



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**MISC. CIVIL CASE NO. 331 OF 2015**

**TRACER LIMITED.....APPLICANT**

**-VERSUS-**

**SGS KENYA LIMITED.....1<sup>ST</sup> RESPONDENT**

**OLUFUNKE ADEKOYA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. SGS Kenya Limited, (herein “the 1<sup>st</sup> Respondent”), filed a preliminary objection, the subject of this ruling basically on the ground that the Honourable Court has no jurisdiction to hear and determine the chamber summons application dated 17<sup>th</sup> July 2015, filed by Tracer Limited (herein “the Applicant”).

2. The said Application is seeking to set aside the international arbitral award (herein “the award”) issued by Olufunke Adekoya (herein “the 2<sup>nd</sup> Respondent”) on 20<sup>th</sup> April, 2015 in Paris, France. The Applicant also prays for the costs thereof.

3. The Preliminary objection is based on the grounds that:

*i. The Agreement which was the subject of the Arbitration proceedings provided that it shall be governed by and interpreted in accordance with the substantive laws of England.*

*ii. All disputes arising out of or in connection with the Agreement will be finally settled under the Rules of Arbitration of the International Chamber of Commerce and the seat of arbitration proceedings will take place in Paris, France.*

*iii. Consequently, the Court which has no jurisdiction to hear an Application for setting aside the arbitral award in the French Court.*

4. The 1<sup>st</sup> Respondent averred that the Court can only exercise secondary jurisdiction in relation to the award at the time of refusal to recognize or recognize and enforce it but it has no jurisdiction to set it aside. The case of; **Kundan Singh Construction Limited vs Tanzania National Roads Agency, Misc. Civil Cause No. 248 of 2012**, was cited in support thereof.

5. The 1<sup>st</sup> Respondent also argued that under section 37(1) of the Arbitration Act of Kenya, ( herein “the Act”), the Court can only deal with an Arbitral Award that is binding; or suspended by the Court of the State in which or under the law of which the award was made. The case of **Rogers Shashoua & 2 Others**

v Mukesh Sharma (2009) EWHC 957(COMM) was cited to support that argument. In that case it was stated that:

*“by agreeing to the seat, the Parties agree that any challenge to an interim or final award is to be made only in the Courts of the place designated as the seat of the arbitration”.*

5. Further reliance was placed on the case of; Roger Shashoua & 2 others vs Sharma (2009) EWHC 957, where the Court held that:

*“an agreement as to the seat of arbitration bring in the law of that country as to the curial law and is analogous to an exclusive jurisdiction clause. Not only is there an agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place of designated as the seat of arbitration”.*

6. The 1<sup>st</sup> Respondent cited Article 5 of New York Convention, to argue that its provisions are similar to section 35 of the Act, and only empowers the Court to enforce or refuse to enforce an international arbitration award but not set it aside.

7. However, the Preliminary objection was opposed by the Applicant on the grounds that, the contract, which forms the subject matter of the relationship between the parties, was founded on the law of Kenya. The case of S.G.S. Societies Generale De Surveillance S.A Kenya &another vs Tracer Limited & Others HCC No. 54 of 2012, was relied on to argue that indeed the Courts in Kenya have acknowledged they have jurisdiction to entertain a matter where the seat of arbitration is outside its jurisdiction. It was further submitted that for the Court to lack jurisdiction, it should have been expressly ousted by the provisions stated by Parliament.

8. The Applicant argued that there is no distinction between Section 7 of the Act which allows the Court to issue interim relief and/or measures, pending the referral of the matter to Arbitration and Section 35 of the Act which deals with setting aside of arbitral award. That, the only distinction between an International and domestic Arbitral Award is found under Section 3 (2) of the Act. The Court should therefore interpret the Act liberally and in the plain language.

9. The Applicant further argued that the setting aside of an Arbitral Award is not based on the International or domestic forum. The Court’s attention was drawn to section 37(a) VI of Act, by the Applicant who argued that there is a difference between the seat of Arbitration and the setting aside of an Award and that the New York Convention distinguishes between the State in which the Award is made and the State of the law applicable. Thus the setting aside of an international award can be done outside the seat of arbitration and the in the Country of the applicable law.

10. The case of Kundan Singh Construction Limited vs Tanzania National Roads Agency (supra), cited by the Respondent was distinguished on the ground that it is based on different facts as there was no reference to the law of Kenya, and therefore it is merely persuasive.

