**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Petition 390 of 2006**

**IN THE MATTER OF: SECTION 84 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: THE GOVERNMENT CONTRACTS ACT**

**IN THE MATTER OF: CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMINAL ACT 2003**

**NEDERMAR TECHNOLOGY BV LTD ..... PETITIONER**

**VERSUS**

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

**THE ATTORNEY GENERAL OF KENYA ..... 2ND RESPONDENT**

**RULING**

The application before me is dated 14th July 2006 and is brought by way of a Chamber Summons. It seeks conservatory orders in terms of prayers (b)(c) (d) and (e) pending the hearing of a Constitutional Petition brought inter-alia under s 84 of the Constitution of Kenya. The orders sought are:

(a) Certification of urgency (now spent the same having been so certified ex-parte)

(b) That interim orders be issued against the Respondents directing the Respondents to cease any act of interfering with the Petitioner, its shareholders, directors, subcontractors agents and/or consultants and/or requiring any one of them to surrender their passports to the Respondents and/or disclosing any detail regarding the agreement entered into between the Government of the republic of Kenya and the Petitioner on 19th November, 2002 on the works code named Project Nexus.

(c) That interim orders be issued against the 1st Respondent restraining the 1st Respondent from circulating, disseminating or in any manner publishing material to the effect that the Petitioner its shareholders, directors, subcontractors, agents and/or consultants are suspected of any economic crime or any other crime emanating from the agreement entered into between the government of the Republic of Kenya and the Petitioner on 19th November, 2002 on the works code named Project Nexus.

(d) That interim orders be issued against the Respondents directing the Respondents jointly and severally not to arrest and/or prefer any criminal charges against the Petitioner its shareholders, directors, subcontractors, agents and/or consultants arising from the agreement entered into between the Government of the Republic of Kenya and the Petitioner on 19th November, 2002 on the works code named Project Nexus

(e) Interim orders be issued against the 1st Respondent directing the 1st Respondent not to interfere with the contractual rights and obligations entered into between the Government of the Republic of Kenya and the Petitioner on 19th November 2002 on the works code named Project Nexus.

In support of the application the applicant has filed two affidavits the first one by *Kimmu Tapani* filed on 14th July 2006 and the second one by the same deponent filed on 24th August, 2006. The applicants skeleton arguments were filed on 22nd September, 2006. The applicant's further skeleton arguments with a list of authorities and a bundle of authorities were filed on 12th October, 2006. The first respondent filed a replying affidavit on 19th July 2006 sworn by Julie Adell Owino. The 1st Respondent also filed grounds of opposition on the same day. It filed skeleton arguments on 20th September, 2006 together with a list of authorities and a bundle of authorities was filed on 12th September, 2006. On 30th October, 2006 the 1st Respondent filed two additional authorities and the applicants similarly filed an additional list of Authorities on the same day. The Court had asked Counsel to address a particular point in the proceedings hence the additional authorities. On the other hand the 2nd Respondent relied on a replying Affidavit sworn by Zachary Mwaura, the Permanent Secretary and Accounting officer Department of Defence.

The application was certified urgent by my learned brother Justice Emukule on 14th July 2006 who ordered inter-alia that the Respondents be served and that the matter be mentioned before me as the Presiding Judge in the Division on 20th July 2006. On 20th July 2006 after the Attorney General had been served he requested for time to study the matter especially the contentions on national security. The 1st Respondent did oppose adjournment but subsequently conceded there was need for it in view of the Attorney General's plea to have sufficient time to respond to the matter. The applicants counsel had earlier sought the courts intervention to have the press excluded because the matter allegedly raised an issue of national security. To enable this point to be canvassed the press agreed to leave my chambers. On the prima facie ground of possible national security issues and the need to have the matter fully ventilated on merit I granted conservatory orders (b)(c)(d) and (e) on an interim basis until 27th July 2006 when it was expected that the matter would be heard inter-parties and on merit. Thereafter the Attorney General applied for adjournment to enable him to prepare his brief and the conservatory measures and/or orders were twice extended by consent until 26th October, 2006.

