REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Petition 390 of 2006

NEDERMAR TECHNOLOGY BV LIMITED ..... PETITIONER

VERSUS

THE KENYA ANTI-CORRUPTION COMMISSION ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

JUDGMENT

The Petition before the court was filed on 14th July 2006 and seeks declarations and orders as set out.

The Petitioner is apparently a foreign company and the 1st Respondent is the Kenya Anti Corruption Commission hereinafter called "*KACC* or Commission" and the second respondent is the Honourable the Attorney General of Kenya.

The Factual background to the subject matter of the petition is that by an agreement dated 19th November, 2002 between the Government of the Republic of Kenya (hereinafter referred to as "*GoK*") as the Employer and the petitioner as the contractor *GoK* contracted the petitioner to design, execute and complete the words specified in the contract comprising inter alia an Integrated Command Control Centre for the Armed Forces of the Republic of Kenya code named "Project Nexus."

The Respondents did not dispute that the Petitioner has executed all the contracted works and handed over the project to GoK in September 2005. *GoK* has not raised any issues touching on the performance of the contract in these proceedings or at all.

Parties before me are in agreement that"

(i) *GoK* defaulted in making the contractual payments to the Petitioner.

(ii) That the Petitioner did file arbitration proceedings in the Hague on 1st March 2006 pursuant to the arbitration clause in the Agreement between the parties.

(iii) That *GoK* is taking part in the arbitral proceedings in the Hague and has filed a defence and that the arbitration proceedings are at an advantaged stage.

THE PETITIONERS COMPLAINTS AGAINST THE 1ST RESPONDENT

(1) By an ex-parte notice of motion dated 24th April 2006 the 1st Respondent moved the Chief

Magistrate's Court at Kibera to issue orders requiring the Petitioner's consultants *Andrew Bernard and Pritpal Singh Thethy* to surrender their passports to the 1st Respondent for an indefinite period. The order was issued ex-parte and continues to subsist to-date. In support of its application in the lower court the 1st Respondent KACC deponed that it was investigating "*the contract for the construction and installation of equipment for the National Military Command Centre code named "Project Nexus" for the Department of Defence by Nedemar Technology B V of Netherlands*".

(2) KACC has not denied that it has seized the Petitioner's assets including a sum of Kshs 900,000 which it continues to hold and that the Commission did also instruct the Ministry of Finance not to pay the Petitioner as required under the terms of the contract.

(3) *KAAC* has sought to intervene and/or interrogate the Petitioner's consultants, subcontractors and employees regarding Project Nexus. During the intervention and/or interrogation *KACC* has sought details relating to the scope and/or parameters of the Project Nexus in a clear attempt to criminalize the Agreement between the *GoK* and the Petitioner.

MAJOR TERMS OF THE AGREEMENT BETWEEN the GOK AND THE PETITIONER:

Clause 67.1 states:-

"If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with or arising out of the contract or the execution of the works whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract including any disputes as to any opinion, instruction, determination, certificate or valuation the parties shall in good faith attempt to resolve such dispute. If such resolution is not possible within a reasonable time either party may refer the matter to arbitration as hereinafter provided."

Clause 67.3 states:-

"Any dispute in respect of which amicable settlement has not been reached within the period stated in sub-clause 67.2 shall be finally settled unless otherwise specified in the contract under the rules of the United Nations Commission on International Trade Law or but only with the consent of the contractor in accordance with the 'Arbitration Act (No11 of 1995) by one or more arbitrators appointed under such Rules. The said arbitrators shall have full powers to review any *decision, opinion instruction determination certificate or valuation.* Arbitration may be commenced prior to or after the completion of the works provided that the obligations of the Employer and the contractor shall not be altered by reason of the arbitration being conducted setting the progress of the works."

Clause 73.1 of the contract provides:-

"The contractor and the Employer shall treat the details of the contract and any documents specifications or plans ancillary thereto as private and confidential save insofar as may be necessary for the purpose of the contract thereof and shall not publish or disclose the same to any third party or any particulars thereof in any trade or technical paper elsewhere without the prior written consent of the other party. The parties hereto further acknowledge that in view of the nature of the contract, plans, specifications and drawings referred to are not annexed hereto but have been supplied in a separate document. The parties hereto further agree that the contractor may not discuss or disclose any details of the contract with any governmental departmental ministry or individuals other than the end-user notified to them pursuant to the provisions of clause 2.1 hereof."

Clause 75.1 states:-

"The Employer agrees that this contract and the transaction contemplated herein constitute a commercial activity and that this contract and the transactions contemplated herein are subject to the domestic private and commercial law, and not international or public law and the Employer hereby irrevocably waives any right of immunity which it or any of its property has or may acquire in respect of its obligations hereunder

and irrevocably waives any immunity from jurisdiction suit, judgment, set off execution, attachment of other legal process (including without limitation relief by way of invitation and specific performance) to which it or any of its property may otherwise be entitled in any suit or proceeding arising out of or relating to the contract save and except as limited by the Government Proceedings Act Chapter 40, Laws of Kenya."

FIRST SCHEDULE TO THE CONTRACT BETWEEN GOK AND THE PETITIONER CONTAIN THE FOLLOWING STIPULATIONS

Clause 2.1

"As at the date of this contract he Employer shall be deemed to have received a Legal Opinion issued by the Attorney General of the Republic of Kenya to the effect that

2.2: The Employer has the power to enter into the Agreement and has taken all necessary actions that are required for the execution delivery and performance of this Agreement.

2.3: This Agreement constitutes a legal valid and binding obligation of the Employer enforceable in accordance with its terms under the laws of the Republic of Kenya.

2.4: The Employer shall have obtained all necessary licenses, authorizations, requisitions, approvals, consents and exemptions required by and in respect of any governmental authority or agency of or within the Republic of Kenya, and has duly effected any other declarations, filing or registrations with any governmental authority or agency which are required or appropriate in connection with the execution, delivery and performance of this Agreement and the use of any equipment or services either within or outside of the Republic of Kenya."

