CYMBELL ADVOCATES

Issue 1, Q1 NEWSLETTER

1 Foreword

2 Setting Aside & Appeals from Arbitral Awards

5 Due Diligence for Risk Mitigation

7 The Value Added Tax Regime of Uganda

9 Financial Assistance for Purchase of Shares

11 Corporate Social Responsibility

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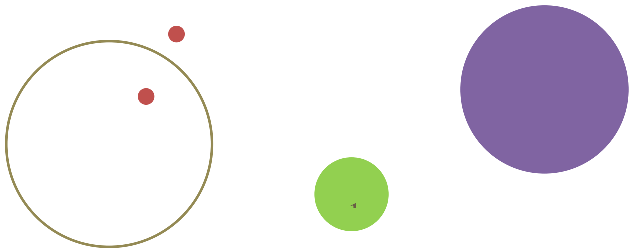


FOREWORD

GODWIN M. MATSIKO – MANAGING PARTNER

Happy 2020! Before the greeting runs cold, we might as well cash in on the good wishes of the new decade from all our readers, professional colleagues and clients. We at Cymbell Advocates are excited and positive about starting this journey with you. Thank you for your continued support and feedback over the past few months.

In our first digest of the year, we bring you insights in an array of interesting areas, trends for techpreneurs to guard their pricy secrets from hearing walls, in the cutthroat quest to make the next Amazon or Facebook. In our soft touch for customer experience buffs, we look at why it might be helpful to keep doing that corporate social responsibility or encourage it in your company if you do not yet have it.

Fights in companies are very much part of the grail and so we thought to check what would happen is some zealous shareholder wanted to pull from the back pocket to fill the front? Would the law allow it? And without leaving you hanging, we threw some spices in on how to do your homework on prospective partners and businesses and what you need to know about "Give Unto Caesar" before Caesar comes knocking.

Finally, in paying homage to our EAC regional presence and service offering, our dispute resolution insights this month look at the pitfalls in arbitration in Kenya and how that relates to Uganda. We take a deep dive on the possibility of appealing and setting aside arbitral awards for the truly East African investor and practitioner.

We hope these insights will give you a helpful snapshot into some of the key things you and your business should look out for in this decade, and yes, do go make that $1m.

Contact us:

Plot 49, Ntinda Road,

1st Floor, Rovis Apartments,

P.O. Box 22276, Kampala (U).

E: law@cymbelladvocates.com

T: +256776739643

f - /Cymbell-Advocates

in - /Cymbell Advocates, Uganda

ARE ARBITRAL AWARDS SCEPTERS OF GOD NO ONE CAN CHALLENGE? THE VIEW POINT IN NYUTU AGROVET LTD VS. AIRTEL NETWORK KENYA LTD & ANOR, AND SYNERGY INDUSTRIAL CREDIT LTD VS. CAPE HOLDINGS LTD

By Arinda Herbert Kainlawren

Arbitration is classified as one of the means of Alternative Dispute Resolution (ADR). Both the Arbitration and Conciliation Act, Cap 4 2000 of Uganda (the "ACA") and the Arbitration Act, No. 4 of 1995 of Kenya (the "AA") define arbitration to mean any arbitration whether or not administered by a domestic or international institution; (for Uganda) where there is an arbitration Agreement.

With increased globalization, arbitration has become the preferred means of resolving international disputes (especially in Commercial disputes) for being lenient on procedural rules, cost effective and expeditious. (Earl S. Wolaver. "The Historical Background of Commercial Arbitration, 83 U. Pa. L. Rev. 132 (1934). For arbitration to occur, the parties either agree prior to or after a dispute has arisen that their dispute will be resolved by arbitration.

In the event of a dispute, the parties agree to involve one or more neutral third parties ("arbitrators", or "arbiters") who make a decision called award that is binding on the parties. This is so because the ultimate objective of (the international) arbitration is to absolutely end disputes. Therefore, the arbitral award should be a final determination of the rights and obligations of the disputants. (Ivan Cisar & Slavomir Halla, 'The Finality of Arbitral Awards in the Public International Law' Conference Pravni Rozpravy, Grant Journal, 2012, p. 1).

