Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling)

Neutral citation: [2021] KEHC 93 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E527 OF 2020

JM MATIVO, J

SEPTEMBER 21, 2021

BETWEEN

EUROMEC INTERNATIONAL LIMITED .... PLAINTIFF

AND

SHANDONG TAIKAI POWER ENGINEERING COMPANY LIMITED .... DEFENDANT

Principles applicable in the interpretation of contracts.

Reported by Ribia John

Law of Contract *– enforceability of a contract – unconscionable contracts – test of unconscionability – procedural unconscionability – substantive unconscionability – purpose of unconscionability – effect of declaring a contract or clause to be unconscionable - what test would the court use to determine whether a contract or term was unconscionable at the time the contract was made – what was the effect of declaring a contract or a clause to be unconscionable – Arbitration Act (Act No. 4 of 1995) section 6*

Law of Contract *– interpretation of contracts – giving meaning to contracts – principles applicable during interpretation of contracts – principles used by courts when interpreting contracts - what factors did the court consider in finding the meaning of words and or clauses in contracts?*

Law of Contract *– interpretation of contracts – background of the contract - whether the background of a contract was admissible – what test did the courts utilise to determine which background of a contract was admissible?*

Law of Contract *– defences – duress – undue influence – what did a party relying on the defence of duress have to prove – what did a party relying on the defence of undue influence have to prove?*

Alternative Dispute Resolution *– arbitration – arbitration contracts – disputes relating to arbitration contracts – doctrine of kompetenz-kompetez (a jurisprudential doctrine whereby a legal body, such as a court arbitral tribunal, had the competence or jurisdiction to rule as to the extent of its own competence on an issue before it - principle of perceptive restraint – jurisdiction of courts vis-à-vis arbitration tribunals – between courts and arbitration tribunals, which body had the jurisdiction to resolve disputes relating to the interpretation,*

applicability, enforceability, or formation of an arbitration agreement - Arbitration Act (Act No. 4 of 1995) section 17; UNCITRAL Model Law on International Commercial Arbitration, article 16(1).

Alternative Dispute Resolution *– arbitration – arbitration contracts – operability of an arbitration contract - meaning of the phrase incapable of being performed – what was the meaning of the phrase "incapable of being performed" as used in arbitration contracts - under what circumstances would an arbitration agreement or clause be deemed to be inoperative.*

Brief facts

The plaintiff's case was that the defendant had expressed interest in securing funding for the construction of high voltage substation and transmission line projects identified by KETRACO, which would be done by either a Buyers' Credit or a Concessional Loan from the Export-Import (EXIM) Bank of China. The plaintiff acted as an intermediary between the defendant and the Ministry of Energy and Petroleum (the Ministry).

After negotiations, the three parties entered into a draft Memorandum of Understanding (MOU). Under the MOU the defendant was to assist the Ministry to apply for financing from the EXIM Bank of China to fund the projects for the benefit of the Ministry, the financing would be in form of a loan agreement between the National Treasury and the EXIM Bank of China. Additionally, the defendant was expected to prepare detailed technical and commercial proposals and a draft contract between the Ministry and the defendant to be presented at the EXIM Bank of China and the contract for the projects would only be finalized upon confirmation of the financing from the EXIM Bank.

The plaintiff contended that the defendant appointed it as its agent.

On January 20, 2015, a meeting was held to review the defendant's technical proposal which was attended by representatives of KETRACO, the defendants and the plaintiffs. Additionally, on or about April 29, 2015, the defendant instructed the plaintiff to provide information on the significance of the project for Kenya. Additionally, upon concluding the negotiations, a contract was prepared and sent to the State Law Office for review and approval, but after due diligence, the State Law Office raised concerns over a World Bank report where the World Bank had debarred the defendant for a period of 18 months over the defendant's involvement in fraudulent practices relating to World Bank-financed electricity projects in Uganda and upon inquiry, the defendant failed to disclose to the plaintiff the reason for the debarment. However, it emerged that the defendant had misrepresented their prior project experience while bidding for contracts.

The plaintiff contended that the debarment presented a fresh impediment, but the plaintiff went out of its way to allay the fears by facilitating and holding meetings with representatives from the State Law Office, the Ministry and the defendant and as result, the contract was finalized. Further, the plaintiff stated that due to the reservations arising from the debarment, the Ministry and KETRACO decided that the project should be executed by the defendant and another more qualified entity to reduce the risk of exposure which led to the Joint Venture between Norinco International Corporation Limited and the defendant, and, ultimately, the contract was executed and its terms were *inter alia* that the Joint Venture of Norinco and the defendant would design, install and commission power transmission networks as more particularly specified in the plaint whose total value was USD 90,286,383.39 and Kshs. 2650, 743, 250.76.

In addition, the plaintiff averred that sometime in 2016, the defendant and the plaintiff entered into a supplementary agreement the terms of which were that both parties would contribute funds as pleaded in paragraph 13 of the plaint. Further, on May 26, 2017, the Ministry and the Joint Venture of Norinco and the defendant entered into a second contract which was modified by Addendum No. 1 executed on October 18, 2019 and Addendum No. 2 executed on April 30, 2020 whose terms were *inter alia* that Joint Venture of Norinco and the defendant would design, install and commission power transmission networks.

The plaintiff averred that the loan was completed and a Buyer Credit Loan Agreement was executed on August 1, 2017 but in January 2017 the defendant, after securing the contract and the funding began to gradually edge the plaintiff out. Subsequently, the plaintiff learnt that KETRACO had paid the defendant

an advance payment of Kshs. 2,650,743,250.75. In June 2018, the plaintiff sent the defendant an invoice of Kshs. 185,552,028/2 being the 7% of the advance payment under article 5 of the agency agreement payable within 30 days, pursuant to clause 5.2 (b) of the Agency Agreement, but in breach of the aforesaid clause, the defendant failed to pay the said amount, and subsequently, it denied the existence of the agency agreement and the supplementary agency agreement or sanctioning its signing.

Further, the defendant argued that the agency agreement and the supplementary agency agreement were not binding on the defendant because the executors had no authority to execute the same; that the agency agreements had been rendered void because the plaintiff had failed to secure the signing of the contract within 12 months from the date of the agency agreement; and the plaintiff should submit to arbitration in Hong Kong, as provided for in the agency agreement. The plaintiff averred that the foregoing was an onerous condition because arbitration in Hong Kong would be expensive and unduly favour the defendant.

The plaintiff also disputed the amount offered by the defendant as compensation and contended that it breached the provisions of the contracts. To remedy the situation, the defendant offered it Kshs. 47,000,000/ = in full and final settlement of the entire amounts under the two contracts on condition that the plaintiff foregoes all the other claims. Further, the Plaintiff could not afford arbitration in Hong Kong, and coupled with challenges attributed to the COVID 19 outbreak, it accepted the offer and the parties entered into an agreement for the said sum subject to the plaintiff relinquishing any further claims under the agreement and to withdrawing all complaints against the defendant lodged with the DCI, KETRACO, the Ministry and the Director for Immigration and furnish proof of the withdrawal of the same. The plaintiff averred that it complied with the foregoing conditions and withdrew the complaints. It averred that the payment of Kshs.47,000,000/= compared to the total outstanding sum, represented a mere 3.15% of the plaintiff's remuneration under contracts 1 and 2, hence, the settlement agreement which in essence compelled the plaintiff to forgo more than 96% of the remuneration was in all fairness oppressive, unconscionable, unethical and unreasonable. Consequently, the plaintiff averred that the settlement agreement was voidable because the same was procured on the basis of economic duress and prayed for damages equivalent to the amount forfeited.

The defendant sought the suit to be stayed and the dispute be referred to arbitration in accordance with article 8 of the agency agreement.

Issues

i. What was the legal framework for arbitration in Kenya?
ii. Under what circumstances would the court interfere in arbitration proceedings?
iii. What test would be utilized by the courts to determine whether a chosen venue could be treated as the seat of arbitration?
iv. What test would the court use to determine whether a contract or term was unconscionable at the time the contract was made?
v. Whether courts could fill in gaps in a contract or in a clause thereof that the court had declared to be unconscionable.
vi. What principles did the court consider when interpreting contracts and finding the meaning of words and or clauses in contracts?
vii. Whether the background of a contract was admissible and what tests determined which background was admissible?
viii. Between courts and arbitration tribunals, which body had the jurisdiction to resolve disputes relating to the interpretation, applicability, enforceability, or formation of an arbitration agreement?
ix. What did a party relying on the defence of duress in a contractual claim have to prove?
x. What did a party relying on the defence of undue influence in a contractual claim have to prove?
xi. What was the meaning of the phrase, “incapable of being performed” as used in arbitration contracts?
xii. Under what circumstances would an arbitration agreement or clause be deemed to be inoperative?

Relevant provisions of the Law

Arbitration Act, (No 4 of 1995)

Section 6 - Stay of legal proceedings

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to sta

Held

1. Kenya was among 85 states and 118 jurisdictions around the world where legislation based on the UNCITRAL Model Law on International Commercial Arbitration had been adopted. That position was underpinned by article 159 of the Constitution which identified the need for courts and tribunals to encourage and promote alternative forms of dispute resolution, including arbitration.
2. The Arbitration Act (the Act) was modeled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and except for the limitations set out in the Act, it applied to both domestic and international arbitrations. The Act was amplified by the Arbitration Rules 1997, and the Nairobi Centre for International Arbitration Act. The legislation was complemented by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which Kenya ratified in 1989. The New York Convention was part of the domestic law of Kenya by virtue of article 2(6) of the Constitution which provided that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. In addition, section 36(2) of the Arbitration Act complemented the New York Convention by providing that an international arbitration award was to be recognized as binding and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya was a signatory.
3. Kenya had also ratified the International Centre for Settlement of Investment Disputes Convention (ICSID or the Centre), which was the legal framework applicable to dispute resolution and conciliation between international investors. Undoubtedly, Kenya's arbitration legislation did not depart from the UNCITRAL Model Law in any significant way. The laws reflected most of the UNCITRAL Model Law principles, including finality of arbitral awards, limited court intervention or interference, and principles such as separability and *kompetenz-kompetenz* (the ability of the arbitral tribunal to rule on the question of whether it has jurisdiction before intervention by national courts). Kenyan arbitration law was not only consistent with but also in full harmony with, prevailing international best practices in the field.
4. Court intrusion in arbitration proceedings was limited only to circumstances expressly permitted by the Arbitration Act. Section 10 of the Act provided that except as provided in the Act, no court would intervene in matters governed by the Act. The section limited the jurisdiction of the court to only such matters as were provided for by the Act. The section exemplified the recognition of the policy of party's autonomy which underlay the arbitration generally and in particular the Act.
5. Section 10 of the Act enunciated the necessity to curb the court's role in arbitration so as to give effect to that policy. The principle of party autonomy was recognized as a critical precept for guaranteeing that parties were satisfied with the results of arbitration. It also helped to achieve the key objectives of arbitration, which was, to deliver fair resolution of disputes between parties without unnecessary delay

and expense. The Act was enacted with the key purpose of increasing party autonomy and minimizing court intervention.

