IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA, GHANA – A.D. 2021

CORAM: ACKAH-YENSU, J.A. (PRESIDING)
GAISIE, J.A.
BAFFOUR, J.A.

SUIT NO. H1/46/2021

DATE: 20TH JANUARY, 2022

IN THE MATTER OF AN APPLICATION UNDER THE INHERENT JURISDICTION OF THE COURT AND SECTION 59 OF THE ALTERNATIVE DISPUTE RESOLUTION ACT, 2010 (ACT 798) TO ENFORCE THE ARBITRAL AWARD OF THE FEDERATION OF COCOA COMMERCE (FCC)

A N D

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF ARBITRAL AWARD UNDER SECTION 59 OF THE ALTERNATIVE DISPUTE RESOLUTION ACT, 2010 (ACT 798)

BETWEEN

DUTCH AFRICAN TRADING COMPANY BV (DATC) - **APPLICANT/ APPELLANT**
DORPSSTRAAT 18
2841 BJ MOORDRECHT
THE NETHERLANDS

A N D

WEST AFRICAN-MILLS COMPANY LTD - **RESPONDENT/ RESPONDENT**
COCOA HOUSE
ACCRA.

JUDGMENT

AMMA A. GAISIE J.A:

This appeal is from a judgment of the High Court, Commercial Division dated 27th March 2020 which dismissed the Appellant's

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application to enforce a foreign arbitral award delivered by the Federation of Cocoa Commerce (FCC) Tribunal on the 4th and 7th of September, 2015 in London, the United Kingdom.

Background:

On 10th January 2020, the Applicant/Appellant (hereinafter 'the Appellant') filed an application on notice for leave to enforce an arbitral award of the Federation of Cocoa Commerce under the inherent jurisdiction of the court (pursuant to Sections 57 and 59 of the Alternative Dispute Resolution Act, 2020, (Act 798).

In the said application, Appellant states that it is a private limited liability company incorporated under the laws of Netherlands while the Respondent/Respondent is a limited liability company incorporated under the laws of Ghana.

The claim which was submitted to the FCC Tribunal was in relation to twelve (12) separate contracts between the parties for the supply of Ghana Cocoa Butter and Ghana Cocoa Liquor.

The Appellant alleges that a key clause in all the 12 contracts was that they were made subject to the FCC Rules of which both parties were conversant and Rule 1(1.3) of the FCC Rules provides that "**any dispute arising under a contract which incorporates the Contract Rules for Cocoa Beans shall be settled by FCC Arbitration in accordance with the FCC Arbitration and Appeal Rules.**"

The Appellant claims that all the 12 contracts signed by the parties made reference to the FCC Rules and that therefore the parties had

agreed that any dispute arising between them shall be referred to and determined by the Federation of Cocoa Commerce (FCC) Tribunal in London.

The Appellant claims that the Respondent breached the terms of all the twelve (12) contracts and therefore they submitted a claim to the FCC Tribunal claiming damages of £5,701,695.88 and €94,234.00.

On 3rd November 2014, the FCC Tribunal gave its award in favour of the Appellant. The Appellant claims further that the Respondent filed an appeal, against the award on 20th November 2014 to the FCC Board of Appeal and requested that the Board give two separate awards because contract numbers 1-11 dealt with disputes under the cocoa butter contracts while the twelfth contract dealt with cocoa liquor. On 4th September 2015 the FCC Board of Appeal issued Award No. AA 036A in favour of the Appellant with respect to the 11 contracts with regard to cocoa butter and on 7th September 2015, it gave its award No. AA 036B in favour of the Appellant with respect to the 12th contract.

The Appellant avers that the Respondent has failed to comply with the award hence his application to the High Court for the enforcement of the arbitral award.

Respondent's case:

In his affidavit in opposition filed on 30th January 2020 the Respondent contends that the application is an abuse of the processes of court as the Appellant had filed two similar applications in the High Court differently constituted in February 2016 and in

June 2019 and both applications had been dismissed. The Respondent avers that an appeal against the decision of the High Court dated 20th March 2018 was struck out by the Court of Appeal for non-compliance with Rules 11(4) and 12 of the Court of Appeal Rules and a subsequent application to have the appeal relisted was withdrawn by the Appellant.

The Respondent contended that there was no merit in the application as there was no arbitration agreement between the parties and the arbitration award the Appellant was seeking to enforce was contrary to the laws governing arbitration and alternative dispute resolution in Ghana.

Judgment:

On 27th March 2020, the High Court gave judgment in favour of the Respondent and refused the Appellant's application for enforcement of the arbitral awards, and set aside the awards. The learned trail Judge agreed with the conclusions of the two previous High Court Judges that there was no express provision or clause in the 12 contracts which made a reference to arbitration in the event of a dispute, and that there was no arbitration agreement between the parties.

Appeal:

The Appellant being aggrieved with this decision of the High Court filed an appeal against the decision on 14th April 2020. The grounds of appeal are as set out below:

i. **The judgment is against the weight of evidence.**

ii. **The trial judge erred in law and in fact when she ruled that there was no binding arbitration agreement between the parties.**

iii. **The trial judge erred in law and in fact when she ruled that the Respondent/Respondent was compelled to partake in the arbitral proceedings at the Federation of Cocoa Commercial Tribunal in the United Kingdom.**

iv. **The trial judge erred in law and fact when she set aside the arbitral award given by the Federation of Cocoa Commerce Tribunal in the United Kingdom in favour of the Applicant/Appellant on the 4th and 7th September 2015 respectively which was out of her mandate.**

v. **Further grounds of appeal to be filed upon receipt of the Record of Appeal.**

The relief sought from the Court of Appeal is "an order setting aside the Ruling of Her Ladyship Doreen Genevieve Boakye-Agyei (J) dated the 27th March, 2020 and granting Applicant/Appellant's application for leave to enforce arbitral award."

