IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO 8 OF 2011
IN THE MATTER OF ARBITRATION ACT, CAP 15-R.E 2002

AND

In the Matter of an Arbitration Conducted in the International Court of Arbitration of the International Chamber of Commerce in Arbitration Case No. 15947/VRO (The" ICC Award")

BETWEEN

Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited (Tanzania) ("both as Claimants" in the ICC Arbitration) and Tanzania Electric Supply Company Limited (Tanzania)("as Respondent" in the ICC Arbitration)

AND

In the Matter of an Intended Petition to Challenge the Award granted by the ICC International Court of Arbitration, ("ICC Award"), in favour of the Claimants

BY

TANZANIA ELECTRIC SUPPLY COMPANY LTD.....PETITIONER

AND

DOWANS HOLDINGS SA (COSTA RICA).....1ST RESPONDENT

DOWANS TANZANIA LIMITED (TANZANIA).....2ND RESPONDENT

Date of Last Orders.....27/07/2011
Date of Final Submissions.....10/08/2011
Date of Judgment.....28/09/2011

JUDGMENT

MUSHI, J.

The petition before me arises out of an arbitration award delivered against the TANZANIA ELECTRIC SUPPLY LIMITED **(Petitioner)**, by the INTERNATION CHAMBER OF COMMERCE ARBITRAL TRIBUNAL (**THE "ICC TRIBUNAL"**), dated 15th of November, 2010, which award was subsequently followed by a **ADDENDUM** issued on 13th of December, 2010. The "ICC Award" ordered the Petitioner to pay DOWANS HOLDINGS SA (Costa Rica) and DOWANS TANZANIA LIMITED (1st and 2nd Respondents, respectively), the sum of United **States Dollars-65,812,630.03**. The matter before the **ICC Arbitral Tribunal**, was for a claim by THE DOWANS, against TANESCO for:-

a) Sums allegedly due in respect of unpaid and/or partially paid invoices for power supplied to TANESCO under a written Agreement for Emergency Power Supply (the POA), dated 23rd June, 2006, and

b) Damages for alleged wrongful termination of the POA by TANESCO, 1st of August, 2008.

Dissatisfied, the Petitioner seeks to challenge the **ICC Award** and prays this court for orders **setting it aside** and/or **remitting** it for the reconsideration of the Arbitrators, pursuant to provisions of section 16 and 15 (respectively) of the Arbitration Act (Cap 15 R.E. 2002).

The claim arose out of a deeply flawed procurement exercise in 2006, in which TANESCO was directed by the Government of Tanzania (GOT) to award an emergency power supply **contract** to a Texas company in the name of RICHMOND DEVELOPMENT COMPANY, (RDVECO). In order to appreciate

the nature and the background to this petition, the following hard and painfully bitter facts are pertinent. I will endeavour to be as brief as possibly can: In the late 2005/early 2006, prolonged drought in the country resulted in a serious crisis of shortage of hydroelectric power (since the country is still wholly dependant on hydroelectric power supply): It was decided, therefore, the emergency should be remedied by the purchase of temporary power to help TANESCO to increase the energy supply to the national grid. TANESCO, which is a public corporation, wholly owned by the GOT, is responsible for the generation, supply, and distribution of electricity through the National Grid. The GOT instructed TANESCO to initiate and implement the necessary measures and procedures for the purchase of the temporary power.

In this country, **all public procurements** are governed by the provisions of the **Public Procurement Act** (PPA) 2004, and its associated **Regulations**. According to sect. 3 of the PPA, 2004, TANESCO is a parastatal organization, public body and a **procuring entity**. In that capacity TANESCO advertised Tender No. PC/010/2006 for emergency power supply from rental gas-based generating plants of 100 Megawatts. Both the advertisement and the Tender Documents (dated 01/3/06) required bidders to have the plant readily available for supply, installation and commissioning within a short period of time.

On 17/3/06, a Company known as RICHMOND DEVELOPMENT COMPANY (a ccompany incorporated in Texas), submitted a bid and proposal for the tender No. PC/010/2006. In its bid and proposal, RDEVCO **represented** that it would supply the plant jointly with **PRATT & WHITNEY,** and that the plant was readily available for supply, installation and commissioning. The bids were opened on 20/3/06. There were eight (8) bids in total.

Under the **Public Procurement Act 2004,** evaluation of bids is conducted by the procuring entity's **Tender Board**. An **Evaluation Committee** of TANESCO's Tender Board Evaluated the eight bids received, and produced a report dated 20/3/06. In this report **all eight** of the bids were found to be **non-responsive** to the tender. As a matter of fact, the RDEVCO's bid was found to be the **"...the poorest technical proposal submitted, ...with no experience shown in similar projects.**" Thus the Evaluation Committee re-commended re-tendering. On 30/3/06, the Board of Directors of TANESCO considered the recommendations of the Tender Board, but decided to opt instead for a different process, known as **"international shopping procurement",** which is also permissible under the PPA 2004. This process would have involved inviting six (6) reputable companies in the business of manufacturing and leasing gas generators to participate in a procurement exercise.

Up to this point the procurement exercise in relation to the tender had proceeded in accordance with the Public Procurement Act 2004, and its Regulations. Then, **all over a sudden,** on 4/4/06, the Government instructed TANESCO to **re-call** the eight non-responsive bidders for further evaluation. The TANESCO Tender Board reluctantly carried out the re-evaluation, protesting that **"..re-calling the already disqualified bidders is out of procedure.**" Non the less, the Tender Board Evaluation Committee produced a supplementary evaluation report dated 10/4/06, which **re-affirmed** that, none of the eight bids was responsive to the requirements of the tender. Again, un-believably, soon after the release of the supplementary evaluation report, the TANESCO's Tender Board was instructed by the Government to **suspend** the tender process with immediate effect. From this point onwards the **mandatory requirement procedures** of the Public

Procurement Act, 2004, were not followed. The Ministry of Energy and Minerals (**MEM**) **took-over** the procurement process. All of the bid documents in the possession of TANESCO were provided to the Ministry on 13/06/06. Subsequently, on 19/06/06 the tender process was formally cancelled by TANESCO's Tender Board.

After the MEM took over the procurement process, RDEVCO, and the other seven bidders were invited to meetings by the MEM for further discussions. The meeting took place on 21/4/06. In this meeting, RDEVCO **continued to represent** that the plant was **immediately available for delivery**. The Ministry's Evaluation Report dated 25/04/06 produced after these meetings **recommended** that RDEVCO be **invited** for **contract negotiations**. The contract negotiating meetings took place between RDEVCO and the GOVERNEMENT NEGOTIATING TEAM (GNT) between 8th and 15th June. In these negotiating meetings, RDEVCO still continued to represent that it had the plant readily available for delivery.

On 23/6/06, a **Power Off-Take Agreement (POA)** (ANNEX-TA-I) was reached, between the RDEVCO and the Government's Negotiating Team (under MEM). TANESCO was **directed** by the Government to **sign the Agreement**. Thus, reluctantly, TANESCO signed the POA. Again, In **Recital B** to the POA, RDEVCO, still represented that it had the **equipment** and the **financial** and the **technical** capabilities to construct, install, commission, operate and maintain the plant required by TANESCO. In fact, RDEVCO had neither the plant to perform the POA, nor monies with which to purchase the plant. The hard facts are, RDEVCO had no significant assets or employees and no previous experience or track record in such projects. The bitter facts are, RDEVCO had entered into a contract with TANESCO, which was not in a position to perform.

Incidentally, up to and until October 2006, the RDEVCO had completely failed to fulfill their part of the POA, despite the fact TANESCO fulfilled its part, in that (according to clauses 4.5 (c) and 15.18 of the POA), by 1/6/2006, TANESCO had established a **Letter of Credit** in favour of RDVECO, for US $ 30,696,598, payable in two installments, –50% on **presentation** of **shipping documents** relating to the first gas turbine unit, and 50% following **delivery** and **acceptance** of specified plant and equipment. However, the terms of Letter of Credit did not allow RDEVCO to draw down monies in order to pay for the purchase of the plant. Since RDEVCO had no monies to purchase the plant, and since it could not draw on the Letter of Credit, RDEVCO simply could not deliver the plants. By this stage, TANESCO had become frustrated by RDEVCO's lack of progress and a series of **false and empty promises** that the plant was ready for shipment, or on its way. On **7/10/06**, TANESCO wrote a formal letter to RDEVCO **complaining** of a number of issues. Thus, RDEVCO was under further pressure to perform, but, of course, it was unable to do so.

Meanwhile, unable to perform the POA, RDEVCO entered into a **secret assignment** of its **contractual rights and obligations** to a Cost Rican Company known as **DOWANS HOLDINGS SA (COSTA RICA)** (DHSA). DHSA is said to be a company incorporated under the laws of Costa Rica, on 1st of July, 2005. It is not very clear who really owns and/or controls DHSA. However, it has been associated with one ROSTAM AZIZ (a Tanzanian businessman tycoon and politician). According to the available scanty documents, it is indicated that DHSA issued powers of Attorney to ROSTAM AZIZI, since 2005, appointing him to manage the company's affairs outside Costa Rica.

The Bitter facts on record further reveal that, Rostam Azizi obtained the details of the POA and of RDEVCO's inability to perform. Facts further reveal that, Rostam Azizi flew over to Houston, Texas on 7/10/06, to meet with the representatives of RDEVCO. On 14/10/06 an agreement was reached to "bail" RDEVCO out of the POA. Thus an agreement was entered into between RDEVCO and DHSA for a **Sale, Assignment and Assumption Agreement** (ANNEX-TA-2). This Agreement provided for RDEVCO to **sale, assign** and **convey** to DHSA **all of its rights, title, benefits** and **interests** in, to and under the POA. It was also agreed that at **a mutually agreed time** RDEVCO and DHSA would jointly approach TANESCO and seek TANESCO's **retrospective consent** to the Assignment. Mean while, TANESCO, was **unaware** of the negotiations between RDEVCO and DHSA and the agreement which was reached on 14/10/06. Facts further reveal that, TANESCO was also **unaware,** at the time, that monies provided by DHSA to RDEVCO enabled RDEVCO to supply the first turbine unit at the end of October, 2006.

Having struck the deal with RDEVCO, DHSA moved rapidly, to ensure that the first turbine unit was acquired by RDEVCO, before seeking for the TANESCO's consent to the assignment of the POA. At least by 22/11/06, DHSA had entered into a contract with a **General Electric Company** (GEC), for the purchase of five (5) generators. Then, on 4/12/2006, TANESCO received two letters. The first letter was from RDEVCO, dated 9/11/2006, enclosing a form of consent to the assignment of the POA to DHSA. The second was a letter from DHSA, dated 14/11/2006. By these letters, therefore, RDEVCO and DHSA, **jointly** sought TANESCO's **re-trospectve consent** to the assignment.

In early December, 2006, a meeting took place between TANESCO and DHSA to discuss the request for consent to the assignment. At this meeting TANESCO requested information about the Standing and financial position of DHSA. In order to **induce** TANESCO to consent to the assignment, DHSA made certain representations to TANESCO about its business standing. In reliance on those representations, TANESCO stated that it would consent to the assignment subject to the provision of an **indemnification agreement** by DHSA. On 21/12/2006, TANESCO formally **consented** to the assignment. DHSA provided the indemnity requested by TANESCO on 22/12/06. A formal **Indemnification Agreement** was entered into on 23/12/2006. The Indemnification Agreement provided in clause 1 that, DHSA would indemnify TANESCO against, amongst other things, any claim by RDEVCO.

Following TANESCO's consent to the assignment of the POA to DHSA, power generation commenced on 23rd of January, 2007; and on 3rd of October, the Plant was fully commissioned. Subsequently, on 13/3/07, DHSA asked TANESCO to consent to the assignment of the POA to DOWANS TANZANIA LIMITED (**DLT**). DTL is a company established in Tanzania, and it is a **subsidiary** wholly owned by DHSA. Before the consent to the assignment, however, on 16/3/07, DHSA and TANESCO jointly signed a **Change of Parties Agreement** (CPA), by which it was agreed that **DHSA** (as assignee) would be a **party to the POA** with TANESCO. Subsequently, on 20/3/2007 TANESCO consented to the assignment of the POA by DHSA to DTL, subject to the provision by DHSA of a **Deed of Undertaking**, confirming that it would remain fully responsible for the obligations under the POA. However, the Deed of undertaking was provided on 9/7/08, after the POA had been terminated.

On 3/10/2007, TANESCO and DTL agreed that the full plant contracted by TANESCO, generating 112 megawatts, was ready for operation and there after DTL made the plant available in accordance with the POA. The plant operated successfully for approximately 18 months, until when DOWANS TANZANIA was informed by TANESCO on 30/06/2008, that POA was **void ab initio** (null and void), and expressed its intention to terminate the POA. DTL was advised to de-commission the plant by 01/08/2008.

The events leading to the de-commissioning of the plant and the subsequent termination of the plant were due to the increasing rise of the **Public Controversy**, regarding the **award** of the POA to RDEVCO and the subsequent assignments of the POA to DHSA and DTL. The public concern regarding the award of the POA to RDEVCO was made by the members of the Parliament of the United Republic of Tanzania, backed with the loud outcries and public demonstrations from the so called **Human Rights Activists Organizations**, who claimed that the POA (and its subsequent assignments) was **improperly obtained** and hence **contrary to the laws of Tanzania** and **Public Policy**. The **Public Concern** demanded that the POA should be terminated.

Meanwhile, the procurement process and subsequent events were being investigated by the Tanzania **Public Procurement Regulatory Authority (PPRA).** In January, 2008, the PPRA published its investigation Report on the **Tender for Emergency Power Supply of Rental Diesel Powered Generators by TANESCO**. The PPRA Report concluded that

"....The whole procurement process was not conducted in accordance with the Public Procurement Act, 2004 and its Regulations..."

Indeed, an earlier **PPRA Audit Report** in May, 2007, had reached similar conclusions.

In November, 2007 a **Parliamentary Select Committee** was formed in order to investigate the matters relating to and incidental to the POA between TANESCO and RDEVCO. On 6/2/08, the Parliamentary Select Committee presented its report to the Parliament. **The Select Committee Report made serious allegations about political interference in the procurement process of the POA, and the connection between Rostam Azizi and DHSA.** The select Committee Report led to the resignation of the Prime Minister, the Minister for Energy and Minerals, and the former MEM Minister. The Select Committee recommended that TANESCO should terminate the contract between TANESCO and the DOWANS, on the grounds that the POA was **improperly procured**.