**COMMON GROUND**

1. That an Agreement was entered into between the Government of the Republic of Kenya and the applicant, Contractor on 29th November, 2002

2. The arbitral clause 67.3 reads:

"**Any dispute in respect of which 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 Rules of the United Nations Commission on International Trade Law. (UNICITRAL)**

3. Clause 73.1 on Confidentiality and Secrecy reads:

"**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 or elsewhere without the previous written consent of the other. The parties hereto further acknowledge that in view of the nature of the contract the 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 this contract with any government department, ministry or individual other than the end user notified to them pursuant to the provisions of clause 2.1 hereof."**

4. Clause 75.1 on scope of the contract and applicable law reads:

"**The employer agrees that this contract and the transactions contemplated herein constitute a commercial activity and that this contract and the transactions contemplated herein are subject to the chosen domestic private and Commercial law and not international or public law ...**

5. Clauses 2.1 on Legal Opinion reads:

"**As at the date of this contract the Employer will be deemed to have received a Legal opinion issued by the Attorney General of the Republic of Kenya to the effect that in;**

Clause 2.3 or enforceability reads:

"**This Agreement constitutes a legal valid and binding obligations of the Employer enforceable in accordance with its terms under the Laws of the Republic of Kenya"**

6. Project Nexus is a classified and an advanced joint military command and was handed over in September, 2005

7. There is default in making payment by the Republic of Kenya and Arbitration has commenced in the Hague and the proceedings have not been concluded by the arbitral tribunal

8. That the 1st Respondent did seek to interview one of the applicants consultants, Andrew Patrick Bernard on 19th May 2006 and that one of the questions posed was

"**What was Project Nexus – what did it comprise?"**

9. Two of the applicants consultants Andrew Bernard and Pritpal Singh Thethy have surrendered their passports to the 1st Respondent following orders obtained by the 1st Respondent in the Chief Magistrate's court at Kibera in Nairobi.

Issues as framed by the Applicant are:

(a) Does the Applicant have locus as a company to file a constitutional reference seeking redress for the violation of its perceived constitutional rights?

(b) Can the applicant file a constitutional reference enjoining the wrongs done or threatened to be done to its directors shareholders consultants and subcontractors

(c) What are the violations which are the basis of the Applicants complaint

**i. In terms of the Contract, the applicant and by extension its directors, shareholders, consultants and subcontractors cannot discuss or disclose any details of the contract with any government department Ministry or individual other than the end user. The Government has not waived this contractual obligation to-date and in the event that the Applicant discloses any information to the 1st Respondent, the Applicant may face penal consequences and/or**

**ii. The contract is an international agreement which is exempt from public law. The Respondents are invoking public law so as to defeat the Applicants vested rights in the contract. Such rights are rights of property which have accrued to the Applicant.**

**iii. The Respondents have invoked criminal jurisprudence to justify seizure of passports, searches and apprehended criminal prosecution. The contract has a valid arbitration clause which stipulates that any dispute is to be adjudicated in an arbitral forum. Criminal law has no place in the commercial agreement made by the contracting parties**

**iv. The 1st Respondent's powers are unconstitutional to the extent that:**

**(a) The provision entitling the 1st Respondent to obtain ex-parte orders to seize a person's passport for an indefinite period is perverse and against the rules of natural justice**

**(b) The Act which created the 1st Respondent cannot have retroactive effect**

**v. The Attorney General gave legal opinion that the Contract was valid and in accordance with the laws of the Republic of Kenya and enforceable as such. The Attorney General cannot renege from that position and now claim to be entitled to prefer any criminal charges against the applicant. The Contract was entered into, executed and completed on the basis of the legal opinion by the Attorney General**

The orders sought include a declaration that the 1st Respondent is infringing and/or is likely to infringe the Applicants' right not to be deprived of property without compensation protected and guaranteed by s 70 of the Constitution. It is claimed that if the conservatory orders are not given as prayed the Petition will be rendered nugatory.

