



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MISC. APPLICATION. NO. 158 OF 2016**  
**IN THE MATTER OF THE ARBITRATION ACT, 1995**

**AND**

**IN THE MATTER OF AN APPLICATION FOR THE ENFORCEMENT OF AN  
INTERNATIONAL ARBITRAL AWARD**

**BETWEEN**

**OPEN JOINT STOCK COMPANY**

**ZARUBEZHSTROY TECHNOLOGY .....APPLICANT**

**VERSUS**

**GIBB AFRICA LIMITED..... RESPONDENT**

**RULING**

**Introduction**

1. This case involves a challenge to an arbitration award in terms of Section 37 of the Arbitration Act, 1995 ('the Act'). The award is an international award. It was made by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation seated in Moscow, Russia (" the ICAC").

2. I must quickly point out that the parties to the contest are Open Joint Stock Company Zarubezhstroytechnology, a corporate entity registered in accordance with Laws of the Federation of Russia (" OJSC") and Gibb Africa Limited, a company registered in accordance with the laws of Kenya ("GAL").

3. The award in question was published on 2 October 2015 by ICAC and qualifies pursuant to Section 3(3) of the Act as an international arbitration award.

**Background facts**

4. The transaction which gave rise to the arbitration had its origins in Libya, Africa while the proceedings which led to this case may be tracked back to Moscow, the seat of arbitration. The following is the background.

5. On 22 September 2009 a written agreement (“the Agreement”) was concluded between the Libyan branch of OJSC and the Libyan branch of GAL for the preparation and development of detailed engineering designs and working documents in the framework of a new railway line from the city Benghazi to Sirte in Libya. The Agreement detailed the parties’ respective obligations and responsibilities as well as timelines.

6. Article 11 of the Agreement provided for the resolution of any disputes arising out of or in connection with the Agreement by amicable settlement, failing consensus resolution was to be by the ICAC whose determination was to be final and binding on the parties.

7. A dispute arose with GAL alleging various violations of the Agreement by OJSC, including nonpayment of invoices. The dispute was duly referred to arbitration by ICAC. The claimant was GAL who filed its statement of claim on 20 May 2013. Pursuant to the arbitration rules of ICAC, GAL appointed its own arbitrator as well as an alternate arbitrator and so did OJSC. ICAC then appointed a chairman of the arbitral tribunal.

8. The arbitration was duly conducted before the ICAC-constituted tribunal. There were pleadings. There were submissions. Oral hearings were held on 20 October 2014 and 11 December 2014. A reasoned award (“the Award”) was then delivered on 2 October 2015. GAL was unsuccessful in its claim for € 73,356,757.94 which had been, inter alia, for the costs of executed works, interest, loss of profits and wrongful declaration of force majeure due to hostilities in the host country of Libya.

9. ICAC by the Award dismissed a portion of the claim (€ 46,794,790.39) and pursuant to ICAC Rules terminated the remainder portion (€26,561,967.55). The Award condemned GAL to pay costs of €670,675/=.

10. It is basically the award on costs which OJSC seeks to enforce and which has caused GAL some di(stress).

### **Local litigation history**

11. OJSC filed the Award in court on 6 April 2016. This was pursuant to Section 36(3) of the Act. The certified Russian version of the Award was accompanied with the English translation as well as the Agreement which contained the arbitration agreement. GAL was copied in the notification. On 13 June 2016, GAL retained counsel who duly filed a Notice of Appointment.

12. On 18 July 2016, OJSC formally applied for the recognition and enforcement of the Award. The application was served upon GAL on 19 July 2016.

13. On 22 July 2016, the court (Farah Amin J) ex parte granted orders for the recognition of the award. This prompted GAL to apply through counsel on 19 September 2016 for the recognition order to be reviewed and vacated. GAL was later to amend its application on 19 September 2016 to include a prayer that the court ought to refuse to recognize the award.

