THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: ANSAH, JSC (PRESIDING)

DOTSE, JSC

YEBOAH, JSC

MARFUL-SAU, JSC

KOTEY, JSC

CIVIL APPEAL
NO. J4/34/2019

24TH JULY, 2019

TIESO GHANA LIMITED ..... PLAINTIFF/APPELLANT/APPELLANT

VRS

EUROGET DE-INVESTA SA ..... DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

KOTEY, JSC:-

Before us is an appeal from the judgment of the Court of Appeal affirming a decision on the trial High Court dismissing an application by the Plaintiff/ Appellant/Appellant (hereinafter Plaintiff) for leave to enter final judgment under Order 64, Rule 13 of C.I. 47.

The Plaintiff was a subcontractor of the Defendant/Respondent/Respondent (hereinafter Defendant) for the construction of a 160-bed regional hospital at Wa in the Upper West region. Their contract was governed by "Federation Internationale Des Ingenieurs-Conseils", International Federation of Consulting Engineers Rules (hereinafter referred to as FIDIC Rules) which contain dispute resolution provisions.

For ease of reference we reproduce the dispute resolution provisions of the FIDIC Rules.

*"**20.1 Contractor's Claim***

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Employer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

20.2 Appointment of the Dispute Adjudication Board

In cases of disagreements between the parties: They shall attempt to resolve their disagreement through friendly, direct dialogue and negotiations. Failure to do that at the end of 30 days from the date when the disagreement arose, either party shall give notice to each other of its wish to resort to a DAB and disagreement shall formally become dispute. Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The parties shall jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4.

The DAB shall comprise, as stated in the Particular Conditions, either one or three suitably qualified persons ("the members") If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons…

20.4 Obtaining Dispute Adjudication Board's Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, or instruction, opinion of valuation of the Employer, then after a DAB has been appointed pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board], and 20.3 [Failure to Agree Dispute Adjudication Board], either party may refer the dispute in writing to the DAB for its decision, with a copy to the other party. Such reference shall state that it is given under this Sub-Clause.

For a DAB of three person, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all information, access to the Site, and appropriate facilities, as the DAB may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrators. If either party is dissatisfied with the DAB's decision, then either party may, within 21 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 42 days (or as otherwise approved) after receiving such reference or such payment, then either Party may, within 14 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 21 days after it received the DAB's decision, then the decision shall become final and binding on both Parties.

20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agreed otherwise, arbitration may be commenced on or after the 30th day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.6 Arbitration

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled with international arbitration unless otherwise agreed by both Parties.

a) The dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,

b) The dispute shall be settled by three arbitrators appointed in accordance with these Rules, and

c) The arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion, or valuation of (or on behalf of) the Employer, and any decision of the DAB, relevant to the dispute.

Neither party shall be limited in the proceedings before the arbitrator(s) to the evidence arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties and DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works."

The Defendant owed the Plaintiff for work done which was to be paid in tranches after each phase of work done and the submission of an invoice. Defendant received the invoices for phases of work done but refused to pay Plaintiff. The defendant then terminated the contract with the plaintiff.

The Plaintiff commenced an action in the High Court by a writ of summons that claimed among other reliefs "a declaration that the purported termination of the contract by the Defendant/Respondent herein on the grounds of non-performance or delayed performance

was false procedurally wrong and unjust" and further claimed for payment for work done together with interest.

Upon an application by the Plaintiff for interlocutory injunction or in the alternative for a valuation of work done at the construction site, the Court declined to grant the interlocutory injunction but granted an order for both parties to send their team of quantity surveyors to value the extent of work done before the Plaintiff handed over the construction site to the Defendant. This report was consensual and was filed and presented to the High Court. The Defendant was then allowed to take over the construction site and they appointed a new contractor.

