REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

HCCOM ARB E006/2021

TREAT OF THE DAY (EA) LIMITED…….....……APPLICANT

VERSUS-

UTILITY TRADING LIMITED……...……..RESPONDENT

CONSOLIDATED WITH

MISC. APPLICATION NO. E160 of 2021

UTILITY TRADING LIMITED/ UTILITY GROUP KENYA LIMITED…..…APPLICANT

-VERSUS-

TREAT OF THE DAY (EA) LIMITED/ TREAT OF THE DAY LLC…...….RESPONDENT

RULING

INTRODUCTION

1. This ruling determines two consolidated applications, namely, HCCOM ARB **E006/2021** *Treaty of the Day (EA) Limited v Utility Trading Limited/Utility Group Kenya Limited* and MISC. Application No. **E160** of 2021, *Utility Trading Limited/Utility Group Kenya Limited v Treat of the Day (EA) Limited/ Treat of the Day LLC*. For ease of reference and brevity, HCCOM ARB **E006/2021** will herein after where the context so permits be referred to as the *"first application* or the *"first applicant."* In the same parity of reasoning, Misc. **E160** of 2021, shall herein after where the context so permits be referred to as *"the second application"* or the *"second applicant."*

2. The common thread between the two applications is that they arise from the same arbitral proceedings between the parties herein which culminated in the Arbitral Award published on **2nd** February, 2021 by Dr. Kariuki Muigua (Sole Arbitrator). For further clarity, the applicant in the *second application* was the claimant before the Arbitral Tribunal while the applicant in the *first application* was the Respondent before the Arbitrator. Accordingly, in this ruling where reference is made to the Arbitral proceedings, the words *"claimant"* and *"Respondent"* shall mean and retain the original character of the parties before the Arbitrator.

3. The factual matrix which triggered the arbitral proceedings is essentially uncontroverted or common ground. It is uncontested that by a Memorandum of Understanding (MOU) dated **30th** May 2018, the parties herein entered into a Joint Venture which sought to achieve a long-term partnership involving a broad range of macadamia value chain with the objective of becoming a large processor and exporter of Macadamia from Kenya. Clause **7** of the MOU which provided mode of dispute resolution reads: -

> ***7. Disputes***
>
> *The parties shall seek to resolve any dispute, controversy or claim arising out of or in connection with this MOU, through good faith negotiations between them within seven (7) calendar days of any formal notice of dispute being served, or such longer period of time as may be mutually agreed between the parties.*
>
> *If the parties are unable to resolve the dispute within this timeframe, and one or both parties desire to pursue the dispute, the complaining party must submit to binding arbitration in accordance with the rules and regulations of the Chartered Institute of Arbitration, Kenya. In the event the parties cannot agree upon an arbitrator within a ten (10) day period, each party shall designate an arbitrator and those two arbitrators shall choose a third arbitrator servicing as the sole arbitrator of the dispute.*

This MOU shall be interpreted and construed in accordance with the laws of the Republic of Kenya.

4. Begore the Arbitral Tribunal, the claimant's claim comprised of a dispute on the amounts of salary costs. It complained that the Respondent had invoiced the claimant on its staff at the facility. It contended that the Respondent's refusal to follow the dispute resolution provisions of the MOU and its attempts to unilaterally terminate the MOU prompted it to obtain a court order protecting the *status quo*. However, as the dispute aggravated, the Respondent threatened to terminate the MOU. The claimant sought several orders: - (a) an injunction to restrain the Respondent from terminating the MOU; (b) an order allowing it to continue operating in the premises; (c) that the salaries be maintained as per the employment contracts and a one Bernard Sitati continues to manage the facility; (d) Damages and costs for breach of the MOU in the sum of **Kshs. 4,951,716/=;** (e) and lost production, damages for deterioration of its nuts, loss of use/business.

5. The applicant in the *first application* before the Tribunal admitted signing the MOU but refuted the claimant's claim. It maintained that claimant was to pay utilities, staff salaries, allocate their staff to manage their property and interests within the MOU and the applicant's access to the claimant's macadamia outputs subject discount rates and credit terms which were to be agreed. It contended that the claimant declined to honour the said terms. It counter-claimed that the arbitrator finds that there existed no dispute as the MOU, that the claimant before the Tribunal pays arrears **Kshs. 1,321,093/=** and damages for alleged failure to deliver the Macadamia plus costs of the case.

6. The Sole Arbitrator awarded and directed in full and final settlement of all issues in dispute that: -

*a. A permanent injunction be and is hereby issued restraining the Respondents either by themselves, their officers, servants, agents, employees or any person acting under their authority and/or instructions from interfering with and/or terminating the memorandum of understanding (MOU) dated **30th** May 2018;*

b. The Claimant be and is hereby allowed to access and operate the Respondents facility in accordance with the memorandum of understanding. The Claimant shall obtain access to and operate the facility within 7 days from the date of collection of the award;

c. The respondents shall give and allow the Claimant to conduct the nut processing activities within 7 days from the date of receipt of this award;

d. The Respondents shall furnish the Claimant with the employment records of all the employees who were in their employ when the memorandum of understanding was executed and those who may have joined its employ subsequently to execution of the memorandum of understanding for purposes of determining their respective salary rates;

e. The Respondents shall pay to the Claimant forthwith the sum of Ksh. 4951,716 being the costs for third party toll processing, cost of moving nuts from the facility to third a third party, Costs of staff not utilized and other costs;

f. The sum of Ksh. 4,951,716 shall attract simple interest at the rate of 12% per annum from the date of the award until payment in full;

g. The respondents shall pay to the Claimant forthwith the sum of Ksh. 2,971,391 being money spent on making the facility;

h. In total the Respondent shall pay the sum of Kshs. 7,923,107/= to the claimants forthwith. That sum shall attract interest at the rate of 12% from the date of the award until payment in full;

i. The respondents shall pay to the claimant the costs and expenses of these arbitration proceeding being legal and other expenses of the Claimant, the fees of the Arbitration Tribunal and any other related expenses to the arbitration.

