



LEGAL AND REGULATORY UPDATE



CASE LAW

1.0

Ham Enterprises Limited and two others v Diamond Trust Bank (U) Limited & Another Supreme Court Civil Appeal No. 13 of 2021

1.1. The Supreme Court of Uganda in June, in a unanimous decision written by the Chief Justice held that a lending transaction between a foreign bank and a Ugandan borrower does not constitute “transacting financial institutions business” as defined by the Financial Institutions Act 2004.

1.2. This holding finally clarified the position that a foreign lender does not require a licence from the Bank of Uganda (“BoU”) in order to extend credit to Ugandan borrowers and has brought calm to a market with a syndicated portfolio of about USD 1.5 Billion.

A lending transaction between a foreign bank and a Ugandan borrower does not constitute “transacting financial institutions business”

1.3. The Appeal arose out of a matter in the High Court filed by Ham Enterprises, Kiggs International (U) Limited and Hamis Kiggundu (jointly “the Borrower”) against Diamond Trust Bank (U) Limited and Diamond Trust Bank (K) Limited (jointly “the Lender”). The Borrower had defaulted on its loan repayments to the Lender, a dispute arose which culminated in the filing of the suit. At trial, the Borrower argued that the loan agreements with the Lender were illegal and unenforceable as the Lender was carrying out financial institutions business in Uganda without a licence from BoU. The High Court agreed. This decision was appealed to the Court of Appeal which reversed the decision of the High Court and accordingly the Borrower appealed to the Supreme Court.

1.4. It must be observed however that even if the Supreme Court had found the loan agreements of the Lender illegal, the Borrower would still have been obligated to repay the loan.

Under Section 54 of Contracts Act, 2010, a person who receives advantage under a void agreement is still bound to restore it or pay compensation to the person from whom they received the advantage.

1.5. Going Forward, foreign lenders, Multilateral Development Banks and other entities involved in cross-border syndicated financings in Uganda and continue to operate in Uganda with confidence.



2.0

AYA Investments(U) Limited v Industrial Development Corporation of South Africa Misc. Cause No. 0058 of 2021.

2.1. In this matter, the Applicant, AYA Investments(U) Limited, sought to set aside an Arbitral Award issued against it in a South African arbitration. The Court instead upheld the Arbitral Award and affirmed the place of arbitration in settling disputes arising out of modern-day financing transactions explaining that where Arbitration awards are properly issued whether locally or internationally, the Courts will not interfere.

2.2. The Applicant and the Respondent, International Development Corporation between the period 2007 and 2017 entered into various Financial Credit Agreements by which the Applicant received financing for the construction of Pearl of Africa Hotel in Kampala, Uganda. The Applicant defaulted and on 13th September 2017, the Respondent issued a Notice to the Applicant recalling the outstanding loan sum which then stood at USD 118,817,012. Further, the Respondent on 14th September, 2017 issued a Notice of Default pursuant to Section 19 (2) of The Mortgage Act No. 8 of 2009 and later commenced foreclosure proceedings.

2.3. The Applicant challenged these by invoking the arbitration clauses under the Financial Credit Agreements. Arbitration commenced in February 2018 in South Africa under the laws of South Africa and the Respondent was awarded the sum of USD 153,072,275 comprising the unpaid principal sum lent over the ten-year period of USD 81,765,318 and the unpaid interest thereon at the facility rate for the said ten-year period being USD 71,308,957. The Respondent was also awarded further interest from the date of the Award until payment in full.

2.4. The Applicant accordingly sought to have the arbitration proceedings declared null and void in the Commercial division of the High Court of Uganda by filing this Application on 30th October 2021. The Court denied the Applicant's Application. It was the Court's opinion that a Court adjudicating upon the validity of an arbitral award is not to function as an appellate Court, but merely to decide upon the legality of the validity of the arbitral award.

Court further observed that when a court reviews an arbitration award, it should not concern itself with the merits of the determination. If the arbitrator has acted within his or her jurisdiction, has not been corrupt and has not denied the parties a fair hearing, then the Court should accept his or her reading as the definitive interpretation of the contract even if the Court might have read the contract differently.

On 16th December 2021 pursuant to Sections 35 and 43 of The Arbitration Act, the Respondent applied for the registration of the Award as a decree of the High Court of Uganda. The Applicant applied to have the Arbitral Award set aside. Once again, the Applicant's application was dismissed with costs to the Respondent.

2.5. These decisions lend credence to the use of arbitration and other Alternative Dispute Resolution mechanisms in financing transactions. Court will generally not interfere in arbitration proceedings whether local or international if the arbitrator(s) have acted within their jurisdiction, void of corruption and afforded parties a fair hearing. Rather, Court will enforce awards arising from such proceedings.

2.6. On a related note, in February this year, the AYA Investments (U) Limited was placed in receivership and the Director of Insolvency and Receivership of the Uganda Registration Services Bureau was appointed Official Receiver and subsequently, as the Provisional Liquidator. This however should not prevent International Development Corporation from executing the Award as Court has previously ruled that a secured creditor cannot be stopped from recovery by a liquidation process.