14. Upon prompting by the court, the parties agreed to vacate the orders of 22 July 2016 (as to recognition). This was on 20 January 2017. The court then directed that the Chamber Summons filed on 18 July 2016 for recognition and enforcement of the Award be heard simultaneously with GAL’s amended application dated 28/10/16 challenging any recognition. The parties were also granted leave to file further affidavits.

15. No less than nine founding and answering affidavits were filed by the parties between 17 May 2016 and 23 February 2017. Paul Karekezi swore all affidavits on behalf of GAL. Igor Sergeevich Smirnov and Maxim Alexandrovich Pyrkov deposed on behalf of OJSC on separate occasions. GAL also filed written submissions and grounds of objection on 23 February 2017 in support of its case.

### **OJSC’s case**

16. OJSC's case is straightforward. The case was urged by Mr. Cecil Kuyo.

17. OJSC contended that there is in existence a valid international arbitration award and Kenya as a signatory to the convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") is bound to ensure its efficacy by recognizing the award and enforcing it.

18. According to OJSC, all the requirements of national law had been met and the Award merited recognition and enforcement. In this regard, OJSC contended that it had met the requirements under Section 36(3) of the Act. A duly certified copy and duly certified translation of the Award in English had been filed. Likewise a duly certified copy of the arbitration agreement had also been filed in court on 5 April 2016.

### **GAL's case**

19. Mr. Kenneth Wilson argued GAL's case, which may be retrieved from the various founding affidavits as well as answering affidavits filed by GAL. GAL also filed grounds of opposition on 23 February 2017.

20. GAL contended that the Award was made without the necessary jurisdiction as the dispute was not within the contemplation of the parties. Additionally, GAL alleged want of jurisdiction as the parties to the dispute were never parties to the arbitration agreement. In this regard GAL pointed to the fact that the Agreement had been executed by Libyan branches of both GAL and OJSC.

21. GAL then contended that the Award could also neither be recognized nor enforced in Kenya as to do so would be contrary to public policy. In this regard, GAL asserted that it was never heard by the ICAC. Additionally, GAL stated it was never served with the Award.

### **Arguments in court**

#### *GAL Submits*

22. Mr. Kenneth Wilson in urging GAL's case drew largely from the various affidavits sworn by Paul Karekezi on behalf of GAL.

23. Mr. Wilson submitted that GAL was never in any agreement with OJSC. Firstly, it was submitted that the Agreement had been executed by the Libyan branches of both OJSC and GAL. Then Mr. Wilson added that the Libyan branch of GAL was in any event owned by Gibb Africa International Ltd ("GAIL") which was a separate entity from GAL with the latter being incorporated in Kenya while the former was registered in the Republic of Seychelles.

24. While conceding that GAL had commenced the arbitral process in May 2013, counsel submitted that the true owner of the claim was Gibb Africa International Ltd ("GAIL") who took over the process once GAL had on 24 June 2014 revoked the power of Attorney it had donated to the counsel who had appeared before ICAC. The counsel was Robert Schulze and the power of attorney had been donated on 19 October 2012. GAIL had appointed another counsel on June 2014 and took part in the proceedings.

25. Counsel faulted ICAC for continuing to sit in an arbitration pursued by GAIL while submitting that GAL had never appointed the law firms which appeared before the ICAC but rather GAIL had. Counsel then added that GAL had not even paid the arbitral tribunal's fees and that apparently a third party unknown to GAL had. For all these, Mr. Wilson stated that ICAC lacked the necessary jurisdiction.

26. As to the proposition that branches of a company were not legal entities and thus could neither bind the parent company nor a third party, counsel referred to the case of **Kenya National Highways Authority v Masosa Construction Ltd & Another [2015]eKLR**.

27. Mr. Wilson further submitted that enforcement of the Award would be contrary to public policy as GAL had not participated in the proceedings before ICAC and thus could not be condemned unheard. Mr.

