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Editor's Note September Edition

Welcome to the September edition of our newsletter.

Dear Esteemed Clients, Stakeholders and Readers,

As the third quarter draws to a close, we find ourselves in a reflective moment, a chance to look back on the year's progress and steady ourselves for the final stretch. We hope this September finds you navigating this seasonal transition with clarity and confidence. To support that very goal, this month's edition of our newsletter brings you a collection of insights aimed at untangling some of the complex issues facing businesses in our region.

We begin by exploring the various avenues available for a Shareholder to exit a company, a critical consideration for strategic planning and corporate longevity. From there, we shift our focus to the practical application of FIDIC contracts within the Tanzanian context, a must-read for anyone involved in the lifecycle of major projects.

Finally, we present a deep dive into the significant case of CMC Motors v Commissioner General TRA, a matter in which we had the privilege of successfully litigating before the Tax Revenue Appeals Board. This analysis is particularly compelling as it affirms a crucial principle: compliance with International Financial Reporting Standards, specifically IAS 21, is not just permissible but required under our tax law.

The court's reasoning provides much-needed clarity, acknowledging that foreign exchange losses from translation are real economic costs incurred wholly and exclusively for business purposes, and are therefore deductible. This landmark decision ensures a fairer and more accurate assessment of taxable income by preventing the taxation of notional gains.

As usual, we invite your feedback, critiques, and case studies. Your contributions drive our collective growth. Stay curious, stay critical, and we will see you next month with fresh insights to navigate the evolving intersections of law, commerce, and policy.

Thank you for joining us on this intellectual journey.

Happy reading!

The Editorial Team

MWEBESA LAW GROUP

THE ANATOMY OF SHAREHOLDER EXIT: LEGAL PATHWAYS AND PRACTICAL CHALLENGES.

Introduction

In every business journey, there comes a point where a shareholder may wish or be compelled to exit. For investors and entrepreneurs in Tanzania, the question is not only whether one can exit, but how it can be done lawfully, efficiently, and fairly. Shareholder exits and buyouts lie at the heart of corporate practice as they determine whether investors can unlock value from their stake, whether companies can restructure ownership smoothly, and whether minority rights are respected.

In Tanzania, as elsewhere, these processes are especially critical in private companies, where shares are not freely traded on a stock exchange. Without clear exit pathways, shareholders risk becoming “locked in” to their investments unable to recover capital, transfer ownership, or move on to new opportunities. This is why understanding the legal and contractual mechanisms for exits and buyouts is indispensable for investors, startups, and company directors alike.

This article examines the principal legal and contractual tools available under Tanzanian law for managing shareholder arrangements and corporate transitions.

It explores statutory mechanisms provided under the Companies Act (Cap. 212, R.E. 2023) and its associated regulations, alongside contractual pathways embedded in shareholder agreements and articles of association, such as drag-along and tag-along clauses, and buy-sell agreements.

The article also addresses practical challenges that often arise in implementation, including valuation disputes, regulatory approvals, and resistance from minority shareholders.With reference to the Statute, relevant case law and practice, we highlight how these mechanisms work in reality, the pitfalls to avoid, and the steps companies and shareholders can take to safeguard their interests.

Whether you are an investor planning an exit, a startup structuring your first shareholder agreement, or a director managing competing shareholder interests, this guide offers practical insights on navigating shareholder exits and buyouts in Tanzania. Because in Company law, the exit is never just the end, it is the moment the real terms reveal themselves.

Overview of Shareholder exit options: From voluntary transfers to court-ordered buyouts

1. Voluntary Share Exits – Transfers, Redemptions, and Capital Reductions

The most common route for a shareholder wishing to exit a Tanzanian company is to sell or transfer their shares. Under Section 79 of the Companies Act (Cap. 212 R.E. 2023), a valid transfer requires a proper instrument of transfer and registration with the company without this, the transfer has no legal effect.

In private companies, however, share transfers are usually subject to restrictions in the articles of association.These often include pre-emptive rights (offering shares first to existing shareholders) or board approval requirements. In practice, many Tanzanian startups and private companies also adopt a right of first refusal (ROFR) in their shareholder agreements.

i **Share forfeiture (calls and forfeiture):**
This has been provided under Section 30 of the Companies Act R.E 2023If a shareholder fails to pay amounts due on partly paid shares, the company may, after giving due notice, forfeit those shares and resell them to recover the unpaid capital. While rarely used in modern private companies where most shares are fully paid this remains a statutory safeguard that can protect the company’s financial integrity.

ii. **Redeemable shares:**
Redeemable shares are a class of shares issued by a company on terms that they may be bought back (redeemed) by the company either on a fixed date or at the option of the company and the shareholder, usually at a pre-determined price, with the redemption being funded out of distributable profits or the proceeds of a fresh issue of shares; upon redemption such shares are cancelled and cease to exist, making them distinct from ordinary shares which generally remain part of the company’s capital until winding up.

