REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Cause 248 of 2012

IN THE MATTER OF ARBITRATION ACT 1995 AND THE ARBITRAITON RULES 1997

In the matter of an arbitration conducted in the Stockholm Chamber of Commerce in Arbitration V 09/2009

BETWEEN

Kundan Singh Construction Limited "Claimant" and

Tanzania National Roads Agency as "Respondent"

KUNDAN SINGH CONSTRUCTION LIMITED …..…… APPLICANT

VERSUS

TANZANIA NATIONAL ROADS AGENCY …….. RESPONDENT

R U L I N G

1. The issue for consideration before this Court arose out of arbitration proceedings conducted in the Stockholm Chamber of Commerce being arbitration V 09/2009. Notice of the filing of the Award in those proceedings was given by the Applicant herein to the Respondent on the 23rd April 2012. The Final Award of the three arbitrators Neil Kaplan, Dorothy Ufot and Makhdoom Ali Khan was delivered at Stockholm on 25 January, 2012 by a majority of 2 to 1, the said Dorothy Ufot delivering a dissenting opinion. Thereafter, the Applicant filed a Chamber Summons herein dated 24th April 2012 filed on 25th of April 2012. That Application sought Orders that the part of the majority Award which allowed the Counterclaim of the Respondent in the arbitration, which is being challenged, be set aside or, alternatively, that part of the majority award be remitted to the majority arbitrators to decide the same applying Tanzanian law which the parties to the arbitration specifically agreed would govern the arbitral proceedings.

2. When Mr. Nagpal for the Applicant and Mr. Munuthia with Mr. Kioko for the Respondent appeared before me at the first mention of this matter before court on 5th July 2012, Mr. Munuthia detailed that he had filed a voluminous Replying Affidavit in response to the Application and that the main issue he wished to address at the outset was whether this court had the jurisdiction to set-aside the

Award as prayed for in the Application. I detailed that I believed that the whole question of whether the court had jurisdiction to hear the Application dated 24th April 2012 was key and important as to whether the Court could proceed therewith. In this regard, I gave directions for the 3 arbitrators to be served before proceeding further with the hearing of the Application. The parties' advocates came back before me on 20th September 2012 to confirm firstly, whether the said arbitrators been served and secondly, whether the parties had filed their submissions in relation to the Preliminary Objection of the Respondent dated 22nd June 2012. Mr. Nagpal stated that he had not had time to file his submissions in response to the Preliminary Objection. Thereafter, the matter was mentioned again before court on 17th October 2012 when Mr. Nagpal confirmed that service of the Application had been made upon the arbitrators by DHL but no response had been received from them to date. He also confirmed that he had been able to file his submissions in response to the Preliminary Objection and the matter could proceed to Ruling on the jurisdictional point. Mr. Nagpal also confirmed that that he had filed a Notice of Motion on behalf of the Applicant herein dated 2nd October 2012 in which he was seeking to amend the particularly the prayers in the Applicant's said Chamber Summons dated 24th April 2012. It was agreed that both the Application to amend the original Chamber Summons and indeed, the Chamber Summons itself, would await the Ruling of this Court on the question of whether it had jurisdiction as raised in the Respondent's said Preliminary Objection.

3. The Respondent's Preliminary Objection detailed simply:

"The Kenyan Courts have no jurisdiction to set-aside an International Arbitral Award."

The same was dated 22nd June 2012 filed herein on 28th June 2012. The Respondent filed its skeletal submissions in support of the Preliminary Objection on 4th July 2012. At the outset, the Respondent referred the court to Article 2 (5) of the Constitution of Kenya. It noted that that the general rules of international law shall form part of the law of Kenya. The Respondent then pointed to **section 3 (3)** of the *Arbitration Act* which defines what amounts to an International Arbitral Award. It detailed that **Section 36 (2)** of the Arbitration Act specifies that an International Arbitral Award shall be recognised as binding and enforced in accordance with the provision of the New York Convention (hereinafter "NYC") or any other convention to which Kenya is a signatory, relating to Arbitral Awards. In the Respondent's opinion Parliament included **section 36 (2)** as the only avenue under the Arbitration Act to challenge an International Arbitral award. The Respondent then referred the court to **section 36 (5)** of the Arbitration Act which shows that the NYC was acceded to by Kenya on 10 February, 1989. The Respondent noted that Article V (e) of the NYC is repeated word by word in **section 37 (1)** of the Act but with the word "Authority" replaced by the word "Court".

4. The Respondent referred to the **Law of Arbitration and Conciliation 5th Edition 2010 volume two** by India's **Justice R. S. Bachawat** in which the learned judge had observed that the enforcement of an International Arbitral Award can be filed in any part of the sub-continent; the position being the same in Kenya. Further, in the case of the **Gulf Petro Trading Company vs Nigerian National Petroleum Corp (2008) 1 Arb LR 137** the Respondent noted that the Supreme Court of India had stated:

"It would seriously undermine the functioning of the convention if the fact that the opportunity for Judicial Review of an Award in the primary jurisdiction has passed which could open the door to otherwise impermissible review in a secondary jurisdiction".

