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Investment Treaties and The Arbitrability of Illegal Contracts: A Review of the Arbitral Award World Duty Free Company Limited Versus the Republic of Kenya

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Key Terms: *Foreign Direct Investment. Corruption. Illegality. Arbitration. Arbitrability*

1. Introduction

Does the illegality of a contract affect an arbitration clause set out in the contract? Can a party to a contract with an arbitration clause resist the reference of a dispute arising from the contract to arbitration because the contract is void or illegal?[1] The typical arbitrator's technical answer to these questions is that the separability doctrine preserves the agreement to arbitrate (i.e., the arbitration clause), notwithstanding the illegality of the main contract. [2] However, this technical answer raises many conceptual challenges.

This article examines the arbitral award in *ICSID Case No. ARB/00/7: WORLD DUTY FREE Company Limited versus the Republic of Kenya* (**'the WDF case**'), in which illegality, arbitrability and many other issues arose. Part 2 of the article provides an overview of the WDF case. Part 3 explores

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1 Kreindler RH, 'Aspects of Illegality in the Formation and Performance of Contracts' International Arbitration Law Review (London) 6:1:1-24, 2003 pp. 1-2.
2 Ibid, at p. 7.

the critical issues raised in the WDF case. These include the jurisdiction of the International Centre for Settlement of Investment Disputes ('**ICSID**') and the validity of an arbitration agreement/clause contained in a contract that is tainted by corruption. The article examines the applicability of international law to an investment contract where the parties have chosen a particular national law within the meaning of Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other states ('**the ICSID Convention**). The essay also examines whether an assignee or successor in the title can invoke an arbitration agreement signed by its predecessor.

2. Overview of the WDF Case

In 1989, a company called "*House of Perfume*" ("**the foreign investor**") concluded a contract ('**the contract**') with the Government of the Republic of Kenya ('**GoK**').[3] The object of the contract was the "*construction, maintenance and operation*" of duty-free complexes at Kenya's Nairobi and Mombasa international airports.[4] The contract provided, *among other things*, that the transaction to which it related was an "*investment*" within the meaning of the ICSID Convention and that the foreign investor was a national of the United Arab Emirates.[5] The contract also provided that the parties consented to (i) submit to the jurisdiction of ICSID and (ii) submit to ICSID for settlement by arbitration of all disputes arising from or relating to the contract or any investment made under the contract.[6] Further, the contract provided that any arbitral tribunal appointed to adjudicate disputes under the contract would apply English law.[7]

In 1990, the parties "*amended*" the contract by substituting "*WORLD DUTY FREE Company Limited*" ('**the Claimant**') for the foreign investor.[8] Under

3 See the Award in the WDF case, paragraph 62. Unless the context otherwise impels, all references to "Award" or "the Award" in this article are references to the Award in the WDF case.
4 Award, paragraph 62.
5 Ibid, paragraph 6.
6 Ibid.
7 Ibid.
8 Ibid, paragraph 63.

the contract (as amended), the Claimant constructed, maintained and operated excellent duty-free shops at Kenya's Nairobi and Mombasa international airports. For two years, the Claimant operated the duty-free shops without any interference from GoK.[9]

The Claimant's Chief Executive Officer ('**CEO**') covertly paid a "*personal donation*" of US$ 2 million to His Excellency Daniel Arap Moi ('**HEDAM**'),[10] the then President of the Republic of Kenya, to secure its substitution for the foreign investor.[11] The payment, a bribe, was intended to secure HEDAM's consent to the foreign investment and procure his assistance in obtaining regulatory and bureaucratic clearances. [12] Accordingly, the "donation" was not recorded in the documents signed by the parties.[13]

In 1992, HEDAM needed to finance his re-election campaign. [14] The Claimant came in very handy—by facilitating a massive fraud against the Kenyan treasury.[15] Under the scheme, commonly known as the Goldenberg Scandal, the Claimant was named the consignee of fictitious gold and diamond exports from Kenya in shipment documents.[16] HEDAM and other senior Kenyan politicians and government bureaucrats used a company linked to the Claimant to siphon funds out of the Kenyan treasury by claiming undeserved export compensation payments from the Central Bank of Kenya.[17]

9 Ibid, paragraph 67.
10 Award, paragraphs 66, 120, 130, 135 and 185.
11 Ibid, paragraph 66.
12 Ibid, paragraph 135.
13 Ibid, paragraph 185.
14 Award, paragraph 68.
15 Ibid.
16 Ibid. The Goldenberg scandal has been the subject of extensive but futile investigations, and prosecutions. Kenyan courts have, through somewhat controversial and highly technical decisions, exonerated key suspects condemned by a judicial commission of inquiry formed to investigate the scandal in 2003. For one of such decisions, see Republic versus Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex-Parte George Saitoti [2006] eKLR.
17 Award, paragraph 68.