6. Section 10 of the Arbitration Act permitted two possibilities where the court could intervene in arbitration. First, was where the Act expressly provided for or permitted the intervention of the court. Second, in public interest where substantial injustice was likely to be occasioned even though a matter was not provided for in the Act. However, the Act could not reasonably be construed as ousting the inherent power of the court especially to do justice. Judicial interference could only be countenanced in exceptional instances. There was need for adherence to the principle of party autonomy, which required a high degree of deference to arbitral decisions and minimized the scope for intervention by the courts.
7. Section 10 of the Arbitration Act was enacted to ensure the predictability and certainty of arbitration proceedings by explicitly providing instances where a court could intrude. Therefore, parties who opted for arbitration had to know with certainty instances when the jurisdiction of the courts could be invoked. Under the Arbitration Act, such instances included, applications for setting aside an award, determination of the question of the appointment of an arbitrator, recognition and enforcement of arbitral awards, and other specified grounds such as where the arbitral tribunal ruled as a preliminary question that it had jurisdiction or in circumstances provided under section 6 (stay of legal proceedings) and section 7 (interim measures).
8. The objective of arbitration was to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective ought to have been the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction was the arbitration agreement between the parties). The third objective was balanced powers for the courts: court support for the arbitral process was essential, the price being supervisory powers for the court to ensure due process. True to the principle of party autonomy, the tribunal's statutory powers could only be excluded or modified by the parties in their arbitration agreement. They were also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.
9. The principal purpose of an arbitration clause was to provide a specialized tribunal to hear the dispute falling within the ambit of the matters governed by the agreement. Parties were at liberty to contract and allow to vest arbitrability determinations in the arbitrator, but only if the agreement contained clear language to that effect. The subject arbitration clause 8 provided the mode of dispute resolution, the seat of arbitration, the applicable rules and the language to be used in the proceedings. Hong Kong was the preferred seat and place of arbitration.
10. The bright-line test would be utilized when determining whether a chosen venue could be treated as the seat of arbitration:
    1. if a named place was identified in the arbitration agreement as the venue of arbitration proceedings the use of the expression arbitration proceedings signified that the entire arbitration proceedings (including the making of the award) was to be conducted at such place, as opposed to certain hearings. In such a case, the choice of venue was actually a choice of the seat of arbitration.
    2. In contrast, if the arbitration agreement contained language such as "tribunals were to meet or have witnesses, experts or the parties" at a particular venue, that suggested that only hearings were to be conducted at such venue.
    3. If the arbitration agreement provided that arbitration proceedings "shall be held" at a particular venue, then that indicated arbitration proceedings would be anchored at such venue, and therefore, the choice of venue was also a choice of the seat of arbitration.

4. The above tests remained subject to there being no other "significant contrary indicia" which suggested that the named place would be merely the venue for certain proceedings and not the seat of arbitration.
5. In the context of international arbitration, the choice of a supranational body of rules to govern the arbitration (for example, the ICC Rules) would further indicate that the chosen venue was actually the seat of arbitration.

11. Unconscionability was one of the grounds provided in section 6 of the Arbitration Act. Unconscionability consisted of the two-pronged test:
    1. procedural unconscionability hinged on the circumstances surrounding contract formation, such as whether a provision was offered on a take-it or leave-it basis or buried in the fine print.
    2. Substantive unconscionability arose when a term was overly-harsh or one-sided. But more importantly, unconscionability isolated terms to which parties did not assent in any meaningful way. Thus, when a party of little bargaining power, and hence little real choice, signed a commercially unreasonable contract with little or no knowledge of its terms, it was hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. Indeed, modern unconscionability empowered courts to strike down provisions that fell outside the circle of assent which constituted the actual agreement.
12. If a contract or term was unconscionable at the time the contract was made, a court could refuse to enforce the contract or could enforce the remainder of the contract without the unconscionable term. The determination that a contract or term was or was not unconscionable was made in the light of its setting, purpose and effect. Relevant factors included weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes. Enforcement of a contract was generally refused on grounds of unconscionability where the inequality of the bargain was so manifest as to shock the judgment of a person of common sense, and where the terms were so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. An unconscionable contract was one in which the provisions were so one-sided, in view of all the facts and circumstances, that the contracting party was denied any opportunity for meaningful choice.
13. When a person signed a document, that signature should denote an intention to be bound by the terms and conditions embodied in the signed document.
14. Unconscionability was meant to protect those who were vulnerable in the contracting process from loss or improvidence to that party in the bargain that was made. Although other doctrines could provide relief from specific types of oppressive contractual terms, unconscionability allowed courts to fill in gaps between the existing islands of intervention so that the clause that was not quite a penalty clause or not quite an exemption clause, or just outside the provisions of a statutory power to relieve would fall under the general power, and anomalous distinctions would disappear.
15. Unconscionability had two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and an improvident transaction. In cases where inequality of bargaining power had been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both.
16. A bargain was improvident if it unduly advantaged the stronger party or unduly disadvantaged the more vulnerable. Improvidence was measured at the time the contract was formed. Unconscionability did not assist parties trying to escape from a contract when their circumstances were such that the agreement then worked a hardship upon them. For a person who was in desperate circumstances, for example, almost any agreement would be an improvement over the *status quo*. In those circumstances, the emphasis in assessing improvidence ought to have been whether the stronger party had been unduly

enriched. That could occur when the price of goods or services departed significantly from the usual market price.

17. Unconscionability, in sum, involved both inequality and improvidence. The nature of the flaw in the contracting process was part of the context in which improvidence was assessed. And proof of a manifestly unfair bargain could support an inference that one party was unable to adequately protect their interests. It was a matter of common sense that parties did not often enter a substantively improvident bargain when they had equal bargaining power.
18. None of the considerations above had been alleged or proved. The settlement agreement was not unconscionable. The applicant's contention was not supported by evidence.
19. Filing pleadings in Hong Kong could be done online. Hearings could also be conducted virtually. That extinguished the argument that the arbitration clause was inoperative on account of costs. Online filing of pleadings and virtual hearings was cheap, convenient, and effective.
20. A contractual interpretation was, in essence, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. The courts would focus on the meaning of the relevant words used by the parties in their documentary, factual and commercial context, in the light of the following considerations:
    1. the natural and ordinary meaning of the clause;
    2. any other relevant provisions of the contract;
    3. the overall purpose of the clause and the contract;
    4. the facts and circumstances known or assumed by the parties at the time that the document was executed; and
    5. commercial common sense; but
    6. disregarding subjective evidence of any party's intentions.
21. In order to determine the relevant context of the contract, the wider context (outside of the contractual document itself) was admissible. Courts would adopt a broad test for establishing the admissible background. The background to a contract included knowledge of the genesis of the transaction, the background, the context and the market in which the parties were operating.
22. In interpreting contracts;
    1. the courts would endeavor to interpret the contract in cases of ambiguity in a way that ensured the validity of the contract rather than rendering the contract ineffective or uncertain.
    2. the courts would strictly interpret contractual provisions that sought to limit rights or remedies, or exclude liability, which arose by operation of law; and
    3. where a clause had been drafted by a party for its own benefit, it would be construed in favour of the other party (the *contra* proferentem rule). The last principle had limited applicability in cases involving sophisticated commercial agreements where a contract had been jointly drafted by the parties or where the parties were of comparable bargaining power.
23. The applicant did not demonstrate misrepresentation or fraud nor was it suggested that there were no prior negotiations culminating in the agreement. The applicant was simply inviting the court to either re-write a binding contract or to assist it to evade the consequences of a legally binding agreement it voluntarily signed.
24. The arbitrator, and not the court had the authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the agreement including, but not limited to any claim that all or any part of the agreement was void or voidable.
25. Arbitration was a private dispute resolution mechanism whereby two or more parties agreed to resolve their current or future disputes by an arbitral tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. The arbitration agreement gave contractual authority

to the arbitral tribunal to adjudicate the disputes and bind the parties. The arbitration agreement was the product of a consensual contract. The court refused the invitation to rectify the arbitration clause. The applicant was inviting the court to venture into the forbidden sphere of re-writing contracts willfully signed by consenting parties.

26. The plaintiff's core ground was that its claim was premised on the settlement agreement. That argument collapsed on several fronts. First, the plaintiff was cutting the ground upon which it was standing. In the event the court agreed and declared the settlement agreement to be invalid, then the original contracts remained. The dispute unless resolved amicably, had to proceed to arbitration in accordance with clause 8. The arbitration clause was worded in broad terms and it contemplated the instant dispute. The plaintiff attacked the settlement agreement on grounds of coercion. When a person signed a document, that signature denoted an intention to be bound by the terms and conditions embodied in the signed document.

27. An undertaking that was extracted by an unlawful or unconscionable threat of some considerable harm, was voidable. Economic duress (or business compulsion) could broadly be described as an imposition, oppression, or taking undue advantage of the business or financial stress or extreme necessity or weakness of another. Economic duress was constituted by illegitimate commercial pressure exerted on a party to a contract, which induced him to enter into the contract, and which amounted to the coercion of the will which vitiated his consent.

28. The party relying on duress had to prove a threat of considerable evil to the person concerned; that the fear was reasonable; that the threat was of an imminent or inevitable evil and induced fear; that the threat or intimidation was unlawful or *contra bonos mores*; and that the contract was concluded as a result of the duress. On the other hand, a party wishing to rely on undue influence had to prove that the other party had influence over him or her; the influence weakened his or her resistance; the other party used his influence unscrupulously towards the innocent party; the transaction which was concluded was prejudicial; and exercising a normal and free will, the innocent party would not have entered into the jural act or transaction. The court should have regard to the person complaining of the duress and the circumstances in which he found himself at the time and then decide, in the light of all the relevant factors, whether it was reasonable for the person concerned to have suffered fear and to have succumbed.