In the light of the **PPRA** and the **Select Committee** criticisms of the procurement process and the events surrounding the award of the POA to RDEVCO, and its subsequents assignments to DHSA and DTL, TANESCO sought legal advice from one of the highly reputable law firm in the country. On 26/5/2008, the said Law firm submitted its report to TANESCO, which, surprisingly, agreed with the recommendations of the Parliamentary select committee in that, the law firm found that the POA was **void ab initio**, and therefore, **not enforceable** under the laws of Tanzania. The law firm advised TANESCO to terminate the contract between TANESCO and the DOWANS

(DHSA and DTL). After considering that legal advice, TANESCO sent a letter dated 30/6/2006 to DTL, stating that the POA was **void ab initio**, since it was not approved by TANESCO Tender Board as required by the Provisions of the **Public Procurement Act, 2004,** and that in addition, the **assignment** of the POA to DHSA was **invalid**. TANESCO requested DTL to decommission the plant by 01/08/2008.

DTL replied by a letter dated 2/7/2008, **denying** the allegations made by TANESCO. On 9/7/2008, DTL sent a fuller response **denying** that the POA was **void** or that the **assignment** to DHSA was **invalid**. The letter asserted that US $ 22,227,055.95 remained unpaid in respect to invoices issued for **power supplied**. Payment of that sum was demanded under clause 12 of the POA. By a further letter dated 11/8/2008, DTL wrote to TANESCO purporting to terminate the POA for non-payment of sums due. By a letter dated 4/9/08, TANESCO requested DTL to remove its turbines from the site (at **Ubungo**) by 30/11/2008.

Thus, following the decision by TANESCO to terminate the POA, DOWANS, on 9/7/08 wrote a letter to TANESCO, **denying** that the POA was **void** or that the **assignment** to DHSA was **invalid**, and it expressed its intention to **challenge the termination** of the POA. On 14/11/2008, DOWANS filed a **request for arbitration** (ANNEX-TA-3) against TANESCO before the **International Chamber of Commerce** (the ICC), in accordance with clause 14 of the POA, whereby the Parties had agreed to refer any **dispute or misunderstanding**, etc, that might arise between them to the ICC. In response to the DOWANS request for arbitration, on 30/11/2009, TANESCO filed its **Answer to the Request** and a **counter – claim** (ANNEX-TA-4).

The parties and the **ICC Court of Arbitration** appointed a distinguished Tribunal to adjudicate upon the dispute in accordance with the **ICC Rules of Arbitration**, 1998. (ANNEX-D.T.L.I). TANESCO nominated as arbitrator, **Sir Jonathan Parker**, a retired Judge of the English Court of Appeal. The DOWANS nominated as arbitrator, **Mr. Swithin Munyantwali** of Uganda, the Executive Director and Co-Founder of the International Law Institute African Centre for Legal Excellence. The ICC Court appointed as **Chairman** of the Tribunal, **Mr. Gerald Aksen**, a well-known American arbitrator, upon the proposal of the United States National Committee. Accordingly, by 01/9/2009, the ICC Arbitral Tribunal became effectively constituted.

The Parties were competently represented. The DOWANS (1st and 2nd Respondents) were represented by **MR. John Miles**, of a Cape Town Law Firm, and **MR. Ricky Diwan**, of Essex Court Chambers. On the other hand, TANESCO was represented by **Mr. Reed Smith LLP**, of the London Law firm, and an English Queen's Counsel, **Mr. Anthony White, Q.C** of Matrix Chambers. Besides the London based Attorneys, TANESCO was also represented by the **Rex Attorneys**, of Dar es salaam, which included **DR Eve Hawa Sinare** and **DR. Alex T. Nguluma**.

On 12/6/2009, the Arbitrators executed the **Terms of Reference** (**ANNEX TA-5**) and so confirmed the acceptance of their appointment. The way in which the proceedings were conducted is summarized at paras. 20-24 of the ICC Final Award. Both parties set out their case in detail in **written pleadings**, there were **written witness statements** and the hearing took place over a period of one week, with the final day taken up by **oral closing submissions.**

On 20/3/2009, the DOWANS filed their **Statement of case** (**ANNEX TA-6**), on 19/6/2009 TANESCO filed its **Answer** and a **counter-claim** (ANNEX TA-7). On 25/9/2000, the DOWANS filed Reply and Answer to the counter claim (ANNEX TA-7). Later, the DOWANS filed **Amended Statement of Case** (ANNEX TA-9) and subsequently, TANESCO filed a **Rejoinder** to the DOWANS' Reply and Answer to counter claim (ANNEX TA-10). Prior to the commencement of hearing, the DOWANS filed **Re-amended Terms of Reference** (ANNEX-TA – 11). Subsequently, the Arbitrators approved the **Amended Terms of Reference** (ANNEX TA-12). On 31/5/2010, the Parties filed their respective **opening submissions** (ANNEX TA-13 and 14).

The hearing commenced on 7/6/2010 to 14/6/2010, at Dar es salaam (ANNEX TA-15). After the closure of the hearing, the Arbitral Tribunal invited counsels for the parties to make their **closing submissions** (ANNEX TA-16-17).

The ICC Arbitral Tribunal made its award on 15/11/2010, which award was received by TANESCO on 26/11/2010. However, on 13/12/2010, the Arbitral Tribunal made on **Addendum** to the Award (ANNEX TA – 18).

On 06/01/2011, one **Ms Vicotria Orlowski**, counsel for the secretariat of the **ICC International Court of Arbitration**, informed the Registrar, of the High Court of Tanzania (vide letter Ref. No. 15947/VRO), that the Parties to the Arbitration, requested the Arbitral Tribunal to cause the final Award to be filed with the High Court of Tanzania, pursuant to the provisions of sect. 12 of the Arbitration Act (Cap 15 R.E 2002). Accordingly, the originals of the **ICC's Final Award**, together with the **addendum**, were duly sent to the Registrar, High Court, Dar es salaam.

On 24/01/2011, one **Mr. K.M. Fungamtama** (Vide his letter, Ref KMF/DOWANS/1/11), informed the Registrar, High Court, Dar es salaam, that he was acting for the DOWANS, and that upon their instructions, he was requesting for the **registration** of the ICC's Final Award. Thus, upon that request, a **Misc Civil Application No. 08/2011**, was duly filed for this matter, in order to obtain the requisite **decree** of this court, in terms of sect 17 of the Arbitration Act, for the purposes of execution.

The filling of the application for the Registration of the ICC's Final Award, attracted several petitioners seeking to block both the said **registration** and the subsequent **payment** of the sums awarded therein. At least five (5) petitioners (including TANESCO) filed their petitions seeking to **challenge the validity** of the ICC's Final Award. The first four petitions however, were **struck out**, following several **preliminary objections on points of law** being raised against their petitions. But the fifth petition (by TANESCO) survived, hence the matter before me.

In this Petition, the Petitioner (TANESCO) is being represented by REX ATTORENYS (who also represented TANESCO, as Respondent, in the Arbitration conducted by the ICC Arbitration Tribunal). The learned Attroneys were **DR. Hawa Sinare** and **DR. Alex T. Nguluma**. The Rex Attorneys were joined with **Prof. Luoga, Esq**, and **Prof. Kabudi, Esq**. and **Dr. Alex Mapunda.** Others included, **Mr. Mwidunda**. The Hon. Deputy Attorney General, **Mr. Masaju**, also joined the team of the afore said Attorneys. On the other, the DOWANS (1st and 2nd Respondents) were represented by Mr. **K.M Fungamtama**.

In this Petition, the Petitioner (TANESCO) claims that, it has been dissatisfied with the Final Award by the ICC's Arbitral Tribunal, on the grounds that the Award has fundamental flaws vitiating it on several grounds, including the following (paragraphs 7,8,9,10 and 11 of the Petition), namely:-

"...7. The Petitioner challenges the **validity** of the ICC Award
in that, the Arbitral Tribunal wrongly retained jurisdiction or acted in **excess of its jurisdiction** by wrongful application of **Texas law** on competence.

8. That the merits of it, the Petitioner has discovered that the ICC Award stand the test of validity in that the arbitration was not conducted **fairly** and the resultant award is grossly flawed on fundamental issues of **facts**, **evidence** and **law**. The Petitioner thus seeks to **set aside the award** by reason of **misconduct** on the following grounds, namely:-

i. The Arbitrators **failed to consider** the Petitioner's **evidence on lack of capacity to contract** by Richmond Development Company LLC, thereby **erroneously interpreting** section 10 and 11 of the **Law of Contract Act** Cap. 345 R.E. 2002.
ii. The Arbitrators **misconducted** themselves, **on the face of the record**, by their **erroneous interpretations** of the **Public Procurement Act. 2004**.
iii. **Failure to consider** the legal obligation of the Petitioner, Ministry of Energy and Minerals and the RDEVCO LLC, which was the company behind the non existent Richmond Development Company, thereby **wrongly accepting that the ministry had the capacity through the Government Negotiation Team to contract outside the Procurement Act, 2004,**

iv. Deliberately **disregarded the evidence** that the **procurement of the POA without a tender** was **invalid** since tender No. PC/010/2006 had been cancelled by the Petitioner's Tender Board.

v. In accepting that the Ministry of Energy and Minerals or the Government Negotiation Team had the capacity to contract the POA for the Petitioner, the **Arbitrators made a fundamental error of law on the face of the record,** resulting into the POA which deviated from the draft attached to Tender No. PC010/2006, was unsuitable for the Petitioner in terms of the time for installation and provision of services, the duration, interim charges, payment of import duty and related taxes, the capacity charge provided in the POA against the available Gas, that **the petitioner was forced to sign the POA with Richmond Development Company LLC** negotiated by a Texas Company that had no previous experience of similar projects nor the financial capacity to perform the POA;

vi. The Arbitrators grossly **misconducted** themselves by their **erroneous interpretation of the Public procurement Act. 2004,** thereby **failing to hold that the Petitioner had not awarded any Tender to Richmond Development Company LLC,** which gave rise to any capable of being assigned to the Respondents. Further, the **Arbitrators committed misconduct by their failure to interpret the public procurement legislation on prohibition** and **public policy**;

vii. Alternatively, the Arbitrators failed to decide that the tender to Richmond Development Company L.L.C (if any) was **improperly secured in breach of internationally accepted norms against improper influence in securing tenders;**

viii. The **Arbitrators ignored the evidence adduced** by the Petitioner **with regard to the capacity to contract** and their systematic **disregard of the**

law applicable to the arbitration in preference to Texas law on the validity of and existence of Richmond development Company L.L.C;

ix. The Arbitrators **disregarded Petitioner's evidence in support of its case in relation to coercion** leading to the **signing the POA** by the Petitioner and **its effect on the subsequent assignment** to the Respondent;

x. The Arbitrators demonstrated gross **bias** in the **consideration of the evidence of the Petitioner** on **misrepresentation** as a ground for avoiding the POA;

xi. Failed to **consider the evidence** of the Petitioner that the **signatory to the Sale**, Assignment and Assumption **Agreement** dated 14 October, 2006, is **not the same signatory of the POA**.

9. The Petitioner further states that the **award contains an error of law manifest on the face of the record** by reason of the **Arbitrator's total failure to address the overwhelming evidence** attesting to the existence **improper procurement** of the POA.

10, That the Petitioner avers that the **enforcement** of the **ICC Final award** is contrary to **public policy**.

11, In the alternative to setting aside the award, the petitioner seeks to have the Award **remitted to the Arbitrators for their reconsideration on the ground that the Arbitrators misconducted themselves by awarding the Respondents a sum of USD 19,955,626,.71,** on account of invoices for power supplied while the reconciliation by the parties in the course of hearing whereby it was agreed that after setting off the amount previously paid to the Respondents in advance., the Petitioner was entitled to a **set off** of a sum of **USD 4,871,052.19.**

The DOWANS (1st and 2nd Respondents) opposed the petition, arguing, that the Petition was **bad in law** since it seeks to **re-open and to re-argue the issues of fact and law decided by the ICC's Tribunal in accordance with the parties agreement that it should do so**. The Respondents submitted that, that was impermissible under the ICC Rules (in particular Article 28.6 of the Rules). In response to claims asserted by the Petitioner in paragraphs 4 (v) and 7 of the Petition, the Respondents submitted that an **Arbitration Agreement** is the foundation on which the jurisdiction of arbitrators rests. It was argued that by virtue of **clause 14.1**of the POA, **the Parties agreed to the jurisdiction of the Tribunal to decide any dispute, controversy or claim** arising out of or in relation to the POA, and that by the Parties agreed to be bound by the ICC Rules of Arbitration (ANNEX – DTL 1).

The Respondents further asserted that, under **clause 14 1 (e) of** the POA, the Parties agreed that, the decisions of arbitrators shall be **final** and **binding** upon the parties and **shall not be subject to appeal**, and further, under **clause 14 1(f)** of the POA, it was expressly agreed that, the Parties **waive any right to challenge or contest the validity or enforceability of Arbitration Agreement** or any **Arbitration Proceedings** or Award brought in conformity with the clause.

The Respondents still maintained that, in submitting the dispute to arbitration by the **ICC Rules** and in accordance with Article 28 (6) of the ICC Rules, the parties under took to carry out the resulting award without delay and waived their right to any form of appeal in so far as such waiver could be validly made.

The Respondents further insisted that the petitioners' claims raised in paragraphs 8 (I) to 8 (XII), as well as paragraph 9 of the Petition, that the arbitrators **misconducted** themselves, as a matter of fact, none of the matters complained of are capable to amounting to **misconduct,** for the purposes of the provisions of sect 16 of the Arbitration Act (Cap. 15 R.E 2002). The Respondents insisted that, it is not open to the Petitioner, as a matter of Tanzania Arbitration Law, to challenge the Award with regard to matters of fact and evidence. However, the Respondents conceded that, the Petitioner can challenge the Award only where it can be pointed out that there exists **an error of law apparent on the face of the Award**. The Respondents further submitted that, the allegations raised under paragraphs 8 (1) through 8 (XI), do not in law and in fact constitute **misconduct to warrant intervention of the court**, nor do they portray **an error of law on the face of the Award**, nor they establish **bias** as alleged by the Petitioner.

With regard to matters raised in paragraph 10 of the Petition, the Respondents claimed that:-

I. That **public policy** is not one of the grounds for **setting aside** the Award provided by the provisions of the Arbitration Act;

II. That the Award is **not in violation of the laws of Tanzania**, and that the Petitioner has **failed to explain what specific area of public policy would be affected** if the enforcement of the Award was to proceed.