Wilson contended that an award could be set aside on the basis of public policy if it was inconsistent with the Constitution or other laws of Kenya and contrary to justice. For this proposition Counsel relied on the case of **Christ for All Nationals v Apollo Insurance Co. Ltd [2002] 2 EA 366** before pointing to Article 50 of the Constitution and reiterating that GAL was being condemned unheard and this was contrary to public policy.

*OJSC submits*

28. Mr. Kuyo for OJSC reiterated that OJSC had satisfied all the requirements for the Award to be recognized and ultimately enforced. The translated version of the Award had been duly certified and filed in court and so too was the Agreement. Mr. Kuyo stated that the OJSC was simply pursuing its costs as awarded by the ICAC on an arbitration which had been initiated by GAL.

29. Counsel contended that GAL was a party to the Agreement from the get go, and no distinction could be made between the Libyan branch of GAL and GAL itself.

30. Mr. Kuyo also insisted that there was adequate evidence to demonstrate the participation of GAL in the proceedings before the ICAC and all the parties who appeared before the ICAC were only aware of GAL. Counsel drew the courts attention to fact that GAIL never contested the arbitral proceedings and indeed their appointed lawyer even objected to an attempt by OJSC to adjourn the proceedings. Counsel also urged the court to take note of the role played by one Paul Karekezi in appointing attorneys and executing documents then attempting to renege on the same.

31. Mr. Kuyo concluded his submissions by asserting that the ICAC had not acted outside its scope and further that no ground had been advanced to establish that the Award was contrary to public policy. For completeness, Mr. Kuyo stated that there was no arbitration agreement between GAIL and OJSC and further that neither GAIL nor GAL had challenged the Award in Russia.

### **Discussion and Determination**

32. I have read the two applications filed on 18 July 2016 (for adoption and enforcement of the Award) and 28 October 2016 (rejection or refusal of the Award). I have also read the various affidavits filed in support of or opposition to the applications. I have further considered carefully the submissions by counsel.

33. The sole issue before me is whether the Award as published on 2 October 2015 in Moscow Russia should be recognized and enforced in Kenya. Recognition and enforcement of an arbitral award may only be made if there is no request for its refusal or if the grounds advanced for its refusal are not proven to fall under Section 37 of the Act. Consequently, if I find for GAL then the application for recognition and enforcement must fail.

34. I must at the onset point out that OJSC has satisfied the requirements under Section 36 of the Act. I will return to this point later on in this ruling.

35. Before I turn to the grounds advanced for and argued for the refusal of the Award, I need point out as well that there were two corollary issues raised by GAL which I have to determine without the benefit of the parties' arguments. GAL pointed out in its application dated 16 September 2016 (and amended on 28 October 2016) that the dispute was not one "contemplated by or falling within the terms of reference to arbitration". GAL also lamented that it had not been notified of the Award. I will deal with these two issues first.

36. Whether the dispute that was lodged before the ICAC was one contemplated or falling within the ambit of the arbitration agreement can only turn on an interpretation of the arbitration clause itself. Article 11 of the Agreement contains the arbitration agreement. It is pursuant to this Article that GAL initiated the arbitration before ICAC. The English translation of Article 11 reads as follows:

***“In case of any dispute arising out of, or in connection with this contract, the contracting parties shall take measures to reach an amicable settlement.***

***Any dispute that cannot be amicably settled by the parties to the contract shall be referred to arbitration in accordance with the rules of the International Trade and Arbitral Tribunal of the Chamber of Commerce and Industry of the Russian Federation (Moscow). The award rendered by the arbitration commission, composed of three members appointed on the basis of set out rules, shall be final and binding for both parties to the contract. The place of arbitration shall be Moscow, Russian Federation. Arbitration proceedings shall be conducted in Russian. The applicable law to this contract and the settlement of disputes hereof shall be the Russian legislation.***

37. A liberal approach should always be given to the construction of arbitration agreements in relation to disputes covered by such agreements. This is in keeping with the tradition that courts should encourage arbitration and not fight it.