The Companies Act permits companies, if authorized by their articles, to issue redeemable preference shares. These shares can later be repurchased (redeemed) by the company, provided they are fully paid and the redemption is financed either from distributable profits or proceeds of a new share issue.

Section 47 of the Act requires the creation of a capital redemption reserve to preserve creditor protection. Redemption provides a contractual and predictable exit route where such shares were built into the company structure from the outset.

iii. **Capital reduction:** ,
Capital reduction is a corporate process through which a company lawfully decreases its share capital, either by extinguishing or reducing liability on unpaid shares, cancelling lost or unrepresented capital, or paying off excess capital to shareholders, subject to statutory procedures and safeguards designed to protect creditors and ensure that the reduction does not prejudice the company’s ability to meet its obligations.

In situations where no third-party buyer is available, a company may instead reduce its share capital to facilitate an exit. This process requires a special resolution of shareholders and approval by the court. The company may then cancel certain shares or repay shareholders excess capital not required for operations. Because creditors must be notified and compensated, if necessary, the procedure is complex and time-consuming, resembling some safeguards found in winding-up processes.

iv. **Liquidation or strike-off:**
Liquidation is the formal legal process of winding up a company’s affairs by collecting its assets, settling its liabilities, and distributing any surplus to shareholders, after which the company is dissolved, whereas strike off is an administrative process through which the Registrar of Companies removes a company’s name from the register, usually because it is inactive, has failed to comply with statutory requirements, or is no longer carrying on business, resulting in its dissolution without the need for a full liquidation.

As a last resort, shareholder exit may be achieved by dissolving the company altogether. This can be done through voluntary liquidation, creditor-initiated winding-up, or an application for strike-off from the companies register. Although drastic, liquidation may be appropriate in cases of shareholder deadlock, insolvency, or where the business has outlived its purpose. For smaller ventures, striking off the company may be a simpler and cost-effective solution if only one owner remains committed to winding down the enterprise.

TAKE NOTE THAT: Regardless of the chosen mechanism, exit transactions in Tanzania require careful attention to regulatory and tax clearances.

For example, the Fair Competition Act requires publication of notices where business assets are sold; certain exits may trigger merger control notifications to the Fair Competition Commission (FCC); and the Registrar of Companies typically insists on a tax clearance certificate from the Tanzania Revenue Authority before registering share transfers.

Depending on the structure, capital gains tax or withholding tax may also apply. These regulatory layers can delay or complicate exits, and should therefore be factored into planning at the earliest stage.

2. Drag-Along and Tag-Along Clauses (Contractual Rights)

In addition to statutory mechanisms, shareholder exits in Tanzania are often shaped by contractual rights negotiated in shareholders' agreements or company articles. Two of the most important tools, particularly in private companies are drag-along and tag-along clauses. Though not provided automatically by law, they are widely used to balance the interests of majority and minority shareholders during exit events.

2.1. Tag-Along (Co-Sale) Rights;

Tag-along rights are designed to safeguard minority shareholders. If the majority shareholder receives an offer to sell their shares, a tag-along clause allows minority shareholders to "piggyback" on the deal and sell their shares on the same terms. This ensures minorities are not left behind in a company with a new, potentially unwelcome controlling owner, and guarantees that they receive the same price per share as the majority. In effect, it levels the playing field by tying the fate of minority investors to the financial outcome secured by the majority.

2.2. Drag-Along (Majority Sale) Rights;

By contrast, drag-along rights empower the majority. Where a supermajority of shareholders has agreed to sell the company to a third party, a drag-along clause compels all shareholders including dissenting minorities to sell their shares on the same terms. This prevents minority holdouts from blocking a lucrative transaction and often helps the majority secure a higher valuation, since buyers typically prefer acquiring 100% control. For minority shareholders, drag-along provisions trade off veto power for certainty of exit.

Because Tanzanian company law does not provide these rights by default, they must be expressly written into the shareholders' agreement or the articles of association. Effective clauses should specify the thresholds that trigger the rights, the process for notifying shareholders, and how the sale price will be determined. Without clear drafting, enforcement can be problematic, minority shareholders resisting a drag-along, for example, may force the majority to seek court enforcement of the agreement.
In practice, drag-along and tag-along rights are standard in companies with venture capital, private equity, or foreign investors, as they give both majority and minority shareholders confidence about future exit scenarios. For business owners and startups, including these provisions at the outset when drafting articles or shareholder agreements helps avoid disputes and protects investor interests when opportunities for exit arise.

3. Statutory buyout mechanisms in Tanzania

While drag-along and tag-along rights are created by private agreements, Tanzanian company law also provides statutory mechanisms that can compel the purchase or sale of shares in certain situations. These remedies found mainly in the Companies Act, Cap 212 R.E. 2023 offer protection to both majority and minority shareholders, particularly where negotiations break down or corporate conduct becomes unfair. Below are the key statutory buyout routes, arranged in order of significance and practical use;

3.1. 90% Squeeze-Out (Section 235 of the Act – Scheme of Arrangement)

Where a takeover or amalgamation scheme is approved by at least 90% in value of shareholders, the buyer (transferee company) may compel the remaining minority to sell their shares on the same terms. This is commonly known as a squeeze-out.