Further representations by *GoK* as per the contract include *Clause 6.2.*

"That the Employer has the power to enter into the contract to perform all its obligations hereunder and that all necessary actions has been taken to authorize the acceptance of such terms by the Employer in the manner in which they are so accepted."

Clause 6.3

"That when accepted by the Employer in the manner referred below the terms and conditions set out in this contract will constitute obligations legally binding and enforceable in accordance with their terms."

Clause 6.4

"That the performance by the Employer of its obligations contained in this contract will not contravene any law of Kenya (or any other country where the Equipment and services are to be installed supplied or provided by agreement mortgage charge or other arrangement to which the Employer is a party or which is or may be binding on the Employer or any of its assets."

Clause 6.6

"That the Employer irrevocably waives all immunity to which it may be or become entitled in relation to that contract, including immunity from jurisdiction enforcement prejudgment proceedings injunctions and all other legal proceedings and relief both in respect of itself and its assets, and consent to such proceedings a relief"

Clause 6.7

"The Employer is subject to civil and commercial law with respect to its obligations under the contract and that the execution delivery and performance of any or all the terms of this contract by the Employer

constitute private and commercial acts rather than governmental or public acts and that the Employer and its property do not enjoy any right of immunity from the suit, set off or attachment or execution or judgment in respect of any or all of its obligations under the contract and that the waiver contained in the contract by the Employer of any such right of immunity is irrevocably binding on the Employer.

The court has taken into account the written submissions of all the parties including the authorities cited.

The court considers that the following, constitute the principal issues for determination.

(A) Does this court have jurisdiction. Can a commercial transaction as set out in the contract have criminal elements and do criminal elements prevent it being commercial and where does the commercial transaction begin and where does the criminal transaction start. Is *KACC* taking over the arbitral body's work or are the intended investigations intended to vindicate criminal law or is *KACC* bound by the Attorney General and the *GoK* representations made in the contract pertaining to civil obligations of *GoK*?

(B) What is the role of criminal law in international contracts?

(C) What is the legal effect of an arbitration agreement in the contract?

(D) What is the scope of the arbitration and does it include determination of illegality?

(E) Was the Attorney General correct in law in excluding public law by contract?

(F) What is the effect of the exclusion of public law on the parties to the contract?

(G) What is the effect of the exclusion of public law on the contract itself?

(H) If the exclusion provision is illegal, is it severable from the rest of the contract?

(I) If the exclusion provision is not severable is the contract void as per this country's public policy.

(J) Does the arbitral clause survive a void or illegal contract?

(K) Who is finally empowered by the contract to make determination on performance, illegality, corruption and fraud etc?

A

JURISDICTION

(1) This court finds that it has jurisdiction since the subject matter "Project Nexus" is based in its territory. Property rights under the Constitution are not restricted to citizens. Thus, the right of protection of law under s 70 should be accorded to all. Similarly property rights under s 75 are not restricted to citizens only. However, there are other fundamental rights under Chapter 5 which have been deliberately restricted to citizens and which cannot be enjoyed by foreigners. With respect, the arguments of both the Attorney General and *KACC* on jurisdiction, are based on misapprehension of the relevant constitutional provisions and the law and in particular the arbitration law.

(2) The second reason for this court to assume jurisdiction is set out in s 10 of the Arbitration Act 1995 of Kenya as follows:-

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

It follows therefore it is for the court, as a matter statute and the requirements of both domestic and international arbitration to uphold the autonomy of the arbitral process.

International Arbitrations are governed by the Arbitration Act - see s 2 of the Act. The Court has a responsibility to ensure that this is done.

(3) Under sections 7 and 18 of the Arbitration Act 1995, this Court is empowered to give interim relief both before and after the commencement of the arbitral process. Some of the orders sought in this petition falls squarely on this provision.

(4) Under the conflict of law rules all higher courts have an "*inherent jurisdiction or residual discretion*" to apply the public policies of their states and to clarify or more properly interpret the letter of their domestic laws and procedural rules. This Court is entitled to consider whether or not the public policy of Kenya has been violated or likely to be violated.

(5) The 1995 Arbitration Act is modeled on the *UNICITRAL MODEL LAW* and it is now generally accepted worldwide, that Arbitration does more than any other modern topic, transcend the territorial boundaries of states in a way never foreseen only a few decades ago. There are now over 34 states who have modeled their arbitration laws on the Model Law. The state courts of these countries will have almost similar roles and standards in arbitration matters. Courts have a supportive role in the arbitral processes. On the issue of jurisdiction the court finds it has jurisdiction under any of the five (5) grounds set out herein.

B

CRIMINAL LAW AND INTERNATIONAL CONTRACTS

Common sense suggests that a commercial transaction can give rise to a criminal activity both before and after commencement. It would therefore be contrary to public policy to prevent fair and genuine investigations against individuals and companies relating to a transaction including a probe on the individuals involved. However, what is still a mystery to this court, is that *KACC* plans or intends to carry out general investigations touching on performance and value of the contract and not any alleged criminal elements against any individuals or companies attached to the Contracting parties. According to their declared intentions they propose to look into the performance or non performance or execution of the contract including valuations, instructions, drawings and specifications just to outline a few. Yet under the terms of the contract any dispute on this (and the *GoK* has presumably filed a defence in the Hague setting out all its grievances) is a matter for the arbitral tribunal as per the arbitration clause in the agreement. This is why the petitioner's contends that the principal aim in the role of the *KACC* is to domestically criminalize the transaction. In other words *KACC* has not demonstrated clearly any defined criminal aspects of the contract taking into account the Attorney General's representations concerning the matters *KACC* now wants to investigate. Neither the Honourable Attorney General nor *KACC* can run away from the opinion, and the representations made by the Attorney General in the areas now the subject matter of the intended investigations. They are birds of a feather! For example, has the *GoK's* defence in the Hague pleaded illegality, corruption, fraud or bribery by the applicant or its contractors or agents? *KACC* has not shown at all that, it bona fide, intends to carry out investigations for the purpose of vindicating criminal justice in this country. *KACC* intends to unravel the representations made by the Attorney General concerning the legality of the transaction on behalf of the *GOK*. *KACC* has urged that it has a statutory recovery role under the Act but to what extent can it use the court's processes either in this country or elsewhere to recover under an illegal contract? Moreover are the proposed investigations not clearly intended to undermine an ongoing arbitral process in the Hague by one party? *KACC* does not blink an eye in stating that it is not part of the Government. However constitutionally we do not have a fourth arm of Government. With respect this is institutional arrogance of the highest order. Our Constitution only recognizes three arms of Government namely the Legislature, Executive and the Judiciary. In the court's view, *KACC* is part of the Executive and the fact that it reports to Parliament or may be mandated by Parliament to undertake its statutory task does not make it entirely independent of the Government. It is not clear who instructed KACC to carry out investigations in the first place. It is still subject to the Constitution and the public policy of the country. For example it cannot be right for *KACC* to urge that any contractual estoppels or waivers which could validly apply to *GoK* of which it is part would not bind it. So that for example when the *GoK* as in this case has contracted that all disputes