Responding to the issue raised in para11 of the Petition, namely, ...**what sums are due and owing to the claimants (Respondents) for power supplied or capacity provided to TANESCO,** either as **debts under the POA** (if valid), or on a

quantum meruit basis (if not), the Respondents submitted that the figure of US $ 19,955,625.71 was **agreed** between the Parties and presented to the Tribunal by agreement. Accordingly, the Respondents insisted, that the Petitioner is thus estopped by its own conduct from challenging this amount. The Respondents, having answered the Petitioner, have prayed this court to dismiss it with costs, and for an order for the **Registration** and **enforcement** of the Award.

The Petition was argued by way of written submissions. Learned Counsels endeavored to submit their submissions on time. Learned Counsels for the Petitioner, first submitted, on the issue raised by the Respondents purporting to challenge the **court's jurisdiction** in entertaining the Petion, relying upon clauses 14 (I) (e) and 14 (I) (f) of the POA. The learned counsels argued that the afore said clauses of the POA are **void** and **unenforceable**, because they cannot **oust** the **jurisdiction** of the court over the matter at hand and therefore, the Petitioner retains the right to challenge the Award pursuant to the provisions of section 14, 15 and 16 of the **Arbitration Act**, the law applicable to the POA.

Submitting on issues raised in paragraph 8 (1) of the Petition, counsels for the Petitioner submitted that the Petitioner is challenging the ICC's Final Award on the grounds that the Arbitrators **misconducted** themselves "**on the face of the record" by their erroneous interpretation of the Public Procurement Act, 2004**, Contrary to the evidence before them, that is, having found as a matter of fact that the Respondents procured the Power off take Agreement (POA) contrary to PPA 2004, **and yet, the Arbitrators went ahead to finding that the POA was not void**.

The learned counsels relied on a number of authorities to define what amounts to a **misconduct**, as it is envisaged in the Arbitration Act, and at what **juncture** an arbitrator is said to have committed the said **misconducted,** and the **effect** of the misconduct on the award itself. Counsels found out that, according to the observations given by one of the leading jurists on Arbitration Law, **Russel On The Law of Arbitration, Anthony Walton, Q.C, 9th,** the term **misconduct** means:-

> ***"....misconduct is often used in technical sense as denoting irregularity and not any moral turpitude. But he term also covers cases where there is a breach of natural justice (page 460)"***

The learned counsels also relied on the decision in the English case, **TAYLOR + SON Vs BARNET TRADING CO. LTD (1953) I.W.R,** where it was held that, an arbitrator is guilty of **misconduct** if he **knows** or **recognizes** that a contract is **illegal** and thereafter proceeds to make an **award upon a dispute arising under that contract**. In the light of the aforesaid observations, counsels invited this court to follow the reasoning adopted in the English case in **TAYLOR V. SONV BARRETT TRADING CO. LTD**, and by **Russell on the Law of Arbitration**, to define **a misconduct as being, an irregularity in the course of conducting arbitration and if it is capable of affecting the result of the proceedings then intervention by the court is not only justified but also necessary**.

Another authority relied upon by the learned counsels for the Petitioner is the decision of the defunct Court of Appeal for East Africa, in the case of **RASHID MALEDINA & CO. (MOMBASA)LTD AND OTHERS V. HOIMA GINNERS LTD (1967) I.E.A 645,** where the said court considered the provisions of sect 12 of the Arbitration Act of Kenya (which are in **pari material** with sect 16 of the Arbitration Act of Tanzania). The said sect. 12 of the Kenyan Arbitration Act, reads as follows:-

> ***"...where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured the court many set aside the award."***

Interpreting the provisions aforesaid to the facts before it, the defunct court, relying on various English authorities dealing with grounds upon which an award may be set aside by courts of law, including an **"error of law apparent on the face of the award"**; The court held that:-

> ***"..The courts will be slow to interfere with the award in arbitration, but will do so whenever this becomes necessary in the interests of justice and will act if it is shown that the arbitrators in arriving at their decision have done so on a wrong understanding or interpretation of the law,***

there is <u>an error of law apparent on the face of the award</u>." ("Emphasis Supplied).

The learned counsels also made a list of English case law in which the jurisdiction of courts were exercised to set aside awards where the was **an error of law on the face of the award.** The list of the English cases included:-

- **Landaver V. Asser (1905) 2KB 184** (improper construction of a contract).
- **Exp. Strabane V. RDC (1910) II.R 135** (Misinterpretation of a statule)
- **Blackford V. Christ church Corp (1962)** 106 5J 263 (misinterpretation of at a contract or rules).

The learned counsels maintained that based on the above references, "**an error of law on the face of the award"** means that, it **is found in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator, stating the reasons for judgement, some legal proposition which is the basis of the award and which can be said is erroneous. (CHAMPSEY BHARA COV. JIVRAJ BALLOO CO (1923) AC 480).** Counsels argued that, in the present petition the **misconduct** in issue is contained in **paragraph 406** of the ICC Award. The learned counsels further submitted that, the arbitrators **misconducted** themselves and the arbitration **on the face** of **the record** by giving effect to a **prohibited**, hence an **illegal contract**. Counsels maintained that, the arbitrators, **having found as a matter of fact that the Public Procurement Act** (PPA, 2004) **<u>prohibited</u> procurement contracts not procured through the Tender Board of the procurement entity, in this case, TANESCO;** and similarly, **having found in evidence that the POA was procured in contravention of the PPA, 2004, they <u>misinterpreted</u> the Act by giving it a**

meaning that the law did not prohibit the contract itself but the public servant or agent from making the deals.

The learned counsels further held that, the arbitrators are guilty of **misconduct as they knew that the contract** (the POA) **had been prohibited yet they misconstrued the law by shifting the burden to the public servant who made the deal and also on performance,** rather than the actual procurement of the POA. Counsels insisted that, the actual procurement of the POA was **prohibited** by the provisions of sect 31 (I) (b), which state:- **.. No. Public body shall award contract unless the award has been approved by the appropriate tender board..**" and sect. 31 (2) of the PAA, 2004, provides:-

> ***"...No person or firm shall sign a contract with any public body unless the award has been approved by the appropriate tender board.." (emphasis supplied).***

The learned counsels argued further that, the Arbitral Tribunal, having found in fact and in evidence (in para 406 of that Award), that the award of the POA to RDEVCO was made in contravention of both sect 31 I (b) and 31 (2) of PPA, 2004, the Arbitrations proceeded to finding that the **effect** of the **prohibition** against contracts entered into in contravention of sect. 31 of the PPA, 2004, **was not to render contracts void ab initio**. The learned counsels further claimed that, contrary to the reasoning of the arbitrators, the provisions of sect. 31 (I) (b) and 31 (2), are quite clear. The counsels maintained that, had the arbitrators directed their minds to English authorities relevant to the issues before them, they would have

found that the PPA, 2004, **prohibited both the award** and the **signing** of the POA, which means that, first, **the POA should not have been awarded** and secondly, **the signing of the POA, was statutorily prohibited in mandatory terms**. The learned attorneys submitted that, the effect of the POA **being awarded by the Ministry of Energy and Minerals** (MEM), and **not the Petitioners** (TANESCO) Tender Board, meant that the POA should not have been there in the first place with the effect that it was **null** and **void ab inition, notwithstanding its performance**.

In arriving at this opinion, the Petitioner's counsels relied on a number of English authorities, including the cases of, (I) **Re an Arbitration between Mahmoud and Inspahani (1921) 2 KB 716; (2) and Archibolds (Freightage) Ltd V. Spanglet (1961) 1 QB374.**

In the case of Re an Arbitration between Mahmoud and Ispahani, in which the law provided that **"...no person shall sell or otherwise deal in any of the articles specified in the schedule thereto unless he had a license issued by or under the authority of the Food Controller ....."** a contract entered into in contravention of the prohibitory law was declared **void ab initio**.

The learned counsels insisted that there is an **express prohibition** in the provisions of sect 31 (I) (b) and 31 (2), from **making** of a contract and the **prohibition is imposed on both parties**. Counsels submitted that, applying the decision in the case of **RE AN ARBITRATION BETWEEN MAHMOUD AND ISPAHANI, (1921) 2 KB 716,** the provisions of sect 31(1) and 31 (2) of the PPA, 2004, provide **unequivocal declaration by legislature**, in the public interest, that a **contract shall not be entered into unless the award has been approved by the**

appropriate tender board. The learned counsels further submitted that, the prohibition is both against the **public body** (and in this case, MEM and TANESCO), and the **individual signatories**. Thus the POA having been expressly **prohibited by statute**, it was **illegal**, hence, **void ab inition**, added the learned counsels.

The learned counsels maintained that, the **prohibition** provided in the provisions 31 (I) and 31 (2) of the PPA, 2002, **goes to the root of the contract itself**, thus the arbitrators **misconducted** themselves by directing their attention to the **performance** of the POA to justify its **validity,** thereby giving effect to a prohibited contract, which was illegal. Therefore, the **POA having been prohibited by statute, the respondents were not entitled to enforce their rights under a contract prohibited by statute**, namely the PPA, 2004. Accordingly, the arbitrators **misconducted** themselves **"on the face of the record"** by their **erroneous interpellation of the PPA, 2004**, and that, the **misconduct** warrants the court to **set aside** the Award, the learned counsels concluded.

Responding to the Petitioner's first complaint in respect to the **jurisdiction** of the Court to entertain the Petition at hand, the Respondent's counsel, Mr. Fungamtama submitted, briefly, that the referred POA clauses 14 (I) (e) and 14 (I) (f), **did not mean that the parties intended to entirely oust the supervisory jurisdiction of the Tanzania Courts** over arbitration proceedings, but to the contrary. Mr. Fungamtama conceded that the Respondents accept that, if there had been a genuine "**misconduct**" on the part of the Tribunal, the court would have the power to intervene and set aside the Award. However, maintained Mr. Fungamtama, by the **Parties' own Agreement**, it is expressly provided that the **Tribunal's conclusion on the issues of facts and law are binding and cannot**

subsequently be challenged, whether before the Tanzania Court or any other court where enforcement of the award is sought. The learned counsel insisted that, besides, the Tanzania Arbitration Act provides that, **an unsuccessful party is not able to challenge** the arbitral tribunal's conclusions of fact and law, therefore, the parties' agreement simply reinforces what is the legal position.

In reference to the provisions of sect 16 of the Arbitration Act, Mr. Fungamtama submitted that in order for the court to set-aside the Award, the court must be satisfied either that, (i) there has been a **misconduct** on the part of the Arbitral Tribunal, or (ii) that, the **Award** has been **improperly procured** by the Respondents. MR. Fungamtama argued that upon the analysis of the **allegations made** by the Petitioner, it would be found that they **do not amount to** allegations of **misconduct** or **improper procurement** of the Award, but mere complaints that the Arbitral Tribunal accepted the case of the Resondents in preference to the case of the Petitioner.

Counsel for the Respondents referred to the oft-quoted case of **DB SHAPRIYA and CO LTD. V. BISH INTERNATIONAL BV (2003) 2 EA 404,** which involved a challenge to a Tanzanian arbitration award by unsuccessful party on the grounds that, **inter alia**, the sole **arbitrator had erred in fact and in law** in respect to **statutory interpretation** of the relevant **statute**. The learned attorney submitted that, Msumi, J. (Rtd), dismissed the petition on the grounds that, it was not a proper challenge to an award under sect. 16 of the Arbitration Act, since none of the matters complained of amounted to, or were capable of amounting to, **misconduct or improper procurement**. The learned attorney further claimed that, the SHAPRIYA case laid down the principle that, **factual and legal determinations of the arbitrators are binding and an allegation that the**

arbitrator has made a mistake of either fact or law is not a proper allegation of misconduct.

Mr. Fungamatama, also referred to several English cases on the issue of **misconduct**, including the case of **MORAN V. LLOYDS (1982) QB, 542**, where it was stated that:-

> ***".. the authorities established that an arbitrator or umpire does not misconduct himself or the proceedings merely because he makes an error of fact or of law....."(Emphasis added)***

Mr. Fungamtama insisted that, similar observation was so stated in the case of **TERSON LTD V. STEVENAGE DEVELOPMENT CORPORATION (1963) 3 ALL ER 863**, where in his lordship Up John, LJ, observed that:-

> ***"... it is quite immaterial that the arbitrator may have erred in point of fact, or indeed in point of law. It is not misconduct to make a mistake of fact. It is not misconduct to go wrong in law as long as any mistake of law does not appear on the face of the award.." (emphasis supplied).***

Mr. Fungamtama maintained that in arbitration, issues of facts and law are determined by the Arbitrators, themselves, as it was further observed by up John, LJ. That:-

> ***"...All questions of facts and are and always have been within the sole domain of the arbitrator, and only a limited control will be exercised over him in relation to question of law....." (emphasis ordered).***

As to what is meant by the phrase, an "**error of law on the face of the award**", Mr. Fungamtama submitted that, according to the observations made by Msumi, J. (Rtd) in the SHAPRIYA case (after make references to several English decisions), the phrase meant that:-

> ***"... an error of law on the face of the award means, in their lordships view, that you can find in the award or document actually incorporated thereto, so for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can say is erroreous.." (emphasis added).***

Having submitted as aforesaid, Mr. Fungamtama conceded that, **the court does have the power to set aside an award if it is satisfied that the award contains, an its face, "an erroneous proposition of law"** and that proposition being the **basis** for the award.

Submitting further, Mr. Fungamtama claimed, however, the **exception** to the general principle that, **courts can set aside an award where there is an "error of law on the face of the award"**, does **not** apply, **if the point of law in question has been specifically referred to the arbitral tribunal for decision.** Mr. Fungamtama insisted that in such circumstances the parties have **opted** that **the tribunal**, and **not the court, should resolve the relevant question of law,** and therefore, in that a situation, the court **cannot interfere** with the tribunal's conclusions, **even if it takes a different view of the law**. The learned counsel further submitted that, the **issues of fact and law raised by the Petitioners** in this petition, **were specifically referred to the tribunal for decision**, therefore, the **Petitioner cannot challenge the conclusions reached by the arbitrators**, even as it was so observed by Msumi, J. (Rtd) in the SHAPRIYA case, that:-

> ***"...this being determination of a specific question of law submitted to the arbitrator, it cannot be challenged before the court. Rather than submitting it to the arbitrator, issue number (vii) ought to have been referred to this court for its opinion by way of special case stated.." (Emphasis added)***

To bring this argument home, the learned counsel referred us to several authorities, including the leading author, **SD SINGH's LAW OF ARBITRATION (10TH Ed) at page 612.** Several English and East African decisions have also being referred, including the case of (I) **W.J. TAME Ltd V. ZAGORITIS ESTATES LTD 91960) E.A 370; and the case of (2) Re KING and DUVEEN (1923) 2 KB 32, as well as the case of (3) ABSALOM LTD V. GREAT WESTER GARDEN VILLAGE SOCIETY LTD (1933) AC 592.**

Mr. Fungamtama concluded his submission on the issue of **Misconduct** and **"an error of law on the face of the award"**, by maintaining that, all of the questions of law decided by the Tribunal in this Petition were specific questions of law which, by the **Amended Terms of Reference** (ANNEX – TA 10) and the **parties' pleadings** and **submissions** in the arbitration, the **Tribunal was specifically asked by the parties to decide**. Having been unsuccessful on those points, insisted Mr. Fungamtama, the Petitioner Cannot now seek to **re-open and re-argue** its case on those points of law before this court, as that would amount to an abuse of the procedure for challenging arbitral awards under the provisions of sect. 16 of the Arbitration Act.