- The buyer must give formal notice to dissenting shareholders.
- Dissenters, in turn, have a right to "put" their shares to the buyer within three months, forcing the buyer to purchase them on the same terms.
- Once the process is complete, all sharehold ers, whether they agreed or not are bought out at the majority-negotiated price.

This mechanism is powerful in large transactions, but requires strict compliance with court-sanctioned procedures, making it less common in smaller private companies.

3.2. Court-Ordered purchase for unfair prejudice (Section 236 of the Act)

If a shareholder proves that the company's affairs are being conducted in a manner unfairly prejudicial to their interests, the court may intervene.

One of its broad powers under section 236(1)(d) of the Act is to order a buyout requiring the majority shareholders or the company itself to purchase the petitioner's shares.The typical grounds include exclusion from management, diversion of company opportunities, or oppressive conduct.

In Elly Mwaijande v. Petro Majinyori and 4 others, Misc. Commercial Cause No. 18 of 2023, the High Court Commercial Division delivered a ruling on the obligations of company directors in facilitating shareholder exits and the consequences of failing to act on legitimate requests. The case centred on the

exits and the consequences of failing to act on legitimate requests. The case centred on the petitioner's attempt to be removed as a shareholder and director of the company, a request that was met with inaction and resistance.

The court held that the refusal to remove the petitioner from the company register amounted to unfair prejudice against the petitioner, triggering judicial intervention. To remedy the situation, the court ordered the appointment of an independent auditor or audit firm to investigate the financial affairs of the company and conduct a valuation of its assets. This valuation was intended to guide the fair and equitable repayment of the petitioner's financial interests in the company. Following the valuation, the court directed that the petitioner be paid an amount proportionate to the shares held, based on their fair value and the gross worth of the company's assets at current market rates. The decision was grounded in the fact that the petitioner held fully paid-up shares, entitling him to a financial exit reflective of his ownership stake.

Additionally, the court ordered the board of directors to convene a meeting and formally resolve the procedure for removing the petitioner as both a director and a member of the company. This directive reinforced the principle that corporate governance mechanisms must be responsive and equitable, particularly in matters involving shareholder rights and exit pathways.

3.3. Just and Equitable Winding Up (Section 282(1)(e))

As a last resort, a shareholder may petition to wind up the company if it is "just and equitable" to do so. Grounds include shareholder deadlock, loss of the company's main purpose, or oppressive conduct. If the application is granted, the company is dissolved and its assets distributed among shareholders.

For example, in ***Sebastian Marondo & Anastazia Rugaba v Norway Registers Development East Africa Limited & Another, Winding Up Cause No 26 of 2019, HC-DSM (unreported)***, the High Court affirmed the right of minority shareholders to petition under this ground.

4. Practical challenges in Shareholder exits and enforcement together with the proposed solutions thereof:

Even where the law sets out clear exit pathways, the reality of executing a shareholder exit in Tanzania is rarely straightforward. Parties often face hurdles that go beyond the black letter of the Companies Act. Some of the most common challenges include:

4.1. Valuation and payment disputes

In compulsory exits such as a court order or a 90% squeeze-out, the purchase price is usually tied to terms set by the majority, which ensures uniformity but often leaves minorities dissatisfied, especially if they feel undervalued or payment is delayed. In voluntary buyouts, the real challenge is agreeing on a "fair" valuation, and without a set method negotiations can drag on. The solution is to provide clarity on pricing whether by fair market value through an independent appraisal, a formula, or a fixed earnings multiple since transparent terms reduce the risk of disputes. The same can be incorporated as a term of the Shareholder's Agreement.

4.2. Minority resistance and litigation risks

Drag-along and tag-along clauses, while designed to protect majority and minority shareholders respectively, can still face resistance where minorities refuse to cooperate or challenge enforcement in court, leading to delays and high costs in Tanzania's slow litigation system. To reduce these risks, such clauses should be drafted with clear, self-executing mechanisms, for example authorising directors or an escrow agent to complete share transfers on behalf of dissenting shareholders and requiring buyers to expressly acknowledge tag-along obligations in the sale contract.

Furthermore, incorporating arbitration or expert determination as the chosen dispute resolution mechanism provides a faster and less expensive alternative to court proceedings. Taken together, these safeguards limit obstruction, ensure enforceability, and help maintain smoother and more efficient exit processes.

4.3. Regulatory approvals and oversight

Share transfers, especially where they involve listed companies, licensed businesses, or transactions meeting merger-control thresholds, often require approval from regulators such as the CMSA, sector-specific authorities, or the FCC.