Consideration of the Appeal:

Grounds A & B:

The judgment is against the weight of evidence.

The trial judge erred in law and fact when she ruled that there was no binding arbitration agreement between the parties.

Appellant's arguments:

In arguing Ground A of the appeal the Appellant refers to several authorities – Boateng v. Boateng & Anor. [1987-88] 2 GLR 81, CA at

pages 81-82; Akufo-Addo v. Catheline [1992] 1 GLR 377 SC at pages 378-379; Djin v Musah Baako [2007-2008] 1 SCGLR 686 @ 691; and Tuakwa v. Bosom [2001-2002] SCGLR 61 and rightly submits that since an appeal is by way of re-hearing, the function of the appellate court is to consider comprehensively the entire evidence on the Record before arriving at its decision, especially where a ground of appeal is that the judgment is against the weight of the evidence. He submits further, relying on Tuakwa v Bosom (supra), that he would point out the various pieces of evidence on the record that supports his case. He then proceeds to consider the other grounds of appeal, without pointing out the pieces of evidence that supports his case, presumably with the omnibus ground of appeal in the background, hence our decision to deal with both grounds A and B of the appeal together, as did the Respondent, as they both dovetail into each other.

Under Ground B of the appeal, the Appellant refers to Section 59 of the Alternative Dispute Resolution Act 2020, Act 798 and the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 and submits that the award was made by a competent authority which had jurisdiction to issue the award based on the contracts signed by the parties – Exhibit JA2 series (page 44 of the Record). The Appellant refers to the two (2) awards issued by the FCC Board of Appeal in relation to the 12 contracts all of which he submitted to the High Court and argues that he fully complied with the requirements of the Arbitration Act and the New York Convention on the enforcement of the awards. He argues further that the signed contracts made reference to the FCC Rules to resolve any dispute that would arise between them and that the New York Convention

1958 deals with the obligations of contracting states to recognise and enforce arbitration agreements. Counsel for the Appellant contends that the 12 contracts made a general reference to the FCC Rules without specific mention of the arbitration clause and that in several arbitrations the Arbitral Tribunal held that there was an arbitration agreement by reference to the general conditions form or document. He refers to some international cases in support of what he calls the *relatio imperfecta* form of an arbitration agreement in which the arbitration agreement is incorporated by reference to another agreement, as opposed to *relatio perfecta* agreements where the arbitration clause is specified in the contract document:

- **Cassation Commercial, Dreistern Work v. Crouzier, 26 June 1990**
- **Cour de Cassation Case Number 91-15. 194 – Societe Bomar Oil N.V V Enterprise Tunisienn d'activités's Petrolières (ETAP) 9 November 1993.**
- **Cour de Cassation Case No. 13231 Del Medico v. Iberprotein 16 June 2011**
-

Counsel for the Appellant submits that the parties knew about the FCC Rules which were incorporated into the 12 contracts and that the learned trial judge erred in holding that there was no arbitration agreement. Furthermore there was no appeal pending in any Court by the Respondent.

Respondent's arguments:

Counsel for the Respondent disagrees that there was a binding arbitration agreement between the parties and therefore the awards

are not enforceable under the laws of Ghana. Counsel states that our courts have a duty to enforce the statutes of our land and refers us to the following cases in support.

- **Republic vrs High Court, Kumasi, Ex parte Khoury [1991] 2 GLR 393 at 399**
- **Republic vrs High Court (Fast Track Division) Ex parte National Lottery Authority [2000]**
- **Boyefio vrs NTHC Properties Ltd. [1996-1997] SCGLR 531.**

In the second edition, to their book "**ADR Principles and Practice," Henry J. Brown and Arthur L Marriott QC**. have stated the essential features of arbitrations as follows at page 52:

> **"The arbitral process is consensual in nature, for it rests on agreement between the parties. There can be no arbitration proper without an arbitration agreement and there can be no arbitration initiated by, or conducted against, a person who is not a party to the arbitration agreement."**

The arbitration agreement is therefore key to the arbitral process, without which there can be no arbitration, and an award obtained in the absence of an arbitration agreement would not be enforceable.

Section 59 of the Alternative Dispute Resolution Act, 2010, Act 798 deals with the enforcement of foreign arbitral awards and it states as follows:-

59(1) The High Court shall enforce a foreign arbitral award if it is satisfied that

(a) **The award was made by a competent authority under the laws of the country in which the award was made;**

(b) **A reciprocal arrangement exists between the Republic of Ghana and the country in which the award was made; or**

(c) **The award was made under the international convention specified in the First Schedule to this Act or under any other international convention on arbitration ratified by Parliament; and**

(d) **The party that seeks to enforce the award has produced**

(i) **The original award or has produced a copy of the award authenticated in the manner prescribed by the law of the country in which it was made;**

(ii) **The agreement pursuant to which the award was made or a copy of it duly authenticated in the manner prescribed by the law of the country in which it was made or in any other manner as may be sufficient according to the laws of the Republic of Ghana; and**

(e) **there is no appeal pending against the award in any court under the law applicable to the contract.**

We must also make mention of the New York Convention on the Enforcement of Foreign Arbitral Awards, 1958, (the New York Convention) which is incorporated into Act 798 as a schedule to the Act and also provides a mechanism for the enforcement of foreign arbitral awards for countries which have ratified the convention.