Submitting on the allegation that enforcement of the Award would be contrary to "**Public Policy**" (para 10 of the Petition), the learned counsel for the Respondents, submitted, briefly that, **"public policy" is not one of the grounds falling under the provisions** of sections 15 and 16 of the Arbitration Act, upon which the petition is grounded. Mr. Fungamtama further argued that, refusing the enforcement of an ICC Award, against a state-owned enterprise, made by highly qualified arbitrators, following an obviously **fair procedure**, would do no credit to

the state of Tanzania, and indeed, it would be contrary to **public policy objectives of upholding international contracts/agreements,** and encouraging investment in Tanzania.

Submitting on the objection raised in para eleven (11) of the Petition, the learned counsel for the Respondents briefly argued that the figure of **US $ 19,955,626.71**, was **agreed** between the parties and presented to the Tribunal by agreement, therefore, the Petitioner is thus estopped by its own conduct from challenging this amount. Mr. Fungamtama concluded his submissions by praying the court to dismiss the petition with costs, and for an order for the registration of the ICC's Final Award.

Before I proceed to deal with the merits or otherwise of the rival arguments, I wish to make the following observations: First, I desire to express my sincere indebtedness to the learned counsels for both parties for their lucid and quite highly educating arguments. I wish to thank them for an in-depth research they have devoted in this matter and the references (including the attachments) of the cases relevant to the Petition. Indeed, a substantial number of authorities (including quotations/observations made by highly qualified and eminent authors) have been cited in their arguments. Let me assure the learned counsels that, indeed I have endeavored to peruse a good number of them. However, in this judgment I can make specific reference to only some of them. Also, let me say this, that I am aware of the fact that this petition has been highly **politicized**. However, I will, to the best of my ability, endeavour to **play deaf** to those **political sentiments and overtones**, in order to deliver a judgment **based on facts and evidence**, according to the relevant law. With those observations made, I proceed now to consider the merits or otherwise of the Petition.

In this Petition, the Petitioner (TANESCO) is asking this court to exercise its powers under the provisions of sect 15 and 16 of the Arbitration Act (Cap 15 R.E 2002), to interfere with the conduct of the proceedings by the **ICC Arbitral Tribunal arbitrators**, who gave the Final Award, the subject of the present Petition. However, before I traverse the grounds of the Petition and the submissions of the counsels for both parties, let me, briefly, remind myself of the **general principles of law and practice which govern arbitration proceedings in this country,** the which principles I believe, will guide this court when considering whether or not to **interfere** with the conduct of the arbitration proceedings.

The first principle is, **whether or not this court is vested with the powers and jurisdiction to entertain this Petition**. It would be re-called that the Petitioner asserted in para 4 (v) of the Petition that the Respondents are seeking to **challenging** the **jurisdiction** of this court in entertaining this Petition, by relying on clauses 14 (I) (e) and (f) of the POA. Counsels for the Petitioner submitted that in as much as clauses 14 (I) (e) and 14 (I) (f) relied upon by the Respondents, purporting to **ousts** the **court's jurisdiction** in entertaining the Petition under S. 16 of the Arbitration Act it is not acceptable since it is contrary to **public policy** and thus **not enforceable**. The learned Counsels in making that submission, were relying on the decision of the English Case, **ZARMIKOW Vs. ROTH SCHMIDT & CO (1922)** 2 KB, 478. The learned counsels argued that in that decision of the court of Appeal of England (made on the basis of the English Arbitration Act, 1889, which is Similar to the Tanzania's Arbitration Act, 1931), the court said, **inter alia**, that:-

> ***"..a clause in arbitration agreement excluding or ousting the statutory jurisdiction of the court to supervise the way in which the arbitrators apply the law in reaching their decision is contrary to public policy, and thus un enforceable..." (emphasis supplied)***

In response to the Petitioners submission on the issue, the Respondents counsel submitted that, the clauses 14 (I) (e) and 14 (I) (f) of the POA, were not intended to **entirely oust** the **jurisdiction** of the courts over the arbitration proceedings, but rather, the Respondents concede that where there is a genuine case for **misconduct** on the part of the Tribunal, the court would have the power to intervene and set the Award aside.

Well, to some extent, let me say that I am comforted by the Respondent's admission. But, supposing, even for the sake of argument, the Respondents had intended to **oust the jurisdiction** of this court to entertain this Petition, that would not have been acceptable, for the simple fact that, the supervisory powers and jurisdiction of the Tanzania courts over Tanzania arbitration proceedings are specifically provided for by the statute (**the Arbitration Act Cap 15 R.E 2002**), which is derived from the **English Arbitration Act**, 1889. Besides, the court is also vested with such powers under the **provisions of sect 95 of the Civil Procedure Code** (Cap 33 R.E 2002), which provide for the **Inherent powers** of the court. Again, such powers have been accorded to the court by a series of **case law** decided by Tanzania courts, as well as other courts in the Common law

jurisdictions, since the enactment of the Arbitration Act, both in England, as well as Tanzania.

For the ease of reference, the **powers** and **jurisdiction** of the courts to **intervene** with arbitration proceedings in this country, are provided by the provisions of sect 15 and 16 of the Arbitration Act, which state that:-

> ***"15..The court may, from time to time, remit the award to the reconsideration of the arbitrators or umpire.....***
>
> ***When an award is remitted, the arbitrators or umpire shall, unless the court otherwise directs, make a fresh award within three months after the date of the order remitting the award.***
>
> ***"16..Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set aside the award." (Emphasis added).***

The provisions of sect 15 and 16 of the Arbitration Act, therefore, **empower the courts to interfere** with the conduct of the **arbitration proceedings** and the **award**, if it is satisfied either that (I) there has been **misconduct** on the part of the Tribunal, or (2) that the **award** has been **improperly procured** by the Respondents. The **intervention** by the court is **automatic, regardless** of any

clause in the arbitration agreement, which purports to **oust** or **waive** the **jurisdiction** of the courts. Indeed, this legal position was made quite clear in the case cited by the Petitioners, the case of **ZARNIKOW** Vs. **ROTH, SCHMIDT** and **COMPANY** (Supra),where Lord Scruttin held that:-

> ***"....In countless cases parties agree to submit their disputes to arbitrators whose decision stall be final and conclusive. But courts, if one of these parties brings an action, never treat this agreement as conclusively preventing the courts from hearing the disputes...."(Emphasis added).***

In up shot, let me conclude this first and preliminary principle by stating that, the Petitioner has the right to challenge the Award, and this court is vested **with powers and jurisdiction** to entertain the Petition, by virtue of sect. 15 and 16 of the Arbitration Act, Cap 15 (RE 2002).

Having re-affirmed the powers and jurisdiction of this court over arbitration proceedings, let me now consider the second vital principle in these proceedings, regarding, **misconduct**. Sect 16 of the Arbitration Act provides that, the court may **set aside** the Award, if it is **satisfied** that there has been a **misconduct** on the part of the Tribunal. That is to say, where the court is satisfied that there has been a genuine **misconduct** on the part of the Tribunal or any of its individual members (arbitrators), the court would rectify that **misconduct** either by **removing** the

offending **arbitrator** and/or by **setting aside** the Award, or **remitting** the award back to the tribunal.

It is unfortunate, however, the Arbitration Act does not define the term "**misconduct**" and worse still, the term is not defined elsewhere in any of Tanzania statutes. In the circumstances, therefore, courts in Tanzania have quite often relied upon and influenced by views of other courts in the **common law** jurisdictions, which have had the opportunity of interpreting **words, terms, phrases**, or **sections** of **law** in **parimateria** and in similar factual situations.

On of the leading cases in Tanzania, which has observed on what is actually meant by the term, **misconduct**, is the celebrated case of **DB SHAPRIYA and Co. Ltd Vs. BISH INTERNATIONAL BV (2003) 2 EA 404.** (which has been cited by counsels for both parties). In this case, Msumi, J. (Rtd) held that, since the Arbitration Act of Tanzania was based on the English Arbitration Act, of 1889, accordingly English authorities as to the true meaning of the term "**misconduct**", were highly relevant to the construction of that term as it appears in the Tanzania legislation. To be precise, Msumi, J. stated (at page 409) that:-

> ***".....Under the influence of this common legal heritage, courts in this country have been, as a matter of practice, regarding both English and Indian courts decisions in the interpretation to be highly persuasive....."(emphasis added).***

And one of the celebrated jurists on arbitration, **RUSSEL ON THE LAW OF ARBITRATION, Anthony Walton,** Q.C (13th Edition), which has been cited by the Petitioner's counsels in their submissions, has observed that:-

> ***"....Misconduct is often used in technical sense as denoting irregurality and not any moral turpitude. But the term also covers cases where there is a breach of natural justice...."(Emphasis Supplied).***

The learned counsels for the Petitioner have also referred the decision in the case of **TAYLOR SON Vs. BARNETT TRADING CO. LTD (1931) WLR,** where it was observed that:-

> ***"....an arbitrator is guilty of "misconduct" if he knows or recognizes that a contract is illegal and thereafter proceeds to make an award upon a dispute arising under that contract....." (Emphasis supplied)***

The learned counsels for the Petitioner invited me to adopt the reasoning proposed by **RUSSELL** and the case of **TAYLOR SON**, regarding the true meaning of **misconduct,** to mean that, a **misconduct is an irregularity in the course of conducting an arbitration and if it is capable of affecting the results of the proceedings, then intervention by the court is not only justified but also**

necessary. Well, admittedly, I have no quarrel with that proposition, and this court holds that the proposition is quite acceptable. That is settled.

From the foregoing observations, therefore, we are satisfied to find that, courts are empowered to set aside an award on the ground of **misconduct**. The main ground of **misconduct** which empowers a court to set aside an award comprises of a number of categories. The first category in **misconduct,** as a ground, is comprised in the general rule that, **a mistake of law or fact by an arbitrator is not a ground for challenging the validity of the award unless the mistake appears "on the face of the award".**

This principle was clearly stated by the court of Appeal in England, in the case of **MORAV V LLOYD's (1983) of ALL ER 2000** (Cited by the Respondent in their submissions). In that case, the Court of Appeal of England observed that, **an arbitrator does not misconduct himself or the proceedings merely because he makes an error of fact or of law, unless it appears "on the face of the award", or where the question of law was raised by special case stated for the opinion of the court, which is the only occasion an error of law could be used to justify the intervention of the court with the proceedings of a arbitrator.**

Indeed, in 1963, the Court of Appeal of England, outlined quite clearly, the **circumstances** in which a court may interfere with the conduct of proceedings by an arbitrator, either to set it aside or remit it, in the case of **TERSON LIMITED Vs. STEVENACE DELEPMENT CORPORATION (1963) 3 ALL ER. 863** (Cited by the Respondents in their submission). The circumstances include the following:- a) If the arbitrator is guilty of **misconduct**, (b) If the award contains **"an error of law on its face,"** and (c) **If a special case is stated on a question of**

law, the court of law will determine that question of law within the framework of the particular special case.

His lordship, Upjohn L.T., after outlining the circumstances in which a court may interfere with the conduct of proceedings by arbitrators and set it aside or remit it, summed his observations by stating, what in his view **does not** amount to such **circumstances**, in the following terms:-

> ***"...But if there is no misconduct, if there is no error of law on the face of the award, or if no special case is stated, it is quite immaterial that the arbitrator may have erred in point of fact, or indeed, in point of law. It is not misconduct to make a mistake of fact. It is not misconduct to go wrong in law as long as any mistake of law does not appear on the face of the award...."***
> ***(Emphasis added).***

Learned counsels for the Petitioner, even as to emphasize this principle, cited the off-quoted case of **RASHID MOLEDINA & CO. (MOMBASA) LTD and OTHERS Vs. HOIMA GINNERS LTD (1967) IEA. 645**, where the defunct court of Appeal for East Africa considered the provisions of sect. 12 of the Arbitration Act of Kenya, which are in **pari material** with section 16 of the Arbitration Act of Tanzania. Interpreting the provisions stated above, to the facts before it, the defunct court, relying on various English authorities dealing with the

grounds upon which an award may be set aside by courts of law, including an **"error of law apparent on the face of the award,"** the court held that:-

> ***"...the courts will be slow to interfere with the award in an arbitration, but will do so whenever this becomes necessary in the interests of justice and will act if it is shown that the arbitrators in arriving at their decision have done so on a wrong understanding or interpretation of the law, there is an error of law apparent on the face of the award...." (Emphasis added).***

As to what amounts to an **"error of law on the face of the award,"** learned counsels for both parties cited the case of **CHAMPSEY BHARA and COMPANY Vs. KUVRAJ BALLOW SPG and WVG COMPANY LIMTED (1923) AC 480**, where it was stated that, it means, **"..an erroneous legal proposition stated in the award and which forms its basis**..." at page 487, the court held that:-

> ***"...an error of law on the face of the award means, in their Lordships View, that you can find it in the award or a document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal***

proposition which is the basis of the award and which you can say it is erroneous.." ***(Emphasis added).***

Courts in Tanzania have reached at similar conclusions as those arrived at by English cases on the issue of, an "**error of law on the face of the award.**" In the case of **CEQB LIMITED Vs SDC (1983) TLR 13,** the late Judge Mwakasendo, accepted as the correct law the statement of Lord Wright in the case of **HEYMAN Vs DARWINS LTD (1942) AC 356**, when he observed that, indeed, it is the court's jurisdiction to set aside an arbitrator's award **if it is bad in law on its face**. And in 2003, Msumi, J. (RTD), in the case of **D.B. SHAPRIYA and CO. LTD** (Supra), having discussed several English and Indian cases, arrived at the conclusion that:-

> ***"..courts cannot interfere with the findings of fact by the arbitrator, and that a mistake of fact or law is not a ground of setting aside or remitting it for further consideration on the grounds of misconduct..."*** **(Emphasis added).**

