IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2024

CORAM: OWUSU (MS.) JSC (PRESIDING)

LOVELACE-JOHNSON (MS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

KULENDI JSC

KOOMSON JSC

CIVIL APPEAL

NO. J4/29/2023

28TH FEBRUARY, 2024

IN THE MATTER OF THE ALTERNATIVE DISPUTE RESOLUTION ACT, 2010 (ACT 798)

AND

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 ARBITRAL AWARD OF THE FEDERATION OF COCOA COMMERCE (FCC)

AND

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

BETWEEN

DUTCH AFRICAN TRADING COMPANY BV (DATC) …. APPLICANT/APPELLANT/ RESPONDENT

VRS

WEST AFRICAN MILLS COMPANY LIMITED ….. RESPONDENT/RESPONDENT/ APPELLANT

JUDGMENT

KOOMSON JSC:

INTRODUCTION:

The Applicant/Appellant/Respondent (hereinafter referred to as 'Respondent') on 10th January, 2022 filed an application for leave of the High Court to enforce an arbitral award of the Federation of Cocoa Commerce, London dated 7th September, 2015. The Respondent/Respondent/Appellant (hereinafter referred to as 'Appellant') filed an Affidavit in Opposition to the Respondent's application on 30th January, 2023.

FACTS OF THE CASE

In the Respondent's Affidavit in Support, it states that the Respondent commenced arbitration proceedings against the Appellant by a claim submitted on 15th January, 2014. The arbitration was before the Federation of Cocoa Commerce (FCC) tribunal in London, UK in relation to twelve (12) contracts between the parties. Respondent states that all twelve (12) contracts were subject to the FCC Rules. The contracts made reference to FCC Rules and agreed that any dispute arising between the parties shall be referred for determination by the FCC Tribunal, London.

The Respondent states that the Appellant breached the contracts and having agreed to submit to arbitration, the Respondent submitted and claimed damages of £5,701,695.88 and €94,234.00 before the FCC Tribunal. The Tribunal gave its award on 3rd November, 2014 in favour of the Respondent for the sums of £2,720,822.90 and €43,359.00 plus interest at Libor plus 2% with the date of default being 3rd January, 2014. The Appellant who was dissatisfied with the award filed an appeal against it on 20th November, 2014.

The Appellant states that the Respondent had earlier filed similar applications in February 2016 and June 2019 before the High Court, Commercial Division (differently constituted) which were all dismissed by the Court. The Appellant further stated that Respondent pursued an appeal in respect of the second ruling at the Court of Appeal but abandoned same because the Respondent found no merit in the appeal. The appeal was struck out for non – compliance with CI 19 and the Respondent brought an application to re-instate the appeal which was subsequently withdrawn.

For the Appellant, there was no arbitration contract between the parties and the arbitration award that the Respondent is seeking to enforce is contrary to the governing Alternative Dispute Resolution Act 2010 (Act 798). On the basis of the foregoing, the Appellant asserted that the application had no merit and same was misconceived and ought to be dismissed with punitive costs.

The High Court dismissed the application for leave to enforce the arbitral award causing the Respondent to appeal to the Court of Appeal.

JUDGMENT OF THE COURT OF APPEAL

In the view of the Court of Appeal, there was an agreement between the parties to submit their dispute to arbitration for resolution. Gaisie J.A, giving the lead judgment held as follows:

> ***"It is our view 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… 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…".***

The Court further held that the right of an arbitral tribunal to rule on its own jurisdiction does not amount to compelling a party to take part in an arbitration. There was no evidence on the Record indicating that the Appellant was compelled to participate in the arbitral proceedings.

APPEAL TO SUPREME COURT

The Appellant appeals to this Court on the following grounds:

i. That the finding by the Court of Appeal that there was a binding arbitration agreement between the parties is contrary to the evidence.
ii. The application submitted to the High Court for leave of the Court did not meet the threshold required for the enforcement of Foreign Arbitral Award in Ghana.
iii. The Court of Appeal failed to consider the effect of the following statutes in their judgment.
    - Section 59(1)(b) of the Alternative Dispute Resolution Act, 2010 (Act 798) which requires existence of reciprocal arrangement between Ghana and the country of the arbitral award.
    - Arbitration (Foreign Award Instrument), 1963 (LI 261), which requires reciprocity of enforcement of arbitral awards between Ghana and the United Kingdom
    - Section 59(1)(d)(ii) of the Alternative Dispute Resolution Act, 2010 (Act 798) which requires production of authenticated copy of the arbitration agreement).