Similarly, the Respondent referred to the case of **Empresa Colombiana de vias Ferreas vs Drummond Ltd Colombia No. 4, page 643 Yearbook of Commercial Arbitration, Volume XXIX (2004)**. In that case a challenge to a French ICC Arbitral Award before the Colombian court was turned down on the ground that only courts in the country where an Award is made, have the jurisdiction to set

the Award aside. Similarly, the Respondent referred to the case of **Steel Corp of The Philippines vs International Steel Services Inc** again to be found in the **Yearbook of Commercial Arbitration Volume XXXIII (2008) page 1125**. In that case, the issue was whether the Philippine court should refuse to enforce a Singaporean award. The Respondent submitted that it had been detailed in the case that only the courts at the place of primary jurisdiction could set aside the Award namely, in this case, the Singaporean Court. More importantly perhaps, the Respondent then referred this court to the well-known decision in **C vs D (2007) 2 All ER (COMM) 557** in which the English Court of Appeal ordered that an injunction restraining proceedings before the US Federal Court should issue for setting aside an English Arbitral Award. The reason given by the Court of Appeal was that the parties in choosing London as the seat of the Arbitration meant incorporating the framework of the English Arbitration Act (1996) so that any challenges to the Award could only be permitted under the provisions of the English Act. It found that any agreement as to the seat of an arbitration was thus analogous to an exclusive jurisdiction clause.

5. The Respondent continued with its submissions by referring me to the case of **Titan Corp vs Alcatel CITSA** again featured in the **Yearbook of Commercial Arbitration, volume XXX (2005)**. It seems that the case involved a dispute between parties with respect to an agreement that contained an arbitration clause providing for ICC Arbitration in Stockholm, Sweden. The Award delivered detailed that Stockholm was the place (or seat) of the arbitration, however evidence was taken in Paris and the remainder of the work was carried out by the arbitrator, who was based in London. The finding was that the Swedish Courts did not have jurisdiction to set-aside the award because there was no tangible connection with Sweden. The respondent also referred this court to the case of **Shashona v Sharma (2009) EHWC 957 (COMM); (2009) 2 All ER (COMM) 477** where the English Court granted an injunction restraining a party from continuing with proceedings to set-aside an award before the courts in India as the English Court determined that England was the seat of arbitration. It was noted that this was despite the fact that the law of India was found to be the proper law of the contract. The Court found:

"The basis of the convention (NYC)…. as applid in England in accordance with its own principles on the conflict of laws is that the courts of the seat of arbitration are the only courts where the award can be challenged whilst, of course, under Article V of the Convention there are limited grounds upon which other contradicting states can refuse to recognise or enforce the award once made".

Similarly, in the case of **Dallah Real Estate & Tourism Holding Co vs Ministry of Religious Affairs, Government of Pakistan (2010) 1 All ER 485** the English Supreme Court found that where a party objected to the jurisdiction of an International Commercial Arbitration it had two options: (a) it could challenge the tribunal's jurisdiction in the Courts of the arbitral seat or (b) it could resist enforcement in the Court before which the award was brought for recognition and enforcement. Finally, the Respondent referred the court to the case of **Celine Gueyffier vs Ann Summers Ltd (2006) Cal. App.** wherein the Californian Court of Appeal had explained that the NYC specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law. The Respondent emphasized that only a court in the country with primary jurisdiction over an arbitral award may annul that award. The country in which an award was made is said to have primary jurisdiction over the same.

6. The Applicant's submissions commenced by detailing that in its opinion the Preliminary Objection itself was an abuse of the process of this court as all it was doing was to attempt to resist and argue against the Applicant's substantive Application for setting aside the arbitral award. Let me say right at the outset that I cannot agree with this submission of the Applicant as I had already detailed in my Ruling of the 5 July, 2012 that I believe that the whole question of whether this court has jurisdiction to hear the Applicant's substantive Application was key and important as to whether the Court could proceed

therewith. In continuing with its submissions, the Applicant considered that Article 2 (5) of the Constitution was of no relevance to this matter and that Article 94 (5) of the Constitution clearly laid down that there must be parliamentary involvement in making or adopting any instrument that becomes law. The Applicant seemed to agree with the position taken by the Respondent that from the reading of **sections 36** and **37** of the Arbitration Act, Parliament intended to adopt the NYC and in fact had done so by the actual and express wording of **section 37 (vi)** thereof.