In the same spirit, section 10 of AA (equivalent of section 9 of the ACA) encompasses the finality principle envisioned above in the sense that it provides for minimal intervention by courts, although in actual practice, the intervention has at times stretched too much as to defeat the essence of arbitration.

Setting aside arbitral awards at the High Court

Therefore, although the AA and the ACA expressly prohibits the Court from intervening in matters governed by the Act, section 35 AA (section 34 ACA) makes an exception for the High Court to set aside arbitral awards. This is evident in the Nyutu and Synergy cases where applications to set aside the arbitral awards were made to the High Court under section 35 AA. In both cases, the Court set aside the arbitral awards for being in breach of section 35 of the AA and dismissed the Petitioners' application for enforcement of the award.

For an applicant to successfully set aside an award, the applicant has the burden to prove that a party to the arbitration agreement lacked capacity, the agreement was invalid, there was a lack of proper notice to a party, the arbitral award dealt with a dispute not anticipated or beyond the scope of reference to arbitration, there were procedural irregularities or malpractice, and lastly the dispute is not capable of settlement by arbitration by law or that the award conflicts with public policy. In addition, such applications must be made before the lapse of one month (section 34 (3) of ACA), and three months (section 35 (3) of AA) from the date of receipt of the award. Any breach of this statutory prerequisite shall cause the application to be dismissed for being time barred. (Fountain Publishers vs. Harriet Nantamu & Anor HCT-00-CC-MA-135-2011).

Appeals from arbitral awards

Generally, there is no statutory right of appeal on the merits/findings of an arbitral award. In addition, there is no right of appeal from an order setting aside an award. In BM Steel Ltd vs Kilembe Mine Ltd HCT-CC-OO-MA-0579 of 2005 it was held that there is no right of appeal against an order setting aside arbitral awards. That setting aside in arbitration is governed by the ACA and not the Civil Procedure Act; the Civil Procedure Rules are of no consequence to the right of appeal in the context of an arbitration. The courts of law actually have no jurisdiction to sit in appeal and examine an arbitral award on its merits (Katamba Phillip vs. Magala Ronald, Arbitration Cause No. 003 of 2007).

Astonishingly, the Appellants in the Nyutu and Synergy case sought leave to appeal to the Court of Appeal which leave was granted despite the Respondents opposing it on the basis that there was no right of appeal under section 35 of the Act. Fortunately, the Court of Appeal, decided for the Respondents, dismissed the appeal and held that there is no right of appeal to the Court of Appeal in matters governed by section 35 of the Arbitration Act. The rationale for the decision is based on the fact that there is no such thing as inherent appellate jurisdiction which (appellate jurisdiction) must specifically be created by law (Baku Raphael vs AG SCCA No. 1 of 2005), which is not the case under the AA and ACA.

Much as that was the position at Court of Appeal, the Appellants in Nyutu and Synergy case further appealed to the Supreme Court as of right under Article 164(3) of the Constitution of Kenya (the equivalent of Article 134 of the Constitution of Uganda) which provides for both the jurisdiction and the right of appeal to the Court of Appeal against all decisions of the High Court. The Appellants argued that (i) it was raising a matter of general public importance, and (ii) that section 10 AA (section 9 ACA) which purport to deny a right of appeal is unconstitutional.

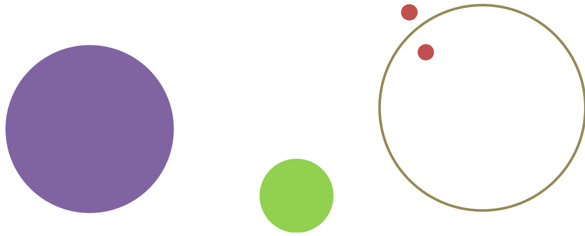
The Supreme Court was faced with two issues for determination; first, whether there is any right of appeal to the Court of Appeal upon a determination by the High Court under section 35 of AA (section 34 ACA); and, secondly, whether sections 10 of AA (section 9 ACA) and 35 of AA (section 34 ACA) limit a party's right of access to justice; and the scope of the principle of finality in arbitration.

The Supreme Court in disposing off the appeals in both cases disagreed with the Court of Appeal holding that there is a limited avenue for appeal under section 35 AA only in exceptional circumstances. Regrettably, the Supreme Court did not offer guidance on what in their view would constitute exceptional circumstances but clarified that not every decision of the High Court under section 35 is appealable to the Court of Appeal. The Supreme Court, in its judgment, suggested the introduction of leave stage, which will act as a sieve.