3.0

Translink Limited v Standard Chartered Bank Uganda Limited Civil Suit No. 415 of 2019



3.1. In this matter, the Court brought further clarity to the obligations arising out of the Banker-Customer relationship and established that banks have no duty to reverse online payments made by a customer. The Court explained that a bank's duty of care in a digital transaction is discharged when it successfully proves that a payment has been made in accordance with a customer's instructions.



3.2. The Plaintiff, Translink Limited instituted this suit against the Defendant bank claiming negligence and breach of contract in the alternative and seeking an order for payment of the sum of USD 13,675. The parties were in a customer -bank relationship. The Plaintiff's claim against the Defendant was for negligence because it failed to carry out the timely countermand instructions of the Plaintiff to pay Nanjing Chuangwei Household Electron-Halifax Bank, UK resulting in the Plaintiff losing USD 13,675.

3.3. Court found that the Defendant bank fulfilled its duty to pay as instructed by the Plaintiff and had no duty to countermand the transaction as the payment had already been effected by the time the countermand instruction was received 51minutes later.

3.4. The Court found that the Defendant bank was neither liable for breach of contract nor liable for breach of banker- customer relationships as it had carried out the instructions as directed by the Plaintiff to pay out the sum of money and no longer retained the right to reverse the transaction once paid out.

3.5. This decision is especially relevant at a time when banking, trade and other such commercial transactions are increasingly being done over electronic platforms. The Court has shown that the Bank's duty in such instances is slightly different from that in over- the- counter transactions. Going forward, we would advise Banks to:

3.5.1. Take comfort in the fact that the courts increasingly seem to understand the nature of digital transactions especially their instantaneousness;

3.5.2. Require that a Customer confirm instructions (even twice) before effecting them; and

3.5.3. Maintain a log of all Bank- Customer correspondence so that the Bank can easily build a case of taking best efforts to effect customer instructions.

Court found that the Defendant bank fulfilled its duty to pay as instructed by the Plaintiff and had no duty to countermand the transaction.

4.0 Silver Kayondo v Bank of Uganda Misc. Application No. 109 of 2022

4.1. In this matter, the Court ruled that crypto currencies under Uganda's current laws and National Payment System are illegal and unlawful and not accepted as a general payment instrument in Uganda.

4.2. Companies that have previously been in the business of virtual assets for now may have to seek to continue to do so under a regulatory sandbox arrangement approved by the Central Bank or otherwise halt operations. Outside of a regulatory sandbox arrangement, the Bank should not liquidate such virtual assets or participate in these kinds of transactions. The Bank will further need to consider how it interacts with its associates and stakeholders abroad who might use crypto as many crypto use cases in Uganda are in the form of cross border remittances.

3.3. On a related note, the Parliament of Uganda late last year granted a go ahead to a private member to introduce a bill to amend the primary law regulating capital markets in Uganda, the Capital Markets Authority Act, Cap 84. The Bill amongst other matters proposes to introduce virtual and digital assets, tokenization and regulatory sandboxes which will support technological innovation under the oversight of the Capital Markets Authority. The Bill is yet to be debated but it would appear that while the Courts have ruled crypto currencies to be unacceptable payment instruments, there are efforts by Parliament to regularize and regulate them within Uganda in the near future. The Anti- Money Laundering Act, 2013 too was recently amended to include Virtual Asset Service Providers (VASPs) as accountable persons for AML/ CFT reporting.





REGULATORY DEVELOPMENTS

5.0

Data update with the Uganda Registration Services Bureau ('URSB').

5.1. URSB recently issued a public notice informing the public of the roll out of a fully-fledged electronic registration system that facilitates seamless registration of companies, business names, legal documents, insolvency and other related services.

5.2. Consequently, URSB now requires all entities that were registered / incorporated before 9th December 2022 to upload their company data onto the new Online Business Registration System (OBRS). The rationale is to ensure the accuracy and correctness of the data on record. The data update can be done through the URSB link – www.obrs.ursb.go.ug.

5.3. The process entails creating a unique account for the entity on the OBRS, entering the Business Registration Number to load the Company or business name details and then starting the data update process. The data submitted will be validated by URSB and thereafter a business account created through which all future transactions of the entity will be conducted. In the meantime, no entity can file any documents with the company registry until the data update process has been completed and approved respectively.

5.4. In light of the above requirement, we have commenced the data update process on OBRS for all our clients. Please advise whether you would like for us to include you on the list of clients we are assisting with this process.

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LEGISLATIVE UPDATES

6.0

The President of the Republic of Uganda on the 26th day of May 2023, signed the Anti Homosexuality Bill into law thereby making it the Anti Homosexuality Act, 2023. The Act seeks to “prohibit any form of sexual relations between persons of the same sex, prohibit the promotion or recognition of sexual relations between persons of the same sex and related matters”. We are happy to discuss this Act and it’s implications for your business separately. Please reach out to your usual AF Mpanga contact if you would like the same.

7.0

The Parliament of Uganda in May 2023 also passed the Competition Act, 2023. The Act is yet to be assented to by the President.

The Act promotes and sustains fair competition in markets in Uganda and prevent practices having an adverse effect on competition in markets in Uganda and related matters. We will discuss this Act comprehensively in a subsequent newsletter.

Please do not hesitate to reach out to your usual AF Mpanga contact if you require further guidance in regard to any of the matters raised above.

AF MPANGA ADVOCATES