7. The Applicant continued with its submissions by maintaining that **section 3 (3)** of the Act did not define what amounted to an International Arbitral Award. It only defines what constituted "domestic arbitration proceedings". Be that as it may and I consider such to be of little importance, the Respondent maintained that **section 35** of the Act contained no restriction limiting the application of that section to domestic arbitration proceedings only. Thereafter, the Applicant spent some time submitting as regards **section 3** in relation to both international and domestic arbitration. It maintained that the definition of an international arbitration therein does not in any way oust the jurisdiction of the Kenyan Court. Further, it maintained that the contents of **section 36 (2)** and **36 (5)** of the Act only serve to prove that this Court has jurisdiction to enforce an Award made outside Kenya. In this regard, I fully concur with the submissions of the Applicant. However, its next submission was as to whether the Award should be "recognised" and "enforced". The Applicant stated that as long as arbitral tribunal has made an award as defined by the Act, the Kenya courts have jurisdiction over that Award otherwise **section 35** of the Act would be rendered meaningless. It emphasised that **section 35** did not provide that only an award made under a domestic arbitration may be set aside nor did it state that an award made in an arbitration which is "international" as defined by the Act can only be set aside after that award has been registered under the provisions of the *Foreign Judgements (Reciprocal Enforcements) Act CAP 43*. It noted that Sweden was not a reciprocating country as defined by that Act. The Applicant stressed that in its opinion, the provisions of **sections 35, 36** and **37** of the Arbitration Act clearly show that the Kenyan Courts have jurisdiction over any Award and that it was noteworthy that **section 37** specifically provided that the recognition or enforcement of an arbitral award, irrespective of the State in which it was made, may be refused in the circumstances therein set out.

8. As regards **section 36** of the *Arbitration Act*, the Claimant maintained that it conferred jurisdiction upon the Kenyan Courts in respect of both domestic and international arbitration awards. It maintained that recognition and therefore jurisdiction over the Award is conferred by the provisions of that section and that the very fact that a party seeks to enforce an Award in Kenya means (quite correctly) that the Kenyan Courts have jurisdiction to order such enforcement. The Applicants stated that the fact that the Act in **section 35** gave the local Court jurisdiction to set-aside an arbitral award *ipso facto* confers jurisdiction upon the court to deal with any arbitral award as defined in the Act, without any reservation or limitation whatsoever. The Applicant maintained that the position at law in Kenya currently stood as follows:

" - Recognition of an arbitral award is automatic under the provisions of section 36 and recognition and enforcement can only be refused if the party against whom it is sought is able to satisfy the requirements of section 37. Jurisdiction which has been conferred on our courts by section 36 (and not by section 37) is not and indeed cannot ever be in issue ***AND***

- Our courts have jurisdiction to international arbitration awards under section 35 because that section does not differentiate or restrict an award in terms of it being either a domestic or an international arbitral award. The words used in section 35 are simply ***"an arbitral award"****. To hold otherwise would be tantamount to writing words into the statute that are not there because they were not intended to be there."*

9. Further, the Applicant drew the court's attention to the Notice which had been served upon it by the Respondent dated 31 May, 2012 as to the filing of the Award herein in Mombasa. The Notice read as follows:

"TAKE NOTICE that if no application to set aside the arbitral award in accordance to section 35 of the Arbitration Act 1995 after expiry of the statutory period provided, we shall proceed to apply to the court ex-parte by summons for leave to enforce the award as a decree". The Applicant maintained by the very wording of that Notice the Respondent was saying that this court has jurisdiction to entertain a **section 35** application in that if the Applicant did not file such an application, then the Respondent would not proceed with enforcing the arbitral award. The Applicant stated that it was not open to the Respondent to now challenge a **section 35** application as the jurisdiction of this court was not dependent upon the whim of the Respondent. It went on to say that the Respondent's contention that the Kenyan courts do not have jurisdiction to set aside the Award has neither any bearing nor relevance to the preliminary objection on the issue of jurisdiction as Article V (e) of the NYC refers only to recognition and enforcement and not jurisdiction. It maintained that the Respondent admitted that **section 35** does not reflect Article V (e) of the NYC and such only reinforces the Applicant's submissions that **section 35** stands alone as the law of the land and is not in any way affected or undermined by Article V (e) or any other provision of the NYC. The Applicant then made the bald statement that neither the text nor the authorities referred to by the Respondent have any relevance or bearing on the issue of the jurisdiction of this court. Surprisingly, having made that statement, the Applicant then went into attempting to distinguish the various cases cited to court by the Respondent. It maintained that the Respondent had failed to attach the case reports in respect of the **Gulf Petro, Empresa Columbiana and Steel Corp of Philippines** cases and that the particular provisions of Colombian law, as well as Filipino law, had no place and nothing in common with Kenya law. The Applicant then went on to say that the issue of jurisdiction is NOT the same as the issue of enforcement. These two issues were entirely separate and it was trite law that one could not enforce if one has not got jurisdiction in the first place. Indeed the Applicant maintained, that in order for a court to enforce an Award, it must have jurisdiction first to do so.

