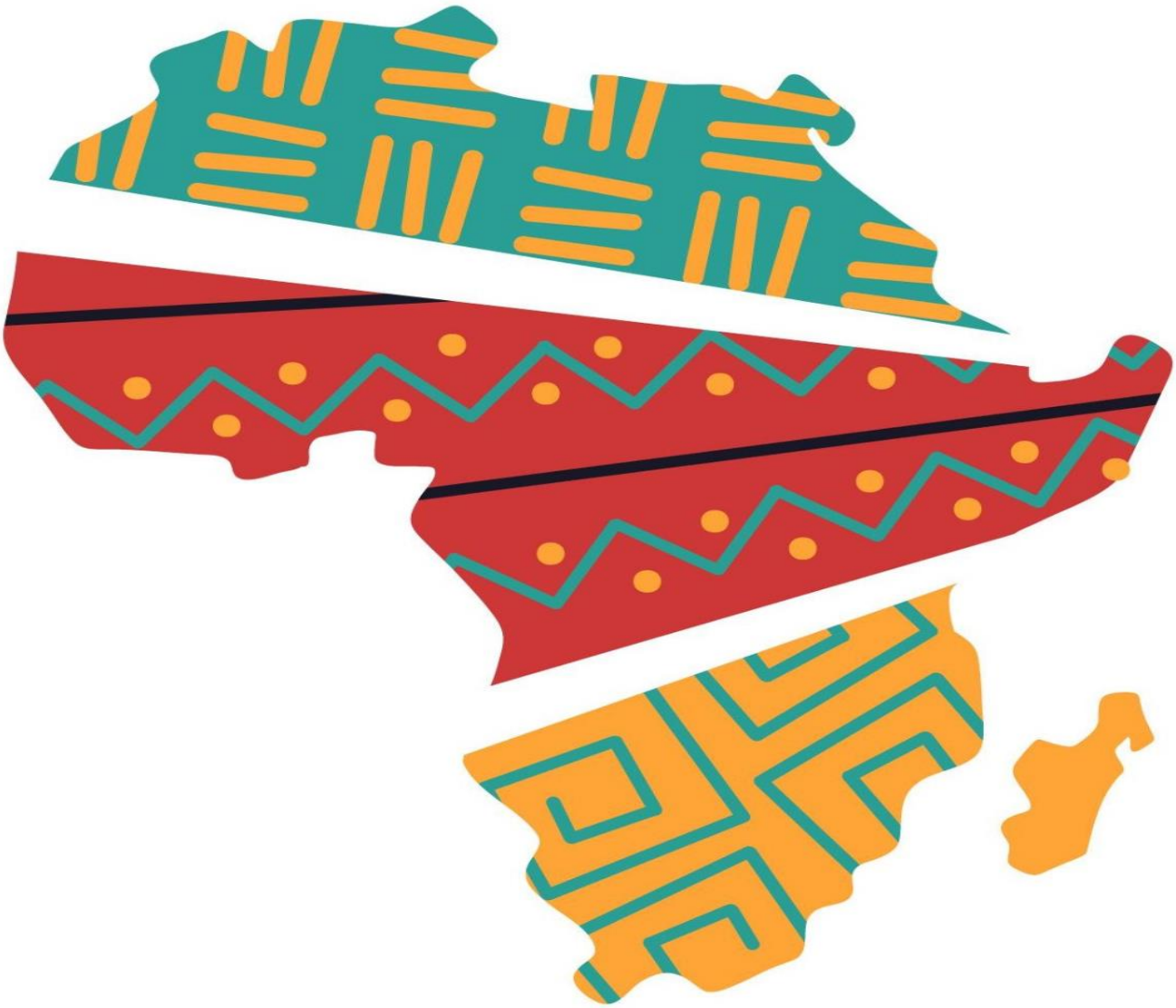
AFRICAN ARBITRATION

CASE REVIEW

WITH CONTRIBUTIONS FROM LEADING LAW FIRMS IN AFRICA



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PREFACE

Arbitration has become an increasingly popular means of resolving disputes in Africa, with a growing number of parties opting for this alternative to litigation. As a result, there has been a corresponding rise in the number of arbitration cases in Africa.

However, given an essential feature of arbitration which is confidentiality, a review of some of these arbitration case may not be appropriate. The purpose of this case review therefore is to provide an overview of some of the most significant arbitration related cases that have been heard in African Courts in the year 2022. The review have been contributed by some of the leading Law Firms on the continent, providing a valuable insight into the state of arbitration in Africa today.

This review is not intended to be an exhaustive analysis of every arbitration related case heard in African Courts, but rather a selection of those cases that have had a significant impact on the development of arbitration law and practice in the region. It is hoped that this review will be of interest to practitioners, academics, and students of arbitration, as well as to anyone with an interest in the resolution of disputes in Africa.

We would like to extend our thanks to all the Law Firms and practitioners who have contributed to this review, and we hope that it will serve as a valuable resource for anyone with an interest in the development of arbitration law and practice in Africa.

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"THE SCOPE OF AND LIMITATIONS ON THE SETTING-ASIDE COURT IN EGYPT"

Al Kharafi Case seems to cause confusion as to the scope of and limitations on the setting-aside courts under Egyptian Law. The main points of concern are (1) whether or not the setting aside court can revisit the merits of the case and (2) whether or not the setting aside grounds listed under the law No. 27 for 1994 promulgating the Egyptian Arbitration Law ("**EAL**") are exhaustively listed.

This article addresses the Egyptian Court of Cassation Judgment in the Appeal No. 12262 for J.Y. 90, which provides some clarity on the scope of setting-aside courts under Egyptian law, for there shall be no room for confusion when the validity of arbitral awards is at stake.

1. Factual Background of the Case

On 8 June 2006, Mohammed Abdulmohsin Al Kharafi & Sons General Trading and Contracting Company ("**Al Kharafi**"), a Kuwaiti company concluded an agreement with (i) the Libyan Government; (ii) the Libyan Ministry of Economic; (iii) the General Authority for Promotion of Investment and Privatization; (iv) the Libyan Ministry of Finance as well as (v) the Libyan Investment Authority (referred to collectively as the "**Libyan Authorities**"), by virtue of which Al Kharafi was assigned the execution of a touristic investment project in Tripoli, Libya (the "**Project**").

Amid the execution of the Project, the Libyan Authorities issued the decision no. 203 for 2010 cancelling the Project. Accordingly, a dispute arose

1 Al Tamimi & Co.- Dr Khaled Atti and Chahira Bacha.

between the parties and Al Kharafi resorted to *ad hoc* arbitration in accordance with the Rules of the Unified Agreement for the Investment of Arab Capital in the Arab States with the hearing venue at the Cairo Regional Centre for International Commercial Arbitration premises in Cairo, in application of clause 29 of the agreement concluded between the parties.

On 22 March 2013, the Arbitral Tribunal issued its award in favor of Al Kharafi compelling the Libyan Authorities to pay Al Kharafi compensation for moral damages, lost profits, lost opportunities and legal fees amounting to USD 936,940,000 in addition to 4% interests on awarded amounts.

Accordingly, the Libyan Authorities lodged an annulment case no. 39 for J.Y. 130 before Cairo Court of Appeal to set aside the arbitral award issued in favor of Al Kharafi.
During the proceedings, FINANCIERE CER joined the proceedings alongside Libyan Authorities on the grounds that a seizure was carried out on the latter receivables under their hands.

On 3 June 2020, the Cairo Court of Appeal issued its judgment setting aside the arbitral award dated 22 March 2013 on the grounds that the awarded compensation is excessive and do not correspond to the sustained damages.

Thus, Al Kharafi challenged the Court of Appeal Judgment before the Court of Cassation on 28 July 2020. The grounds for challenge is the violation of the law and its incorrect application as the Appeal Court annulled the arbitral award for exaggeration in determining due compensation and lack of proportionality with sustained damaged, although setting aside motion is not an appeal against the arbitral award and hence the court cannot revisit the arbitral tribunal's determinations.

Further, the annulment/setting-aside grounds prescribed under the EAL are exhaustively listed and do not include the exaggerated nature of the awarded compensation.

2. Legal Issues for Determination

It appears from the above that the legal issues that the Court of Cassation had to examine in the appeal no. 12262 for J.Y. 90 is the scope of review of the court in the event of a setting-aside motion and the nature of the grounds listed under article 53 of the EAL.

In other words, the Court of Cassation had to decide whether or not Cairo Court of Appeal exceeded the scope of its review in setting aside the arbitral award on the basis of the excessive nature of the awarded compensation and hence violated article 53 of the EAL.

3. Relevant Legal Framework

The relevant provision of the Egyptian Arbitration Legislation is article 53 of the EAL.

Article 53 exhaustively lists the grounds to annul/set aside the award. They are as follows:

a. if there is no arbitration agreement, or the arbitration agreement is void, voidable or prescribed by the lapse of its duration;
b. if either party to the arbitration agreement was, at the time of its conclusion, fully or partially incapable according to the law governing said party's capacity;
c. if either party to the arbitration was unable to present its case for not being properly notified with the appointment of an arbitrator or with the arbitral proceedings or for any other reason beyond its control;

d. if the arbitral award excluded the application of the law agreed upon by the parties to govern the subject matter of the dispute;
e. if the arbitral tribunal was constituted or the arbitrators were appointed in manner violating the law or parties' agreement;
f. if the arbitral award ruled on issues falling outside the scope of the arbitration agreement or exceeding it. In such case only the ruling on parts outside the scope of the arbitration agreement are set aside; or
g. if the arbitral award or the arbitral proceedings underlying it are void and affecting the validity of the award.

Accordingly, in order for a court to set aside an arbitral award, one or more of the abovementioned grounds shall materialize.
It is worth noting that said annulment grounds are similar to those stated in the New York Convention for the Recognition and Enforcement of Arbitral Awards, to which Egypt is a signatory.

4. Analysis and Conclusion

On 24 June 2021, the Egyptian Court of Cassation issued its judgment revoking the Appeal Judgment and rejecting the setting aside of the arbitral award.

The Court of Cassation noted that while the EAL provided that an arbitral award could be set aside/annulled, the EAL limited the grounds for annulment to specific circumstances exhaustively listed under article 53 of the EAL.

The Court further noted that the annulment judge is not entitled to review the arbitral award to assess or oversee the arbitral tribunal's determination of the compensation, irrespective of whether or not the arbitral tribunal's determination was valid or incorrect. As even if their determination was incorrect, said incorrectness is not a ground for annulment given that a setting aside motion is different from an appeal.

Lastly, the Court noted that the excessive/exaggerated nature of the awarded compensation is not among the cases exhaustively listed under article 53 of the EAL and is among the issues left to the discretion of the arbitral tribunal. Accordingly, it does not fall under the scope of setting aside motions. Thus, Cairo Appeal Court violated the law and incorrectly applied it.

It is worth noting that the Appeal Court Judgment upon its issuance created confusion as to the scope of review and its limits in setting aside motion. Hence, the approach taken by the Court of Cassation in the case at hand eradicated all confusion created and confirmed the standing of Egyptian Courts *vis-à-vis* setting aside motions in Egypt.

Based on the Court of Cassation Judgment in Al Kharafi Saga, the following important points may be confirmed:

a. the Setting Aside Court cannot revisit the merits of the arbitral case;
b. the determination of due compensation is among the issues left to the discretion of the arbitral tribunal solely; and
c. the setting aside grounds prescribed under article 53 of the EAL are exhaustively listed.

KENYA[2]

Supreme Court Petition No. 12 Of 2016; Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute Of Arbitrators- Kenya Branch (Interested Party) (2019) EKLR.

"The right of appeal from a decision of the High Court to set aside an arbitral award made under Section 35 of the Arbitration Act 1995"

1. Introduction

The case was a majority decision of a five-judge bench of the Supreme Court **("SC")** and related to a ruling of the Court of Appeal which had dismissed an appeal against the decision of the High Court. The Court of Appeal, in its ruling had found that there was no right of appeal from a decision of the High Court to set aside an arbitral award made under Section 35 of the Arbitration Act 1995 **("the Act").**

2. Background and summary of the facts of the case

Airtel Networks Kenya Ltd **("Airtel")** and Nyutu Agrovet Limited **("Nyutu")** had entered into a distribution agreement in terms of which Nyutu was contracted to distribute various telephone handsets on behalf of Airtel. The dispute arose when an agent of Nyutu, one George Chunga, placed orders for Airtel's products totaling KES. 11 million for which Airtel made payment. Upon delivery, Airtel realized that the orders were made fraudulently. Nyutu had also failed to pay the said amount and the agreement between the parties was thus terminated and a dispute arose in that regard.

By agreement, the parties appointed an arbitrator in their dispute. Upon conclusion of the arbitration hearing, the arbitrator delivered an award of

2 Bowmanslaw. - Cecil Kuyo, George Ndung'u , Ibrahim Godofa ,Adhiambo Wameyo, Agnes Akal.

KES. 541,005,922.81 in favor of Nyutu; the bulk of which was awarded under the heading "tort of negligence". It is this award that Airtel sought to set aside in the High Court and formed the basis of the subsequent appeals.

At the High Court, Airtel had filed an application under Section 35 of the Act seeking to set aside the award in its entirety. The entire arbitral award was then set aside. Immediately after delivery of the High Court decision, Nyutu orally sought leave to appeal to the Court of Appeal, which application was opposed by Airtel on the basis that no right of appeal existed in relation to a decision made under Section 35 of the Act. Despite the objection, the High Court granted Nyutu leave to appeal. Nyutu thereafter filed an appeal. The Court of Appeal unanimously held that the decision by the High Court made under Section 35 of the Act was final and no appeal lay to the Court of Appeal; thus striking out the appeal and awarding costs to Airtel. Aggrieved by the finding of the Court of Appeal, Nyutu filed the appeal to the SC.

3. Provision of the arbitration laws on the legal issues.

The relevant legal provisions that were in question in the decision were sections 10, 32A and 35 of the Act.

- Section 10 of the Act provides that a court should not interfere with matters that are governed by the Act except for situations specifically outlined in the Act.

- Section 32A of the Act, provides that an arbitral award is final and binding on the parties, except as otherwise agreed by them.

- Section 35 of the Act allows parties to contest an arbitral award in the High Court by filing an application to set it aside under specific grounds within 3 months of receiving the award. These grounds include where the party was not given a right to be heard before the arbitrator and public policy

4. Summary of SC's decision and principles

The SC disagreed with the contention that section 10 and 35 of the Act which bar court involvement in arbitration denied a party the right to access to justice. It also stated that appeals from the High Court to the Court of Appeal against decisions on setting aside of awards may be allowed in cases where the High Court has gone beyond the grounds provided by section 35 for setting aside of awards and made a decision that is so severe, so clearly wrong, and has completely denied justice to either of the parties.

5. Legal issues for determination and analysis of the SCs decision.

a. Whether sections 10 and 35 of the Act contravene a party's right to access justice

The SC found that the right of appeal is established by law and can only be granted by the Constitution or a statute. The SC further stated that statutory limitations on appeals do not necessarily infringe on the right to access justice, and each case should be evaluated on its own circumstances. The court may still exercise discretion and refuse to assume jurisdiction even when a right of appeal exists. The SC found that there was no proper basis for finding that there was a denial of access to justice, and the plea to declare sections 10 and 35 of the Act unconstitutional was rejected.

b. Whether there is a right of appeal to the Court of Appeal following a decision by the High Court under section 35 of the Arbitration Act.

The SC stated that the purpose of section 35 of the Act is to promote fairness and efficiency in the dispute resolution process. This means that once an arbitral award has been issued, parties can only challenge it by seeking an order of setting aside from the High Court. However, the SC noted that the

goal of efficiency should not come at the expense of true justice, and that there may be legitimate reasons for appealing High Court decisions.

The SC added that since there is no explicit prohibition on appeals under section 35, an unfair decision made by the High Court should not be completely protected from appellate review. It further added that in exceptional cases, the Court of Appeal should have the authority to investigate such unfairness. However, the SC cautioned that this authority should be used cautiously to avoid overwhelming the system with appeals and undermining the fundamental purpose of arbitration.

The SC agreed with the Interested Party that the only time an appeal from the High Court to the Court of Appeal should be allowed for a determination made under section 35 is when the High Court, in setting aside an arbitral award, has gone beyond the grounds provided by the section 35 of the Act and has made a decision that is so severe, so clearly wrong, and has completely denied justice to either of the parties.

c. What are the appropriate reliefs

The prayers sought by the Petitioners were that the SC finds that a party has a right of appeal from the High Court to the Court of Appeal on a decision arising out of an application made under the provisions of section 35 of the Arbitration Act. The SC granted the prayer and determined that a party does have the right to appeal under certain conditions. The second prayer was for the SC to issue an order reinstating the original appeal. The SC ordered for the previous order of the Court of Appeal to be set aside and the original appeal to be reinstated.

d. Who should bear the costs

The SC stated that it has the discretion to award costs to ensure that justice is served. The SC found that the case was significant for resolving the

debate on the extent of the Court of Appeal's jurisdiction in arbitration matters and for providing clarity on the issue. As a result, neither party was held accountable for the court's decision. The SC decided that the justice of the case required that neither party should bear the burden of costs and thus, each party was responsible for their own costs.

6. The dissenting opinion of Emeritus Chief Justice DK Maraga.

In a dissenting opinion, the Justice Maraga disagreed with the majority opinion on the various issues for determination as summarized below:

a. Whether or not there is a right of appeal against High Court decisions made under section 35 of the Arbitration Act.

Justice Maraga acknowledged that the main objective of the Act is to limit court intervention in arbitral proceedings. He further stated that the principle of harmonization, which ensures consistency and coherence in the interpretation of laws, should be applied and that all the Constitution's Articles are complimentary. He noted that the Act only allows appeals under section 39 in domestic arbitrations with the consent of the parties and that there was no consent by the parties. He therefore concluded that there was no right of appeal against decisions made under section 35 of the Act.

b. Whether or not sections 10 and 35 of the Arbitration Act limit a party's right of access to justice.