The Goldenberg scandal was soon exposed to the public. The Claimant contended that GoK began to commit various transgressions after the exposure of the Goldenberg scandal. First, GoK maliciously instigated a takeover of the Claimant by a Mr Kamlesh Patni.[18] Next, Kenyan courts appointed a receiver over the Claimant at the instance of Mr Kamlesh Patni.[19] The receiver "*mismanaged and ran down*" the duty-free shops.[20] GoK unlawfully deported the Claimant's CEO to the United Arab Emirates to thwart opposition to the takeover.[21]

The Claimant contended that the actions of GoK constituted illegal expropriation.[22] The Claimant also argued that the GoK's appropriation acts resulted in the "*classic…investment dispute that ICSID was established to resolve.*"[23] Consequently, the Claimant prayed for an order for "*payment of full compensation*" against the Republic of Kenya.[24]

GoK was oblivious of the bribe to HEDAM and the Claimant's complicity in the Goldenberg Scandal. Specifically, GoK knew details of the bribe to HEDAM and the Claimant's complicity in the Goldenberg Scandal through the Claimant's witness statement.

GoK denied the alleged transgressions.[25] It raised objections on, *among other things*, the Tribunal's jurisdiction and the Claimant's capacity to institute the proceedings. On capacity, GoK contended that the Claimant had been struck off the Register of Companies at the Isle of Man, its place of incorporation, a year before the commencement of the arbitration proceedings.[26] That being the case, GoK contended that the Claimant did not exist in law. GoK challenged those who had filed the arbitral dispute to

18 Mr. Kamlesh Patni was the chief architect of Goldenberg Scandal.
19 Award, paragraph 71.
20 Ibid.
21 Ibid, paragraph 72.
22 Ibid, paragraph 74.
23 Award, paragraph 75.
24 Ibid, paragraphs 76-77.
25Ibid, paragraphs 80-87.
26 Ibid, paragraph 94.

demonstrate "*both the resurrection of the company [i.e., the Claimant] and its authorisation to commence the action."*[27]

After receiving a copy of the Claimant's Witness statement, GoK applied for summary dismissal of the Claimant's case.[28] The crux of GoK's application was that the contract was void and unenforceable because the Claimant procured it by bribery.[29] GoK submitted the contract was unenforceable as a matter of Kenyan and English law and *ordre public international.*[30] Besides, GoK had now avoided the contract.[31]

The Claimant made rejoinders. First, the bribe to HEDAM was a collateral agreement before and severable from the contract.[32] Accordingly, the contract was valid and enforceable.[33] Second, both parties were guilty of illegality since HEDAM was GoK's agent.[34] According to the Claimant, HEDAM was "*one of the remaining 'big men' of Africa, who, under the One-Party state Constitution was entitled to say, like Louis XIV, he was the state."*[35] The Claimant also contended that HEDAM was comparably more blameworthy. Therefore, dismissing the claim would have inequitably placed a "*one-sided burden*" on the Claimant.[36]

The Tribunal dismissed the claim because[37] the Claimant (i) had admitted to bribery in obtaining the contract; (ii) bribery was a serious offence under Kenyan and English law; and (iii) bribery of public officials offended *ordre public international* and various international conventions.[38]

27 Award, paragraph 94.
28 Ibid, paragraph 105.
29 Ibid.
30 Ibid, paragraph 105.
31 Ibid, paragraph 109.
32 Award, paragraphs 111-112.
33 Ibid.
34 Ibid, paragraph 114.
35 Ibid, paragraph 185.
36 Ibid, paragraphs 113 and 176.
37 Ibid, paragraph 192 (1).
38 Award, paragraphs 143-147.