10. As far as the case that this court thinks valuable for guidance in relation to its Ruling herein, being the case of the **C vs D** (supra), the Applicant pointed out that again the Respondent had failed to attach the case report but also that the same was cited out of context and, if anything, supports the Applicant. It went on to say: *"Indeed the position is the same in Kenya where we are governed by our own Arbitration Act and under which any and all applications in respect of setting aside an arbitral award are to be made which is precisely what the Applicant has done. The case of C vs D is not an authority on jurisdiction"*. Similarly as regards the **Titan Corp** case, the Applicant pointed out that the case report was not available and also that the same was cited out of context. It maintained that the case was irrelevant to the issue of jurisdiction. However the Applicant noted that in that case there were hearings pending in other countries and that was the reason why the English court did not adjudicate. The Applicant maintained that it was obvious, even from the brief passage relied upon by the Respondent in its submissions, that the court did not hold that the Swedish courts did not have jurisdiction to set-aside the award as had been contended by the Respondent. The Applicant also maintained that the **Shashona** case was also cited out of context and therefore entirely distinguishable. It reiterated that the Arbitration Act 1995 specifically and expressly gave this court the jurisdiction to set aside an arbitral award under the provisions of section 35. That section did not differentiate between a domestic arbitral award and an international arbitral award. As to the **Dallah Real Estate & Tourism** case, the Applicant maintained that the same concerned the issue as to whether the court could consider and determine issues in respect to the arbitral tribunal's jurisdiction and not the court's jurisdiction. It maintained that the case was entirely inapplicable to the matter before court. Finally as regards the cases cited by the Respondent, the Applicant in reference to the **Celine Gueyffier** case, maintained that the case was not relevant when considering the issue of an award made in an international arbitration but only that of a domestic

arbitration. The Applicant reiterated again that had Parliament intended that section 35 to apply only to an Award in a domestic arbitration, it would have expressly said so but it had not said so.

11. The Applicant then went on to refer this court to the case of **Mumias Agricultural Transporters Ltd vs Chanan Agricultural Contractors NAI HCCC No. 786 of 1996** which had found that for a preliminary point of law, affidavit evidence was held inadmissible. The Applicant asked the court not to admit but to ignore the Replying Affidavit dated 22 June 2012. The Applicant then made the rather surprising statement that the Preliminary Objection was ill-founded because it was obviously not based upon agreed facts. It maintained that the facts herein are very much in dispute and this was evidenced by the fact that the said Replying Affidavit contained no less than 43 paragraphs. The Applicant then went on to cite the well-known **Mukisa Biscuit Manufacturing Ltd vs West End Distributors Ltd (1969) EA 697** where again it had been held that a preliminary objection is a pure point of law and could not be raised if any fact has to be ascertained. The same point was raised and referred to in the next two cases cited by the Applicant being **Eunice Karimi Kibunja vs Mwirigi M'Ringera Kibunja Civil Appeal No. 103 of 1996** and **Nitin Properties Ltd vs Jagjit Singh Kalsi & Anor. Civil Appeal No. 132 of 1989**. In the latter case, the Court Appeal had held that a preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The Applicant also referred the court to another case in which a preliminary objection must be based on a point of law being **United Insurance Company Ltd vs Scholastica Odera (unreported)**. Finally, the Applicant referred the court to the unreported case of **Avtar Singh Bhamra & Anor vs Oriental Commercial Bank** where it had been held that a preliminary objection must stem from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained. The Applicant noted that the court had gone on to hold that the right to be heard is a fundamental right which cannot easily be taken away unless there are compelling reasons therefore.

12.The Applicant then spent some time as regards what it termed the 36 irrelevant paragraphs of the Replying Affidavit. It detailed that the said paragraphs clearly demonstrated that the Respondent itself accepted that the court had jurisdiction and had attempted to counter the arguments and grounds as to the setting aside of the **section 35** Application dated 24 April 2012. It stated that: *"indeed the very fact that the Respondent has included itss 36 paragraphs proves that the Kenyan Courts indeed do have jurisdiction to deal with an application to set aside the Award".* The Applicant forcefully maintained that the NYC does not oust the jurisdiction of this court and that the converse was the correct position under Kenya law. The fact that Kenya is a signatory to the NYC does not automatically mean that the NYC overrode the express provisions of the Act to oust the jurisdiction of the Kenya courts. In conclusion, the Applicant maintained that the very fact that the Arbitration Act contains **section 35** in the form that it does, expressly proves, beyond doubt, that there is an intended difference between the provision of **section 35** and **section 37**. The Applicant stated that **section 35** deals with setting aside an award, whereas **section 37** deals with recognition and enforcement of an award. Different grounds and different considerations applied to each of the two separate sections. In the Applicant's view the Act set no limits and provided no restriction as regards the jurisdiction of the Kenya Courts in respect of arbitration proceedings as defined in the Act be they domestic arbitration proceedings or international arbitration proceedings. It submitted that this Court as a Court of the sovereign state of Kenya has jurisdiction to deal with the application filed under section 35 to set aside the arbitral award, subject to the Applicant satisfying the requirements thereof. I must confess that I found the Applicant's submission as regards Section 35 to be uncessarily repetitive.

13. By its Chamber Summons dated 24 April 2012, the Applicant sought Orders:

"1. That the part of the majority Award which allows the Counterclaim of the Respondent in this

Arbitration which is being challenged herein be set aside.

2. Alternatively the part of the award referred to in prayer 1 above be remitted to the majority arbitrators to decide the same applying Tanzania Law which the parties to the arbitration specifically agreed will govern the arbitration."