PRINCIPLE APPLICABLE TO APPEALS

It is established that appeals are by way of rehearing i.e. the appellate court steps into the shoes of the court of first instance and evaluates the cases of the parties together with the evidence adduced. In the case of **Mensah (Dec'd); Mensah & Sey v. International Bank (Gh.) Ltd. [2010] S.C.G.L.R. 118 at 132-133**, this Court held as follows:

> ***"It is necessary to point out that an appeal is by way of rehearing and as explained by Osei Hwere J. (as he then was) in Nkrumah v. Ataa [1972] 2 G.L.R. at page 18, whenever an appeal is said to be (by way of rehearing) it means no more than that, the appellate court is in the same position as if the rehearing were the original hearing and hence may receive evidence in***

addition to that before the court below and it may review the whole case and not merely the point as to which the appeal is brought"

Adinyira JSC in the case of **Nana Kow Mensah King vs. Opanin Kweku Kyikyibu Gyan (Civil Appeal No. J4/5/2015 delivered on 22nd July, 2015)** held as follows:

"There is a host of jurisprudence on point that an appeal at whatever stage is by way of rehearing as every appellate court has a duty to examine the record of proceeding by scrutinizing pieces of evidence on record and ascertain whether the decision is supported by the evidence. In that respect the appellate court can draw its own inferences from the established facts and in arriving at its judgment, the appellate court can affirm the judgment for different reasons or vary it."

GROUND I

The finding by the Court of Appeal that there was a binding arbitration agreement between the parties is contrary to the evidence.

It is trite that submission to arbitration is based on the mutual consent of the parties pursuant to an agreement to that effect. The decision for a dispute to be resolved by arbitration is not unilateral and by established practice, standards and law, arbitration is not coerced because there must always be an underlying agreement between the parties.

Learned Counsel for the Appellant argues that the authenticated copies of the alleged agreement between the parties do not contain any arbitration clause or reference to any arbitration proceedings. He further argues that if an external document is required before the determination can be made, then it is doubtful whether the content of that document was within the contemplation of the parties at the time they executed the agreement. Since the authenticated contracts themselves do not disclose intention to resort to arbitration in the event of disputes, it is far-fetched to import the content of another outside document to be able to determine if parties agreed on arbitration to settle their disputes. Counsel

concludes on this ground by arguing that, the trial court aptly applied the requisite law when it held that the awards were not enforceable in Ghana because there was no binding arbitration agreement and for a contract to be referred to as arbitration for resolution, there should be express provision in the contract to that effect.

For Counsel for the Respondent, the parties incorporated the FCC Rules into the 12 contracts by express reference. A true and proper interpretation and enforcement of the twelve (12) contracts between the parties as argued by Counsel for the Respondent, must be read together with the referenced and duly incorporated FCC Rules. Reading the 12 contracts together with the duly incorporated FCC Rules leads to only one conclusion that the parties contracted to refer all their disputes to arbitration under the FCC Rules, which they did, leading to the awards the Respondent now seeks to enforce with the leave of the Court.

This ground of appeal invites this Court to ascertain the existence or otherwise of an arbitration agreement between the parties. A scrutiny of the contracts before the Court shows that there is no express arbitration clause on the face of the contracts. The absence of this clause is the basis for the Appellant's invitation to this Court to hold that there was no arbitration agreement between the parties.

Article II of the CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 1958 (NEW YORK CONVENTION) requires that an agreement to submit to arbitration must be in writing. Article II states as follows:

> ***"1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.***

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

A careful reading of the provision shows that it is silent on incorporation by reference of an arbitration clause.

A foreign arbitral award cannot be enforced in Ghana unless the Court establishes that there exists an arbitration agreement between the parties. Section 2 of the Alternative Dispute Resolution Act, 2010 (ACT 798) indicates the form in which arbitration agreement must be:

"Form of arbitration agreement

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.

