under section 10 of the Arbitration Act No. 19 of 2000, we find that the learned judge had no choice but to refer the dispute to arbitration as provided for in the Hunting Concession Agreement”

## STAY OF LEGAL PROCEEDINGS CONT...

### 2. **Pouwels Construction Ltd and Another v Inyatsi Construction Ltd SCZ Judgment No. 23 of 2016**

“Since there was a valid arbitration agreement, the learned trial judge had no jurisdiction to adjudicate the matter. He had an obligation to stay the proceedings and refer the parties to their choice of dispute resolution forum. In the circumstances, we hold that the subsequent legal proceedings ... were a nullity”

## STAY OF LEGAL PROCEEDINGS CONT...

### 3. Audrey Nyambe v Total Zambia Ltd - SCZ Judgment No.1/2015

“We have no doubt that at the time the dispute between the parties arose, and indeed at the time the matter was referred to arbitration, the arbitration clause had become **inoperative and incapable of being performed**. In view of the foregoing we find that the learned judge erred when she stayed the proceedings before her and referred the matter to arbitration”

## STAY OF LEGAL PROCEEDINGS CONT...

“If at any time **during the continuance of this agreement**, any dispute, differences or questions relating to the construction, meaning or effect of this agreement or any clause herein shall arise between the parties, then the aggrieved party shall give written notice or the affected party shall give written notice of not less than 21 days to the other party herein. Each party shall within 14 days of the date of expiry of the written notice aforementioned appoint an arbitrator. The matter shall therefore be referred to the two arbitrators”

(Nyambe v Total Zambia Limited SCZ Judgment No.1/2015)

**T H A N K Y O U !**

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. These shapes are primarily located on the right side of the frame, creating a modern, layered effect. The rest of the background is plain white.