ARBITRATION IN GHANA

Arbitration is increasingly becoming a common mode of dispute resolution in Ghana, especially for large-value international disputes. Some of the principal advantages are as follows:

a. Confidentiality and flexibility of arbitration proceedings;
b. Awards are final and binding and not subject to appeals on the merits;
c. Arbitration is seen as faster compared to litigation. Albeit this depends on the complexity of the dispute and the willingness of the parties to cooperate in the process.

Some of the principal disadvantages are as follows:

a. Cost; and
b. Inherent delays in the enforcement of awards through the courts.

Arbitration is mostly international and domestic. With Domestic Arbitration, the Ghana Arbitration Centre and its rules are mostly used. With International Arbitration the International Court of Arbitration of the International Chamber of Commerce (ICC) and the London Court of International Arbitration are mostly used.

Arbitration in Ghana lasts roughly about four (4) months to one (1) year depending on the complexity of the matter and the willingness of the parties to cooperate in the process.

Legislation

The Alternative Dispute Resolution Act 2010, Act 798 (The Alternative Dispute Resolution Act) is the law governing arbitration in Ghana. The same law applies for domestic and international arbitrations. The national arbitration law is based on the UNCITRAL Model Law.


The Alternative Dispute Resolution Act requires that an Arbitrator decide the dispute:

a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
b) in accordance with such other considerations as are agreed by the parties or determined by the Arbitrator.

Where to the extent that no law has been chosen or agreed on, the Alternative Dispute Resolution Act requires the Arbitrator to apply the law determined by the conflict of laws rules, which the Arbitrator considers applicable.
The courts are now more inclined to enforce agreements to arbitrate. An arbitration agreement may not be enforced where the underlying contract is one that requires parliamentary approval and parliamentary approval was not sought before signing the underlying contract.

Arbitration agreements will not bind a party that has not consented to arbitration

**Disputes that can be arbitrated**

Not all disputes can be arbitrated. The Alternative Dispute Resolution Act, stipulates that the Act applies to matters other than those that relate to:

a. the national or public interest

b. the environment

c. the enforcement and interpretation of the Constitution or

d. any other matter that by law cannot be settled by an alternative dispute resolution method

**Arbitration clause and Litigation**

Where a party commences litigation in the courts in Ghana, despite an arbitration agreement, the other party may apply to the court to stay proceedings and refer the action or a part of the action to which the arbitration agreement relates, to arbitration.

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. The Arbitrators decision can be challenged by application to the appointing authority or the High Court for a determination of the Arbitrator’s jurisdiction.

**Selection of Arbitrators**

**How are Arbitrators selected?**

The arbitration agreement will usually set out the procedure for selecting the Arbitrators. Where the arbitration agreement does not provide for a procedure for appointing an Arbitrator or the parties fail to agree on a procedure for appointing an Arbitrator, each party in an arbitration which requires the appointment of three Arbitrators, shall appoint one Arbitrator and the two
appointed Arbitrators shall appoint the third Arbitrator who shall be the chairperson. In an arbitration, which requires the appointment of a sole Arbitrator, if the parties fail to agree on the Arbitrator within fourteen days after the receipt of a request for arbitration by one party from the other party, the appointment shall be made by the appointing authority upon a request by a party.

In practice an application may be made to the court to appoint an Arbitrator where the parties are unable to agree on an Arbitrator.

**Requirements in Ghana as to disclosure of conflicts?**

Where a person is requested to be an Arbitrator, that person shall disclose in writing any circumstances likely to give reasonable cause to doubt as to the independence or impartiality of that person. From the time of appointment and throughout the arbitral proceedings the Arbitrator shall without delay also disclose to the parties in writing any circumstances likely to give reasonable cause to doubt as to his independence or impartiality.

**Are there limitations on who may serve as an Arbitrator?**

There are no limitations on who may serve as an Arbitrator. Arbitrators have ethical duties. The Alternative Dispute Resolution Act requires Arbitrators to be fair and impartial to the parties and to give each party the opportunity to present its case. In addition the Arbitrator must avoid unnecessary delay and expenses and adopt measures that will expedite the resolution of the dispute.