Article IV of the New York Convention states as follows:

(1) **To obtain the recognition and enforcement mentioned in the preceding articles, the party applying for the recognition and enforcement shall at the time of the application, supply;**

(a) **The duly authenticated original award or a duly certified copy thereof.**

(b) **The original arbitration agreement or a duly certified copy thereof.**

The learned trial judge refused the application to enforce the arbitral award as she did not find an express arbitration agreement in the 12 Contracts which is a pre-requisite for the enforcement of the award by the court. She states thus at page 237 of the Record:

"**I have read the 12 agreements which are the subject matter of this application and which have been annexed to the application and there is in them no express provision or**

clause making reference to arbitration in the event of dispute between the contracting parties."

The learned trial judge relied on Section 2 of Act 798 which states the form of arbitration agreement as follows:-

"**2.(1) Parties to a written agreement may provide that a dispute arising under the agreement shall be resolved by arbitration.**

(2) A provision to submit a dispute to arbitration may be in the form of an arbitration clause in the agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing and may be in the form provided in the Fifth schedule to this Act.

Relying on these provisions, the learned trial judge concluded that there was no express written arbitration clause in the 12 contracts. However, Section 2(4) expands further what amounts to an arbitration agreement in writing as follows:

(4) For the purpose of this Act an arbitration agreement is in writing

(a) If it is made by exchange of communications in writing including exchange of letters, telex, fax, e-mail or other means of communication which provide a record of the agreement; or

(b) there is an exchange of statement of claim and defence in which the existence of the agreement

is alleged by one party and not denied by the other."

From the above provisions, what is required as proof of an arbitration agreement is evidence that the parties have agreed to submit their disputes to arbitration. This evidence, according to our laws, should be in writing, may be incorporated in the contract itself or in a separate agreement, and may even be inferred from an exchange of communication in writing or in an exchange of pleadings where there is no denial of the existence of the arbitration agreement.

In their recently published book, **Alternative Dispute Resolution – A Ghanaian Perspective, at page 71**, the learned authors, **Sir Dennis Dominic Adjei and Mrs. Barbara Ackah-Yensu** both Justices of the Court of Appeal, state in response to the question "Can arbitration be agreed upon by reference" as follows:-

> "**The Model Law [i.e. The UNCITRAL Model Law] admits a third form equivalent to the written arbitration agreement: the reference in a contract to a document containing an arbitration clause, provided that the contract is in writing and the reference is such as to make that clause part of the contract. The provision does not require the existence of a specific reference to the arbitration clause**".

It is our opinion that the learned trial judge erred in holding that there was no arbitration agreement between the parties. There was an arbitration agreement by reference to the FCC Rules or by incorporation of the FCC Rules. The 12 contracts which were signed by both parties to the contract, except the one on cocoa liquor, were

all short form contracts of the Federation of Cocoa Commerce (page 40 of the Record). All the 12 contracts specify the conditions of the contract thus:

"**Conditions: The Federation of Commerce Ltd (FCC Rules).**"

The FCC Rules are the Contract Rules for Cocoa Beans (Applicable to contracts concluded on or after 01 March 2012) of the Federation of Cocoa Commerce Limited situate in the United Kingdom.

Article 1.2 of the FCC Rules deals with incorporation of the FCC Rules into contracts and states as follows:-

"**1.2 Incorporation of Rules**

(a) **Any contract incorporating these Contract Rules for Cocoa Beans shall also be deemed to incorporate the FCC Arbitration and Appeal Rules, the FCC Sampling Rules and the FCC weighing Rules (collectively, together with these Contract Rules for Cocoa Beans "the FCC Rules") which the parties declare they are familiar with and agree to, and shall form part of the contract". (Emphasis is ours).**

By incorporating the FCC Rules into the 12 contracts, the parties thereby incorporated all the rules specified in Article 1.2 above, as well as the FCC Arbitration and Appeal Rules into the 12 contracts".

Clause 1.3 of the FCC Rules states as follows:-

"**1.3 FCC Arbitration**

Any dispute arising under a contract which incorporates the Contract Rules for Cocoa Beans shall be settled by FCC Arbitration in accordance with the FCC Arbitration and Appeal Rules.

The seat of the arbitration proceedings is England and the laws of England and the provisions of the Arbitration Act 1996 or of any other statutory modification or re-enactment thereof shall be the applicable procedural law.

Arbitration and Appeal proceedings shall be conducted in the English Language on the basis of the English language versions of the FCC Rules, unless and always subject to Rule 1.2(1) the Parties have agreed and specified in the contract that proceedings are to be conducted in the French language on the basis of the French language versions of the FCC Rules".

