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ALTERNALTIVE DISPUTE RESOLUTION

PERSONAL ASSIGNMENT

**Review of the Consultancy Agreement between UKU Ltd (Client -Developer) and Samson & Sons Consultants Ltd (consultant) in regard to provision of Market Study of a 5 acre land parcel in Ruiru Town**.

**CLAUSE 7: CONFIDENTIALITY**

In this Consultancy agreement, the information in question includes market projections of the piece of land, its highest and best use, future and historical statistics of the area, price growth and others. Such information should be handled in a private manner since it offers a competitive advantage to the client.

A confidentiality agreement is a legally binding contract in which a person in his case a consultant, promises to treat specific information as a secret and promises not to disclose the secret to others without proper authorization. Receiving Party (consultant) shall hold and maintain the Confidential Information in strictest confidence for the sole and exclusive benefit of the Disclosing Party (client). Receiving Party shall carefully restrict access to Confidential Information to employees, contractors, and third parties as is reasonably required and shall require those persons to sign nondisclosure restrictions at least as protective as those in this Agreement. Receiving Party shall not, without prior written approval of Disclosing Party, use for Receiving Party's own benefit, publish, copy, or otherwise disclose to others, or permit the use by others for their benefit or to the detriment of Disclosing Party, any Confidential Information. Receiving Party shall return to Disclosing Party any and all records, notes, and other written, printed, or tangible materials in its possession pertaining to Confidential Information immediately if Disclosing Party requests it in writing.

Time Periods. The nondisclosure provisions of this Agreement shall survive the termination of this Agreement and Receiving Party's duty to hold Confidential Information in confidence shall remain binding until after a period of 18 months after termination of the agreement.

Advantages of the confidentiality clause;

* A Non-Disclosure Agreement Ensures Clarity on What Information is Confidential

It enables the parties to define what constitutes confidential information. Therefore, if you are the party disclosing confidential information, you will want this definition to be as broad as possible. Additionally, it should include any commercially sensitive information of your business, whether or not such information is:

* in a tangible form;
* marked in writing as ‘confidential’; or
* provided orally.
* It Helps to Set and Enforce the Consequences of Disclosure

Confidentialiy can be useful to set out the parties expectations of how confidential information should be protected. Additionally, to set out what the consequences are of disclosing such information. Setting this out clearly in writing and having both parties on the same page will hopefully limit the likelihood of the other party sharing your confidential information

* A Non-Disclosure Agreement Helps to Preserve Key Business Relationships

Confidentiality can be important to preserve key business relationships. It provides peace of mind in long term business relationships where confidential information must flow between the parties.

* It Limits the Reasons a Party Can Use the Confidential Information

You may be providing confidential information to another party for a specific reason. However, you may be concerned that the other party will use the information for other purposes. A benefit of using cconfidentiality is that you can limit the reasons the receiving party can use the confidential information. This is usually referred to as the purpose. Further, the receiving party will only be able to use the confidential information for that particular purpose.

**CLAUSE 8: DISPUTE RESOLUTION**

**Section a) Introduction**

Any disputes arising from the interaction of the two parties shall be reffered to a single arbitrator. The dispute resolution shall consider the arbitration act of 1995 or any other modifications or reenactments.

Arbitration is governed by the Constitution of Kenya 2010, the Arbitration Act 1995 and the Nairobi Centre for International Arbitration Act 2013. The Arbitration Act 1995 (as amended in 2010) is based entirely on the UNCITRAL Model Law. Initially, it was a mirror copy of the Model Law, but with the 2010 amendments, the Act now encompasses recent developments in arbitration practice and procedure. Kenya has experienced an influx of foreign direct investment in recent years, which has improved the Kenyan economy in general. Due to the increase in commercial activity, arbitration has become the preferred mechanism for resolving commercial disputes, particularly those involving foreign investors. Arbitration is most commonly used by commercial companies and foreign direct investors through investment arbitration. There is, however, a general understanding that arbitration is not the appropriate medium for resolving criminal matters, including commercial disputes that may have been tainted by some criminal liability.

The Limitations of Actions Act, Cap 22 of 2007, does not expressly limit bringing an arbitration claim to a specified number of years. However, it does limit (to six) the number of years that an action founded on contract and tort can be brought. In addition, an action for the recognition and enforcement of awards cannot be brought after six years have elapsed from the date the cause of action accrued.

Appointment of arbitrators

The two parties, UKU Ltd (Client -Developer) and Samson & Sons Consultants Ltd are entitled to choose an arbitrator if they fail to agree on the appointment of an arbitrator (section 12, Arbitration Act). Section 12(2) states that where the parties fail to agree on a procedure for an appointing arbitrator, they can do the following:

* In an arbitration with three arbitrators, each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator.
* In an arbitration with two arbitrators, each party will appoint one arbitrator.
* In an arbitration with one arbitrator, both parties must agree on the appointed arbitrator.

Removal of arbitrators

Grounds for challenging an arbitrator arise from circumstances giving rise to justifiable doubts as to his or her impartiality and independence, such as:

* Not possessing the qualifications agreed on by the parties.
* Being physically or mentally incapable of conducting the proceedings.
* Doubts concerning capacity to conduct the proceedings.

**Section b)**

The language of communication shall be English and the tribunal shall be in Nairobi. The decision of the arbitrator shall be final.

**Section c) Procedure**

The parties' consensus will dictate the date of commencement. However, where there is no consensus, the arbitration will be deemed to have commenced on the date the respondent receives a request to refer the matter to arbitration (section 22, Arbitration Act).

Applicable procedural rules:

* The tribunal will follow the procedure agreed on by the parties.
* Where there is no consensus between the parties, the tribunal can conduct the arbitration as it considers appropriate, having regard to the desire to avoid unnecessary delay or expense, while affording the parties a fair and reasonable opportunity to present their cases.
* The power of the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made.
* Every witness giving evidence and every person appearing before a arbitral tribunal will have at least the same privileges and immunities as witnesses and advocates in proceedings before a court.
* The tribunal can direct that a party or witness will be examined on oath or affirmation and can administer or take the necessary oath or affirmation.

An agreement binds the parties to the agreement, under the privity of contract principle (Arbitration Act). A person cannot be bound by a contract to which they are not party, and therefore cannot be joined to arbitral proceedings. Case law reflects this position. Exceptions include the following:

* On the death of a party, the agreement is enforceable against or by the deceased's personal representative (Arbitration Act).
* In the event of bankruptcy, the trustee in bankruptcy adopts the contract and the terms are enforceable by or against the trustee (section 38, Arbitration Act).

**Conclusion**

The two clauses suite the two parties especially if the arbitration procedures are done with the right procedures and confidentiality. The above causes may not work if the dispute is criminal in nature since it will require the attention of the court.

References;

***Sample Confidentiality Agreement (NDA) | Nolo.*** (n.d.). Retrieved March 24, 2021, from <https://www.nolo.com/legal-encyclopedia/sample-confidentiality-agreement-nda-33343.html>.

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