Attached to the Supporting Affidavit to the Applicant's said Application and marked "RSU 1" was the Contract as between the Applicant and the Respondent dated 1 August, 2007 being Contract No. TRD/HQ/1003/2007/08. At pages 223 - 225 of that Exhibit was the clause detailing Settlement of Disputes. The first sub-clause 67.1 provided for disputes to go before the Tanzanian Disputes Review Board. It is the understanding of this court that that particular step for dispute resolution was waived by consent of both parties hereto. The Contract provided that sub-clause 67.3.2 would be retained in the case of a contract with a foreign contractor…… and thereafter the Contract read:

"(a) Contracts with foreign contractors

Rules of Arbitration Institute of the Stockholm Chamber of Commerce:

Sub-Clause 67.3.2 (a) – Any dispute, controversy, or claim arising out of or in connection with this Contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce."

Earlier in the said Contract under Sub-Clause 5.1 Language/s and Law, it was provided that the law applicable to the Contract was that in force in the country stipulated in the Appendix to Bid. In that document, at page 175 of the said Exhibit, it detailed under the heading “Contract Documents” that the language is English and **"the law is that at the time being in force in the United Republic of Tanzania".** From this, it seems therefore that the parties chose that the law of the Contract was the law of the United Republic of Tanzania and that any dispute as between the parties would be governed by the rules of procedure of the Arbitration Institute of the Stockholm Chamber of Commerce.

14. The most recent decision as regards the proper law of an arbitration agreement is that of the English Court of Appeal in **Sulamerica Cia Nacional de Seguros vs Enesa Engenharia SA (2012) EWCA Civ 638**. The leading judgement in that case which I considered to be very persuasive as regards this court, was delivered by **Moore-Bick LJ**. The dispute therein concerned claims made by an insured under two policies of insurance against various risks arising in connection with the construction of a hydro-electric generating plant in Brazil. The policies contained a mediation clause, an arbitration clause specifying London as the seat of arbitration, a governing law clause providing that the policies were to be governed exclusively by the laws of Brazil and an exclusive jurisdiction clause in favour of the courts of Brazil extending to any disputes arising under, out of or in connection with the policies. The insurers gave notice of arbitration, seeking a declaration that they had no liability under the policy. The insured then commenced proceedings in Brazil, seeking to establish that the insurers were not entitled to refer their dispute to arbitration and obtained from the court in Sao Paulo an injunction restraining the insurers from resorting to arbitration. In response, the insurers made an application without notice to the Commercial Court in London seeking an injunction to restrain the insurers from pursuing the proceedings in Brazil. The court, at first instance, granted the injunction order sought and the insured appealed.

15. The term "proper law" is synonymous and interchangeable with the terms "applicable law" and "governing law". There are three main aspects of proper/applicable/governing law relating to contracts which provide for international commercial arbitration as the means of settling disputes (see **Dicey, Morris and Collins on the Conflict of Laws, 14th Edition, 2006**). According to the learned authors of

that volume, these are as follows:

“The law governing the substance of the dispute (the lex causae). Commercial contracts with a transnational dimension will usually contain a clause specifying the governing law of the contract, i.e. the system or principles of law which regulate(s) the substantive rights and obligations of the parties and in accordance with which the contract is to be interpreted. An express provision as to the governing law of contract will usually be the lex causae, subject to any mandatory rules applicable at the seat of arbitration.

The law governing the arbitration proceedings (the lex arbitri). The arbitration agreement will usually, though not always, be set out in a clause within the commercial contract which will usually specify the juridical seat of the arbitration. The seat may be in a different national jurisdiction from that of the governing law of the contract. In general, arbitral proceedings are governed by the national law of the seat of the arbitration. This will govern the procedure of the arbitration (commencement, appointment of arbitrator(s) and procedures leading to the award) and the support and supervision of the courts of the seat.

The law governing the arbitration agreement, referred to in Sulamerica as the proper law of the arbitration agreement. An arbitration clause is a separate agreement from the rest of the contract in which it is located and, as such, has its own proper/applicable/governing law (as does an arbitration agreement contained in a separate document), which governs the validity, scope and interpretation of the agreement to arbitrate. Those matters may be of considerable importance; an invalid clause will result, in principle, in any award being unenforceable, and the same risk applies where an arbitral panel exceeds the scope of an arbitration agreement. It is therefore perhaps surprising that arbitration clauses, including model clauses recommended by arbitral institutions, seldom specify the proper/applicable/governing law of the arbitration agreement.

In Sulamerica, the issue of the proper law of the arbitration agreement fell to be determined by the English courts because one party sought the assistance of those courts, as the national courts of the seat of arbitration, to protect the right to arbitrate. In other instances, the issue might be one for arbitrators to consider in order to establish the existence of extent of their own substantive jurisdiction under the Kompetenz-Kompetenz principle. Or the courts of another state, which is party to the New York Convention, might need to consider the issue when asked to enforce an arbitral award made at the seat: the Convention provides that the recognition and enforcement of an award may be refused where:

‘the [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made’.