Therefore, the grounds for curial intervention must be narrowly construed, and should generally concern procedural failures that are unfair and prejudicial to the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of its powers. (See also AKN & Another vs. ALC & Others and other appeals [2015] SGCA 18 at p.38). The principle of finality in arbitral proceedings has attracted considerable scholarly comments. One that merits mention here is a quote from the work of Dr. Katherine A. Helm (Katherine A. Helm (Dr.), 'The Expanding Scope of Judicial review of Arbitration Awards: Where Does the Buck Stop? Dispute Resolution Journal, Vol. 61, No. 4, Nov. 2006 -Jan. 2007, pp. 6) who states;

"...if courts were free to intervene more liberally in the arbitration process, the advantage of a speedy and less costly resolution of disputes by private arbitration mechanism would certainly disappear."

In conclusion, court intervention should be restricted, and the dissatisfied party or Appellant must be required to seek leave of Court to appeal where obvious injustices by the High Court must not be left to subsist because of the 'no Court intervention' principle. However, Courts must be cautious, as to only intervene in exceptional circumstances lest parties may find arbitration no longer a quick alternative to litigation and consider whether at all include arbitration clauses in their agreements.



YOU CAN REDUCE RISK BY DOING YOUR HOMEWORK; THIS IS HOW!

By Brenda Karuhanga

Due diligence refers to research done before entering into an agreement or financial transaction with another party. It is an analysis of the background checks to obtain information of an organization or individual that allows the concerned investors to confidently transact business or engage with that party.

Due Diligence may take various categories; investigative due diligence that deals in entities and third party business transaction, supply chain due diligence which helps improve risk management particularly for importers/exporters, tracking companies, shippers, flight for- warders as well as start-up global logistics firms, and reputational due diligence which specializes in fact finding with respect to the character or a person or entity.

Fact finding due diligence is quite diverse and includes investigations into forensic accounts, in house security, lawyers or employees. Under this, all kinds of behavior or facts can be investigated including corruption, false insurance claims, fraud, etc.

Legal due diligence is the form of due diligence performed by a company on the other company, it can also be an investigation into one's own company. The goal is to assess the potential risks of selling or buying another business or business assets. Reasonable due diligence is used most often in connection with the performance of a professional or fiduciary duty or with regard to proceeding with the court action. legal due diligence is common in sales of the proprietary rights to goods and services and sale or purchase of property or business in merger and acquisitions or partnership, the investigations can take many forms and gather many different types of information take for instance property transactions, this will need to assess real estate record, liens on the property, compliance issues, building code requirements and others. If you are considering merging with or acquiring another business, legal due diligence investigation is in your best interest. A professional who is knowledgeable in legal due diligence can help you complete the investigation.

Due diligence is necessary in order to uncover risks in business or in people to protect your organizations. In today's competitive environment, it is advisable to engage an advisor, usually a private investigator or due diligence attorney/associate who will help you uncover the risks in dealing with a particular entity or individual. It is a challenging adventure that combines human nature, tracking skills, logic, physical abilities and keen observation.

Effective due diligence relies on effective and modern communication and data carriers or technologies that can be used to retrieve and analyses data and information. These span from devices to complex computer software and algorithms such as lie detectors. Nonetheless, other mundane tactics or strategies may be employed and may often prove more effective due to the human element or human judgment involved. These include physical tracking, observation, surveillance, detection, analysis, deductive reasoning and good anticipation, interviews and research among others. Some personality tests have also been developed and are widely used by recruiters to try and anticipate behavior and character, for example the Enneagram and SHL personality inventory assessments, to mention but a few.

By taking a detailed review and or survey of new and existing customers and third parties you can help safeguard your reputation and comply with regulatory requirements. This also ensures sound compliance standards and helps you be more informed. It can also help anticipate customer demands and trends which, in a data driven world can help make decisive decision on what, when and where to stock or display and generally, profitable business decisions. This task would again best be outsourced to an independent and qualified investigator or firm.