These approvals are substantive and can affect timelines, disclosure obligations, and even the terms of deal closure. To address this challenge, parties should plan ahead by conducting regulatory due diligence to determine which approvals are necessary and then engage proactively with the relevant regulators to understand disclosure standards and approval timelines. Embedding conditions precedent for regulatory approvals into the transaction documents, alongside long-stop dates, ensures that both parties have clarity and protection against uncertainty. In addition, seeking pre-filing consultations with regulators helps anticipate and address potential compliance or competition concerns before formal submission. This proactive and structured approach minimizes the risk of delay, improves transparency, and enhances the likelihood of a smooth and timely completion of the transfer.

4.4. Tax clearance and fiscal compliance

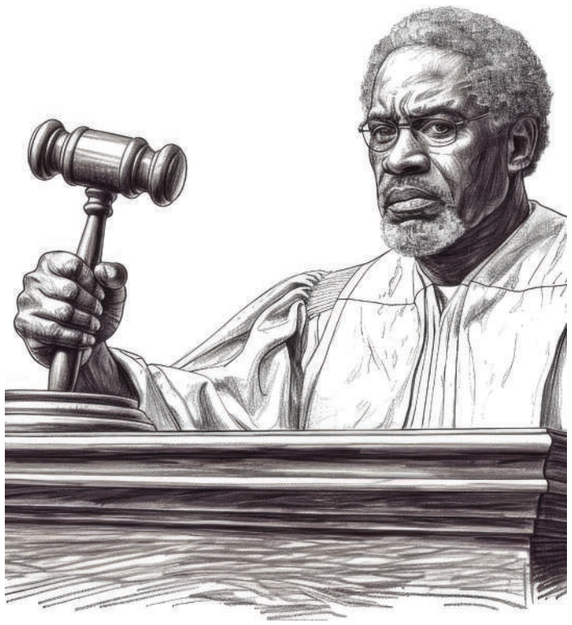
No exit is complete without addressing tax. Share sales attract capital gains tax, and the Registrar of Companies will not register a transfer or process a company closure without a valid tax clearance certificate. In practice, this means engaging with the Tanzania Revenue Authority (TRA) early. Delays in assessments, audits, or disputes over valuations can hold up transactions, regardless of how well-negotiated the deal terms are. Foreign shareholders must plan for capital gains tax, dividend taxation, and remittance procedures. Tanzanian law often requires official proof of dividend declarations, share reductions, or loan repayments before cross-border remittances are approved. Early tax planning ensures smoother exits.

4.5. Corporate formalities and documentation

The mechanics of transferring shares require meticulous attention to statutory detail: updating the company's share register, issuing new certificates, stamping transfer documents, and filing necessary returns with the Registrar. Skipping a step, however minor, risks the transfer being invalid or open to challenge. Directors bear the duty of ensuring that statutory filings are made promptly and accurately. It is important that the required steps are adhered to in order to prevent the challenges encountered thereon.

4.6. Articles of Association as hidden traps

Many private companies in Tanzania adopt Table A of the Companies Act as their default articles. These contain provisions such as pre-emption rights, share liens, and restrictions on transfers that can significantly alter how exits play out. A shareholder may assume free transferability, only to discover that the articles give existing members first refusal or the company itself a lien on unpaid shares. Reviewing and tailoring articles early is therefore essential to avoid unpleasant surprises later. If the exit route may involve share redemption or capital reduction, ensure these are expressly authorized in the company's Articles of Association. Sufficient profits or reserves must be recorded, and court confirmation is often required, a process that can be time-consuming if not planned for in advance.



4.7. Timing, confidentiality, and deal dynamics

Beyond the legal mechanics, exits are commercial negotiations carried out under a veil of sensitivity. Sellers often require confidentiality agreements (NDAs) before opening books for due diligence. Drag- and tag-along rights, meanwhile, demand coordination: for instance, a minority exercising tag-along rights can only join the sale once the majority has secured a binding offer. Timing is everything, and unclear communication at this stage can derail otherwise promising transactions.

Conclusion

Navigating shareholder exits in Tanzania requires a blend of legal knowledge and practical planning. Voluntary sales are common, but shareholders should proactively address exit mechanics in their governing documents. When disputes arise, Tanzanian law offers both contractual and statutory tools to resolve them. In all cases, clear drafting and compliance with procedural rules are crucial.

For startup investors or founders, the takeaway is: plan your exit path from the start. Negotiate robust exit rights and information rights in your SHA, keep the company's articles updated, and consult experts early if a sale looms. This ensures that when an exit opportunity or disagreement comes, the business can move forward smoothly or if push comes to shove, the courts have a clear framework to enforce fair outcomes.

NAVIGATING THE BLUEPRINT: MASTERING FIDIC CONTRACTS IN TANZANIA'S INFRASTRUCTURE BOOM.

Introduction

Tanzania is witnessing a historic transformation. From the Standard Gauge Railway (SGR) and the Julius Nyerere Hydropower Project to new ports, highways, and urban developments, the nation is building the foundation for its future. This infrastructure boom is largely driven by among others public-private partnerships and international financing, bringing with it a common legal language: the FIDIC suite of contracts (*Fédération Internationale Des Ingénieurs-Conseils*). All these complexes, multi-million-dollar projects require a robust legal framework to succeed.