From the foregoing observations, we can safely summarize this vital principle regarding the law and practice of arbitration proceedings, by stating that, **courts do have powers to set aside an award if it is satisfied that the award contains, on its face, an erroneous proposition of law that forms the basis for the award.**

Having stated that, let us move on to yet another vital principle of practice in relation to the conduct of arbitration proceedings. From the analysis of case law, it has been established that, the **exception** to the general principle that, courts can set aside an award if it contains an **"error of law on the face of the award,"** does **not** apply, **if the point of law in question has been specifically referred to the arbitral tribunal for decision**. The rationale is that, in such circumstances, **the parties have agreed between themselves that the tribunal, and not the court, should resolve the relevant question of law, and therefore, the court cannot interfere with the tribunal's conclusion, even if its takes a different view of the law.**

In this Petition the Respondent's defence is wholly dependant on this principle. Therefore, the Respondent's counsel, Mr. Fungamtama, submitted extensively on it for the purpose of reminding this court that, the above principle has been in existence and practiced for the **"past two hundred years or so"**. In his endeavor to convince the court of the existence and practice of the said principle, Mr. Fungamtama, first referred the obvious case of **SHAPRIYA, 2003** (Supra). In that case, one of the issues which the arbitrator had been asked to decide was an issue of the construction of a statute, the legal issue being:-

> ***"....whether the assumption of a position of an architect under the contract by the Respondent which is not registered as an architect under the Architects, Quantity Surveyors and Building contractors Registration Act, number 35 of 1972,***

was irregular and/or unlawful.."
(Emphasis added)

The Petitioner sought to challenge the arbitrator's conclusion in relation to that issue. Msumi, J. (Rtd) held that, **they were not entitled to do so on the basis of the principle that it is not open to an unsuccessful party to challenge the arbitrator's conclusion on point of law that had been specifically referred to him for decision**. Msumi, J. (Rtd) specifically observed the following:-

> *"....<u>This being determination of a specific question of law submitted to the arbitrator, it cannot be challenged before the court</u>. Rather than submitting it to the arbitrator, issue number (VIII) ought to have been referred to this court for its opinion by way of special case stated." (Emphasis added).*

The principle that, **the court will not interfere with the finding of the arbitrators on a question of law that has been referred to it, even if the court is of the opinion that the same is wrong,** was also considered by the defunct court of Appeal for East Africa in the case of **WJ TAME LTD Vs ZAGARITS ESTATE LTD (1960) E.A 370**. In that case, counsel for the Petitioner had sought **ex posto facto** to move the court to set aside the award for the alleged error of law arising from the finding of the arbitrators on an issue of law submitted to him. The East African Court of Appeal succinctly stated that the exception to the general

rule that an arbitration can be set aside by the court, **if an error of law appears on the face of the award,** is **not applicable where the parties have specifically referred a question of law to arbitration**. In the case of **WJ TAME LTD** (Supra), the specific issue referred to the arbitrators was, "**Is the claim, if any, barred by Limitation?** " At page 372, the East African Court of Appeal, held that:-

> ***"This was a specific question of law referred to the arbitrators for decision and that it was not proper for the court to interfere with that decision merely on the basis that it disagreed with the arbitrators' conclusion .(Emphasis added)***

The foregoing judicial observations summarize the legal position obtaining in this Country regarding arbitration proceedings. Indeed, the principles of law regarding **misconduct** of an arbitrator, and the fact of **"an error of law on the face of an award, which constitute ground for setting aside an award,** have been **repeatedly elaborated** upon by various English and Indian Court decisions, as well as by the Courts of Tanzania and East Africa, at large. I am satisfied that those principles are firmly established in Tanzania, and the courts have been using them as a guide in determining allegations of **misconduct** on the part of an arbitrator as grounds for **setting aside an award.** Let me now turn to consider the specific allegations of **misconduct** leveled at the arbitrators **vis-à-vis** the above established legal principles.

As we have seen, the Petitioner's allegations of **misconduct** by the arbitrators are set out in paragraphs 7, 8 (I) to 8 (xi), also in paragraphs 9, 10, even para 11of the Petition. Specifically, learned counsels for the Petitioner submitted that the arbitrator's **misconduct** is contained in paragraph 406 of Award. They contended that, the **arbitrators misconducted themselves and the arbitration on the face of the record by giving effect to a prohibited, hence an illegal contract.** They maintained that, the arbitrators having found as a matterof law that the Public Procurement Act, (PPA) 2004 **prohibited procurement contracts not procured through the Tender Board of the procurement entity**, in this case TANESCO, and similarly, having found in evidence that the POA was procured in contravention of the PPA 2004, they **misinterpreted** the Act by giving it a meaning that the law **did not prohibit the contract itself** but the **public servant or agent** from making the deals, thus the arbitrators are guilty of a **misconduct** as they **knew that the contract had been prohibited, yet misconstrued the law by** shifting the burden to the **public servant** who made the deal and also on **performance**, rather than the **actual procurement** of the POA.

Responding to the allegations of **misconduct** by the arbitrators, the Respondents submitted that, the Petitioner **should not be allowed to re-open and to re-argue the issues of fact and law** decided by the ICC Arbitral Tribunal, in accordance with the **parties** own **agreement** that it should do so. The Respondents argued that the **Arbitration Agreement** (POA ANNEX-TAI) is the very foundation on which the jurisdiction of arbitrators rests, as it was so decided in the case **of MVITA CONSTRUCTION CO. Vs TANZANIA HORBOURS AUTORITY. (Civil Appeal No. 94 of 2001 Unreported).** In that case the Court of Appeal of Tanzania held that:-

"..Under the law of Tanzania, an arbitrator's authority, power and jurisdiction are founded on the agreement of the parties to a contract to submit present or future differences to arbitration.." ***(Emphasis added).***

The Respondents maintained that, by virtue of clause 14 (I) of the POA, the parties agreed to resolve their disputes in accordance with the **Rules of Arbitration of International Chamber of Commerce (the "ICC Rules)- (ANNEX DTL – T.I).** The Respondents insisted that on 12/06/2009, the ICC Arbitral Tribunal executed **Terms of Reference** (**ANNEX-TA-5**), as it is required by Article 18 of the ICC Rules. **The Terms of Reference** were signed by the members of the Tribunal and the parties themselves. The **Terms of Reference** were amended on 26/05/2010, in order to adjust certain dollar claims and to include the Rejoinder points as well as additional claims **(ANNEX TA-II)**. The Respondents further maintained that, the purpose of the **Terms of Reference** was to define the **scope** of parties **dispute** and hence the **issues to be determined by the ICC's Arbitral Tribunal.**

The Respondents further argued that, by signing the **Terms of Reference** and the **Amended Terms of Reference**, the Petitioner agreed (according to clause 5.1) to the issues to be determined by the Tribunal, to include:-

"....The Tribunal shall decide the issues necessary to resolve the claims for relief of the parties as set forth above. More

> ***specifically, the questions of fact or law to be resolved by the Arbitral Tribunal in order to make the decisions on the issues in the present case shall be those appearing from the parties' submissions, statements and pleadings made, and to be made and, in addition, any further questions of fact or law which the Tribunal, in its own discretion, may deem necessary to decide upon, after hearing the parties, for the purpose of resolving the present dispute.." (Emphasis added).***

The Respondents asserted that in view of the above clause, **it is not open to the Petitioner to challenge the Tribunal's decisions on fact and law as alleged**, since all the questions of **fact** and **law** raised the Petition, **were questions which the parties specifically asked the Tribunal to decide.** The Respondents maintained that, indeed, at the start of the arbitration proceedings, the **Petitioner submitted a list of 16 issues** to be adopted by the Tribunal and to decide. This list (together with one issue submitted by the Respondents) of 17 issues was **adopted** by the Tribunal, and the Parties.

Before we proceed further, let us verify for ourselves, the said list of 17 issues submitted to and adopted by the Arbitral Tribunal and the parties. Paragraph 391 of the Award summarizes the **list of issue for determination by the Tribunal.** At paragraph 391, the Arbitral Tribunal observed that:-

> ***"..391 the terms of reference do not contain a listing of the issues in the case: Rather, it was left to the discretion of the Tribunal to compile them, after the completion of the hearings. Now that the hearings are concluded, it is possible to provide a complete set of the issues that were submitted to the Tribunal. The Respondent at the Closing Oral Argument, submitted a list of sixteen issues that the Tribunal adopts. In addition, the Claimants raised a seventeenth issue by way of an amendment to its Re-Amended statement of Case. All seventeen issues are listed below; and addressed in turn by the Tribunal. (Emphasis added).***

The Issues:-

1. Was the POA void and of no legal effect? (**The POA Issue**)
2. If the answer to issue I is Yes: Is TANESCO precluded from denying its validity? (**The First Preclusion Issue**)
3. It the answer to issue 1 is Yes and the answer to issue 2 is No: can the claimants establish a separate contract (whether express or implied) on the

same or similar terms; OR are the Claimants entitled to damages on a quantum meruit basis? (**The Novation Issue**)

4. In any event: was TANESCO's consent to the assignment of the POA from REDEVCO to DHSA procured by misrepresentation? (**The Misrepresentation Issue**)
5. If the answer to issue 4 is Yes: Was such consent voidable, and, if so, has it been avoided? (**The Voidability Issue**)
6. Was the Change of Parties Agreement void and of no legal effect? (**The Change of Parties Issues**)
7. If the answer to issue 6 is Yes: Is TANESCO precluded from denying the validity of the Change of Parties Agreement? (**The Second Preclusion Issue**)
8. Was the assignment of the POA from DHSA to DTL void and of no legal effect? (**The Assignment Issue**)
9. If the answer to issue 8 is Yes: Is TANESCO precluded from denying its validity? (**The Third Preclusion Issue**)
10. If the answer to issue 1 is No: Was the POA terminated by TANESCO's letter dated 30 June 2008 OR by DTL's letter dated 11August 2008? (**The Termination Issue**)
11. What sums are due and owing to the Claimants for power supplied or capacity provided to TANESCO, either as debts under the POA (if valid) OR on a quantum merit basis (if not)? (**The Consideration Issue**)
12. Are the claimants entitled to any, and if so what, damages for early termination of the POA (if valid)? (**The Damages Issue**)
13. Can TANESCO set off the unrecouped advance payments made to DHSA under the Letter of Credit and/or the unreimbursed sum paid to DHSA in

respect of air freight charges against any sums due to the Claimants? (**The Set-off Issue**)

14. Can TANESCO recover by way of Counterclaim the amount by which the aggregate sums sought to be set off (see issue 13) exceeds the aggregate of the Claimants' claims? (**The Counterclaim Issue**)
15. Are the Claimants entitled under Section 3.4 of the POA (if valid) to indemnities from TANESCO in respect of (i) VAT (ii) corporation tax, (iii) import charges, and/or (iv) export charges incurred or to be incurred? (**The Section 3.4 Issue**)
16. Is TANESCO entitled under clause 1 of the Indemnification Agreement dated 23 December 2006 to an indemnity from DHSA against any sum which it is found liable to pay RDEVCO in ICC Arbitration No. 15910/VRO? (**The RDEVCO Arbitration Issue**)
17. Are the Claimants entitled to damages for loss allegedly caused by the injunction granted by the Tanzania High Court? (**The Injunction Issue**)

The Respondents insisted that, from the list of 17 issues, it is quite clear that all the questions of fact and law decided by the Arbitral Tribunal, were the very questions of fact and law which, by the **Amended Terms of Reference**, and the **parties Arbitration Agreement, the Tribunal was specifically asked by the parties to decide.** The Respondents' learned counsel, MR. Fungamtama, contended that, having been unsuccessful on those points, the Petitioner **cannot now seek to re-open and to re-argue** its case on those points of fact and law before this court, for that would not be a proper use of the procedure for challenging arbitral awards under the provisions of sect. 16 of the Arbitration Act.

Before I make a decision on this matter, let me make the following finding; that, by **submitting** themselves to the **arbitration clause** (14 (I)) of the POA, thereby **binding** themselves by the **ICC Rules of Arbitration** (Rule 28 (6), and by **signing** the **Amended Terms of Refence** (Clauses 5.1 and 8.9), the **parties demonstrated a clear intention that the ICC Arbitral Tribunal will determine all the issues of fact and law**, and that **the determination of those issue will be final and binding**. It is obvious that the parties did not anticipate that such issues of fact and law would be **re-opened and re-argued before the Tanzania Court.** It is a fact that according to the Parties' Agreement, **the objective was to settle their disputes out of court**. It is so sad that this objective has not been realized, therefore this court has to resolve the parties' disputes. And in doing so, the law to apply is the **Tanzanian Law of Arbitration,** and the **relevant case law that has interpreted the said law**, as we have demonstrated in the preceeding paragraphs.

To begin with, I am inclined to agree with the Respondents that, having gone through the grounds raised by the Petitioner in the Petition, **all the questions of fact and law decide by the Arbitral Tribunal** in this Petition, **were those questions of facts and law which the Parties specifically asked the Arbitral Tribunal to decide**, by the Parties **Amended Terms of Reference, pleadings and submissions during** the arbitration proceedings. The 17 issues submitted to and adopted by the Arbitral Tribunal and the parties alike, explicitly establish this fact. That being the position, therefore, in the light of the authorities summarized in the foregoing paragraphs, **it is not open to the Petitioner to challenge the matters of facts and law that were directly asked by parties to be determined by the Arbitral Tribunal.** That principle of law is firmly established in a number of decision (discussed in this petition), including the case of **D.B. SHAPRIYA**, and the case of the defunct court of Appeal for East Africa, **W. J. TAME Vs**

ZAGORITIS ESTATES LTD (Supra), and a number of English cases, as we have seen. This principle is also supported by a series of observations made by distinguished Jurists on the subject, including, **SD Singh's & Law of Arbitration (supra), who observes that**:-

> ***"...if a question of law is specifically referred and it becomes evidence that the parties desire to have a decision on that specific question from the arbitrator rather than from the court, the court will not interfere with the award of the arbitrator on that question on the grounds that there is an error of law apparent on the face of the record, even if the view taken by the arbitrator does not accord with the view of the court." (Emphasis added)***

The Petitioner's learned counsels purported to argue that the issues of **misconduct** complained of **were not specifically referred to the Arbitral Tribunal for its specific decision,** but rather, the Tribunal **assumed such powers** and hence **made decisions of their own.**

May be, for the sake of the Court's record, and thoroughness, it would be appropriate to go back to the **parties pleadings** and **submissions**, in order to satisfy ourselves, whether or not the complaints made by the Petitioner, were specifically referred to the Arbitral Tribunal for its decision. We have seen, of

course, the contents of the 17 issues proposed by the parties and adopted by the Arbitral Tribunal (Para 391 of the ICC Award).