**Are there specific rules or codes of conduct concerning conflicts of interest for Arbitrators?**

There are no specific rules or codes of conduct concerning conflicts of interest for Arbitrators.

**Interim Measures**

**Can Arbitrators issue interim measures or other forms of preliminary relief?**

An Arbitrator may at the request of a party grant any interim relief that the Arbitrator considers necessary for the protection or preservation of property. An interim relief may be in the form of an interim award and the Arbitrator may require the payment of costs for such a relief.

Interim reliefs issued by Arbitrators are enforceable in courts.
Will courts grant provisional relief in support of arbitrations?

Yes. The courts will grant provisional relief in support of arbitrations under the following circumstances:

a. for the taking of evidence of witnesses
b. for the preservation of evidence
c. in respect of the determination of any question or issue affecting any property right which is the subject of the proceedings or in respect of which any question in the proceedings arise for the inspection, preservation or taking of samples or the observation of an experiment conducted upon a property
d. for the sale of any goods the subject of the proceedings
e. for the granting of an interim injunction or the appointment of a receiver

Such measures may be ordered after the constitution of the arbitral tribunal.

The Court can direct that, its orders cease to have effect in whole or in part upon a decision to that effect by the Arbitrator or other institution vested with power to act in relation to the subject matter of the order.

To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration?

The courts may grant evidentiary assistance/provisional relief in support of the arbitration. Where the case is one of urgency the Court may on the application of a party to arbitral proceedings make orders, as it considers necessary for the purpose of preserving evidence or assets. If the case is not one of urgency, such measures will require the tribunal’s consent if the latter is in place or the parties must provide their agreement in writing. In any case the Court shall act if the Arbitrator or other institution vested with power is unable for the time being to act effectively.

What is the general approach to disclosure or discovery in arbitration?

The extent of disclosure or discovery in arbitration depends on the Arbitrators involved, Counsel in the matter and the complexity of the case. At the Arbitration Management Conference, the Arbitrator is to determine the need for discovery, production of documents or the issue of interrogatories and to establish how this should be done. Typically parties disclose only documents on which they intend to rely to prove their case.
The tribunal can require the parties to disclose documents in their possession.

**Are arbitrations confidential? What are the rules regarding confidentiality?**

Yes arbitrations are confidential. Except as otherwise agreed by the parties or provided by law the Arbitrator is to ensure the confidentiality of the arbitration. In addition, the award shall not be made public without the consent of the parties.

The Alternative Dispute Resolution Act stipulates that an Arbitrator in taking evidence shall take into account applicable principles of legal privilege.

**How is witness testimony presented?**

The use of witness statements with cross-examination is common. Oral direct examinations are not common. Arbitrators may also question witnesses.

**How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?**

There are no formal requirements relating to how expert testimony is presented. Expert testimony is typically by way of a written report. Each party is given the opportunity to cross-examine the expert at the hearing.

**Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties?**

The arbitral tribunal has the power to appoint an independent expert. But it is not common for the arbitral tribunal to appoint experts besides those appointed by the parties. There are no requirements that experts must be selected from a particular list.

**Are there formal requirements for an award to be valid?**

The parties are free to agree on the form of the award and in the absence of such an agreement, the Alternate Dispute Resolution Act requires that:

a. the award shall be in writing
b. the Arbitrator shall sign the award, state the date and place where the award was made and state in writing the reasons for the ward.

An Arbitrator may within the scope of the arbitration agreement grant any relief that the Arbitrator considers just and equitable including specific performance.

Can Arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

There is no express rule as to whether Arbitrators can award punitive or exemplary damages. Arbitrators can award interest. The Arbitrator can grant the appropriate pre-award or post award relief at simple or compound interest under the terms of the contract and applicable law.

Are interim or partial awards enforceable?

Yes interim and partial awards are enforceable

Are Arbitrators allowed to issue dissenting opinions to the award?