j. The parties will be at liberty to agree on the quantum of these costs. In the event that parties do not agree on the quantum, the Claimant shall file before the Tribunal a bill of costs together with submissions in support within 14days from the date of collecting this award and the respondents shall file submissions in response to the claimant's bill of costs within 14days from the date of receipt of the same. The Tribunal shall tax the costs and publish an award on costs

7. Whereas the *first application* seeks to set aside the Arbitral Award, the *second application* seeks an order that the Award be recognized as binding and be enforced by this court. Each applicant prays for costs of its application. For the sake of succinctness, I will summarize the two applications separately.

The first application

8. The *first application* dated **1st** March 2021 is premised on Articles **10** and **159 (1)** & **(2)** of the Constitution, sections **35 (2) (a) & (b)** of the Arbitration Act (herein after referred to as the Act), sections **1A, 1B** and **3A** of the Civil Procedure Act and Rule **7** of the Arbitration Rules, 1997. It seeks to set aside the Award and to be awarded costs of the application. Prayers **(a)** & **(b)** of the application are spent.

9. The key grounds cited in support of the *first application* are that the Award granted the Respondent compensation in relation to terms outside the contract. The contestation here is that:- (a) the Arbitrator directed the *first applicant* to pay for processing of nuts outside its facility and at a rate not contemplated by the MOU; (b) the Arbitrator failed to appreciate the contents of the MOU as he further directed that the *first applicant* allows the *second applicant* to access and operate the facility **7** days from the date of award, almost **2** years after the lapse of the MOU, and, in so doing, the Arbitrator went outside and or amended clause **2.3** of the MOU in as far as ownership and operation is concerned.

10. The *first applicant* states that the Award was designed to confer an undue and undeserved benefit and to unjustly enrich the *second applicant* in flagrant disregard/contravention of the public policy of Kenya. It states that the Award is contrary to established principles of law and justice and offends the constitutional principles on standard of conduct expected of a person interpreting and/or applying the law.

11. Additionally, the *first applicant* states that the effect of the award is to legitimize an illegality and to aid the Respondent in deriving benefit from a contract that they themselves breached by non-payment of Salaries and Utilities under clause **5(ii),** and also the award has the effect of allow the *second applicant* to unjustly profit from its own wrongs and to unfairly punish a hapless party who at all times acted as per the contract. Further, that it faults the Arbitrator for failing to appreciate that as at the **18th** November 2018 when the *second applicant* moved out of the facility, they were in breach of the MOU and that there was no court injunction forcing the *first applicant* to allow the use of the facility without meeting its obligations under the MOU. Lastly, the *first applicant* states that the Award is oppressive, and, any payments in furtherance of the Award would amount to an illegality and/or contrary to the public interest.

The Respondent's reply to the first application

12. The *second applicant's* opposition as contained in the Replying affidavit of Benard Sitati, its manager dated **23rd** March 2021 is that the MOU provided for Arbitration in the event of a dispute, that the *first applicant* purported to terminate the Contract and prevented the *second applicant* from exercising its rights under the contract, and that, the dispute(s) was referred to arbitration before Dr. Kariuki Muigua, PH. D (C.Arb), the sole Arbitrator who rendered the Final Award on the **2nd** February 2021. It states that the parties did not reserve the right of appeal.

13. The *second applicant* states that the Arbitrator did not act arbitrarily, irrationally or capriciously as claimed; that the decision is based on the rule of law and careful consideration of the party's obligations under the contract, and, that the dispute determined and the award falls within the terms of reference; and the Award is not in conflict with the public policy of the Republic of Kenya nor does it seek to amend the contract.

14. Additionally, the *second applicant* states that the *first applicant* has failed to disclose that it denied the *second applicant* access to the facility compelling it to obtain a court order in High Court Commercial Case No. E093 of 2018 to continue operating at the facility. Further, that one of the core tenets of the dispute involved determining the amounts of salaries due and payable, and whether the *second applicant* was responsible to pay the applicant's staff salaries or whether it was only liable to pay its staff.

15. The *second applicant* states that the Tribunal in the Award clarified its reasoning on the purported non-payment of staff at pages 50 — 51 of the Award. Further, it states that the *first applicant* refused to follow and abide by the stipulations of the contract on dispute resolution and terminated the contract. It also states that the Tribunal did not amend clause **3.4** of the contract, but the Award only clarifies the nature of expenses to be incurred by the *second applicant*.

16. The *second applicant* contends that the compensation is within the terms of the contract, and that it proved its case. Additionally, it states that the Award does not offend or amend clause **2.3** of the Contract as far as ownership and operation of the facility is concerned nor does it confer the ownership of the facility to the *second applicant*, but it simply allows it to use the facility as per the contract. It also states that the Award does not confer to it undue and undeserved benefit nor does it contravene public policy of Kenya, or principles of law and justice or constitutional provisions. Lastly, it states that the *first applicant* flouted the court order allowing it to use the facility.