On the other hand the issues as seen from the 1st Respondent are:

**(1) Whether the Petitioner has capacity to lodge the petition**

**(2) Whether the Commission is precluded from investigating suspected corruption or economic crime arising from a Commercial Agreement/Contract entered into between the Government of Kenya on the one hand and a foreign company, on the other.**

**(3) Whether an arbitration clause in the Agreement between Government of Kenya and a foreign Company precludes the Commission from investigating the integrity of the procurement procedures of the Agreement/Contract**

**(4) Whether section 77(4) of the Constitution bars the Commission from investigating alleged Criminal offences which took place before the enactment of the Anti Corruption and Economic Crimes Act, No 3 of 2003**

**(5) Whether investigations by the Commission is tantamount to criminalization of the agreement/contract between the petitioner and the Government of Kenya**

**(6) Whether the Commission may seize travel documents search premises and seize assets during investigations**

**(7) Do the investigations infringe the Petitioners constitutional rights in contravention of sections 70(a)(c) 75 and 80 of the Constitution"**

**(8) Who may raise the issue of national security in a matter, and whether the Commission may be stopped from conducting its investigations on the grounds of national security.**

**LOCUS**

On this I therefore find on a prima facie basis that the applicant has locus – in any event locus can always be canvassed at the next stage on merit. The definition of person in s 123 of the Constitution does embrace corporate and unincorporated associations. Fundamental rights embraced by s 70, s 82 (non discrimination_ s 75 (property rights can be enforced by non human persons. However where a right has its origin on the oneness of the human being only an individual can seek constitutional relief.

**ARBITRABILITY**

Arbitrability is dependent on the public policy of each state or country. I shall revert shortly on the meaning of the term arbitrability which is sometime confused with the term "arbitrable" whereas the two are distinct terms and do not necessarily mean the same thing.

**ANALYSIS**

This being an application for interim relief I will deliberately be brief so as not to compromise the hearing of the petition on merit. I therefore do not intend to delve on any issue in detail and I shall confine myself to the guiding principles of law and whether or not taking a broad view of the situation on a prima facie and tentative basis conservatory relief or orders are merited.

**SCOPE OF THE ARBITRATION CLAUSE**

I endorse the ratio in the two cited American cases namely *ROBERT FAZIO & OTHERS v LEHMAN BROTHERS INC 2003 FEDEX APP 0284P* and *PRIMA PAINTS v FLOOD & CONKLIN* 388 us 395 that fraud is arbitrable before the arbitral tribunals the reason for this is that fraud does touch on the validity of a contract and validity is arbitrable before arbitral Tribunals. The additional reason for this is the application of the now internationally recognised principle of separability which in Kenya is reflected in s 17 of the Arbitration Act 1995. In short, the principle of separability means that the arbitration agreement is separate from the underlying contract. S 17 of the Kenya Arbitration Act is based on *UNICITRAL MODEL LAW* on which the Agreement the subject matter of this suit is based. Thus an arbitration clause which forms part of the contract (as in this case) shall be treated as an independent agreement from the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

**FRAUD**

Tribunal should not decline jurisdiction where allegations of fraud in the procurement or performance of a contract are alleged since this is within its competence to adjudicate on and rule on its effect on the agreement..

**BRIBERY AND CORRUPTION**

**Contracts not enforced both before Arbitrators and the courts**

Issues of bribery or corruption in the procurement or performance of a contract raise important questions of public policy.

What is an arbitral tribunal to do if there is a dispute as to the performance of an international commercial agreement and it is said as an excuse for nonperformance that the agreement had for its object the payment of bribes or some other fraudulent inducement. When this issue was raised in 1967 before a distinguished Swedish Judge who was acting as sole arbitrator in an I.C.C. arbitration, he was firm in his opinion that such a dispute was not arbitrable. Judge Largergren said:

"**It cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously, violate bonus mores or international public policy are invalid or at**

**least unenforceable and they cannot be sanctioned by courts or arbitrators."**

A tribunal may however decide on an issue of morality if it arises in the course of proceedings. Illegality does not deny a tribunal of jurisdiction because of the principle of separability.

It is not the duty of an arbitral tribunal to assume an inquisitorial role and to search officially for evidence of corruption where none is alleged. The arbitral tribunal should not allow itself to be used by the parties to sanction conduct which is illegal.

## APPLICABLE LAW AND ITS IMPLICATION TO THE MATTER BEFORE THE COURT

Pursuant to the now internationally accepted principle of party autonomy the parties may choose for themselves the law applicable to the dispute. This principle is however subject to the qualifications of bonafides, legality and of no public policy objection!