29. A court would use its power not to enforce a contract sparingly, and only in the clearest of cases in which the harm was substantially incontestable and proven. A court would decline to use the power where a party relied on abstract values of fairness and reasonableness to escape the consequences of a contract. The party who attacked the contract or its enforcement bore the onus to establish the facts. The principle that public policy demanded that contracts freely and consciously entered into had to be honoured.

30. According to the principle of, perceptive restraint a court had to exercise perceptive restraint when approaching the task of invalidating, or refusing to enforce, contractual terms. A court would use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases. Contracts, freely and voluntarily entered into, should be honoured.

31. The party's intentions were clear. In any event, the question of whether there existed a dispute or not touched on the jurisdiction of the arbitrator. The arbitrator's jurisdiction could be challenged by attacking the agreement's validity or the tribunal's jurisdiction over the subject matters, among other challenges. Section 17 of the Arbitration Act provided for the doctrine of *kompetenz-kompetenz*, a jurisprudential doctrine whereby a legal body, such as an arbitral tribunal, could have competence, or jurisdiction to rule as to the extent of its own competence on an issue before it. The doctrine of *kompetenz-kompetenz* was enshrined in the UNCITRAL Model Law on International Commercial Arbitration and Arbitration Rules. Article 16(1) of the Model Law and article 23(1) of the Arbitration

Rules both dictated that the arbitral tribunal was to have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

32. The word inoperative could be deemed to cover those cases where the arbitration agreement had ceased to have effect. The ceasing of effect to the arbitration agreement could occur for a variety of reasons. One reason could be that the parties had implicitly or explicitly revoked the agreement to arbitrate. The same dispute between the same parties had already been decided in arbitration or court proceedings.

33. The phrase incapable of being performed applied where the arbitration could not be effectively set in motion. It could be that the clause in question was too vague or perhaps other terms in the contract contradicted the parties' intention to arbitrate. If an arbitrator specifically named in the arbitration agreement refused to act or if an appointing authority refused to appoint, it might be concluded that the arbitration agreement was incapable of being performed. However, that would only apply if the curial law of the state where the arbitration was taking place had no provision equivalent to article 11 of the UNCITRAL Model Law.

34. The term incapable of being performed would relate to the capability or incapability of parties to perform an arbitration agreement; the expression would suggest something more than mere difficulty or inconvenience or delay in performing the arbitration. There had to be some obstacle that could not be overcome even if the parties were ready, able and willing to perform the agreement and the focus in the practical examples canvassed by the court was on the administration of the arbitration itself rather than on the merits of what was to be referred to arbitration.

35. An arbitration agreement was inoperative, at the very least, when it ceased to have effect as a binding contract. That could occur as a consequence of various contractual doctrines, such as discharge by breach, by reason of waiver, estoppel, election or abandonment. More specifically, an arbitration agreement will be inoperative where a party had committed a repudiatory breach of that agreement and the repudiation had been accepted by the innocent counterparty. The phrase incapable was a situation where a contingency prevented the arbitration from being set in motion, whether or not that contingency was foreseen and bargained for.

36. An arbitration agreement was null and void if it did not have a legal effect due to the absence of consent. A lack of capacity, such as when a party did not have the authority or permission to enter into an arbitration agreement, could invalidate the clause. An arbitration agreement could also be null, where the clause's language was so vague or ambiguous, that the parties' intention could not be decided. However, defective arbitration clauses may nonetheless be interpreted by a court to give meaning to them, to save the parties' intention to arbitrate, as courts tended to interpret the clauses narrowly, to avoid giving a back door, for a party wishing to escape the arbitration agreement. The null and void language had to be read narrowly given a presumption of enforceability of agreements to arbitrate.

37. The arbitration clause was not inoperative, null or void. The grounds cited by the plaintiff could not pass the above tests. The averments in the plaint and the bulk of the prayers sought left no doubt that the plaintiff's claim was premised on contracts 1 and 2. The dispute disclosed in the instant case fell within the ambit of article 8 of the agreement.

38. The defendant's application was merited. Section 6 (1) of the Arbitration Act provided that a court before which proceedings were brought in a matter which was the subject of an arbitration agreement was to, if a party so applied not later than the time when that party entered an appearance or otherwise acknowledged the claim against which the stay of proceedings was sought, stay the proceedings and refer the parties to arbitration unless it found that the arbitration agreement was null and void, inoperative or incapable of being performed; or that there was not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

Application allowed. The proceedings were stayed pending arbitration of the dispute(s) between the parties. No order as to costs.

Citations

Cases

Kenya

1. *Abdul Aziz Suleiman v South British Insurance Co Ltd* [1965] EA 66 - (Explained)
2. *Adopt-A-Light Ltd v Magnate Ventures Ltd & 3 others* Civil Application 159 of 2009; [2009] eKLR - (Explained)
3. *Areva T & D India Lmited v Priority Electrical Engineers & another* Civil Appeal No 103 of 2011; [2012] eKLR - (Explained)
4. *Blue Limited v Jaribu Credit Traders Limited Nairobi* Civil Suit 157 of 2008; [2008] eKLR - (Explained)
5. *County Government of Kirinyaga v African Banking Corporation Ltd* Civil Case 3 of 2018; [2020] eKLR - (Explained)
6. *Feba Radio (Kenya) Limited t/a Feba Radio v Ikiyu Enterprises Limited* Civil Appeal 170 of 2013; [2017] eKLR - (Explained)
7. *Kenya Airports Parking Services Ltd & another v Municipal Council of Mombasa* Civil Case 434 of 2009; [2010] eKLR - (Explained)
8. *Kenya Alliance Insurance Co Ltd v Annabel Muthoki Muteti* Civil Appeal 144 of 2019; [2020] eKLR - (Explained)
9. *Kenya Breweries Limited & another v Bia Tosha Limited & 5 others* Civil Appeal 163 of 2016; [2020] eKLR - (Explained)
10. *Kenya Engineering Workers Union v Narcol Aluminium Rolling Mills Ltd* Civil Appeal 72 of 2015; [2016] eKLR - (Explained)
11. *Kenya Union of Domestic, Hotels, Educational Instituitions and Hospital Workers (Kudheiha) v North Coast Beach Hotel* Cause 109 of 2014; [2015] eKLR - (Explained)
12. *Laiser Communications Limited & 5 others v Safaricom Limited* Civil Appeal 247 of 2012; [2016] eKLR - (Explained)
13. *Mjomba Agencies Limited v Mvule Investment Company Ltd* Civil Suit 228 of 2016; [2017] eKLR - (Explained)
14. *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] KLR 12 - (Cited)
15. *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* Petition 12 of 2016; [2019] eKLR - (Explained)
16. *Polyphase Systems Limited v Sterling & Wilson Solar Limited and Malindi Solar Group Limited (Interested Party)* Commercial Civil Case E196 of 2021; [2021] eKLR - (Explained)
17. *Republic v Chairman Business Premises Rent Control Tribunal & another ex- parte Hekima College* Miscellaneous Civil Application 323 of 2012; [2014] eKLR - (Explained)
18. *Technoservice Limited v Nokia Corporation & 3 others* HCCC/E093/2020; [2021] eKLR - (Explained)
19. *UAP Provincial Insurance company Ltd v Michael John Beckett* Civil Appeal 26 of 2007; [2013] eKLR - (Explained)
20. *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] KLR 898 - (Explained)

South Africa

1. *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 - (Explained)
2. *Medscheme Holdings (Pty) Limited & Another v Bhamjee* SCA Case 214/04 - (Explained)
3. *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 - (Explained)
4. *Preller v Jordaan* 1956 (1) SA 483 - (Explained)

United Kingdom

1. *Arnold v Britton* [2015] UKSC 36 - (Explained)
2. *Broken Hill City Council v Unique Urban Built Pty Ltd* [2018] NSWSC 825 - (Explained)

3. *Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347 - (Explained)
4. *Fili Shipping Co Ltd v Premium Nafta Products and Others* [2007] UKHL 40 - (Explained)
5. *Fiona Trust and Holding Corporation and others v Primalov and others* [2007] EWHC 1217 - (Explained)
6. *JP Morgan Chase Bank NA v Federal Republic of Nigeria* [2019] EWCA Civ 1641 - (Explained)
7. *Merthyr (South Wales) Ltd v. Merthyr Tydfil CBC* [2019] EWCA Civ 526 - (Explained)
8. *Persimmon Homes Ltd v Ove Arup and Partners Ltd* [2017] EWCA Civ 373 - (Mentioned)
9. *Persimmon Homes v. Ove Arup* [2017] EWCA Civ 373 - (Explained)
10. *Premium Nafta Products Limited (20th defendant) and others (Respondents) v Fili Shipping Company Limited (14th Claimant) and others (appellants)* [2007] UKHL 4 - (Explained)
11. *Roger Shashoua & 2 others v Mukesh Sharma* [2009] EWHC 957 - (Explained)
12. *The Fehmarn* [1957] 2 Lloyds Rep 551; [1957] 1 WLR 815; [1957] 2 All ER 707 - (Explained)
13. *Tillman v Egon Zehnder Ltd* [2019] UKSC 32 - (Explained)
14. *Trunk Flooring Ltd v HSBC Asset Finance (UK) Ltd* [2015] NIQB 23 - (Explained)

India

BGS SGS Soma JV v NHPC Ltd 2019 SCC OnLine SC 1585 - (Explained)

United States

1. *Aquascene, Inc v Noritsu American Corporation* 831 F Supp 602 (MD Tenn 1993) - (Explained)
2. *Haun v King* 690 SW 2d 869 (Tenn Ct App 1984) - (Explained)
3. *Matter of Friedman* 64 AD 2d 70; 407 NYS 2d 999 (1978) - (Explained)
4. *Rent-A-Center, West, Inc v Jackson* 561 US 63; 130 S Ct 2772 (2010) - (Explained)

Canada

Uber Technologies Inc v Heller [2020] SCC 16 - (Explained)

Australia

Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & others [2019] QSC 173 - (Explained)

Singapore

1. *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2016] SGHC 238 - (Explained)
2. *Lucky-Goldstar International (HK) Ltd v NG Moo Kee Engineering Ltd* [1993] HKCFI 14 - (Explained)