Justice Maraga opined that arbitration is a method of resolving disputes enshrined in the Constitution and that individuals have the freedom to choose which method best suits their needs. As such, he noted that parties who choose arbitration must accept that they are giving up certain rights, such as the right to appeal, in exchange for the benefits that arbitration provides. He further stated that parties choose arbitration because they don't want their disputes to end up in court, but once they make that

choice, they cannot claim that their right of access to justice has been denied or limited. Therefore, the CJ concluded that arbitration does not restrict access to the court system.

c. The scope of the principle of finality in arbitration

Justice Maraga stated that he believed that the principle of finality in arbitration applies to both the arbitration award and any court proceedings that may arise from it, as it is important for speed and finality of the entire process. He pointed out that the Act reflects this principle in section 32A and limits court involvement in arbitration proceedings to maintain finality. His conclusion was therefore that if this principle only applied to the award, it would defeat the purpose of arbitration.

7. Conclusion

In conclusion, the SC ruled that a party has the right to appeal a decision made by the High Court on an application to set aside an arbitral award under section 35 of the Act. This decision clarifies that if the High Court's decision goes beyond the grounds outlined in the Act and results in a gravely wrong decision that denies justice to one of the parties, an appeal to the Court of Appeal is allowed. This ruling sets a precedent in arbitration practice in Kenya.

Supreme Court Petition No. 2 Of 2017 – Synergy Industrial Credit Limited v Cape Holdings Limited [2019] EKLR

1. Introduction

The Supreme Court (the "**SC**") of Kenya on 6th December 2019 settled the position in law regarding the limits of court intervention in arbitration. It held that where the circumstances involve allegations of manifest unfairness or breach of natural justice, parties ought to be allowed recourse beyond the High Court ("**HC**"). The SC acknowledged the varying jurisprudence on the question of whether parties to an arbitration agreement should have further recourse to the Court of Appeal (the "**CoA**"). Previously, Kenyan courts have differed on whether to allow appellate court intervention in the interest of justice or to refrain to uphold the fundamentals of alternative dispute resolution. The SC appreciated both schools of thought but concluded that the arbitration principal of minimal court intervention cannot supersede the need to correct an injustice.

2. Background and factual summary

This was an appeal against the ruling of the CoA where it held that it lacked jurisdiction to entertain appeals from the HC arising out of parties seeking to set aside arbitral awards under Section 35 of the Arbitration Act, No. 4 of 1995 (the "**Act**").

Synergy Industrial Credit Limited (the "**Petitioner**") and Cape holdings Limited (the "**Respondent**") entered a sale agreement (the "**Agreement**") for the purchase of office blocks and parking spaces of a property located in the Riverside Drive suburb of Nairobi. A dispute arose under the contract between the Petitioner and the Respondent (the "**Parties**") which led to the arbitration forming the foundation of this decision. The resulting award ordered the Respondent to pay the Petitioner KES 1,666,118,183.00, being the amount of money advanced to the Respondent with interest, loss of

income opportunity, exchange fluctuations and costs. The Respondent challenged the award before the HC urging that it be set aside under Section 35 of the Arbitration Act.

The HC found in favour of the Respondent, setting aside the award on the ground that the Arbitrator acted beyond his terms of reference. Thereafter, the Petitioner filed an appeal at the CoA and the Respondent applied to strike out the appeal on the ground that there was no right to appeal a High Court decision under Sections 10, 35, 36 and 37 of the Act. The CoA agreed with the Respondent by holding that save for Section 39 of the Act, there is no right of appeal from a decision of the HC made pursuant to Section 35 of the Act.

This provoked the present appeal to the SC where the Petitioner's prayers included an order reinstating its appeal and another order directing the CoA to hear and determine the appeal expeditiously.

3. Legal arguments

The Petitioner's case was that the silence in Section 35 of the Act on the appealability of a HC decision to the CoA should be interpreted to confer jurisdiction on the CoA due to the CoA's unlimited jurisdiction under Article 164(3) of the Constitution of Kenya, 2010 (the "**Constitution**"). According to the Petitioner, if the Act had intended to limit the jurisdiction of the CoA under Section 35, it would have provided so expressly, as it did in declaring the HC decision final under other provisions such as Sections 12(8), 14(6), and 15(3).[3] The crux of the Petition was that a finding that the CoA did not have jurisdiction would leave it without a remedy in law as it could not recover the money advanced to the Respondent neither could it have possession of the disputed property as the Agreement had terminated.

3 Citing Inco Europe Ltd & Others v. First Choice Distribution (A Firm) and Others (Inco Europe Ltd) [2000] I Lloyd's Rep. 467 where it was stated that "where a section is silent about an appeal from a decision of the Court, no restriction was intended."

The Respondent on the other hand contested that arbitration law was created to deter court intervention in arbitral proceedings. Additionally, the Respondent referred to Article 159(2)(c) of the Constitution which requires all courts to promote alternative dispute resolution mechanisms such us arbitration. The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (the "**UNCITRAL Model Law**"), which Kenya is a signatory, further emphasises the need to insulate arbitration processes from interference by courts. For these reasons, the Respondent contested that the silence in Section 35 of the Act can only be interpreted to limit further appeals from decision of the High Court, unlike Section 39 of the Act which expressly allowed the CoA's jurisdiction over decisions made under Section 39.

4. Issues for determination

There was only one salient issue for determination from the arguments of the parties:

a. Whether there is a right to appeal to the CoA following a decision of the HC under Section 35 of the Arbitration Act.

5. Provision of the Arbitration Laws on the Legal Issues

Section 35 of the Act allows a party to arbitration proceedings to apply to the High Court to set aside an arbitral award on grounds such as where "the arbitral tribunal deals with a dispute not contemplated or not within the terms of the reference to arbitration or contains decisions beyond the scope of the reference to arbitration".[4]

Section 10 further limits court intervention to those circumstance prescribed by the Act. Section 39, on the other hand, allows appeals to the CoA,

4 Arbitration Act, No. 4 of 1995, Section 35(2)(iv).

'notwithstanding Sections 10 and 35'on decisions of the HC on questions of law arising in the domestic arbitration under Section 39(2). The CoA would have such jurisdiction where the parties agree to the CoA's jurisdiction or where the CoA considers the determination of the point of law involved will affect the rights of a party in the arbitration.

Other ancillary provisions of the law include Article 159(2)(c) of the Constitution that requires courts to be guided by the principles of alternative dispute resolution such as arbitration, and Article 164(3) of the Constitution that underpins the jurisdiction of the CoA to hear appeals from the High Court.

6. Is there a right to appeal to the CoA following a decision of the HC under Section 35 of the Arbitration Act?

The SC analysed domestic and comparative jurisprudence and an analysis of the UNICTRAL Model Law provisions.

From domestic jurisprudence, the SC acknowledged that the question of appeal was not settled. On the one hand, the CoA affirmed the right of appeal reasoning that since Section 35 is silent on whether an appeal can lie to the CoA, it should be interpreted to confer jurisdiction as it had expressly done so in other provisions.[5] In addition, the CoA jurisdiction should allow such appeals in exceptional circumstances to address the violation of the rules of natural justice.[6] On the other hand, the CoA also found that it does not have jurisdiction because the right of appeal must be expressly provided for in statute, and only Section 39(3) in the Act allowed

5 See, for example, Kenya Shell Limited v. Kobil Petroleum Limited, Civil Application No. 57 of 2006 (unreported); DHL Excel Supply Chain Kenya Limited v. Tilton Investments Limited Civil Application No. NAI. 302 of 2015; [2017] eKLR.

6 See, for example, Kurji and another v. Shalimar Limited and Others Civil Appeal No. 197 of 2004; [2006] eKLR.

further appeals.[7] The court emphasised the fundamental principles of minimal court intervention in arbitration matters and a party's consent to such intervention and its attendant consequences.[8]

The SC observed this similar dilemma in the United Kingdom, Canada, and Singapore. In those jurisdictions, there is generally no right of appeal against the decision of the HC in setting aside or affirming an award.[9] However, leave to appeal may be granted in limited circumstances,[10] such as where there is unfairness or misconduct in the decision-making process, to prevent an injustice from occurring and to restore confidence in the process of administration of justice.[11] Other circumstances include where the subject matter is very important in terms of economic value or legal principle,[12] and where it is necessary to clarify the law because of conflicting decisions on an issue.[13] The SC, nonetheless, remained categorical that whatever the circumstance, courts should not deal with the merits of an arbitral award as this was beyond their purview.

On the UNICTRAL Model Law, the SC noted that although Article 5 limiting court intervention in similar terms as Section 10 of the Act, its explanatory notes allowed States to prescribe within legislation limited circumstances under which appeals could lie to a second tribunal.

7 See, for example, Anne Mumbi Hinga v. Victoria Njoki Gathara Civil Appeal No. 8 of 2009; [2009] eKLR; Micro-House Technologies Limited v. Co-operative College of Kenya Civil Appeal No. 228 of 2014; [2017] eKLR.

8 See, for example, Nyutu Agrovet Limited v. Airtel Networks Limited Civil Appeal (Application) No.61 of 2012; [2015] eKLR.

9 Amec Civil Engineering Ltd v. Secretary of State for Transport [2005] EWCA Civ 291.

10 AKN & another v. ALC and others and other appeals [2015] SGCA 18, paragraphs 38 and 39.

11 AstraZeneca Insurance Co Ltd v. CGU International Insurance plc and others [2006] All ER (D) 176 (Oct); Sattva Capital Corp. v. Creston Moly Corp. [2014] 2 SCR 633.

12 Sattva Capital Corp. v. Creston Moly Corp. [2014] 2 SCR 633 citing British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology, 2000 BCCA 496, 192 D.L.R. (4th) 122.

13 Antaios Compania Naviera SA v. Salen Rederierna AB (The Antaios) [1984] 3 All ER 229.

In sum, the SC found that Section 35 should be interpreted in a manner promoting the purpose and objectives of arbitration laws including expeditious and fair dispute resolution. Where parties agree to settle their disputes through arbitration, the arbitral tribunal should be the main and only determinant of the merits of the dispute. A HC can therefore only intervene on prescribed grounds because the purpose of Section 35 is to ensure the courts correct specific errors of law which would otherwise cause a miscarriage of justice.

Nonetheless, the Supreme Court maintained that the CoA has residual jurisdiction which assists it in safeguarding the integrity of the administration of justice in exceptional and limited circumstances and where there is no express statutory bar. According to the SC, this residual jurisdiction ensures that the objectives of arbitration are not upheld at the expense of real and substantive justice. In this regard the SC found that the CoA ought to have heard the Petitioner's appeal to avoid the manifest unfairness that would result if the Petitioner was to lack remedy in law.

The SC further held that leave to invoke the CoA's jurisdiction should only be granted where the HC has overturned an award on ground outside those provided in Section 35 of the Act. To this end, the SC recommended that a leave mechanism be introduced in legislation to ensure only merited appeals are admitted before the CoA.

7. Conclusion and Analysis

This decision settles the jurisprudence on court's intervention in arbitration matters. However, in his dissenting opinion, Justice David Maraga considered the majority decision to be an amendment of Section 35 of the Act and he instead interpreted Section 10 of the Act to mean that court intervention, including the CoA's, must be expressly prescribed in the Act given the integral principal of finality in arbitral proceedings.

Notably, this decision does not delineate what constitutes a miscarriage of justice, and its recommendation on legislating the condition of leave has not been implemented yet. The effect of this is a proliferation of arbitration appeal cases to the CoA, merited and otherwise, thus compromising the principle of expediency. To this extent, Justice Maraga may be right in that many commercial actors would inevitably lose confidence in the Kenyan arbitral system.

In conclusion, although this decision averted a miscarriage of justice which sought to deny the Petitioner a remedy in law, the jurisprudence set is likely to affect the integrity of arbitration as an alternative dispute resolution mechanism. Nonetheless, the decision is noteworthy for having settled the law on the silence in Section 35 of the Act, thus introducing consistency and predictability on the question of courts' intervention in arbitration.

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Court Petition No. 47 of 2019 Geo Chem Middle East v Kenya Bureau Of Standards [2020] EKLR

1. Introduction

This case focuses on the extent of judicial intervention in arbitration and addresses the instances in which the court's intervention is absolutely necessary.

2. Background and summary of the facts of the case

On 5th June 2009, Geo Chem Middle East (the "**Petitioner**") and Kenya Bureau of Standards (the "**Respondent**") entered into a three (3) year contract with an option of renewal, where the Petitioner was contracted to provide qualitative and quantitative inspection and testing services of imported petroleum products (the "**Contract**"). The Petitioner alleged that it discharged its contractual obligations since it established a petroleum inspection facility at the Port of Mombasa which was launched on 27th August 2009 and subsequently commenced provision of the contracted services.

However, the Respondent notified the Petitioner that the Government had "suspended" the Contract until further notice. The Contract only provided for termination with a six (6) months' notice period. Moreover, in the event of force majeure, the Respondent was obligated to issue a 14 days' notice. Despite this, no notices were issued to the Petitioner resulting in a claim against the Respondent for the outstanding fees for services rendered. In response, the Respondent informed the Petitioner that the Contract stood terminated upon the lapse of sixty (60) days from when the "suspension" notice was issued. The Petitioner, aggrieved by the turn of events, instituted arbitration proceedings against the Respondent pursuant to the dispute resolution clause in the contract. Both parties appointed an arbitrator prompting the arbitrators to appoint an umpire.

The Petitioner's claim was for the sum of USD 2,487,784.24 being unpaid invoices for services rendered, USD 468,629.12 incurred in equipping a laboratory, USD 1,207,150.91 being expenses incurred in setting-up operations at the Port of Mombasa, USD 16,989,356.76 being income lost due to the suspension of the contract and interest on each of the claimed amounts. On the other hand, the Respondent filed a counterclaim for KES 947,640, 169.87 being unremitted royalties of KES 699, 365, 439.2 plus interest at the rate of 5%.

The arbitral tribunal in its award found that the alleged "suspension" of Contract "until further notice" did not constitute termination as envisaged under the Contract, and neither did the same constitute notice of occurrence of a force majeure event as stipulated in the Contract. The tribunal also found that the Respondent had unlawfully terminated the Contract and was thus liable for the losses incurred by the Petitioner during the alleged suspension of the Contract.

The tribunal in its determination awarded the Petitioner the sum of USD 8,591,139 in respect of the remaining contract period of twenty-nine (29) months as well as USD 3,687,437.21 inclusive of interest and Valued Added Tax for services rendered, and upon deduction of royalties due and owing.

a. Proceedings before the HC ("HC")

The Petitioner filed an application before the HC for the enforcement of the arbitral award. Similarly, the Respondent filed an application seeking orders to set aside the arbitral award pursuant to Section 35 of the Arbitration Act, 1995 (the "**Act**"). The grounds relied upon by the Respondent were that the arbitral tribunal dealt with a dispute not contemplated by, nor falling within, the terms of the reference to arbitration and further, that the arbitral award contained decisions on matters that were beyond the scope of the

reference to arbitration. It also claimed that the award conflicted with public policy.

The HC held that it is not within its mandate to re-evaluate decisions of an arbitral tribunal on the basis that the HC would be deemed to be sitting on an appeal over the decision in issue. The HC further opined that Kenya's public policy regarding arbitral awards being final would be afflicted if the same court sat on an appeal over the decision of the arbitral tribunal.

Consequently, the Respondent's application to set aside the arbitral award was dismissed and instead, allowed the Petitioner's application and adopted the arbitral award as a judgment of the HC pursuant to the provisions of Section 36(1) of the Act.

b. Proceedings at the CoA ("CoA")

Aggrieved by the ruling of the HC, the Respondent appealed to the CoA. In its determination, the appellate court held that the issues determined by the arbitral tribunal fell outside its scope pursuant to Section 35(2)(iv) of the Act and that the award which imposed a liability on the Respondent, a state corporation, to pay from public funds over KES1,000,000,000 without proof of liability was against public policy. This decision culminated in the Petitioner's appeal before the Supreme Court.

3. Legal issues for determination

a. Whether the Supreme Court is vested with the requisite jurisdiction to hear and determine the instant Petition.

The Supreme Court ("**SC**") declined to address the substantive issues tied to the CoA's judgement because the matter did not require any interrogation of any constitutional provision under Article 163(4)(a) of the 2010 Constitution of Kenya which would attract its jurisdiction. The SC however,

assumed jurisdiction on the basis that the CoA overstepped its mandate contrary to its statutory confines as further discussed below.

b. Whether the CoA had the jurisdiction to determine the appeal before it.

The SC observed that the CoA usurped the powers of the HC and proceeded to determine a matter that had not been substantively decided by the latter. The SC reiterated that where an appellate court holds that a lower court has wrongly declined to determine a matter on the mistaken belief that it lacks jurisdiction to do so, the appellate court must remit that matter to the lower court directing it to exercise its jurisdiction. Only after the lower court has complied with such an order, would a substantive appeal lie to the appellate court. The SC held that the CoA acted in excess of than its jurisdiction.

c. What reliefs are available to the parties.

The SC allowed the appeal and set aside the judgement of the CoA. Its implication is that the ruling of the HC was maintained thus upholding the arbitral award in favour of the Petitioner.

4. Provision of the Arbitration Laws on the Legal Issues

In its determination of the matter, the SC referred to Section 35 of the Act which provides that recourse to the HC against an arbitral award can only be made if certain grounds are established. In addition, Section 39 of the Act stipulates that an application or an appeal may be made to the HC on any question of law arising during the arbitration or out of the award.

Interestingly, Section 39(3) of the Act provides that an appeal against a decision of the HC shall lie to the CoA only if the parties have agreed on it prior to the delivery of the arbitral award. Moreover, the CoA may also take up an appeal/application if it is of the opinion that it is a matter of general

importance and the determination of which will substantially affect the rights of one or more of the parties.

5. Summary of Court's Decision and Principles

The SC referred to its decisions in Nyutu **Agrovet Limited v. Airtel Networks Kenya Ltd & Another [2019] eKLR ("Nyutu")** and Synergy Industrial Credit Limited v. Cape Holdings Limited **[2019] eKLR ("Synergy").** The essence of these decisions provides that an appeal may lie from the HC to the CoA on a determination made under Section 35 of the Act only in instances where the HC, in setting aside an arbitral award, stepped outside the grounds outlined in Section 35 of the Act. In addition, the HC must have made a decision so grave and manifestly wrong to the detriment of the parties hindering their right to access to justice.

