Of Dissenting Opinions and révision au fond - A Tale of Three Jurisdictions

A recent case that led to arbitral and court proceedings in Sweden, Kenya, and Tanzania brings up several issues, among them the advantages and disadvantages of dissenting opinions and whether state courts may review arbitral awards on the merits.

The Project in Tanzania and the Dispute

Kundan Singh Construction Limited (Kenya) - now KSC International Limited - and Tanzania National Roads Agency (Tanzania) entered into a contract on 1 August 2007 to upgrade a road in Tanzania. Disputes were to be submitted to a dispute board, and if any party was dissatisfied with the dispute board’s decision, that party could refer the dispute for arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce. The law applicable to the contract was “...that at the time being in force in the United Republic of Tanzania”. In addition to the two parties, the engineer played an important role in the project and was responsible, for example, for the issue of interim payment certificates. Following a failure of the engineer to issue an interim payment certificate in accordance with Kundan Singh's request, a dispute arose mainly as to whether Tanzania National Roads Agency was responsible for certain delays and whether consequently Kundan Singh was entitled to recover damages. Kundan Singh referred the dispute to the dispute board and apparently terminated the contract without waiting for the dispute board’s recommendation, which was issued on 12 February 2009.

The Arbitration in Sweden

Kundan Singh, being dissatisfied with the dispute board’s recommendation, submitted the dispute for arbitration, and Tanzania National Roads Agency filed a defence and a counterclaim. During the arbitration, the parties entered into an agreement to waive the requirement to bring disputes before the dispute board prior to referring them for arbitration. The majority of the arbitral tribunal concluded that a condition for termination of the contract was lacking because Kundan Singh had not waited for the dispute board’s decision. Furthermore, Kundan Singh was ordered to pay Tanzania National Roads Agency several amounts of money. One of the key issues in the arbitration was the engineer’s relationship with Tanzania National Roads Agency. To determine this relationship, the majority apparently first examined the relationship between English law and Tanzanian law, as both parties had referred to a number of English court decisions, and came to the conclusion that this relationship was regulated by certain Tanzanian constitutional provisions. The majority found that while English law was rather clear on the engineer’s relationship with

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1 Unless otherwise indicated, all quotes are reproduced as in the original source.
Tanzania National Roads Agency, a provision in the Tanzanian Procurement Ordinance could have yielded a different result. The majority concluded that the engineer did not represent Tanzania National Roads Agency and that consequently, the engineer's failure to issue the interim payment certificate could not be attributed to Tanzania National Roads Agency. Dorothy Ufot, in a dissenting opinion, came to the conclusion that the engineer was Tanzania National Roads Agency's agent, and that hence, the engineer's actions were to be attributed to Tanzania National Roads Agency.

Setting Aside Proceedings in Sweden

In April 2012, Kundan Singh filed a challenge against the award, arguing that the arbitral tribunal had either exceeded its mandate or committed a procedural error that may be assumed to have affected the outcome because (1) the arbitral tribunal had failed to apply the parties' choice of applicable law (Tanzanian law) and (2) the arbitral tribunal had erroneously applied the parties' waiver agreement. The court rejected Kundan Singh's request. The court established that if an arbitral tribunal committed an error in its interpretation or application of a choice of law rule, this is considered a substantive error and, under Swedish law, does not constitute a ground for annulment of an arbitral award. The court then concluded that the majority had not failed to apply Tanzanian law and that the possibility that the majority may have been in error regarding the meaning of Tanzanian law would not constitute a ground for annulment of the award. The court also concluded that the arbitral tribunal had properly taken into account the waiver agreement.

Proceedings in Kenya and Tanzania

Parallel to the proceedings in Stockholm, Kundan Singh had filed an application in the High Court of Kenya at Nairobi and requested that the award be partially set aside, or alternatively, be remanded to the majority. The court dismissed the application with costs, holding that "...Sweden is the country of the primary jurisdiction in relation to these proceedings not Kenya, which only has a secondary jurisdiction role in terms of recognition and enforcement of arbitral awards...".