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

(a) 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."

The conditions of the contract agreed to and executed by the parties is the FCC Rules. Specifically, it is stated in the contract as follows:

"conditions: The Federation of Commerce Ltd (FCC Rules)"

The Respondent argues that the contracts ought to be interpreted as having regard to the FCC Rules to enable this Court arrive at the conclusion that disputes were to be resolved by arbitration. In its view, by the execution of the contracts, the parties have incorporated the FCC Rules as part of the contracts. Therefore, if there is a dispute, the procedure provided for resolution of dispute under the FCC Rules automatically become applicable.

The Federation of Cocoa Commerce (FCC) per its official website ***(https://cocoafederation.com/fcc/about/about-the-fcc)*** has its roots dating back to 1929 when the Cocoa Association of London (CAL) was established to serve the growing trade in physical cocoa. The Federation of Cocoa Commerce Ltd is registered in England and Wales.

In our view, section 2 of Act 798 does not provide an exhaustive list of how an arbitration agreement can be concluded by the Court as being in writing. Determining the incorporation of an arbitration clause by reference is a matter of construction of the contract. We do not subscribe to the argument by the Appellant that an arbitration agreement must be express on the face of a contract before it can be binding or be deemed to be in writing. Under appropriate circumstances, where the arbitration clause is contained in a document and the document is made part of the contract, then the parties would still be deemed to have agreed on the arbitration clause.

Anin J.A. in the case of **The Republic vs. Special Tribunal Exparte Akosah [1980] GLR 592-608** on incorporation by reference said: ***"When a document is declared to be incorporated by reference in another document, it means that one document shall be taken as part of another document in which the declaration is made just as if it were set out at length therein."***

Lord Esher M.R. in **In re Wood's Estate (1886) 31 Ch.D. 607 at pp. 615-616** also said*:* ***"If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into***

the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes, therefore, those sections of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855."

It is observed then that, incorporation is not limited only to instances of an express mention of same on the face of the document. If an Agreement is made subject to standard form rules or standard form rules is made a condition in the contract, then depending on the circumstances of the case, the Court can conclude that there has been an incorporation by reference of the standard form rules.

Incorporation of an arbitration clause by reference in a contract is not novel and this has received judicial pronouncement in some jurisdictions like the UK and India. The Supreme Court in India, in the cases of **Inox Wind Ltd vs. Thermocables Ltd (2018) 2SCC 519** and **M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited, (2009) 7 SCC 696** considered incorporation of arbitration clauses by reference.

In the **M.R. Engineers case**, the Indian Supreme Court recognised that: ***"There is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the contract. In the second case, the parties intend to incorporate the referred document in entirety, into the contract. Therefore, when there is a reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intention of adopting or borrowing specific portions of the said document for application to the contract.***

The Court continued as follows:

> ***"We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive). If a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. If the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract.***
>
> ***On the other hand, where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract. For example, if a contract provides that the specifications of the supplies will be as provided in an earlier contract or another purchase order, then it will be necessary to look to that document only for the limited purpose of ascertainment of specifications of the goods to be supplied. The referred document cannot be looked into for any other purpose, say price or payment of price. Similarly, if a contract between X and Y provides that the terms of payment to Y will be as in the contract between X and Z, then only the terms of payment from the contract between X and Z, will be read as part of the contract between X and Y. The other terms, say relating to quantity or delivery cannot be looked into.***

Sub-section (5) of Section 7 merely reiterates these well-settled principles of construction of contracts. It makes it clear that where there is a reference to a document in a contract, and the reference shows that the document was not intended to be incorporated in entirety, then the reference will not make the arbitration clause in the document, a part of the contract, unless there is a special reference to the arbitration clause so as to make it applicable."