The second application

17. Vide the application dated **3rd** March 2021, the *second applicant* seeks an order that the final award be recognized as binding and the same be enforced by this court. It also prays for costs of the application. The application is founded on the grounds *inter alia* that the parties did not reserve the right of appeal and that it is in the interests of justice that the final Award be enforced.

The first applicant's Reply

18. The *first applicant*'s Reply to the *second application* is contained in the Replying affidavit of Clifton Jura. Essentially, it rehashes the grounds in support of the *first application*, hence, it will add no value to rehash them here. It will suffice to highlight some aspects. It states that based on clause **3.4** of the contract, correspondences and invoices exchanged by the parties, there couldn't have existed a dispute as to the amounts the applicant was required to remit because the contract had clarified all the information on expenses.

19. It maintains that due to the *second applicant's* prolonged breach of the contract, it served it with a notice to terminate the contract pursuant to Clause **5**, and, notwithstanding the breach, the *second applicant* obtained court orders maintaining the *status quo* and continued to operate in the facility while still in breach. The *first applicant's* position is that the *second applicant* used the court order as a shield and refused to perform their obligations under the contract. Further, after the orders lapsed on **19th** November 2018, the *second applicant* on its own volition removed all their macadamia NUTS without paying as per the contract. Additionally, the *first applicant* states that the *second applicant's* failure to honour the contract caused the friction between the parties.

The first applicant's advocates submissions

20. The *first applicant's* counsel submitted that the Award is contrary to public policy. He cited *Christ of All Nations v Apollo Insurance Co. Ltd*[1] which held that an Award is contrary to public policy if it was found to be: - (a) Inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. He also cited *Rwama Farmers' Co-operative Society Ltd v Thika Coffee Mills Ltd*[2] which stated that the terms "contrary to public policy" and "against public policy," "opposed to public policy" do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and violates the basic norms of society. He also cited *Glencore Grain Ltd v*

TSS Grain Millers Ltd ***[3]*** which held that an award would be contrary to public policy of Kenya if it is immoral or illegal or that it would violate in clearly unacceptable manner, basic legal and/or moral principles or values in the Kenyan society. He argued that the court in the said case explained that the word "illegal" would hold a wider meaning than just "against the law," and that it would include contracts or acts that are void. Further, it would also include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive.

21. Additionally, counsel cited *Anne Mumbi Hinga v Victoria Njoki Gathara*[4] which held that "public policy would involve some element of illegality or that which would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the state's powers are exercised." Further, he cited *Federica Martina Ferro v Gabriella Zouras Ferro*[5]in which the court stated that possible procedural public policy grounds include, fraud in the composition of the tribunal; breach of natural justice; lack of impartiality; lack of reasons in the award; manifest disregard of law; manifest disregard of the facts; annulment of place of arbitration. It was counsel's submission that the Sole Arbitrator manifestly disregarded the law by making pronouncements which effectively re-wrote the MOU which was a breach of public policy.

22. Additionally, counsel submitted that the Sole Arbitrator disregarded the doctrine of freedom of contract. He cited *George M. Musindi & 2 Others v Small Enterprises Finance Co. Ltd*[6]in which the court cited Sir George Jessel in Printing *and Numerical Registering Company v Sampson*[7] that: - "…public policy requires … that men of full age and competent understanding shall have the utmost liberty contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of Justice." He also cited *Caesar Njagi Kunguru v Kenya Commercial Bank Ltd*[8] for the proposition that it is not part of the courts mandate to rewrite or modify contracts because they were freely negotiated by the parties.

23. On the *second application*, he submitted that the application is unmerited and ought to be rejected under the grounds set out in Section **37** of the Act, specifically, that the enforcement would be contrary to public policy because the Sole Arbitrator disregarded the common law principle of Freedom of Contract; and the Sole Arbitrator disregarded the *second applicant's* conduct which was relevant in coming up with a just decision. To support his argument on breach of public policy, he cited *Wilfred Ogot Lusi v Land Layby Kenya Limited****[9]*** and argued that the Arbitrator disregarded the law.

The second applicant's advocates submissions

24. The second applicant's counsel argued that at the heart and soul of the first applicant's application is the amount awarded to the second applicant in the Final Award. He posed the question whether quantum of an award can be the basis for setting aside an arbitral award under Section **35** of the Act. He described the grounds cited in support of the *first application* as an attack on the character of the Arbitrator. He submitted that the first applicant in advancing the said grounds is asking this court in the name of acting in good equity and conscience and social norms and values, to do deductive reasoning and find that the Award is unconscionable and indeterminable. He argued that the first applicant is asking this court to substitute the Arbitral Tribunal's findings and decision with its own which amounts to asking this court to sit on appeal against the Award. He submitted that this court has no jurisdiction to do that.

25. He submitted that the *first application* must be determined within the confines of Section **35** and specifically the allegation that the Award is contrary to public policy and that the Arbitrator through the Award, sought to amend the terms of the Contract. He argued that this court's duty is to establish whether within the laid down principles of law the first applicant has established those two grounds.

26. He submitted that the Arbitration Act is based on the UNICITRAL Model law and argued that there are three fundamental principles shared worldwide by the States whose Arbitral laws are modelled on the UNICITRAL model law. *First*, the principle of non-interference by the courts. Under this principle, he argued that the common thread in the UNICITRAL Law is to restrict judicial intervention in arbitral matters and to confine any intervention to limited grounds specified in the Acts. He argued that where the Act requires court intervention, it provides so specifically and where the Act anticipates court intervention, it makes specific provision for such intervention.