This is the agreement to refer disputes to FCC Arbitration and these provisions have been incorporated into the 12 contracts signed by the parties at various dates. The FCC Rules have detailed provisions on all aspects of trading in commodities, specifically in cocoa beans and covers the quality of cocoa beans to be shipped, how to calculate the weight, delivery issues, declaration of shipment and risk, default and arbitration among other matters. These provisions are peculiar or specific to the commodities market of which cocoa beans form a part.

Both the Appellant and the Respondent are players in the commodities market for cocoa beans. They must have been conversant with the FCC Rules to have incorporated it in all 12 contracts. By incorporating the FCC Rules into their contract they agreed to submit to FCC arbitration in accordance with the FCC Arbitration and Appeal Rules.

The 12 Contracts are Short Form contracts under the FCC Rules.

Short Form Contract is defined in clause 2.29 of the FCC Rules as:

> **"... those terms expressly agreed between the parties including the Parties' agreement to incorporate applicable FCC Rules. The Short Form Contract for Cocoa Beans published by the FCC incorporates the FCC Rules as defined in the preamble to these Contract Rules for Cocoa Beans."**

The Short Form Contract can be found at page 40 of the Record and forms the basis or precedent for the 12 contracts signed by the Parties. It incorporates all the FCC Rules unless stipulated otherwise and forms the basis of the agreement between the Parties to submit to FCC arbitration.

The learned trial judge erred in holding that there was no express written arbitration agreement, there was an arbitration agreement by reference to the FCC Rules. Ground B of the Appeal is therefore upheld.

Ground C:

The trial judge erred in law and fact when she ruled that the Respondent/Respondent was compelled to partake in the arbitral proceedings at the Federation of Cocoa Commerce Tribunal in the United Kingdom.

Unlike adjudication in our courts, a party cannot be compelled to take part in an arbitration unless he is a party to the arbitration agreement. As a general rule, no party can be compelled to submit to an arbitration unless he is party to the arbitration agreement.

The learned trial judge stated that she could not find evidence in the Addendum to the Award of the parties agreeing on the choice of arbitration or the jurisdiction of the arbitration and that an arbitration cannot be imposed on a party. She stated at page 238 that "**it is up to the decision of the parties whether or not they want their conflicts to be resolved by arbitration and no party to a contract can be forced into arbitration if that party has not agreed to such procedures**". The learned trial judge concludes that "**a close examination of the processes filed and all attachments**" indicates that there was no express agreement to arbitrate and "**without a prior arbitration agreement, there cannot be a valid arbitration award**".

We have already indicated under Ground B of the award that there was a valid arbitration agreement by incorporation of the FCC Rules into the 12 contracts.

It is clear from the Awards that the Respondent had objected to the jurisdiction of the tribunal, but this was considered and overruled by the Tribunal as well as by the Appeals Board (see page 80 and 115 of the Record) where the FCC Tribunal and the FCC Appeals Board considered the objection and ruled that they had jurisdiction to deal with the arbitration.

Under the FCC Rules, clause 1.1 the law of the contract "**as to its formation and execution**" is stated to be English Law. The seat of arbitration pursuant to clause 1.3 of the FCC Rules is England and therefore the English Arbitration Act of 1996 is the applicable procedural law governing the contracts. Counsel for the Appellant therefore refers this Court to Section 30 of the English Arbitration Act, 1996 on the competence of a tribunal to rule on its own jurisdiction. Section 30 states as follows:-

"30. Competence of tribunal to rule on its own jurisdiction:

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to –

(a) **Whether there is a valid arbitration agreement.**

(b) **Whether the tribunal is properly constituted, and**

(c) **What matters have been submitted to arbitration in accordance with the arbitration agreement.**

(d) **Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part."**

There are similar provisions in Ghana's Act 798, Sections 24 and 25 thereof which state as follows:

"24. **Competence to rule on jurisdiction**:

Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction particularly in respect of

(a) **The existence scope or validity of the arbitration agreement**

(b) **The existence or validity of the agreement to which the arbitration agreement relates;**

(c) **Whether the matters submitted to arbitration are in accordance with the arbitration agreement**".

Therefore, under Act 798 an arbitral tribunal can rule on its own jurisdiction and this does not amount to compelling a party to take part in an arbitration.

Section 25 of Act 798 deals with objections to jurisdiction and states that

"(1) **A party that intends to object to the jurisdiction of an arbitration shall do so before taking the first step in the proceedings to contest the case on its merits.**

(2) **The appointment or the participation in the appointment of an arbitrator is not a bar to that party raising an objection on jurisdiction**".

It is evident from the records that the Respondent raised the issue of the jurisdiction of the FCC Tribunal and the FCC Board of Appeal which both ruled that they had jurisdiction to hear the dispute (page 112-113 of the Record).

The FCC Appeal Board concluded on the issue thus at page 102 of the Record:

> "**Lack of incorporation of FCC Rules**
>
> **The contract mentions under "conditions": The Federation of Commerce Ltd. (FCC Rules)" but the appellant contends that these words are insufficient to incorporate the FCC Arbitration and Appeal Rules. This wording used in the contracts, is clearly referring to the Federation of Cocoa Commerce and once the parties agreed to incorporate FCC Rules, they automatically have agreed to incorporate the FCC Arbitration and Appeal Rules. There is no need for the contracts to contain the form of arbitration clause set out in CP3 and CP4 short form contracts because**
>
> (a) **The use of Short Form contracts is not mandatory.**
>
> (b) **The Arbitration Act 1996 provides in Section 6(2) that the reference to a document containing an arbitration clause constitutes an arbitration agreement**".