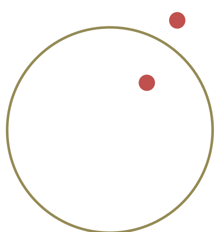
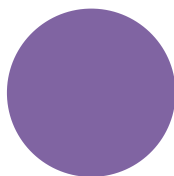
Due diligence is also critical in the mergers/acquisition space. A wave of mergers and acquisitions have taken place in Uganda as companies look for ways to protect their market share and ensure better returns for shareholders. This has also served to strengthen the position of such companies for example when DFCU Bank acquired Crane Bank assets. When conducting due diligence on a target company, your goal is to thoroughly evaluate its affairs legally, financially, environmentally, and even factually in order to make an informed decision as to whether to proceed with the acquisition. The best way to efficiently evaluate the materials is to view it in an organized virtual data room that is not only easy to navigate but also completely secure.

It is also important to review corporate records for partnership agreements, vendors and supplier relationships and agreements to purchase securities. A poorly conducted or a rushed due diligence in the context of an acquisition or merger may prove to be a bitter or even fatal pill to swallow and therefore demands patience and expertise.

In financial due diligence the focus is on income statements, balance sheets, cash flow statements, etc. For instance, of planning to purchase a business it is not only about if it is attractive to you or positioned in an area of town, but before you purchase the business due diligence needs to be performed with the help of professionals to know things like; does the business have a healthy cash flow? how reliable are its financial projections and what multiple is it placing on those earnings? are profits going up or down?, are there any hidden liabilities?, is the company up to date on its taxes and filings?, etc.

In the process of adding a vendor, due diligence should be conducted to know the following; is the ordering process easy and straight forward? do they have multiple warehouses in case a product is out of stock at one site? how often do they bill and what are the terms? are they willing to put special pricing in writing? etc. There is also due diligence for purchasing commercial property under this; environmental concerns like does the property contain hazardous material, location, building inspections, performance data, etc. are looked at.

Due diligence involves digging through a business's records, checking references, making sure everything checks out, and searching for items the business might have hidden.

WHAT YOU NEED TO KNOW ABOUT VAT BEFORE YOU RUN INTO CAESAR.

By Wanda Samuel Ronald

It is a well-known principle that all of us who consume goods and services pay Value Added Tax (VAT) in one way or the other. VAT in Uganda is governed by the Value Added Tax Act, Cap 349 of the laws of Uganda.

For one to be eligible to be registered for VAT they should meet particular conditions under the Act which include the following: that the person's taxable supplies exceed the threshold currently at Shs. 37,500,000 for a three months' period or Shs. 150,000,000 per year or one who has reasonable grounds to expect that the total value of anticipated taxable supplies during that period will exceed the registration threshold currently at Shs. 37,500,000 for a three months' period or Shs. 150,000,000 per year. Government, Local and Public bodies are also equally required to apply for registration when they commence taxable transactions.

When one has been registered, the registration can be cancelled either by the taxpayer voluntarily asking the Commissioner to cancel the registration. however, this can only happen if the taxpayer has been registered for at least 2 years. The Commissioner may also cancel the registration of a taxpayer who was ordinarily not eligible for registration due to reasons such as the taxable person having no place of abode, failure by the business to keep proper records among others. Once a taxpayer is registered for VAT, it is their obligation to lodge their tax returns for the tax period within fifteen days after the end of the tax period.

The return should state the amount of tax payable for the period, the amount of any tax credit refund claimed, and any other matter that may be prescribed.

There are however circumstances where the Commissioner may make an assessment for a taxpayer for example when a person fails to lodge a return as required by the law, where the Commissioner is not satisfied with the return lodged by a person, or where the Commissioner has reasonable grounds to believe that a person will become liable to pay tax but is unlikely to pay the amount due. A taxpayer may object to such an assessment which objection is addressed to the Commissioner within 30 days of receiving such an assessment and it will be the Commissioner's obligation to either allow the objection in whole or in part within 30 days after receiving the objection.

If the Commissioner does not communicate the decision within the stated time frame, then it will be deemed that they have allowed the objection.

In the event the taxpayer is not satisfied with the objection decision, then they can appeal the same to the Tax Appeals Tribunal.