27. He submitted that Section **10** of the Act states that except as provided in the Act, no courts shall intervene in matters governed by the Act. He argued that the clear intention of this provision is that the court is to be involved in a consensual arbitration only under the limited circumstances prescribed in the Act specifically Section **35** and **37** of the Act or the Rules made under the Act. In support of this proposition, he cited *Anne Mumbi Hinga v Victoria Njoki Gathara****[10]*** which underscored non-interference by the courts describing the Act as a complete code except as regards the enforcement of the award where the Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate. Fortified by the said decision, counsel submitted that the applicant's invocation of Articles **10** and **159** of the Constitution is irrelevant. He submitted that the said provisions do not confer jurisdiction to this court to interfere with the Award. Additionally, he argued that Articles **159** of the Constitution deals with judicial authority, while Article **10** deals with national values and principles of good governance which have no relevance whatsoever to this matter. He argued that the disputes between the parties were purely commercial disputes and not matters of national values and good governance whatsoever.

28. Counsel referred to the second principle in UNICITRAL Law, and argued that it is the finality of Arbitral Awards and pro arbitration policy. He submitted that this principle underlines the fact that arbitration is consensual, and that parties bind themselves to carry out the Arbitral Award. He submitted that Section **32A** of the Act specifically provides that an Arbitration Award is final and binding on the parties and the courts cannot interfere with the Award except in the specific instances clearly set out in Sections **35** and **39** of the Act.

29. He submitted that Section **39** Act provides that where the parties have agreed, an application may be made to the High Court to determine any question of law arising in the course of the arbitration or an appeal on any question of law arising out of the award. He argued that in the instant case the parties did not reserve any right to the High Court to determine any question of law whether on application or appeal against the Arbitral Award under Section **39**. As a consequence, he submitted that this court has no jurisdiction to determine any questions of law whether on application or appeal arising from the Award. He submitted that the Award is final and cited *Anne Mumbi Hinga v Victoria Njoki Gathara* (*supra*) which underscored the concept of finality of arbitration awards.

30. Counsel submitted that courts while dealing with an application to set aside an arbitral award under Section **35** of the Act should be

circumspect because the court is not sitting on an appeal from the decision of the arbitrator and cannot therefore purport to assess or re-evaluate the evidence presented before the Tribunal or go to the merits of the Award. He argued that the courts must respect the decision of the parties to go to arbitration and should not therefore interfere with Arbitral Award even if the court itself on the facts of the case might have arrived at a different conclusion.

31. On the third principle under UNICITRAL Law, counsel argued that Arbitrators are the masters of facts, and, that the courts have no jurisdiction under Sections **35** to review the decision of the Arbitral Tribunal for purposes of substituting it with their own views and conclusions. To fortify his argument, he cited *National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited*[11] for the holding that all questions of fact are and always have been within the sole domain of the Arbitrator and that the court cannot interfere with the findings of fact by the arbitrator. Also, counsel placed reliance on *Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others**[12]*** for the holding that "a court will not interfere with an Arbitral decision even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties." He submitted that this reasoning also applies to the award of damages which was solely within the jurisdiction of the Arbitrators to determine.

32. Additionally, counsel submitted that even in in situations where an appeal is permissible under Section **39**, the law is very clear that the court cannot interfere with the arbitrator's findings of fact. To support this position, he cited *Kenya Oil Company Limited & another v Kenya Pipeline Company*[13] where the court of Appeal cited Lord Justice Steyn in *Geogas S.A v Trammo Gas Ltd* thus: -

> "*The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.*"

33. Further, counsel cited *National Cereals & Produce Board v Erad Suppliers & General Contractors Ltd*[14] which held that Section **35** permits the setting aside of an arbitral award, but it does not permit an appeal, rather setting aside is a narrower avenue for challenging an award than an appeal and that the grounds for setting aside an award are restricted under the Act. He also referred to the Supreme Court decision in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*[15] which held *inter alia* that courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration."

34. Regarding the argument that the award offends public policy, counsel cited the definition in the *Black's Law Dictionary**[16]*** defines "public policy" (1) *Broadly, principles and standards regarded by the Legislature or by the courts as being of fundamental concern to the state and the whole society."* (2) *More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large.* Counsel cited *Attorney General of Kenya v Anyang' Nyong'o & 10 Others**[17]*** for the proposition that what offends public interest or policy are issues of unlawfulness, morality and reprehensive behavior. Counsel cited *Rwama Farmers' Co-Operative Society Limited v Thika Coffee Mills Limited*[18] and *Anne Mumbi Hanga v Victoria Njoki Gathara* (supra) for a similar holding.

35. Counsel argued that the decision in *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd,**[19]*** relied upon by the first applicant's, the emphasis was that the award was patently in violation of statutory provisions. He also cited *Conrad Construction & Equipment Limited v Iberdrola Engineering & Construction Company**[20]*** in which the court emphasized that Arbitrators are masters of the facts in the disputes they are called upon to decide. He submitted that the applicant is aggrieved by findings of fact and law and that the application to set aside the Award is an appeal against the Award disguised as an application to set aside the Award. He submitted that the fact that the first applicant does not agree with the factual and legal findings and decisions does not mean that the Award should be set aside. (Citing *Christ for all Nations v Apollo Insurance Co Ltd*[21]).