Notwithstanding the above, the SC also emphasized that this circumscribed jurisdiction should only be exercised in the clearest of cases should the CoA assume jurisdiction. According to the Court, this principle is deemed as the prevailing governing law regarding appeals from the HC to the CoA in arbitration disputes, arising from Section 35 of the Act. In addition, the SC amplified that appeals arising from arbitration disputes are not as open-ended as those instituted in ordinary litigation.

The SC reiterated that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. It further stated that, to expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and that the decisions in **Nyutu** and **Synergy** should not be taken as stating anything to the contrary.

Noteworthy, the SC declared that in conformity with the principle of the need for expedition in arbitration matters, where the CoA assumes jurisdiction in conformity with the principle established in the above cases mentioned and delivers a consequential judgment, no further appeal should ordinarily lie to the SC.

6. Analysis/comments on the Decision of the Court

Based on the above, it is evident that the courts are growing accustomed to the utilization, enforcement and limited interference with arbitration. It is arguable that the judiciary does not want a repeat of the shortcomings of the repealed Arbitration Act which permitted extensive court intervention as that would render the recourse to ADR mechanisms redundant.

7. Conclusion

This case acknowledged that the role of courts has been greatly diminished despite the narrow exceptions provided for under Sections 35 and 39 of the Act. However, the Act also permits the intervention of the HC to determine issues where parties fail to agree or to assist the arbitral tribunal in some other way.[14] An illustrious example is Section 6 of the Act which confers the HC with powers to stay legal proceedings and refer the matter to arbitration where there is a pre-existing agreement to refer the matter for arbitration.

8. References

Constitution and Statutory Legislation

Arbitration Act, Act No. 4 of 1995(Amended in 2009) [Revised Edition 2019]

Cases

Nyutu Agrovet Limited v. Airtel Networks Kenya Ltd & Another [2019] EKLR

Synergy Industrial Credit Limited v. Cape Holdings Limited [2019] EKLR

14 Arbitration Act, Act No. 4 of 1995(Amended in 2009) [Revised Edition 2019].

Jurisdiction of Courts in Entertaining Disputes Arising from a Contract Containing an Arbitration Clause

1. Introduction

Cit: Kenya Breweries Limited & another v Bia Tosha Limited & 5 Others [2020] eKLR.

Court: The Court of Appeal at Nairobi.

Date of Judgement: 10th July 2020.

The case before the Court of Appeal ('**CoA**') was brough before the court as an appeal from the ruling and order of the High Court of Kenya ('**HC**') at Nairobi which was delivered on 29th June 2016.

2. Background and Summary of the Case

Bia Tosha Limited ('**1st Respondent**') entered into a commercial relationship with Kenya Breweries Limited and UDV (Kenya) Limited (the '**Appellants**') in 1997 for beer distributorship. The relationship, which involved the Appellants appointing the 1st Respondent as a beer distributor, had since expanded to include additional territories to the territories over which the initial relationship was entered into.

The commercial agreement between the 1st Respondent and the Appellants for the beer distributorship had provisions for purchase of goodwill, which was duly purchased by the 1st Respondent. The material agreement also had an arbitration clause for reference of disputes arising between the parties in relation to their commercial relationship.

A dispute arose between the 1st Respondent and the Appellants regarding the exclusivity of the distributorship agreement i.e., exclusivity over territories where goodwill has been purchased, as well as the refund of amounts paid in goodwill in lieu of exclusive distributorship over territories where the goodwill has been purchased. The 1st Respondent approached the HC on 14th June 2016 with a Petition. The Petition was accompanied by an

application for conservatory orders seeking preservation of status quo pending the hearing and determination of the petition. Before the HC was also a Notice of Motion filed by Kenya Breweries Limited seeking orders to stay the proceedings before the HC and refer the matter to arbitration.

Via a ruling issued on 29th June 2016, the HC made determinations on the application for conservatory orders and the application for stay of proceedings as follows –

a. Conservatory orders were granted on the reasoning that the dispute raised some constitutional issues touching on the violation of proprietary rights; and

b. Stay of proceedings and reference of matter to arbitration was denied on the reasoning that there are third parties enjoined in the matter before the HC who were not parties to the arbitration agreement in question.

The appeal before the CoA arose from the above ruling by the HC and the Appellants relied on numerous grounds including the HC's jurisdiction when there was in existence an arbitration clause.

3. Legal Issues for Determination

The CoA isolated the following three (3) issues for determination in the appeal before it –

a. Whether the HC wrongly assumed jurisdiction and granted orders while ignoring party autonomy and freedom of contract in the face of an arbitration agreement;

b. Whether the HC issued final orders which conferred rights not in the contract before the petition was heard and evidence tested; and

c. Whether the dispute was purely a commercial dispute elevated to a constitutional petition against established principles.

4. Provision of the Arbitration Laws on the Legal Issues

In making a determination on the first of the three (3) issues for determination set out above, the CoA referred to the provisions of section 6 of the **Arbitration Act, 1995** and also referred to the decisions in the cases of **Niazsons (K) Ltd vs. China Road & Bridge [2001] eKLR** and **Corporate Insurance Company vs. Loice Wanjiru Wachira [1996] eKLR** as follows –

Section 6 of the Arbitration Act, 1995

a. This section provides as follows:

"(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds –

a. That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings".

b. The CoA highlighted the provisions of this section to demonstrate the obligations of a court upon being moved under this section (as was indeed done by Kenya Breweries Limited via its Notice of Motion before the HC seeking orders to stay proceedings and refer the matter to arbitration).

The Case of Niazsons (K) Ltd vs. China Road & Bridge [2001] eKLR

a. The CoA highlighted the following holding in this case:

"*All that an applicant for a stay of proceedings under section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:*
(a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;

(b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and

(c) Whether the suit intended concerned a matter agreed to be referred to arbitration".

The CoA highlighted the holding in this case to demonstrate that the provisions of section 6 of the Arbitration Act, 1995 have been crystallized in case law.

The Case of Corporate Insurance Company vs. Loice Wanjiru Wachira [1996] eKLR

a. The CoA highlighted the following holding in this case:

"*…the existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings*".

The CoA highlighted the holding of this case to further reiterate the provisions of section 6 of the Arbitration Act, 1995 and the rights that this section affords parties before a court who also have an arbitration agreement between them.

5. Summary of the Court's Decision and Principles

The CoA allowed the appeal before it having agreed with the Appellants on the issues set out for determination and ordered as follows –

a. That the conservatory order issued by the HC be set aside and substituted with an order staying the proceedings before the HC pending the dispute being referred to arbitration; and

b. That the dispute between Kenya Breweries Limited and 1st Respondent be referred to arbitration in accordance with the respective parties' distributorship agreements.

In arriving at the above dispositions, the court emphasized on the following key issues/principles –

- **Parties are bound by their contracts and a court of law cannot purport to rewrite a contract between parties.**

This was in reference to the HC's findings that the dispute between the parties raised constitutional issues that were not suitable for determination by arbitration. The CoA noted that the said constitutional issues arose from the distributorship agreement between the parties and in determining the same, the dispute resolution mechanism in the distributorship agreement should be resorted to in the first instance.

- **Article 159(2)(c) of the Constitution of Kenya, 2010 mandates courts to promote alternative dispute resolution such as mediation and arbitration.**

The CoA noted that the HC failed to give due consideration to the above constitutional provision and disregarded the terms of the distributorship agreement between the terms (reference to the arbitration clause in the agreement). The CoA further observed that the HC did not heed to the dictates thereto to promote alternative dispute resolution, but rather downgraded it.

6. Analysis/Comments on the Decision of the Court

The CoA, in this case, was faced with the crucial question of court intervention in arbitration. This question has been at the centre of many decisions made by Kenyan courts relating to arbitration.

Section 10 of the Arbitration Act, 1995 limits court intervention in arbitration matters as follows: "*Except as provided in this Act, no court shall intervene in matters governed by this Act*". The Act clearly stipulates instances where courts can intervene in arbitration matters from the initial stages all through to the latter stages of arbitration.[15]

Section 6(1) of the Arbitration Act, 1995, which has been relied upon by the CoA in this matter, falls under instances of court intervention in arbitration prior to the commencement of arbitration proceedings (at the point of

15 See; Kariuki Muigua, "*Role of the Court under Arbitration Act, 1995: Court Intervention Before, Pending and After Arbitration in Kenya*" (2010).

reference to arbitration). It is a mechanism by court to refer parties to arbitration, pursuant to a valid arbitration agreement between/among them, and subject to an application by one of the parties to this effect. This decision by the CoA, like numerous other decisions by Kenyan courts, is a demonstration of the respect that courts increasingly have for this provision of the Act.

It is particularly encouraging to see Kenyan courts, as the CoA has done in this instance, respect the terms of contract between parties and the parties' autonomy to choose a dispute resolution mechanism suitable to their needs. It is equally encouraging to see that courts are not overzealous to allocate to themselves the role of the arbiter in instances where a valid arbitration clause exists between the parties before them.

7. Conclusion

The CoA decision adds to growing precedence from Kenya courts that emphasize the need to promote alternative dispute resolution in Kenya, and to respect party autonomy and freedom of contract by respecting the terms of contracts between parties. The CoA decision is not only legally sound but is also very much welcome in the promotion of arbitration as a dispute resolution in Kenya and critically in the campaign to have courts respect arbitration as a dispute resolution mechanism and only intervene as stipulated under the Arbitration Act, 1995.

Reference(s)

Muigua, K., (2010). "*Role of the Court under Arbitration Act, 1995: Court Intervention Before, Pending and After Arbitration in Kenya*".

GHANA[16]

Court of Appeal Decision in M. Barbisotti & Sons Ltd v Euroget De-Invest S.A, Dr. Said Deraz & Cal Bank Ghana Limited [Unreported][17]

1. Introduction

On July 8, 202, the Court of Appeal of Ghana, by a majority decision in the above-mentioned suit, overturned, a decision of the High Court, (Commercial Division), Accra dated 30th July, 2018 ("Ruling"). The appeal emanated from an action filed by the Respondent (**M. Barbisotti & Sons Ltd**) at the High Court claiming among others, breach of a construction contract, and fraud.

The 1st Appellant (**Euroget De-Invest S.A),** a real estate developer, had raised at the High Court, a preliminary objection against the suit before it. The 1st Appellant who was the 1st Defendant at the High Court, asserted in its objection that by the relevant dispute resolution agreement between the parties, the agreed forum for resolution of disputes between the parties was by a dispute adjudication board with an opportunity to escalate the dispute to arbitration if applicable under the auspices of the International Chamber of Commerce (**ICC**). The 1st Appellant also requested the High Court to stay proceedings before it and refer the parties to their agreed dispute resolution mechanism notwithstanding that a claim of fraud had been alleged by the Respondent in its pleadings. There was also present as a party, a third entity who was a non-party (**Cal Bank Ghana Ltd**) to the dispute resolution agreement. The High Court by the Ruling, rejected the Appellants' objection and dismissed the request for stay of proceedings and reference to alternative dispute resolution. The Appellant appealed and this was the Ruling that the Court of Appeal overturned. The Court of

16 AB & David Africa - Benjamin Kpakpo Sackar and Naa Amorkor Amarteifio, MCIArb

17 Civil Appeal No. H1/162/2019, dated July 8, 2021

Appeal, in its decision, held among other things that once the alleged fraud is against the contract itself (as opposed to fraud in the arbitration agreement), the claim of fraud is arbitrable and same could be determined by an arbitral tribunal.

Regarding the presence of a third party, the Court of Appeal reasoned that although an arbitration agreement is a contract which ordinarily binds and can be invoked by the parties to the agreement, there are exceptions to this general rule. The court opined that non-signatories could be bound to the arbitration agreement of others through incorporation by reference assumption, agency, veil piercing or alter ego and estoppel.

This case review addresses how the Ghanian courts have made a shift over time, to become a pro arbitration fora. It provides some clarity on the arbitrability of certain disputes and the rights of third parties who are non-parties to an arbitration agreement.

2. Background and Procedural History

This dispute arose from a contract awarded to the 1st Appellant by the government of Ghana to construct a number of hospitals in Ghana. One of the hospitals which was designated a military hospital, was to be constructed in Afariland, Kumasi, in the Ashanti Region of Ghana.

The description of work specified in the 1st Appellant's invitation for tenders included the construction of a building with capacity to house 500 hospital beds, construction of 154 units of staff housing, construction of 10 outhouse units and construction of a building known as the Northern Command Building and other related facilities (**Project**).

The 1st Appellant in turn, engaged the Respondent, as its subcontractor to carry out the Project. The contract price for the subcontract, was USD 59,000,000.00. The parties adopted as their form of the subcontract, the

FIDIC Conditions of contract for EPC/Turnkey Projects, First Edition, 1999 ("the Subcontract"). In order to secure the obligations under the Subcontract, the Respondent was required to issue both a performance guarantee and an advance payment guarantee ("Securities") which it did in the sums of $5,900,000.00 and $7,994,500.00 respectively. The Securities were issued by third party, **CAL Bank Ghana Ltd,** and Standard Chartered Bank, United Kingdom respectively on behalf of the Respondent in favour of the 1st Appellant. The Securities had expiry dates and were to be renewed periodically ahead of their expiry.

Under the Subcontract, the 1st Appellant and the Respondent agreed to refer any dispute arising out of or in connection with the Subcontract to a dispute adjudication body with the right by either party if dissatisfied, to escalate the dispute to arbitration or in the absence of a dispute adjudication body, directly to arbitration before a sole arbitrator.

The Respondent commenced works as required under the Subcontract. In the course of time, the Respondent raised a number of concerns relating to the 1st Appellant's failure to honour its obligations under the Subcontract. While the Respondent's concerns remained unresolved, the 1st Appellant made demands on the Respondent to renew the Securities which were about to expire. The 1st Appellant purported to have called one of the Securities; the Advance Payment Guarantee, and, also threatened to call the other, the Performance Guarantee. A dispute arose between the parties and the Respondent filed an action at the High Court against the 1st Appellant and two other parties being the chief executive officer (**Dr. Said Deraz**) of the 1st Appellant and a bank that issued the Advance Payment Guarantee, as 2nd and 3rd Defendants respectively. In the case it filed before the High Court, the Respondent among other things, alleged fraud on the 1st Appellant's part.

The Respondent's basis of the fraud allegation was that the 1st Appellant by false statements, induced it to enter into the Subcontract and also induced it to instruct its bankers to provide the Securities.

The Respondent on the same day it commenced the action, also applied to the High Court to injunct the 1st Appellant and 2nd Appellant (**Dr. Said Deraz**) from receiving any proceeds under the Advance Payment Guarantee and from calling the Performance Guarantee.

The 1st Appellant objected to the suit on grounds that the Respondent had come to the wrong forum. The Appellants by application, requested the High Court to stay proceedings and refer the parties to their agreed dispute resolution mechanism. Following the hearing of the application, the High Court delivered the Ruling by which the appellant's objection and request were dismissed.

The Appeal

In its appeal, the Appellants canvassed several grounds but for the purpose of this review, the following are the Appellants' grounds that will be discussed in this piece:

a. The trail judge failed to appreciate the fact that the Arbitrator could deal with all matters including issues of the alleged fraud especially when same was a mere allegation which according to the 1st and 2nd Appellants strongly denied and rejected.

b. The trial judge erred when she held that the presence of the 3rd Defendant clothed her with jurisdiction to hear the matter and ignored the arbitration agreement between the relevant parties in clear violation of the intentions of the parties.

3. Legal issues

3rd Defendant's position as non-party to the ADR agreement

The issues that confronted the Court of Appeal to decide, was whether a person not a party to the alternative dispute resolution agreement (a "Non-party") could be allowed or be compelled to be joined as party to participate in the alternative dispute resolution proceedings;

To the Court of Appeal, this bothered on whether given the context, the Non-party's presence was going to be one merely of a nominal defendant or a substantive defendant. In considering this, thought was given to the allegations made against the Non-party, the reliefs being sought as a whole against the Non-party, and to the extent to which a decision on the issues, could potentially impact the Non-party under the Alternative Dispute Resolution Act, 2010 (Act 798) (**hereafter referred to as ADR Act**).

It was the Appellants' case that the 3rd Defendant (i.e. the bank that issued the Securities) was joined to the suit only as a nominal defendant and the only reason for the joinder was that it granted an Advance Payment Guarantee and facilitated the acquisition of the Performance Security by the Respondent and nothing more. Appellants further argued that as a nominal defendant, the 3rd Defendant would not be affected by any decision made by an arbitral tribunal.

The Respondent, on the other hand, sought to justify the presence of the Non-Party. The Respondent argued that the Non-Party was not a nominal defendant and relied on the possibility of contractual claims that the Non-Party may have against either of the parties. The Respondent urged the Court of Appeal to affirm the position that reference to alternative dispute resolution was inapplicable given that alternative dispute resolution was a

consensual process and the Non-Party not having consented, a compelling case exists for the court, not ADR, to decide the dispute.

Arbitrability of the claim of fraud

A second legal issues which confronted the Court of Appeal and had to be determined was whether the alleged fraud perpetuated on the Respondent, was arbitrable in which case an arbitral tribunal must determine it. In the Respondent's pleadings filed before the High Court, it pleaded fraud and also raised it as a ground to oppose the Appellants' application for stay of proceedings. The Appellants, filed no defence to the claim of fraud but in responding to the claim in its application for stay, argued that fraud was arbitrable and as such, the High Court remains an improper forum for determining the allegation of fraud.

In its response to the parties' respective arguments on fraud, the High Court, reasoned that the allegation of fraud is a serious allegation which falls under section 1(d) of the ADR Act. The High Court further reasoned that the allegation of fraud is a quasi-criminal offense and has a high standard of proof. As such it is only subject to the court's jurisdiction and not arbitration or other dispute resolution mechanisms.

The Court of Appeal took a different view.

4. Applicable Arbitration Legislation or Principle

In this review, the arbitration legislation and general principle of law which were at play in the decisions at the High Court and the Court of Appeal, is section 1(d) of the ADR Act. Section 1(d) provides as follows:

a. This Act applies to matters other than those that relate to

(d) any other matter that by law cannot be settled by an alternative dispute resolution method.