The Court relied on **Russell on Arbitration 23rd Edition (2007)** with particular reference to pages 52 – 55 of the Book and quoted relevant portions as follows:

"Reference to another document. The terms of a contract may have to be ascertained by reference to more than one document. Ascertaining which documents constitute the contractual documents and in what, if any, order of priority they should be read is a problem encountered in many commercial transactions, particularly those involving shipping and construction. This issue has to be determined by applying the usual principles of construction and attempting to infer the parties' intentions by means of an objective assessment of the evidence. This may make questions of incorporation irrelevant, if for example it is clear that the contractual documents in question are entirely separate and no intention to incorporate the terms of one in the other can be established. However, the contractual document defining and imposing the performance obligations may be found to incorporate another document which contains an arbitration agreement. If there is a dispute about the performance obligations, that dispute may need to be decided according to the arbitration provisions of that other document. This very commonly occurs when the principal contractual document refers to standard form terms containing an arbitration agreement. However, the standard form wording may not be apt for the contract in which the parties seek to incorporate it, or the reference may be to another contract between parties at least one of

whom is different. In these circumstances it may be possible to argue that the purported incorporation of the arbitration agreement is ineffective. The draftsmen of the Arbitration Act, 1996 were asked to provide specific guidance on the issue, but they preferred to leave it to the court to decide whether there had been a valid incorporation by reference. (Para 2.044)

"Reference to standard form terms. If the document sought to be incorporated is a standard form set of terms and conditions the courts are more likely to accept that general words of incorporation will suffice. This is because the parties can be expected to be more familiar with those standard terms including the arbitration clause. (Para 2.048)

"The current position therefore seems to be that if the arbitration agreement is incorporated from a standard form a general reference to those terms is sufficient, but at least in the case of reference to a non-standard form contract in the context of construction and reinsurance contracts and bills of lading a specific reference to the arbitration agreement is necessary."

In **the M.R. Engineers case**, the court favoured a specific reference for incorporation of an arbitration clause and was of the view that a general reference to a document would not be sufficient to include an arbitration clause. An exception was however created for standard forms for trade associations and professional institutions. The Court held that:

"A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the requirement of special reference is where the referred document is not another contract, but a Standard form of terms and conditions of a Trade Associations or

Regulatory institutions which publish or circulate such standard terms & conditions for the benefit of the members or others who want to adopt the same. The standard forms of terms and conditions of Trade Associations and Regulatory Institutions are crafted and chiselled by experience gained from trade practices and conventions, frequent areas of conflicts and differences, and dispute resolutions in the particular trade. They are also well known in trade circles and parties using such formats are usually well versed with the contents thereof including the arbitration clause therein. Therefore, even a general reference to such standard terms, without special reference to the arbitration clause therein, is sufficient to incorporate the arbitration clause into the contract."

In the **Inox Wind case**, The Appellant being a manufacturer of wind turbine generators (WTGs) issued two purchase orders to the Respondent for the supply of cables for the WTGs. The Respondent was engaged in the business of manufacture of wind power cables and other types of cables. By the purchase order, the supply was to be according to the terms and conditions in the Order and the Standard Terms and conditions of the Appellant which included a dispute resolution clause for arbitration. The Respondent accepted all terms and conditions mentioned in the Purchase Order except the delivery period. The Respondent, pursuant to the Purchase Order, supplied wind power cables to the Appellant. While laying the cables supplied by the Respondent-company, the Appellant discovered that the outer sheaths of the cables of 150 sq. mm. were cracked. This forced them to stop the WTGs so as to avert damage to expensive equipment. According to the Appellant, the Respondent-company did not replace the cables. The Appellant, therefore, was constrained to issue a notice dated 30.10.2014 proposing the name of a sole arbitrator in terms of the Standard Terms and Conditions. The decision to refer the matter for arbitration was disputed by the Respondent arguing that there was no agreement on an arbitration clause.

The India Supreme Court allowing the appeal held that:

"In view of the development of law after the judgment in M.R. Engineers'

case, we are of the opinion that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause. In other words, general reference to a standard form of contract of one party will be enough for incorporation of arbitration clause. A perusal of the passage from Russell on Arbitration 24th Edition (2015) would demonstrate the change in position of law pertaining to incorporation when read in conjunction with the earlier edition relied upon by this Court in M.R. Engineers' case. We are in agreement with the judgment in M.R. Engineer's case with a modification that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause.