36. Counsel submitted that the first applicant has not challenged the Arbitrator's findings of fact that it was in breach of the Contract. He argued that the Tribunal found as a matter of fact that the proper course for the first applicant was not to terminate the Contract as: (i) the second applicant had settled some of the invoices but there was a dispute as to amounts payable in some of the invoices, and it therefore follows that a lack of consensus about amounts due in an invoice did not warrant a termination of the Contract, as the aggrieved party was required to declare a dispute and follow the dispute resolution process provided under Clause **7** of the Contract; (ii) The Tribunal also found that if consensus had been reached regarding the amounts payable with regard to the dispute and the claimant refused to settle the subsequent invoice, then the first applicant would have been entitled to terminate the contract, hence, the fist applicant acted wrongly and contrary to the provisions of the Contract.

37. Counsel submitted that in light of this uncontested and unchallenged breach of the contract, it is clear there is no question of illegality of the Award. He submitted that the amount of award for each breach were matters falling squarely within the mandate *of the Tribunal.* He argued that the first applicant is asking this court to sit on appeal against the Award and relied on *Kenyatta International Convention Centre (KICC) v Greenstar Systems Limited**[22]*** which held that matters to do with the propriety or otherwise of the Arbitrator awarding a specific sum, or interest or costs are matters over which only the Arbitrator had jurisdiction to deal; and which this court would have no mandate to interfere. He urged the court to reject the invitation to engage in an appeal on legal merits.

38. He also submitted that the assertions that the Award was in excess of the contract and amounts to unjust enrichment are in any event clearly without any legal or contractual basis. He submitted that the Arbitrator made his finding based on the list of issues presented by the parties, and therefore the Award is within the reference to Arbitration.

39. On the submission that the award does not recognize the breach on the Employment Laws or that the Award disregarded Employee rights; and that the Arbitrator made a commercial decision in total disregard of fair labour practices in Kenya, counsel submitted that the

dispute was not about breach of Employment Laws, but breach of contractual obligations between the parties.

40. On whether the award rewrote the contract, he submitted that matter relating to merits are within arbitrator's jurisdiction. Additionally, he submitted that the said allegations are not among the grounds specified in section **35.** He cited *Mahican Investments Ltd & others v Giovanni Gaida & others* for the holding that in order to succeed, the applicant must show *beyond doubt* that the *arbitrator has gone on a frolic of his own* to deal with matters not related to the subject matter of the dispute. He argued that the Tribunal clearly articulated the reasons for its findings and that the findings squarely fell within the principles set out in the *Mahican Investments Ltd & others v Giovanni Gaida & others* and that it did not amend the Contract.

41. Regarding the second application seeking recognition and enforcement of the Award, he cited Section **36 (1) & (3)** of the Act and submitted that the applicant has demonstrated that the Arbitral Tribunal followed due process and made a proper and reasoned Award. He argued that the first applicant has failed to establish any of the grounds for setting aside the Award under Sections **35** or **37** Act to warrant refusal for recognition and enforcement of the Award.

42. He submitted that the Award is final and it should be recognized and enforced. He relied on *National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited, Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others Rwama Farmers' CoOperative Society Limited v Thika Coffee Mills Limited and Kenyatta International Convention Centre (KICC) v Greenstar Systems Limited* where the court having found no grounds for setting aside Arbitral Awards proceeded to recognize and order enforcement under Section **36** of the Act. He submitted that there is no justification as to why this court should not adopt the Award as a decree of the court in order to pave way for its enforcement. Lastly, on costs, he cited Section **27** of the Civil Procedure Act and argued that the second applicant is entitled to costs.

Determination

43. For starters, it is a correct statement of the law that the general approach on the role and intervention of the court in arbitration in Kenya is provided in section **10** of the Act which provides that except as provided in the Act, no court shall intervene in matters governed by the Act. In peremptory terms, section **10** restricts the jurisdiction of the court to only such matters as are provided for by the Act. The section exemplifies the acknowledgement of the policy of party's ?autonomy" which underlie the arbitration generally and precisely under the Act. The section enunciates the need to curb the court's role in arbitration so as to give effect to that policy.[23] The principle of party autonomy is recognized as a critical precept for assuring that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.

44. The phraseology of section **10** leaves no doubt that it authorizes two possibilities where the court can intervene in arbitration. *First*, is where the Act expressly provides for or permits the intervention of the court. *Second,* in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. However, emerging jurisprudence is in agreement that the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially. A case in point the Supreme Court decision in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party),*[24] (*the Nyutu case*) which held that this judicial intervention can only be countenanced in exceptional instances. The Apex Court was clear that such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration**.** The Apex Court clarified the restricted instances in which the court's intervention can be permitted to include instances of process failures as opposed to the merits of the arbitral award itself. Three consequences flow from the foregoing decision while applying it to this case. *One.* The first applicant has not alleged of proved process failures nor do I see any. *Two,* it should be borne in mind that the Apex Court was addressing appeals from the High Court to the Court of Appeal unlike the instant case. Before me is an application for setting aside an award which must stand or fall on the clear grounds enumerated in section **35** and nothing more.

45. *Three,* even assuming that the exceptional circumstances contemplated by the Supreme Court do apply in applications under section **35** (and I still believe it was addressing appeals to the Court of Appeal), the Supreme Court in the *Nyutu case* did not define exceptional circumstances nor is it defined in the Arbitration Act or any other statute. The *first application* did not cite exceptional circumstances nor do I find any. However, for the sake of completeness, I find it necessary to attempt to define exceptional circumstances. I profitably refer to the following points from a leading South African decision: -[25]

> *i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . ."*
>
> *ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
>
> *iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.*
>
> *iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*
>
> *v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional. ? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.*

46. The Supreme Court in the *Nyutu case* stated that Section **10** of the Act was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene. Therefore, parties who resort to arbitration, must know with

certainty instances when the jurisdiction of the courts may be invoked. Under the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds. Under Section **35(1),** recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections **(2).** This implies that an applicant seeking to set aside an Arbitral Award must demonstrate the grounds under the said sub-section.