on performance of the contract should go to arbitration, *KACC* cannot reasonably submit that it is not so bound as an outfit of *GoK*. It cannot be right to criminalize performance or non performance of the contract under the guise of investigations especially after the Hague arbitral process has commenced. It has no power to unravel what the *GoK* has done contractually. The purported investigations are patently illegal. *KACC* as a statutory creature is confined to inter-alia investigative and recovery roles. It is bound by all other laws except where otherwise stated in the Act creating it. If this court has a statutory mandate to uphold arbitral autonomy under s 10 as a matter of public policy of Kenya *GoK* and all other bodies and agencies related to *GoK* are equally bound. Perhaps the only exception is where there are aspects of international commercial agreement such as this which point to specific acts of criminality and therefore contrary to the public policy of Kenya. Thus, where as in this case both Hon the Attorney General and the *GoK* have made clear contractual and commercial representations concerning the validity of the agreement as set out earlier in this judgment to the other contracting party, *KACC* cannot as a matter of law be allowed to undo a commercial transaction under the guise of criminal investigations. Its mandate under the Act cannot be used for any purpose outside the donating Act. It is equally bound by the representations of the Honourable the Attorney General and the *GoK* including the confidential defence filed in the Hague on behalf of the GoK. In *R v SOMERSET 1955 QBD 513* the court observed:-

"But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of rights which it enjoys for its own sake at every turn, all of its dealings constitute the fulfillment of duties which it owes to others indeed it exists for no other purpose."

Similarly, as regards prosecutions, it has no independent existence outside the role of the Attorney General and where a contract for example is illegal and unseverable it cannot be allowed to possibly use the court process for recovery while raising the banner or defence of illegality. The loss would have to fall where it fell in the first place. If the court were to hold as urged by the Attorney General and *KACC*, that the exclusion clauses, s 75(1) and 6.7 are illegal this would automatically render the contract illegal and void. Where Hon the Attorney General has advised the *GoK* or given an opinion, *KACC* is part of Government as stated above or where the Attorney General makes representations or gives an opinion to the other Contracting Party parties, he does so in all those capacities because he is the overall Chief Legal advisor to the Government by virtue of s 26 of the Constitution. When the Attorney General changes course, as he has sadly and unfortunately done in this case, by contending that the exclusion clause on public law is illegal, (the court does not agree) while he was instrumental in its crafting, including making clear representations concerning the legality and validity of the contract which are clearly binding on him and *GoK*, he loses the high moral ground, that office is obligated to occupy or expected to occupy. He further undermines the public morality of the state and also undermines his ability to effectively discharge his duties under s 26 of the Constitution. Any investigations by *KACC* which are under the law expected to be handed over to the Honourable the Attorney General have to be viewed in the same light and they would be an exercise in futility. The long shadow of what appears to the Court, to be total lack of public morality as defined in the recent judgment of this court, in the case of *MIDLAND FINANCE & SECURITIES GLOBETEL INC v MINISTERY OF FINANCE AND THE ATTORNEY GENERAL Misc Civil Application No. 359 of 2007* cannot aid the two offices in achieving and securing the public interest as regards investigations or any prosecutions or even any recovery measures based on their intended actions. This Court could not agree more with the Court's findings in the Ugandan case of *UGANDA v BANCO ARABE ESPANOL (2007) EA 333* where the court observed:-

"In my view the opinion of the Attorney General as authenticated by his own hand and signature regarding the laws of Uganda and their effect or binding nature or any agreement contract or other illegal transaction should be accorded the highest respect by government and public institutions and their agents. Unless there are other agreed conditions, 3rd parties are entitled to believe and act on that opinion without further inquiries or verifications. It is improper and untenable for the government, the Bank of Uganda or any other public institution or body in which the government of Uganda has an interest to question the correctness or validity of that opinion in so far as it affects the rights and interests of 3rd parties."

I find that it is improper and untenable for the Honourable the Attorney General to have found the

exclusion clause legal and effective as at 19th November 2002 when the contract was signed and the other representations made, and now six (6) years later, he has the courage and the nerve to openly disown the clause and the other representations in a court of law. Surely what has changed now, to warrant such a drastic acrobatic change of mind by the foremost legal advisor to the Government. Granted that the contract was signed in the twilight days of the previous regime and the legal battle is taking place in another regime, the office of the Honourable the Attorney General is an institution with institutional memory, and rules of common decency, demand that the office maintains consistency in its opinions and representations based on the law. Moreover there has not been any change of chairs in the office in between the two regimes either!

The change of mind smacks of total lack of public morality and even on this ground alone, the Court finds that it would be difficult to conclude that what is driving the new position, by the Hon the Attorney General and the other government agencies including *KACC*, is the public interest. On this ground alone the Court is entitled to stop them in their tracks.