The FIDIC contracts are a a suite of standardized legal agreements for Construction and Engineering Projects developed by the International Federation of Consulting Engineers, a global association of National Consulting Engineer Associations. These standard form contracts are designed to allocate risks fairly between the Employer (client) and the Contractor.The contracts are famously known for their color-coded forms such as the Red book for Civil Engineering works, Silver book and the yellow book for design and building, to mention but a few. In December 2017, FIDIC published new versions ('second editions') of its Red, Yellow and Silver Books.

The most commonly used books from the rainbow suite use in Tanzania include;

1.1. Red Book: For building and engineering works designed by the Employer. This book is commonly used in public-sector projects. The Employer who in most cases is the government provides the design via her engineer or consultant and the contractor builds according to the design issued by the employer. The Employer bears most design risk while the contactor bears more construction risk. This is mostly used in traditional construction projects where the employer wants control over design on projects such as roads, and public buildings.

1.2. The Yellow Book: in this book the contractor is responsible for both designing and construction to meet the Employer's requirements. In this book more risk is shifted to the contractor especially on the designing and construction. The book is more applicable on industrial works, process plants and infrastructure projects where the employer specifies performance requirements rather than detailed design.

1.3. The Silver book this book is a contract condition for EPC/Turnkey projects. Unlike the Red and Yellow Books, the Contractor accepts a higher level of risk and assumes responsibility for the accuracy of the Employer's requirements. The Employer still retains major risks such as, *force majeure*, events., but the Employer exercises limited control. The Silver Book is recommended in cases where the Employer is mostly interested in the end results rather than the process and/or the design of the works. By signing the agreement, the Contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the works without adjusting the contract price.

This article intends to unpack the application of FIDIC Contracts in largescale construction projects in Tanzania, common pitfalls in their application and the strategies employed to manage the risks arising therefrom.

[1] https://www.lexisnexis.co.uk/legal/guidance/fidic-contracts-introduction#:~:text=The%20payment%20mechanisms%2C%20including%20interim,seamless%20execution%20of%20construction%20projects

[2] https://www.instituteccp.com/fidic-red-yellow-and-silver-books-a-brief-overview/

[3] ibid

[4] ibid

[5] https://infra.global/international-contracts-improving-tanzanian-megaprojects/

2. THE APPLICATION OF FIDIC CONTRACTS LARGE-SCALE CONSTRUCTION PROJECTS IN THE TANZANIAN CONTEXT

The adoption of FIDIC Contracts on major infrastructure projects such as the Standard Gauge Railway (SGR), Nyerere Hydro power Project and the Kigogo-Busisi bridge has procured a significant inclination to attract foreign investment accountability, and facilitating timely, budget-conscious, and high-quality project delivery which demonstrates an interesting inclination to engage international expertise and standards, in major infrastructure endeavors.

2.1. LEGAL RATIONALE FOR THE PREFERENCE OF FIDIC CONTRACTS

The selection of FIDIC contracts over other standard forms such as those from the International Chamber of Commerce (ICC) or institution-specific templates is not merely a matter of convention but a strategic legal decision grounded in several key advantages which can include;

2.1.1. Risk allocation certainty: FIDIC contracts are renowned for their meticulously drafted risk allocation matrix. This pre-established balance reduces transactional costs and negotiation time, providing a predictable legal environment for both Employers and Contractors. This is particularly valuable in Tanzania, where a clear framework mitigates the ambiguity that can lead to disputes. FIDIC's general conditions are based on fair and balanced risk/reward allocation between the Employer and the Contractor and are widely recognised as striking an appropriate balance between the reasonable expectations of these contracting Parties.

2.1.2. Attraction of International finance and expertise: Multilateral financing agencies such as the World Bank and African Development Bank, often mandate or strongly recommend the use of FIDIC contracts. Their familiarity and acceptance within the global construction industry make them instrumental in attracting foreign direct investment and reputable international contractors, who are assured of a fair and predictable contractual platform.

2.1.3. Comprehensive procedural framework: FIDIC provides an integrated system for project administration, encompassing clear mechanisms for variations, claims, certifications, and dispute resolution. This procedural rigor ensures that projects are managed systematically, which is crucial for the timely and budget-conscious delivery of large-scale public infrastructure.

2.1.4. Tiered dispute resolution and ADR culture: FIDIC's emphasis on on-the-job dispute resolution (Engineer / DAB) promotes early resolution and preserves project continuity. This is complementary to Tanzania's Arbitration Act, 2020, which recognizes both domestic and international arbitration and provides statutory support for arbitration agreements and awards. According to Golden Principle 5 FIDIC's Golden principles Rules, unless there is a conflict with the governing law of the Contract, all formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration.