47. Subsection **(2)** sets out the grounds upon which the High Court will set aside an arbitral award. The grounds which the applicant must furnish proof for the arbitral award to be set aside are: incapacity of one of the parties; an invalid arbitration agreement; Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award. Apart from the above, the High Court may also set aside arbitral awards where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya.

48. Perhaps I should state that by agreeing to arbitration, parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else.[26] Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute relitigated or reconsidered. By agreeing to arbitration, the parties limit interference by courts to the ground set out in section **35** of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise. It follows that any attempt by an applicant under the said section to introduce grounds outside sub-section **(2)** of the said provision is impermissible.

49. The nub of the grounds in support of first application is that the Arbitrator directed the applicant to pay for processing of nuts outside its facility and at *a rate not contemplated by the MOU*; ***that he failed to appreciate the contents of the MOU*** *by directing the second applicant to access and operate, almost **2** years after the lapse of the MOU, and in so doing, **he went outside** and or amended clause **2.3** of the MOU*. The first applicant also states that the Award was designed to confer an undue and undeserved benefit and to unjustly enrich the second applicant in flagrant breach of the public policy of Kenya. And, that, the Award is contrary to established principles of law and justice and offends the constitutionally anchored principles in relation to the standard of conduct required of a person interpreting and/or applying the law. The first applicant contends that the effect of the award is to legitimize an illegality and to aid the second applicant to derive a benefit from a contract which they themselves breached and also the award has the effect of allow the second applicant to unjustly profit from its own wrongs and to unfairly punish a hapless party who at all times acted as per the contract. The first applicant also faults the Arbitrator for failing to appreciate that as at the **18th** November 2018 when the second applicant moved out of the facility, they were in breach of the MOU. Lastly, the first applicant states that the Award is oppressive, and, any payments in furtherance of the Award would amount to an illegality and/or contrary to the public interest.

50. In previous decisions of this court, I have observed that it is a principle of common law that a final award must deal with all the issues put to the tribunal. A final award that does not do so is imperfect. This does not mean that arbitrators must deal with each individual item separately but they must take each item into consideration in arriving at their conclusion(s). The essential function of an arbitrator, is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain alive.

51. A reading of the bulk of the infractions cited by the first applicant leaves no doubt that majority of the grounds fall outside the ambit section **35(2).** They infiltrate the merit of the decision. I will first address the only two grounds which fall under section 35. *First* is the allegation that the arbitrator Arbitrator directed the first applicant to pay for processing of nuts outside its facility and at ***a rate not contemplated by the MOU***; ***that he failed to appreciate the contents of the MOU*** *by directing the second applicant to access and operate, almost **2** years after the lapse of the MOU, and in so doing, **he went outside** and or amended clause **2.3** of the MOU*.

52. The gravamen of the above ground(s) of attack is that the Arbitrator dealt with matters outside the scope of the Arbitration. Put differently, the attack here as I see it is that the Arbitrator exceeded his powers. The term 'exceeding his powers' requires little by way of elucidation and this statement by Lord Steyn says it all:-[27]

> "*But the issue was whether the tribunal "exceeded its powers"…this required the courts… to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have…*"

53. As was held in *Cf Bull HN Information Systems Inc v Hutson*[28] "to determine whether an arbitrator has exceeded his authority . . . courts "do not sit to hear claims of factual or legal error . . ." . . . and "[e]ven where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards. . ." The term acting outside the scope of his mandate must be understood in context. The ground is to all intents and purposes identical to a ground of review available in relation to proceedings of inferior courts. It is a valid ground under the Act for setting aside an award if an arbitrator had 'exceeded his powers.' To exceed one's powers does not go to merit but to jurisdiction. However, where a decision maker misconceives the nature of the inquiry a hearing cannot in principle be fair because the body fails to perform its mandate.

54. Before concluding that arbitrator misconceived the nature of the inquiry and his duties or exceeded his powers, it is necessary to appreciate the nature of the inquiry, the arbitrator's duties, and his powers. The arbitration clause reproduced earlier is clear on matters to be referred to the Arbitrator. In this regard, the suggestion by the first application that there was no dispute is unsustainable. On the contrary, it is clear from the position taken by both parties that a dispute arose between the parties. It is admitted that the second applicant obtained court orders to gain access to the facility. The second applicant admits issuing a Notice to terminate the MOU. Curiously, the first applicant now argues that there was no dispute under the MOU, the same contract it sought to terminate. The other important and uncontested point is that the MOU contained a dispute resolution clause.

55. The duty of the Arbitrator was to determine the dispute between the parties, including disputes relating to the interpretation of the MOU

and disputes of a legal, financial and technical nature, the procedural rules to apply and the laws of the Republic governing the agreement. In this regard the Arbitrator had to choose between two opposing contentions. In short, the arbitrator had to: - (i) interpret the agreement; (ii) apply the Kenyan law; (iii) construe the contract terms, and (iv) consider all the admissible evidence. The Arbitrator had, according to the terms of reference, the power (i) not to decide an issue which he deemed unnecessary or inappropriate; (ii) to decide any further issues of fact or law, which he deemed necessary or appropriate; (iii) to decide the issues in any manner or order he deemed appropriate; and (iv) to decide any issue by way of a partial, interim or final award, as he deemed appropriate.