All in all, I hold both Respondents are not entitled in law to criminalize a commercial transaction while it is clear to all that the greater public interest, which is recovery of any loss, can be secured in the Arbitration. When a court of law also holds as this court did that passports are part of the constitutional right to liberty and movement, and also holds that the section in *ACECA* upon which *KACC* was detaining the passport is unconstitutional, the passports, properties and funds of the Petitioner which were previously held pursuant to the section, ought to have been released immediately. *KACC* has a responsibility to bow to the judgment of the Court and immediately release the passport and the funds in line with the judgment unless it has obtained a stay pending appeal. If the *GoK* as a contracting Party was desirous of seeking interim relief concerning the passport or funds under the Agreement, it should have sought this by invoking s 7 and s 18 of the Arbitration Act. Condoning *KACC's* intervention which is clearly a violation of the Arbitration Act and a threatened breach of the Arbitration Agreement is both illegal and against Kenya's public policy and also the public interest of the Country. *KACC* violated the law by using other processes outside the Contracting Parties' Agreement and the public policy of Kenya which includes Court judgments and the relevant statutes. A one sided approach to investigations, is a government big brother threat or the flexing of governmental muscle in order to offset a contractual balance of power while arbitration on the issues at hand is proceeding in the Hague. This is foreign to international commercial relationships and clearly, deny the investigations the bona fides they would otherwise have under our criminal justice system.

C

THE LEGAL EFFECT OF AN ARBITRATION CLAUSE IN THE CONTRACT

KACC says that it is not bound by the Unicitral Model Laws or Rules which parties in exercise of their right of choice and autonomy have applied to the contract. *KACC* says Kenya has not ratified the *UNICITRAL*.

This is certainly a mis-apprehension of the law by KACC, in that Kenya does not have to ratify it, for the parties to the contract to apply or choose the Rules as the ones to apply to the contract. The rules govern the arbitration not by virtue of ratification by any country, but by virtue of the parties' freedom of contract and the right to choose the both the applicable law and procedural law. The right to choose vested in the contracting parties when making the agreement. The contracting parties rules of choice are the *UNICITRAL RULES*. Section 2 of the Arbitration Act 1995 defines both domestic and international arbitration agreements. It should also not be forgotten that the Arbitration Act 1995 is modeled on the Model Law.

The legal effect of the existence of a valid arbitration agreement is that the disputes as defined by the parties (except matters not permitted by the public policy of the states involved) must be referred to arbitration. This is why it is wrong for *KACC* to attempt to criminalize performance or non-performance, opinions, valuations, determinations, valuation etc, because they fall squarely within the purview of the Arbitral tribunal. The matters within the scope of the arbitral tribunal include illegality, fraud, bribery or

corruption. It is Kenya's public policy to invoke criminal law in order to vindicate criminal justice and that, what is patently ulterior and extraneous to this role must be held to be contrary to the public policy and I so hold. Attempts to stop payment payable and due to a contracting party induces breach of contract. *KACC's* directives on this constitute a statutory breach and clear encouragement by *KACC* for the *GoK* to breach an international commercial agreement and such an action is clearly outside the purpose of both vindicating criminal justice and upholding Kenya's public policy. No agent whether within or without *GoK* should be allowed to unravel contractual transactions entered into by the Government.

All the disputes as defined by the parties in the contract are, and must be the subject matter of the arbitral process because anything else would undermine the principle of party autonomy and also undermine the principles governing international commercial agreements.

Perhaps I should also add that even the definition of public law itself does clearly reveal why the parties were justified in excluding it. Thus *Blacks Law Dictionary Editor* defines public law as:-

"a general classification of law consisting generally of constitutional administrative criminal and international law, concerned with the organization of the state, the relations between the state and the people who compose it, the responsibilities of public officers to the state, to each other, and to private persons and the relation of states to each other."

It is contradistinguished from private law, affecting only an individual or a small number of persons. Contract law is such a law.

Again *Websters Online Dictionary* defines public law as that area of constitutional, administrative, criminal and international law that focuses on the organization of the government the relations between the state and its citizens, the responsibilities of government officials and the relations between sister states. It is concerned with political matters, including the powers, rights, capacities and duties of various levels of government and government officials. Generally private law is the area of law in a society that affect the relationship between individuals or groups without the intervention of the state or government.

In this matter it is clear to the court that the parties intention as expressed in the exclusion clause, was to keep government intervention out of a purely contractual matter. They did this using the exclusion clause set out above. It is therefore quite evident that any application of public law to a purely contractual relationship would be destructive of party autonomy and commercial certainty. These are two attributes which are essential to commercial relations and in particular international commercial relationships. Even from a strict legal sense the intervention by the courts by way of the application of public law would be unacceptable.

Indeed what is of greater relevance to the relationship between the contracting parties in this matter is "private international law" otherwise known as conflict of laws. Thus the conflict of laws, often called "private international law" in civil law jurisdictions is less international than public international law. It is distinguishable from public international law because it governs conflicts between private persons, rather than states (or other international bodies with standing). It relates to the question of which jurisdiction should be permitted to hear a legal dispute between private parties, and which jurisdiction law should be applied, therefore raising issue of international law see the case of *GRUNKIN & PAUL (EUROPEAN CITIZENSHIP) 2008 EVECJC 353/06.*

Choice of Law Clause

With the above background the court has no hesitation in holding that the exclusion clause (75.1) is bona fide and legal because it constitutes a choice of law clause or proper law clause in a contract because the parties have clearly defined or specified what law, will apply to resolve their dispute. The choice has justification in public policy. Under section 29 of the Arbitration Act, the parties right of choice of law is recognised.

As an application of the public policy of freedom of contract, the parties have the autonomy to make whatever bargain they want. However, the exclusion clause concerning choice of the law cannot be used as a device to evade the application of a mandatory provisions of law within a relevant legal system such as that of Kenya and hence the rider of *bona fide*."

Chitty on contracts, General principles 27th Edition defines "bona fide and legal" as follows:

"that the parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closer connection with another law. If after having discovered that one particular provision was void under the proper law, they were to try and evade its consequences by claiming that the provision was subject to another legal system, their claim should not be considered as bona fide expression of their intentions."

If the clause is recognised, as I have done in this case, as a good faith term in the forum state, the arbitral tribunal must apply the chosen proper law to resolve the dispute. This court has done the same as part of its role in determining whether or not Kenya Public Policy has been violated.