In the present case, the purchase order was issued by the Appellant in which it was categorically mentioned that the supply would be as per the terms mentioned therein and in the attached standard terms and conditions. The Respondent by his letter dated 15.12.2012 confirmed its acceptance of the terms and conditions mentioned in the purchase order except delivery period. The dispute arose after the delivery of the goods. No doubt, there is nothing forthcoming from the pleadings or the submissions made by the parties that the standard form attached to the purchase order is of a trade association or a professional body. However, the Respondent was aware of the standard terms and conditions which were attached to the purchase order. The purchase order is a single contract and general reference to the standard form even if it is not by a trade association or a professional body is sufficient for incorporation of the arbitration clause."

In the English case of **Aughton Ltd. v. M.F. Kent Services Ltd. [1991] (57) BLR 1 ("Aughton"),** the Court of Appeal held that a general reference to a contract would be insufficient to incorporate any arbitration clause, unless sufficient cause existed to suggest

to the contrary, and a special reference was therefore, necessary. See also the English cases of **Anonymous Greek Co. of General Insurances (The "Ethniki") v. AIG Europe (UK) [2002 (2) All ER 566] and Trygg Hansa Insurance Co. Ltd. v Equitas Ltd. [1998 (2) Lloyds' Rep.439)**.

In **Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL [2010] EWHC 29 (Comm),** the Queen's Bench presided by Mr. Justice Christopher Clarke recognised the categories (single contract case and two contract cases) of incorporation of an arbitration clause by reference to another document. The contract that was in dispute did not specifically state an arbitration clause. There were specific terms of the contract on headings such as "material, quality, price etc." and the contract ended on a general clause as ***"All the rest will be the same as our previous contracts".*** Some of the previous contracts had provided for an arbitration of disputes in London.

Single contract case instances include incorporation of the standard terms and conditions of one of the parties attached to an offer letter or standard terms of an industry. It also includes reference to previous contracts executed between the same parties. Two contract instances are where reference is made to a contract between one of the parties and some other party or a contract between entirely different parties.

Clarke J was of the view that in single contract cases, general reference suffices as the parties are deemed or supposed to have knowledge of the standard terms if they include an arbitration clause. After a review of previously decided cases on the subject, he held as follows:

> ***"Like Langley J, however, I do not accept that, in a single contract case, the independent nature of the arbitration clause should determine whether it is to be incorporated. A commercial lawyer would probably understand that an arbitration clause is a separate contract collateral to another substantive contract and that the expression "arbitration clause" is, on that account, something of a misnomer for "the arbitration contract which is ancillary to***

the primary contract". But a businessman would have no difficulty in regarding the arbitration clause (as he would call it) as part of a contract and as capable of incorporation, by appropriate wording, as any other term of such a contract; and it is, as it seems to me to a businessman's understanding that the court should be disposed to give effect. A businessman who had agreed with his counterparty a contract with 10 specific terms under various headings and then agreed with the same counterparty terms 1-5 under the same headings as before and, as to the rest, that all the terms of the previous contract should apply, would, I think, be surprised to find that "all" should be interpreted so as to mean "all but the arbitration clause".

See the opinion of **Langley J in Sea Trade Maritime Corporation vs. Hellenic Mutual War Risks Association (Bermuda) Ltd (The Athena No.2).**

The author David Joseph, in ***Jurisdiction and Arbitration Agreements and their Enforcement*** **(Sweet & Maxwell, 2nd Ed, 2010) at para 5.19)** expresses his view on the requirement of specific reference as follow: ***"It does, however, need to be stressed that the requirement of express words of reference is only a general rule. There might be particular background circumstances, such as a course of dealing or a usage in a particular trade, which make it appropriate to depart from the general rule. It is also possible to conclude in a particular case that the parties have made their intentions sufficiently clear to contract back-to-back with another contract so as to result in the incorporation of the dispute resolution provision in that other agreement, or that a contract was concluded by an agent who knew of the existence and application of the dispute resolution provision in question."***

In the instant case, the condition of the contracts is FCC Rules. Having carefully studied the Statement of case filed by the Appellant, it is not the case of the Appellant that the FCC Rules are not applicable to the contract executed between the parties. The Appellant rather argues

the absence of specific mention of an arbitration clause in the contract means that there was no arbitration agreement in writing signed to by the parties.