Suffice to note is that only persons who make taxable supplies are eligible for registration for VAT purposes. A taxable supply is defined to mean the supply of goods and services other than those which are exempt or made in Uganda by a taxable person as part of his or her business activities. The second schedule to the VAT Act specifies the exempt supplies to include the supply of education services, the supply of medical, dental and nursing activities, the supply of postage stamps, the supply of financial services, the supply of insurance services, the supply of unprocessed foodstuffs, agricultural products and livestock, the supply of feeds for poultry and livestock, among others.

VAT refunds may be obtained at the end of a tax period and this will happen where a business has paid more tax on their purchases than the tax that is due on their sales.

When a registered tax payer charges VAT on the standard rate while the goods or services supplied are VAT exempt of zero-rated then they will be obliged to the overpaid output tax.

It is worthy to note that a person liable for VAT is to maintain the following documents; (a) original tax invoices, copy tax invoices, credit notes, and debit notes received by the person; (b) a copy of all tax invoices, credit notes, and debit notes issued by the person; (c) customs documentation relating to imports and exports by the person; and (d) such other accounts and records as may be prescribed by the Commissioner General.

VAT like any other tax is subject to evasion by the taxable persons in various ways such as failure to collect VAT on supply of goods and services, non-registration of qualifying persons, claiming of VAT credits for invalid invoices, zero-rating on exports, reporting of less sales, among others.

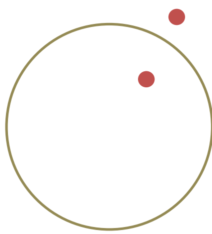
It is therefore prudent that every registered person charges VAT and efficiently accounts for the same to Uganda Revenue Authority.

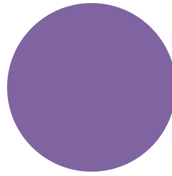
DISPUTE RESOLUTION DEPARTMENT

At Cymbell Advocates, we have an experienced team of dispute resolution lawyers who can assist you in a number of matters related to resolution of disputes whether through litigation, mediation or arbitration.

Our services include:

- Representation in courts
- Drafting demand letters
- Debt recovery
- Drafting and responding to court summons
- Mediation and Negotiation
- Arbitration
- Company/corporate disputes
- Corporate advisory
- Execution of judgments
- Legal due diligence
- Enforcement of security





Can a Company Assist in the Purchase of its own shares?
A view from the Companies Act 2012
By Owen Henry

Financial assistance refers to instances where a company financially supports the acquisition of its own shares or in its holding or subsidiary company. Prior to the Companies Act 2012, the offering of financial assistance by a company for this purpose was generally prohibited. The prohibition was based on inter alia, the very stringent capital maintenance requirements that have since been relaxed.

Within stipulated circumstances and if certain procedures that are in modern commercial law parlance referred to as "whitewashing", are met, a company may today offer financial assistance for the acquisition of its shares. In fact, private companies are generally not covered by the prohibition unless they are subsidiaries of a public company.

What amounts to "financial assistance"?

The precise meaning or the extent of what does or does not amount to financial assistance may be highly contested. For example, if a company meets the costs of identifying a potential buyer of shares held by one of its shareholders intending to sell, or if a company obtains financial advice on behalf of a shareholder who intends to sell his or her shares, does this amount to financial assistance that would fall under the prohibition?

It may or may not and this may also depend on the judge adjudicating this contention. On its part, the Companies Act adopts a definition of financial assistance which is rather wide and to a degree, exhaustive

a. Financial assistance given by way of gift in the best interests of the company;
b. Financial assistance given by way of guarantee, security or indemnity;
c. Financial assistance given by way of a loan or any other agreement ... or by way of a novation of or the assignment of rights arising under a loan or such other agreement; or
d. Any other financial assistance given by a company the net assets of which are by reason of the financial assistance reduced to a material extent or which has no net assets.

The statutory provisions on financial assistance are found in part III of the Companies Act. Section 63 thereunder stipulates the circumstances under which a company may offer financial assistance for the purchase of or

subscription to its own shares. If a company ordinarily carries out the business of lending money, it would be illogical to prevent it from giving assistance for the purchase of shares, even if those were its own shares or those of its subsidiary. This is intended to accommodate financial institutions. A blanket prohibition would adversely prejudice such companies. In another instance, a company might want to incentivize its employees by way of a share incentive scheme. This practice is now common among companies as a way of creating a sense of common ownership and responsibility for the success of the company. The rules permit a company contemplating this course of action to offer financial assistance to its employees under such a scheme to provide a loan, in good faith, to any employee other than a director with a view of enabling such a person to purchase or subscribe to shares in the company or its subsidiary.