Counsel for the Respondent disputes that the "**alleged contracts**" were validly closed between the parties and did not include any valid agreement or arbitration by FCC Rules. However, we find from the records, as did the tribunal, that eleven of the contracts were signed

by both parties which included the Managing Director of the Respondent. Furthermore, the FCC Rules states clearly that the contracts shall be subject to English Law and the Tribunal, at page 113 referred to Section 6.2 of the English Arbitration Act which states:

(2) **The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.**

The FCC Board of Appeal also relied on Section 5.2 (b) of the English Arbitration Act which states that:

"**There is an agreement in writing:**

(b) **If the agreement is made by exchange of communication in writing**".

There is clearly no evidence on the Record indicating that the Appellant was compelled to participate in the arbitral proceedings. We have found earlier in this judgment that there was an agreement to submit disputes under the contracts to FCC Arbitration. The Respondent raised an objection to the jurisdiction of the Tribunal which considered the objection and overruled it. The evidence on the Record also shows that the Respondent appealed against the first award and even requested that the FCC Appeals Board should give two separate awards, which the Appeals Board agreed to and in fact gave two separate awards. There is no evidence of being compelled to participate in the proceedings pursuant to an arbitration agreement

it has signed off. The learned trial judge erred in holding that the Respondent was compelled to participate in the arbitral proceedings. Ground C of the Appeal is also upheld.

Ground D.

The trial judge erred in law and fact when she set aside the arbitral award given by the Federation of Cocoa Commerce Tribunal in the United Kingdom in favour of the Applicant/Appellant on the 4th and 7th September 2015 respectively which is out of her mandate.

Counsel for the appellant contends that the learned trial judge exceeded her mandate when she set aside the arbitral award when the Respondent had not made any formal application to challenge the award or set it aside. Counsel argued that the trial court therefore had no jurisdiction to set aside the award. Counsel refers to Section 58 of Act 798 which sets out the procedure for setting aside an arbitral award which shall be by application made to the High Court.

It follows from our decision on grounds B and D of the appeal that the trial judge erred in setting aside the award because there was a valid arbitration agreement pursuant to which the FCC Tribunal and the FCC Appeal Board issued the arbitral award. Arguments under this ground of appeal are therefore moot Ground D of the appeal is also upheld.

Having gone through the entire Record of Appeal and the issues raised by the Appellant under grounds B, C and D of the Appeal we

also find that the judgment was against the weight of evidence and therefore uphold Ground A of the Appeal.

The entire appeal succeeds and the judgment of the High Court dated 27th March 2020 is hereby set aside.

To conclude, we find that there was an agreement to submit disputes under the 12 contracts to arbitration by incorporation of the FCC Rules into the contracts executed by the parties. We also find from the Record no evidence of the Appellant being compelled to submit to arbitration. The Appellant raised the issue of the jurisdiction of the Arbitral panel which dealt with the matter, having authority to do so under the FCC Rules and which was not contrary to Act 798 or the UN Convention on the Enforcement of Arbitral Awards as well as the English Arbitration Act which is the law of the seat of the arbitration.

The appeal is upheld and the judgment of the High Court dated 27th March 2020 is hereby set aside.

[SGD.]

AMMA A. GAISIE J.A.

(JUSTICE OF APPEAL)

[SGD.]

I agree

ERIC KYEI-BAFFOUR J.A.

(JUSTICE OF APPEAL)

CONCURRING JUDGMENT

B. ACKAH-YENSU, JA

INTRODUCTION

I have had the opportunity of reading, in draft, the lead judgment of my learned sister, Amma Gaisie, JA. While I am in agreement with her conclusion, I wish to express my own views on the intricate issues arising for determination in this appeal.

FACTS OF CASE

The background facts of this case have been comprehensively discussed in the lead judgment and so I shall not repeat it. As stated in the lead judgment. The Appellant filed an application in the High court for leave of the court to enforce an arbitral award. The application was dismissed for the reason that there was no agreement for the parties to submit any dispute to arbitration in the twelve (12) contracts signed by the parties. Dissatisfied with the judgment of the trial court, the Appellant appealed on a number of grounds already discussed in the lead judgment. In this delivery, I will limit myself to grounds (b) and (d) set out as follows: *"(b) the trial Judge erred in law and fact when she ruled that there was no binding arbitration agreement between the parties, and (d) the trial Judge erred in law and fact when she set aside the arbitral award given by the Federation of Cocoa Commerce Tribunal in the United Kingdom in favour of the Applicant/Appellant on the 4th and 7th September .... respectively which was out of her mandate.*

CONSIDERATION

I shall discuss the two grounds compositely.