We have already determined the issue of, whether clause 14 (I) (e) and 14 (I) (f) of the POA **bars** the Petitioner from challenging the Award, and whether or not the clause ousts the jurisdiction of the Court to entertain the Petition. The issue was answered in the **negative**.

At para 7 of the Petition, the Petitioner challenged the Award on the basis that the Arbitral Tribunal "...**wrongly retained jurisdiction or acted in "excess of its jurisdiction" by wrongful application of Texas law on competence.**" However, it appears that the Petitioner has **abandoned** this complaint, as there are no specific submissions which have been made regarding that ground. Accordingly, I find it that the Petitioner, on his own accord, has **vacated** that complaint.

The Petitioner has raised eleven (II) Separate allegations of **misconduct,** at paragraph 8 (I) to 8 (XI) of the Petition. In their submissions, the Petitioner's learned counsels have referred these complaints as being "**erroneous Interpretation of the Public Procurement Act, 2004.**" At paragraph 406 of the Award, the Arbitral Tribunal made a finding that, **the Agreement (POA) between the Petitioner** (TANESCO) and **Richmond** (RDEVCO) **was not approved by the Petitioner's tender board as required by sect. 31 of the PPA, 2004.** The Tribunal's findings are to this effect:-

"406....on the facts, we have no hesitation in finding, indeed it may be

common ground between the parties, <u>that the award of the POA to RDEVCO was not approved by the Respondent's Tender Board.</u> Hence the award of the POA to RDEVCO <u>amounted</u> to a <u>contravention of sect. 31 (I)</u> (b) by the Respondent and/ or MEM (if it be the case that, on a true analysis, MEM, rather than the Respondent, awarded the POA to (RDEVCO), and also a contravention of sect. 31 (2) by RDEVCO (acting by MR GIRE).(Emphasis added).

Having so dicided, the Tribunal added and stated at para 407, that:-

"407..So, the first question for the Tribunal in addressing the illegality issue is whether those contraventions of the PPA, 2004, or either of them, had the effect of rendering the POA void and of no effect..."

The Petitioner's learned counsels submitted that, the Tribunal **Misconducted** itself, because, having found that the POA was "illegal" **could no longer decide on the "illegality" of the POA.**

The Respondent's learned counsel submitted that, the Tribunal was requested to consider, **that in view of the applicable principles of law, the effect of the breaches of sect. 31 of the PPA, 2004.** The Respondents further submitted that the parties' request is embodied in Issues No. 1and 2, adopted by the Arbitral Tribunal. The Respondents argued that the Arbitral Tribunal was specifically requested to consider:-

1) Was the POA void and of no legal effect?
2) If the answer to issue No. 1 is Yes, is TANESCO precluded from denying its validity?

It was the Respondents' case that, the Tribunal, considered the issue at length (as it is referred in the Award as " **The Illegality Issue**", and summarized in Paragraphs 405 to 510 of the Award). The Arbitral Tribunal, basing its analysis on the English law authorities (since parties agreed at para 408 of the Award that, there was no relevant difference between Tanzania Law and English Law), and after a detailed considerations of the terms of the PPA, 2004, the Arbitral Tribunal reached its conclusions that, **the POA, although void, was more the less still valid and binding on the parties,** as it was so stated and at para. 511 of the Award:-

> ***"...we find that the POA, when signed, was a valid and enforceable contract. We accordingly resolve this issue in favour of the claimants."***

The learned counsel for the Respondents maintained that, there is no basis for any allegations of **misconduct** on the part of the Arbitral Tribunal in relation to

the way in which it reached its conclusions on the basis of the parties submissions. It was further argued that, the Arbitral Tribunal cannot, in their Award, give effect to and enforce an "illegal" award, because, **on its face the POA was not "illegal and hence prohibited"**, but rather **POA was a perfectly valid and lawful contract**. The Respondents still argued that, the allegations that the Arbitral Tribunal's decision amounted to "**an error on the face of the award,**" does not apply in this Petition, in the light of the principles set out in the **SHIPRAYA** case (and the other authorities we have referred to), since **the relevant questions of law were the one that the Tribunal was specifically asked to decide**. The learned counsel, concluded saying that, the court, therefore, **has no power to intervene** with the Tribunal's conclusions on this issue.

I dealt with the foregoing issue of **misconduct** at length for the purpose of satisfying myself whether or not the specific questions of fact and law were referred to the Tribunal for its determination. And I am satisfied to answer that question in the **affirmative**. As I have observed earlier on, the **Arbitral Tribunal was directly asked by the parties to determine the issues raised in paragraph 8 (I) to 8 (XI)**, by virtue of their seventeen (17) issues, adopted by the Tribunal. In the light of authorities discussed herein, since the issues, were submitted to the Arbitral Tribunal, and the Arbitral Tribunal decided them, **even if the decision of the Arbitral Tribunal are alleged to have been erroneous**, this **does not make the award "bad on its face**." Accordingly I will not intervene with the decision of the ICC's Arbitral Tribunal.

We now move to ground No. 9 raised in the Petition, that the award contains **an error of law manifest on the face of the record by reason of the Arbitrator's total failure to address the overwhelming evidence** attesting to the

existence of **improper procurement of the POA.**" Learned counsels submitted that the question of **improper procurement of the POA** arose when it was alleged and over whelming evidence was put before the Arbitrators that **MR. Postam Azizi** used his position to **influence** the award of the POA to the Respondents, and that this evidence was given by the Respondent's witness, one MR. Surtees. The learned counsels further submitted, as it was decided in the case of **GEBRE HIWET DEBASSIE V. LA FRORIDA FURE INSURANCE CO. LTD (1965) ALR Comm. 346, that if the Arbitrator fails to decide all the matters which were by the submissions referred to him,** this also amounts to misconduct on the part of the Arbitrator, as it is in this case at hand.

But with respect to the Petitioner, it is a fact that, the question of **"improper procurement"** of the POA **did not form one of the seventeen (17) issues** adopted by the Arbitral Tribunal. The Arbitral Tribunal, as we have seen, was specifically asked to determine," **whether the POA was void and of no legal effect,** on the basis that it was not entered into in accordance with the requirements of the PPA, 2004. If that was the case, therefore, the Tribunal was justified not to consider the role played by MR. Rostam Azizi, (**which was not disclosed**), because the Petitoner did not allege the fact of Mr. Azizi's involvement in the Procurement of the POA somehow had the legal consequence that the POA was void and of no legal effect. The Tribunal, therefore, reached the conclusion (at para 28 of the Award) that, **the precise nature of the role played by MR. Rostam Azizi was "<u>not of central relevance to the issues before the Tribunal</u>."** The Arbitral Tribunal specifically observed that:-

> ***"..There is no dispute as to the primary facts of this matter, with one***

exception, the Tribunal is satisfied that all the witnesses who gave oral evidence did so honestly and to the best of their recollection, and that their evidence is reliable. The one exception is Mr. SURTEES, who was manifestly evasive when asked about the beneficial ownership of Caspian Ltd and DHSA and about the somewhat mysterious role played in the history of this matter by Mr. ROSTAM AZIZI, who (as is common ground) acted from time to time on behalf of, and as attorney for, DHSA. He was also evasive about his own relationship with DHSA. Notwithstanding that these matters are not of central relevance to the issue before the Tribunal, the fact that Mr. Surtees was evasive when asked about them means that the Tribunal must approach his evidence with caution. "(Emphasis added).

The Tribunal was entitled to reach that finding for the reason that, to them (the Arbitrators), **the exact role played by MR. Rostam Azizi in the**

procurement of the POA, was not an issue specifically submitted to them by the Petitioner for their decision. For the foregoing reason, therefore, I find that it is not quite proper to allege that the Tribunal **declined to decide on an issue that was presented to them**. Accordingly, it is the finding of this court that the Petitioner's allegation that the award contains an error of law manifest on the face of the record **by reason of the Arbitrator's total failure to address the overwhelming evidence attesting to the existence of "improper procurement of the POA**," is not correct. Hence, I reject that ground.

We now consider the Petitioner's allegations that, the **Arbitrators demonstrated gross bias** in **the consideration of the evidence** of the Petitioner on **misrepresentation,** as a ground of avoiding the POA (para 8 (x)).

Submitting on this issue, the learned counsels for the Petitioner argued that, the 1st Respondent had **misrepresented** itself in respect of the **assignment** of the POA. It was further submitted that, despite the evidence placed before the Arbitral Tribunal establishing **misrepresentation**, the **Arbitrators found that no such misrepresentations had been established**, and if it did, the Petitioner could not avoid the POA long after the assignment. Then the learned counsels submitted at length, surveying some of the evidence (both documentary and oral), that was produced before the Tribunal during the arbitration proceedings.

Responding to this allegation, the learned counsel for the Respondents simply stated that the Petitioner's case is yet another attempt to **re-open** and to **re-argue** their case before this court (**as if it was an appeal**), against the Tribunal's conclusions of fact, under the guise of an allegation of **misconduct**. If was further contended that the serious allegations regarding **bias** by the Arbitrators are not

based on any **independent evidence**. The learned counsel maintained that, during the arbitration proceedings, **there was never any suggestion by the Petitioner that one or more of the member of the Tribunal were or might have the appearance of being biased**. The learned counsel further claimed that, at no time during the entire reference including the arbitration hearing, did the Petitioner indicate to the Tribunal or the Respondents that the way in which the Tribunal proposed to conduct the proceedings or conducted the proceedings was in any way **unfair** or would deprive the Petitioner of a proper opportunity to present its case. **Nor did the Peititoner indicate that any procedural course which the Tribunal proposed to take or took would amount to misconduct.** It was further contended that the arbitration proceedings were conducted by the Tribunal with **scrupulous fairness**, with parties having ample opportunity to present their respective cases, both orally and in writing, and that is why the Petitioner did not present any objection to the conduct of the proceedings. The learned counsel futher argued that, in terms of Article 33 of the ICC Rules, **any party which proceeds with the arbitration without raising objection to a failure to comply with the provision of the rules,....or to the conduct of the proceedings shall be deemed to have waived its rights to object.**" (Emphasis added).

The learned counsel for the Respondents further submitted that, **since the Petitioners did not raise such an objection regarding the alleged bais by the Arbitrators during the proceedings, they cannot be allowed to do so now.** It was further maintained that the Tribunal dismissed the Petitioner's **misrepresentation** case on the basis that, **the POA had not in fact been induced by the making of any untrue statements.**

It is a fact that the issue of **misrepresentation**, was one of the seventeen (17) issues adopted by the Tribunal, as issues No. 4 and 5:-

> ***"4..In any event: was TANESCO's consent to the assignment of the POA from REDEVCO to DHSA procured by misrepresentation" (the misrepresentation issue).***
>
> ***"5...If the answer to issue 4 is Yes: was such consent voidable, and, if so, has it been avoided?" (The violability issued...***

The Tribunal discussed the issues of **misrepresentation** at length (paras 516-524). With regard to the **letter of 8th December, 2006**, and **accompanying documentation relied upon** by the Petitioner, the Tribunal found that **it did not contain any untrue statements**. At paras 520 of the Award, The Tribunal concluded that:-

> ***"...The Tribunal, therefore, concludes that the statements in the letter of 8th December, 2006, were true, and therefore, the claimants cannot be held to have misrepresented any information in that communication. Rather the submission was consistent with normal***

bidding practices in the procurement process." (Emphasis added).

Similarly, in respect to the **letter of 18th December, 2006** and **accompanying documentation relied upon** by the Petitioner, the Tribunal found that **it did not contain any untrue statements.** Indeed the Tribunal, after summarizing the evidence on the issue of **misrepresentation**, the Tribunal noted (at para 522 of the Award) that:-

"...It is therefore, a little puzzling that this could be the basis of a misrepresentation claim under sect. 18 of Tanzania contract law, and the view of the Tribunal is that such a claim cannot be sustained." (Emphasis added).

The Tribunal accordingly reached a conclusion on the issue of **misrepresentation**, as follows para 524 of the Award:-

"....The Tribunal Accordingly finds that the letter dated 8th December, 2006, and 18 December, 2006, and the accompanying documentation did not misrepresent the true position alleged by TANESCO. It follows that the Misrepresentation issue is resolved in favour of the claimants." (Emphasis added).

The Tribunal made some observations on the issue of **voidability of the POA on the ground of the alleged misrepresentation**, as summarized in paras 527 – 530 of the Award. At para 525, the Tribunal observed that, **"....given our ruling on the misrepresentation issues, the voidability Issue does not arise."** The Tribunal further stated at para 530, that, "...**had the voidability issue arisen for decision, the Tribunal would have resolved it in favour of the claimants**", on the ground that, assuming that there was a **misrepresentation** in the letters dated 8th December, and 18th of December, "...**the Respondents would have no difficulty in discovering the true position through the exercise of "ordinary diligence", and that accordingly, the existence of such misrepresentation did not render the contract voidable under sect 19 (1) of the Tanzania Law of Contract**" (para 526).

From the foregoing analysis, I am satisfied that the Arbitral Tribunal **considered** the issue of **misrepresentation** submitted to it for decision, and reached its conclusion on the basis of the evidence presented to it; hence **it cannot be said that the Tribunal arrived at a decision based on their opinion influenced by bais**. And in the light of the established legal principles we have discussed in the preceeding paragraphs, these being questions of fact and law specifically referred to the Tribunal for its decision, and since the Tribunal considered the issue, and decided them, then this court cannot interfere with the decision of the Arbitral Tribunal. Accordingly, this allegation is rejected.

The Petitioners also submitted in their written submissions that the Arbitrators were guilty for assuming **"excess of jurisdiction",** on the ground that, "upon making certain findings which were sufficient to render the POA invalid, the Tribunal ought to have found that **it no longer had jurisdiction or authority to**

make an award on an illegal contract, and it is **irrelevant** that the contraventions of PPA 2004 did not render the POA void and of no legal effect under English or Tanzania Law.."

This issue of **"excessive jurisdiction,"** with respect, **was not raised in the Petition**. The only issue of jurisdiction made in the Petition was with regard to the use of **Texas Law** and the **lack of capacity of REDVCO**. At any event, the Arbitral Tribunal made a finding that, the **POA was not a "wholly unenforceable"** contract. Indeed, even some English Authorities have also held that, **if an arbitral tribunal has a jurisdiction clause to determine the legality of the underlying contract, and have concluded that the contract is valid according to its applicable law, the award is enforceable** (referred case of **WESTACRE INVESTMENTS INC. Vs JUGOIMPORT-DPR HOLDING CO. LTD (1999) 2 LLOYD's Rep. 65.**

The Tribunal did decide exactly what it is stated in the foregoing decision. The Tribunal found (at para 511 of the Award), that **"the POA, when signed, was a valid and enforceable contract."** In that respect, therefore, the issue of **"illegality of the POA" did not arise in the eyes of the Tribunal**. And since the **Tribunal made a specific finding on it,** the Petitioner can no longer **re-open** and **re-argue** the issue in this court, In the light of the established principles of law we have alluded to earlier on. Accordingly, this complaint is rejected.