The arbitration agreement which is the subject matter of these proceedings has chosen the English law as the proper law of contract or the governing law. Both this court and any arbitral body are bound to respect the parties choice of the applicable law to the substance of the Agreement and must apply that law in adjudicating on the contract. This court is however not contractually the proper forum. However what is arbitrable depend on the public policy of the countries or states and may differ from contrary to country or state to state. To illustrate the point criminal matters are not arbitrable in Kenya and in many other states. Since it is the English law which is the proper law to govern the International Agreement before this court my court (in Kenya) is a stranger as far as the Agreement is concerned. All the same the irony of the situation before me is that although this court is a foreign court, it has been invited to hold that all the disputes arising from the Agreement in question are arbitrable, as the arbitral process has commenced in the Hague. It has been contended that Kenyan authorities including the 1st Respondent KACC should not investigate any suspicion of possible corruption or fraud touching on the procurement of the Agreement in question. In addition should the investigations reveal a criminal offence no prosecution should be commenced in Kenya because all matters should be handled by the arbitrator in the Hague. However on a strictly prima facie basis this contention or position cannot be correct because it would violate the public policy of Kenya not to investigate and prosecute the criminal offences within its territorial jurisdiction. Yet when the Attorney General advised or agreed to the incorporation of the clause above which excludes public law he excluded criminal law matters. As to public policy, a court that applies a foreign law as the law chosen by the parties is not obliged to apply provisions of that law which are incompatible with its mandatory rules – for a good example see Article 7 of the Rome Convention.

Clause 75.1 does give rise to a serious contention concerning public policy, jurisdiction and applicable law. Tentatively rightly or wrongly it has excluded criminal matters as applicable law.

## NATIONAL SECURITY

The affidavit sworn by Zachary Mwaura Permanent Secretary, Department of Defence has expounded on this. The affidavit speaks for itself on this issue. However in the situation presented to the court where plans specifications and drawings have deliberately not been attached to the Agreement due to obvious national security concerns, it is this courts tentative view that it must have the final word because any public proceedings would involve publication of the plans, specifications and drawings which have a considerable military dimension. In addition the Government itself has contractually agreed that disclosure cannot be made to any Government department or entity. Prima facie this includes the 1st Respondent. The Government must be held to its contractual bargain.

In addition the court is of the view that national security is generally not justiciable. Thus, in a recent case, still unreported *R v WAFUBWA*, the Court of Appeal held that military matters are not justiciable. That case related to a contract of employment among other issues. This one relates to a highly confidential and secretive military project and the view of the court is that National Security concerns override any other public interest concerns including investigations no matter how well intended or loss

contemplated or suspected in monetary terms.

In *ZAMORA [1916] 2 AC 77, 107* Lord Parker said

"**Those who are responsible for the National 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 I have already sought to say, namely that some matters, of which National Security is one are not amenable to the judicial process ..."**

In the case of *COUNCIL OF CIVIL SERVICE v MINISTER FOR CIVIL SERVICE 1985 AC 374* Lord Scarman said that the Minister's opinion on security ought to be accepted unless no reasonable Minister could in the circumstances reach such a conclusion. In the view of the court, Mwaura's affidavit has not touched on that any possible leaks touching on plans, drawings and specifications and that any contemplated proceedings are likely to be public. He has not also touched on justificiability.

In *R v SECRETARY OF STATE FOR HOME DEPARTMENT* ex-parte RUDDOCK [1987] 1 WLR 1482 at pg. 1490:

"**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.**

Moreover in a recent *GREENPEACE* case which I cannot immediately correctly cite due to time constraints, it was held that in matters of National Security the court should have the final word.

I have no doubt in my mind that the issue of justiciability has not been addressed at all or properly addressed in Mwaura's affidavit.

While it is for the State to invoke National Security as contended by the 1st Respondent, this court finds that there are limits dictated by law and commonsense which the court must observe in dealing with the question. The court cannot afford to abdicate its judicial function. The issue of potential damage to National Security looms large in the circumstances of this case, and regardless of what is intended to be achieved by the Respondents in the view of the court in the scale of competing public interests flowing from the Agreement in question, the issue of National Security would tilt the scale both in this country or any other civilized country. In addition the issue of justiciability of military matters casts a long shadow in favour of granting the conservatory orders to enable such serious issues to be properly ventilated on merit.