56. In determination an application of this nature, the point of reference remains Section **35 (2)** of the Act which requires in peremptory terms that an application to set aside an arbitral award can only be allowed if the party making the application furnishes proof of the grounds provided therein. The applicant's grounds that the Arbitrator determined matters outside the MOU is not supported by evidence. They are simply empty statements. Failure to furnish evidence as decreed by the said provision is a fertile ground for the application to be refused.

57. In any event, even if the Arbitrator had either misinterpreted the MOU, or failed to apply the law correctly, or had regard to inadmissible evidence, it does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator *'has the right to be wrong'* on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To borrow from Hoexter JA:[29]

> *"It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court."*

58. The point here is the first applicant failed to appreciate that the power given to the Arbitrator was to interpret the MOU, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly.[30] Errors of the kind mentioned have nothing to do with him exceeding his powers or dealing with matters not contemplated under the MOU; they are errors committed within the scope of his mandate. To illustrate, an Arbitrator in an arbitration has to apply the law but if he errs in his understanding or application of the law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.

59. A reading of the Award leaves no doubt that the Arbitrator understood clearly the nature of the dispute referred to him,, he understood his duty was to interpret the MOU and that he had, in this regard, to choose between the conflicting contentions tendered by the parties. He understood particularly well that he had to determine the meaning of the contract with reference to its true construction and that he could only have regard to admissible evidence.

60. As was held *Telcordia Technologies Inc v Telkom SA Ltd*,[31] the Supreme Court of Appeal of South Africa stressed the need, when courts have to consider the confirmation or setting aside of arbitral awards, for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimizes the scope for intervention by the courts. This same position was reiterated by our Supreme Court in the *Nyutu Case.* Resolving, for the purposes of the present case, the tension between this principle and the duty of the courts to ensure, before ordering that an arbitration award be enforced by the court, that the award was obtained in a manner that was procedurally fair, is the key constitutional issue that in my view fits the exceptional circumstances the Supreme Court alluded to in the *Nyutu Case*. However, in this case, no argument was advanced before me to suggest that the dispute was not conducted in a procedurally fair manner or that the existence of exceptional circumstances to warrant the limited court intervention suggested by the Apex Court. It follows that the argument that the Arbitrator went outside his mandate by determining matters not contemplated in the MOU collapses. In *Mahican Investment Limited v Giovani Gaid & 80 Others* it was held: *In order to succeed (in showing that the matters objected to are outside the scope of the reference to arbitration) the applicant must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute."*

61. The other ground cited by the applicant is that the award is against public policy. I reproduced the reasons for so stating earlier. I need not rehash them here. It is common ground that one of the grounds for the court to reject the award enforcement is if the award is violation of 'public policy.' In fact, arbitrability and public policy are closely related. Arbitrability relates to the legality of an arbitration agreement or process, while public policy refers to the laws or standards that either the agreement or the award might contravene.[32]

62. I have stated in previous decisions that arbitrability and public policy overlap in arbitration practice. A violation of public policy, may render an agreement in arbitrable.[33] Courts often refer to "public policy" as the basis of the bar.[34] Thus, if the court feels that an issue falls in the scope of public policy, the court may intervene only, to protect the benefit of the public. An obvious example is criminal law, which is generally the domain of the national courts.[35] The criminal case involves the violation of good morals affecting the public; therefore, the parties' autonomy is restricted and the court will decline to enforce the award.

63. Generally, public policy is used to describe the imperative or mandatory rules that parties cannot exploit.[36] Public policy is outside and beyond the scope of arbitration and stays within exclusive judicial jurisdiction, and it also can be the obstacle to the arbitration of certain disputes. The concept of public policy often is used to describe the imperative rules of each country. Public policy serves as the rationale on which a domestic court may refuse the enforcement of an arbitral award, which is contrary to the laws or standards of the court's jurisdiction. If the court feels that enforcement of an award would violate the basic notions of morality and justice, the court may vacate such award.[37]

64. Domestic public policy is expressed by legislative enactments, constitutional constraints, or judicial practice within individual states.[38] Hence, public policy is a legal principle founded on the concept of public good. It can be used to protect the morale of a country or justify a court's intervention where an agreement is considered harmful to the public welfare. Even though such public policy will disturb only one part of community, the court should weigh the whole of the community in applying public policy considerations if it believes that such

actions may impact their own public good and morale. These mandatory rules of public policy are found in a State's laws and are designed to protect the public interests of that State, not of any particular private individual or entity.

65. The main case regarding public policy in England is *Deutsche Schachtbau-und Tiefbohrgesellschafl MB.H (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil).*[39] In this case, the court reasoned that in order for an English court to set aside the award on the public policy defense, the claiming party must prove that there is "some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.[40] In addition, it was not contrary to public policy of England if the arbitrator used common principles underlying the laws of the various nations to govern contractual relations, especially when the parties failed to specify which system of law would apply. The English court confirmed that it had to violate a particular existing justified interest of the English public to be a public policy exception.[41]The court must see that such recognition and enforcement of award may endanger the interest of the state's citizens by executing its public authority. Thus, any public policy exception that cannot show clearly how the recognition and enforcement could damage the interest of state's public will not be considered as a bar to recognize or enforce the award.

66. A review of all the grounds propounded by the first applicant in support of the plea that the award or portions thereof offend public policy leave me with no doubt that the first applicant has not satisfied the tests laid down in the above cited case. First, the first applicant did not identify provisions of the Constitution or statues impinged by the award. Even if it had cited such provisions, it is not enough to recite statutory or constitutional provisions or an enactment. The party alleging breach of public interest must prove beyond doubt how the recognition and enforcement of the award would damage public good or how it would be clearly injurious to the public good or, that possibly, that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.