3. Issues Raised in the WDF Case

(a) Jurisdiction and Arbitrability

The ICSID Convention provides for determination, by conciliation or arbitration, of any "*legal dispute arising directly out of an investment*" between the contracting states and nationals of other contracting states.[39] The ICSID Convention does not define either legal disputes or investment, but ICSID panels generally construe the terms liberally.[40] Although these terms are construed liberally, ICSID jurisdiction is dependent on the existence of a conflict of rights, i.e. the existence or scope of a legal right or obligation, as opposed to a mere conflict of interests.[41] Accordingly, ICSID's jurisdiction does not extend to moral, political, economic, or commercial disputes.[42]

GoK raised many objections to the jurisdiction of the arbitral tribunal in the WDF case. First, having been struck off the Register of Companies before the institution of the arbitration proceedings, the Claimant was not only non-existent but could not also institute the proceedings.[43] Second, the Claimant was a stranger to the arbitration agreement.[44] Accordingly, there was no consent to arbitrate within the meaning of Article 25 of the ICSID Convention.[45] Thirdly, GoK submitted that the dispute did not arise under the contract.[46] The upshot of GoK's objection was that all the three facets of

39 See Article 25 of the ICSID Convention. See also Lowenfeld A.F, International Economic Law (2nd ed.) Oxford, New York: Oxford University Press, 2008). , at p. 537.
40 Moses M.L, The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2008) at p. 225 The drafters of the ICSID Convention chose not to define investment. See Tupman, M. W, Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes, 35 Int'l & Comp. L.Q. 813-838 (1986). at p. 816.
41 FEDAX N. V. versus The Republic of Venezuela 37 I. L.M. 1378 at 1381, paragraph 15.
42 Ibid.
43 Award, paragraph 98.
44 Ibid, paragraph 34.
45 Ibid. See also paragraph 75.
46 Ibid, paragraphs 34 and 82.

ICSID jurisdiction (i.e. *ratione personae*, *ratione materiae* and *ratione voluntatis*) were non-existent.

Although the Tribunal did not address the issue of jurisdiction, it is arguable that having been struck off the Register of Companies before instituting the arbitration proceedings, the Claimant did not exist in law.[47] Furthermore, the Claimant's court-appointed receiver, the only person who could lawfully have initiated the proceedings, disowned them.[48] Therefore, the registration of the request for arbitration in the WDF case suggests a possible administrative lapse. Rule 2 (2) of ICSID's Institution Rules provides, *among other things*, that a request for arbitration lodged by a juridical person shall be supported by documentation showing that the Claimant has taken all necessary steps to authorise the request. Rule 6 (2) (b) of ICSID's Institution Rules requires the Secretary-General to peruse a request for arbitration and refuse to register the request if he finds no jurisdiction. Since the Claimant was under receivership, ICSID's Secretariat ought to have perused the documents to determine whether the receiver had authorised or consented to the institution of the request for arbitration.

Back to the Claimant's legal existence, it is noteworthy that although Article 25 (2) (a) of the ICSID Convention requires natural claimants to be nationals of a contracting state on the date on which the parties consented to submit to conciliation or arbitration *"as well as on the date on which the request was registered,"* there is no similar requirement for Claimants who are juridical persons.[49] This might explain why the Tribunal was not overly concerned about the Claimant's legal existence when it filed the proceedings.

47 The Tribunal allowed the Claimant to apply to be reinstated to the Register of Companies. See inter alia paragraphs 95 and 101 of the Award.
48 The receiver wrote to the Tribunal requesting withdrawal of the proceedings. See inter alia paragraphs 20, 32, 94, 95, 98, 100 and 102 of the Award. The Directors, who had instituted the proceedings, were only permitted to act on behalf of the Claimant two years after institution of the proceedings.
49 Underlining and emphasis supplied. Article 25 (2) (a) of the ICSID Convention, however, was designed to oust natural persons with dual or multiple nationalities, or nationality of the host state. See Tupman, M. W. Op. Cit. at pp. 817 and 834.

Regarding *ratione voluntatis*, i.e., consent to arbitration, it was common ground that the Claimant was not a party to the contract at inception but rather acceded to it in 1990. GoK's objection went to whether a third party, successor in title or an assignee of a contract can claim the benefit of an arbitration clause contained in the contract. How, if at all, did the Claimant acquire any rights under the contract? The "amendment" of the contract to substitute the Claimant for *House of Perfume* did not, in our view, confer any rights on the Claimant.[50] One does not transfer contractual rights (and obligations) by amendment but by novation or assignment.[51] With novation, parties to a contract agree that a third party, who also agrees, shall stand in the relation of either of them to the other.[52] This tri-partite agreement extinguishes the old contract and establishes a new one between the third party and one of the parties to the original contract.[53] On the other hand, an assignment need not involve the consent of the three parties.[54] Unlike novation, the assignment does not extinguish the contract; it merely substitutes a third party for one of the parties.[55]