38. In **Fili Shipping Co. Ltd v Premium Nafta Products & Others [2007] UKHL 40**, Lord Hoffman stated as follows:

***“[13] In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen are inclined to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction”***

39. Absent any express provision excluding a particular grievance or dispute from arbitration; it is apparent that only the most forceful evidence of a purpose to exclude the claim from arbitration will help a party disputing the arbitration. Otherwise and adopting a liberal approach, any doubts should be resolved in favour of arbitration. Support for this legal proposition must obtain from Article 159(2)(c) of the Constitution which expressly enjoins courts and tribunals to promote alternative forms of dispute resolution, including arbitration.

40. I do also believe that a liberal approach in interpreting an arbitration agreement stands in better stead as parties do not ordinarily intend to have their disputes heard by or before two forums.

41. Thirdly, is the widely held view from a commercial perspective that it is comparatively easy for any business person who wants to exclude any particular dispute from arbitration or any dispute resolution forum to do so: see **AT & T Technologies Inc v Communication Workers of America 475 US 643 (1986)**.

42. In the instant case, GAL who initiated the arbitration did not avail to the court copies of the statement of claim or response to the claim to help identify the dispute. The Award however coherently and extensively outlines the dispute. Amongst other things GAL had claimed monies for work done and also alleged breach of contract.

43. I hold the view that in so far as the arbitration agreement urged for “*any dispute arising out of or in connection with*” the Agreement to be referred to arbitration, the dispute which was before ICAC was of the nature contemplated by the parties to the arbitration agreement. The arbitration agreement was drafted in a manner to cover literally all disputes arising from the Agreement.

44. It brings me to the question as to whether the GAL was notified of the Award.

45. Notification of an award, in my view serves two purposes. It brings to an end the arbitral process. Secondly, it also seeks to urge compliance prior to any recognition and enforcement proceedings by the successful party. By the same vein it prompts any challenge by the unsuccessful party. In the midst,

notification means that the timelines for challenge or recognition and enforcement are also triggered.

46. In the instant case, it is not clear when GAL's legal representatives were notified by ICAC of the Award. It is however clear that, locally, GAL was notified of the Award by the OJSC's Counsel on 2 June 2016 and urged to pay the amount of costs as decreed under the Award. The notification also alluded to the fact that the Award had been filed in the High Court for purposes of recognition (not enforcement). There is on record an Affidavit of service sworn by one Wycliffe Ihonya and filed on 11 January 2017 which confirms this fact of notification. I did not hear GAL to contest this Affidavit of service.

47. I find that GAL had been duly notified of the Award.

48. GAL has not challenged the Award. GAL has only resisted its enforcement/recognition locally.

49. GAL has also sought to resist the Award for want of jurisdiction on the part of the ICAC on the basis that GAL was not a party to the arbitration agreement and also not a party to the proceedings.

50. GAL's contention is that the arbitration agreement was executed by the Libyan branch of the GAL and therefore in accordance with Kenyan law GAL could not be bound. No specific Kenyan law was however pointed to the court to show that a branch (not a subsidiary or holding company) of a limited liability company is a distinct entity of the registered entity.

51. I must first point out that the award as well as the arbitration was an international one not domestic.

52. There exists international public policy which prevents an entity whether private or public from invoking restrictive provisions of its domestic or national laws in order to prevent *a posteriori* arbitration agreed between the parties. The case of **Gatoil –v- NIOC** reported in the 1992 Year book of Commercial Arbitration at page 587 is of relevance. The English High Court was confronted with arguments by a Panamanian company Gatoil that the other party to the arbitration agreement National Iranian Oil Company (NIOC) lacked capacity to arbitrate because of the provisions of the domestic Iranian Constitution. The court held that such objections could only be raised at the hearing of the arbitral proceedings but not before or after. When raised at inception or at the stage of recognition and enforcement it equates evading the arbitration and that would be contrary to public policy which itself encourages arbitration.