The area I have covered in upholding the choice of law clause in this matter is now a well trodden area. In the case of *VITA FOOD PRODUCTS [1939] AC 277 (P.C.)* which is a leading conflict of laws decision of the Privy Council on appeal from Nova Scotia, the Privy Council upheld the proposition that an express choice of law clause in a contract should be honoured as long as the agreement was bona fide and not against public policy. The case expanded the parties ability to choose the jurisdiction of their contracts.

D

THE SCOPE OF ARBITRABILITY

The scope of the arbitral process includes determining whether or not the main contract is valid. In other words the arbitral tribunal is entitled to rule on the validity of the main contract. It can declare it illegal and void. This includes a determination whether Clause 75(1) which purports to exclude public law (i.e constitutional and criminal law) is valid or not. Because the arbitral clause is regarded as separate from the main contract it survives any nullification of the main contract and as long as the arbitral clause itself is valid (and there is nothing in this transaction which suggests to this court that it is not valid) the tribunal is under the principle of Kompetenz/Kompetenz entitled to determine the invalidity of the main contract. *KACC* cannot therefore be allowed to usurp matters well within the purview of the intended arbitration. Competence, Competence, is the inherent power of an arbitral tribunal to rule on its own jurisdiction. In French the same principle is expressed as "Competence de la Competence while in Germany it is exppressed as Kompetenz/Kompetenz. Rules of procedure of various international arbitration bodies do provide for competence of the tribunals. In the case of Kenya this principle is enshrined in s 17 of the Arbitration Act 1995.

While short term gains of appearing to pursue criminality, might appear appealing to *KACC*, the long term effect of failure by the country to uphold the principle of party autonomy and respect for the arbitral process, would in the eyes of other states and international bodies, erode her capacity and standing to enter into international commercial contracts in future. While it has been suggested that this particular set of contract may be questionable, failure for the country and the domestic courts to uphold shared international principles concerning an international commercial contract have the potential of undermining future above board international commercial transactions. Just because in the past some government officials have been tempted as alleged, to enter into some contractual relationship with "ghost" contracting parties this cannot be a good reason for this great nation to disown internationally recognised principles. After all, in the case before this court, the so called "ghosts" did hand over a completed project!

E

THE PUBLIC LAW EXCLUSION CLAUSE, THE LAW AND

PUBLIC POLICY.

The 1st Respondent has strongly urged the court to follow Lord Dennings holding in the case of *LEE v THE SHOWMENS GUILD OF GREAT BRITAIN [1952] 2 Q. B 329* at page 342 where the learned Judge held:-

"Parties cannot by contract oust the ordinary courts from their jurisdiction. They can of course agree to leave questions of law, as well as questions of facts to the decision of the domestic tribunal. They can indeed, make the tribunal the final arbiter on questions of fact but they cannot make it the final arbiter on question of law. They cannot prevent its decisions being examined by the courts. If parties should seek by agreement to take the law out of the hands of the courts and put it in the hands of a private tribunal, without any recourse at all to the courts in cases of error of law the agreement is to that extent contrary to public policy and void."

Surprisingly, the Honourable Attorney General's representative did support the 1st Respondent Counsel both in his written submissions and in his oral highlights that Clause 75.1 which purports to exclude public law is illegal. The Attorney General submissions were made notwithstanding the fact that he is the author of the offending clause on behalf of the *GoK*. Both Counsel for the 1st and 2nd Respondents said nothing concerning the consequences of the illegality clause to the rest of the provisions of the contract if their joint contentions were to be upheld. In other words if the clause is illegal is that part severable from the other parts of the contract? To give one illustration, if the exclusion clause 75.1, were to state that the constitutional law and criminal law of Kenya would not apply to the contracting parties in my view such a clause would render the entire contract illegal and void and it would not be severable from the rest of the contract. The reason is that such a contract would violate the public policy of Kenya and also undermine her sovereignty. Yet this is what the two Counsel for the respondents appear to suggest to the Court. According to them the offending clause is so reprehensible and contrary to public policy to the extent that this court ought to invalidate it. Of course this is a matter for determination by the arbitral tribunal in the Hague. This is of course, to my mind a misapprehension of the law especially as it appertains to international commercial agreements. It is also a self defeating argument, in that a contract illegal in the sense outlined above, is void and un-enforceable by either party. It is contaminated by turpis causa and the rule has persisted that, *ex turpi causa oritur non action.* The maxim means that no person can claim any right or remedy whatsoever under an illegal transaction in which he has participated. In pursuance of an illegal contract, *KACC* would have no capacity or basis to invoke *ACECA* or for that matter the process of any court to effect recovery.

To my mind a closer look at the exclusion clause in the contract, unlike the illustration given above suggests to the court that the exclusion of public law is targatted at the transaction itself, it being an international commercial agreement. In other words what has public law to do with a commercial agreement or contract? I hold that if parties exclude public law as the governing law of the contract it is perfectly in order. The exclusion neither offends the public policy of Kenya nor its sovereignty. S 29 of the Arbitration Act permits the parties to select the applicable law. In exercise of the right of party autonomy, all that they have done is, to make a choice of the applicable law and procedural law and it is their right to do so. All they are saying and apparently this is not palatable to the respondents is that, it is not their wish or desire to have a commercial transaction criminalized under the guise of enforcing public law, and that it must be regarded for all purposes as a commercial transaction and the applicable law applied to it. To illustrate the point what is criminal about the performance or non performance of the contract. What is criminal about certification, delay, valuations, determinations, variation or the operation of the liquidated damages clause? Nothing at all, yet the 1st Respondent in obvious violation of the principle of party autonomy and the choice of law governing the transition purports to hold one end of the criminal stick to have the assets of the petitioner seized without for instance one of the parties seeking an interim measure to the same effect, pursuant to the Arbitration law of the country as provided. In addition the 1st Respondent has purported to raise general questions concerning the contract, selectively as against the petitioner and its employees or agents contrary to a specific clause in the Contract securing