16. In **Sulamerica**, **Moore-Bick LJ** comprehensively reviewed various authorities which I shall come to. However, at paragraph 9 of his judgement the learned Judge had this to say:

“It was common ground before us, as it had been before the judge, that the proper law of the arbitration agreement is to be determined in accordance with the established common law rules for ascertaining the proper law of any contract. These require the court to recognize and give effect to the parties’ choice of proper law, express or implied, failing which it is necessary to identify the system of law with which the contract has the closest and most real connection: See Dicey, Morris & Collins, The Conflict of Law, 14th ed., paragraph 16R-001. It was also common ground that an arbitration agreement forming part of a substantive contract is separable, in the

sense that it has an existence separate from that of the contract in which it is found. That principle, which reflects the presumption that the parties intended that even disputes about matters which, if established, would undermine the intrinsic validity of the substantive contract (such as fraudulent misrepresentation) should be determined by their chosen procedure, has been given statutory recognition by section 7 of the Arbitration Act 1996. In Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254 the House of Lords re-emphasised both the presumption that parties to a contract who have included an arbitration clause intended that all questions arising out of their relationship should be determined in accordance with their chosen procedure and the seperability of arbitration agreements which enables their intention to be effective".

17. And then at paragraphs 11, 12, 13 and 15 of his judgement in **Sulamerica**, the learned Judge reviewed the two notable cases in this regard as follows:

"11. It has long been recognized that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law. It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate. In Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] A.C. 334 Lord Mustill said (at pages 357-):

'It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the "curial law" of the arbitration, as it is often called'. (Emphasis added).

12. That is consistent with his observations in the earlier case of Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1982] 2 Lloyd's Rep. 446 when discussing the possibility that different systems of law may govern the substantive contract, the arbitration agreement, the individual reference and the arbitral proceedings. At page 455, col. 2 he said:

'Where the laws diverge at all, one will find in most instances that the law governing the continuous agreement [sc. The arbitration agreement] is the same as the substantive law of the contract in which it is embodied and that the law of the reference is the same as the lex fori'. (page 455);

and at page 456, col. 1:

'In the ordinary way, this [sc. The proper law of the arbitration agreement] would be likely to follow the law of the substantive contract'.

However, it should be noted that in that very case Mustill J. (as he then was) was inclined to treat the parties' choice of Zurich as the place of arbitration as indicating and intention that the law governing the arbitration agreement should be the law of Zurich.

13. Similar statements of principle may be found in other cases. Thus, in Sonatrach Petroleum Corp v Ferrell International Ltd Ltd [2002] 1 All E.R. (Comm) 627 Colman J. said in paragraph [32]:

'Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract'.

15. The choice of curial law is normally made by identifying the seat of the arbitration. In the passage in his speech in Channel Tunnel Group v Balfour Beatty cited earlier Lord Mustill recognized that it is more common for the curial law of the arbitration to differ from the proper law of the substantive contract, as a result of the parties' agreeing to arbitrate in a country other than that whose law they have chosen to govern their agreement, than it is for the proper law of the arbitration agreement to differ from the proper law of the substantive contract. He did not explain why that should be the case, but in my view two reasons suggest themselves. One is that it is not at all uncommon in certain kinds of international arbitration, especially those involving government contracts, for the seat of the arbitration to be chosen on grounds (often a desire for a neutral forum) which differ from those which underlie the choice of law to govern the substantive contract. Another is that parties entering into a contract, whether containing an arbitration agreement or not, are likely to intend that the whole of their relationship, including the agreement to arbitrate, is to be governed by the same system of law".

18. later in his judgement in **Sulamerica, Moore-Bick LJ** quoted extensively from the **Dicey, Morris and Collins** commentaries as well as this quotation from **Mustill & Boyd, Commercial Arbitration 2nd Edition at p. 63**:

"The starting point is to determine the proper law of the contract in which the arbitration is embedded. As a general rule the arbitration agreement will be governed by the same law, since it is part of the substance of the underlying contract. But this is not an absolute rule, since other factors may point clearly to some other system of law. Thus if the arbitration is to be held in the territory of a state which is party to the New Your Convention on the Recognition and Enforcement of Awards, section 5 (2) (b) of the Arbitration Act 1975 (now section 103 (2) (b) of the Arbitration Act 1996) appears to give rise to a rebuttable presumption that the law governing the validity of the arbitration agreement is the law where the award is to be made. The presumption would, we submit, readily be rebutted in favour of the proper law of the underlying contract."

19. Earlier in this judgement, I have referred to the case of **C vs D** (supra). That case was also reviewed by **Moore-Bick LJ** in **Sulamerica** in which he commented as follows:

"20. C v D also concerned a claim on a policy of insurance expressly governed by New York law which contained a clause providing for arbitration in London "under the provisions of the Arbitration Act 1950 as amended". The insured commenced arbitration proceedings in London against the insurer and obtained an award in its favour. The insurer then applied to the tribunal to correct its award on the grounds that its findings constituted a manifest disregard of New York law and indicated that it would apply to a federal court to set aside the award on those grounds. The insured brought proceedings for an injunction restraining the insurer from starting

proceedings in New York or from relying on the law of New York to oppose the enforcement of the award. Cooke J. held that the choice of Landon as the seat of arbitration involved an agreement that any proceedings seeking to challenge the award would be only those permitted by English law and granted the relief sought. On appeal this court upheld his decision on the grounds that the choice of the seat of arbitration involved also a choice of forum for remedies seeking to challenge any award. (Underlining mine).