53. I must hasten to add that in view of the express provisions of the New York Convention at Article V (1)(a) which deals with capacity of a party to bind oneself by referring to personal (domestic law), the issue as to capacity is not to be taken lightly and so dismissed merely on the basis of international public policy to encourage arbitration. It is important for the party raising it to avail sufficient proof to show that capacity was lacking.

54. In the instant case, the Libyan branch of GAL was an entity dominated and controlled by GAL and no evidence has been tendered to reveal otherwise. It was certainly not a separate or independent entity in the form of a subsidiary and so when GAL's representative signed the Agreement it could only bind GAL and no other party. I am also not satisfied that GAL has availed sufficient proof that Kenyan law restricts or prohibits private entities from committing to international arbitration through their branch offices as was in this case. The cases referred to by GAL, namely **Kenya National Highways Authority v. Masosa Construction Ltd & Another [2015]eKLR** and **Mukesh Nanji Gala & 2 Others v. Heritage Enterprises & Another, Bombay High Court Arb. Petition No. 515 of 2013**, both dealt with situations where the parties seeking to enforce arbitration agreements were distinct entities. The two cases would thus be irrelevant for the purposes of this case.

55. It brings me to the question of public policy.

56. GAL contended that a recognition and enforcement of the Award of 2 October 2015 would be contrary to public policy as GAL would be condemned unheard having not participated in the arbitration itself.

57. Section 37(1)(b)(ii) of the Act provides that the recognition or enforcement of an arbitral award may be refused if the recognition or enforcement would be contrary to the public policy of Kenya. This resonates well with Article V(2)(b) of the New York Convention which provides that the recognition and enforcement of an award may be refused if the competent authority in the country where recognition and enforcement are sought finds that “the recognition or enforcement of the award would be contrary to the public policy of that country”.

58. Dubbed the ‘unruly horse’, much ink has been spilled over the foundation and the content of public policy. Locally, the notion was aptly captured by Ringera J (as he then was) in the case of **Christ For all Nationals v. Apollo Insurance Co. Ltd** [2002] 2 EA 366 when he stated as follows:

***“although public policy is a most broad concept incapable of precise definition... an award could be set aside under Section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was***

***a) Inconsistent with the Constitution or other laws of Kenya, whether written or unwritten or***

***b) Inimical to the national interest of Kenya or***

***c) Contrary to justice and morality”.***

59. The issue before me no doubt has nothing to do with setting aside an award under Section 35(2)(b)(ii) of the Act but it is to be noted that the recognition or enforcement of an award will also be refused if the court finds that such recognition or enforcement would be contrary to the public policy of Kenya. Ringera J’s words are thus perfect guidance as to what public policy entails.

60. I may perhaps add that public policy, in my view, generally refers to the set of socio-cultural, legal political and economic values, norms and principles that are deemed so essential that no departure therefrom can be entertained. Public policy acts as a shield for safeguarding the public good, upholding justice and morality and preserving the deep rooted interest of a given society.

61. It would also be apt to note that due to a risk of local manipulation to avoid international awards, it is essential that, when raised to resist recognition or enforcement, public policy is interpreted in a restrictive manner. It cannot be generalized but rather a party seeking to rely on it must show a well-settled and clear public policy so that a losing party is not seen to be merely engaged in a retaliatory exercise.

62. *In casu*, GAL contends that it would be contrary to the provisions of the Constitution, in particular Article 50, for the Award to be recognized and enforced as GAL never participated in the arbitral process. It is also stated that it would be contrary to justice and morality to enforce the award. GAL asks the court to safeguard the basic right of an individual to be heard as enshrined under Article 50 by refusing to recognize the Award.