Since GoK sought to avoid the contract as originally signed, a prayer ultimately granted by the Tribunal, we may legitimately assume that the Claimant acquired the contract by assignment.[56] It seems the parties were unaware of the distinction between assignment and novation. The distinction is not academic. It can have significant practical consequences. If the Claimant had entered into the contract by novation, it would have been

50 For instances where jurisdiction was established notwithstanding that the Claimant was an assignee/successor in title rather than original signatory to the arbitration agreement, see *Holiday Inns versus Morocco and Amco versus Indonesia*, both discussed in Tupman, M. W. Op. Cit. at pp. 817-820 and 824-827.
51 Beale HG and Chitty J, *Chitty on Contracts.*, Vol 1 (30th Edition, Sweet & Maxwell 2010), paragraph 19-086.
52 Ibid.
53 Ibid, paragraph 19-088.
54 Ibid.
55 Ibid, paragraph 19-086.
56 See Award, paragraphs 52, 183, 188 and 192.

necessary to provide separate consideration for the transaction besides the consideration provided by the investor.[57]

However, the distinction between assignment and novation does not solve the jurisdictional issue of *ratione voluntatis* (i.e., consent to arbitrate). Whether viewed as novation or assignment, the "amendment" of the contract entailed a purported transfer of rights under an illegal contract—a logical impossibility. Furthermore, since the arbitration clause was legally a separate agreement from the contract, we cannot simply assume that it was also transferred through the 1990 "amendment." [58] Consequently, the jurisdictional requirement of consent in Article 25 (1) of the ICSID Convention was lacking.

We posit that the Claimant did not also establish the jurisdictional requirements of *ratione personae* and *ratione materiae*. As stated, having been de-registered before the institution of the proceedings, the Claimant was non-existent and hence could not have been a national of a contracting state under Article 25 of the ICSID Convention. Furthermore, the grievance that Mr Kamlesh Patni took over the Claimant was not backed by any evidence of complicity on the part of GoK. Indeed, the complaint only disclosed ownership battles (over the Claimant) between Messrs Nasir Ali and Kamlesh Patni. As GoK put it, the claim did not arise directly from an investment; it related exclusively to a dispute between two individuals.[59]

Arbitrability of Void, Illegal or Unenforceable Contracts

Questions often arise about the arbitrability of contracts tainted with illegality.[60] The concept of arbitrability goes to public policy limitations on

57 Beale HG and Chitty J. Op. Cit. at paragraph 19-088.

58 For a contrary view, see Holiday *Inns versus Morocco* (discussed in Tupman, M. W. Op. Cit. at pp. 817-820), where it was held that any party on whom rights and obligations under an agreement have devolved is entitled to the benefits and subject to the burdens of an arbitration clause contained in the agreement.

59 Award, paragraph 82.

60 Kreindler R. H Op. Cit. at pp. 1-2 and 7-8.

disputes capable of settlement by arbitration.[61] Generally, states regard disputes involving serious crimes (such as bribery) as unfit for settlement by arbitration.[62] However, the doctrine of arbitrability has limited applicability in foreign investment disputes.[63] The question of arbitrability of dispute arising from a foreign investment tainted by bribery or other serious crimes may arise either from the host state's domestic law or from principles of public international law.[64]

In the WDF case, admission of bribery went to the arbitrability of the dispute.[65] Article 41 of the ICSID Convention empowers a tribunal to judge its own competence/jurisdiction.[66] Since the contract was obtained by bribery, it was not arbitrable.[67] Although the Tribunal appreciated the relevance of corruption to the arbitrability of the contract, it held that "*no evidence was adduced*" to the effect that the bribe "*specifically*" procured the arbitration clause.[68] The Tribunal, invoking the separability doctrine, assumed that the parties' arbitration agreement remained subsisting, valid and effective.[69]

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61 Sornarajah M, *The Settlement of Foreign Investment Disputes* (Kluwer Law International 2000) at p. 178.

62 Ibid, at p. 174. Generally, family matters, patent regulation and issues of bankruptcy are not arbitrable in most states. See Moses, M. L. Op. Cit. at p. 68. See also Article 1 (5) of the UNCITRAL Model Law on International Commercial Arbitration, which recognizes the rights of states to decide the categories of disputes that may be submitted to arbitration.

63 Sornarajah, M. Op. Cit. at p. 179.

64 Ibid.

65 On situations when a foreign investment contract may not be arbitrable, see Sornarajah, M. Op. Cit. at pp. 180-185.

66 The doctrine of competence-competence gives arbitral tribunals a "residual" power to investigate their jurisdiction and, possibly, issue an award against jurisdiction. See Kreindler, R. H. Op. Cit. at p. 8.