Texts & Journals

1. Christie, RH., Bradfield, G., (Eds) (2011), *Christie's the Law of Contract in South Africa* Durban: LexisNexis 6th Edn p 315
2. Sutton, DJ., et al (Eds) (2007), *Russell on Arbitration* London: Sweet & Maxwell 23rd Edn p 293
3. Walton, A., (Ed) (1963), *Russell on the Law of Arbitration* London: Stevens & Sons 17th Edn para 7.046

Statutes

1. Arbitration Act, 1995 (Act No 4 of 1995) sections 6(1)(b); 7; 10; 17; 36(2) - (Interpreted)
2. Arbitration Rules, 1997 (Act No 4 of 1995 Sub Leg) In general - (Cited)
3. Constitution of Kenya, 2010 articles 159(2)(c)(d)(6) — (Interpreted)
4. Evidence Act (cap 80) section 97 — (Interpreted)
5. National Centre for International Arbitration Act, 2013 At No 26 of 2013) sections 4 (1), 5 — (Interpreted)

International Instruments

1. International Centre for Settlement of Investment Disputes Convention, 2006
2. The New York Arbitration Convention, 1959
3. UNCITRAL Model Law on International Commercial Arbitration, 1985 articles 11, 16(1); 23(1)

Advocates

None mentioned

RULING

1. In order to contextualize the defendant's application dated March 2, 2021, it is necessary to highlight, albeit briefly the nub of the plaintiffs' case as enumerated in its Plaint dated November 23, 2020. In its plaint, the plaintiff avers that in or about 2012, the Ministry of Energy and Petroleum (the Ministry) through the Kenya Electricity Transmission Company "KETRACO") identified electricity transmission line projects which required funding.

2. The plaintiff avers that the defendant expressed interest in securing funding for construction of high voltage substation and transmission line projects identified by KETRACO which would be done by either a Buyers' Credit or a Concessional Loan from the Export Import (EXIM) Bank of China. It states that the defendant's commitment to secure funding was reiterated to the then Permanent Secretary in the said Ministry on 14th January 2013 and as consideration for obtaining funding, the defendant requested the Ministry to issue a Memorandum of Understanding (MOU) to the defendant which would see the Ministry award the defendant contracts to construct high voltage 220/66KV transmission lines and associated substations from Kamburu to Thika, 132KV, Turkwel to Lodwar and 132KV Rangala (Yala) to Busia.

3. The plaintiff states that negotiations on the terms of the MOU commenced in 2012 with the plaintiff as the intermediary between the Ministry and the defendant. It states that an intermediary was necessary because the defendant being a foreign company, operated by foreigners who were not familiar with how state agencies contract for provision of services, the plaintiff' s role was to guide the defendant in negotiating an MOU and keep the defendant updated on the progress. Also, the plaintiff avers that pursuant to the deliberations and negotiations, a draft MOU was prepared which the Ministry forwarded to the State Law Office for approval. Further, on 14th March 2013, the draft MOU was cleared by the State Law Office and forwarded to KETRACO on 10th May 2013, and the plaintiff up dated the defendant on the progress. Further, on 1st August 2013, the Ministry and the defendant executed the MOU whose terms were inter alia –

    a) The defendant shall assist the Ministry to apply for financing from the EXIM Bank of China to fund the projects for the benefit of the Ministry;

    b) The financing will be in form of a loan agreement between the National Treasury and the EXIM Bank of China; and

    c) The defendant was expected to prepare detailed technical and commercial proposals and a draft contract between the Ministry and the defendant to be presented at the EXIM Bank of China and that the contract for the projects would only be finalized upon confirmation of the financing from the EXIM Bank.

4. The plaintiff avers that the defendant satisfied with the plaintiff's competence and efficiency negotiated an agency agreement with the plaintiff which was executed on 1stAugust 2013 the terms of which were *inter alia* that the plaintiff, as the defendant's agent would perform the services listed in paragraph 10 of the plaint. It avers that after executing the Agency Agreement, the defendant failed to conduct the feasibility studies as required and on 17thSeptember 2013, KETRACO commissioned another entity

to conduct feasibility studies to secure the funding as well as establish commercial viability of projects completed after 1 year. Further, the defendant studied the feasibility study and on 10th December 2014, it proposed to send a technical team to Kenya to carry out a site survey which was done in December 2014 and the defendant prepared the project milestones.

5. Further, on January 20, 2015, a meeting was held to review the defendant's technical proposal which was attended by representatives of KETRACO, the defendant' s and the plaintiff's. Also, on or about April 29, 2015, the defendant instructed the plaintiff to provide information on the significance of the project for Kenya. Additionally, upon concluding the negotiations, a contract was prepared and sent to the State Law Office for review and approval, but after due diligence, the State Law Office raised concerns over a World Bank report dated August 19, 2015 where the World Bank had debarred the defendant for a period of 18 months over the defendant' s involvement in fraudulent practices relating to World Bank financed electricity projects in Uganda and upon inquiry, the defendant failed to disclose to the Plaintiff the reason for the debarment. However, it emerged that the defendant had misrepresented its prior project experience while bidding for contracts.

6. The plaintiff states that the debarment presented a fresh impediment, but the plaintiff went out of its way to allay the fears by facilitating and holding meetings with representatives from the State Law Office, the Ministry and the defendant and as result, the contract was finalized. Further, the plaintiff states that due to the reservations arising from the debarment, the Ministry and KETRACO decided that the project should be executed by the defendant and another more qualified entity to reduce the risk of exposure which led to the Joint Venture between Norinco International Corporation Limited and the defendant, and, ultimately, the contract was executed on January 29, 2016 and its terms were inter alia that the Joint Venture of Norinco and the defendant would design, install and commission power transmission networks as more particularly specified in the Plaint whose total value was USD 90,286,383.39 and Kshs. 2650, 743, 250.76.

7. In addition, the plaintiff avers that sometime in 2016, the defendant and the plaintiff entered into a Supplementary Agreement the terms of which were that both parties would contribute funds as pleaded in paragraph 13 of the Plaint. Further, on May 26, 2017, the Ministry and the Joint Venture of Norinco and the defendant entered into a second contract which was modified by Addendum No. 1 executed on October 18, 2019 and Addendum No 2 executed on 30th April 2020 whose terms were inter alia that Joint Venture of Norinco and the defendant would design, install and commission power transmission networks namely 220KV Turkwell-Lokichar-Lodwar overhead power lines, 220 kV LILO lines at Lokichar substation and associated substation facilities namely Bay Extension of 220/66KV Kainuk substation, 2x60 MVA 220/33 KV substation at both Lokichar and Lodwar, 132 k V Mnyanga-Busia-Ragala-Bondo-Ndigwa overhead power lines, 132 kV Tororo/Musaga Tee to the proposed 132 k V substation at Myanga and associated substation facilities namely 132 kV switching station at Myanga, 2x23 MVA 132/33 KV substation at Busia, Bay Extension of 132 KV Ragala substation, Ix23 MVA 132/33 KV substation at Bondo and Ix23 substation at Ndigwa; and this contract was valued at USD 61,312,409.73 plus Kshs 2,253,742,475.49.

8. The plaintiff avers that the loan was completed and a Buyer Credit Loan Agreement was executed on August 1, 2017, but sometimes in January 2017 the defendant, after securing the contract and the funding began to gradually edge the plaintiff out. Subsequently, the plaintiff learnt that KETRACO had paid the defendant advance payment of Kshs 2,650,743,250.75. In June 2018, the plaintiff sent the defendant an invoice for Kshs 185,552,028/2 being the 7% of the advance payment under article 5 of the Agency Agreement payable within 30 days from June 4, 2018, pursuant to clause 5.2 (b) of the Agency Agreement, but in breach of the aforesaid clause, the defendant failed to pay the said amount,

and subsequently, it denied the existence of the Agency Agreement and the Supplementary Agency Agreement or sanctioning its signing.

9. Further, the defendant through its advocate argued that the Agency Agreement and the Supplementary Agency Agreement were not binding on the defendant because the executors had no authority to execute the same; that the Agency Agreements had been rendered void because the plaintiff had failed to secure the signing of the Contract within 12 months from the date of the Agency Agreement; and the plaintiff should submit to arbitration in Hong Kong, as provided for in the Agency Agreement. The plaintiff avers that the foregoing was an onerous condition because arbitration in Hong Kong would be expensive and unduly favor the defendant.

10. Further, the plaintiff avers that subsequently, the defendant disputed authorizing signing the Agency Agreements, but after some negotiations, the defendant offered the plaintiff USD 250,000/= which it rejected because under clause 5.1 of the Agency Agreement dated 1st August 2013; its remuneration was 7% of the total contract value. Further, that the value of Contract 1 was USD 90,286,383.39 and Kshs 2,650,743,250.76, thus 7% of the plaintiff' s entitlement was USD 046.84 plus Kshs 185,552,027.55 while Contract 2 was valued at USD 2,409.73 plus Kshs 2,253,742.49.7, 7% thereof was USD 4,291,868.68 and Kshs 157,761.943. As a consequence, the plaintiff avers that its entitlement under Contract 1 and 2 was is USD 10,611,915.52 plus Kshs 343,314,000.83.

11. It states that in 2020 the defendant offered it Kshs. 47,000,000/= in full and final settlement of the entire amounts under the two contracts on condition that the plaintiff foregoes all the other claims. Further, the plaintiff could not afford arbitration in Hong Kong, and coupled with challenges attributed to the COVID 19 outbreak, it accepted the offer and the parties entered into an agreement for the said sum subject to the plaintiff relinquishing any further claims under the agreement and to withdrawing all complaints against the defendant lodged with the DCI, KETRACO, the Ministry and the Director for Immigration and furnish proof of the withdrawal of the same. The plaintiff avers that it complied with the foregoing conditions and withdrew the complaints. It avers that the payment of Kshs 47,000,000/= compared to the total outstanding sum, represents a mere 3.15% of the plaintiff's remuneration under Contract 1 and 2, hence, the Settlement Agreement which in essence compels the Plaintiff to forgo more than 96% of the remuneration is in all fairness oppressive, unconscionable, unethical and unreasonable. Consequently, the plaintiff avers that the Settlement Agreement is voidable because the same was procured on the basis of economic duress as particularized in paragraph 51 of the plaint.