General principle of law on arbitration:

Reference is made to article 7 of the UNCITRAL Model Law on International Arbitration. The relevant provision is as follows:

An arbitration agreement is the cornerstone of the arbitration process.[18] *The general principle in arbitration is that parties to an arbitration agreement cannot be compelled to arbitrate without their consent. Parties will usually submit all or certain disputes to arbitration which have or may arise between them in respect of a defined legal relationship, contractual or otherwise.*

5. Summary of decision and Analysis

Regarding the first issue identified in the case for purposes of the review, the Court of Appeal simply stated that although an arbitration agreement is designed to accommodate parties to the contract, there are exceptions.[19]

An arbitration agreement is a contract and can usually only bind and be invoked by the parties to the agreement. However, there are situations where third parties who are not parties to the arbitration agreement may either be bound by or be beneficiaries of the arbitration agreement.

The Court Appeal recognized five circumstances under which third parties or non-signatories may be bound to an arbitration agreement of other persons or parties.

18 Verady Tibor Et Al, International Commercial Arbitration: A transitional Perspective, (Thompson/West 2006): 85)

19 Regent Seven Seas Cruises Inc. v Rolls Royce PLC 2007 WL 601992 (S.D. Fla) [2007]

These are circumstances of agency, veil piercing/alter ego, incorporation by reference assumption and estoppel.[20]

The court noted the argument of the 1st and 2nd Appellants that the Respondent only joined the 3rd Defendant as a nominal defendant because it facilitated the acquisition of a Performance Guarantee and granted an Advance Payment Guarantee. In their argument, they also emphasized that the Respondent joined the 3rd Defendant only to restrain it from releasing funds to the 1st and 2nd Appellants in relation to the contract.

The court seized the opportunity to discuss who a nominal defendant is in relation to the facts presented before it. The court defined a nominal defendant relying on an American case[21] to be:
"a person who can be joined to aid the recovery of relief with an assertion of subject matter jurisdiction only because he has no ownership interest in the property which is the subject of litigation. A nominal defendant holds the subject matter of the litigation "in a subordinate or possessory capacity as to which there is no dispute".

In the Court of Appeal's judgment, a nominal defendant was likened to a trustee or agent who has possession of the funds which are the subject of litigation. A category of person must be joined to the action purely as a means to facilitate collection of funds and would be ordered by the court to pay the relevant party once the action comes to an end.

The court therefore upheld this issue upon which this ground of appeal was based for the 1st and 2nd Appellants. It did so on the basis that reference of the action to arbitration does not in any way affect the interest of the 3rd Defendant since it is only holding the Advance Payment Guarantee which

20 Thomson CSF, SA v. American Arbitration Association, 64 F 3d. 773 (2nd Cir. 1995)

21 Sec v. Cherif 933 F.2D 403 [1991]

the 1st and 2nd Appellants sought to call-in in accordance with the contract they executed with the Respondent.

The Court of Appeal had another hurdle to determine regarding whether the court and not the arbitral tribunal had jurisdiction to determine fraud as a quasi-criminal offence.

The Court of Appeal in determining this issue noted that one of the major doctrines of arbitration is arbitrability. The principle states that certain disputes may not be determinable using arbitral processes even in circumstances where they fell within the relevant scope of the arbitration agreement.

Section 1 of the ADR Act, provided for matters that are not subject to arbitral processes. These matters relate to the national or public interest, the environment, the enforcement and interpretation of the constitution and any other matter that by law cannot be settled by an alternative dispute resolution method.

It was the considered opinion of the Court of Appeal that, the ADR Act did not include fraud as one of the matters that could not be settled under arbitral processes. The Court reinforced its position by contrasting the provision of the ADR Act to its predecessor legislation the Arbitration Act, 1961 (Act 38). The Court after comparing the two, posited that unlike Act 38 where it was expressly provided that irrespective of the existence of an arbitration agreement, questions of fraud were to be determined by the court, the ADR Act did not contain such a provision.[22] In the opinion of the Court of Appeal, the ADR Act expressly repealed Act 38 and in doing so, it did not save the provision on fraud regarding agreements that came into force after Act 798.[23]

22 Section 27 (2) & (3)

23 Section 137 (1), the Act in section 89(2) only precludes customary arbitral tribunals from determining criminal matters.

The attitude of the Court of Appeal was not surprising because in a previous case entitled AngloGold Ashanti Ghana Limited v. Mining & Building Contractor (unreported)[24], , the Court of Appeal had reasoned that where a party pleads fraud, it is not mandatory for the court to consider same as the basis to deny reference to arbitration.

Another reasoning the Court of Appeal gave in overturning the Ruling which is worth discussing, is the distinction the Court of Appeal made as to the kind of agreement that could be said to have been tainted by fraud if at all as the Respondent had alleged. The Court of Appeal in its ruling, considered the construction contract and the arbitration clause/agreement, as two separate agreements. The Court of Appeal noted that the alleged fraud pertained only to the contract itself and not the arbitration agreement. On the doctrine of separability in an arbitration agreement, the contract is a separate document from the arbitration clause or the arbitration agreement[25]. With this distinction, the Court of Appeal reasoned that in circumstances where the contract is rendered null and void upon determination of the fraud in the contract, the arbitration agreement would still hold valid and enforceable. In the Ruling, the Court of Appeal emphasized that a court may only refuse a reference to arbitration only if the allegation of fraud is against the arbitration agreement itself.

6. Conclusion

The decision of the Court of Appeal in this case, affirms the pro arbitration stance of the Ghanaian courts. Fraud is no longer a hold-back or a constraint to the Court's ability to defer on fraud claims, to the ADR forum.

24 Suit No. H1/201/2015 dated December 17, 2015

25 Premium Nafta Products Ltd v. Fili Shipping Co. Ltd. [2007] UKHL 40

Also, the general principle of arbitration being solely for the parties to the contract remains the law but has been established to have exceptions before the Ghanaian courts. Depending on the facts of each case and how the third party is connected to the matter, the Court will not refuse to refer parties to arbitration simply because one of the defendants was a non-party to the relevant arbitration agreement. However, such third party must be one who may be seen as a collateral party and whose absence will not impede or adversely affect the adjudicating entity's ability to substantively resolve the real issues in dispute.

REFERENCING

Laws of Ghana

1. Alternative Dispute Resolution Act, 2010 (Act, 798)

2. Arbitration Act, 1961 (Act 38) (Repealed)

Domestic Cases

3. AngloGold Ashanti Ghana Ltd v. Mining & Building Contractor, Civil Appeal No. H1/201/2015 dated December 17, 2015

Foreign Cases

4. Regent Seven Seas Cruises Inc. v. Rolls Royce PLC 2007 WL 601992

5. Thomson CSF, SD v. American Arbitration Association, 64 F 3d. 773 (2nd Cir 1995)

6. SEC v. Cherif 933 F. 2D 403 [1991]

7. Premium Nafta Products Ltd v. Fili Shipping Co. Ltd [2007] UKHL 40

Books

8. Verady Tibor Et Al, International Commercial Arbitration, A Transitional Perspective, (Thompson/West, 2006) 85

MAURITIUS[26]

***Flashbird Ltd v Compagnie de Sécurité Privée et Industrielle SARL* [2021] UKPC 32**

1. Introduction

This case concerned an appeal made by the Appellant, Flashbird Ltd (**Flashbird**), as of right to the Judicial Committee of the Privy Council (**JCPC**). Flashbird sought an appeal of a decision of the Supreme Court of Mauritius which dismissed Flashbird's application to set aside an arbitration award, pursuant to s 39(2)(a)(iv) of the International Arbitration Act 2008 (**Act**).

2. Background and procedural history

The dispute arose out of a consultancy agreement entered into by the parties in 2013, concerning assistance to be given by the Appellant to the Respondent, Compagnie de Sécurité Privée et Industrielle SARL (**CSPI**). The agreement provided that Flashbird was to assist CSPI in obtaining a contract for the management and development of security and safety services at international airports in Madagascar.

In August 2016, CSPI filed a request for arbitration with the Secretariat of the Arbitration and Mediation Center (**MARC**) of the Mauritius Chamber of Commerce and Industry. CSPI sought: (i) judicial termination of the consultancy contract due to Flashbird's alleged non-performance of its contractual obligations; (ii) the refund of various payments made by it; and (iii) damages.

In October 2016, MARC designated Dr Jalal El Ahdab as sole arbitrator to determine the dispute. Flashbird objected to the appointment of a sole arbitrator. In December 2016, Flashbird applied to the Permanent Court of

26 ENSafrica - Jillian Griffiths and Thierry Koeinig.

Arbitration (**PCA**) under s 12 of the Act to seek the appointment of a three-person tribunal. The application was rejected by the PCA.

The arbitration then proceeded, without Flashbird's participation. Towards the end of the MARC arbitration, CSPI commenced parallel arbitral proceedings before the ICC.

On 24 October 2017, Dr El Ahdab issued his final award ordering that the consultancy agreement be terminated and Flashbird to make repayments to CSPI, as well as awarding CSPI damages and costs.

On 18 December 2017, Flashbird applied to the Supreme Court to set aside the award pursuant to s 39(2)(a)(iv) of the Act, on grounds that the arbitral procedure had not been in accordance with the agreement of the parties. The basis for Flashbird's claim was that the arbitral procedure, including the constitution of the tribunal, should have been in accordance with the rules of the International Court of Arbitration of the International Chamber of Commerce (**ICC**) rather than the rules of MARC. The Supreme Court held Flashbird's application to be devoid of merit and it was refused with costs.[27]

Flashbird then brought an appeal against the Supreme Court's decision, as of right, to the JCPC. The appeal was heard in October 2021 and the JCPC handed down its judgment on 13 December 2021.

3. Legal issues

The main issue in the appeal concerned the parties' agreement as to which arbitral rules ought to apply in the arbitration. The arbitration agreement referred all disputes for administration by MARC. However, it subsequently provided for the arbitral procedure to be in accordance with the rules of

27 *Flashbird Limited v Compagnie de Sécurité Privée et Industrielle SARL* [2018 SCJ 402] 12

'*the International Chamber of Commerce*', and by one or more arbitrators appointed in accordance with those rules.

This raised a contradiction, as Article 1.2 of the MARC rules provided that parties who nominate MARC are to be bound by the MARC rules, whilst article 1.2 of the 2012 version of the ICC rules provided that the ICC was the only organization authorised to administer arbitrations under the ICC rules.

Dr El Ahdab resolved the contradiction in holding that: (i) the first choice of MARC in the arbitration agreement should prevail; and (ii) that the reference to the "international" chamber was in error and ought to be interpreted as referring to MARC, and accordingly the MARC rules.

In the appeal, Flashbird argued the arbitrator had erred in his interpretation and that the arbitration agreement was a "hybrid" arbitration clause, under which MARC was to administer the arbitration, in accordance with the ICC Rules. Flashbird claimed that had the ICC rules been applied, three arbitrators would have been appointed to the tribunal. As the ICC rules were not applied, Flashbird claimed that the arbitration procedure had not been in accordance with the parties agreement and a setting aside of the award under s 39(2)(a)(iv) was therefore warranted.

4. Applicable arbitration legislation

The relevant provisions of arbitration legislation considered in the case was s 39(2)(a)(iv) of the Act:

39. Exclusive recourse against award
(2) An arbitral award may be set aside by the Supreme Court only where –
(a) the party making the application furnishes proof that –
(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with this Act

5. Summary of decision and principles

a. Supreme Court decision

The Supreme Court rejected Flashbird's argument. It found significant the fact that the appointment of a single arbitrator had been provided for in the arbitration agreement itself and was consequently in accordance with the expressed intent of the parties.[28]

The Supreme Court also examined the ICC rules and held that the general rule was for the appointment of a sole arbitrator,[29] but that the ICC had a discretion to appoint a number of arbitrators ranging from one to three in any given case.[30] The court stressed that there was notably no rule to the effect that three arbitrators would systematically be appointed in all cases.[31] Rather, a three member panel would only be appointed in large and complex cases necessitating three arbitrators.

The Supreme Court held that there was nothing to show that the ICC would have considered the circumstances as warranting a three-member tribunal.[32] It also found telling the fact that *Flashbird* did not adduce any evidence showing that the ICC had appointed a three member tribunal in the parallel ICC proceedings.[33] As such, Flashbird had failed to establish its case.[34]

28 Ibid 8

29 ibid 10

30 ibid 9

31 ibid

32 ibid 10

33 ibid 12

34 ibid 11

Notwithstanding this conclusion, the Supreme Court further held there to be no indication of any prejudice that could result from the appointment of a single arbitrator rather than three.[35] Accordingly, Flashbird had not suffered any substantial prejudice as a result of any alleged breach of the ICC rules to warrant the setting aside of the award.[36]

b. JCPC decision

The Board agreed with the Supreme Court's finding that the appointment of a sole arbitrator was in accordance with the parties' agreement and that following the ICC arbitral procedure would not be likely to have resulted in the appointment of three arbitrators rather than one.[37] The Board made a minor qualification to the Supreme Court's approach, which made no difference to the ultimate conclusion, being that: '*the question would be whether MARC applying ICC Rules would be likely to have proceeded to appoint a panel of three arbitrators instead of a sole arbitrator rather than, as the Supreme Court suggested, whether the ICC would have done so*.'[38]

The Board also agreed with the Supreme Court's decision that Flashbird had not shown that it suffered material prejudice sufficient to justify a setting aside of the award.[39]

As such, the Board held that it was not necessary to determine whether or not the arbitration clause was a "hybrid" clause. It observed, however, that there was force in the arbitrator's conclusion that the second paragraph of the clause should be interpreted as referring to MARC rules.[40] The Board highlighted the '*manifest complications and disadvantages*' of agreeing a

35 ibid 12

36 ibid 11

37 *Flashbird Ltd v Compagnie de Sécurité Privée et Industrielle SARL* [2021] UKPC 32 [24]

38 ibid [25]

39 ibid [29]

40 ibid [30]

"hybrid" arbitration clause since it '*creates problems in terms of certainty and increasing litigiousness*'. The Board also cited the view of Esteban[41] that it '*should be avoided in the interest of safeguarding the principle of efficiency of arbitral procedure*'.[42]

6. Analysis and comment

The decision in *Flashbird* reaffirms the pro-arbitration stance of Mauritius in upholding the decision of the arbitrator as well as that of the arbitral institution. In deciding that the alleged breach of arbitral procedure was insufficiently prejudicial, the decision also gives deference to the arbitral process and award. This is in contrast to the position of the French courts during CSPI's subsequent attempted enforcement proceedings. The Paris Court of Appeal determined that Dr El Ahdab had wrongly retained jurisdiction under the MARC rules, and that the matter ought to have been determined by the ICC. CSPI appealed against the Court of Appeal's decision, however the Cour de Cassation simply rejected the appeal without giving reasons.[43]

Flashbird also indicates the Board's view as to the desirability of "hybrid" arbitration clauses. It set out the several complications and disadvantages of "hybrid" arbitration clauses,[44] which was not strictly relevant to any argument, and notably did not examine any potential advantages that may be gleaned from such clauses. It therefore seems clear that the Board shares Esteban's view that a "hybrid" arbitration clause is '*a bad idea*'.[45]

41 Carlos Molina Esteban, 'Hybrid (institutional) arbitration clauses: party autonomy gone wild' (2020) 36 Arbitration International 475

42 Ibid 476

43 J. Peeroo, 'International Arbitration 2022: Mauritius' [2022] Chambers and Partners , <https://practiceguides.chambers.com/practice-guides/international-arbitration-2022/mauritius/trends-and-developments> accessed 17 January 2023

44 ibid [31]

45 ibid

The Board also stated that it did not seek to '*resolve the tension between party autonomy and procedural efficiency*',[46] encapsulated within the question of whether the arbitration clause was a "hybrid" clause or not. Reading between the lines, however, the decision could perhaps be interpreted as indicating the Board's view that party autonomy in choosing a "hybrid" clause ought to concede to procedural efficiency in aligning arbitral rules with the presiding institution.

7. Conclusion

In conclusion, an alleged failure to implement a "hybrid" arbitration clause in *Flashbird* did not mean that the appointment of a sole arbitrator was not in accordance with the parties' agreement and, even if it was not, insufficient prejudice had been caused to justify the award being set aside.[47]

46 *Flashbird* (n 10) [32]

47 'Supreme Court of Mauritius right to refuse set-aside of award based on alleged non-compliance with hybrid arbitration clause (Privy Council)' [2021] Thomson Reuters Practical Law Arbitration <https://uk.practicallaw.thomsonreuters.com/w-033-7665?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 16 January 2023

***Essar Steel Limited v Arcelormittal USA LLC* [2021 SCJ 248] (*Essar*)**

1. Introduction

In *Essar*, the Appellant, Essar Steel Limited (**ESL**), sought to set aside a provisional order of the Supreme Court of Mauritius which granted recognition and enforcement of an ICC award in favour of the Respondent, Arcelormittal USA LLC (**AUL**). ESL also sought to stay the enforcement of the award.

2. Background

ESL was incorporated in Mauritius and the holding company of Essar Steel Minnesota LLC (**ESML**). ESML, as a subsidiary of ESL, produced and supplied iron ore pellets.

ESML and AUL entered into a contract for the supply from ESML and purchase by AUL of iron ore pellets over a ten year period. EML was not originally a party to the contract, however was subsequently joined to it by way of an amendment. EML was joined in order to, amongst other things, make ESL and ESML jointly and severally responsible for the performance of the agreement.

The contract contained an arbitration agreement which provided for disputes to be settled under the ICC Rules and '*within six months from the execution of the Terms of Reference, from the issuance of the Terms of Reference by the Arbitral Tribunal and the parties, or, if a party refuses to execute the Terms of Reference by the ICC Court*'.

AUL terminated the agreement on 27 May 2016, citing anticipatory and repudiatory breach by ESML. In July 2016, ESML entered into bankruptcy proceedings in the USA. ESL contended that as of 1 August 2016, it no longer

had control over ESML, as ESML's affairs were thereafter managed by a chief restructuring officer.

AUL initiated ICC arbitration proceedings seated in Minnesota in August 2016. AUL brought the arbitration against ESL alone, given ESML's ongoing bankruptcy proceedings and in February 2017, the tribunal was appointed by the ICC. ESML's former CEO, Mr Vuppuluri, acted as ESL's named representative in the arbitration.