Rule 1.2 of the FCC Rules provides 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 Quality 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."

Rule 1.3 further states as follows:

> *"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(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."*

The parties made the FCC Rules a condition to the contracts executed. Even though the foreign authorities **(Habas Sinai, The Athena (No.2), Inox Wind)** are of persuasive authority, we are of the opinion that by making the FCC Rules a condition of the contracts, the parties agreed to be bound by the FCC Standard Terms. The incorporation by reference

under consideration is that of a standard form contract or a single contract case. Langley J in **the Athena (No.2)** stated that:

> ***"In principle, English law accepts incorporation of standard terms by the use of general words and, I would add, particularly so when the terms are readily available and the question arises in the context of dealings between established players in a well-known market. The principle, as the dictum makes clear, does not distinguish between a term which is an arbitration clause and one which addresses other issues.***

Russel's literature provides further insight when he submits that: ***"Reference to standard form terms. If the document sought to be incorporated is a standard form set of terms and conditions the courts are more likely to accept that general words of incorporation will suffice. This is because the parties can be expected to be more familiar with those standard terms including the arbitration clause.... "The current position therefore seems to be that if the arbitration agreement is incorporated from a standard form a general reference to those terms is sufficient, but at least in the case of reference to a non-standard form contract in the context of construction and reinsurance contracts and bills of lading a specific reference to the arbitration agreement is necessary."***

We therefore hold that a true construction of the contracts executed by the parties necessitates that, the FCC Rules be read together and deemed as part of the contracts as a whole. Any interpretation which excludes the FCC Rules would defeat the intention of the parties. If the FCC Rules are incorporated by reference in the contracts, then the procedure provided for the resolution of disputes under the FCC Rules automatically becomes applicable between the parties except where it is expressly or impliedly excluded. The Appellant cannot execute contracts which make the FCC Rules a condition and yet pick and choose which provisions of the FCC Rules it deems to be applicable. It would be unconscionable for this Court to subscribe to the Appellant's position and hold that the arbitration clause in the FCC Rules is not applicable when the Appellant does not dispute the fact that the FCC Rules is a

condition in the contracts executed. And to re-echo what **Apaloo J. A stated** in the case of **Sasu v Nyaduala (1973) I GLR 221 at page 225** that; ***"A party should be held to any act or statement which it would be unconscionable to permit him to deny"***

The arbitration agreement provided in the FCC Rules specifically Rule 1.3 applies. The FCC Rules by Rule 1.1 is subject to English Law and EAA 1996 and is applicable.

The English Arbitration Act, 1996 (EAA) as amended requires for arbitration agreements to be in writing. Section 6 of the Act defines an "arbitration agreement" as an agreement to submit to arbitration present or future disputes (whether they are contractual or not).

Section 5 also expands on an agreement in writing as follows:

> *"(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. The expressions "agreement", "agree" and "agreed" shall be construed accordingly.*
>
> *(2) There is an agreement in writing— (a) if the agreement is made in writing (whether or not it is signed by the parties), (b) if the agreement is made by exchange of communications in writing, or (c) if the agreement is evidenced in writing.*
>
> ***(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing****.*
>
> *(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement."*

On incorporation of an arbitration agreement by reference, section 6(2) of the English Arbitration Act provides as follows: ***"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.***

Section 5(3) of EAA 1996 therefore recognizes incorporation of arbitration clause by reference when it provides that "***Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing***.". The incorporation of the FCC Rules by reference means that the parties agreed in writing that the arbitration clause in the Rules becomes the arbitration agreement in writing. The parties having knowledge of the FCC Rules within the cocoa industry and the impact of the FCC Rules as a standard form contract are deemed to know of the Rules and the arbitration clause provided therein. In agreeing to be bound by the FCC Rules, the parties automatically subscribed to the arbitration clause.

The Court of Appeal in holding that there was an arbitration agreement committed no error and accordingly ground 1 fails.