In the judgment of the trial court, the learned trial Judge posited as follows:

> *"This position of the Respondent finds favour with the Court could not also find an express crafted agreement and this obviously cannot form the arbitration agreement. I have read the 12 agreements which are the subject matter of this application and which have bear annexed to the application and there is in them no express provision or clause making reference to arbitration in the event of dispute between the contracting parties. The requirement for arbitration agreement is so important that the law states again in Section 59(1)(d)(ii) that the party that seeks to enforce the award has to produce the arbitration agreement pursuant to which the award was made or a copy of it duly authenticated in the manner prescribed by the law of the country in which it was made or in any other manner as may be sufficient according to the laws of the Republic of Ghana. Indeed this is a mandatory requirement and it is essential, as when the arbitration agreement is produced to the Court it will afford the Court the opportunity to examine the content thereof and determination the circumstances under which the award was made. It will also enable the Court to determine whether the arbitrator had a substantive jurisdiction and/or was competent to make the award that it did. What was produced suffers from sufficiency of evidence as per Evidence Act of 1975, Act 323, Section 11".*

For purpose of clarity, I will reproduce one of the contracts between the parties which was virtually the same in terms of format, for all the 12 contracts. It is as follows:

"We confirm having bought from you:

Contract Number:	*05/07/FOB/Y12/500 WAMCO*
Origin:	*Ghana Cocoa butter*
Quality:	*Evpeller butter with ffa 5%, if above than compensation of 2% for each % FFA75 Max 12% FFA; filtered.*
Price/Ratio:	*0.52 times London Liffe September 2012*
Packing:	*25kg carton boxes with p.e. liner*
Destination:	*As per our instructions*
Shipment:	*FOB, July 2012 prompt*
Quantity:	*Circa 500ml in 20ft Container shipment*
Payment:	*Cash against documents*
Conditions:	*The Federation of Commerce Ltd. (FCC rules)*

Please return one copy of this contracts duly signed".

I will proceed by posing the question; what is an arbitration agreement? It's typically a clause in a broader contract in which parties agree to settle out of court through arbitration procedures, any dispute that arise between the parties. It may also be a separate agreement from the substantive contract between such parties.

Arbitration is therefore a creature of contract. As with every type of contract, it must satisfy a number of conditions in order to be valid.

Without a valid arbitration agreement, no arbitration can take place or award can be rendered. In other words, a valid arbitration agreement is the foundation of any arbitration proceedings.

The starting point in discussing the conditions any arbitration agreement must satisfy to pass the test of validity is the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1959 (the "NY Convention").** Under the NY Convention, the contracting states undertake to recognize an arbitration agreement when the following requirements are complied with:

a. The agreement is in writing
b. It deals with any existing or future disputes in connection with a defined legal relationship, whether contractual or not.
c. It concerns a matter capable of settlement by arbitration.
d. The parties to the arbitration agreement have legal capacity under law applicable to them.
e. The agreement is valid under the law which the parties have chosen and, if there is no such choice, under the law of the seat of the arbitration (in the terms of the NY Convention *"under the law of the country where the award was made"*).

Both the NY Convention and most arbitration laws, including Ghana's Alternative Dispute Resolution Act, 2010 (Act 798) establish as a formal requirement that the arbitration agreement be in writing. On the one hand, most of the domestic arbitration laws take a broad view of what constitutes a written document, accompanying telexes, emails and all other means of communication which generate a record.

As aforesaid, generally applicable principles of contract law also apply to arbitration agreements. Therefore, these agreements are subject to the substantive requirements for validity that are commonly applied to any type of contract. Firstly, any valid arbitration agreement must reflect the conscious, mutual and free will of the parties to resort to arbitration and not to other means of dispute resolution, including state courts. The consent of both parties to submit their dispute to arbitration is the cornerstone of arbitration. In addition, the infringement of other rules of contract law may also constitute a ground for the annulment of an arbitration agreement, such as in cases involving fraud, illegality, or lack of capacity, among others.

In her judgment, the learned trial Judge opined as follows:

> *"In the opinion of the court, the reference in the arbitration award that the parties have an arbitration agreement does not absolve the applicant from complying with the express provision of the statute to produce the said arbitration agreement to the High Court in an application to enforce a foreign award".*

Consequently, she concluded that:

> *"... the court is firmly of the view that the applicant has failed to satisfy the conditions precedent to the grant of leave to enforce a foreign arbitral award".*

Counsel for the Appellant deposed in the affidavit in support of the application for leave to enforce the arbitral award of the Federation of Cocoa Commerce (FCC) that the Parties herein signed 12 contracts

which made reference to the FCC rules and agreed that any dispute arising between them shall be referred to the FCC Tribunal in London, United Kingdom. He annexed copies of the said contracts and also the FCC Rules.

In contracts, it is quite a common practice to encounter schedules, annexes, appendices that are incorporated by reference to other documents, additional contracts and supplementary terms and conditions. Often this referenced material is essential to the form and consequences of a legal agreement. Terms and conditions which are not immediately visible would be effectively incorporated by reference into the relevant contract as long as reasonable steps are taken to bring existence of the terms and conditions to the notice of the party. See **Parker v South Eastern Railway Company [1877] 2 CPD 416**. Once the attention of the other party has been drawn to it, incorporation will take place if the latter proceeds in such a way that he is deemed to have accepted the terms; i.e. the party proceeds without raising any objections.

Incorporation by reference is defined in Black's Law Dictionary (8th Ed) as:

> *"A method of making a secondary document part of a primary document by including in the primary document a statement that secondary document should be treated as if it were contained within the primary one".*

Incorporation by reference is thus a familiar method of making alluded-to-documents part of a contract, and is often used to save

space when parties want to include or reference another legal document or contract into a new contract.

In my view it is clear that the term in the contracts in question, concluded as follows: "*Condition: The Federation of Commerce Ltd. (FCC rules)*", sufficiently indicates that the said contracts were subject to the FCC Rules.