On 26 June 2017, the tribunal issued a Confidentiality Order which categorised certain documents containing sensitive pricing and supplier information as "Highly Confidential" and only able to be disclosed to experts, consultants, authors or prior recipients. Certain information was also classified as "Confidential", but which could be shared openly with anyone working at ESL. The Confidentiality Order contained a mechanism which allowed ESL to seek a declaration from the tribunal authorising its lawyer to discuss any "Highly Confidential" material with anyone at ESL (**Declaration Mechanism**). During discovery, AUL submitted 23,000 pages of "Confidential" documents in disclosure material to ESL.

In April and May 2017, the tribunal offered to assist ESL in any manner it could to obtain documents, however ESL failed to enlist the help of the tribunal.

The Terms of Reference were only approved on 28 June 2017, as ESL had refused to execute the document. ESL objected to the stipulation in the Terms of Reference of a six month timeframe for completion of evidentiary hearings.

On 9 August 2017, ESL informed the tribunal that it would not, in the circumstances, be in a position to participate in the arbitration or assist the tribunal any further.

The proceedings proceeded to evidentiary hearings, which were held without ESL's participation on 10-11 October 2017. The tribunal ensured that ESL's rights to a fair hearing were not compromised as it continued to ask ESL to participate in the evidentiary hearings and it provided ESL with transcripts.

On 19 December 2017, the tribunal gave its award and found in favour of AUL, holding that ESL had wrongfully repudiated the agreement and ordered it to pay over USD $1.5 billion in damages, costs and interest.

On 22 February 2018, the Supreme Court of Mauritius granted AUL a provisional order recognising and enforcing the ICC award.

ESL subsequently applied to set aside the provisional order and sought a stay of the enforcement of the award. The basis for ESL's application was that:

a. it had been unfairly treated in the arbitration, such that it had been unable to prepare its defence and present its case. This constituted a breach of Article V(1)(b) of the Convention for the Recognition and the Enforcement of Foreign Arbitral Awards (**Convention**); and

b. the enforcement and recognition of an arbitral award made in non-conformity with Article V(1)(b) of the Convention would be contrary to the public policy of Mauritius, and as such a breach of Article V(2)(b) of the Convention.

3. Legal issues

The main issue for determination by the Supreme Court of Mauritius was whether there had been a breach of due process under Articles V(1)(b) and/or V(2)(b) of the Convention, which would require recognition and enforcement of the ICC award in Mauritius to be refused.

ESL alleged that the tribunal's adherence to the six month '*compressed timetable*' rendered it unable to defend the claims or participate in the arbitration, as:

a. the claim was complex;
b. it faced significant practical difficulties in not having access to ESML's documents or employees holding most of the relevant information; and
c. the Confidentiality Order additionally made it impossible for ESL to access documents within the six-month timeframe.

4. Applicable arbitration legislation

The relevant provisions of arbitration legislation considered in the case were Articles V(1)(b) and V(2)(b) of the Convention:

Article V

I. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

5. Summary of decision and principles

a. Article V(1)(b) claim

The Supreme Court first considered the question of the level of denial of procedural fairness required by Article V(1)(b). It highlighted that Article V1(b) concerned only serious procedural defects which have a material effect on the proceedings.[48] The relevant question for the case at hand was, '*not whether a party used (either well or at all) its opportunity to present its position, but rather whether it was afforded a reasonable opportunity to do so*.' The Supreme Court observed that Article V(1)(b) may only be invoked where a reasonable opportunity to present one's case is unfairly denied by the tribunal[49] and that it is incumbent on the parties to participate actively in the proceedings.[50]

The Supreme Court rejected ESL's claim that it had been unable to present its case on account of fundamental defects in the arbitral procedure.[51] It found unconvincing ESL's argument that the complexity of the dispute meant that a six month timeframe was inappropriate, stating that ESL '*must have been aware of the complexity of the contract since the start of negotiations being given the nature of its own activities and of the contract*.'[52]

ESL's contention that it was unable to access ESML documents within a compressed timetable also found no favour with the Supreme Court. Significant was ESL's concession that it '*never even took the trouble to*

48 *Essar* [69] citing [Restatement (Third) U.S. Law of International Commercial Arbitration §4-13, comment e (Tentative Draft No. 2 2012)]

49 *Essar* [66]

50 ibid [68]

51 ibid [81]

52 ibid [86]

access the 23,000 pages of documents disclosed'[53] by AUL and that it could have applied for arbitral subpoenas.[54] The Supreme Court also highlighted ESL's failure to utilise the assistance of the tribunal in accessing ESML documents.

Finally, the Supreme Court refused ESL's argument that the Confidentiality Agreement prevented it from accessing documents needed to prepare and present its case. It found telling the fact that ESL did not avail itself of the Declaration Mechanism, nor identify any particular person with whom it wished to share any document under the Confidentiality Order.[55] Also significant was that all of the 23,000 documents disclosed by AUL were not classified as "Highly Confidential", and so were able to be shared openly within ESL.[56]

The Supreme Court found it '*abundantly clear*' that ESL was given '*more than a reasonable opportunity to appear and be heard and to present its defence*', yet unreasonably failed to avail itself of that opportunity.[57] It was therefore of the view that '*ESL in effect had only itself to blame for not participating in the arbitral proceedings.*'[58] The Supreme Court therefore held that neither ESL's conduct nor any other factor established a material breach of due process as contemplated by Article V(1)(b) of the Convention.[59]

53 ibid [92]

54 ibid [85]

55 ibid [89]

56 ibid [90]

57 ibid [93]

58 ibid [92]

59 ibid [94]

b. Article V(2)(b) claim

Having failed to establish a material breach of due process by the arbitral tribunal, being ESL's only argument in support of its objection on the ground of public policy, the Supreme Court also declined ESL's Article V(2)(b) claim.[60]

The Supreme Court pressed that only a '*very limited notion of public policy should apply to recognition of foreign awards*' as compared to domestic awards.[61] Enforcement of an award would only be denied where there was a flagrant or specific breach of public policy which would violate Mauritius' '*most basic notions of morality and justice*'.[62] ESL had not shown such a breach in the way the arbitral proceedings were conducted.63 It therefore failed to meet the threshold required under Article V(2)(b) of the Convention to refuse recognition and enforcement of the award.[64]

6. Analysis and comment

The Supreme Court in *Essar* upheld Mauritius' pro-arbitration stance. It rigorously tested the claim that there had been a failure of the tribunal to afford procedural fairness and applied a narrow interpretation to Article V(1)(b) '*in light of the Convention's general pro-enforcement objectives*'.[65]

Moreover, the decision reaffirmed Mauritius' position that the enforcement of an arbitral award will only be denied if the enforcement would violate the '*most basic notions of morality and justice*' of Mauritius.

60 ibid [96]

61 ibid [71]

62 ibid [96]

63 ibid

64 ibid [97]

65 ibid [61]

7. Conclusion

A party who consciously chooses not to play an active part in an arbitration will be unable to claim that there had been a material breach of due process in the proceedings and prevent the recognition and enforcement of an arbitral award on the basis of Article V(1)(b) of the Convention. Nor will this constitute a breach of public policy under Article V(2)(b) of the Convention.

NIGERIA[66]

Sakamori Construction (Nig) Ltd v Lagos State Water Corporation (2021) LPELR-56606(SC)

1. Introduction

1.1 This appeal provides the position of the law on application for stay of proceedings pending arbitration and when a Court or Tribunal ought to give effect to an arbitration agreement.

2. Background and Summary of the Facts of the Case

2.1 The appeal is against the judgment of the Court of Appeal Lagos Judicial Division, in appeal **No. CA/L/489/2010.** The Appellant instituted the Suit **LD/1146/2009** claiming in the main, the sum of ₦462,068,741.92 as outstanding payment arising from the contract for supply and laying of secondary and tertiary networks system. The trial Court entered judgment for the Appellant and awarded the sum claimed and 10% post judgment interest. The trial Court held that the affidavit evidence and exhibits annexed by the Appellant were not challenged and thus, deemed admitted. The Respondent filed an appeal at the Court of Appeal, where the Appellate Court set aside the judgment of the trial Court and held that the trial High Court of Lagos State lacked jurisdiction to try the case and thereby set aside the judgment of the trial Court and referred the parties to arbitration in line with the terms of the contract between them.

3. Legal Issues for Determination

66 Stren & Blan Partners - Amala Umeike, Kayode Akindele, Ibitola Akanbi and Stanley Umezuruike.

3.1 The first issues for determination considered by the Supreme Court was whether the Court of Appeal was right in granting an order referring the parties to arbitration.

3.2 The second issue considered was whether the Court of Appeal was right when it held that the trial Court did not have jurisdiction to hear and determine the Appellant's case.

3.3 The third issue considered was whether the Respondent ought to have filed a defense and/or counter affidavit to the Appellant's processes at the trial Court.

4 Provision of the Arbitration Laws on Legal Issues:

Section 5 of the Arbitration and Conciliation Act[67] .

5 Summary of Court's Decision and Principles

5.1 On the first issue, the Supreme Court held that the dispute which parties to an arbitration agreement consent to refer to an arbitration must consist of justifiable issues triable civilly, and a Court or tribunal should only give effect to an arbitration clause where the dispute is within the scope of the arbitration clause in question. The Supreme Court agreed with the Appellant that the arbitration clause stipulated for "Engineer" to be the appointed the arbiter of disputes arising from the contract between the parties which is indicative of the fact that the dispute envisaged to come under the arbitration clause is more of a technical dispute in relation to the nature and scope of work to be done as against a liquidated money demand as in the instant case. The Court held that the instant dispute arose from an admitted debt and it thus does not fall within the purview of the technical disputes envisaged under the arbitration agreement entered into

67 CAP A18 LFN 2004.

by the parties, especially as the debt was acknowledged and admitted by the Respondent.

5.2 Relying on the decisions in *Development Board vs. Fanz Construction Co. Ltd*[68], *Nigeria vs. AQS*[69]; *Fasz International Ltd vs. HND Trustees Ltd*[70], the Supreme Court held that the hallmarks of the decisions in all the authorities is to the veritable effect that the Courts of law and Tribunals should only give effect to an arbitration clause where the dispute is unequivocally within the ambit and contemplation of the clause in question. The Apex Court thereby allowed the appeal and held that the Court below was wrong to have referred parties to arbitration.

5.3 On issue two, the Supreme Court found that the Preliminary objection of the Respondent challenging the jurisdiction of the of the trial Court to determine the matter given the presence of the arbitration agreement between the Parties was not filed prior to the delivery of the judgment of the trial Court. On failure to give effect to the arbitration clause, the apex Court held that the Appellant's claim before the Court was essentially a liquidated money demand for a debt which the Respondent has acknowledged and admitted, not on any document containing the arbitration agreement. As such, the trial Court was right to not rely on the arbitration agreement to hold that it lacked jurisdiction to determine the matter.

5.4 On the last issue, the Supreme Court held that the presence of an arbitration agreement entered by parties to submit disputes to arbitration does not automatically oust the jurisdiction of the Court. Thus, where there is no application for stay of proceedings before the Court or the Court has heard and refused such application, the Court would proceed and entertain the

68 (1990) 4 NWLR (Pt. 142)1 @ 32-33 paragraphs H-B

69 (2008) ALL FWLR (PT. 406) 1872

70 (2010) ALL FWLR (PT. 547) 669.

claim. The Supreme Court therefore found that the failure of the Respondent to file any processes in its defense and in response to the originating process and application for summary judgment filed by the Appellant prior to the delivery of ruling on the application, was an attempt to frustrate the proceedings of the trial Court. The Supreme Court finally noted that the provisions of *Order 22 Rule 2(1) of the High Court of Lagos State (Civil Procedure) Rules 2004* [71] were not in contradiction of the provision of *section 5 of the Arbitration and Conciliation Act* which makes provision for stay of proceedings of a matter which is a subject of an arbitration agreement between parties. Thus, the Respondent could have filed its defense at the trial Court and raise the existence of an arbitration agreement in the defense at the trial Court.

6 Analysis/Comments on the Decision of the Court

6.1 The decision of the Supreme Court re-established the position of the law that the mere presence of an arbitration clause does not automatically oust the jurisdiction of a Court of law. The agreement between the parties only goes to arbitration if a certain type of dispute envisaged in the arbitration agreement comes up. In the case at hand, the disagreement that arose was with regard to liquidated money demand which was not envisaged or captured by the agreement and so cannot be subject to arbitration. The Court had no reason to look outside the Appellant's Statement of Claim in determining jurisdiction.

6.2 The decision on the steps to be taken by the Respondent seeking a stay of proceedings deviates from the earlier position as established in *Obembe v. Wemabod Estate Ltd*[72], in that case, the apex Court held that in order to get a stay, party must not take any step in the proceedings. The Court further stated that the filing of applications and defence in the proceedings

71 The provision is *in pari material* with Order 24 Rule 2(1) of the High Court of Lagos State (Civil Procedure) Rules 2019

72 (1977) LPELR-2161 (SC)

amount to taking step in the proceedings. Now, their Lordships have clarified and established the principle that parties who seek stay of proceedings pending reference to arbitration can file their defense and plead the existence of an arbitration agreement and by so doing, have not forfeited their right to stay of proceedings.

7 Conclusion

7.1 In sum, the Court has provided guidance to Nigerian Courts on approaching the principle of stay of proceedings pending Arbitration under the relevant sections of the Arbitration and Conciliation Act and the Rules of Court that the fact that a party seeking stay of proceedings have filed his defense to plead the existence of an arbitration agreement does not preclude him from being entitled to the grant of an order of stay of proceedings pending arbitration. The Supreme Court has also re-affirmed the position of the law that the disputes which parties to an arbitration agreement consent to refer to an arbitration must consist of justifiable issues triable civilly, and a Court or Tribunal should only give effect to an arbitration clause where the dispute before the Court is within the scope of the arbitration agreement relied upon.

AEPB v Mahaj (Nig) Ltd 8 (2021) LPELR-55590(CA)

1. Introduction

1.1 This appeal borders on the power of the Court to decide on the merit of an arbitral award as if it were a regular appeal over a Court's judgment. The Court of Appeal re-affirmed the position of the Nigerian Law that a Court has no jurisdiction to sit as an appellate Court over an arbitral award and the power of a Court to set aside an arbitral award restrictive and cannot be exercised outside the provisions of the Arbitration and Conciliation Act[73] (the Act).

2. Background and Summary of the Facts of the Case:

2.1 This appeal is against the decision of the High Court of the Federal Capital Territory. The Appellant prayed the trial Court for an order to set aside the Final Arbitral Award rendered on the 2nd November 2019. By the final award, the Respondent/Cross-Appellant, was awarded the sum of ₦475,845,089 (Four Hundred and Seventy-Five Million, Eight Hundred and Forty-Five Thousand, Eighty-Nine Naira).

2.2 The facts leading to this appeal and cross-appeal, briefly stated, are that parties before the Court of Appeal entered into a solid waste collection and disposal agreement dated the 1st August, 2009. The agreement contained an arbitration clause in the event of a dispute arose from the cleaning contract. A dispute eventually arose, and parties referred same to arbitration.

2.3 The final award was awarded the sum of ₦475,845,089 (Four Hundred and Seventy-Five Million, Eight Hundred and Forty-Five Thousand, Eighty-Nine

73 CAP. A18 LFN 2004.

Naira) in favour of the Cross-Appellant. General damages in the sum of ₦10,000,000.00 (Ten Million Naira) was also awarded in favour of the Cross-Appellant as well as cost in the sum of ₦15,000,000.00 (Fifteen Million Naira) representing 100% of the recoverable cost pursuant to Article 40 of the First Schedule to the Arbitration and Conciliation Act. Interest at the rate of 8% per annum was also ordered to be paid in respect of the monetary awards made by the Arbitration Tribunal.

2.4 Upon the application of the Appellant, the trial Judge upheld the Final Awards in part and set aside the other parts of the award in relation to recoverable costs, interest and general damages ordered by the Arbitral Panel in favour of the Cross-Appellant.

2.5 Aggrieved by the judgment, the Appellant appealed to the Court of Appeal. Also aggrieved by the judgment of the High Court setting aside the recoverable costs, interests and general damages awarded at arbitration on the ground that it amounts to double compensation, the Respondent Cross-Appealed.

3. Legal Issues for Determination:

Whether a Court can sit on appeal over the decision of the Arbitration Tribunal

4. Provision of the Arbitration Laws on Legal Issues:

Sections 29, 30, 34[74], 48 and 52 of the Act.

5. Summary of Court's Decision and Principles:

74 It provides as follows: "a Court shall not intervene in any matter governed by this Act, except where so provided in this Act".

5.1 The decision of the Court of Appeal was that the Court in setting aside an arbitral award has a restricted role under the Act as a Court does not have the power to delve into matters pertaining to arbitration awards as if it is an appellate court, it can only exercise the powers prescribed under the Act. The setting aside of an arbitral award by the trial Court must be predicated on the enabling provisions of the Act.

5.2 Relying on the decision in *NITEL Ltd V, Okeke*[75], the Court held that the Court does not sit on appeal over an arbitral Award. The Court further noted that even when the Court finds merit in an application to set aside an award, its jurisdiction is limited to setting aside the award and remitting it to the Arbitrator for reconsideration.

5.3 The Court also relied on the decision in *MTN (Nig.) Ltd V. Hanson*[76] in re-affirming the principle that the role of the High Court with regards to an application to set aside an Arbitral Award is not Appellate as the Court cannot go into the merit of the case. Whenever a Court sits to consider an application to set aside an arbitral award, it is not sitting as an appellate Court over the arbitral award of the Arbitrator. This is because the Court is not empowered to determine whether or not the findings of the Arbitrator and his conclusions were wrong in law.

5.4 The Court stated that in seeking to set aside an arbitral award, the Applicant needs to prove facts on any provision under sections 29, 30, 48 and 52 of the Act.

a. **Section 29(2)** of the Act which provides thus:

"…the Court may set aside an arbitral award if the party making the application furnishes proof that the award contains decision on matters

75 (2017) 9 NWLR (Part 1571) Page 439 at 474 paras A-B

76 (2017) 18 NWLR (Part 1598) page 394

which are beyond the scope of the submission to arbitration, can be separated from those not submitted, only the part of the award which contains decisions on matters not submitted may be set aside…"

b. **Section 30** provides:

a. Whether an Arbitrator has misconducted himself, or where the Arbitral proceedings or award, has been improperly procured, the Court may, on application of a party, set aside the award.

b. An arbitrator who has misconducted himself may on the application of any party be removed by the Court.