21. Since it was the agreement of the parties to arbitration in London under the provisions of the Arbitration Act 1996 that carried with it a choice of England as the forum in which to pursue challenges to the award, it was unnecessary for the court to reach a decision on the proper law of the arbitration agreement. Indeed, Longmore L.J. with whom Sir Anthony Clarke M.R. and Jacob L.J. agreed, expressly recognized that the result would have been the same, even if the proper law of the arbitration agreement had been the law of New York (para [20]). Nonetheless, he went on to express his view on the question, which at the end of paragraph [23] he defined as being "to discover the law with which the agreement to arbitrate has the closest and most real connection". Having considered the passage in Lord Mustill's speech in Channel Tunnel Group v Balfour Beatty, to which I have referred, and having rejected the argument that Lord Mustill was expressing a view about the frequency with which the proper law of the arbitration agreement is likely to differ from the law of the seat, he said in paragraph [26]:

'One is therefore just left with his dictum in the Black Clawson International case (with which I would respectfully agree) that it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration. The reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place'.

20. Reverting to the cited case of **Black Clawson International** (supra), the learned judge put forward a further viewpoint to the extent of quoting from **Longmore LJ** as saying therein:

"…. It has, I believe, been generally accepted that in an arbitration case with a foreign element, three systems law are potentially relevant. Namely: (i) The law governing the substantive contract. (ii) The law governing the agreement to arbitrate, and the performance of that agreement. (iii) The law the place where the references conducted: the *Lex fori*.

In the great majority of cases, these three laws will be the same. But this will not always be so. It is by no means uncommon for the proper law of the substantive contract to be different from the *Lex fori*; and it does happen, although much more rarely, that the law governing the arbitration agreement is also different from the *Lex fori.* See Miller vs Whitworth Street Estates Ltd (1970) 1 Lloyd's Rep. 269; (1970) A. C. 583."

21. Although I do not consider it really necessary to set out the decision of the English Court of Appeal in **Sulamerica**, there are two further paragraphs in **Moore-Bick LJ**'s Judgement which I also consider relevant to the matter before this court. These are at paragraphs 25 and part of paragraph 26 of the Judgement as follows:

"Although there is a wealth of dicta touching on the problem, it is accepted that there is no decision binding on this court. However, the authorities establish two propositions that were not controversial but which provide the starting point for any enquiry into the proper law of an

arbitration agreement. The first is that, even if the agreement forms part of a substantive contract (as is commonly the case), its proper law may not be the same as that of the substantive contract. The second is that the proper law is to be determined by undertaking a three-stage enquiry into (i) express choice, (ii) implied choice and (iii) closest and most real connection. As a matter of principle, those three stages ought to be embarked on separately and in that order, since any choice made by the parties ought to be respected, but it has been said on many occasions that in practice stage (ii) often merges into stage (iii), because identification of the system of law with which the agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties have made an implied choice of proper law: See Dicey, Morris & Collins, op. cit. paragraph 32-006. Much attention has been paid in recent cases to the close and most real connection, but, for the reasons given earlier, it is important not to overlook the question of implied choice of proper law, particularly when the parties have expressly chosen a system of law to govern the substantive contract of which the arbitration agreement forms part".

22. In adopting the wealth of data and pronouncements in relation to **Sulamerica**, I now need to review the Applicant's submissions in relation to **section 35** of our Arbitration Act (now Cap 49, Laws of Kenya). It is quite clear to me that the Applicant has made this Application as a result of the threatened commencement of enforcement proceedings by the Respondent as against the Applicant in Mombasa. Hence the reference as above by the Applicant to the Notice served upon it by the Respondent dated 31 May, 2012. That Notice basically repeated Rule 6 of the Arbitration Rules, 1997 which reads:

"If no application to set aside an arbitral award has been made in accordance with section 35 of the Act the party filing the award may apply *ex parte* by summons for leave to enforce the award as a decree."

Rule 6, as indeed the Arbitration Rules 1997, were made under the provisions of the Arbitration Act 1995 which has since been amended and those amendments included in the "new" Cap 49. Regretfully, no new Arbitration Rules have as yet been made under the amalgamated statute Cap 49. I do not share the Applicant's viewpoint that the Respondent by its said Notice has recognised the right of the Applicant to make Application to set aside the Arbitral Award herein.

23.Under the heading "Recognition and Enforcement of Awards" **section 36 (5)** reads as follows:

"In this section, the expression 'New York Convention' means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958 and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation."