12. In addition, the plaintiffs states that in reply to its fresh demand, the defendant's advocates contended that the Agency Agreements were inoperative because the contracts had not been awarded within twelve months provided for in the Agency Agreement despite signing the Supplementary Agreement in October 2016 expressly recognizing the existence of the Agency Agreement dated 1st August 2013; and that the Kshs. 47,000,000/= was paid on an ex-gratia basis. Further, it avers that the plaintiff has been in constant breach of the agreements occasioning the plaintiff loss as pleaded in paragraphs 54 and 55 of the plaint. As a consequence of the foregoing, the plaintiff prays for the following orders: -

    a. A declaration that the Settlement Agreement entered into on May 19, 2020 is void on account of economic duress;

    b. A declaration the Settlement Agreement entered into on May 19, 2020 is unconscionable and unjust and an order releasing the plaintiff from its obligations under the said Agreement;

c. A declaration that the defendant is contractually bound to pay the plaintiff Kshs 138,552,027.55 being sums outstanding under the Invoice dated June 4, 2018;

d. A declaration that the defendant is bound to pay to the plaintiff 7% of the remainder of the amounts under Contract 1 and Contract 2 within 14 days after the same is receipted from KETRACO pursuant to clause 5.2 (c) of the Agency Agreement dated August 1, 2020;

e. Special damages of Kshs 138,552,027.55 outstanding under the Invoice dated June 4, 2018 being 7% of the amounts received by the defendant from KETRACO together with interest at court rates from July 4, 2018 until payment in full;

f. Costs of the suit together with interest at court rates from the date of judgment until payment in full

g. Any other such relief that the honorable court deems fit to grant.

The defendant's application

13. By an application dated March 3, 2021, the subject of this ruling the defendant seeks orders that this suit be stayed and the dispute be referred to Arbitration in accordance with Article 8 of the Agency Agreement dated August 1, 2013. The defendant also prays for the costs of the application. Prayers (a) & (b) of the application are spent.

14. The grounds relied upon are that the plaintiff's claim is premised on the Agency Agreement dated August 1, 2013 as read with the Supplementary Agreement to the Agency Agreement dated October 2016, that in article 8 of the Agency Agreement, the parties ousted the jurisdiction of the court to entertain any dispute(s) arising from the Agreement by providing that it shall be first resolved amicably failing which it shall be referred to arbitration. The defendant states that these proceedings contravene the arbitration clause which ousts this court's jurisdiction to resolve disputes arising from the said Agreements. Lastly, it states that this court has an obligation to promote alternative forms of dispute resolution under article 159(2)(c) of the *Constitution*.

The plaintiff's replying affidavit

15. Anthony Thairu, the plaintiff's director swore the replying affidavit dated April 14, 2021 in opposition to the application. He averred that this suit is premised on the Agency Agreement dated August 1, 2013 and the Supplementary Agency Agreement dated October 2016. He contends that the defendant failed to conclusively comply with the settlement agreement by not paying fully the sums due to the plaintiff, and that, the defendant has been changing goal posts by disputing the agreements and claiming that the Kshs 47,000,000/= was paid out of a moral obligation. He averred that the arbitration clause is inoperative and incapable of being performed considering that disputes should be submitted to Hong Kong International Arbitration Center, which will be expensive, a position aggravated by challenges caused by Covid-19 travel restrictions. He deposed that the defendant is solely to blame for its inactions and failure to abide by the Agency Agreement, yet it now seeks to refer this matter to arbitration knowing too well that the plaintiff cannot not afford the high arbitration costs.

Applicant's supplementary affidavit

16. Mr Liu Zhennan, the defendant's Commercial Manager swore the supplementary affidavit in response to the plaintiff's affidavit. He deposed that the plaintiff admits at paragraph 3 of the replying Affidavit that the suit is founded on the Agency Agreement dated August 1, 2013 and a Supplementary Agreement dated October 2016 and in line with clause 8 of the Agreement settlement of disputes was to be first resolved through friendly negotiations and in the event of failure, the dispute would be referred to arbitration at the Hong Kong International Arbitration Centre ('HKIAC').

17. He averred that it has not been demonstrated that the arbitration clause is null and void, inoperative or incapable of being performed. He averred that the Covid-19 restrictions or its consequences has no basis because conduct of arbitration proceedings through the auspices of HKIAC employs normal arbitration principles and procedures and the parties are free to agree on procedures that ensure resolution of disputes quickly and economically. Further, he averred that the parties do not have to travel to Hong Kong to have the arbitration done at HKIAC and filing of pleadings is also done virtually as article 3.1(e) of the HKIAC Administered Arbitration Rules, 2018 provide for parties to upload pleadings, proposals, statements, orders and awards to any secured online repository that parties agree to use and is accessible to parties and the Arbitrator; and hearings can be conducted virtually with the agreement of the parties.

18. He averred that the HKIAC Guidelines for Virtual Hearings which came into effect on 26th March 2020 were promulgated to "ensure that participants experience a seamless and effective virtual hearing" and a look at the HKIAC Rules demonstrates that this dispute can be determined faster and cost-efficiently. Further, since the friendly negotiations failed, the parties' next course of action is Arbitration. He deposed that this court has an obligation to promote alternative forms of dispute resolution pursuant to article 159(2)(c) of the Constitution and it should uphold the provisions of article 8 of the Agreement and refer the dispute to Arbitration. Lastly, this court should give effect to the provisions of the Agreement by downing its tools and referring the parties to arbitration as agreed.

The defendant's/applicant's advocates submissions

19. The defendant's advocate submitted that article 159(2)(d) of the Constitution obligates courts to promote alternative forms of dispute resolution including arbitration, and that the Act codifies the right of parties to a contract agree to refer any disputes arising from their contracts to arbitration as an alternative dispute resolution mechanism. He submitted that the Act allows a party to an arbitration agreement to apply to stay proceedings filed in court in breach of an arbitration agreement to have the dispute referred to arbitration and that there is no dispute that the parties entered into an agreement that contained an arbitration clause. He argued that no proper basis under the Act has been given by the plaintiff for not complying with the terms of the arbitration agreement. He urged the court to give effect to the parties' agreement and refer the dispute to arbitration thus giving effect to the constitutional principle in article 159(2)(d).

20. Counsel submitted that the plaintiff's claim is premised on the Agency Agreement dated August 1, 2013 as read with the Supplementary Agreement to the Agency Agreement dated October 2016. He argued that article 8 of the Agency Agreement contains the clause on Settlement of Disputes which stipulates the mode of settlement and place of arbitration. He submitted that the procedure agreed upon for settlement of disputes is (i) good faith negotiations, failing which (ii) refer the dispute to Hong Kong International Arbitration Centre (HKIAC) for arbitration. He argued that good faith negotiations were held between the parties with the assistance of the parties respective Advocates which culminated in signing of the Settlement and Release Agreement by virtue of which the Plaintiff was

paid Kshs 47 million by the defendant. He submitted that since the Plaintiff is alleging duress in accepting the said payment, the import is that the negotiations did not achieve the desired result, so, the next step is to refer the dispute to arbitration. In addition, he submitted that even though the defendant denies the validity of the Agency Agreement, due to the separability principle, the question of the validity of the Agency Agreement is an issue for determination by the arbitrator.

21. Regarding the argument that the arbitration agreement is null and void, inoperative or incapable of being performed, counsel cited *County Government of Kirinyaga v African Banking Corporation Ltd*[1] which held that the court has to determine a threshold issue of whether there exists a valid arbitration agreement. (*Niazsons (K) Ltd v China Road & Bridge Corporation Kenya*[2] also cited). Additionally, counsel submitted that for the plaintiff to succeed in the above allegation, it has to demonstrate grounds which vitiate a contract such as illegality, misrepresentation, duress and undue influence or mistake, which have not been demonstrated. He submitted that the plaintiff is citing costs of the arbitration and challenges attributed to COVID 19. However, he argued that the HKICA Rules allow online filing of pleadings and other correspondence, virtual hearings and expedited proceedings with the consent of the parties, hence the issue of costs is a red herring. He submitted that there are no legal impediments to the validity, operation and performance of the arbitration clause, and that the arbitration clause captures the clear intention of the parties to oust this court's jurisdiction and refer any disputes to arbitration in line with article 159(2)(c) of the *Constitution*.

22. Counsel urged the court to uphold the sanctity of the contract freely entered into by the parties conferring exclusive jurisdiction to the arbitration tribunal to be established by HKIAC and argued that there are no exceptional circumstances to warrant departure from the agreement. He also argued that conduct of the arbitration proceedings through the auspices of HKIAC employs normal arbitration principles and procedures and party autonomy is applicable and the parties are free to agree on procedures which ensure resolution of disputes quickly and economically including virtual hearings and cited *Areva T & D India Lmited v Priority Electrical Engineers & Another*[3] in which the court appreciated that business people choose arbitration over courts mainly because they want a more expeditious resolution of disputes and where parties have chosen an exclusive jurisdiction to facilitate settlement of disputes, the same must be allowed unless there are special and exceptional circumstances to warrant the departure of the same.

23. He submitted cited the test for determining the effect of exclusive jurisdiction clauses in *The Fehmarn*,[4] which is, where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy the court that the agreement should be overridden and that proceedings should be allowed to continue. He also cited *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd*[5] which stated that the exclusive jurisdiction clause should be respected because the parties themselves freely fixed the forums for the settlement of their disputes and there must be something exceptional to justify departure from it. He urged the court to be guided by *Trunk Flooring Ltd v HSBC Asset Finance*

[1] {2020} e KLR.

[2] {2001} e KLR.

[3] {2012} e KLR.

[4] {1957} Lloyds Law Reports, 511.

[5] {1985} KLR 898.

(UK) Ltd[6] which cited *Russell on Arbitration* [7] that "inoperability of an Arbitration Agreement applies where for example the arbitration agreement has been repudiated or abandoned or contained such an inherent contradiction that it could not be given effect." He submitted that the Arbitration Agreement has not been repudiated nor abandoned by both parties.

24. Also, he cited *Kenya Alliance Insurance Co. Ltd v Annabel Muthoki Muteti*[8] which cited *Blue Limited v Jaribu Credit Traders Limited Nairobi*[9] which held that "before staying proceedings, the court has to be satisfied that there is a valid arbitration clause capable of performance and argued that the Arbitration Agreement is valid capable of being performed and disregarding the parties' contract is tantamount to rewriting their contract. He cited *Feba Radio (Kenya) Limited v Ikiyu Enterprises Limited*[10] in which the Court of Appeal warned against rewriting the terms of the contract for the parties.