5.5 The Court therefore found that the trial judge erred when he declined to uphold the decision of the Arbitrator by finding that the award was "not sought by the cross-Appellant, hence, it amounted to double compensation". The Court of Appeal found that these pronouncements are decisions on the merit of the award which the trial Court is not empowered to hold. The trial Judge wrongly acted in appellate capacity in setting aside the award.

5.6 The Court held that the lower court was not empowered to determine whether or not the findings of the arbitrator and their conclusion were wrong in law. What the Court ought to do was to look at the award and determine whether on the state of the law as understood by them and as stated on the face of the award, the arbitrators complied with the law as they themselves rightly or wrongly understood it. The approach is for the Court to place itself in the position of the Arbitrators, not above them and then determine on that hypothesis, whether the Arbitrators followed the law as they understood and express it.

5.7 Finally, the Court relying on the Revenue Mobilisation's case[77], re-affirmed the principle that facts found by an arbitrator cannot warrant a setting

77 Revenue Mobilisation, Allocation and Fiscal Commission v. Onwuekweikpe (2008) LPELR-8398 (CA)

aside order even though there is no evidence upon which this decision can be found.

6. Analysis/Comments on the Decision of the Court

6.1 The decision of the Court of Appeal follows the position of the law that a trial Court cannot sit on appeal over an arbitral award. The restricted powers vested on the Court sitting on an application to set aside an arbitral award is as provided in the enumerated provisions of the Act, any attempt by a Court to inquire into the facts founded by an arbitrator is to put itself in appellate capacity over the arbitrator. The subjective approach to be taken by a Court in determining whether to set aside or uphold an arbitral award is for the Court to place itself in the position of the Arbitrators, not above them and then determine on that hypothesis, whether the Arbitrators followed the provisions of the law as they understood and expressed it in the final award.

6.2 Based on the foregoing, the following points must be noted importantly:

a. The Court is not empowered to determine whether or not the findings of the Arbitrator and his conclusions were wrong in law.

b. The Court does not have the power to delve into matters pertaining to arbitration awards as if it is an appellate Court.

c. The Court ought to place itself in the position of the Arbitrators, not above them and then determine on that hypothesis, whether the Arbitrators followed the provisions of the law as they understood and expressed it in the final award.

7. Conclusion

7.1 On the whole, the Court of Appeal in this decision has further clarified the role of Courts and provided guidance to Courts sitting on applications by parties to set aside an arbitral award to restrict the exercise of the power to set aside to the extent granted under the relevant sections of the Act and not to probe into the correctness of the findings of the arbitrator.

Abuja Investment Co. Ltd & Ors v Sanderton Ventures Ltd & Anor (2022) LPELR 57568 (CA)

1. Introduction

1.1. The appeal entrenched the position of the law on the jurisdiction of an arbitral tribunal and when arbitral proceedings shall be deemed to be terminated.

2. Background and Summary of the Facts of The Case

2.1. The appeal is against the Ruling of the Federal High Court, Abuja, delivered in Suit **No. FHC/ABJ/CS/475/14**. The 1st Respondent case was that the Federal Government of Nigeria, through the 2nd Appellant, gave approval for the award of a contract to the 1st Respondent for the construction of 832 housing units at Kubwa district in the FCT. Consequently, the 1st Appellant (agent of the 2nd and 3rd Appellants) awarded the contract to the 1st Respondent and a building contract agreement dated the 13th of October 2000 was executed between themselves.

2.2. The 1st Respondent immediately commenced work. However, the execution of the contract was stalled midway due to a variation of the contract sum because of introduction by the 1st Appellant, of a new wall component known as the RBS panels for the construction of the wall component of the buildings. The execution of the contract was also frustrated by some other acts of the 1st Appellant such as engaging sub-contractors without the consent of the 1st Respondent.

2.3. Owing to the disagreement arising therefrom, the Minister of the FCT constituted a committee in 2003. The committee recommended among others that the 1st Appellant pays a certain amount to the 1st Respondent for the construction of the 4 model blocks. Irrespective of the 1st Respondents demand, the recommendations of the panel was not

implemented by the 2nd and 3rd Appellants, instead, the 1st Appellant executed a loan and legal mortgage agreement with a Bank (which later became union bank of Nigeria) wherein the construction site was mortgaged with the consequence that in the event of the 1st Appellant defaulting, right of foreclosure would be exercised by the Bank on the construction site.

2.4. Subsequently, notice of determination of the contract was submitted by both parties and in obedience to the terms of the contract agreement, the 1st Respondent commenced arbitration proceedings against the 1st Appellant, but the arbitration did not see the light of the day as the 1st Appellant frustrated the arbitration. Hence, the institution of the action before the trial Court.

2.5. Upon being served with the Writ, the Appellants filed a Motion on Notice to strike out the matter for lack of jurisdiction and dismissing the Suit for being an abuse of Court process and or being statue barred. After taking arguments on the issues raised the trial Court delivered its ruling in favour of the Respondent.

2.6. The trial Court gave an order staying further proceedings in the Suit and directed that parties should commence arbitration proceedings immediately as earlier directed by a different Federal High Court in 2011 and that once the process of arbitration is completed and decision is given, the present Suit should abate. Aggrieved by the decision of the trial Court, the Appellants appealed to the Court of Appeal.

3. Legal Issues for Determination

3.1. The first issue considered was whether the lower Court was right in refusing to dismiss the 1st Respondent's instant Suit No. **FHC/ABJ/CS/475/2014** for being an abuse of Court process regard being had of the decision of the lower Court in Suit No. **FHC /ABJ/CS/651/2011** earlier filed by the 1st

Respondent against the Appellants and the pendency of Suit No. **FCT/HC/CV/265/05** before the High Court of the Federal Capital Territory, Abuja as well as the two arbitrations in respect of the subject matter of the Suit.

3.2. The second issue considered was whether in the circumstances of this Suit, the lower Court had the jurisdiction or was right to make orders directing the parties, particularly the 1st Respondent and 1st Appellant, to arbitration and for stay of proceedings pending the arbitration.

3.3. The third issue considered was whether it was right for the lower Court to have assumed jurisdiction and determine the said issue of statute bar.

4. Provision of the Arbitration Laws on the Legal Issues:

Sections 12, 34 & 27 of Arbitration and conciliation[78]

5. Summary of Court's Decision and Principles

5.1. The Court of Appeal resolved all the issues in the favour of the Appellants to the effect that the Suit before the lower Court constituted an abuse of the Court process, thus depriving the lower Court jurisdiction to entertain the Suit. Since the lower Court has no jurisdiction in the first place, it is not in the position to make any orders such as referring parties to commence an arbitration. What was expected of the lower Court upon finding that it lacks jurisdiction, is to make an order for the dismissal of the Suit and no more.

5.2. Also, on the resolution of whether the Suit is statute barred or not the Court held that it can only be resolved by the arbitration panel by virtue of Section 12 of the Arbitration and Conciliation Act. The Court held that however tempting the arguments on the issue are, it is not for the Court to step in and

78 Arbitration and conciliation Act Cap A18, Laws of the Federation of Nigeria 2004

to pronounce on same. In the same vein, the lower Court being devoid of jurisdiction, similarly affected the jurisdiction of the Court of Appeal. The Court held that it is trite as contended that a Court that has no jurisdiction, can only open its mouth to say it has no jurisdiction. It cannot make any other order not even that of transfer. On when arbitral proceedings shall terminate. The Court of Appeal held that pursuant to the provisions of Section 27 of the Arbitration and Conciliation Act, an arbitral proceeding can be said to have been terminated when the conditions stated in section 27 are established. The conditions provided are as follow:

a) The arbitral proceedings shall terminate when the final award is made or when an order of the arbitral is issued under subsection (2) of this section.
b) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

- the claimant withdraws his claim, unless the Respondent objects thereto and arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute; or
- the parties agree on the termination of the arbitral proceedings; or
- the arbitral tribunal finds that continuation of the arbitral proceeding has for any reason become unnecessary or Impossible.

6. Analysis/Comments on the Decision of the Court

6.1. It is a settled law that the presence of an arbitration clause in a contract does not oust or obviate the jurisdiction of the Court and either the power of the Court to stay proceedings on the Suit pending the conclusion of arbitration or proceed to immediately assume jurisdiction over the Suit where there is no dispute between the parties.

6.2. However, the Court of Appeal did not give recourse to the above in its decision as it was not in issue. It was evident, as found by the Court of Appeal, that the 1st Respondent abused the Court processes having

instituted the same subject matter in the High Court of Abuja, Federal Capital territory while two arbitration proceedings were pending, which Court made the decision appealed against.

6.3. The Court has thus laid down the principle that when the Court finds that its process is being abused or has been abused, it should not hesitate in dismissing the process. Further, where the Court finds that it lacks jurisdiction to entertain a matter, it can only pronounce that it has no jurisdiction, but the Court does not have the power to take further steps or make any other order not even that of transfer or directing parties to commence an arbitration process.

7. Conclusion

7.1. In conclusion, although the Court of Appeal was more concerned that the Suit before the lower Court constituted an abuse of Court processes however, it is still evident that the decision of the lower Court was in accordance with arbitration principle and law particularly re-affirming the powers of an arbitral tribunal with respect to its jurisdiction and when an arbitral proceeding would be deemed to have terminated.

Global Formwork (Nig) Ltd v Musa & Ors (2022) LPELR-57776(CA)

1. Introduction

The appeal provides the position of the law on terms of contract as it relates to an arbitration clause where parties to an agreement make provision for arbitration, before an action can be instituted in Court, an aggrieved party must first seek the available remedy in the Arbitration.

2. Background and Summary of the Facts of the Case

2.1. This appeal is against the ruling of the High Court of the Federal Capital Territory, Kubwa, delivered by Hon. Justice Bello Kawu. The brief facts as garnered is that the Appellant, a private developing Company advertised houses for sale being part of a large Housing scheme under a Deed Agreement between the 2nd and 3rd Respondents and the Appellant. The 2nd and 3rd Respondents are the official authority to provide infrastructures for the scheme and give necessary approvals for the progress of the scheme. The 1st Respondent being interested paid for one of the houses being advertised by the Appellant but eventually changed from the Type 2A House to Type 3A single storey detached house with boys' quarters. In consequence, she moved from the agreement of 29/3/2010 to another agreement on 24/8/2011 in respect of the single storey detached house, had to pay more and eventually in total paid the sum of ₦43,340,000.

2.2. Further to the 1st Respondent's claim that the Appellant did not deliver the house, nor did he return her money. She therefore proceeded to the Court after several efforts to have her money back. Whilst the matter had commenced, the 1st Respondent sought stay of the proceedings for parties to resort to Arbitration in accordance with the agreement of the parties to resolve all disputes arising therefrom by reference to Arbitration in accordance with the party's agreement dated 29/3/2010 however, the

other agreement dated 24/8/2011 had no arbitration clause. The Court refused the application. Being dissatisfied with the ruling, the Applicant appealed.

3. Legal Issues for Determination

3.1. The sole issue for determination was whether the Claimant can safely maintain an action in respect of two separate and distinct contract transactions subjoined in one Suit without first exhausting the option for recourse to arbitration contained in one of the agreements and whether the trial Court ought to stay proceedings pending recourse to arbitration in respect of the agreement containing arbitration clause.

4. Provision of Arbitration Laws on the Legal Issues

Sections 5 and 1 of the Arbitration and conciliation Act[79]

5. Summary of Court Decision & Principles

5.1 On the sole issue the Court held that it is a settled law that parties are bound by their terms of contract thus, the Court cannot re-write for the parties their terms of contract and since parties entered into a contract and the extant agreement does not contain recourse to arbitration the Court cannot, therefore, import into the contract any extraneous term not contemplated by the parties and that having also looked through the length and breadth of the Offer Letter which was the last subsisting agreement between the parties up until the action instituted by the 1st Respondent no mention or reference was made to arbitration. In the result, the appeal was not allowed and thus dismissed.

79 Cap A18, Laws of the Federation of Nigeria 2004

5.2 Whether where parties to an agreement make provision for arbitration before an action can be instituted in Court, an aggrieved party must first seek the available remedy in the Arbitration: The Court held that the law is that where an agreement contains arbitration clause, that parties should first refer any issue arising between them to arbitration, no party will be allowed or permitted to breach such.

6. Analysis/Comments on the Decision of the Court

6.1 The decision of the Court of appeal in this case is very apt because the appellant cannot rely on a former agreement that contains an arbitration clause since that agreement has been varied with another one that does not give recourse to arbitration, it would be a misapplication of the above provisions of arbitration law to stay proceedings and refer the matter to an arbitral tribunal.

6.2 Doing so would amount to the Court importing into the new agreement extraneous term not contemplated by the parties although this is not to say parties cannot refer dispute to arbitration without an arbitration clause or agreement, provided that parties conclude a submission agreement once a dispute has arisen.

6.3 Therefore, since this was not contemplated in the facts of the case the Appellant cannot expect the Court to refer the matter to an arbitration and stay proceedings because those agreements arose from a separate and distinct contractual transaction.

7. Conclusion

7.1 In conclusion, if parties intend to enter into an arbitration agreement, it better for such an agreement to be carefully written and both parties must have mutually agreed and consented to the agreement as an arbitration agreement will be construed strictly and the Court will not infer into such agreements terms not expressly agreed upon by parties.

Hartal (Nig.) Ltd v Midmac Construction (Nig.) Ltd (2022) LPELR-58380(CA)

1. Introduction

1.1 This case is between *Hartal (Nig.) Ltd V. Midmac Construction (Nig.) Ltd*[80] delivered on Thursday the 14th day of July 2022 in the Abuja judicial division of the Court of Appeal.

2. Background and Summary of the Facts of the Case

2.1. This was an appeal against the decision of the High Court of the FCT. The Respondent instituted an action against the Appellant at trial by an Originating Motion. The Motion sought an Order of Court appointing an arbitrator for the Appellant, in line with the parties' agreement.

2.2. The Appellant filed a Counter Affidavit in opposition. The Court delivered judgment in favour of the Respondent, appointing the 2nd arbitrator. Dissatisfied with this decision the Appellant appealed to the Court of Appeal. Noteworthy is that the Respondent filed a Preliminary Objection, pursuant to Section 7 (4) of the Arbitration and Conciliation Act Act[81] challenging the competence of the appeal.

3. Legal Issues for Determination

3.1. The sole issue for determination by the Court of Appeal is whether, considering the unambiguous provisions of Section 7 (4) of the Act, the Court has the jurisdiction to hear and determine the appeal.

4. Provision of the Arbitration Laws on the Legal Issues

80 (2022) LPELR-58380(CA)

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Section 7 (4) of the Act on appointment of arbitrator by the Court, for a party that fails to appoint an arbitrator.

5. Summary Of Court's Decision and Principles

5.1. The Court struck out the appeal for want of jurisdiction in favour of the Respondent. The Court further held that Section 7(4) of the Act which is on the appointment of an arbitrator by a Court is not inconsistent with Section 36(2) of the Constitution,[82] because when the Court appoints an arbitrator for a party the Court does not go into the merit of the case.

5.2. Also, that section 36(2) of the constitution which deals with fair hearing is not in issue as in the instance where the party as in this case has failed to help itself by appointing an arbitrator within 30 days as required pursuant to section 7 the Act.

5.3. The Court must do so, and the party is at liberty to challenge the decision of the Court appointed arbitrator should the need arise while carrying out his duties, but not the appointment made by the Court. Thus, the rationale behind section 7(4) the Act is to ensure that parties who willing submit themselves to arbitration do not resile from such an understanding by frustrating the agreement they entered. Once a party decides to submit itself to arbitration, they accept the process, warts and all.

6. Analysis/Comments on the Decision of the Court

6.1. Appointment of an arbitrator can either be by the Court, an Arbitration Institution, a Multi-Door Courthouse or by the parties subject to the provision on mode of appointing an arbitrator. Thus, when it is the duty of a party to appoint an arbitrator, such duty cannot be waived and when there is nonperformance of this duty, the other party may ask the Court to make

82 The Constitution of the Federal Republic of Nigeria, 1999. (As Amended).

such appointment. This is the crux of this case and the import of section 7(1) of the Act.

6.2. The Appellant failed to appoint an arbitrator pursuant to the agreement, the act of the Appellant hampered the proper constitution of the arbitral tribunal, hence the High Court in accordance with section 7 made the appointment upon the application of the Respondent. The decision was appealed and the Court of appeal in as a Court of equity did not aid the indolent, but rather confirmed the appointment and dismissed the appeal.

The decision is proper owing to the equitable maxim that equity aids the vigilant and not the indolent. So, in the instant case, the indolent appellant's appeal was rightly dismissed for lack of jurisdiction and for non-compliance with the law.

7. Conclusion

7.1. In conclusion, appointment of an arbitrator by a party is an important duty as can be seen from the facts of this case, thus failure to make such appointment will lead to an appointment by the Court. Where parties have agreed that one party shall make appointment of arbitrators upon disputes arising out of a contract and the appointing party fails to discharge this duty, the other party is at liberty to bring an application for Court appointed arbitrators.

TANZANIA[83]

In recent years, the field of arbitration proceedings in the United Republic of Tanzania has undergone a number of noteworthy developments. In 2020, the new Arbitration Act [CAP 15 RE 2020] was instituted, replacing the previous Arbitration Act of 1931. This new legislation establishes a more comprehensive mechanism for the regulation of arbitral proceedings and accreditation of arbitrators. Additionally, it creates the Tanzania Arbitration Centre, a government-funded organization through which both domestic and international disputes can be addressed. This is expected to foster increased investor confidence in the resolution of disputes and provide a readily accessible alternative dispute resolution mechanism, thereby reducing the backlog of cases in the national courts. Given the ongoing rise in the utilization of arbitration in commercial disputes, we would like to highlight some recent developments regarding the approach of the Tanzanian courts towards arbitration.

Arbitration cannot be bypassed through liquidation proceedings.

In the case *of North Mara Gold Mine Limited v Diamond Motors Limited, Civil Appeal No. 29 of 2017*, Court of Appeal of Tanzania, at Dar es Salaam (Unreported), the Court of Appeal determined that the High Court had committed an error in dismissing a petition to stay winding-up proceedings which aimed at facilitating the resolution of the underlying dispute through arbitration.