We now more to ground No. 10 of the Petition, that the **enforcement of the Award is contrary to public policy**. Submitting on this issue, learned counsel for the Respondent argued that, under the provision of sect 16 of the Arbitration Act, 2004, **"public policy"** is not one of the recognized grounds for setting aside an

award. It was further argued that, the Petitioner **failed to specify the specific area of public policy would be affect if the enforcement of the Award was to be proceed**. Further still, the learned counsel maintained that, at any rate the Award **is not in violation of the laws of Tanzania.**

The learned counsels for the Petitioner endeavoring to answer the question posed, **whether "public policy" is a ground for setting aside an award,** the learned counsels conceded the fact that, the provisions of **sect 16 of the Arbitration Act of Tanzania do not explicitly mention "public policy" as a ground for setting aside on Award** (as it is in the case of Kenyan Arbitration law), however, counsels for the Petitioner submitted that the **courts' inherent power** to **set aside an arbitral award** on ground that its enforcement would offend the **public policy** of the country of the forum, has been recognized in several common law jurisdictions, including the Tanzanian Courts. The learned counsels then referred to a number of cases, including the following:- **(1) DEUTSCHE SCHACHTBAN-UND TIEFBOHARGESELSCHAFT mbH Vs RAS ALHAIMAN NATIONAL OIL Co and Another (1936) 2 ALLER 770 (England), (2) CBI NZ Ltd Vs BADGER CHIYODA (1990) LRC COMM. 621 (NEW ZEALANG),** also the Tanzania case of (3) **Misc Commercial Cause No. 13 of 2007, MS E & A CONSTRUCTION Vs permanent SECRETARY, MINISTRY OF PLANNING, ECONOMY & EMPOWERMENT & Another (15/08/2008, Unreported).**

Having discussed those cases, the learned counsels for the Petitioner concluded that, through the principles established by case law, "**public policy**" now constitutes a **universally accepted ground** for setting aside an award.

Responding to the Respondents' claim that, the Petition **did not specify the area of public policy that would be affected and concerned if the enforcement of the Award was to proceed**, the learned counsels for the Petitioner submitted that, the **Award offends the public policy as it contravenes some PPA, 2004 provisions,** whose **public policy** is embodied in the **reasons and objectives** of the **Public Procurement Bill**, and reflected in section 31 (1) (b) and 31 (2) of the PPA, 2004, It was father contended that, the **prohibition** contained in those sections **constitutes** the **"public policy"** whose purpose is to ensure the **integrity** of the procurement process and the **proper use** of public funds. It was concluded that, the **prohibitions** cannot be **circumvented** by **contract** and that **any contract made in contravention** of those provisions is **void and of no legal effect**.

As for the contention raised by the Respondents that, the **Award is not in violation of the laws of Tanzania**, the learned counsels for the Petitioner submitted that, the award of the POA offended the **public policy** of Tanzania because **it is in violation of the PPA, 2004** and hence in **violation of the laws of Tanzania**. The learned counsels concluded their submission by maintaining that, the Award is liable to be **set aside** for offending "**public policy**" on the ground that its enforcement would contravene the PPA, 2004, provisions on grounds that:- (a) **the making approval of the Petitioners' Tender Board being an indispensible condition precedent to the award of the POA to RDEVCO, and (b) requiring the Petitioner (as opposed to MEM), the statutory authority competent to award the POA**. Hence, it was concluded that, to allow the Award to be enforced not withstanding these contraventions would offend the "public policy" considerations underlying the provisions of sect 31 (I) (b) **and 31 (2) of the PPA, 2002**.

Responding to the Petitioner's submission, the Respondents submitted that the **contract** (POA) had **legitimate purposes** in the **public interest** as **it provided the supply of much needed power to the Tanzania National Grid**. The Respondents further contended that the Arbitral Tribunal observed (at paras. 560-562) that, it was **agreed between the parties** that, if (as it was the case) the POA was a valid contract, **a principal sum of US $ 19,955,626.71 was owed to the Respondents for the power actually supplied**, and which sum has not been paid yet by the Petitioner, for the last three (3) years now.

The learned counsel for the Respondents, further submitted that the question of law submitted to and considered by the Tribunal was, **whether the "public policy" (behind the PPA, 2004) requirement to submit contracts to the tender boards of the public procuring entities),** combined with the reading of the legislation, **necessarily had the effect of rendering any contract entered into otherwise than in accordance with the provisions of sect 31 (1) (b) and 31 (2) the PPA, 2004, void and of no legal effect**. It was further insisted that the Tribunal considered these considerations at para. 460 of the Award, and thereafter at para 540. The Arbitral Tribunal specifically found that, **a contract entered into in contravention of sect 31 (I) (b) and 31 (2) of the PPA, 2004, is not automatically void ab initio**. The learned counsel, again, insisted that the issue was specifically referred to the Tribunal for decision, and yet, the Petitioner does not like the conclusion of the Tribunal. However, it was insisted, the Petitioner cannot be allowed to **re-argue** the issues in this court, in the light of the well established principle of law on this matter.

The learned counsel for the Respondents concluded his submission saying that, refusing the enforcement of the ICC Award under the guise of the claim that,

it would be contrary to "public policy", and it would have a **negative** and **potentially disastrous consequences** for **attracting foreign direct invest-ment** in Tanzania. The learned counsel, by way of expanding this contention, submitted that, the Petition involves a **state-owned entity entering into commercial arrangements with foreign investors.** That state-owned entity, (The Petitioner), agreed that any disputes should be resolved by international arbitration (a commonly used means of dispute resolution in international investments). The Respondents' counsel added that, Petitioner, therefore, agreed that, in the event of a dispute, its conduct would be judged by international arbitrators, applying the law of Tanzania. In the present case, added the learned counsel, a panel of distinguished arbitrators heard the matter, and **having given both parties ample opportunity to present their respective cases,** The Tribunal made a ruling based on the facts and the law Applicable. The Tribunal found that, **the Petitioner repudiated the POA.** In reaching this conclusion, **the Tribunal rejected the various arguments put forward by the Petitioner that the POA,** which had been entered into in 2006, and **substantially performed** by the Respondents, **was void or voidable.** The Respondents maintained that, the Petitioner **has been found liable to pay sums owed to the Respondents** under the POA and **to pay damages for its early repudiation of the agreement,** something which is the natural consequence in law of contract.

It is a fact that, the issue of **Public Policy** in relation to the **illegality/validity** and the **enforcement** of the ICC Award was specifically referred to the Arbitral Tribunal for consideration and decision (Issues No. 1 and 2). It is also a fact, the **Public Policy behind the PPA, 2004,** was considered by the Tribunal at paras 459-509. At para 460 of the Award, the Tribunal considered the **objects** and

reasons relating to the PPA, 2004 Bill. Having considered the issue, the Tribunal (at para 504 of the Award) concluded that:-

> ***"....We can find nothing in the public policy objectives of the PPA, 2004, to support the implication of a provision having the effect that a contract entered into in contravention of sect 31, that is to say, every such contract is automatically void ab oinitio, regard less of its terms and regardless of whether the continued performance of the contract might be to the public benefit. The implication of such a draconian, disproportionate and one size-fits-all consequence of a contravention of section 31 would, in our judgment, require a very strong statutory context, and the public policy objectives of the PPA, 2004, do not begin to provide such a context.."***

The Tribunal further observed, in para 505 of the Award, that:-

> ***"..As for the terms of PPA 2004 itself, sect 31 (4) is, in our judgment, positively inconsistent with a contract awarded in contravention of sect 31 (1) being automatically Void ab***

> ***intion. Subsection (4) expressly covers a situation where a contract "has been awarded" in contravention of the Act. in such a situation, it is the duty of the tender board to report the matter to (among others) the PPRA (Public Procurement Regulatory Authority), and to recommend "such actions as may deem appropriate". Sub-section (4) accordingly recognizes and contemplates that action may be taken by PPRA (and others) in relation to an existing contract which has been awarded in contravention of sect 31 (I) of the Act.."*** *(Emphasis supplied).*

Indeed, the Tribunal further observed in para 506, that:-

> ***"....Nor can we find anything elsewhere in the PPA 2004 to support the assertion that a contract awarded in contravention of sect. 31 is automatically void ab initio. In particular, the fact that sect. 87 makes it an "offence" for a public body to award, of for the supplier to sign, a***

contract which has not been approved by the appropriate tender board, seems to us to us to suggest that Parliament considered that, that was a "sufficient sanction" for a contravention of sect 31 (I) OR 31 (2)..." *(Emphasis added*

And yet further, in para 508 of the Award, the Tribunal stated that:-

> ***'..A further factor, militating against the implication of a provision rendering contracts awarded in contravention of sect 31 (1) and 31 (2) from being automatically void ab initio, are the wide range of investigatory powers of the PPRA: powers which are exercisable after, as well as before, the award of a contract to which sect 31 applies.."*** *(Emphasis supplied)*

Indeed the Tribunal further observed in para 509, that:-

> ***"...lastly, and crucially, subsections (I) and (2) of sect 31 say nothing whatever about the performance of the contract.***

> ***On the contrary, they are focused exclusively on the awarding or the signing of the contract. Indeed, the fact that it is accepted by the Respondents that the performance of the POA by DHSA/DTL was entirely satisfactory is one of number of extraordinary features of this case. Moreover, it is undeniable that it was in the public interest for the POA to continue in force, thereby providing much needed power to the national grid..."(Emphases added).***

Admittedly, an examination of paras 459-509 of the ICC Award, it is enough to state that the Arbitral Tribunal **considered** and **decided** the main issues referred to it by the Parties regarding the **illegality/validity** of the POA, and its **enforcement**, in relation to **Public Policy** issue. These were specific issues referred to the Tribunal, and the Tribunal made its decisions. **Assuming, (for the sake of it), that the Tribunal made an erroneous decision**, still this court cannot interfere with the decision of the Tribunal, in the light of the long established legal principles that, **matters of law specifically referred to an arbitral Tribunal cannot be challenged.** This was specifically stated in the case of Re KING Vs DUVEEN (1913) (Supra), that:-

> ***."..it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he***

does decide it, <u>the fact that the decision is erroneous does not make the award bad on its face</u> so as to permit of it being set aside."(Emphasis supplied)

In the light of these principles, therefore it would not be proper for this Court to interfere with the Arbitral Tribunal's findings on **"Public Policy"** issue, for in doing so, it would amount to **re-opening** and **re-arguing** of the issues that the parties agreed to submit to the Tribunal for determination. Accordingly, this ground of Petition is rejected.

Now, we move to the last ground of the Petition, No. 11. In this ground the Petitioner is seeking this court that, in the event that the court refuses to set aside the Award, then, in the alternative the Court should **remit the Award to the ICC Arbitrators for their reconsideration** on the ground that the **Arbitrators <u>misconducted</u> themselves by awarding the Respondents a sum of USD 19,955,626.17, on account of invoices for power actually supplied**. The Petitioner asserted that the Arbitrators should reconsider the amounts stated in para 561 and 568 of the Award on the ground that the **amounts are not correct**.

In their submission, the learned counsels argued that, this court is vested with wide powers and jurisdiction under the provisions of sect. 15 of the Arbitration Act, which, although it does not prescribe any conditions upon which the court can remit an award, it means therefore, **the power to remit is not limited,** unlike the powers to **set-aside** an award. The counsels further argued that the power to remit an award is **wide enough to include any such grounds that**

may be disclosed by a party seeking remission, and that, such grounds have been developed and settled by case law. The learned counsels surveyed several authorities in their endeavor to establishing such grounds for remission. The referred cases included:- **KING Vs THOMAS MCKENNA Ltd (1991) I ALL ER 653**, and the Tanzania case of **CRDB BANK Ltd Vs. THE GOVERNMENT OF THE REPUBLIC OF TANZANIA;** MISC Cause No. 34 of 2007 (Unreported).

Having considered the case law, the learned counsels for the Petitioner submitted that, an award can be remitted to arbitrators for re-consideration, where it is established that:- (I) due to some **clear error** in calculation, **mishap** or **misunderstanding**, some aspects of the dispute have not been **considered and adjudicated** upon as fully as/or in the manner that the parties were entitled to expect, and that (2) it would be **inequitable** to allow an award to take effect without some further consideration by the arbitrators (**KING Vs THOMAS MCKENNA (Supra)**.

Having established those principles, the learned counsels for Petitioner, applying the same, maintained that, in the present Petition, the Arbitrators awarded the Respondent the sum of USD 19,955,626.71 (para 561 of the Award), with a **clear** error, **mishap** or **misunderstanding** of the **Parties agreement** placed before the Tribunal (para 560 of the Award). It was further argued that, **the award of that sum was contrary to the Petitioner's expectation and has manifest errors when the amounts due to the Petitioner and the amounts due to the Respondents and the evidence before the Parties and the arbitrators are compared**. The learned counsels concluded that the foregoing **misconduct constitutes the ground for remitting** the Arbitrators for their reconsideration. The

Petitioner then gave a detailed analysis of **invoices** and **data,** an the attempt to establish the alleged **errors of miscalculation**.

Responding to this ground of Petition, the learned counsel for the Respondents submitted that the issue was submitted to the Tribunal, **as issue No. 11**. It was further submitted that, the **parties agreed between themselves of the figure USD 19,955,626.71, and presented the same to the Tribunal by agreement** (para 560 and 561 of the Award). It was insisted that the Petitioner should be **estopped** by its own conduct from challenging the said amount.

The learned counsel for the Respondents further contended that, applying the principles from the **KING Vs THOMAS MCKENNA Ltd** (Supra) case, the facts submitted to the Arbitral Tribunal by the Parties, demonstrated that:-

a) There was **no misunderstanding** of the **parties agreement** on **quantum figures**; and

b) That the agreed position reflects the **unchallengeable correct factual position as to quantum figures** and therefore, there is no basis for remitting the Award to the ICC Arbitrators.

The learned counsel concluded stating that, the Petitioner is just seeking to **re-open** and **re-argue** the questions which were specifically referred to the Arbitral Tribunal for consideration and decision, and since the Arbitral Tribunal has made its findings, therefore, the Petitioner's attempt to re-open the issues should not be permitted.