63. It is a common cause that the arbitration leading to the now impugned Award was initiated by GAL. It filed the statement of claim. It later however revoked the Power of Attorney that it had been given to its Attorney (Counsel) before the ICAC. GAL says that GAIL later appointed another attorney to appear in the proceedings. The Award reveals that several attorneys appeared before the ICAC including the Attorneys appointed by GAIL. The attorneys numbering six were appointed on different dates. They are reflected as appearing for GAL. There is indication that the claim proceeded with GAL as the claimant. There is evidence that GAL was afforded opportunity to be heard and was heard. There is no indication and no evidence was availed that GAL withdrew or even attempted to withdraw the claim. Nowhere is GAIL reflected as a party to the proceedings.

64. GAL has through its affidavit filed on 13 January 2017 submitted that it was GAIL which was the parent company of the Libyan branch of GAL. A part from the deposition in the affidavit there is nothing documentary to support such a contention.

65. I hold the view that GAL participated in the arbitral proceedings having commenced the same and that it is only by way of an afterthought, having lost the claim that GAL now seeks to bring in GAIL as the original true claimant. My view could have been easily swayed if there ever had been an attempt to withdraw the proceedings or even to amend the claim.

66. I have found that GAL participated in the proceedings. I must however address the relationship between arbitration and the Constitution in view of the reference by GAL to Article 50 of the Constitution.

67. Firstly, arbitration entails the exercise of a private rather than public power by the arbitral tribunal as well as the parties. Arbitration is consensual to the parties and provides a process. Intrinsicly, all rules of natural justice including necessity of impartiality and hearing must be heeded even in the private process.

68. The language used under Article 50 of the Constitution however points to public tribunals and forums. Article 50(1) stipulates that :

***“every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”*** (emphasis mine)

69. In my view, arbitral forums do not qualify to fall under Article 50(1). Arbitral forums are always conducted in private and even though arbitrators are expected to conduct themselves in a judicial manner, they must not observe the court style which is what Article 50 contemplates. Thus, whereas, the constitutionality of any arbitration forum is never in question due to Article 159(2)(c) of the Constitution and whereas any arbitral forum must never forget to apply the basic rules of natural justice, the extent of both Article 47 ( as to fair administrative action) and 50(1) of Constitution cannot be fetched on an arbitral process.

70. With regard to recognition and enforcement of the award, our law is consistent with the New York Convention. The court need only be satisfied that there existed a binding and consensual agreement to resolve the dispute by arbitration and that an award has been published. The court then must see the award and a translated version , where it is not in English. The party seeking to enforce then does no more.

## **Conclusion**

71. The duty of the court should be to encourage and support international arbitration or arbitration generally. Avoidance of the process through the court ought to be in exceptional circumstances duly proven to fall within the limited prescription of the Arbitration Act. The limited instances where the court is allowed to interfere must be so cautiously invoked and approved by court. The evidence leading to the interference must be convincing enough and where there is doubt; progress of the arbitral process is to be favoured. The onus of showing good cause within the meaning of sections 35 and 37 of the Arbitration Act is not easily dischargeable. There is a pro-enforcement theme which runs through the New York Convention and which must be transposed domestically as well.

72. I end by summarizing my findings.

73. I find that the arbitral process was commenced by GAL. I also find that GAL participated in the arbitral process. I find that GAL has not availed sufficient proof for me to find that GAL was not a party to the arbitration agreement. I also find and hold that, in the circumstances of this case, recognition and enforcement of the Award of 2 October 2015 would not be contrary to public policy. OJSC has done enough to convince me that the Award ought to be recognized and enforced.

## **Disposal**

74. I dismiss GAL's application.

75. I allow OJSC's application. The Award published in Moscow, Russia on 2 October 2015 is to be recognized as binding on the parties under the laws of Kenya as well and is to be enforced as against GAL accordingly.

76. Each party will bear its own costs of both applications.

77. Orders accordingly.

**Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of March, 2017.**

**J. L. ONGUTO**

**JUDGE**