Quite clearly therefore under the heading of "Recognition and Enforcement", the Kenya courts will enforce foreign arbitral awards as it is bound to do so under this section and the **NYC**. **Section 36(2)** of the Arbitration Act reads:

"(2). An international arbitral award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral

These provisions are similar to the provisions in Article IV of the NYC. In the enforcement of such an arbitral award, these courts shall be guided by the NYC. The effect of the Arbitration Act, especially Part VII, is to put a foreign award in the same position as a Kenyan award in relation to enforcement and

recognition. An international arbitration as described under **Section 3** of the Act is defined as;

"a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different states;

b) one of the following places is situated outside the state in which the parties have their places of business;

i. the juridical seating seat of arbitration is determined by or pursuant to the arbitration agreement; or

ii. any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state."

24. The grounds set out under the auspices of **Section 37(1)** of the Arbitration Act are the same grounds that the court would, under local jurisdiction, set aside an award. **Section 37(1)(a)(vi)** merely provides the basis upon which a court may refuse to recognize or enforce an award that has been set aside by a 'competent authority' which in defined as 'an authority in which, or under the law of which, that award was made.' The competent authority under which an application for setting aside a foreign award therefore, refers to the authority in which, or under the law in which, the award was made.

25. In buttressing this position and as per the Respondent's submissions herein, the court in **Gulf Petro Trading Co. v Nigerian National Petroleum Corporation** (supra) observed that:

"It would seriously undermine the functioning of the Convention if the fact that the opportunity for judicial review of an award in the primary jurisdiction has passed could open the door to otherwise impermissible review in a secondary jurisdiction."

Again in the case of **Empresa Columbiana se Vias Ferreas v Drummond Ltd** (supra) the court held that:

"The New York Convention contains no provision granting general jurisdiction to national courts to hear a recourse to set aside a foreign arbitral award. On the contrary, the Convention provides that one of the grounds on which contracting states may deny recognition or enforcement of a foreign arbitral award is the setting aside or suspension of the award by a competent authority of the country in which, or under the law of which, the award was made."

Similarly in **Gueyffier v Ann Summers Ltd** (supra) the Court of Appeal in California held that;

"The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief, See Conv Article V(1)(e)."

Under the NYC Article V, the recognition and enforcement of an award may be refused on grounds similar to those adopted under **Section 37(1)(a) and (b)** of our Arbitration Act. Under NYC Article VI, the application to set aside or suspend an arbitral award is made in relation to Article V(1)(e), similar to

Section 37(a)(vi) which provides *inter alia*;

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court in the state in which, or under the law of which, that arbitral award was made.

According to Justice R.S Bachawat of India in **Law of Arbitration and Conciliation, Fifth Edition, Volume 2** at page 2435 on the enforcement of an arbitral award, writes that;

"A Petition for enforcement of a foreign award can be filed in any part of the country where a party answerable in a claim of arbitration may have money or where a suit for recovery can be filled."

In **Halsbury's Laws of England, Fourth Edition (Relssue) Volume 2(3)** at paragraph 87, the learned authors state that in recognition and enforcement of awards under the New York Convention (to which Kenya has acceded to as above):

"A New York Convention award may, by permission of the court be enforced in the same manner as a judgment or order of the court to the same effect. Where permission is so given, judgment may be entered in terms of the award."

26. Accordingly and going back to the principles enunciated **Sulamerica** , I find that the law governing the substance of the dispute (the *Lex Causae*) is that of the United Republic of Tanzania and that the law governing the arbitration proceedings (the *Lex Arbitri*) is that of Sweden. Further, I find that the Contract as between the parties specified Sweden as the juridical seat of the arbitration. Obviously there is nothing to stop the parties agreeing that the seat of arbitration may be in a different national jurisdiction from that of the governing or applicable law of the Contract. In view of the transcript of the hearing proceedings in Paris, France exhibited to the Replying Affidavit of Engineer Mgani dated 22 June, 2012 as "ES 2", it seems that this is one of the rare cases where there is the third option being the *Lex fori* being French law. However it is also clear from the Award itself that the place and the seat of Arbitration is Stockholm, Sweden. Thus, despite the Contract applying Tanzanian law, I find and hold that the proper law of the Contract in which the arbitration is embedded is the law of Sweden which in terms of the NYC is the law of the primary jurisdiction and, to my mind, the Swedish courts are the appropriate authority under which the Applicant herein should be applying to set-aside the Award if it be so minded. That said, I have no doubt that the Applicant is correct in its submissions that **Section 35** of our *Arbitration Act (Cap 49, Laws of Kenya)* allows and provides for the setting aside, on the grounds therein detailed, of both domestic and international awards. What the Applicant has overlooked is the application of the law which the parties themselves have chosen in relation to the arbitral proceedings and for remedies as to the challenge of the Award made thereunder. As above, I find that Sweden is the country of the primary jurisdiction in relation to these proceedings not Kenya, which only has a secondary jurisdiction role in terms of recognition and enforcement of arbitral awards. Accordingly, I uphold the Respondent's Preliminary Objection dated 22 June, 2012 and I dismiss the Applicant's Application dated 24 April, 2012 with costs to the Respondent.

DATED and delivered at Nairobi this 18th day of December 2012.

J. B. HAVELOCK

JUDGE