The Defendant refused to accept to pay the amount agreed upon by the team of quantity surveyors and filed an application before the Court to activate the dispute settlement provisions of the contract. This application was granted and the court referred the matter to a Dispute Adjudication Board (hereinafter referred to as DAB). The Institution of Surveyors was nominated by the agreement of both parties. The DAB submitted its decision to the Court recommending the same amount as the joint team of quantity surveyors appointed by the parties for the amount of work done. Aggrieved by the decision of DAB, the Defendant gave a notice of dissatisfaction to the Plaintiff. Plaintiff then filed a motion for leave to sign final judgment on the DAB decision under Order 64 of the High Court (Civil Procedure) Rules 2004, (CI 47).

The trial High Court Judge refused to grant the said application to sign final judgment and referred the matter to international arbitration in accordance with the FIDIC Rules. Dissatisfied with the ruling of the trial High Court, plaintiff appealed to the Court of Appeal which dismissed the appeal. It is against this decision that the plaintiff has appealed to this court on the following grounds as contained in the Notice of Appeal.

Grounds of Appeal

1. The learned Court of Appeal erred in law and in equity when it affirmed the decision of the High court dismissing the application to sign final judgment on the value of

work done which had been agreed upon by both parties and confirmed by the Dispute Adjudication Board hereinafter called DAB.

2. The Court of Appeal wrongly affirmed the decision of the High court which referred the case to international arbitration by ignoring the fact that Appellants claim is peculiarly for work done as agreed between the parties and confirmed by the court.

3. The learned court's misapprehension of the rules governing arbitration led to make a reference to international arbitration under paragraph 20 of the FIDIC contract when there was no such basis and said reference amounted to a reference for "its own sake" occasioning injustice to the Plaintiff/Appellant/Applicant.

4. The learned Appeal Court erred when it refused to give weight to the fact that Respondent's "notice of dissatisfaction" did not conform to the definition of a valid "notice of dissatisfaction" by demonstrating "serious irregularity" and has been so ruled by a ruling of the High Court on record dated 4th July 2017.

5. The ruling of the Court of Appeal to the effect that international arbitration was a matter of course (since it is set out in paragraph 20 of the FIDIC contract) is a misinterpretation of the law and rules governing arbitration, especially where there was no basis from the peculiar circumstances of this case for such reference.

6. The High Court's definition of an "arbitral award" to exclude the DAB report dated 31st January 2018 was wrong in law and has occasioned a miscarriage of justice to the Appellant.

7. The Appellate Court in its judgment ignored the clear and unambiguous interpretation of FIDIC clause 20.6 which stated that only decisions of the DAB which have "not become final and binding" shall be settled by international arbitration.

8. The judgment of the Court of Appeal dated 15th November, 2018 is against the weight of the evidence.

Issues in this Appeal

We have carefully examined the eight grounds of appeal filed by the plaintiff and argued by the parties and are of the considered view that they can logically be grouped into three main issues, namely;

i. Whether the decision DAB process was an arbitration and its decision an arbitral award?
ii. Whether the decision of the DAB is "final and binding" between the parties; and
iii. Whether the Court of Appeal erred in affirming the decision of the trial High Court to refer the dispute between the parties to international arbitration?

We now proceed to examine these issues.

Was the DAB process an Arbitration?

This issue is captured in ground 6 of the notice of appeal.
On this matter the trial court in its ruling of 31st January 2018 (page 1521 of the record) held as follows;

"I find that the parties submitted themselves to a Dispute Adjudication Board which came out with a decision. The respondent has filed a notice of dissatisfaction with the said decision. This decision was not an arbitral award. In view of this there is no arbitral award properly so called which is capable of being adopted and entered by this court as final judgment within the meaning of Order 64 of C.I.47."

The Court of Appeal affirmed this finding of the trial High Court when it stated at page 21 of its judgment dated 15th November 2018 as follows;
"Indeed, under clause 20.4 of the FIDIC Rules the DAB shall be deemed not to be acting as arbitrators".

The Plaintiff is challenging this holding by the courts below. Counsel for the Plaintiff argued before us that the DAB process was an arbitration and its decision an arbitral award.