3. THE ENFORCEABILITY OF FIDIC CONTRACTS WITHIN THE TANZANIAN LEGAL FRAMEWORK

The efficacy of any standard form contract is contingent upon its enforceability within the host nation's legal system. FIDIC contracts, while international in origin, derive their legal force in Tanzania from their conformity with and subordination to domestic law. Though the FIDIC contracts serve as a universal template of construction contracts, the said contracts are usually standardized to meet the needs of a particular employer. Amending the FIDIC general conditions is not a bad thing in itself.

[6] Fédération Internationale des Ingénieurs-Conseils (FIDIC), *The FIDIC Golden Principles*, 1st ed. (Geneva: FIDIC, 2019) Pg6

[7] Fédération Internationale des Ingénieurs-Conseils (FIDIC), *The FIDIC Golden Principles*, 1st ed. (Geneva: FIDIC, 2019) Pg 8

3.1. All contracts in Tanzania are governed by the Law of Contract Act, Cap 345, which sets out the essential elements required for a valid agreement namely: offer, acceptance, consideration, and intention to create legal relations. A FIDIC contract, like any other, must first satisfy these foundational requirements to be legally enforceable within the Tanzanian jurisdiction. Once constituted as a valid contract under Cap 345, the specific provisions of a FIDIC agreement may be upheld by Tanzanian courts, provided they do not conflict with mandatory statutory provisions or public policy. In this regard, the FIDIC framework operates as a lex specialis, a specialized contractual regime for construction projects which supplements the general principles of Tanzanian contract law (lex generalis) without overriding them. FIDIC's structured approach to risk allocation, variation procedures, and dispute resolution is therefore enforceable to the extent that it aligns with Tanzania's legal norms and regulatory expectations.

3.2. For public projects, where the government is involved, the Public Procurement Act Cap 410 RE 2022 is paramount. While FIDIC offers robust tendering procedures, its application must be adapted to comply with the mandatory provisions of this Act. This includes strict adherence to rules on local content preferences, as provided for under section 33 (1) (d) of the Procurement Act Cap RE 2022 which provides emphasis on ensuring that best practices in relation to procurement and disposal by tender are strictly adhered by procuring entities. The use of prescribed tender documentation, and mandatory use of the Tanzanian national e-procurement systemis also encouraged. In the event of any conflict between a FIDIC provision and a mandatory requirement of the Public Procurement Act, the latter shall prevail.

3.3. The standard FIDIC contracts require significant modification to govern public-private partnership and concession agreements regulated by the **Public-Private Partnership Act Cap 103 RE 2022**. Key adaptations include; extending the contractual term to cover the entire concession period, incorporating detailed obligations for long-term operation and maintenance (O&M), defining the parameters for service availability payments, and establishing clear protocols for the handover of the asset to the public authority at the concession's end where the parties sign the Agreement as per the provisions of Section 24 of Cap 103 RE 2022 . The FIDIC Silver Book (EPC/Turnkey) often serves as a starting point but must be heavily supplemented to reflect the operational phase and risk-sharing model envisaged under the PPP Act.

3.4. Dispute resolution: FIDIC's multi-tiered dispute resolution mechanism, culminating in arbitration, is highly compatible with Tanzania's modern Arbitration Act of 2020. This Act, based on the UNCITRAL Model Law, provides a robust legal framework for both domestic and international arbitration. A FIDIC arbitration clause designating Tanzania as the seat will be governed by this Act, ensuring that arbitral awards are enforceable in Tanzanian courts. The Arbitration Act expressly provides under section 5 (ii) among other things the Act is founded on principles which include promote consistency between domestic and international arbitration. The Act provides limited grounds for challenging awards, thereby upholding the finality of the arbitral process, a core principle of FIDIC's dispute avoidance and resolution philosophy.

3.5. Although modifications may be made to FIDIC contracts, the FIDIC Golden Principles stipulate that such modifications must not undermine the defined duties, rights, obligations, roles, and responsibilities of the parties, nor the fundamental requirements of the project. For instance; Under the Red Book, or Yellow Book contract, the Engineer is required to obtain the Employer's approval before making any determination of a Contractor's claim or granting any extension of time pursuant to sub-clause 3.7 (or (or sub-clause 3.5 in the 1999 Editions). The Engineer's role as defined in a FIDIC Contract is to fairly determine the Contractor's entitlements in accordance with the Contract conditions, and this should not be subject to influence or control by the Employer. If the Employer disagrees with the Engineer's determinadetermination, the Contract provides an avenue for resolving this by the Dispute Avoidance/-Adjudication Board.

3.6. The position was emphasized by the Court of Appeal in the case of **Tanzania Ports Authority and Another vs JV Tangerm Construction Co. Ltd and Technocombine Construction Ltd (A Joint Venture) (Civil Appeal No. 34 of 2024) [2025] TZCA 425 (19 May 2025)** in order to resolve, refered to Exhibit P3, which incorporated the FIDIC Conditions (Part F) to the Construction contract. Variations were to be governed by clause 13, with clause 13.3 outlining the procedure where the Engineer was mandated to request a written proposal from the contractor, who must respond with reasons for non-compliance or details of the proposed variation, programme adjustments, and price implications. The Engineer would then approve, disapprove, or comment, and any variation would be documented in writing and acknowledged by the contractor. In this case, the Engineer gave instructions orally, contrary to the contractual procedure, rendering the said instructions non-compliant to the contractual terms under the FIDIC conditions.