This is what is provided under clause 1.3 of the FCC Rules:

> *"1.3 FCC ARBITRATION*
>
> *Any dispute arising under a contract which incorporations the Contract Rules for Cocoa Beans shall be settled by FCC arbitration in accordance with the FCC Arbitration and Appeal Rules.*
>
> *The seat of the arbitration proceedings is England and the laws of England and the provisions of the Arbitration Act 1996 or of any other statutory modification or re-enactment thereof shall be the applicable procedural law.*
>
> *Arbitration and Appeal proceedings shall be conducted in the English language on the basis of the English language versions of the FCC Rules, unless and always subject to Rule 1.2(b), the Parties have agreed and specified in the contract that proceedings are to be conducted in the French language on the basis of the French language versions of the FCC Rules".*

Paragraph 23 of the FCC Rules also reads as follows:

> *"ARBITRATION AND APPEAL*

Any dispute arising under the Contract Rules of Cocoa Beans must be referred to FCC Arbitration to be settled".

From the record, it is evident that the Respondent never objected to the terms of the said contracts including the clause that the contracts were made subject to the FCC rules. The contracts in question were obviously not the first to have been entered into between the Parties.

More importantly, the Respondent submitted to the jurisdiction of the FCC Tribunal and the Tribunal gave its award on the 3rd of November, 2014 upon satisfaction that both parties had been given adequate opportunity to state their case prior to the hearing (page 79 of ROA). Were it not so, why else would the Respondent make the following request:

> *"In this appeal, we would ask the Board to issue two awards, one dealing with the dispute under the butter contracts (1-11) and the other dealing with the dispute under the liquor contract (12) in accordance with its powers under section 47 of the Arbitration Act 1996 and/or Rule 8.15".* The Respondent's reasons for this request included that: *"... the appeal in relation to the cocoa liquor contract be the subject of a separate award because the cocoa liquor contract was made some 4 months after the cocoa butter contracts ...". (See page 120 of ROA).*

From the record, the FCC Board of Appeal agreed to give separate awards in relation to the contracts (pages 88 and 120 of ROA).

It must be emphasized that, International arbitrations may be either "*institutional*" or "*ad hoc*". There are significant differences both

Institutional arbitrations are conducted pursuant to institutional arbitration rules, which have been incorporated by the parties' arbitration agreement, and in practice are almost always overseen by an appointing authority with responsibility for constituting the arbitral tribunal, fixing the arbitrator's compensation and similar matters. In contrast, *ad hoc* arbitrations are conducted without the benefit of an approving authority or pre-existing arbitration rules, subject only to the parties' arbitration agreement and applicable national arbitration legislation.

In the international context, arbitration clauses are presumptively *"separable"* or *"severable"* from the contract within which they are found. The *"separability presumption"* is provided for by legislation or judicial decisions in virtually all jurisdictions, and by leading institutional arbitration rules. In Ghana, it can be found in section 3(1) of the ADR Act, 2010 (Act 798).

The separability presumption provides that an arbitration agreement, even though included in and related closely to an underlying commercial contract, is presumptively a separate and autonomous agreement. The rationale for the separability presumption is that the parties' agreement to arbitration consists of promises that are independent from the underlying contract; *"the mutual promises to arbitrate (generally) form the quid pro quo of one another and constitute a separable and enforceable part of the agreement"*. See **Robert Lawrence Co. v Devonshire Fabrics Inc. 271 F.2d 402, 409 (2d Cir. 1959)**. The presumption is also supported by practical

justification, including insulating the arbitration agreement and arbitrators jurisdiction from challenges to the underlying contract.

A basic issue affecting the enforceability of international arbitration agreements is the allocation of authority between arbitrators and national courts to decide disputes over the interpretation, validity and enforceability of arbitration agreements, including the *"Competence-Competence"* doctrine. This doctrine is almost universally accepted in international arbitration legislation, judicial decisions and other authorities. Under this doctrine, an arbitral tribunal presumptively possesses jurisdiction to consider and decide on its own jurisdiction. Arbitration legislation in many states specifically provide for the arbitrators' competence-competence. Article 16 of the UNCITRAL Model Law is entitled *"Competence of arbitration tribunal to rule on its jurisdiction"* and grants arbitrators competence to consider challenges to their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. See **Fiona Trust & Holding Corp v Privcelov [2007] 1 All ER (Comm) 891 (English Ct. App.).**

In practice, the competence-competence doctrine means that if its jurisdiction is, it lacks challenged (e.g. because the arbitration agreement is non-existent, invalid or terminated), the tribunal presumptively has the authority to consider and rule upon the jurisdictional challenge, subject to at least a measure of subsequent judicial review of the arbitrators decision. Clearly therefore, the FCC Board of Appeal did no wrong. The FCC Board of Appeal as an arbitration institution took on the role of administering the arbitration process, applying its own set of rules which provided the

framework for the arbitration between the Parties herein by the FCC Tribunal sitting in London. By virtue of the doctrine of Competence-Competence, it was authorized to decide on its own competence once the tribunal was constituted.

The recognition and enforcement of arbitration awards are of paramount importance for the success of international arbitration. This is well evidenced by the fact that the enforceability of awards is considered as one of arbitration's primary advantages internationally. Unless parties can be sure that at the end of arbitration proceedings, they will be able to enforce the award, and that the award will not be a phynic victory.