67. It is not enough to allege, as the first applicant did that the Award will offend public policy or the Award will enrich the payee if paid. *First*, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. The first applicant's argument flies on the face of this basic principle of Arbitration. *Second*, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are to be determined. The applicant cannot now purport to rewrite the contract by attempting to free itself from the arbitration outcome which is binding upon the parties by hiding behind the concept of public policy. *Third*, the arbitrator is chosen, either by the parties, or by a method to which they have consented. *Fourth*, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed.

68. Lastly, the applicant argued that the Arbitrator re-wrote the contract. As stated above, the Arbitrator has power to construe the contract. A reading of the Award leaves no doubt that the Arbitrator only determined matters referred to him. The argument that he re-wrote the contract lacks basis.

69. The arbitrator is only subject to the limitations under the Act. The Act confers the Arbitrator with exclusive jurisdiction over questions of fact and law which flows from the provisions of the Act which exclude appeals and limits reviews. The court may only be approached as provided by the Act. Unless the arbitration agreement provides otherwise, an award is only subject to the provisions of the Act, final and not subject to appeal or review and that each party to the reference must abide by and comply with the award in accordance with its terms. Clearly, the Legislature intended the arbitral tribunal to have exclusive authority to decide whatever questions submitted to it, including any question of law. That is what the parties agreed.

70. Flowing from my discussion on the issues discussed above, I find and hold that the applicant has failed to establish any grounds for this court to set aside the arbitral award. The upshot is that the *first application* dated **1th** March 2021 is dismissed.

71. I now turn to the *second application*. I have weighed the material presented before me and the law. The first applicants' grounds in opposition to the *second application* are a replica of its grounds in support of the *first application*. I have already concluded that the *first application* lacks merit. The *first application* seeking to set aside the award having collapsed, I find no impediment to the *second application*. Put differently, I find no bar to the *second application* either legal or equitable. The effect is that the *second application* dated **3rd**March 2021 is merited. I allow the said application and order that the Arbitral Award published on **2nd** February 2021 be and is hereby recognized, adopted and enforced as an order of this court. Leave be and is hereby granted to *Utility Trading Limited/Utility Group Kenya Limited* to enforce the Arbitral Award published on **2nd** February 2021 as a decree of this court. I further order that the first applicant pays costs of the two applications to the second applicant.

Orders accordingly

Signed, Dated and Delivered via e-mail at **Nairobi** this **13th** day of July 2021

John M. Mativo

Judge

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[1] {2002} 2 EA 366.

[2] {2012} e KLR.

[3] {2002} e KLR.

[4] {2009} e KLR.

[5] {2020} e KLR.

[6] {2007} e KLR.

[7] 1875 LR 19 FG 462 at 465.

[8] HCCC (Milimani) 1543/2000.

[9] HC.COM. MISC. NO. E005 OF 2021.

[10] {2009} e KLR.

[11] {2014} e KLR.

[12] {2005} e KLR.

[13] {2014} e KLR.

[14] {2014} e KLR.

[15] [2019] e KLR.

[16] Seventh Edition, 1999, p.1245.

[17] {2010} e KLR.

[18] {2012} e KLR.

[19] Appeal No 7419 of 2001.

[20] HCCC No 579 of 2014.

[21] {2002} 2 E.A. 366.

[22] {2018} e KLR.

[23] See Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293.

[24] {2019} e KLR.

[25] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.

[26] They may even reduce the level of procedural fairness by, e g, agreeing that the arbitrator may decide the matter without hearing them.

[27] *Lesotho Highlands Development Authority v Impregilo SpA* {2005} UKHL 43 para 24.

[28] 229 F 3d (1st Cir 2000) 321 at 330.

[29] Administrator, South West Africa v Jooste Lithium Myne (Edms) Bpk 1955 (1) SA 557 (A).

[30] *Armah v Government of Ghana* [1966] 3 All ER 177 at 187 quoted in Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208 (HL) at 223D-F.

[31] [2006] ZASCA 112; 2007 (3) SA 266 (SCA); 2007 (5) BCLR 503 (SCA) at para 4.

[32] 3 Julam D M Lew, Loukas A Mistelis and Stefan M Kroll, Comparative International Commercial Arbitration, Kluwer Law International, 32 (2003).

[33] Id

[34] 4 Laurence Shore, Defining "Arbitrability": The United States vs. The Rest of the World, New York Law Journal, 15 (2009).

[35] Mistelis L. & Brekoulakis S., Arbitrability: International & Comparative Perspectives, 4 (2009).

[36] Pierre Lalive. Transnational (or Truly International) Public policy and International Arbitration, : Comparative Arbitration Practice and Public Policy Arbitration ICCA InternationalArbitration Congress, 261(1987).

[37] 3 Bockstiegel, K., Public Policy and Arbitrability, Comparative Arbitration Practice and Public Policy Arbitration: ICCA International Arbitration Congress, 179(1987).

[38] Parsons & Whitmore Overseas Co. v. Societe Generale de L' Industrie du Papier, 508 F.2d 969, 974 (2d Cir 1974).

[39] Deutsche Schachtbau-und Tiefbohrgesellschaft MB.H (D.s. T.) v. Ras Al Khaimah Nat 'I Oil Co. (Rakoil). 2 Lloyd's Rep. 246, 254 (K.B.)(1987).

[40] Ibid

[41] Alexander J. Belohlavek, Arbitration, Order Public and Criminal Law: Interaction of Private and Public International and Domestic Law, 1347 (2009),