67 See, for instance, ICSID Case No. ARB/03/26: *Inceysa Vallisoletana, S. L. versus Republic of El Salvador*, where it was held that there was no jurisdiction to arbitrate a contract obtained by fraud.

68 Award, paragraph 187.

69 Ibid.

Under the separability doctrine, the illegality of a contract does not necessarily invalidate an arbitration agreement/clause contained in the contract.[70] Therefore, an agreement to go to arbitration, contained in an arbitration clause to a contract, can be challenged "*only on grounds relating directly to that agreement."*[71] However, the separability doctrine can lead to logical and legal absurdity if taken too literally. If a contract is void, the logical/legal result is that there is no contract. A void contract is a bargain that, although containing all the indices of a standard contract, is in reality so defective as to be ineffectual in the eyes of the law.[72] Such a bargain, it is said, is empty from the outset, *void ab initio.*[73] Our view is that there cannot be a valid arbitration agreement regarding such a (non-existent) contract.[74] Be that as it may, the separability doctrine serves some functional, practical purposes. It precludes a party to an arbitration agreement, for instance, from avoiding arbitration by merely alleging that the underlying contract is invalid.[75]

Bribery & Applicable Law

What law ought to have been applied to the issue of bribery? Article 42 of the ICSID Convention requires arbitral tribunals to decide disputes under the law chosen by the parties. Absent such choice, tribunals are enjoined to apply the law of the state party to the dispute (including its conflict of law rules) and such rules of international law as may be applicable.

A textual reading of Article 42 suggests that ICSID tribunals cannot apply international law where the parties have chosen a particular national law as the applicable law. Assuming this is correct, it would follow that English law, as opposed to international law, applied to the issues raised in the WDF case—including bribery. The Tribunal, however, examined the validity and

70 Ibid.
71 Fili Shipping Co. Ltd & Others versus Premium Nafta Products Ltd & Others [2007] UKHL 40.
72 Award, paragraph 164.
73 Ibid.
74 *O'Callaghan versus Coral Racing Ltd* (unreported), The Times, 26/11/1998.
75 Kreindler, R. H. Op. Cit. at p. 7.

enforceability of the contract under international law.[76] Since the parties had chosen English law as the applicable law, it was erroneous for the Tribunal to apply international law. By using international conventions against corruption when it was not obliged to do so, the Tribunal arrogated the mandate of enforcing the conventions.[77]

So, what is the effect of bribery on a foreign investment contract? From the decision in the WDF case, where English law governs such a contract, it is voidable at the option of the innocent party.[78]

Responsibility for Bribery

According to the Claimant, HEDAM received the bribe as an agent of GoK.[79] On the other hand, GoK attributed the actions of Mr Ali, the bribe-giver, to the Claimant. GoK did not have to prove agency between Mr Ali and the Claimant since the latter had filed a witness statement saying that he had paid the bribe on behalf of the Claimant. Although the Claimant's agent was indisputably guilty of bribery, it was oppressive for the Tribunal to dismiss the claim. Where bribery is so endemic in a country that it is practically impossible to do business with that country without bribing its officials, it is oppressive to punish a foreign investor who has little choice in such circumstances.[80]

76 Award, paragraphs 129, 143, 146 and 157.

77 On why foreign investment arbitration may be unsuitable for cases touching on matters of general international concern, including bribery, see Sornarajah, M. Op. Cit. at pp. 184-187.

78 For a concise and superb summary on the distinctions between void and voidable contracts, see the opinion of Lord Mustill, excerpted at paragraph 164 of the Award.

79 The Tribunal correctly rejected this argument (Award, paragraph 185), because there is no principle in English law under which knowledge can be attributed to the state in respect of covert corrupt actions of its officers.

80 Award, paragraphs 130, 176 and 177. However, the Award is unimpeachable to the extent that the Tribunal merely gave effect to the law chosen by the parties.

Drafting and Pleading Competence

Two aspects of drafting and pleading arise in the WDF case. First, the Claimant introduced the issue of bribery.[81] The unnecessary introduction of this issue became fatal to the Claimant's case. Second, the WDF case shows the need for drafters of foreign investment contracts to consider that the host country's laws may be identical to English law or other laws commonly chosen as the applicable law in such contracts. Had the contract drafters checked, they might have discovered no difference between English and Kenyan law on contract.