The New York Convention, (supra) empowers a signatory country to enforce an arbitration award granted in another signatory state as though it were a court judgment of the first signatory state. Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the New York Convention seeks to provide a common legislative standard for recognizing arbitration agreement and Court recognition of enforcement of foreign and non-domestic arbitration awards. The Convention's principal aim is that the foreign and non-domestic arbitral awards will not be discriminated against. It obliges parties to ensure that such awards are recognized and are generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of parties' jurisdiction to give full effect to an arbitration agreement by requiring the courts to deny parties access to court in contravention to their agreement to refer matters to arbitration.

It is significant to note that Ghana is a signatory to the New York Convention. As a signatory state, Ghana has the legal obligation to ensure the seamless enforcement of foreign and non-domestic arbitral awards within its jurisdiction. The Convention has been incorporated wholesale into Ghana's ADR Act. Section 59(1) of the ADR Act clothes the Courts with jurisdiction for enforcing foreign awards and the conditions precedent that ought to be established by an applicant for the enforcement of an award.

Section 59(1) of the ADR Act provides as follows:

"(1) The High Court shall enforce a foreign arbitral award if it is satisfied that

(a) The award was made by a competent authority under the laws of the country in which the award was made;

(b) A reciprocal arrangement exists between the Republic of Ghana and the country in which the award was made; or

(c) The award was made under the international convention specified in the First Schedule to the Act or under any other international convention on arbitration ratified by Parliament, and

(d) The party that seeks to enforce the award has produced

(i) The original award or has produced a copy of the award authenticated in the manner prescribed by the law of the country in which it was made.

(ii) The agreement pursuant to which the award was made or a copy of it duly authenticated in the manner prescribed by the law of the country in

which it was made or in any other manner as may be sufficient according to the laws applicable to the arbitration.

(e) There is no appeal pending against the award in any court under the law applicable to the arbitration".

Therefore, the High Court is the court of first instance with the jurisdiction under the Ghanaian law to enforce foreign arbitral awards in Ghana. A party seeking to enforce a foreign arbitral award in Ghana must therefore demonstrate before a High Court that the conditions precedent as required under section 59(1) of the ADR Act have been met. Notwithstanding the ground rules as spelt out under section 59(1), a losing party to an enforcement proceedings has within the limited grounds provided under section 59 (2) the right to challenge the enforcement of the award in Ghana. The grounds under section 59(2) directly reflects the grounds for impeaching an award under Article V of the New York Convention. Section 59(3) provides as follows:

"(3) Despite subsection (1) the court shall not enforce a foreign award if

(a) The award has been annulled in the country in which it was made;

(b) The party against whom the award is invoked was not given sufficient notice to enable the party present the party's case;

(c) A party, lacking legal capacity, was not properly represented;

(d) The award does not deal with the issues submitted to arbitration; or

(e) The award contains a decision beyond the scope of the matter submitted for arbitration".

Where any of the above grounds can be raised and successfully argued, the courts can set the arbitral award aside. However, when none of the above grounds exists, the courts should grant leave to enforce the foreign arbitral award as if it was a judgment of the court.

From the evidence on record, the appellant satisfied section 59 of the ADR Act. Based on an appeal against the award by the Respondent on the basis that the FCC Tribunal had to issue two (2) separate awards in respect of the eleven (11) of the contracts between the parties and one (1) in respect of the contract for cocoa liquer. The Appellant further satisfied the condition that there was no pending appeal by the Respondent and that the appeal filed by the Respondent had been dismissed.

There is nothing on the record to indicate that the Respondent had any application before the trial court to challenge the award or for it to be set aside. Consequently, the trial court had no business setting aside the arbitral awards. The trial Judge therefore exceeded her mandate when she set aside the arbitral awards and thus making her order void, and I accordingly order the said order to be set aside. See **Mosi v Bagyina [1963] 1 GKR 337**.

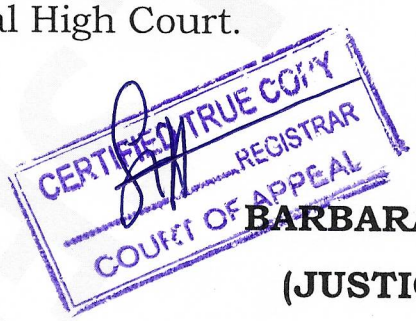
I will rest my report with this quotation from the case of **Klimatechnik Engineering Limited v Skanska Jensen International [2005-2006] SCGLR 913** as follows:

"The finality rule must be made to bite. In so far as the award is not tainted, and the procedural and natural justice rules had been observed, the parties should be prepared to accept the

decision of an arbitral tribunal even if they have reason to believe a court or some other tribunal would have adjudged matters differently ..... Thus in the absence of any clear evidence of impropriety on the part of the arbitrators or umpire, if our courts would routinely review and overturn, on the law and the merits, awards which were given within jurisdiction and were not improperly procured, and in respect of which the procedural or natural justice rules were never breached, the speed and above all, the finality of the arbitral process would be greatly undermined and jeopardized. The courts have a duty to support and give validity to arbitral awards properly procured ..."

CONCLUSION

For all the reasons set forth, I will also allow the appeal and set aside the judgment of the trial High Court.



[SGD.]

BARBARA ACKAH-YENSU J.A

(JUSTICE OF APPEAL)

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