## CONFIDENTIALITY

The issue of confidentiality unlike the issue of National Security and its breach is generally actionable. In my view this aspect of confidentiality falls squarely within the already appointed arbitral tribunal, because my prima facie view is that it is covered by the arbitration clause set out above.

Under s 10 of the Arbitration Act this court is statutorily bound to uphold party autonomy and for this reason I find myself unable to adjudicate on this issue. It is the preserve of the arbitral Tribunal at the Hague and any party to the Agreement could raise it there.

## CASELAW CITED

For the reasons indicted above I shall refrain from a detailed comparison. For now my tentative view is that this case is distinguishable from all the cases cited and calls for a different set of treatment because the matter in the view of the Court principally turns, on an international commercial agreement and in particular arbitrability, confidence and the applicable law (Choice of Law) and lex arbitri (or the law of

the seat of arbitration).

**EXCLUSION**

Clause 75.1 of the Agreement excludes public law and applies as the applicable law "the chosen domestic private and commercial law and not *international* or *public law*.

Public Law as per Blacks Law Dictionary means

**1. The body of law dealing with the relations between private individuals and the government and with the structures and operation of the government itself. Constitutional law, criminal law and administrative law taken together.**

**2. ..... (not relevant)**

While public policy might point perhaps demand a contrary position the Attorney General, is recorded in the Agreement as having advised concerning the legality of the exclusion of public Law. As we have seen above this includes Criminal Law matters. In these proceedings he has taken a different position even on the issue of national security. However the clause on Public Law exclusion is crystal clear. The court has agonised over this but prima facie the principle of party autonomy in international arbitration also demands that the parties right to choose the applicable law must be accepted or upheld by the Courts and the arbitral Tribunals.

In the Agreement in question, the applicable law as a matter of choice is the English law and not the Kenya law.

The Kenya Government now wants to apply a different law and argue that its public policy does not allow exclusion of criminal matters. The prima facie view of this court is that this has to be contested before the appointed arbitral tribunal in the Hague for the reasons which will shortly become apparent.

One thing is certain, individual parties cannot be allowed under the public policy doctrine to exclude criminal matters by contract. However where a sovereign State with the advice of the Attorney General, contracts with a foreign company to exclude criminal matters from a commercial agreement and expressly provides that public law shall not apply to an Agreement the matter becomes highly complicated and contentious. Since this agreement is specifically incorporated in the choice of law clause in the contract the prima facie view of the court is that it falls within the ambit of the arbitral Tribunal which would be competent to rule on it. Any of the parties can ask for a ruling on this because the Arbitral Tribunal must apply the applicable law to the Agreement in question. It is the English position which must be considered vis a vis the excluding clause and the public policy.

To emphasise the complexity and the agony of this matter the court must in passing also observe that the Kenya Government has in the same Agreement also waived the immunity of its assets abroad such as Embassy buildings etc which are therefore liable to attachment as a matter of contract expressed to have been okayed by the Attorney General.

The Arbitral Tribunal is therefore competent to apply the applicable law of the contract or the law governing the contract. This in turn means the law regulating the substance of the Agreement. This includes interpretation and validity of the contract, the rights and obligations of the parties, the performance and the consequences of the breaches of the contract.

**ARBITRABILITY – WHAT IT MEANS**

This topic was touched on earlier but the full meaning of the term was not given. Arbitrability means whether or not the subject matter of dispute is capable of being resolved by arbitration. It follows therefore that the concept of arbitrability is basic to the arbitral process. A careful examination of both the Model Law (which has been applied to the Agreement the subject matter of this dispute) and the New

York Convention refer expressly to disputes that are "capable of being resolved by arbitration," which impliedly recognize that as a matter of law some disputes may not be capable of being so resolved. Whether or not a particular dispute is legally "capable of being resolved by arbitration", is at the end of the day a matter of public policy, but it is a matter on which states may well differ with some taking a more restrictive attitude than others.