Finally, if the assistance in question has been given in good faith and in the interests of the company, then it falls under the acceptable circumstances. It is therefore a question of justification and persuasion that the financial assistance given is for the benefit of the company and is given in good faith. That is always a question of fact.

Outside of the circumstances above, a company is prohibited from giving financial assistance whether by way of loan, guarantee, security or otherwise.

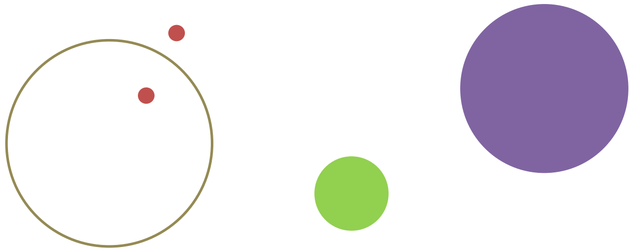
This also covers circumstances where a subsidiary company might want to give financial assistance for the purchase of shares in its holding company or vice versa.

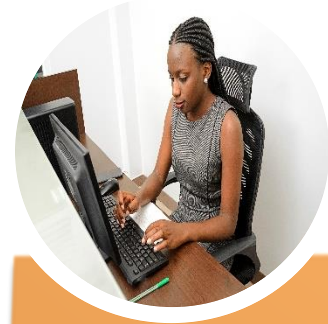
Why the prohibition?

The motivations behind the prohibition include among others, protection of minority shareholders and creditors who may be affected if the company's assets are depleted. This is because the company's resources are actually expended for the benefit of the purchaser and not necessarily for the benefit of the company which should be the case.

Under common law, the general mischief guarded against has was and is that the resources of the company or its subsidiaries should not be used directly or indirectly to assist a purchaser financially to make the acquisition. This may prejudice the interests of creditors and the interests of any shareholders.

If people who cannot provide the funds necessary to acquire control of a company from their own sources or by borrowing on their own credit, the company will be made to part with its funds either on inadequate security or for an illusory consideration.





IS CORPORATE SOCIAL RESPONSIBILITY A WASTEFUL PR STUNT?

By Alebar Kanyonza

Corporate Social Responsibility also known as corporate sustainability, corporate conscience or corporate citizenship refers to the obligation of business enterprises to adopt policies and plans of actions that are desirable in terms of expectations, values and interest of the society. Basically, corporate sustainability describes business practices built around social and environmental considerations.

Basic areas considered under corporate social responsibility include pollution control, health and hygiene, training and self-help and other philanthropic activities with initiatives like pro-bono work, advocacy campaigns, behavior change campaigns and donations to charity.

The three pillars under corporate sustainability.

The environmental pillar gets the most attention. Companies focus more on reducing their carbon footprint, packaging waste, water usage and their overall effect on the environment. This is considered "beneficial" as it may create positive and sustained financial impact to the company. For example, in the recycling process, there are lesser packaging costs involved for manufacturers however it is complicated to quantify the extent of environmental damage done by manufacturers. The social pillar is another poorly defined concept; more like a social license. A sustainable business should have the support and approval of its employees, stakeholders and the community it operates in. It all comes down to treating employees fairly, being a good neighbor and community member.

Businesses can focus on retention and engagement strategies like paternity benefits and leadership and development opportunities for their employees and strategies to give back to the community like sponsorships/ scholarships and investment in local public projects.

The economic pillar: To be sustainable, a business must be profitable. Activities that fit under this pillar include compliance, proper governance and risk management. This pillar cannot out-maneuver the other two.

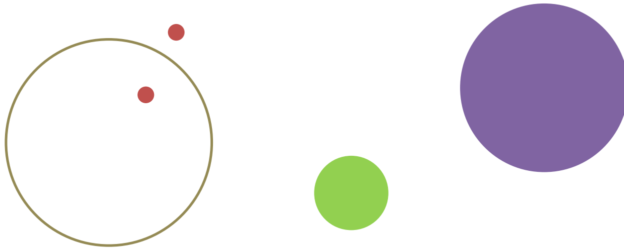
The Expectations? Social Responsibility is not limited to business owners. The expectations of all stakeholders have to be taken into account.