The plaintiff's advocates submissions

25. The plaintiff's counsel submitted that even though section 6(1) of the Act is mandatory, if the matters provided in the said section are proved, the court will not stay the proceedings and refer the matter to arbitration. He cited article 159(2)(d) and argued that the court will promote other forms of dispute resolution where the circumstances of the case so permit and the parties have agreed to an alternative mode of dispute resolution. He argued that in view of the grounds cited, this matter ought not be referred to arbitration. He relied on *UAP Provincial Insurance company Ltd v Michael John Beckett* in which the court declined to refer a dispute to arbitration where the claim was admitted because there was no dispute. He also relied on *Abdul Aziz Suleiman v South British Insurance Co Ltd*. in which the court held that where the parties have reached a settlement, there was nothing to be referred to arbitration. He urged the court to decline the orders sought because there is nothing to be referred to arbitration since the parties signed a Settlement Agreement. He submitted that the plaintiff seeks to declare settlement agreement void on grounds of duress. He also argued that the settlement Agreement did not contemplate referral to arbitration. Citing the above decisions, counsel argued that the enquiry the court undertakes under section 6(1)(b) is to ascertain whether there is a dispute between the parties and if so, whether such dispute relates to matters agreed to be referred to arbitration and to form an opinion on the merits of the dispute. (Also cited *Mjomba Agencies Limited v Mvule Investment Company Ltd.*).

26. Fortified by the above decisions, counsel submitted that the defendant has not justified the prayers sought. He relied on *Laiser Communications Limited & 5 others v Safaricom Limited*[11] which held that "in the absence of a mutual agreement between the parties as to the manner and mode of resolving the apparent and actual dispute it was entitled to move to court in order to seek justice from court for what they thought or believed to be irreconcilable differences and dispute between the parties." He also submitted that the plaintiff being economically challenged, the proceedings contemplated in Hong Kong would cast an extremely heavy burden upon the plaintiff as it would not afford the administrative costs, filing fees and hourly rates for conducting proceedings in Hong Kong.

6 {2015} NIQB 23.

7 17th Edition Sweet & Maxwell 2015 by Francis Russell at paragraph 7.046

8 {2020} e KLR.

9 (Milimani) HCCS No. 157 of 2008.

10 {2017} e KLR.

11 {2016} e KLR

27. He also submitted that the Agency Agreement, its performance and default thereof have been carried out and effected within the jurisdiction of this court and all the parties are within this court' s jurisdiction. Lastly, he submitted that the pleadings on record have demonstrated pertinent triable issues ripe for consideration before this court, that would not be effectively addressed in Arbitration owing to the defendant's conduct and character.

The Defendant/applicant's submissions in reply

28. The defendant's counsel submitted that an arbitration clause is considered as independent, separate and severable from the main contract, so, the defendant can enforce the arbitration agreement while at the same time it disputes the validity of the Agreement. He relied on *Kenya Airports Parking Services Ltd & another v Municipal Council of Mombasa*[12] which held inter alia that where there exists an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawful and therefore invalid, such view does not invalidate the arbitration clause in the agreement. He also relied on the Court of Appeal in *Adopt-A-Light Ltd v Magnate Ventures Ltd & 3 Others*[13] in which the court underscored the provisions of section 17 of the *Arbitration Act* which grants the arbitrator power to rule on its own jurisdiction and the validity or otherwise of the agreement.

29. Additionally, he submitted that a reading of the plaint shows that the entire claim and the prayers sought arise from the Agreement. He relied on *Kenya Breweries Limited & another v Bia Tosha Limited & 5 others*[14] where the court rejecting a similar argument stated *inter alia* that "there is no way the infringement of the alleged constitutional rights can be divorced from the written agreements they are embedded in, and which is allegedly breached. The parties were brought together by the trade agreements, the claim for unfair trade practices and payment of goodwill are emanating from the agreements. Moreover, there is a plethora of cases, some cited by the learned judge, that reiterate the principle that parties are bound by the terms of their contracts; that a court of law cannot purport to rewrite a contract between the parties, and that where there is no ambiguity in an agreement, it is to be construed according to the words used by the parties. (See section 97 of the *Evidence Act*). The learned judge also failed to give due consideration to the provisions of article 159(2)(c) of the *Constitution* that mandates courts to promote alternative dispute resolution such as mediation and arbitration by disregarding the terms contained in the distributorship agreement. It is clear to us the learned Judge did not heed to the dictates thereto to promote alternative dispute resolution in this matter, but rather downgraded it." Counsel also argued that prayers (a) and (b) in the plaint fall within the jurisdiction of the Arbitrator as they emanate from the Agreement.

30. Regarding the argument that the plaintiff will incur huge arbitration costs if the arbitration proceeds in Hong Kong, he submitted that all this court is required to do is to give effect to the parties' contractual intention. He cited *Republic v Chairman Business Premises Rent Control Tribunal & another Ex-parte Hekima College*[15] in which the court deplored the practice of using submissions to introduce factual matters. He cited *Kenya Engineering Workers Union v Narcol Aluminium Rolling Mills Ltd*[16] where

[12] {2010} e KLR.

[13] {2009} e KLR.

[14] {2020} e KLR.

[15] {2014} e KLR.

[16] {2016} e KLR.

the Court of Appeal held that: "In *Kudheiha v North Coast Beach Hotel*, Cause No 109, (Mombasa), the court reiterated as follows: The court has time and again stated that Closing Submissions should not serve as a forum for adducing additional evidence; it is simply a forum for arguing one's case on the basis of the recorded evidence. Despite all the above, the appellant has persisted, right up to thisc court, with irregular adduction of evidence, including introducing in the record of appeal other documents, which were not before the trial court. This practice has no legal basis and must cease forthwith." He urged the court to ignore the factual evidence at paragraph 40 of the submissions.

Determination

31. A suitable preliminary point is to highlight the relevant legal framework governing arbitration proceedings in Kenya. In fairly recent decisions of this court, namely, *Technoservice Limited v Nokia Corporation & 3 others*[17] and *Polyphase Systems Limited v Sterling & Wilson Solar Limited and Malindi Solar Group Limited (Interested Party)*[18] which involved a similar dispute, I had the opportunity of discussing the applicable law. Inevitably, I will essentially replicate much of what I stated in the said case to the extent it is relevant to these proceedings.

32. For starters, Kenya is among 85 states and 118 jurisdictions around the world where legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been adopted. This position is underpinned by article 159 of the *Constitution* which plainly identifies the need for courts and tribunals to encourage and promote alternative forms of dispute resolution, including arbitration.

33. Our *Arbitration Act*[19] is modelled on the UNCITRAL Model Law, and except for the limitations set out in the Act, it applies to both domestic and international arbitrations. The Act is amplified by the *Arbitration Rules 1997*; and the *Nairobi Centre for International Arbitration Act*.[20] Section 4(1) of this Act establishes the Nairobi Centre for International Arbitration whose functions as set out in section 5 of the Act includes to— (a) promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; (b) administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; (c) ensure that arbitration is reserved as the dispute resolution process of choice.

34. The above legislations are complemented by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which Kenya ratified in 1989. *The New York Convention* is part of domestic law of Kenya by virtue of Article 2(6) of the Constitution which provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. In addition, section 36(2) of the *Arbitration Act* complements the New York Convention by providing that an international arbitration award shall be recognized as binding and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya is a signatory.

35. Kenya has also ratified the *International Centre for Settlement of Investment Disputes Convention* (ICSID or the Centre), which is the legal framework applicable to dispute resolution and conciliation between international investors. Undoubtedly, Kenya's arbitration legislation does not depart from the UNCITRAL Model Law in any significant way. The laws reflect most of the UNCITRAL Model Law principles, including finality of arbitral awards, limited court intervention or interference, and

17 HCCC/E093/2020.

18 HCCOMM/E196/2021

19 Act No. 4 of 1995.

20 Act No. 26 of 2013.

principles such as separability and Kompetenz-kompetenz. Our arbitration law is not only consistent with, but also in full harmony with, prevailing international best practice in the field.

36. In Kenya, court intrusion in arbitration proceedings is limited only to circumstances expressly permitted by the *Arbitration Act*. In this respect, section 10 of the Act provides that except as provided in the Act, no court shall intervene in matters governed by the Act. In dictatorial terms, the section limits the jurisdiction of the court to only such matters as are provided for by the Act. The section exemplifies the recognition of the policy of party's #autonomy" which underlie the arbitration generally and in particular the Act.

37. Section 10 enunciates the necessity to curb the court's role in arbitration so as to give effect to that policy.[21] The principle of party autonomy is recognized as a critical precept for guaranteeing 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. The Act was enacted with the key purpose of increasing party autonomy and minimizing court intervention.

38. Section 10 leaves no doubt that it permits 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, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially. As the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*[22] (the Nyutu case) observed, this judicial interference can only be countenanced in exceptional instances. The Supreme Court stressed the need for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts.

39. The Supreme Court stressed that section 10 of the Act was enacted to ensure predictability and certainty of arbitration proceedings by explicitly providing instances where a court may intrude. It follows that parties who recourse 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, recognition and enforcement of arbitral awards, and other specified grounds such as where the arbitral tribunal rules as a preliminary question that it has jurisdiction or in circumstances provided under section 6 (Stay of legal proceedings) & section 7 (Interim measures).

40. The objective of arbitration is to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective should be the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction is the arbitration agreement between the parties). The third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.