4. COMMON PITFALLS IN THE APPLICATION OF FIDIC CONTRACTS

Many projects in Tanzania run into difficulties not because of the FIDIC form itself, but due to how it is administered. Key pitfalls include:

4.1. Inadequate understanding of FIDIC Contracts. Parties often lack sufficient understanding of the specific requirements of FIDIC contracts, leading to disputes over risk allocation, payment terms and dispute resolution procedures. This results into poor pre contractual planning due to unforeseen ground conditions andunderstated project costs, triggering claims for extensions of time and additional costs. Critical clauses governing variations, extensions of time, and the Engineer's role are often not fully understood, leading to disagreements.This culminates to disputes over delays and performance.

4.2. Dispute resolution mechanisms
The Dispute Adjudication Board (DAAB) is a powerful tool for real-time dispute resolution. However, parties often see it as an adversarial step rather than a collaborative one. Delaying its formation until a dispute arises, or ignoring its recommendations, misses its primary value in avoiding costly arbitration. Furthermore, the enforcement of the dispute adjudication board decisions in cases where the matter was adjudicated in another jurisdiction, while crucial for initial resolution, are not automatically enforceable in Tanzania. Parties seeking to enforce a DAB decision must file a civil claim in the Tanzanian courts, establishing the claim based on the decision, which is a complex process. Without a clear understanding of how to enforce DAB decisions through the court system, the adjudication process can feel like a black hole if a party holding a favorable decision cannot secure its implementation.

4.3. Conflict Between FIDIC and local laws
FIDIC contracts must be interpreted in light of Tanzania's local laws and regulations. Parties must consider the prevailing Tanzanian legal framework, which includes specific regulations for the construction sector and public procurement. A thorough understanding of local laws should be observed when applying FIDIC Contracts.

[8] http://constructionblog.practicallaw.com/amending-fidic-contracts-practical-issues/

[9] Fédération Internationale des Ingénieurs-Conseils (FIDIC), *The FIDIC Golden Principles*, 1st ed. (Geneva: FIDIC, 2019) pg 8

[10] Civil Appeal No. 34 of 2024 [2025] TZCA 425 (19 May 2025) pg 15-18.

5. STRATEGIES TO MITIGATE THE RISKS ARISING FROM THE APPLICATION OF FIDIC CONTRACTS.

To navigate these challenges, parties must adopt proactive and informed strategies.

5.1. For Employers.

5.1.1. Employers are encouraged to invest in Capacity Building for their project management team and the Engineer's staff through thorough training in FIDIC contracts procedures.

5.1.2. Due diligence should be conducted by the employers before signing of the contract, perform detailed so as to identify potential issues like unforeseen ground conditions, allowing for design adjustments and cost planning.

5.1.3. Drafting of clear and unambiguous contracts is another useful strategy. Employers must ensure the contractual wording is simple, clear, and explicit, especially in allocating risks, to avoid misunderstandings and potential disputes later on.

5.1.4. Understanding of the local frame work governing contracts. Employers must familiarize themselves with the local legal infrastructure, including the independence of the judiciary and the complexity of contract law in Tanzania, which can impact the enforcement and interpretation of FIDIC terms.

5.2. For Contractors, to manage legal risks with FIDIC contracts in Tanzania, contractors should thoroughly understand the contract's specific clauses for claims, variations, and dispute resolution, perform comprehensive site investigations, maintain detailed records, proactively communicate with the employer and engineer, implement robust insurance policies, negotiate favorable contractual clauses for specific risks, and utilize alternative dispute resolution (ADR) methods for timely resolutions.

6. CONCLUSION

Tanzania's infrastructure boom presents immense opportunity. The FIDIC contract, when understood and applied correctly, is not a weapon for battle but a blueprint for successful partnership. It provides the structure needed to deliver complex projects on time and within budget. The key to unlocking its value lies in moving beyond a mere legal compliance exercise and embracing its principles of fairness, procedure, and proactive communication. By investing in expertise, respecting local context, and utilizing tools like the DAAB as intended, employers and contractors can turn Tanzania's infrastructure blueprint into a lasting reality.

TURNING THE TIDE ON FOREX LOSSES: A STRATEGIC WIN IN CMC AUTOMOBILES V. THE COMMISSIONER GENERAL, TRA– INCOME TAX APPEAL NO. 41 OF 2024, TRAB, DAR ES SALAAM.

Introduction

Our litigation team had the privilege of representing the Appellant, CMC Automobiles Limited, in this significant appeal concerning the tax treatment of foreign exchange losses. The case centred on a fundamental clash between the Tanzania Revenue Authority's (TRA) narrow interpretation of a specific provision of the Income Tax Act and the comprehensive accounting and fiscal principles governing business operations in a multi-currency environment. This judgment represents a crucial victory for taxpayers engaged in foreign currency transactions.