and safeguarding confidentiality of the transaction, it being of a military nature. The intended one sided investigations and queries are unfair and clearly violate the confidentiality provisions and the respondent has no right whatsoever to induce breach of contract between two contracting parties under the guise of criminal investigations and in blatant violation of the principle of party autonomy. In the view of this court, all these acts constitute criminalization of a commercial transaction contrary to a specific agreement to the contrary, between the two contracting parties. I find that for this reason that the 1st respondent is an intruder. It was never appointed by *GoK* to be its overseer of commercial agreements nor does *ACECA* which created it, empower it to purport to unravel or adjudicate in commercial relations involving the *GoK*. Its function is to deal with any specific criminal acts of the individuals or companies. I find and hold that its actions and intended actions are ulterior to vindication of criminal justice. They are certainly not prevented from pursuing any specific criminal acts by individuals or companies since this would violate Kenya's Public policy. However, they are certainly not allowed in law violate the party's autonomy or the choice of law applying to a commercial transaction. Indeed, *KACC's* endevours violate the Arbitration Act 1995 which recognizes the right of the parties to choose any law of their choice to apply to a commercial transaction. *KACC's* proposed actions are therefore illegal. *KACC's* one sided approach to investigation is difficult to understand. At the moment there is no bar, injunction or restrictions preventing *KACC* making inquiries or taking action against Government officials who could have perpetrated any criminal acts. Yet *KACC* persists in one sided pre-occupation with investigations against a foreign Company as a contracting party. Does it not take two to tango! Granted that investigations as a constitutional objective under s 75(6)(ii) of the Constitution are properly underpinned in law, I find and hold that a selective one sided approach denies them the inherent fairness and bona fides, because when investigations are carried out that way, they cannot in turn advance or attain the public interest and the Court has the power to stop them as the final arbiter of the public interest. The Court is entitled to hold that the public interest has or will be safeguarded by *GoK's* confidential defence in the Hague where the *GoK* is expected to have counter claimed for any loss incurred by the *GoK* as a Contracting party.

As is clearly evident this contract or transaction is not governed by Kenya law and except on the issue of public policy and the other specified supportive role of the domestic court the *KACC* unilateral sideshows have no legal basis. The applicable law is as per the contracting parties choice as set out in the contract and the procedural law is that of the Netherlands, the seat of arbitration in the Hague.

The autonomy of the parties principle

The principle of the autonomy of the parties means the freedom of the parties to choose for themselves the law applicable to their contact including procedural law. In the case of Kenya the principle of party autonomy is underpinned in sections 2, 10, 20(1) and 29(1) of the Arbitration Act 1995.

Restrictions on party autonomy

The rule is that, so long as the intention on the choice of law is:

(i) bona fide

(ii) legal and

(iii) there is no reason for avoiding the parties choice on the grounds of public policy

the parties are absolutely free to choose for themselves the applicable law. The options that may be available to the contracting parties include:

(i) national law

(ii) public international law

(iii) concurrent laws

(iv) combined laws (or the tonic commune doctrine)

(v) the shariah

(vi) transactional law (including the general principles of law; international development law; the lex mercatoria; codified terms and practices; and trade usages)

(vii) equity and good conscience

I hold that the parties right to choose the applicable law in their commercial or contractual relations include the right to exclude certain branches of any law.

With great respect, Lord Dennings holding as set out above did not nor does it apply to Arbitration Agreements and it is now trite law that an arbitration agreement, by which contracting parties provide that before legal proceedings are taken, questions of law and fact shall be decided by a private tribunal (arbitration agreement is not per se a contract to oust the jurisdiction of the court) is valid and enforceable. Indeed, if any party were to act contrary to the Arbitration agreement such an unileteral act would, result as per the Arbitration 1995, in a stay of the proceedings order made by the court pursuant to section 6 of the Act. An arbitration Agreement as contained in this contract is not a contract to oust the jurisdiction of the court (the respected Lord Denning was not dealing with an arbitration agreement) or to oust the enforcement of criminal law as regards specific acts. Indeed arbitral tribunals do deal with both issues of fact and law and the courts are only allowed to intervene as stipulated in the Arbitration Act.

A valid attack on the excluding clause would only have arisen if:

(1) It was a contract to commit a crime or a tort or a fraud on a third party.

(2) A contract that is sexually immoral.

(3) A contract to the prejudice of public safety eg a contract to stifle a prosecution would be void if prosecution is for a public offence.

(4) A contract which tends to promote corruption in public life.

(5) A contract to defraud revenue.

In all the above categories, (and this contract is not one of them), the contracts are illegal and the illegality would not generally be severable from the rest of the contract.

This court has no doubt whatsoever that, it cannot be prevented by contract from invoking both Constitutional and criminal law in exercise of its jurisdiction nor can contracting parties exempt themselves from this court's jurisdiction by contract. The parties may however exclude the application of these two branches of law to commercial transactions without offending public policy of the country, and this is what the contracting parties have done in this matter because commercial arrangements as contemplated had nothing to do with public law which would be a major stumbling black to contractual relationships. Nothing demonstrates this better than KACC's intended intervention under the banner of public law! Indeed it is what the parties wanted to avoid in the first place. For the avoidance of doubt I must find that any action whatsoever in the country must be subject to the public policy of Kenya which the courts must always uphold.

Finally the challenge on this ground, as against the Petitioner is mis-guarded in that, the Petitioner has notwithstanding the exclusion clause, invoked this court's constitutional and statutory jurisdiction or submitted to this court's jurisdiction by filing this Petition and seeking the safeguarding of its fundamental rights to property, seeking interim relief and seeking this court upholding of the principles of party autonomy by having the matter left in the hands of the arbitral tribunal in the Hague. The Petitioners submission to this Court's jurisdiction is clear proof that the exclusion of public law clause in

the commercial contract in question, is not against the public policy of Kenya and that the Clause was instead intended to underline the commercial nature of the contract. Parties may be subject to both Constitutional and criminal jurisdiction but this transaction is not so subject by virtue of it being a commercial transaction and also by virtue of the choice of law by the parties.