This position must however be understood with clause 75.1 in view where public law has been excluded. The question is who is competent to interpret and rule on this, this being an international Agreement with an arbitral clause? The prima facie view is that it is the arbitral tribunal. By virtue of S 10 and section 17 of the Arbitration Act 1995 the arbitral Tribunal has the power rule on its jurisdiction and the validity of the Agreement. S 10 prevents the courts from interfering with the party autonomy – except as specifically allowed in the Act.

**THE LEX ARBITRI OR THE LAW GOVERNING THE ARBITRATION**

The Agreement, the subject matter of this dispute is substantively governed by the English law as a matter of choice by the parties, the law governing the arbitration itself on the other hand is that of the seat or forum of arbitration. It follows therefore as the seat of the arbitration is the Hague, the law governing the arbitration is that of the Netherlands.

**WHAT IS THE LAX ARBITRI?**

Steyn J in the English case of *SMITH LTD v H & S INTERNATIONAL* 1991 2 LLYODS Rep 127 at 130 defined it as follows:

"**What then is the law governing the arbitration. It is as the present authors trenchantly explain a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. court orders for the preservation or storage of goods), the rules empowering the exercise by the court of supportive measures to assist an arbitration which has run into difficulties (e.g. filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the court of its supervisory jurisdiction over arbitrators (e.g. removing an arbitrator for misconduct)** In other words the lex arbitri extends to inter alia:

(i) whether a dispute is capable of being referred to arbitration that is to say whether it is arbitrable under the local law of the seat of arbitration.

(ii) Interim measures of protection.

From the above it is prima facie apparent to this court that the other bodies that have jurisdiction to determine arbitrability in respect of the Agreement are the Netherlands courts. This point is reinforced even further by the express exclusion of public law by the parties which include the Kenya Government.

**PUBLIC POLICY**

Public policy broadly includes principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. Public policy narrowly means the principle that a person should not be allowed to do anything that would tend to injure the public at large. This definition has been given because public policy has prominently featured in this ruling.

**RETROACTIVITY OF KACC**

Whether or not KACC can investigate criminal offences not defined in the Act establishing it and committed before its existence is an arguable point which for obvious reasons I cannot express any definite view at the moment and at this stage save to say that generally the law and the Constitution

frowns upon retroactivity.

## CONSTITUTIONAL AND ALLEGED VIOLATIONS

Where an international agreement with an arbitration clause excludes the application of public law and signed by the government allegedly on the advice of the Attorney General this is in the view of the court, a great constitutional issue because it touches on the sovereignty of the state under s 1 and 1A of the Constitution. Equal protection of law and the alleged property rights under s 70 and 75 are fairly arguable matters.

## CONCLUTION

To recap my ruling has hinged or turned on the following:

### (1) ARBITRABILITY

As I held in the KARMALI case where the parties have agreed to refer their differences or disputes to arbitration it is the statutory duty of our courts to uphold the party autonomy and to decline to hear such matters. In the case of Kenya, s 10 is explicit on this by providing that the court can intervene in the arbitral process only as set out in the Act. This is why the applicant is correct in invoking the section which has the effect of ousting the jurisdiction of the court except where the Acts invites the courts intervention. Ordinarily the courts role is supportive.

However, there are some disputes which even in the words of the New York Convention 1958, concern a subject matter which is not capable of settlement by arbitration. Such disputes are regarded by the relevant legal system as being more suitable for resolution by the courts.

The other way of describing the same thing is to describe such disputes as not "arbitrable".

Section 3 of the Arbitration Act of Kenya 1995 provides:

"**An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not."**

This definition does not exclude fraud bribery or corruption or even tortious liability. Thus under the principle of separability the arbitral Tribunal in the Hague could rule on the effect of fraud, bribery or corruption on the Agreement if proven and if the matters are raised there. The arbitral tribunal can receive evidence on these maters and rule on them including the interpretation and validity of the Agreement under the principle of separability.