41. The principal purpose of an arbitration clause is to provide a specialized tribunal to hear the dispute falling within the ambit of the matters governed by the agreement. Parties are at liberty to contract

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

[22] {2019} e KLR.

to allow to vest arbitrability determinations in the arbitrator, but only if the agreement contains clear language to that effect. Turning to this case, the subject arbitration clause 8 reads: -

> " All disputes arising from in connection with performance of this Agreement shall be settled first through friendly discussion between all parties. In case that no agreement is reached, the disputes shall be submitted to Hong Kong International Arbitration Center for arbitration which shall be conducted in accordance with the Center's arbitration rules in effect at the time of applying for arbitration. The arbitration shall be conducted in English. The arbitral award is final and binding upon both parties"

42. A reading of the above clause leaves no doubt that it provides the mode of dispute resolution, the seat of arbitration, the applicable rules and language to be used in the proceedings. Hong Kong is the preferred seat and place of arbitration. Regarding the seat of arbitration, the Supreme Court of India in *BGS SGS Soma JV v NHPC Ltd*[23] prescribed the following bright-line test for determining whether a chosen venue could be treated as the seat of arbitration:-

    a. If a named place is identified in the arbitration agreement as the "venue" of "arbitration proceedings", the use of the expression "arbitration proceedings" signifies that the entire arbitration proceedings (including the making of the award) is to be conducted at such place, as opposed to certain hearings. In such a case, the choice of venue is actually a choice of the seat of arbitration.

    b. In contrast, if the arbitration agreement contains language such as "tribunals are to meet or have witnesses, experts or the parties" at a particular venue, this suggests that only hearings are to be conducted at such venue. In this case, with other factors remaining consistent, the chosen venue cannot be treated as the seat of arbitration.

    c. If the arbitration agreement provides that arbitration proceedings "shall be held" at a particular venue, then that indicates arbitration proceedings would be anchored at such venue, and therefore, the choice of venue is also a choice of the seat of arbitration.

    d. The above tests remain subject to there being no other "significant contrary indicia" which suggest that the named place would be merely the venue for certain proceedings and not the seat of arbitration.

    e. In the context of international arbitration, the choice of a supranational body of rules to govern the arbitration (for example, the ICC Rules) would further indicate that the chosen venue is actually the seat of arbitration. In the context of domestic arbitration, the choice of the Indian Arbitration and Conciliation Act, 1996 would provide such indication.

43. I will first address unconscionability, which is one of the grounds provided in section 6 of the Act. Unconscionability consists of the two-pronged test that prevails in most jurisdictions. One, procedural unconscionability which hinges on the circumstances surrounding contract formation, such as whether a provision was offered on a take-it-or-leave-it basis or buried in fine print. Two, substantive unconscionability which arises when a term is "

[23] 2019 SCC OnLine SC 1585.

44. If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term. The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes. Enforcement of a contract is generally refused on grounds of unconscionability where the "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.[24] An unconscionable contract is one in which the provisions are so one-sided, in view of all the facts and circumstances, that the contracting party is denied any opportunity for meaningful choice. The foregoing are the standards upon which the applicant's contention will be judged.

45. When a person signs a document, that signature should denote an intention to be bound by the terms and conditions embodied in the signed document. A three-fold inquiry is suggested as follows: -Firstly, was there a misrepresentation as to the one party's intention; Secondly, who made that representation; and thirdly was the other party misled thereby? The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled? Perhaps the most explicit explanation of unconscionability is to be found in in a fairly recent decision by the Canadian Supreme Court in *Uber Technologies Inc v Heller*[25] in which the court addressed both unconscionability and those in vulnerable positions and its effect on bargaining power. The relevant excerpts are re-produced below:

a. Unconscionability was meant to protect those who were vulnerable in the contracting process from loss or improvidence to that party in the bargain that was made. Although other doctrines could provide relief from specific types of oppressive contractual terms, unconscionability allowed courts to fill in gaps between the existing islands of intervention so that the clause that was not quite a penalty clause or not quite an exemption clause or just outside the provisions of a statutory power to relieve would fall under the general power, and anomalous distinctions would disappear.

b. The Canadian doctrine of unconscionability had two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and an improvident transaction. In many cases where inequality of bargaining power had been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both.

c. A bargain was improvident if it unduly advantaged the stronger party or unduly disadvantaged the more vulnerable. Improvidence was measured at the time the contract was formed; unconscionability did not assist parties trying to escape from a contract when their circumstances were such that the agreement then worked a hardship upon them. For a person who was in desperate circumstances, for example, almost any agreement would be an

24 *Haun v. King* , 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984) (quoting *In re Friedman* , 64 A.D.2d 70, 407 N.Y.S.2d 999 (1978)); see also *Aquascene, Inc. v. Noritsu Am. Corp.*, 831 F. Supp. 602 (M.D. Tenn. 1993)

25 **2020 SCC 16**

improvement over the status quo. In those circumstances, the emphasis in assessing improvidence should be on whether the stronger party had been unduly enriched. That could occur where the price of goods or services departed significantly from the usual market price.

d. Unconscionability, in sum, involved both inequality and improvidence. The nature of the flaw in the contracting process was part of the context in which improvidence was assessed. And proof of a manifestly unfair bargain could support an inference that one party was unable adequately to protect their interests. It was a matter of common sense that parties did not often enter a substantively improvident bargain when they have equal bargaining power.

46. The applicant's invitation to this court to find that the Settlement Agreement is unconscionable is not supported by evidence. None of the considerations illuminated in the above jurisprudence has been alleged or proved. No evidence was submitted to demonstrate imbalance of bargaining power.

47. The plaintiff argues that conducting proceedings in Hong Kong would be expensive. It also cited financial and travel challenges attributed to COVID 19 restrictions. First, as correctly argued by the defendant, filing pleadings in Hong Kong can be done online. Also, hearing can be conducted virtually. The rules support the foregoing. The forgoing extinguishes the argument that the arbitration clause is inoperative on account of costs. The reverse is true. Online filing of pleadings and virtual hearing is cheap, convenient and effective.

48. The other reason upon which the applicant's argument fails is primarily a question of interpretation of the arbitration clause to get its real meaning and intention of the parties. Contractual interpretation is, in essence, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. In *Arnold v Britton*,[26] Lord Neuberger explained that the courts will focus on the meaning of the relevant words used by the parties 'in their documentary, factual and commercial context,' in the light of the following considerations: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but (vi) disregarding subjective evidence of any party's intentions.

49. Professor A Burrows QC in the 2019 case of *Federal Republic of Nigeria v JP Morgan Chase Bank NA*[27] summarized the modern approach to contract interpretation in the following terms: -

> " The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the

[26] Arnold v. Britton [2015] UKSC 36.

[27] Federal Republic of Nigeria v. JP Morgan Chase Bank NA [2019] EWHC 347 (Comm), paragraph 32, approved by the Court of Appeal in *JP Morgan Chase Bank NA v. Federal Republic of Nigeria* [2019] EWCA Civ 1641, paragraphs 29, 73 and 74.

expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain."

50. The courts have established that in order to determine the relevant context of the contract, the wider context (outside of the contractual document itself) is admissible and typically ruled that they will adopt a broad test for establishing the admissible background. A recent ruling provided clarification that the 'background' to a contract includes 'knowledge of the genesis of the transaction, the background, the context and the market in which the parties are operating.'[28] Other important points to note regarding the courts' approach to contractual interpretation include: - (a) the courts will endeavor to interpret the contract in cases of ambiguity in a way that ensures the validity of the contract rather than rendering the contract ineffective or uncertain;[29] (b) the courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law; and (c) where a clause has been drafted by a party for its own benefit, it will be construed in favour of the other party (the contra proferentem rule). This last principle has limited applicability in cases involving sophisticated commercial agreements where a contract has been jointly drafted by the parties or where the parties are of comparable bargaining power.[30] The applicant did not demonstrate misrepresentation or fraud nor was it suggested that there were no prior negotiations culminating in the agreement. The applicant is simply inviting this court to either re-write a binding contract or to assist it to evade consequences of a legally binding agreement it voluntarily signed.

51. The other reason to bear in mind is that the Arbitrator, and not the court has authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the agreement including, but not limited to any claim that all or any part of the agreement is void or voidable. In *Rent-A-Center, West, Inc v Jackson*[31] a 5-4 decision held that unconscionability challenge should go to the arbitrator. A reading of the agreement shows that the parties consented to the seat and place of arbitration and the applicable law. In absence of fraud or misrepresentation, they are bound by their choice.This court cannot re-write their preferred choice. In *Roger Shashoua & 2 others v Sharma*[32] the court held that:

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

[28] *Merthyr (South Wales) Ltd v. Merthyr Tydfil CBC* [2019] EWCA Civ 526).

[29] *Tillman v. Egon Zehnder Ltd* [2019] UKSC 32.

[30] See *Persimmon Homes v. Ove Arup* [2017] EWCA Civ 373.

[31] Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772 (2010).

[32] {2009} EWHC 957.

52. In *Fili Shipping Co Ltd v Premium Nafta Products and others* [On appeal from *Fiona Trust and Holding Corporation and others v Primalov and others*,[33] Lord Hoffmann, delivering the speech with which all their lordships concurred, said: -

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

53. In *Fiona Trust* (*supra*), (which the House of Lords upheld in Fili Shipping), decided in the English Court of Appeal, Longmore LJ, delivering the court's unanimous judgment, said:

> " As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all."
>
> And
>
> 'One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen.'
>
> And
>
> 'If there is a contest about whether an arbitration agreement had come into existence at all, the court would have a discretion as to whether to determine that issue itself but that will not be the case where there is an overall contract which is said for some reason to be invalid, eg for illegality, misrepresentation or bribery, and the arbitration is merely part of that overall contract. In these circumstances it is not necessary to explore further the various options canvassed by Judge Humphrey Lloyd QC since we do not consider that the judge had the discretion which he thought he had."

54. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an arbitral tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the arbitral tribunal to adjudicate the disputes and bind the parties. The arbitration agreement being the product of a consensual contract, I refuse the invitation to "rectify the arbitration clause." The applicant is inviting the court to venture into the forbidden sphere of re-writing contracts willfully signed by consenting parties.

55. The plaintiff's core ground as I see it is that its claim is premised on the Settlement Agreement. This argument collapses on several fronts. First, the plaintiff is clearly cutting the ground upon which it is standing. In the event the court agrees and declares the Settlement Agreement to be invalid, then the

[33] [2007] UKHL 40; [2007] Bus LR.

original contracts remain. The import is that the dispute unless resolved amicably, must proceed to arbitration in accordance with clause 8.

56. Second, prayers (c), (d) & (e) of the plaint actually relate to the Contracts 1& 2. A reading of the arbitration clause shows that it is worded is broad terms and it contemplates the instant dispute.

57. Third, the plaintiff attacks the Settlement Agreement on grounds of coercion and even submitted that this court is required to satisfy itself on the merits of the dispute. As stated earlier, when a person signs a document, that signature should denote an intention to be bound by the terms and conditions embodied in the signed document.