11. The Respondent however responded by arguing that contrary to the Applicant’s submissions that there two sets of laws herein, namely the law of Kenya and England, the award and the Chamber Summons Application does not refer to the law of Kenya, as one of the grounds of setting aside of the award. The Respondent maintained that the law governing the main contract should take precedence to the law cited in the Appendix to the contract.

12. The Respondent further argued that, the Act defines both “Arbitration” and “International Arbitration”, and the two definitions should be read together with Sections 35 and 37 of the Act to assist the Court in determining the issue of ousting its jurisdiction.

13. After filing the respective documents to the preliminary objection, the parties agreed to dispose it of the Application by filing submissions, which were subsequently highlighted. I have considered the

arguments and submissions tendered and I find that the main issue raised for determination is whether the Court has the jurisdiction to hear the Application seeking to set aside the foreign Arbitral Award herein, and whose the seat of arbitration thereof was outside the jurisdiction of the Court.

14. I wish to start by considering the definition of International Arbitration. Section 3 (3) of the Act defines the same as follows:

***“An arbitration is international if—***

***(a) the parties to an arbitration agreement have, at the time of the conclusion of that 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 place of arbitration if determined, 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”***

15. The saving grace herein is that there is no dispute that the subject Arbitration and the resultant Award are a subject of International arbitration. However as aforesaid the issue is whether the Court has jurisdiction to set it aside. Section 35 of the Act, which deals with the setting aside of an award. It provides as follows:

***“(1). Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).***

***(2) An arbitral award may be set aside by the High Court only if—***

***(a) the party making the application furnishes proof-***

***(i) That a party to the arbitration agreement was under some incapacity; or***

***(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the law of Kenya; or***

***(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or***

***(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided 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; or***

***(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or***

***(b) the High Court finds that-***

**(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or**

**(ii) the award is conflict with the public policy of Kenya”**

16. The key question therefore is whether the words an “arbitral award” under section 35 of the Act refers to a domestic and/or international arbitral award. That leads to the definition of an arbitral award. Section 3 of the Act defines an arbitral award as:

**“ arbitral award” means any award of an arbitral tribunal and includes an interim arbitral award”**

17. These provisions do not clearly answer the question. However in my considered opinion, applying the literal meaning thereof, the arbitral award envisaged under section 35 of the Act will be deemed be both domestic and international arbitral award. While considering the provisions of section 35 of the Act in the case of, **Kundan Singh Construction Limited (supra)**, the Court observed as follows:

**“ That said, I have no doubt that the Applicant is correct in its submissions that Section 35 of the Arbitration Act (cap 49, Laws of Kenya) allows and provides for setting aside, on the grounds therein detailed, of both domestic and international awards.”**

18. If that position is correct, then the next issue to consider is whether despite the provisions of section 35 of the Act, the Court has jurisdiction to set aside an Arbitral Award where the seat of Arbitration is outside its jurisdiction. The Respondent argued that the seat of Arbitration determines the law of the Country where a challenge to an Arbitral Award may be made. Reliance was placed on the decision in the case of; **C v D (2007), EWHC 154**, where it was held that:

**“ the seat of arbitration brings in the law of that country as the curial law and it is analogous to an exclusive jurisdiction clause. Not only is there an agreement to curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the Arbitration, so that by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made by the courts of the place designated as the seat of arbitration”**

19. The question therefore is what law is applicable in setting aside the Arbitral Award herein? Is it the law that governs the substance of the contract (the *lex causae*) or the law governing the proceeding (the *lex arbitri*), or the law of the State of juridical seat of arbitration. In the same vein which Courts have the jurisdiction to entertain the Application seeking to set aside the Arbitral Award?

20. The above issues are informed by the fact that, in the course of contracting the parties may agree on the law applicable to the substance of the contract and to settlement of any dispute that may arise. If the arbitration is identified as the dispute resolution mechanism, then in most cases the juridical seat of arbitration and the rules applicable will also be agreed on.

21. As stated by Lord Mustill in the case of; **Channel Tunnel Group Ltd vs Balfour Beatty Ltd (1993) A.C. 334**, that:

**“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”**

22. In relation to challenge of an International Arbitral Award and considering the comparative law on

this subject, I find that generally an unsuccessful party in Arbitration proceedings who seeks to avoid the award has three options;

- i) *appeal against the award, if this is permitted under the applicable law or the arbitration rules;*
- ii) *challenge the award in the courts of the place where the award was made;*
- iii) *wait until the successful party initiates enforcement proceedings before a court at which stage it can seek to resist enforcement.*

23. In the third case, the initiative is in the hands of the successful party while in the first two cases the initiative lies with the unsuccessful party. In either case, it is the unsuccessful party that invokes the grounds for challenging the validity of an Award.