It is the national laws which establish the domain of arbitration as opposed to that of the courts. It is the prerogative of each state to decide which matters may or may not be resolved by arbitration in accordance with its own political, social and economic policy. It is for the Legislature and the courts in each country to balance the domestic need of reserving matters of public interest to the courts against the more general public interest in promoting trade and commerce and also the settlement of disputes. Regard must be had to the issue of arbitrability, to the local law of Kenya (and the effect of the specific exclusion of public law ..), to the law governing the arbitration agreement (ie the United Kingdom law), the law of the seat of arbitration (the Netherlands) and the law of the place of enforcement of the award (this could be Netherlands or Kenya or whenever the assets of Kenya are (the Agreement having waived the immunity of the Kenya assets! – it could be anywhere the assets are at the moment and therefore the position is fluid.

To conclude whether or not a particular type of dispute is arbitrable under a given law is substantially a matter of public policy for that law to determine. On the other hand, public policy varies from one country to the next and also changes from time to time. The effect of the specific exclusion of public law

by the Agreement is a critical question for this court and the arbitral Tribunal.

(2) **PRINCIPLE OF SEPARABILITY**

This means that the arbitration clause in a contract is considered to be separate from the main contract of which it forms part, and as such, survives the termination of that contract.

Article 16(1) of the Model Law provides:

"**The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."**

Nearly all modern laws of arbitration recognize the principle of separability. In the case of the United States, its Supreme Court in the case cited by the applicant's counsel, PRIMA PAINT (supra) recognized the principle of separability. In the case of Kenya s 17 of the Arbitration Act sets out the principle.

On the strength of this principle therefore the Arbitration Tribunal in the Hague can rule on fraud, corruption, bribery confidentiality etc but it cannot adopt an inquisitorial mode and become an investigator.

**3. NATIONAL SECURITY**

Because of the potential damage to national security in the event of public proceedings, the non justiability of military matters and the high position occupied by national security matters, in the scale of public interest issues the court has been unable to accept as final, the affidavit by the Permanent secretary of the Department of Defence and the court has for the reasons set out above held it has the final word.

**PUBLIC POLICY**

While ordinarily this is the preserve of the court, the Agreement in question having excluded public law, has given this matter a different dimension and the prima facie view of the court is that even this does fall within the ambit of the Arbitral Tribunal in the Hague. May I also observe that with all due respect to the 1st and 2nd Respondents their pre occupation with what appears to be suspicions touching on the criminal angle of the investigations would prima facie appear to the court, lacking in balancing the Public Interests involved in the matter especially when the Government has itself contractually purported to exclude public law. Prima facie this approach is unlikely to advance the public interest. On the other hand as the respondents are not barred from conducting commercial investigations this could more effectively advance the public interest by for example assisting the 2nd Respondent in defending the national interest at the Hague.

**CONSERVATORY ORDERS AND/OR INTERIM RELIEF**

As mentioned above in connection with "lex arbitri" interim relief in respect of arbitration is ordinarily applied for and granted as stated above, by the courts of the seat of arbitration and where so empowered the Arbitral Tribunal can give some interim relief as stipulated in the Model Law or as specified in the Local Arbitration Acts. Kenya is not the seat of the arbitration relating to the Agreement the subject matter of these proceedings. The only reason for entertaining the application by this Court is the grounding of the application on Constitution provisions and the issue of public policy.

Except for the arguable Constitutional issues and public policy it is apparent from the above analysis, that all the other matters prima facie fall within the ambit of the Arbitral Tribunal. The other reason for the suitability of the matters falling within the ambit of the Arbitral Tribunal is the confidentiality of the Arbitral process. The Arbitral process whether international such as in this matter or domestic is

absolutely confidential. However as the court must pursuant to s 10 and 6 of the Arbitration Act uphold the principle of party autonomy and the arbitral process generally, until all the issues are ventilated on merit, I grant orders in terms of prayers b, c, d and e in the application dated 14th July 2006 until the determination of the Petition or until further orders of the court. Since all the parties had expressed the wish to achieve early determination regardless of the outcome of this application for conservatory orders, I further order that the parties file and serve written skeleton arguments with lists of authorities if any within the next 30 days. I further order that this file be immediately sent to his Lordship the Chief Justice to consider fastracking the hearing or making such further orders as may be appropriate. Costs shall be in the cause.

It is so ordered.

DATED and delivered at Nairobi this 28th day of November, 2006.

**J.G. NYAMU**

**JUDGE**

Wahoro for the Attorney General

Mr Ruto/Rugo for KACC

Mr Ngatia for the Applicant