Conclusion

The Tribunal in the WDF case ought to have dealt with or at least commented on the serious jurisdictional and other issues raised by the parties. Given the provisions of Article 42 of the ICSID Convention, it was unnecessary, if not objectionable, for the Tribunal to make an extensive foray into and apply international law. Despite the criticisms outlined in this article, the Award is a praiseworthy restatement of national and international law on bribery of foreign public officials. The award should encourage international investors to pursue their business goals within internationally accepted ethical standards. In this regard, it should be recalled that the Tribunal declined to consider the well-known fact that corruption was endemic within GoK at the time the bribery took place.[82]

81 Award, paragraphs 66, 68 and 184.
82 Award, paragraph 156.

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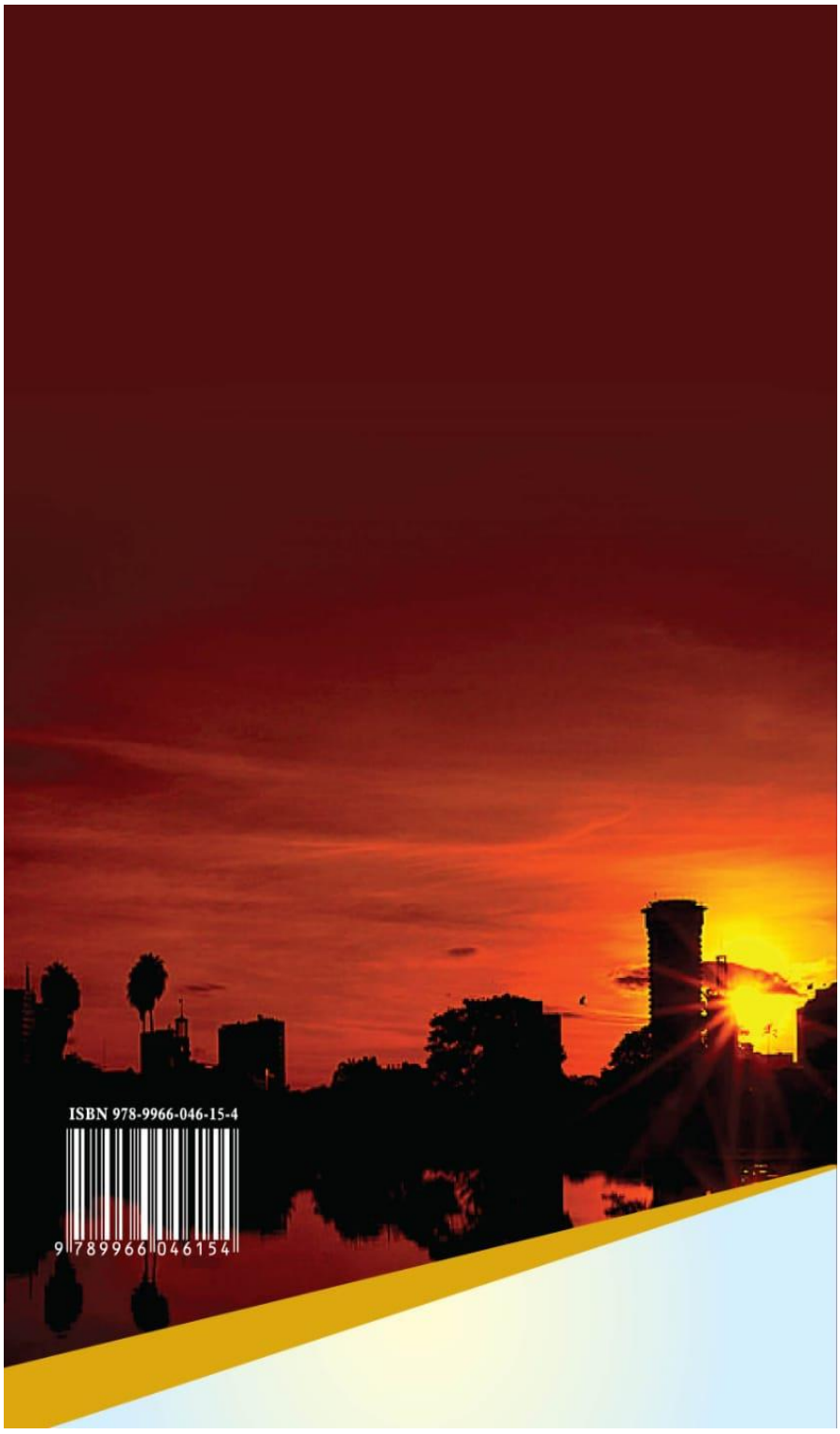
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