58. Fourth, the concept of economic duress was recently considered in depth in *Medscheme Holdings (Pty) Limited & Another v Bhamjee*[34] which explained it as follows: - "in general terms, an undertaking that is extracted by an unlawful or unconscionable threat of some considerable harm, is voidable. Economic duress (or business compulsion) may broadly be described as imposition, oppression or taking undue advantage of the business or financial stress or extreme necessity or weakness of another. To put it differently, economic duress is constituted by illegitimate commercial pressure exerted on a party to a contract, which induces him to enter into the contract, and which amounts to a coercion of the will which vitiates his consent.

59. The party relying on duress must prove a threat of considerable evil to the person concerned; that the fear was reasonable; that the threat was of an imminent or inevitable evil and induced fear; that the threat or intimidation was unlawful or contra bonos mores; and that the contract was concluded as a result of the duress.[35] On the other hand, a party wishing to rely on undue influence must prove that the other party had influence over him or her; the influence weakened his or her resistance; the other party used his influence unscrupulously towards the innocent party; the transaction which was concluded, is prejudicial; and exercising a normal and free will, the innocent party would not have entered into the jural act or transaction.[36] In *Paragon Business Forms (Ply) Ltd v Du Preez*[37] it was emphasized that the court should have regard to the person complaining of the duress and the circumstances in which he found himself at the time and then decide, in the light of all the relevant factors, whether it was reasonable for the person concerned to have suffered fear and to have succumbed thereto. This is also the approach suggested by Christie, *The Law of Contract in South Africa*: -[38]

> "The point is that every person who complains of duress is entitled to be seen as the sort of person he or she is, but toprevent theremedy gettingout of hand he is not entitled to resile from the contract if he claims to have succumbed to the fear that would be unreasonable even for the sort of person he is."

60. A court will use its power not enforce a contract sparingly, and only in the clearest of cases in which the harm is substantially incontestable and proven. A court will decline to use the power where a party relies on abstract values of fairness and reasonableness to escape the consequences of a contract. The party who attacks the contract or its enforcement bears the onus to establish the facts. There are,

[34] (SCA Case 214/04 (judgment of Nugent JA handed down on 27 May 2005).

[35] See *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 3068.

[36] See *Preller v Jordaan* 1956 (1) SA 483 (A) at 492 H.

[37] 1994 (1) SA 434 (SE) at 441D-G.

[38] 6th Ed at 315.

however, two principles which require further elucidation. The first is the principle that public policy demands that contracts freely and consciously entered into must be honored. The second principle requiring elucidation is that of "perceptive restraint." According to this principle a court must exercise "perceptive restraint" when approaching the task of invalidating, or refusing to enforce, contractual terms. It is encapsulated in the phrase that a "court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases." This principle follows from the notion that contracts, freely and voluntarily entered into, should be honored.

61. A reading of Contract 1 and 2 and the Settlement agreement leaves no doubt that the party's intentions were clear. In any event, the question whether there exists a dispute or not touches on the jurisdiction of the arbitrator. The arbitrator's jurisdiction can be challenged by attacking the agreement's validity or on the tribunal's jurisdiction over the subject matters, among other challenges. Section 17 of the *Arbitration Act* provides for the doctrine of kompetenz-kompetenz, a jurisprudentialdoctrine whereby a legal body, such as a court arbitral tribunal, may have competence, or jurisdiction to rule as to the extent of its own competence on an issue before it. The doctrine of kompetenz-kompetenz is enshrined in the UNCITRAL Model Law on International Commercial Arbitration and Arbitration Rules.[39] Article 16(1) of the Model Law and article 23(1) of the Arbitration Rules both dictate that "the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

62. The term "inoperative" was considered by Hammerschlag J in *Broken Hill City Council v Unique Urban Built Pty Ltd*. [40]Urban brought a motion for the matter to be referred to arbitration. The Council resisted on the grounds that the arbitration agreement was inoperative. The issues for determination were, what was meant by the term inoperative and whether clause 42.3 rendered the arbitration agreement inoperative. His Honour referred to the case of *Lucky-Goldstar International (HK) Ltd v NG Moo Kee Engineering Ltd* [41] in which the parties had agreed that arbitration would be in accordance with the rules of procedure of an association which did not exist. Kaplan J noted that the phrase 'inoperative or incapable of being performed' had been taken from the New York Convention of 1958 and endorsed the following commentary of academic commentators: -

> " The word 'inoperative' can be deemed to cover those cases where the arbitration agreement has ceased to have effect. The ceasing of effect to the arbitration agreement may occur for a variety of reasons. One reason may be that the parties have implicitly or explicitly revoked the agreement to arbitrate. Another may be that the same dispute between the same parties has already been decided in arbitration or court proceedings (principles of *res judicata* ...).
>
> ...[A]s for instance where the award has been set aside or there is a stalemate in the voting of the arbitrators or the award has not been rendered within the prescribed time limit. Further, he suggests that a settlement reached before the commencement of arbitration may have the effect of rendering the arbitration agreement inoperative, although he notes an American decision which left this issue to the arbitrators.
>
> As to the phrase 'incapable of being performed', Professor van den Berg is of the view that this would seem to apply to a case where the arbitration cannot be effectively set in

39 Bantekas, Ilias. An introduction to international arbitration. New York. p. 109. ISBN 9781316275696. OCLC 917009113; Croft, Clyde Elliott; Kee, Christopher; Waincymer, Jeff (2013). A guide to the UNCITRAL arbitration rules. Cambridge: Cambridge University Press. p. 249. ISBN 9781107336209. OCLC 842929920.

40 {2018} NSWSC 825.

41 {1993} HKCFI 14.

motion. The clause may be too vague or perhaps other terms in the contract contradict the parties' intention to arbitrate. He suggests that if an arbitrator specifically named in the arbitration agreement refuses to act or if an appointing authority refuses to appoint, it might be concluded that the arbitration agreement is 'incapable of being performed'. However, that would only apply if the curial law of the state where the arbitration was taking place had no provision equivalent to ss 9 and 12 of the Arbitration Ordinance and art 11 of the Model Law."

63. The phrase 'incapable of being performed' was considered in *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & ors*[42] Fortuna brought a motion to stay court proceedings pending arbitration pursuant to the arbitration agreement contained in the contract. Bulkbuild resisted the motion, claiming that the arbitration agreement was incapable of being performed on the grounds that there would be a risk of different factual findings being reached if its claims against Fortuna were determined by arbitration but its claims against another party to the proceedings (the Superintendents) were determined by a court. It was argued that the claim against Fortuna arose out of similar factual matters as its claims against the Superintendents. The court, rejecting Bulkbuild's argument, held at that mere inconvenience, "such as might arise if the claims against the second and third defendants were permitted to be actively pursued in the court, at the same time as the arbitration of the claim against the first defendant," does not render the arbitration agreement incapable of being performed. The court considered the meaning of the phrase 'incapable of being performed' from which the following points can be taken: -

a. the term would relate to the capability or incapability of parties to perform an arbitration agreement; the expression would suggest "something more than mere difficulty or inconvenience or delay in performing the arbitration";

b. there has to be "some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement"; and

c. the focus in the practical examples canvassed by the court was on the administration of the arbitration itself rather than on the merits of what was to be referred to arbitration.

64. In *Dyna-Jet Pte Ltd v Wilson Pte Ltd*,[43] it was recognized that an arbitration agreement is inoperative, at the very least, when it ceases to have effect as a binding contract. That can occur as a consequence of various contractual doctrines, such as discharge by breach, by reason of waiver, estoppel, election or abandonment. More specifically, an arbitration agreement will be inoperative where a party has committed a repudiatory breach of that agreement and the repudiation has been accepted by the innocent counter party. The phrase "incapable of being performed" was interpreted in the above case as being a situation where a contingency prevents the arbitration from being set in motion, whether or not that contingency is foreseen and bargained for.

65. An arbitration agreement is 'null and void' if it does not have a legal effect due to the absence of consent. Furthermore, a lack of capacity, such as when a party does not have the authority or permission to enter into an arbitration agreement, may invalidate the clause. An arbitration agreement may also be null, where the clause's language is so vague or ambiguous, that the parties' intention cannot be decided. However, defective arbitration clauses, may nonetheless be interpreted by a court to give meaning to it, to save the parties' intention to arbitrate, as courts tend to interpret these clauses narrowly, to avoid

[42] {2019} QSC 173.

[43] {2016} SGHC 238.

giving a 'back door,' for a party wishing to escape the arbitration agreement. Thus, the 'null and void' language must be read narrowly given a presumption of enforceability of agreements to arbitrate.

66. There is nothing before me to show that the arbitration clause is inoperative, null or void. The grounds cited the plaintiff cannot pass the above tests. In fact, the averments in the plaint and the bulk of the prayers sought leave no doubt that the plaintiffs claim is premised on Contracts 1 & 2. I may usefully cite the House of Lords decision in *Premium Nafta Products Limited (20th defendant) and others (respondents) v Fili Shipping Company Limited (14th claimant) and others (appellants)*[44] which stated:-

> "Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.
>
> In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.
>
> If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.
>
> A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause...
>
> In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked...: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.""

44 {2007}UKHL 4.

67. There is nothing before me to show that the arbitration clause is inoperative, null or void. Commercial arbitration is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties. The law requires the parties to honour their contractual obligation to arbitrate. The law also provides for limited judicial intervention in arbitral proceedings, and supports the enforcement of arbitral awards in a manner similar to that for national court judgments. National laws generally recognize and support arbitration as a mutually exclusive alternative to litigation as a means of finally resolving disputes.

68. Flowing from the jurisprudence discussed herein above and the conclusions arrived at, it is my finding that the dispute disclosed in this case falls within the ambit of article 8 of the agreement. Therefore, I find and hold that the defendant's application dated 2nd March is merited. Section 6(1) of the *Arbitration Act* provides that a court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds— (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

69. As stipulated by the above statutory prescription, I order that these proceedings be and are hereby stayed pending arbitration of the dispute(s) between the parties. I make no orders as to costs.

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 21 ST DAY OF SEPTEMBER 2021

JOHN M. MATIVO

JUDGE

Delivered electronically via e-mail and uploaded into the e-filing system

JOHN M. MATIVO,

JUDGE