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High Court overturns practice of appointment of arbitrators

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Every so often, a judgment is passed that upsets settled ways of doing business. When the hue and cry has hushed, upon closer and sober examination, it is often discovered that the old way of doing business was indeed wrong thus a new era is born. *International Development Consultants Ltd -V- Jimmy Muyanja and others Misc. 133 of 2018* is one such decision.

The applicant challenged the appointment of an arbitrator by the Executive Director of the Centre for Arbitration and Dispute Resolution (“**CADER**”), under the Arbitration and Conciliation Act (Cap 4) (the “**Act**”). The applicant contended that the power to appoint an arbitrator under the Act was vested in the appointing authority (being the Governing Council of CADER and not in the Executive Director.

In his judgment, handed down on 1 March 2019, Hon. Justice Musa Sekaana picked apart the Act, separating the office of the Executive Director and its functions from that of the Governing Council of CADER. He found that where parties leave it to the appointing authority under the Act to appoint an arbitrator, that appointing authority is the Governing Council of CADER and not the Executive Director.

Up until this point, the power to appoint arbitrators by CADER was exercised by the Executive Director. Dozens of arbitrations have been conducted and concluded by arbitrators appointed by the Executive Director. Except for a 30-day limitation provision, the awards of these arbitrators would now be the subject of severe contest. Losing parties to more recent arbitral awards may well consider an application to set aside on the basis that the arbitral tribunal was not lawfully appointed.

The more thorny issue by far is that the Governing Council has never been appointed under the Act. The Governing Council is to comprise a Chairperson appointed by the Minister; the Executive Director appointed by the Council; the President of the Commercial Court; three representatives appointed by the Minister from existing private sector organisations (unspecified); and a representative of Uganda Law Society.

There are certainly minefields to navigate ahead given this prescription. Which are the “existing private sector organisations” from which the Minister should appoint three representatives? How is the representative of Uganda Law Society to be selected? Can the Minister make the choice or is it by the Uganda Law Society?

This also begs the question, if there was no Governing Council, who then appointed the current Executive Director?

It was for such issues around CADER, among others, that the Uganda Bankers Association and the Uganda Law Society moved to establish another arbitration centre named International Centre for Arbitration and Mediation in Kampala. The new centre is expected to start work in the next few months.

For CADER, what is done is done. We now have an excellent opportunity to right this ship and help it resume its journey in dispute resolution.

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