I therefore find that the exclusion clause is valid and that GoK, the Hon the Attorney General and *KACC* are singly and jointly bound by it. This also includes the confidential provisions in the contract and those that relate to non disclosure due to the military nature of the project. *KACC* has no right to induce the breach of the confidentiality provisions by purporting to interrogate the petitioners contractors and other agents on the ground. *KACC* has only a statutory mandate as defined in *ACECA* and this does not include supervising commercial contracts. *KACC* has no heritage of rights and it is part of the Executive arm of the Government. It cannot be allowed to claim to be the fourth arm of Government which operates from the clouds and which superintends all the other agencies. It does not have any such unfettered powers. *KACC* is bound by the public policy of Kenya which inter-alia includes all laws. Where *KACC* purports as in this case to operate in a manner which undermines public policy, the Court is entitled to restrain it. Contractual obligations binding on *GoK* and the Attorney General are equally binding on *KACC* as a Government agency.

In a situation where the Chief Legal Advisor to the *GoK* cannot walk the high moral ground due to the clear opinion and representations he has made to the other contracting party/petitioner when the contract was made, the Court must restrain him from the intended action in order to uphold the needs of public morality and public policy of the Country because failure to do so would result in the misuse of the law and abuse of power. Constitutional job holders hold power in trust for the people and it is against the public interest not to use power for the intended purposes or to allow public officials to act contrary to the mandate given by law. Section 26 powers, whether in respect of investigations or prosecutions cannot be proper when the office exercising them remains unconcerned about a possible breach of an international commercial agreement which agreement has an unseverable and legal exclusion clause .

A public official who acts contrary to the principles of public morality cannot in my judgment, discharge, his constitutional mandate whether as defined by the Constitution or by any enactment. Indeed I could not agree more with Lord Steyn's definition of the purpose of criminal law in the House of Lords in the *ATTORNEY GENERAL'S REFERENCE (No.3 of 1999)*:

"The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

In my judgment, both the Respondents have acted or threatened to act in a manner that would not uphold the purpose of criminal law.

The Kenya Government may be a victim of an assumed, alleged, presumed or imagined crime but it is also a contracting party as regards the transaction in question. A one sided approach to investigations relating to the transaction as threatened by *KACC* fails the purpose of criminal law. A primary purpose of the criminal law system is to punish a perpetrator not to directly benefit the victim of a crime. Most crimes are committed by a specific action. Criminal law seeks to protect the public from harm by inflicting punishment upon those who have already done harm and by threatening with punishment those who are tempted to do harm. The harm that criminal law aims to prevent varies. It may be physical harm, death or bodily injury to human beings, the loss of or damage to property; sexual immorality; danger to the government; disturbances of the public peace and order; or injury to the public health. Conduct that threatens to cause but has not yet caused a harmful result may be enough to constitute a crime. Thus, criminal law often aims to avoid harm by forbidding conduct that may lead to harmful results.

With the purpose of criminal law as outlined above in view, *KACC's* action of seizure of the

Petitioner's property violates the basic rule of commercial practice that contracts shall be enforced according to their terms - pacta sunt servada. It also violates the principle that contracts should be performed in good faith and that a state entity cannot evade the enforcement of its obligations by denying its capacity to make a binding arbitration agreement or by causing her agents such as KACC to undertake investigations aimed at undermining the other Contracting Party. What the *GoK*, as a contracting party should have done as started elsewhere in this judgment, if it was desirous of seeking interim relief, was to invoke Sections 7 and 18 of the Arbitration Act in seeking any deserved interim relief and not to invoke *ACECA* provisions which go counter to its contractual obligations of Kenya as a Contracting Party. Moreover as a result of *KACC's* intervention without directing its mind to the applicable law, the *GoK* is now exposed to the risk of not carrying out its obligations, which action could result in the release of the other contracting party i.e. the breach of the principle of "*exemption non adimplenti contractus*".

KACC is subject to the public policy of Kenya and where a violation is threatened it must be restrained even if the heavens fall.

F

EFFECT OF EXCLUSION ON THE CONTRACT

The effect of the exclusion clause on the contract is that public law cannot apply to the transaction.

G

THE EFFECT OF THE EXCLUSION OF PUBLIC LAW ON THE PARTIES

The effect of the exclusion is that, neither contracting party nor related agencies can apply public law to the contract in question and the contract must be governed and regulated by the parties choice of law.

H

SEVERABILITY OF THE ILLEGAL PROVISIONS FROM THE REST OF THE CONTRACT

In this matter the court has held that exclusion of public law from the contract does not offend the public policy of Kenya and therefore the issue of severability does not arise. Were the exclusion, held contrary to the public policy, the exclusion provision in the contract would not in the circumstances be severable.

I

IF EXCLUSION NOT SEVERABLE

If exclusion is not severable the entire contract would b e void.

J

SURVIVAL OF THE ARBITRAL CLAUSE

Yes the arbitral clause does outlive a void or illegal contract hence the ability and capacity of the arbitral tribunal to rule on the issue of illegality and on whether an illegal provision would be severable from the rest of the provisions.

K

FINAL ARBITER

The final arbiter on the validity of the contract including the effect of illegality, fraud, bribery or

corruption if any, is the arbitral tribunal. However as clearly stated by the court when adjudicating on the issue of jurisdiction this court is perfectly entitled to rule on whether or not the country's public policy has been violated.

SECTION 26 OF THE CONSTITUTION

The Attorney General in giving his opinion or advice or in making the representations pertaining to this contract did so in his capacity as the Chief Legal Advisor to the *GoK* pursuant to s 26 of the Constitution. It would therefore be unjust oppressive and contrary to principles applicable to international commercial arbitrations or international commercial contracts to permit him to back out of the representations made and the principle in the *BANK OF UGANDA* case applies squarely to him and to *KACC* as an agent of *GoK*. Indeed the greater public interest of recovery will be served and secured by having all the contractual disputes and obligations handled by the Arbitral Tribunal. *KACC's* attempt to criminalize matters relating to the performance or not of the contract by the Contracting Parties, does not serve the public interest. *KACC's* role, a one sided attempt, is clearly ulterior to the commercial nature of the transaction and also ulterior to criminal justice. *KACC's* endevours to criminalize the transaction would defeat the very purpose for which the exclusion clause was intended by the Contracting Parties which was to confine the transaction to the application of commercial law principles and as per the choice of law by the parties. In this regard the immortal words of the court in *GITHUNGURI II* case apply fully, namely:-

"It is as much in the public interest that breaches of the law should be punished as is to ensure that in the process of doing so that people are not bashed about so that they lose respect for the law. If the law falls into disrepute it will have a shattering effect upon the society's sense of security of their personal freedom and property. The court is the final arbiter of how the public interest is to be preserved."