Facts of the case
CMC Automobiles Limited, a company involved in the sale, distribution, and servicing of automobiles and spare parts, naturally conducts numerous transactions denominated in foreign currencies. For the year of income 2021, the Respondent (the Commissioner General of the TRA) conducted an audit and disallowed a foreign exchange loss of TZS 93,383,000.00.

The Respondent's position was that a foreign exchange loss is only permissible for tax deduction under Section 39(g) of the Income Tax Act, 2004, which deals with the realization of a "foreign currency debt claim" at the point it is "actually paid." The TRA argued that the Appellant's loss, which arose from the year-end translation of outstanding balances (e.g., debtors, creditors, bank balances) into Tanzanian Shillings, did not constitute an "actual payment" and was therefore disallowable. The Appellant objected to this adjusted assessment, but the Respondent maintained its stance in its final determination, leading to this appeal.

The Issues for Determination
The Board framed three issues:

1. Whether the Respondent's decision to disallow the foreign exchange loss was correct in law and fact?
2. Whether the Respondent correctly applied Section 39(g) of the ITA, 2004 to the Appellant's financial assets and liabilities?
3. What reliefs were the parties entitled to?

The Board's decision and reasons
The Board allowed the Appellant's appeal, resolving the first two issues in the negative. The Board's reasoning was robust and multi-faceted:

1. Holistic interpretation of the Income Tax Act:

The Board firmly rejected the Respondent's attempt to isolate Section 39(g) as the sole provision governing foreign exchange losses. It held that the ITA must be read as a whole, citing the Court of Appeal's guidance against a "piecemeal" interpretation. The Board identified other critical provisions:

1.1. Section 11(2): Allows deduction of all expenditure incurred "wholly and exclusively" in the production of income.

1.2. Section 21(1): Mandates that a person shall account for income "according to generally accepted accounting principles" (GAAP).

1.3. Section 28(1): Requires that all tax calculations be quantified in Tanzanian Shillings.

2. Limited scope of section 39(g) ITA:

The Board conducted a plain-language reading of Section 39(g), noting the phrase "in the case of" limits its application to the specific instance of realizing a debt asset. It does not, in any way, preclude, restrict, or address the recognition of losses arising from the translation of other monetary items like bank balances or trade payables/receivables at year-end, as required by Section 28(1).

3. Nature of the loss is real and allowable:

The Board accepted the Appellant's argument that the loss was a genuine business expense. The fluctuation in exchange rates between the transaction date and the year-end reporting date meant the Appellant had to spend more Tanzanian Shillings to settle its foreign currency obligations. To tax this loss without allowing its deduction would result in an inaccurate picture of the company's true income.

4. Compliance with accounting standards:

The Board implicitly endorsed the application of IAS 21 (which requires recognizing exchange differences in profit or loss) through Section 21(1) of the ITA. It found that the Appellant's accounting treatment was not in conflict with the ITA but was, in fact, a necessary consequence of complying with it.

5. Factual basis of the loss established:

The Board found that the Appellant had provided a clear and detailed explanation, including ledger accounts and examples (such as the overdraft balance), to demonstrate how the loss occurred. The Respondent's rejection of this evidence was based on an erroneous legal premise (an exclusive reliance on S.39(g)) and was therefore unfounded.

What this decision means; This judgment is a landmark ruling for the Tanzanian business community for several reasons:

1. End of isolated interpretation: It condemns the TRA's practice of applying a single provision in isolation to override the entire scheme of the Act. Tax authorities must consider the ITA as an integrated framework.

2. Validation of accounting practice: It affirms that compliance with International Financial Reporting Standards (IFRS), specifically IAS 21, is not only permissible but required under Section 21(1) of the ITA, unless directly contradicted by a specific provision.

3. Recognition of economic reality: The decision acknowledges that foreign exchange losses from translation are real economic costs incurred "wholly and exclusively" for business purposes and are therefore deductible under Section 11(2). This prevents the taxation of notional gains or the disallowance of real losses, ensuring a fair and accurate assessment of taxable income.

4. Clarity for taxpayers: Businesses with foreign currency exposures can now rely on established accounting principles when preparing their tax computations, provided they can substantiate the losses with detailed records.

6. CONCLUSION

The Board's decision is a well-reasoned and comprehensive victory that correctly interprets the law in line with both accounting principles and economic reality. It provides much-needed clarity and certainty for taxpayers. However, it is critical to note that the Tax Revenue Appeals Board is a first-instance tribunal. The Respondent, the Commissioner General of the TRA, possesses a right of appeal to the Tribunal and subsequently the Court of Appeal on points of law. Given the significant implications of this case for revenue collection and the TRA's longstanding stance on this issue, it is highly probable that this decision will be appealed. While the Board's reasoning is powerful, the final word on this matter rests with the higher judiciary.

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