There is no specific reference to dissenting opinions in the Alternative Dispute Resolution Act. However under the Alternative Dispute Resolution Act where there are three or more Arbitrators any award or decision of the tribunal shall be by the majority of the Arbitrators.

Are awards by consent permitted?

Yes. Awards by consent are permitted. If during the proceedings the parties settle the dispute, the Arbitrator shall terminate the proceedings and with the agreement of the parties, record the settlement in the form of an arbitral award on agreed terms.

Apart from an award, proceedings may be terminated if the parties by agreement decide to withdraw the matter from arbitration.

What powers, if any, do Arbitrators have to correct or interpret an award?

The Arbitrator, at the request of a party or on the Arbitrator’s own volition can:
a. correct an award in order to remove any clerical, typographical, technical or computation error in the award.

b. make an additional award in respect of a claim presented to the Arbitrator but omitted from the award.

Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

Unless the parties have agreed otherwise, the unsuccessful party usually bears the cost of the arbitration.

What are the elements of costs that are typically awarded?

Typically awarded cost include the Arbitrator’s fees and expenses, counsel’s fees and the cost of supervision by an arbitral institution (where applicable).

Challenges to Awards

Awards may be challenged by an application to the High Court made by a party to the arbitration and the award may be set aside by the Court only where the applicant satisfies the Court that:

a. A party to the arbitration was under some disability or incapacity;

b. The law applicable to the arbitration agreement is not valid;

c. The applicant was not given notice of the appointment of the Arbitrator or of the proceedings or was unable to present the applicant’s case;

d. The award deals with a dispute not within the scope of the arbitration agreement or outside the agreement except that the Court shall not set aside any part of the award that falls within the agreement;

e. There has been failure to conform to the agreed procedure by the parties;

f. The Arbitrator has an interest in the subject matter of arbitration which the Arbitrator failed to disclose.

There are time limitations for challenging awards. The Alternative Dispute Resolution Act says that an application to set aside an award may not be made after three (3) months from the date on
which the applicant received the award unless the Court for justifiable cause orders otherwise.

Challenge proceedings do not stay enforcement proceedings. An application for stay of execution must be made in addition to the challenge proceedings.

**Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?**

No. An award cannot be appealed against.

**May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?**

Yes. Under Ghana’s High Court Civil Procedure rules, the court may remit an award to the tribunal in any of the following cases:

a. if the award has left undetermined some of the matters referred to arbitration or if it has determined matters not referred to arbitration;

b. If the award is so indefinite as to be incapable of execution; or

c. If an error with regard to the legality of the award is apparent on the face of the award.

**Recognition and Enforcement of Awards**

An application on notice must be made to the High Court for the enforcement of an award. The applicant must exhibit the original award or produce a copy of the award authenticated in the manner prescribed by the law of the country in which it was made as well as the agreement pursuant to which the award was made.

The grounds for opposing enforcement include the following:

a. the award has been annulled in the country in which it was made

b. the party against who the award is invoked was not given sufficient notice to enable the party present the party’s case

c. a party lacking capacity was not properly represented

d. the award does not deal with the issues submitted to arbitration
e. the award contains a decision beyond the scope of the matters submitted for arbitration.

The High Court is the competent court. In practice a stay may be granted pending the determination of the challenge to the enforcement proceedings.

Once the local court recognizes the foreign award, it can be enforced in the same manner as a judgment or order of a court. A writ of execution or garnishee order can be issued to compel payment of a money award. An application for the appointment of a receiver can also be made.

What is the attitude of courts towards the enforcement of foreign awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The courts generally enforce foreign awards. The Courts will not enforce a foreign award that has been set aside or annulled by the courts at the place of arbitration.

How long does enforcement typically take?

It depends on whether the award is contested or not. If the award is contested then enforcement can take 3-4 years as the losing party has a right of appeal to the Court of Appeal and the Supreme Court of Ghana. Awards like court judgments must be enforced within 6 years from the date they become enforceable.

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