24. In the third case the forum selection is a matter for the successful party, while in the first two cases the forum is normally the place where the award is made. Article 34 Model Law provides that after the Award has been made, a party may apply to Court *in the place of arbitration* to set it aside. It is understood that review of awards by the Courts at the seat of arbitration *promotes efficiency in international arbitration by enhancing the trust of the parties in the process.*

25. It is also internationally accepted that parties who wish to challenge an award should exhaust possibilities for review of the award by *the tribunal that rendered it*, (England, Arbitration Act section 70[2]), or *the institution within which the award* was made, (ref; GAFTA rule 12(6); ICSID Rules Articles 50, 52, 55). This includes seeking correction and interpretation of the Award as appropriate. Thus challenges must be filed with a Court with jurisdiction to hear the Application. This is normally the Court at the seat of arbitration, (unless otherwise agreed by the parties). It has been suggested that it is unnecessary and unhelpful to exercise this freedom to choose another Court. (Redfern and Hunter, International Commercial Arbitration, paragraph 9- 45). This is the position adopted in the Model Law, Articles 34, 1 and 6) and the majority of Arbitration laws.

26. It follows that Applications made to Courts, outside the place of arbitration are generally rejected. Austrian Oberster Gerichtshof, 22 October 2001, 1, OB 236/01, 197 2002), the Court discussed the issue of whether an Arbitral Award made in China could be challenged in Austria on the grounds of Austrian laws or New York Convention; and found that it lacked jurisdiction. There are, however, a few cases where the Courts have assumed jurisdiction to hear challenges of Awards rendered abroad on the basis that the law of this State was applicable to the merits. (Hitachi Ltd et al (Japan) v Mitsui & co (Germany) v Rupali polyester(Pakistan), (2000) XXV YBCA 486 (Supreme Court)

27. Generally therefore most laws provide for challenge of Awards at the place it was made, while parties may modify in the Arbitration Agreement the extent to which such challenge proceedings are available to their arbitration. It is noteworthy that *challenge is the only remedy a party has against an award in the Courts of the place where the award was made. Enforcement may still be insisted in other courts.*

28. In the instant case the parties entered into a Reseller Agreement and provided under clause 9.1, *that the Agreement is governed by, and interpreted in accordance with substantive Laws of England, exclusive of any rules with respect to conflicts of laws Under clause 9.2 the Agreement provided that all disputes arising out of or in connection with the present agreement will be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The parties agreed that communications with external and in-house legal counsel are fully protected by attorney-client privilege and the proceedings would take in Paris (France) and be conducted in English.*

29. From the above provisions, law governing the Contract or Agreement between the Parties was clearly spelt out as the Laws of England; and stated the disputes would be governed by the Rules of Arbitration of International Chamber of Commerce (ICC) and the seat of Arbitration being in Paris, France.

30. However, the Applicant relies on Clause 12 of the Appendix 11 to the Agreement entitled the “General Conditions of Service and Sale for Kenya Revenue Authority Electronic Cargo Tracking System (ECTS).” This clause 12 provides that:-

*“This contract shall be governed by the Laws of Kenya and all disputes arising out or in connection with these General Conditions or the Contract shall be finally settled under the rules of arbitration of the Chartered Institute of Arbitration, Kenya. The seat of Arbitration shall be Nairobi, Kenya.”*

31. The question therefore is which Contract is governed by this Clause 12. I note that Clause 1 of the said Electronic Cargo Tracking System (ECTS) makes reference to a “Client” and the client is defined as follows:-

*“Client” means any entity company or individual requesting the purchase of Equipment or services from SGS.”*

32. I also find the Parties in this matter are not named as the sole Parties to the Contract referred to under Contract Clause 12 referred to herein. I have also had the benefit of considering the Award rendered herein. It makes reference to the Parties therein as SGS (K) Ltd, and Tracer Ltd under paragraph 1 of the Arbitral Award, the Parties to the Arbitration proceedings are identified as SGS Kenya Ltd, (the Claimant) and Tracer Ltd. (the Respondent). Throughout the proceedings reference is made to paragraph 2.3, 2.4, and 2.5, of the Reseller Agreement. There is no reference to Clause 12.