The Appellant, North Mara Gold Mine Limited (**North Mara**), entered into a Surface Drilling Agreement and a Pre-Split Agreement with the Respondent, Diamond Motors Limited (**Diamond Motors**), for the supply of drilling services. Both agreements entered by the parties provided for a dispute resolution clause.

83 Bowmans Law (Dar es Salaam) - Evarist Kameja, Mohammedzameen Nazarali.

The dispute between the parties arose over an alleged non-payment for services rendered by Diamond Motors, to North Mara, as well as an uncertainty as to the amount due for payment to Diamond Motors. Pursuant to the terms of the agreement, North Mara issued a notice of dispute to Diamond Motors, to have the dispute between the parties resolved through arbitration.

As the notice to initiate the arbitration process was pending, Diamond Motors approached the High Court of Tanzania (Commercial Division), seeking to wind up North Mara, for its inability to pay its debts as the fall due.

Upon being served with the petition for winding up, North Mara filed a petition to stay winding up proceedings pending reference to arbitration. Accordingly, Diamond Motors filed a preliminary objection on the grounds that the arbitrator had no jurisdiction to determine the dispute between the parties, after a winding up petition had been filed. The basis of the above position is that the High Court of Tanzania is vested with exclusive jurisdiction in determining winding up petitions.

The trial judge upheld the preliminary objection, thus dismissing the petition for stay of winding up proceedings and ordered for the winding up proceedings to proceed. Aggrieved with the decision, North Mara appealed to the Court of Appeal

In its judgment, the Court of Appeal concluded that the request to have the dispute resolved through arbitration prior to proceeding with the winding-up petition, did not divest the High Court of its jurisdiction as the sole authority to determine winding-up proceedings. As a result, the High Court was deemed to have erred in declining to grant the request.

This decision is consistent with the ruling in the matter of *Queensway Tanzania (EPZ) Limited v Tanzania Tooku Garments Co. Ltd*, *Misc.*

Commercial Cause No. 43 of 2020, High Court of the United Republic of Tanzania (Commercial Division), at Dar es Salaam (Unreported). In that case, the court struck out a petition to wind up the respondent in order to facilitate resolution of the dispute through arbitration.

The High Court judge cited the English case of *Salford Estates (No. 2) Limited v Altomart Limited [2015] Ch. 289 [2014] EWCA Civ. 1575*, which provides:

"Courts should not encourage parties to use 'the draconian threat of liquidation' as a means of bypassing an arbitration agreement. To allow that to happen, it was said, 'would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue."

The judge also cited the case *of Parmalat Capital Finance Ltd v Food Holdings Ltd (in liq) [2009] 1 BCLC*, in which the court held:

"A party to a dispute should not be allowed to use the threat of a winding-up petition as a means of forcing the company to pay a bona fide disputed debt."

The judge emphasized that if an award were to be properly issued through arbitration, any failure to satisfy the award would entitle the successful party to seek recourse through the courts, including the filing of winding-up proceedings. In this manner, the policy of upholding parties' autonomy in arbitration would be maintained while still preserving the right of a creditor to file for winding-up proceedings.

In accordance with the court's approach of promoting arbitration, the parties in were directed to resolve their dispute through arbitration dispute as the underlying dispute between the parties from which the petition arose, was arbitrable.

It should be noted however, that an exception exists to this rule. If the parties have an agreement providing for arbitration, and the respondent admits to

the debt in dispute, the court will proceed with the winding-up petition, as determined in the matter of *Sinotruk International v TSN Logistics Limited, Miscellaneous Commercial Cause No. 13 of 2021,* High Court of the United Republic of Tanzania (Commercial Division), at Dar es Salaam (Unreported).

An arbitral award will be set aside where the underlying contract is deemed to be a nullity

In the case of *Cereals and Other Produce Boards of Tanzania v Monaban Trading & Farming Company Limited, Miscellaneous Commercial Cause No. 9 of 2022,* High Court of Tanzania (Commercial Division), at Dar es Salaam (Unreported), the court held that an arbitration agreement will not be enforceable where the underlying contract is void.

In 2007, the Respondent, Monoban Trading & Farming Company Limited, entered into a Milling Agreement with the National Milling Corporation (**NMC**), a body corporate, for milling and storage services. It is important to note that the agreement provided for an arbitration clause. In 2008, the parties entered into an addendum to the agreement which allowed the Respondent to expand the milling plant capacity by carrying out major investment amounting to USD 2.684 Million. These were to cover costs of rehabilitation, refurbishing, repair and maintaining the plant to NMC, an entity which, by that time, was in the divestiture process.

Subsequently in 2013, through an Instrument of Transfer, the Treasury Registrar transferred some assets of the then NMC to the Petitioner, Cereals and Other Produce Board of Tanzania, one of which included the land in dispute.

In 2014, the Respondent entered into a Deed of Variation with the Consolidated Holding Corporation (**CHC**), given that the Milling Agreement signed in 2007 was found to have been entered when the NMC was under divestiture.

In 2019, the Respondent handed over the property to the government and a Deed of Handing over was executed. The Respondent is alleged to have agreed to the removal of the properties on the premises by 31 March 2020. The Respondent subsequently sued the Petitioner for unilaterally terminating the Milling Agreement entered between the parties in 2007.

The court appointed an arbitrator to preside over the dispute who ruled in favour of the Respondent.

Aggrieved, the Petitioner applied to have the award set aside on the grounds of irregularity and misconduct. The Petitioner cited several grounds to have the award set aside, however, one of the grounds cited was that, the Sole Arbitrator committed serious irregularities in considering that, the Petitioner had inherited the Milling Agreement, its Addendum and Deed of Variation of the NMC making the same liable under the contract between defunct NMC and the Respondent while there was no any agreement to such effect.

The Petitioner argued legally there has never been an express vesting of assets and liabilities of the defunct NMC on the Petitioner, and, that, since there was such a finding on the part of the Sole Arbitrator, that should have been sufficient to hold that the arbitration agreement contained in the Wheat and Maize Agreement and its Addendum, does not bind the Petitioner as the latter was not the Successor of the defunct NMC.

He submitted that, although the Sole Arbitrator made a finding that, as per the law there was no express vesting of assets and liabilities by an Act of Parliament establishing the Petitioner, yet, she proceeded to state that, through the instrument of Transfer dated August 2013, the Petitioner became the successor in title of the property in dispute and has inherited the liabilities of the defunct NMC pertaining to the property in issue and thus, the arbitration agreement.

The Petitioner submitted further that, two issues which need to be addressed on that regard, and these are:

a. whether this honourable Court has jurisdiction to determine the jurisdiction of the arbitrator, while the arbitrator was appointed by the Court in Misc. Civil Cause No. 8/2019 between Monaban Trading and Farming Company Ltd and Cereal and Other Produce Board of Tanzania; and

b. whether the Arbitrator has substantive jurisdiction to arbitrate over the matter emanating from an invalid contract and arbitration agreement.

In its ruling, the court cited the South Africa case of *Canton Trading 17 (Pty) Ltd t/a Cube Architects vs. Fanti Bekker Hattingh NO (479/2020) [2021] ZASCA 163* (1 December 2021) in which the court stated:

"if the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party that denies he has ever entered into the contract is thereby denying that he has ever joined in the submission."

"Since the submission of a dispute to arbitration requires the consent of the parties if the very agreement that requires the submission is challenged on the basis that such agreement never came into existence, a dispute exists as to whether there was submission of the dispute to arbitration at all. The problem that then arises is this: who decides the 'existence dispute', the courts or the arbitrators? The question as to who decides whether a dispute goes to arbitration or remains in the courts is one of ever greater significance, given the enhanced role that arbitration enjoys in the resolution of disputes, both domestically and in transnational law. This question may arise at different stages. As the present matter illustrates, there may be litigation at the commencement of a dispute as to whether the

courts should decide the dispute or whether it should be sent to arbitration. Sometimes, however, the issue crystalizes for the first time before the arbitrators. They are asked to decide whether they enjoy jurisdiction to hear the dispute. The arbitrators may determine the issue. Finally, a court may be called upon to decide whether the arbitrators correctly assumed jurisdiction over the dispute, if the arbitrator's award is taken on review or enforcement proceedings are brought."

The court held that under Section 40A(1)(m) of the Public Corporation Act [Cap 257 RE 2002], a specific corporation shall not enter into any lease agreement without the approval of the CHC, the Milling Agreement entered between the parties was void for the fact that NMC did not have the requisite capacity to enter into the agreement in the first place. Accordingly, the arbitration agreement between the parties was deemed invalid too.

The above case highlights the necessity of ensuring the capacity of both parties before entering into an agreement. By ensuring that all parties have the necessary power and authority to enter into the agreement, the chances of successful resolution through arbitration are increased. Neglecting to verify capacity could result in costly and time-consuming legal battles and ultimately jeopardize the effectiveness of the agreement, as was the case above.

An arbitral award will be set aside where the arbitrator has not adhered to the terms of the arbitration clause.

In the case of *Kilimanjaro Oil Company v Tanzania Petroleum Development Corporation, Miscellaneous Commercial Cause No. 25 of 2020,* High Court of Tanzania (Commercial Division), at Dar es Salaam (Unreported), the High Court held that an arbitral award will be set aside for the arbitrator's failure to adhere to the terms of the arbitration agreement.

The Petitioner applied to have the award set aside, alleging, amongst others, that the award was tainted with illegality.

The court held that the arbitral agreement between the parties provided that a decision was to be provided by the adjudicator within 14 days of receipt of a notification of dispute. In the present circumstances however, the parties had not done so.

The court stated:

"*It is elementary in the law of arbitration that, arbitration is an alternative dispute settlement mechanism through which parties to a dispute submits a dispute, by mutual agreement, to one or more arbitrators, who arbitrate and make a binding decision.*"

"*The Adjudicator was bound to act within the mandates of the power given to him*".

"*An Arbitrator is a creature of the arbitration agreement. If there is a specific prohibition in the agreement against the entertainment of claims, but in disregard of such prohibition, the arbitrator hears the matter and makes an award, the arbitrator is guilty of legal misconduct.*"

Based on the above, the court declared the arbitral award a nullity.
The above decision has followed a long line of case law highlighting the necessity of the arbitrator to stick to the terms of the arbitration agreement. After all, it is the arbitration agreement that clothes the arbitrator with jurisdiction.

UGANDA[84]

High Court Miscellaneous Application No. 0085 of 2019 (Arising from Arbitration Cause No. 0005 of 2019): Uganda Development Corporation v Rocktrust Contractors Limited

1. Introduction

This Application was brought by the Applicant seeking for Orders that the arbitral award be set aside on grounds that;

a. there are inconsistencies in the arbitral award that render it vague, ambiguous, uncertain, illegal, unjust, unfair, and not in accordance with The Arbitration and Conciliation Act;
b. it contains decisions on matters beyond the scope of the submission to arbitration; and
c. there was evident partiality in the arbitral decision and award; it is perverse and bears errors on its face; and that it is in conflict with public policy in Uganda.

2. Background and summary of the facts of the case

Uganda Development Corporation (the "Applicant") and Rocktrust Contractors Limited (the "Respondent") executed a contract on 18th January 2017 for the supply, installation, and commissioning of two electrical installations, accessories, and equipment for the Kigezi Highland Tea Factory in Kabale and Kisoro Districts within a period of three months from the date of execution of the contract.

A dispute arose when the Respondent accused the Applicant of having breached the contract by altering the scope and design of the work which

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prolonged the duration of the work and as a result the Respondent sought an additional Shs 1,277,029,989/=. The Applicant also claimed unnecessary delay of execution of the works, non-performance, and unsatisfactory performance.

The parties failed to agree and decided to refer the matter to arbitration where an award was delivered in favour of the Respondent and the Applicant being dissatisfied filed an Application before the Court.

3. Provisions of the law applicable to the legal issues

The Court considered and relied on Sections 34(2) of the Arbitration and Conciliation Act, Cap 4 of the Laws of Uganda (hereinafter to be referred to as the "ACA").

Section 34(2) of the ACA provides for instances where a party can apply to set aside an arbitral award and states as follows-

An arbitral award may be set aside by the court only if—

I. the party making the application furnishes proof that—

   a. the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda;
   b. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; except that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;

c. the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or;
d. the court finds that the award is in conflict with the public policy of Uganda.

Under **Order 15 Rule 3 of the Civil Procedure Rules** the Court may frame issues from all or any of the following materials;

a. allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties;

b. allegations made in the pleadings or in answers to interrogatories delivered in the suit; and

(c) the contents of documents produced by either party.

4. Summary of the Ruling of the High Court

The High Court ruled that the Application succeeded only in part. The award of Shs. 314,840,385/= being the balance on the contractual sum was upheld. However, the award of Shs. 402,488,700/= on account of the variations; Shs. 97,652,449/= on account of extra work carried out on designs; and VAT at 18% on all the said sums was set aside.

5. Issues for determination and analysis of High Court decision

Whether the appointment of the arbitrator was valid

The Judge relied on the doctrine of *Kompetenz Kompetenz*, which states that an arbitral tribunal has jurisdiction to consider and decide any disputes

regarding its own jurisdiction, subject to, in certain circumstances, subsequent judicial review.

Court found that, the parties appeared before the arbitrator on 16th April 2018 and subsequently on 17th December, 2018 and unconditionally agreed upon the procedural directions. By their mutual consent, they conferred jurisdiction upon the arbitrator. The parties appeared before the arbitrator and agreed on the procedure without any of the parties objecting to the arbitrator's jurisdiction.

Whether the arbitrator exceeded his jurisdiction or engaged in other misconduct.

The Applicant contended that the arbitrator exceeded his jurisdiction when in assessing the sums recoverable, he considered the respondent's claim for "the extra costs on designs" yet the contract was for "the supply, installation and commissioning of two electrical installations, accessories and equipment."

The Judge relied on the case of London Export Corporation Ltd v. Jubilee Coffee Roasting Co. Ltd. [1958] I W.L.R. 271 at 277 in which it was stated that *where the award has been made by the arbitrator in breach of the agreed procedure, the applicant is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have not agreed to be bound by an award made by the procedure in fact adopted*.

The Judge further noted that the fact-finding process by an arbitrator can be summarised in three categories: production of evidence; admission or rejection of evidence; and evaluation or interpretation of evidence. Production of evidence before the arbitrator is voluntary; it is up to the parties to produce whatever evidence they consider useful to their claims

The Court found that by Clause 10 of their agreement, the parties agreed to submit "any disagreement or dispute arising between them under or in connection with the contract," to arbitration, in the event that they failed to resolve such dispute or difference by mutual consultation within twenty-eight (28) days from the commencement of such consultation.

The Court further noted that issues related to "the extra costs on designs" were not only canvased in the evidence but also in the arguments of both counsel, thereby justifying the arbitrator's consideration of that aspect of the dispute between the parties all matters decided by the arbitrator constituted part of the dispute, and were contemplated by and fell within the terms of the submission to arbitration. Court ruled that the award did not contain any decision on matters beyond the scope of the submission to arbitration.

Whether the arbitrator was biased.

The Applicant noted that the arbitrator went about the task of evaluating evidence, whereby he readily inferred extension of the contract based only on the conduct of the parties, while rejecting the proposed inferred assignment of part of the contractual obligations based on the same conduct, the arbitrator was predisposed or prejudiced against the applicant.

The Court relied on the case of R. v. Sussex Justices, ex parte McCarthy [1924] 1 K.B. 256, where it was stated that "*it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done*."

The Court decided that the Applicant did not demonstrate bias on the part of the arbitrator, express or implied.

Whether the award is contrary to The Arbitration and Conciliation Act.

The Court noted that an arbitral award is considered not to be in accordance with the Act when any of the following occurs, namely;

a. when the appointment of the arbitrator(s) and the arbitration proceedings were not done as per the agreement between the parties as well as the laws selected by the parties;
b. the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;
c. the adversarial principle was not respected;
d. (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing any such agreement, was not in accordance with the Act;
e. the arbitral tribunal violated its mandate. Not every violation will lead to a refusal of enforcement or setting aside.

The Court found that the parties had been treated with equality and each party had been given a full opportunity to present its case.

Whether the award is contrary to public policy

According to section 34 (2) (b) (ii) of The Arbitration and Conciliation Act, a court can set aside an arbitral award if it finds that the award is in conflict with public policy since no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.

The Court relied on the case of Christ For All Nationals v. Apollo Insurance Co. Ltd [2002] 2 EA 366 where it was discussed that an award could be set aside under the Act as being inconsistent with the public policy if it is shown that either it was:

a. inconsistent with the Constitution or other laws of Uganda, whether written or unwritten; or

b. is inimical to the national interest of Uganda or;

c. is contrary to justice and morality.

The Court ruled that to the extent that the award is contrary to the substantive provisions of Regulations 54 and 55 of The Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014 and the declared policy behind of The Public Procurement and Disposal of Public Assets Act, or to the terms of the contract, it would be patently against public policy, and this would necessitate Court's intervention.

6. Conclusion

In conclusion, the High Court found that the Application only succeeded in part as follows-

a. The arbitrator had jurisdiction and the appointment was valid.

b. The Arbitrator was not biased.

c. The arbitral award was in accordance with the Arbitration and Conciliation Act.

d. The arbitrator's award was contrary to public policy to the extent that it did not comply with Regulations 54 and 55 of The Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014

e. The Applicant was awarded half of the costs of the application.

High Court Miscellaneous Cause No. 0021 of 2021 (Arising From Arbitration Cause Number 0004 of 2021): Lakeside Diary Limited v International Centre For Arbitration and Mediation Kampala & Midland Emporium Limited

1. Introduction

The Application in this case was made under the provisions of section 35 (2) and (3) of the Arbitration and Conciliation Act, ("ACA") seeking an order setting aside the arbitral award on grounds that the 2nd Respondent unilaterally appointed the arbitrator contrary to the provisions of the Act, and the distribution agreement executed between the parties.