GROUNDS II & III

The Appellant argues that the Court of Appeal failed to ensure that the threshold set by section 59(1)(b) of the Alternative Dispute Resolution Act, 2010 (ACT 798) was met by the Respondent for the enforcement of the FCC Arbitral Award. According to the Appellant, despite the provisions of article 1(1) of the New York Convention, contracting states are allowed the right to decide at the time of ratification, accession or the signing of the Convention on the basis of reciprocity, which country's awards it would recognise and enforce in its territory. For the Appellant, the Arbitration (Foreign Awards) Instrument, 1963 (LI 261) specifically provides countries that Ghana has reciprocity with in terms of recognition and enforcement of their awards and this does not include the UK. Thus, it was erroneous for the Court of Appeal to conclude that the FCC Award can be enforced in Ghana.

Section 59 of ACT 798 provides as follows:

> **"Enforcement of foreign awards**
>
> ***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 arbitration.

(2) A party who seeks to enforce a foreign award and who relies on a document

which is not in the English Language, shall produce a certified true translation of that document in English to the Court.

(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 matters submitted for arbitration."

The Arbitration (Foreign Awards) Instrument 1963 (L.I. 261), a legislative instrument was passed pursuant to the section 36(2) of the erstwhile Arbitration Act, 1961 (Act 38). As at the commencement of ACT 38, the 1958 NEW YORK CONVENTION was already in force and even though Ghana had not acceded to the CONVENTION and it had been domesticated and incorporated as schedule to ACT 38.

Section 36(2) of ACT 38 provided as follows:

> ***"Awards to which sections 37 to 41 apply***
>
> ***(1) This section and sections 37 to 41 apply to an award made after the commencement of this Act in a reciprocating State, and to an award made in the Republic in pursuance of an arbitration agreement not governed by the law of the Republic, and an award to which those sections apply is referred to as "a foreign award."***
>
> ***(2) In subsection (1) "reciprocating State" means a State declared by the President by legislative instrument to be a party to the Convention set out in the Schedule or any other State to which sections 37 to 41 are, by legislative instrument, applied by the President on the basis of reciprocity."***

In line with section 36(2) of then ACT 38, LI 261 was passed and the President specified certain countries as reciprocating states.

Ghana acceded to the New York Convention in 1968 and in the year 2010, the Alternative Dispute Resolution Act was passed (Act 798) and by section 137(1), Act 38 was repealed. The New York Convention was ratified and made the first schedule of Act 798. Despite the repeal of Act 38, L.I. 261 was saved under section 137(2) of Act 798 by the following provision ***"any instrument, agreement, Regulations and order made under that Act and in force immediately before the commencement of this Act shall continue to be in force, until otherwise legally altered".***

Learned Counsel argues that by virtue of the fact that LI 261 was not repealed and also the fact that the UK is not listed as a reciprocating state in LI 261, then the Court of Appeal erred in holding that the FCC Arbitral Award made in UK is enforceable in Ghana.

It is the concurring opinion of **B. ACKAH-YENSU, JA (as she then was)** that the Appellant attacks in this judgment:

> ***"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."***

On face value, the argument of the Appellant appears persuasive but a closer examination of the New York Convention, the section 59 of Act 798 and the position of the Law prior to the passage of the Act 798, defeats the argument of the Appellant that foreign awards from UK are not enforceable in Ghana simply because the UK is not mentioned in LI 261. In our opinion, that is a narrow view of the role and impact of the New York Convention and does not represent the true intention of the Legislature.

Under Act 38, foreign awards from reciprocating states were enforceable in Ghana. Section 36(2) further defined reciprocating states as follows: "***reciprocating State means a State declared by the President by legislative instrument to be a party to the Convention set out in the Schedule or any other State to which sections 37 to 41 are, by legislative instrument, applied by the President on the basis of reciprocity***. (emphasis supplied)

The Convention mentioned is the New York Convention and in our view, two categories of reciprocating states were established under section 36(2):

a. Countries that are signatories to the New York Convention
b. Countries that are not signatories to the New York Convention but are captured by legislative instrument declaring that there is reciprocity

A careful reading of section 59(1), specifically paragraphs (b) and (c) shows that Act 798 maintains the distinction gleaned from the erstwhile Act 38, that is, distinction between

a. Countries that are not parties to the New York Convention but have reciprocity with Ghana as regards recognition and enforcement of foreign awards
b. Countries that are signatories to the New York Convention

Section 59(1)(b) and (c) of Act 798 is as follows:

> "***(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."