It is a fact that, according to the Tribunal's findings, the Tribunal awarded the Respondents the following sums:-

a) First, **USD 19,955,627.17, by way of debt in respect of unpaid or partially paid invoices,** for the period 26th January, 2007 (when generating capacity began under POA), until 11th, August, 2008 (when the POA was terminated (para 561 of the Award).

b) Second, **USD 36, 705, 013.94, by way of damages in respect of unexpired period** of the POA, being from 11, August, 2008 (being the date of early termination), 2nd October, 2009 (being the expiry of the 24 months from the COD (para 568 of the Award).

Now, the Petitioner is challenging the **debt element** on the basis that **the parties were not agreed on quantum figures**, and that the Tribunal was wrong to proceed on this basis. Also, the Petitioner is challenging the **damages** on the basis that the **parties were not agreed that re-coupment of advances** in respect of mobilization should be spread over the unexpired period of the POA, and that the Tribunal was equally wrong to proceed on this basis.

It is a fact that the issues raised by the Petitioner were specifically referred to the Tribunal, forming issue No. 11, out of the 17 issues.
The issue reads as follows:-

> ***"11..what sums are due and owing to the claimants for power supplied or capacity provided to TANESCO,***

> ***either as debts under the POA (if valid) or on a quantum merit basis (if not)? (The consideration issue).***

The Arbitral Tribunal considered the issue under the heading of "**QUANTUM**", and the sub-head, "**The consideration issue**" (para 558-562 of the Award). The Tribunal found as a fact, that, **the parties finally reached an agreement as to the amount the Petitioner owed the Respondents**. First, At para 560, the Tribunal observed that:-

> ***"560.. At the commencement of the hearing of the arbitration, the parties were in dispute as to the net amount recoverable by the claimants by way of debt or damages on the footing that the POA was a valid contract. Happily, however, by the stage of closing submissions the parties were able to agree the figure in respect of debt and damages (i.e in respect of both consideration Issue and Damages Issue), subject only VAT being stripped out and addressed as a separate issue..."*** (Emphasis added).

Then, at para 561 of the Award, the Tribunal stated that the **agreed amount, by the parties**, as follows:-

> ***"561.... Returning to consideration Issue, <u>the agreed net aggregate principal sum owing to DTL is US $ 19,955,626.71</u>. It is also agreed that the appropriate rate of interest is simple interest at 7.5% per annum, and that applying that rate of interest up to 14 June, 2010 (the final day of the hearing) produces a total sum in respect of principal and interest as at that date of US $ 24,168,343.83."*** **(Emphasis added)**

And finally the Tribunal concluded that:-

> ***"562.... In answer to the consideration Issue, therefore, <u>the Tribunal awards the sum of US $ 24, 168, 343.83</u> to the claimants, together with interest at the agreed rate of 7.5% per annum on the aggregate sum of US $ 19,955,626.71, from 15 June, 2010 to the date of payment of this sum.." (Emphasis added)***

The Arbitral Tribunal considered the issue of **Damages**, in paras 563-568. At para 563 of the Award, the Tribunal stated that:-

"..It follows from the Tribunals earlier finding that the Respondent repudiated the POA, that DTL is entitled as against the Respondent to damages for its early termination. As noted above, the figures for damages under this head of claim are also agreed.." (Emphasis added)

At para 568, the Arbitral Tribunal, in awarding the **damages**, stated that:-

"...the agreed figures themselves, the net aggregate principal sum (representing the notional capacity charges during the relevant period less deductions in respect of recouped advance payments), is US $ 36,705,013.94...adding simple interest at 7.5% ...the net aggregate principled sum of US $ 36,705,013.94. **(Emphasis added)**

The Arbitral Tribunal, having discussed the issue of **set-off** and **counter claim,** the Tribunal concluded in para 569 of the Award, that:-

"...Given that un recouped advance payments under the letter of credit have been taken into account in calculating the sum due to DTL by way of debt and damages, these issues fall away." (Emphasis added)

In other words, the **Arbitral Tribunal dismissed "all other claims and counter-claims of the parties..**" (para 641 (5) of the Award).

Looking at the submissions made by the Parties in the Arbitration proceedings, **it is a fact that, Parties made their submissions at length on the issue of "quantum"** and the Tribunal thereafter **considered** the issue and **decided it**. As it was submitted by the Respondents' counsel, the issue of "**quantum**" and the "**rates of interest**" was **agreed by the parties**. The Tribunal has likewise confirmed that fact as we have demonstrated in the foregoing paragraphs. The Tribunal reached its conclusions basing on the **facts (figures and data) provided and agreed upon by the parties**, and including the rates of interest. If this was the position, **the Petitioner is not allowed to go back and deny what they had agreed upon**. It is the finding of this court that, the Arbitral Tribunal considered the issues of "**quantum**" in accordance with the facts and the agreement by the parties. The Tribunal was entitled to arrive at the conclusions they made. I find nothing to suggest that there could be any **misunderstanding** as to such crucial issues. Accordingly, I reject ground No. 11, on the ground that **I do not find any valid reason to remit** the Award to the ICC Arbitrators for reconsideration of the amounts awarded to the Respondents.

Before making the final orders, let me, briefly, summarise what I have determined: **I did not consider this Petition as if it was an appeal** (since the Tanzania Arbitration Act (Cap 15, RE 2002) does not provide the right of appeal to the losing party), but rather I proceeded with the determination of the Petition, by applying the **recognized principles of law and practice** applicable in Tanzania for **challenging arbitration awards**, under the Arbitration Act (Cap. 15-R.E 2002).

Happily, both parties, as well as this court, are in agreement that these principles of law have been established through case law, and they have been practiced since the enactment of **British Arbitration Act**, 1889, and for that matter, the Tanzania Arbitration Act.

In this Petition, the Parties entered into an agreement for the supply hydroelectric power (the POA). The parties agreed to resolve their **disputes** by way of **arbitration**, and in accordance with the **Rules of Arbitration of International Chamber of Commerce** (the 'ICC Rules"). As required by Article 18 of the **ICC Rules**, the Parties executed the **Terms of Reference**, which defined the **scope** of the Parties **dispute**, and hence the **issues to be determined by the Arbitral Tribunal**.

By signing the **Terms of Reference** (clause 5), and by virtue of the **Arbitration Agreement** (clauses 14. (1) of the POA), the parties agreed to, and submitted to the **powers** and **jurisdiction** of the **ICC Arbitral Tribunal, to consider and decide** any dispute, controvery or claim arising out of or in relation to the POA. The Parties agreed, therefore, **the ICC Arbitral Tribunal shall decide the issues necessary to resolve the claims for relief of the Parties;** but more **specifically**, the parties agreed that, **all questions of fact or questions of law shall be considered and decided by the ICC Arbitral Tribunal, in order to make decisions on the issues submitted to the Arbitral Tribunal.**

Again, by Virtue of clause 14 (I) of the POA, the Parteis agreed to be **bound by the ICC Rules**, in accordance with article 28 (6) of the ICC Rules. According to the provisions of this Article, the decisions of the ICC **Arbitral Tribunal** shall be **final and binding upon the parties and shall not be subject to appeal**. The

parties further agreed to **waive** any **right to challenge the validity or enforceability** of the **arbitration agreement** or any **arbitration proceedings** or the **award arrived at by the Tribunal**. Besides, the parties agreed to **carry out** the **resulting award** without **delay** and **waived their right to any form of appeal.**

It is a fact that the **Arbitration Act of Tanzania**, does not provide for an appeal (I wish it could), however, the provisions of sect 16 of the Act, provide the losing party **some limited right to challenge an arbitral award** an **grounds of misconduct** by the Arbitral Tribunal, and **improper procurement** of the award. The losing party to an arbitral award can pray the court to **set aside an** award on grounds of **misconduct** only where it can be pointed out that there exists **"an error of law apparent on the face of the arbitral award"**.

However, the **exception** to this general principle that, courts can set aside an award where there is **"an error of law on the face of the award"**, does **not** apply, if **the points of fact or law** in question **have been specifically referred to the arbitral tribunal for consideration and decision**. The rationale to this principle is that, in such a situation, the parties have **opted** that the **arbitral tribunal, and not the court of law**, should resolve the relevant question of law, and therefore, in that case, the court of law, **cannot interfere** with the arbitral tribunal's findings, **even if the tribunal takes a different view of the law.**

In this Petition, the Petitioner (TANESCO), dissatisfied with the **ICC's Final Award**, filed a Petition containing about fix (5) **main grounds** (including eleven (11) sub-items) of contention, based mainly on the alleged **misconduct** by the ICC Arbitral Tribunal and the Award, hence prayed the court to **set aside** the Arbitral Award (under sect. 16 of the Arbitration Act), or in the **alternative**, the

court should **remit** the arbitral award to the **ICC Arbitrators** for their **re-consideration** (sect 15); on grounds that the ICC Arbitrators **misconducted** themselves in **awarding** the **Respondents certain disputed sums of US Dollars.**

The Respondents vehemently opposed the Petition on the grounds that, the Petition was **bad in law**, since it seeks to **re-open** and to **re-argue** the **issues of fact** and the **issues of law**, which were **decided by the ICC Arbitral Tribunal**, upon the Parties agreement. It was further submitted that, **since all the question of fact and law** raised in the Petition, were the **specific questions which the parties specifically asked the Arbitral Tribunal to decide**, therefore, in the lights of the well established relevant principles of law governing arbitration proceedings and in the light of Article 28 (6) of the ICC Rules, **the Petitioner cannot be allowed** by the court to **re-open the issues** alleged in the Petition.

It is a fact that, at the close of the Arbitration proceedings, the Parties submitted to the Arbitral Tribunal a **list of 17 issues to be considered and decided by the Arbitral** Tribunal. It is a fact that both the Tribunal and the Parties **adopted the 17 issues.**

After a **careful analysis of the grounds** of complaint raised in the Petition in the light of the submissions made by the learned counsels for the Parties, and indeed, **having very meticulously gone through the Arbitration proceedings, together with the contents of the ICCS Arbitral Award**, and the lot of the documents made available to me by the learned counsels, I am satisfied that, **all the questions of fact and the questions of law decided by the Arbitral Tribunal in this Petition, were the very questions of fact and law (issues) which the Parties specifically asked the Arbitral Tribunal to consider and decide.** In the

light of the long standing principle of law regarding arbitration proceedings, in particular:-

> ***"...if a question is specifically referred and it becomes evidence that the parties desire to have a decision on that specific question from the arbitrator rather than from the court, the court will not interfere with the award of the arbitrator on the grounds that there is ".. an error of law apparent on the face of the record", even if the view taken by the arbitrator does not accord with the view of the court" (SD Singh's Law of Arbitration) (Emphasis added).***

It is my humble opinion that this court, I am a afraid, is bound to follow the above stated principle.

Again, in the light of yet another long standing principle of the law and practice regarding arbitration proceedings, that:-

> ***"..It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that decision is erroneous does not make***

> ***the award bad on its face** so as to permit of it being set aside." (Re King and Duveen (Supra) (Emphasis Added).*

Again, it is my humble opinion that this court is yet, equally bound to follow the above stated principle.

The rationale behind these regal arbitration proceedings principles, has been admirably summarized by yet one of those leading and eminent Authors, **Mustil & Boyd,** in his masterpiece treatise on **"COMMERCIAL ARBITRATION"** 2nd **Ed; Butler worth's, 1989**(cited by the learned counsel for the Respondents), where he observed, at page 413, as follows:-

> ***"....just as an award prevents a party from raising a second time a claim on which he has succeeded, so also the award prevents him from disputing a second time an issue which he has failed. The losing party cannot be permitted to try again, just because he believes that on the second occasion he may have a more sympathetic tribunal, more convincing witnesses, or a better advocate. There must be an end to disputes." (Emphasis added).***

Indeed, an attempt to **re-open** and to **re-argue issues of fact and law which have been referred to arbitrators**, under the guise of the so-called "**public policy**", was expressly rejected by a Kenyan Court, in the case of **CHRIST FOR ALL NATIONS VS APOLLO INSURANCE (2002) E.A 366** (Cited by the Respondent's counsel). In this case, an attempt to take issue with the Arbitration Tribunal's construction of an insurance contract on the graund that the enforcement of the Award would be contrary to "**public policy**", the Kenyan court **rejected the contention**.

For the **sake** and **benefit** of Parties in this Petition (and indeed, the Government of Tanzania), I find it appropriate to quote at length the observations made by the Kenyan Judge, when he stated that:-

> ***"....this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law, or mixed fact and law or of construction of statute on the part of an arbitrator cannot by any stretch of legal imagination be said to be inconsistent with "Public Policy" of Kenya. On the contrary, the "Public Policy" of Kenya leans towards the finality of arbitral awards, and parties to arbitration must learn to accept awards,***

warts and all, subject only to the right to challenge within the narrow confines of sect. 35 of the Arbitration Act.." (Emphasis added).

Indeed that same quest for having "**finality to disputes/arbitral Awards**" (observed in the foregoing authorities), is embodied in our **Civil Procedure Code** (Cap 33, R.E 2002), and for that matter, the **Arbitration Act** (Cap 15). Both pieces of legislation provide for **arbitration**, as an **alternative mechanism** for dispute (especially – commercial disputes) resolution, out of court litigation, with the view that, parties, **on their own agreement**, would reach an **amicable** and **speedy** solution of their disputes, and that the solution would be **final** and **binding** upon them. Therefore, it is my decided opinion that, it is also one aspect of our "**public policy**" towards the need to having **finality of disputes and arbitral commercial awards.** It is my hope that, both the parties (and GOT, for that matter) in this Petition, would **receive** that simple message.

Thus, taking into consideration the well established principles of law regarding arbitration proceedings in this country (and elsewhere within the common law jurisdictions), I find that it **would not be proper for this court to interfere with the findings of the ICC's Arbitral Tribunal,** for, in doing so, it would amount to **re-opening** and **re-arguing** of **the issues of fact and issue of law that the parties, by their own agreement, submitted to the ICC Arbitral Tribunal for its consideration and decision.**

Having said that, and for the reasons demonstrated in the judgment, this petition is hereby **dismissed** with costs. It is hereby ordered that, in terms of sect.

17 of the **Arbitration Act** (Cap 15, R.E 2002), the **ICC's Final Award** filed in this court, be formally **registered** and should be a **decree** of this court and **enforceable** as such. It is so ordered.

E.M.E MUSHI

JUDGE

28/09/2011

Judgment delivered this 28th day of September, 2011, in the presence of the learned counsels for Petitioners; Dr. Eve Sinare, Mr. Mwandambo, G. Ngwilini and W. Lukezebi (for Prof. Luoga) and Mr. Fungamtama, advocate for the Respondents.

E.M.E MUSHI

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