Counsel referred to KLIMATECHNIK ENGINEERING v. SKANSKA JENSEN INTERNATIONAL [2005-2006] SCGLR 913 at 925, where the court found that the decisions of both arbitrators and umpires are to be treated as arbitral awards under the Arbitration Act,1961(Act 38). As an arbitral award, the plaintiff argued the Court must comply with Order 64 of CI 47. R 12(1) which specifically stipulates that, "No award shall be set aside except on the ground of perverseness or misconduct of the arbitrator or umpire" if is to set aside the decision of the DAB. Counsel submitted that in order for the court to disregard the arbitral award, the defendant must prove the award is perverse or that the arbitrators or umpires misconducted themselves. As the Defendant has failed to prove any perverseness or misconduct, counsel argued that the court cannot set aside the decision of the DAB.

The Defendant, on the other hand, submitted that there has been no arbitration and therefore no arbitral award capable of adoption. The DAB process, the Defendant contended, was an expert adjudication not arbitration. It argued that once a Notice of Dissatisfaction has been issued within the stipulated time it is enough to take the dispute resolution to another level which will culminate at international arbitration.

The ruling of the trial High Court which was affirmed by the Court of Appeal was in respect of an application by the Plaintiff for the leave to sign final judgement under Order 64 of C1.47. In Klimatechnik Engineering Ltd v Skanska Jensen International [2005-2006] SCGLR 913 at 927 Georgina Wood JSC (as she then was) stated; "The importance of determining the statute under which the application was initiated cannot be overemphasised". See also Akwass Farms Ltd. v. Ghana Telecom Co Ltd. (C.A., unreported, Suit No. HI/30/2010, dated 9th December 2010).

Order 64, rule 1 of CI. 47 provides that, "if the parties to an action desire that any matter in dispute between them in an action shall be referred to the final decision of an arbitrator, either party or both parties may apply to the court at any time before final judgment for an order of reference and on application the Court may make an order of reference accordingly". Rule 8 then provides that the award of the arbitrators "shall contain a conclusive finding on each of the matters referred. Rule 13 finally provides that if there is

no application to set aside or remit an award under the rules, a party may file the award for incorporation into an order of the court.

There are therefore two conditions precedent to the invocation of order 64, rule 13; an arbitration and a final award.

We begin our consideration of this issue by reiterating the admonition of Adinyira JSC in **BCM Ghana Ltd v. Ashanti Goldfields Ltd** [2005-2008] SCGLR 602 at 611 that "The Courts must strive to uphold dispute resolution clauses in agreements."

Clause 20.4 of the FIDIC Rules provides that, "The DAB shall be deemed to be not acting as arbitrators." It further provides that "neither party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this sub-clause". The DAB report itself stated that; "The parties therefore submitted that the DAB resolves the dispute between Tieso Ghana Ltd v Euroget De-Invest by Adjudication as opposed to Arbitration".

It is therefore evident that at the stage of the DAB, arbitration has not commenced. In fact clause 20.6 of the FIDIC Rules then goes on to provide for arbitration. The Plaintiff has not provided us with any reason why we should depart from the clear express provision of their agreement, as contained in clause 20.4 of the FIDIC Rules, that the DAB shall be deemed not to be acting as arbitrators. We therefore reject the contention of the Plaintiff that the DAB process was an arbitration and affirm the decision of the trial High Court and the Court of Appeal that it was not.

Is the Decision of the DAB "final and binding"?

We now consider the question whether the decision of the DAB is "final and binding" and capable of adoption as a final judgment of a court under Order 64 of C.I.47.

Clause 20.4 of the FIDIC Rules provides that;

"If the DAB has given its decision as to a matter in dispute to both parties, and no notice of dissatisfaction has been given by either party within 21 days after it received the DAB's decision then the decision shall become final and binding upon both parties".

Both the trial High Court and the Court of Appeal held that the following the issuing of a "Notice of Dissatisfaction" by the Defendant the decision of the DAB was not "final and binding". The Court of Appeal, affirming the decision of the High Court stated per Kwofie J.A at page 22 of its judgement dated 15th November 2018;

"It is my view that with the defendant having given the Notice of Dissatisfaction within the time stipulated by the FIDIC rules the decision of the DAB cannot become final and binding on the parties".