A business owner or shareholder expects a fair return on their investment. Without even considering dividends, shareholders also expect an appreciation in value of their shares. The employees expect a fair salary based on their nature of work and prevailing market rates considering other benefits and bonuses. The customer expects a good quality product or service at a reasonable price. The authorities involved expect compliance of all policies or regulations. The community expects a contribution towards its general welfare and upliftment.

The Arguments: Most business owners find social responsibilities a violation to their profit maximization and a dilution of the business purpose. Businesses must absorb the costs involved or pass them on to their customers. There is never any direct social accountability from the business sector to the public. However, Social responsibility is any business firm's ethical obligation. It has an impact on the public opinion of a business. The socially responsible businesses tend to have better community relations and improved business image. A good public image gives a firm access to more customers, better employees and money markets.

Considerations: In 2010, the International Organization for Standardization (ISO) released a set of voluntary standards meant to help companies implement corporate social responsibility. Unlike other ISO standards, ISO 26000 provides guidance rather than requirements because the nature of CSR is more qualitative than quantitative, and its standards cannot be certified.

Way forward: Yes, it is worth the cause. Companies need to determine the true implication of social responsibilities to their businesses, study ways to meet their primary goals and balance them out with societal expectations. It is important for them to be good corporate citizens!



TRENDS FOR TECHPRENUERS: PROTECTION OF TRADE SECRETS

By Rita Auma

Kakuzo Okakura in her book; The Book of Tea states that the art of life lies in constant readjustment to your surroundings. Let's face it, the world is in a constant state of change and if one wants to make it in the corporate industry one needs to get on board with it. Change is what one would refer to as a necessary evil.

We have seen the world evolve in different aspects more so in the technology industry which the question whether the law is sufficient to fully protect rights.

Kenny Kelvin in his book What Technology Wants alludes to it (technology) being a living, breathing thing. Its growth has resulted into new terms like techpreneurs - people who create, start and manage their own technology businesses. This art is not limited to the gadget making process but also engulfs startups that come up with different ideas like improving business concepts.

The question that arises from such changes is how one can best protect one's interests in one's upgraded concepts and ideas since in most cases these are improvements of already existent innovations in the industry.

The law provides for such information to be protected through Trade Secrets. These include; "Information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

According to section 3 of the Trade Secrets Protection Act 2009, a person has the right to prevent information lawfully within his or her control from being disclosed to or acquired, or used by others without his or her consent in a manner contrary to honest commercial practice.

"Trade secret" means information including but not limited to a formula, pattern, compilation, program, method, technique, or process, or information contained or embodied in a product, device or mechanism which—

(a) is, or may be used in a trade or business

(b) is not generally known in that trade or business

(c) has economic value from not being generally known

(d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Section 4 of the same act illustrates the conditions one must fulfil for protection.

1. Information protected under the Act must—

a. be a secret in the sense that it is not … generally known among or readily accessible to persons within the circles that normally deal with that kind of information. This was well elaborated in Persy Lubega v MTN C.S 165 of 2011, where the plaintiff alleged inter-alia that MTN had used her business concept to develop Mobile Money without compensating her. The High Court in dismissing her claim opined that the concept of mobile banking was not a new concept as it had been tried in other parts of the world and was thus not a trade secret. A global example of a trade secret can be the formula used to make coca cola products and the specific ingredients therein.

b. have commercial value because it is secret. A claim cannot be sustained if the "Trade Secret" does not have commercial value.

What is the product worth to the customer? What is its tradability? What makes the product stand out in this case is how much that would stand to be lost if the secret was released. If there is no loss estimate attached to it then there would be no grounds to claim.

C. have been subject to reasonable steps under the circumstances, by a person lawfully in control of the information, to keep it secret. There must have been an actual effort to protect the secrecy of the information.

A trade secret is taken to be protected so long as the conditions prescribed above are complied with in relation to it. As such there are no formal registration mechanisms or processes with respect of Trade Secrets.

In conclusion, although the law provides for the protection or enforcement of Trade Secrets, the only sure way to maintain a Trade Secret is keep it a secret. None the less, should the secret be publicized by for example an ex-employee, there are remedies under the law.