2. Background and summary of the facts of the case

The Applicant executed a distribution agreement with the 2nd Respondent granting the 2nd Respondent exclusive distribution rights over given territories in Kenya. The clause on Dispute Resolution provided as follows-

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof shall be settled by arbitration to be held in Kampala, Uganda in accordance with the law in this jurisdiction, and judgement upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.*

Differences arose between the Applicant and the 2nd Respondent regarding performance of the contract. The 2nd Respondent alleged that the Applicant breached the agreement when it stopped supplying the products before expiry of the contractual term and entered into direct sales contracts in the territories. The Applicant alleged that the 2nd Respondent breached the contract by failing to meet agreed sales targets. The parties having failed to settle their dispute amicably referred the matter to the International Centre for Arbitration and Mediation in Kampala (ICAMEK) for the appointment of an arbitrator in accordance with the Dispute Resolution Clause.

The 1st Respondent appointed an arbitrator. The 2nd Respondent filed a statement of claim and notified the Applicant of the appointment of the arbitrator, dates of preliminary hearings, giving directions, and hearings but the Applicant abstained from responding or attending.

The arbitrator delivered their award and found the Applicant liable to pay the 2nd Respondent damages and costs of the arbitration.

It was contended by the Applicant that the agreement was signed by the Applicant's marketing head without the authorisation of the Applicant and in contravention of a circular forbidding staff from executing contracts on behalf of the company. The Applicant also objected to the choice of the arbitrator and suggested reference to the Centre for Arbitration and Dispute Resolution (CADER) instead, which the arbitrator disregarded.

3. Provisions of the Arbitration and Conciliation Act ("ACA")

The Court considered and relied on section 35 (2) and (3) of the Arbitration and Conciliation Act which provides for grounds to set aside an arbitration award.

Court also considered section 11 (3) of the Arbitration and Conciliation Act which provides for appointment of arbitrators in case parties fail to agree on an arbitral tribunal.

4. Legal issues for determination and analysis of the Court's Ruling

Whether a party to the arbitration agreement pursuant to which the award was rendered did not have the capacity to enter into the agreement

It was contended by the Applicant that the arbitration clause was void since the distribution agreement was signed without the authorisation of the Applicant.

The High Court found that the marketing manager of the Applicant had implied authority to bind the company and there was no need for a formal appointment process for a director to be vested with implied authority. Court found that a contract may be made on behalf of a company by any person acting with the company's express or implied authority and in any case, implied ratification will take place where either the conduct of the principal or the surrounding circumstances invite the inference that the principal has endorsed the agent's conduct. Based on correspondence admitted as evidence by the 2nd Respondent, the Applicant acknowledged the agreement contained reference to arbitration. Court found that the Applicant had capacity to execute and perform the contract.

Whether the agreement is not valid under the applicable law.

The High Court considered the principal of separability of an arbitration clause in finding that the validity of an arbitration agreement will not necessarily depend on whether broader agreement remains in force concurrently with the wider agreement.

Relying on common law rules applicable to an arbitration agreement, the Court found that in the instant case the agreement specifically stated that "arbitration to be held in Kampala, Uganda in accordance with the law in this jurisdiction". Court found that the Applicant did not advance any argument that would annul the agreement on this account.

Whether the subject of the dispute is arbitrable

The Court considered the nature of the dispute in this instant case being claims founded on breach of contract and found that a matter is arbitrable under the laws of Uganda. Court held that a matter is considered to be non-arbitrable if mandatory laws provide that certain issues are to be decided by courts of law only, like criminal matters. Matters of contract are arbitrable and so is the dispute.

Whether the composition of the arbitral tribunal was irregular

According to section 10 of the ACA, parties are free to determine the number of arbitrators provided that such number is not an even number. However, where the parties fail to determine the number of arbitrators, there has to be one arbitrator. Court concluded that parties' failure to specify the number of arbitrators in their submissions to arbitration results in the appointment of a sole arbitrator.

According to Regulation 12 (2) of the Arbitration Rules, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to the impartiality and independence of the arbitrator. Court did not find evidence of partiality of the tribunal and therefore no irregularity in the composition of the arbitral tribunal.

Whether the tribunal wrongfully accepted jurisdiction in respect of the dispute

Court recognised the principle of "*Kompetenz-Kompetenz*" and party autonomy in arbitration. In the instant case, by stating that "any controversy or claim arising out of or relating to this contract, or the breach thereof shall be settled by arbitration to be held in Kampala, Uganda in accordance with the law in this jurisdiction and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof." Whilst the parties in this case did not specify the arbitrator, the mode of selection and the rules to be applied, the phrases "by arbitration to be held in Kampala" in accordance with the law in this jurisdiction provide a basic framework from which the Court will turn to the Arbitration and Conciliation Act to fill the gap caused by the lack of the parties' agreement on the procedure for appointment of arbitrators and the rules of procedure.

Court relied on section 11 (3) (a) and (b) of the Arbitration and Conciliation Act which provides an institutional arbitration procedural framework within which the

arbitration proceedings will be concluded, in cases where by their submission to arbitration or otherwise, parties fail to appoint an arbitrator. Per section 11 (5) of the Arbitration and Conciliation Act, the decision of the appointing authority is final and not appealable.

According to section 2 (1) (a) of the Arbitration and Conciliation Act, "appointing authority" means an institution, body or person appointed by the Minister to perform the functions of appointing arbitrators. In this instance, the Court found that ICAMEK appointed an arbitrator, and the arbitrator did not wrongfully accept jurisdiction.

Whether the composition of the arbitral tribunal or arbitral procedure was other than as prescribed by any lawful agreement between the parties.

Section 13 (2) of the Arbitration and Conciliation Act provides that a party who intends to challenge an arbitrator, must within fifteen days after becoming aware of the composition of the appointing authority or circumstances disqualifying the arbitrator send a written statement of the reasons for the challenge to the authority and the appointing authority shall decide on the challenge within a period of thirty days from the receipt of the written statement.

According to section 19 (2) of the Arbitration and Conciliation Act, where the parties do not agree on the procedure to be followed by rules of the arbitral tribunal in the conduct of the proceedings, the arbitral tribunal may, subject to the Act, conduct the arbitration in a manner it considers appropriate. Relying on the above provisions, Court found that neither the composition of the arbitral tribunal nor the procedure was other than prescribed by lawful agreement between the parties.

Whether the arbitral award is contrary to public policy

According to section 34 (2) (b) (ii) of the Arbitration and Conciliation Act, a court can set aside an arbitral award if it finds that the award is in conflict with public

policy since no citizen can do that which has a tendency to be injurious to the public or against public good. Court noted that although public policy is an almost broad concept incapable of precise definition, an award could be set aside in the following instances; (a)inconsistent with the Constitution of Uganda or other laws of Uganda, whether written or unwritten; or (b) is inimical to the national interests of Uganda; (c) is contrary to justice and morality. Consequently, an award would be considered to be in conflict with public policy if, inter alia, (i) the making of the award was induced or affected by fraud or corruption; or (ii) it is in contravention of the fundamental policy of the Constitution or laws of Uganda, (iii) is in conflict with the most basic notions of morality, justice and are generally detrimental or harmful to citizens of the general public.

In this case, the principles court considered to be within the meaning of section 34 (2) (b) of the Act are the prohibition against abuse of contractual or legal rights, of expropriation without compensation, the prohibition against discrimination, the principal of proportionality and the result which it gives rise to. Court found that the Applicant has not established any violation envisaged by section 34 of the Arbitration and Conciliation Act.

5. Conclusion

Upon considering all the grounds of the Application, Court dismissed the Application with costs to the defendant. This Ruling exhaustively considered several common questions in domestic arbitration, particularly on applications to set aside awards. Public policy is a common ground for setting aside an award. By delving into questions such as public policy, appointment of arbitral tribunals. Court helpfully addressed loopholes that arise where the arbitration clause/agreement is silent on several details of the arbitration. It is not uncommon for parties to draft very scanty arbitration clauses which are exploited by parties to circumvent arbitration proceedings. By dismissing the application on all grounds, Court filled so many gaps and loopholes with scanty information using the available legislation.

AN OVERVIEW OF HIGH COURT MISCELLANEOUS APPLICATION NO. 441 OF 2020 (Arising from Civil Suit No. 914 of 2019): AMBITIOUS CONSTRUCTION COMPANY LIMITED VS UGANDA NATIONAL CULTURAL CENTRE

1. Introduction

This Application was brought by the Applicant seeking for Orders that the High Court Civil Suit No. 914 of 2019 be stayed and the dispute be referred to an Arbitrator and for Court to be pleased to appoint an Arbitrator to resolve the dispute.

2. Background and summary of the facts of the case

Ambitious Construction Company Limited (the "Applicant") and the Uganda National Cultural Centre (the "Respondent") executed a contract on 7th August 2017 for the renovation of the National Theatre premises (the "Contract"). The Contract contained a dispute resolution clause that provided for reference of the matters to an Adjudicator agreed by the parties, failure of which the matter would be referred to arbitration for final determination of the dispute.

The Applicant depones that upon a dispute arising over the performance of the contract, the Applicant wrote to the Respondent for purpose of agreeing on an Adjudicator and initiating Adjudication proceedings but the same was ignored by the Respondent. The Applicant wrote to the Uganda Institute of Professional Engineers (UIPE) to provide an Adjudicator whom the Institute provided in the name of Engineer Hans Mwesigwa. The appointment was communicated to the Respondent, but the latter still ignored. The Applicant therefore brought the suit to the High Court for purpose of the Court referring the matter to arbitration and to appoint an Arbitrator.

The Respondent opposed the Application and stated that the dispute subject of HCCS No. 914 of 2019 relates to breach of a contract that contains arbitration clauses. Accordingly, the Applicant wrongfully filed the suit with full knowledge

that an arbitration clause existed in the agreement requiring the parties to submit the dispute to arbitration. The deponent concluded that this application is misconceived since the suit from which it arises is wrongfully before the Court.

3. Provisions of the law applicable to the legal issues

The relevant provisions of the law applied in resolution of this matter are Sections 5 and 9 of the Arbitration and Conciliation Act, Cap 4 of the Laws of Uganda (hereinafter to be referred to as the "ACA").

Section 5 of the ACA provides for Stay of legal proceedings and states as follows-

a. *A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, refer the matter back to the arbitration unless he or she finds—*
b. *that the arbitration agreement is null and void, inoperative or incapable of being performed; or*
c. *that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.*
d. *Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made."*
e. **Section 9 of the ACA** provides that,

> "*Except as provided in this Act, no court shall intervene in matters governed by this Act.*"

4. Summary of the Ruling of the High Court

The High Court ruled that a party seeking reference of a matter to arbitration is required to show that there is a binding and enforceable arbitration agreement

between the parties; that an arbitrable dispute exists between the parties before the court; that the application is made after a defence has been filed in the matter before the court; and both parties have been given a hearing.

In the present case, there is no dispute as to whether the agreement between the parties contained an arbitration clause. There is no claim by either party that the arbitration agreement is null and void, inoperative or incapable of being performed. Consequently, there is no dispute over the existence of an arbitrable dispute between the parties. It is also clear that this application was brought after the Defendant in the suit (the Respondent herein) had filed a defence. Similarly, it is also not in doubt that both parties have been heard on the application for reference of the matter to arbitration. The parties appear agreed and there ought not to have been a dispute over reference of this matter to arbitration.

5. Issues for determination and analysis of High Court decision

Whether filing the suit before the High Court was the best mechanism available to the Applicant to seek reference of the dispute to arbitration

The Applicant filed HCCS No. 914 of 2019 (the suit) not because they were unaware of the existence of the arbitration agreement or because they had ignored it, but because of the alleged conduct by the Respondent of ignoring the prior efforts taken to resolve the dispute in accordance with the contract. The Applicant therefore opted to bring the suit to Court for purpose of the Court referring the matter to arbitration and to appoint an Arbitrator.

Section 11 of the ACA provides for appointment of arbitrator(s). Under sub-section (4), where parties fail to agree on appointment of an arbitrator, a party interested in the appointment may apply to the Appointing Authority. Under S. 2(1)(a) of ACA, "appointing authority" means an institution, body or person appointed by the Minister to perform the functions of appointing arbitrators and conciliators. The Centre for Arbitration and Dispute Resolution (CADER) was put

in place as such "Appointing Authority" within the meaning of the Arbitration and Conciliation Act (ACA).

However, in International Development Consultants Ltd -V- Jimmy Muyanja and others Misc. 133 of 2018 (Ssekaana J.), it was held that the power vested in CADER was exercisable by the Governing Council of CADER and not by the Executive Director as the practice had been at the time. The dilemma was that as of March 2019 when the decision was passed, the Governing Council was not in place.

Court found that in absence of an appointing authority within the meaning of the ACA, the Plaintiff was right to seek the court's intervention for purpose of appointment of an arbitrator. The suit by the Plaintiff/Applicant was therefore properly brought before the court. This application was as well, properly before the court.

Whether, after reference of the matter to arbitration, the suit should be stayed (as prayed for by the Applicant) or dismissed with costs.

The Judge relied on Section 5 of ACA whose head note reads "Stay of legal proceedings" to find that the power to stay proceedings in such circumstances is provided for under the governing Act.

The Court found that after referring the dispute to arbitration, a stay of the suit serves no useful purpose since it is not envisaged that the parties would come back to court other than in a manner provided for in the ACA in instances such as setting aside the award, enforcing the award, applications for interim measures, among others. In all such instances, there will be no need for the stayed suit. To that extent, once court entered an order referring the matter to arbitration, it is unnecessary to stay the suit and an order of terminating the suit passed.

Whether the Respondent is entitled to costs of the suit.

Regarding the costs of the suit, it was argued by Counsel for the Respondent that the application was misconceived, and an abuse of the court process and it ought to be dismissed with costs.

The Court referred to its Ruling that the Applicant was justified in bring this suit to find that it cannot therefore be penalized to costs. Given that the dispute between the parties is yet to be determined on the merits, Court ordered that the costs shall abide the order of arbitration as to costs.

6. Conclusion

In conclusion, the High Court found for the Applicant and ordered as follows-

i. The dispute between the parties herein is referred to arbitration.
ii. High Court Civil Suit No. 914 of 2019 is closed as it has served its purpose.
iii. The Court hereby appoints the Firm of Praxis Conflict Centre who shall assign a suitable Arbitrator of the dispute between the parties.
iv. The costs of this application and of the suit shall abide the order of arbitration as to costs.

These Ruling addresses what hitherto was a grey area in domestic arbitration practice, that is, whether the High Court has the power to appoint an arbitrator where there is an appointing authority. This Ruling also addresses a vice among parties to a contract who snub arbitration proceedings with the view to frustrate the claimant from commencing arbitration proceedings or sustaining them. Not unique to this case and several others in Uganda is the absence of a statutory appointing authority duly appointed under the ACA which leaves parties with very limited options of appointing authorities.

High Court Miscellaneous Application No. 1656 of 2022 (Arising from Miscellaneous Application No. 1623 of 2022, Miscellaneous Cause No 0021 of 2021, Arbitration Cause No 004 of 2021): Lakeside Diary Limited v. Midland Emporium Limited & 3 Others

1. Introduction

This Application was brought by the Applicant seeking for Orders that the execution of the Decree and Orders arising from the arbitration award ICAMEK/REQ/2019/05A: Midland Emporium Limited vs Lakeside Diary Limited be stayed pending the hearing and final determination of Mis Application No 1653/2022: Lake side Diary Limited vs ICAMEK and Midland Emporium Limited.

2. Background and summary of the facts of the case

The Applicant filed Miscellaneous Application No 1653 of 2022 Lake side Diary Limited vs ICAMEK and Midland Emporium Limited seeking for the leave of Court to appeal against the Ruling and Orders of the Honourable Court in Miscellaneous Cause No 0021 of 2021. The Applicant filed this Application for stay of execution pending hearing and determination of the Application of leave to appeal.

3. Provisions of the law applicable to the legal issues

The relevant provisions of the law applied in resolution of this matter are Section 79 (1a) Civil Procedure Act which states as follows-

> "Except as otherwise specifically provide for in any other law, every appeal shall be entered-

a. Within thirty days of the date of the decree or order of the Court,

Section 9 of the ACA which provides that;

> Except as provided for in this Act, no court shall intervene in matters governed by this Act."

Section 17(2) of the Judicature Act which states that-

> "With regard to its own procedures and those of the magistrates 'courts, the High Court shall exercise its inherent power to prevent the abuse of the process of court by curtailing delays, including the power to limit and stay delayed prosecutions as may be necessary for achieving the ends of justice."

4. Summary of the Ruling of the High Court

The High Court ruled that neither the CPA nor the ACA allows for appeals in respect of questions of fact, law or mixed law and fact arising in the Course of arbitration. Appeals may only be considered upon agreement of the parties and in this case the arbitral award was final and binding.

5. Issues for determination and analysis of High Court decision

Whether the execution of the Decree and Orders arising from the Arbitral award should be stayed pending hearing and final determination of Misc Application 1653 /2022.

The Court noted that the Applicant had satisfied:

That the Application was lodged in accordance with are Section 79 (1a) Civil Procedure Act where every appeal had to be filed within thirty days of the date of the decree. The computation of thirty days lapsed on 20th November 2021 and the Applicant lodged the Notice of Appeal on 2nd December 2021 hence this was out of time.

Court noted that that there only two instances where the ACA shall allow the intervention of Court. The first instance is under the provisions of **section 34 of the ACA** on Application for setting aside arbitral award and the second instance is under the provisions of **section 38 of the ACA** on Questions of law arising in domestic arbitration.

The Applicant lodged the application to set aside the arbitral award under section 34 of the ACA vide Misc. Cause 0021/2021 and the same was dismissed with costs to the Respondents. Court found that this brought an end any form of litigation governed by the ACA and therefore cannot be subject to review or appeal.

What remedies are available to the parties.

The Judge noted that it is a general rule that costs shall follow the event as is discussed in Section 27(1) of the Civil Procedure Act and the Application was dismissed with Costs to the 1st Respondent.

6. Conclusion

In conclusion, the High Court reinforced the principal of autonomy of parties to an arbitration agreement and further the finality of arbitration proceedings.

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THIERRY KOEINIG

Thierry Koenig is Head of ENSafrica Mauritius, the oldest and largest law firm in Mauritius which in 2020 celebrated its 200 years practice on the island. Thierry specialises in corporate matters (capital markets, M&A, banking and financing, restructuring), litigation (complex commercial and insolvency litigation) and arbitration (domestic, international commercial and investment arbitration proceedings, and extensive experience in the enforcement of securities). Consistently ranked as a leading lawyer by Chambers in both general business law and dispute resolution, Thierry is a leading individual by the Legal 500 EMEA.