The threshold under section 59 for the enforcement of foreign award is not that the Country from which the award emanates must be a signatory to the New York Convention and at the same time have its name indicated in the Legislative Instrument. The word used between paragraphs (b) and (c) is "or" which is disjunctive. It means that, when the award satisfies either (b) or (c) together with other requirements under section 59, it ought to be enforced. In the case of **In Re Diplock; Wintle v Diplock [1941] Ch 253 at 260-261, CA** Sir Wilfred Greene MR had this to say*: **"The word 'or' is prima facie, and in the absence of some restraining context, to be read as disjunctive,** and if a testator wishes to give his trustees a discretion to apply his property either to charitable or benevolent objects, I do not myself know what word in English language he can more suitably use than the word 'or".*

When the section 59 is read as a whole specifically with the 1st Schedule (New York Convention), the argument of the Appellant falls as unmeritorious. See the case of **Canada Sugar Refining Co. v. R. [1898] A. C. 735 at p. 741, P. C.** where Lord Davey said, ***"Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."***

A proper understanding of section 59(1)(c) of Act 798 is given by the Legislature in the Schedule. For emphasis we will quote the beginning of the first schedule:

"FIRST SCHEDULE

CONVENTION ON THE RECOGNITION AND

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 1958

(NEW YORK CONVENTION)

(Section 59 (1)(c))"

It is our respectful view that, proper context is given by the Legislature that every foreign award from a contracting state to the New York Convention automatically falls under section 59(1)(c).

Article III of the Convention states that: ***"Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."*** The finding by the Court of Appeal that Ghana as a signatory state is bound to recognise and enforce awards from other signatory states cannot be faulted.

Article I (3) further provides that: ***"When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration."***

From a combined reading of section 59(1)(c) and Articles 1(3) and 3 of the New York Convention, Countries that executed the Convention automatically satisfy the reciprocity test based on the undertaking in the Convention. Reciprocity arises by virtue of the fact that Ghana together with the foreign country from where the award emanates are signatories to the New York Convention. There is no need for the signatory state to be named in LI 261 before its award can be enforced in Ghana.

As at the time of the passage of LI 261 in 1963, Ghana had not acceded to the New York Convention. Ghana became a party to the Convention in 1968. The argument by Counsel for the Appellant leads to absurdity, in that, despite Ghana being a signatory to the Convention which has been ratified and made part of our laws, the Appellant's suggestion would mean that save for the countries listed in LI 261, all awards from contracting states to the Convention not named in LI 261 would not be enforceable in Ghana. Such a conclusion would defeat Ghana's assumed obligation under the International Convention and would deal a great blow to Ghana's image as a contracting party to the Convention.

Again, by our hierarchy of Laws, Act 798 takes precedence over LI 261. Thus, there is no requirement for the UK to be specifically named in LI 261 before arbitral awards from the UK can be enforced in Ghana.

We therefore hold that, with the UK being a signatory to the Convention, all arbitral awards from the Country are enforceable in Ghana subject to qualification with all other requirements under section 59 of Act 798. The Appellant's argument that section 59(1)(b) ought to have been satisfied is clearly untenable and unsupported by the clear provisions of Act 798.

No error was committed by the Court of Appeal in its judgment and indeed the section 59 of Act 798 was reproduced copiously in the judgment of the court below.

CONCLUSION:

We hold that there was an arbitration agreement between the parties by virtue of incorporation of the FCC Rules which contained the arbitration clause and foreign arbitral awards from UK are enforceable in Ghana subject to qualification with the provisions under section 59 of Act 798.

We accordingly dismiss the appeal in its entirety as being of no merit.

G. K. KOOMSON
(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

PROF H. J. A. N MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)

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JUSTIN AMENUVOR ESQ. FOR THE APPLICANT/ APPELLANT/RESPONDENT WITH HIM, MIRACLE ATTACHEY & MAAME AKUA NYATEKYIWAA BOATENG.