33. In the decision rendered by the Arbitrator he recognizes his jurisdiction by making reference to Article 9.2 of the Reseller Agreement. He also recognizes and finds that the Teaming Agreement is connected with the Reseller Agreement and the Parties participated in the proceedings, which were conducted in accordance with the provisions of Article (9.2). In that case the provisions of clause 12 of the General Conditions of Service cannot override the provisions of Article 9.2 of the Reseller Agreement.

34. As aforesaid the Applicant is seeking to set aside the Arbitral Award and therefore basically resisting its enforcement. The law outlined above clearly indicates that the seat of Arbitration is the most preferred forum for setting aside an international award. The reasons is clear, as aforesaid other than promote efficiency in the international arbitration by enhancing the trust of the Parties in the process, the Arbitrator who considered the dispute is well versed with the substance of the matter to consider the grounds for setting aside the Arbitral Award.

35. In the case of; **Channel Group v Balfour Beatty Ltd.[1993] Adj.L.R. 01/21 Adjudication Law Reports. Typeset by NADR. Crown Copyright reserved. 12,** the Court observed as follows:

***“But a national court may also be invited, as in the present case, to play a secondary role, not in the direct enforcement of the contract to arbitrate, but in the taking of measures to make the work of the chosen tribunal more effective.”***

36. The Applicant referred the Court to the case of; **S. G. S. Societies Generale De Surveillance S.A. Kenya Ltd & Another v Tracer Ltd & Others HCCC No. 54 of 2012.** I have had the benefit of reading that authority and I note that in that Case the Court was dealing with the issue as to whether it had Jurisdiction under Section 7 of the Act to issue “interim relief”. This application is dealing with the question of jurisdiction to set aside a foreign Arbitral Award. Apparently the Law firm appearing for the Applicant herein, is the same firm that appeared for the Respondent in that matter and argued that although the Court has jurisdiction to issue interim relief, under Section 7 of the Act, that argument did not arise in the given circumstances similar to this case and in International Arbitration.

37. The Honourable Court in considering the issue of grant of interim relief, relied on the case of; **Tononoka Steels Ltd v The Eastern and South Africa Trade and Development Bank (Civil Appeal No. 255 of 1998** and concluded that, it was bound by the decision of the Court of Appeal therein that, the

Court has residual jurisdiction to deal with *peripheral matters* reserving the jurisdiction to deal with *substantive disputes and differences to the International Chamber of Commerce sitting in London*. The question is: Is the setting aside of the award herein peripheral matter? I don't think so.

38. Apparently the Court in the above decision distinguished the Channels case (*supra*), on the ground that in that case the Court's power was curtailed by the law of the land in relation to that particular kind of Contract. The Court then ruled in the case of; ***S. G. S. Societies Generale De Surveillance S.A. Kenya Ltd*** (*supra*) that Section 7 of the Act does not limit or exclude International Arbitration. I agree with that finding but still the Court of Appeal was quite clear that the substantive matters are better dealt with by the Court with the primary jurisdiction.

39. The Respondent relied on the case of; ***Kundan Singh Construction (supra)***, in which the Court dealt with the issue similar as herein that is, whether it had jurisdiction to set aside an International Arbitral Award and arrived at the conclusion that the Court has no jurisdiction. The Court stated as follows:

***“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 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, on 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 there under. 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<sup>nd</sup> June, 2012 and I dismiss the Applicant's Application dated 24<sup>th</sup> April, 2012 with costs to the Respondent”.***

40. I entirely concur with the finding of the Court above. In conclusion of this matter, I find that the Parties herein agreed that the Agreement which formed the subject of Arbitration proceedings is governed and interpreted in accordance with the substantive law of England. It was agreed all disputes would be determined under the rules of International Chamber of Commerce. The seat of arbitration was agreed on as Paris, France. The reference to Kenyan law in the Appendix to the main contract cannot override these provisions. The Applicable law establishes the primary jurisdiction of the Court.

41. The upshot of all this is that I uphold the Preliminary Objection by the Respondent and hold that the Court has no jurisdiction to hear the Chamber Summons Application dated 17<sup>th</sup> July 2015, seeking to set aside the Arbitral Award issued on 20<sup>th</sup> April 2015. The costs of the Preliminary objection are awarded to the Respondent.

42. Orders accordingly.

**Dated, delivered and signed in an open Court on 18<sup>th</sup> day of October, 2017 at Nairobi**

**G.L. NZIOKA**

**JUDGE**

**In the presence of:**

Mr. Ndolo for Kilonzo for the Applicant

Ms. Muthee for Wilson for the 1<sup>st</sup> Respondent

No Appearance for the 2<sup>nd</sup> Respondent

Teresia ..... Court Assistant