The Plaintiff challenges this finding by the High Court and the Court of Appeal. The Plaintiff argued that both the value of work done determined by the joint team of quantity surveyors and the decision of the DAB are "final and binding" within the meaning of clause 20.6 of the FIDIC Rules. "The DAB is thus enforceable and final" it contended. The Plaintiff conceded that the Defendant did, in fact, issue a Notice of Dissatisfaction within the time frame stipulated by clause 20.4 but argued that the notice failed to point out why the Defendant was dissatisfied with the decision of the DAB. The failure of the notice of dissatisfaction to challenge the decision of the DAB on any substantive grounds or for "serious irregularity", Plaintiff submitted, rendered the notice nugatory.

The Defendant, on the other hand, submitted that the FIDIC Rules do not require it to provide detailed reasons for its dissatisfaction with the decision of the DAB. It contended that clause 20.4 of the FIDIC Rules only requires that "this notice of dissatisfaction shall state that it is given under this sub-clause and shall set out the matter in dispute and the reason(s) for dissatisfaction". The Defendant therefore submitted that its notice of dissatisfaction that "Our client has been served with a copy of the decision of the DAB dated 28th of April 2017 and it is our client's instructions to say that they are dissatisfied with the said decision arrived at by the DAB. It is our client's further instructions to say that

Tieso Ghana Limited is not entitled to the sum stated in the 28th April 2017 decision" complies with the FIDIC Rules.

Clause 20.4 of the FIDIC Rules provide that;

> "If the DAB has given its decision a s to a matter in dispute to both Parties and no notice of dissatisfaction has been given by either party within 21 days after it received the DAB's decision, then the decision shall become final and binding on both Parties".

Both the trial High Court and the Court of Appeal held that, following the issuing of a Notice of Dissatisfaction with the DAB decision by the defendant, that decision was not final.

The Court of Appeal, affirming the decision stated per Kwofie J.A at page 22 of its judgment of dated 15th November 2018;

> "It is my view that with the defendant having given the notice of dissatisfaction within the time stipulate by the FIDIC rules the decision of the DAB cannot become final and binding on the parties.

The plaintiff challenges this finding by trial High Court and the Court of Appeal.

The plaintiff argues that both the value of work done determined by the joint team of quantity surveyors of and the decision of the DAB are "final and binding" within the meaning of clause 20.6 of the FIDIC Rules. "The DAB is thus enforceable and final" it contended. The Plaintiff conceded that the Defendant issued a Notice of Dissatisfaction within the time frame stipulated by clause 20.4 of the FIDIC Rules but argued that the notice failed to point out why the Defendant was dissatisfied with the decision of the DAB. The failure of the Notice of Dissatisfaction to challenge the decision of the DAB on any substantive or procedural grounds or for "serious irregularity" rendered the notice invalid, the Plaintiff submitted.

The Defendant on the other hand, submitted that the FIDIC rules did not require it to provide detailed seasons for its dissatisfaction with the decision of the DAB. It contended that clause 20.4 of the FIDIC rules only requires that;

> "this notice of dissatisfaction shall state that it is given under this sub-clause and shall set out the matter in dispute and the reason(s) for dissatisfaction"

The defendant therefore submitted that its notice of dissatisfaction that "our client has been served with a copy of the decision of the DEAB dated 28th of April 2017 and it is our client's instructions to say that they are dissatisfied with the said decision arrived at by the DAB. It is our client's further instructions to say that TIESO Ghana Limited is not entitled to the sum stated in the 28th of April 2017 decision" complies with the FIDIC Rules.