I hold that the public interest lies in arbitration and not in pursuing one sided investigations. The recovery of any moneys which could have been lost in a completed project is a matter well within the purview of the arbitration and the *GoK* has I presume, filed a confidential defence which neither party can disclose to the Court due to the confidential nature of the arbitration proceedings in the Hague. Moreover the *GoK* had specifically contracted as reproduced early in this judgment, that there was to be no disclosure whatsoever to any agent department or entity of *GoK* which must surely include *KACC*.

NATIONAL SECURITY

Although the affidavit sworn by Zachary Mwaura, Permanent Secretary Department of Defence has expressed the Permanent Secretary's view of the matter on security concerns, the situation presented to the court where plans, specifications and drawings have deliberately not been attached to the Agreement due to the obvious national security concerns and strict confidentiality provisions incorporated in the contract to secure this aim, it is the court's view that it is entitled to have the final word because any acts, inquiries investigations or court proceedings would include publication of the plans, specifications and drawings which would have a considerable national security dimensions. It is also not lost to the court that the confidentiality provisions in the contract were principally aimed at safeguarding the national security. In addition the Government itself has contractually agreed that disclosure cannot be made to any Government department or entity. This includes *KACC* and therefore the Government must be held to its part of the contractual bargain.

Moreover national security matters are largely non justiciable. In the case of *CAPTAIN WAFUBWA* (unreported) the Court of Appeal held that military matters are not justiciable. The case in question related to a contract of employment among other issues. The contract before me, relates to a highly confidential and secret military project and it is the firm view of this court, that national security concerns override any other public interest concerns including investigations no matter how well intentioned. Any queries as intended would violate national security concerns. The prosecution of a criminal act or omission or anti corruption crusades, including investigations, all fade away in the face of national security. The need to preserve national security ranks higher in the public interest concerns for this Country although foreigners have attempted in the recent past to have us reverse this hierarchy of

interests, whereas they cannot jeopardize their national security interest in their own countries, if presented with the same facts. After all any loss incurred by the Government or to be suffered is contractually compensable through the arbitral process and full recovery is where the greater public interest is located.

Finally, with great respect, the Permanent Secretary in his affidavit has not given thought or mention to these concerns at all and the court is entitled to intervene because in the view of the court no other Permanent Secretary given the same set of facts would reach Mwaura's conclusion in the circumstances.

In *ZAMORA* [1916] 2 AC 77 at page 107 *Lord Parker* said:

"Those who are responsible for the Natural Security must be the sole judges of what the National Security requires. It would be obviously undesirable that such matters should be the subject of evidence in a court of law or otherwise discussed in public. The Judicial Committee were there asserting what we have already sought to say namely that some matters of which National Security is one are not amenable to the judicial process ..."

Again in the case of *R v SECRETARY OF STATE FOR HOME DEPARTMENT ex parte RUDDOCK [1987] I WLR 1482* at page 1490 the court held:

"It was said that, credible evidence was required in support of a plea of national security before judicial investigation of a factual issue IS *PRECLUDED*, Taylor J, accepted that in an extreme case where "cogent" "very strong and specific" evidence of potential damage to National Security flowing from the trial of the issues, a court might have to decline to try factual issues."

Also in a recent *GREEN PEACE* case the same court held that in matters of national security the court has the final word. Were *KACC* to continue with contemplated inquiries the issue of potential damage to national security looms large (contrary to the confidential provisions in the Agreement which were clearly meant to safeguard this) and I find and hold that regardless of what is intended to be achieved by the respondents, in the scale of competing public interests which flow from the contract in question, the issue of national security overrides everything else both in this country and I dare say in any other civilized counties.

Actions that are clearly against the public interest, induce breach of contract including confidentiality provisions and choice of jurisdiction, subvert the principle of party autonomy, undermine the principles of international commercial contracts and the principle of public morality, brings into serious question the bona fides of the Respondents and which clearly shows that the Respondents have not correctly addressed the relevant law and which actions threaten national security must be stopped by the court at the earliest opportunity. In addition the threatened actions violate the Arbitration Act 1995, undermine in a substantial way the freedom of contract, the principles of justice and fairness, the purpose of criminal justice including the principle of constitutional justice and therefore the court's intervention is absolutely necessary so as to uphold the public interest. I find and hold that the State as a contracting party is bound by the provisions of section 2 of the Arbitration Act which provides:-

"Except as otherwise provided in a particular case, the provisions of this Act shall apply to domestic and international arbitration."

It is also bound by s 7 and 18 on the procedure for obtaining interim relief and s 17 on the powers of the arbitral tribunal and it is also further bound by s 29 and s 20 on the choice of law including procedural law. I further find that the word "party" means as per section 2 of the Arbitration Act a party to an arbitration agreement and includes a person claiming through or under a party." This includes both Mr Hon the Attorney General and KACC.

Finally I find and hold that in a situation where public law has been excluded from a contractual transaction its purpose cannot be defeated by a state contracting party by unilaterally using public law to whip the other contracting party or to gain advantage in the face of arbitral proceedings. This would be

contrary to public policy and international commercial practice and would also constitute breach of the arbitration agreement.

All in all, both Respondents are in breach of the public policy of Kenya and are hereby restrained and the matter left to the arbitral tribunal. In the result I grant prayers in the petition as follows:-

(d),(e),(f),(g),(h),(i),(j),(k),(l),(m),(n),(o),(p),(q), and (r) only

All other declarations and orders have been denied declined or refused.

I award costs as against the Petitioners.

DATED and delivered at Nairobi this 30th day of October, 2008.

J.G. NYAMU

JUDGE