In turn, Tanzania National Roads Agency filed an application in the High Court of Kenya at Mombasa for recognition and enforcement of the arbitral award. Kundan Singh opposed that application, arguing mainly that the arbitral tribunal had decided on matters beyond the scope of the arbitration agreement, that Tanzania National Roads Agency had not first referred its claim to the dispute board, and that the majority had not applied Tanzanian law. After examining the "public policy"-ground for refusal as well as evidence submitted by the parties, the court went on to conclude that "[t]here is ample evidence from the Respondents replying affidavit and further affidavit that the decision of the majority as set out in the award was made contrary to the laws of Tanzania." In the end, the court dismissed the application, holding that "...there would be no justification legally or morally to condone a breach of a contract Between [sic] two parties and it would contrary [sic] to the public policy of Kenya to allow a court to be used towards that end."

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Tanzania National Roads Agency apparently also filed an application for recognition and enforcement of the arbitral award in the High Court of Tanzania,\(^6\) but the status or outcome of the proceedings in Tanzania is not known to the author.

**Annotations**

The conclusions of the Svea Court of Appeal and the High Court of Kenya at Mombasa are diametrically opposed to each other on whether an allegedly wrong application of the law chosen by the parties would affect the arbitral award. On the international level, authoritative commentators have pointed out that "[i]t is a generally accepted interpretation of the [New York Convention] that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V [New York Convention] does not include a mistake in fact or law by the arbitrator."\(^7\) This approach is also followed on the national level in several jurisdictions.\(^8\)

Because the UNCITRAL Model Law and Kenya's Arbitration Act, No. 4 of 1995 are "substantially similar"\(^9\) and since Article 36 of the UNCITRAL Model Law corresponds, at large, to Article V New York Convention, one could be inclined to expect that Kenyan courts would follow the internationally accepted interpretation of the New York Convention that prohibits a revision of the merits of an arbitral award. Yet before having such expectations, one ought to consider that the purpose of public policy is to protect the public interests of the state which will decide on the arbitral award,\(^10\) and that therefore, despite a harmonised framework, the issue is ultimately in the control of national courts and national laws.\(^11\) Public policy has furthermore "...by its very nature, a dynamic character, so that any classification may crystallise public policy only at a certain period of time."\(^12\) It is therefore submitted that it would be preferable if courts considered what was stated in Recommendation 1(c) (at para 24) of the International Law Association Committee on International Commercial Arbitration's Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards:\(^13\) "...the Committee encourages States courts to consider how courts of other countries have applied the public policy test and, to the greatest extent possible, to apply the test consistently."

Finally, the case also shows some of the advantages and, as the case may be, disadvantages of dissenting opinions.\(^14\) On the one hand, a dissenting opinion may permit an arbitrator to provide her or his personal judgment and does not force her or him to concur in a decision to which he or she cannot fully subscribe; on the other hand, a dissenting opinion may disclose a basis for attack on the award.\(^15\)

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\(^6\) [Tanzania National Roads Agency v Kundan Singh Construction Ltd, High Court of Tanzania, Miscellaneous Cause No. 4/2013](http://www.nrwe.de).

\(^7\) For a German perspective, cf. e.g. Dutch seller v German (F.R.) buyer, Regional Court [Landgericht] of Zweibrücken, 11 January 1978, (1979) IV Yearbook Commercial Arbitration pp262-263, 263; for a recent, general affirmation that the prohibition of a révision au fond is considered as a fundamental principle in Germany, cf. Higher Regional Court [Oberlandesgericht] of Köln, Decision of 24 July 2013, Case No. 19 Sch 8/2013, available at www.nrwe.de.


\(^9\) [Loukas A. Mistelis (ibid.) p2.](http://www.beck.de) (at para 11).


\(^12\) [Available at www.ila-hq.org/download.cfm/docid/0328B0D5-46CE-4CB0-912A0B891B82E11AF.](http://www.beck.de)

\(^13\) [Stephan Wilske and Lars Markert, § 1052 ZPO, in Volkert Vorwerk and Christian Wolf (eds), Beck'scher Online-Kommentar ZPO (last updated on 15 January 2013 and available, upon subscription, at http://beck-online.beck.de) (at para 11-16, generally on the issues that arise in this context).](http://www.beck.de)