Having carefully considered the arguments of the parties, the FIDIC Rules and the law on contractual dispute resolution provisions, ii is our considered opinion that the parties agreed to be governed by a dispute resolution process provided for under the FIDIC Rules and are bound by it. Under these Rules, the DAB process is an intermediate expert adjudication stage. The decision of the DAB only becomes "final and binding" if neither party gives a notice of dissatisfaction within 21 days. Once a party gives a notice of dissatisfaction within the stipulated period, the DAB decision is not "final and binding."

We therefore affirm the decision of the High Court and the Court of Appeal that the decision of the DAB was not final and binding and not capable of adoption as a final judgement of the Court under Order 64 of C.I. 47.

Was it an Error to Refer the Dispute to International Arbitration?

Following its dismissal of the Plaintiff's application for leave to sign final judgement on the decision of the DAB, the trial High Court affirmed by the Court of Appeal, referred the dispute between the parties to international arbitration under the FIDIC Rules.

This has been heavily challenged by the Plaintiff in grounds 2,3,5 and 8. The reference to international arbitration has been variously described by the Plaintiff as a reference for "its

own sake" "a misinterpretation of the law and rules governing arbitration" and being "against the weight of the evidence". The Plaintiff contends that since both the joint team of quantity surveyors chosen by the parties and the DAB arrived at the same figure as the total amount due to the it for work done, there was no need to refer to the matter to international arbitration, hence the description a reference "for its own sake". It submitted that the determination of the value of work done by the quantity surveyors and the DAB cannot change or be altered and therefore is final and binding and cannot be the subject of international arbitration. At page 15 of its Statement of Case, the Plaintiff stated its position as follows:

> "My Lords, it is the Appellant's respectful submission that as long as the value of work done and agreed upon by both parties is confirmed it will be an exercise in futility for any court of law and equity to hold that the same figure confirmed and agreed by both parties as work done and owed to the Appellant be sent to further international arbitration".

The Plaintiff concluded that on the peculiar facts of this case since the quantity surveyors appointed by the parties have determined the value of work done and it has been confirmed by the DAB, there is no dispute to be referred to international arbitration.

The Defendant, on the other hand, challenged the interpretation placed on the valuation of the quantity surveyors and the decision of the DAB. It argued the quantity surveyors made an independent valuation, which was not accepted by the Defendant. It also argued that the decision of the DAB went beyond the valuation of work done and included other matters such as calculation of interest. It further submitted that it was because they did not accept the valuation of the quantity surveyors that the matter was referred to the DAB. They therefore contended that following its notice of dissatisfaction to the DAB decision, the trial High Court and the Court of Appeal were right in referring the dispute to international arbitration in accordance with the FIDIC rules.

The arguments being canvassed by the Plaintiff before us were urged on the Court of Appeal which after consideration rejected them. The Court of Appeal stated its conclusion at page 22 of its judgment as follows;

"The Rules (FIDIC) have therefore provided for a step by step approach to dispute resolution starting from friendly dialogue and negotiations, referral to Dispute Adjudication Board and where a Notice of Dissatisfaction is given by either party, then there would be attempts to settle amicably and where that fails international arbitration".

We have carefully considered the facts of this case, the submissions of the parties and the FIDIC rules and find the position of the Plaintiff untenable. The parties contracted to be governed by the FIDIC Rules. These Rules provide for a dispute resolution process. The Plaintiff's contention that the dispute between the parties has ended is not borne out by the facts. The Defendant did not accept the valuation of the quantity surveyors and gave a notice of dissatisfaction after the DAB decision. We therefore affirm the decision of the High Court and the Court of appeal to refer the dispute between the parties to international arbitration under the FIDIC Rules.

In the circumstances, this appeal fails in its entirety and is accordingly dismissed.

(SGD) PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

ANSAH JSC:-

I agree with the reasoning and conclusion of my brother Kotey.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

DOTSE JSC: -

I agree with the reasoning and conclusion of my brother Kotey JSC.

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

YEBOAH JSC :-

I agree with the reasoning and conclusion of my brother Kotey JSC.

ANIN YEBOAH

(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU JSC:-

I agree with the reasoning and conclusion of my brother Kotey JSC.

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

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