# Ghana

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## In summary

This article sets out some of the key developments in arbitration practice in Ghana in 2022.

## Discussion points

- Enforcement of interim arbitral awards
- Preservation of the right to arbitration as an exceptional circumstance in applications for stay of proceedings
- Challenge of an arbitral award on the grounds of arbitrator's partiality
- Bifurcation of claims in application for stay of proceedings

## Referenced in this article

- Alternative Dispute Resolution Act 2010 (Act 798) (the ADR Act)
- Land Act 2020 (Act 1036)
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention)

## Introduction

A review of the key developments taking place in the arbitration space in 2022 shows that arbitration remains a viable alternative to dispute resolution offered by national courts. The growth of arbitration in Ghana may be attributed to the oft-cited inherent advantages associated with the dispute resolution method (ie, speed, flexibility, the privacy and the finality of outcomes); however, it may also be attributed to the statutory and judicial blessings that arbitration has received and continues to receive in judicial and legislative arenas. Thus, while national courts and arbitral tribunals offer independent platforms for dispute resolution; arbitral tribunals rely significantly on courts for assistance in the course of their work. The review, especially of case law developments, will show that courts are supportive of arbitration and have, in deserving instances, referred matters brought before courts in breach of valid arbitration agreements, to arbitration. This is consistent with the role that the courts have played and continue to play.

This article is divided into two parts. The first part considers legislative developments in the area of arbitration. The second part will focus on case law development, touching on a number of important questions. These questions include:

- whether interim arbitral awards are enforceable in Ghana;
- whether the need to preserve a party's right to arbitrate constitutes an exceptional circumstance for the purpose of a grant of application for stay of proceedings; and
- whether a court, in making reference to arbitration, is entitled to refer part of the claim to arbitration and exercise jurisdiction over part of the claim not caught within the web of the arbitration agreement.

## Legislative development

### Section 98 of the Land Act: wide in scope, limited in application

In the previous year's legislative update, we highlighted section 98 of the Land Act 2020 (Act 1036) as a significant development in the use of arbitration and other alternative dispute resolution methods in resolving land disputes. Section 98 provides that:

> *An action concerning any land or interest in land in a registration district shall not be commenced in any court unless the procedures for the resolution of disputes under the Alternative Dispute Resolution Act, 2010 (Act 798) has been exhausted.*

We raised two concerns regarding the implementation of section 98. The first issue concerned the provision's insistence on parties initially resorting to alternative dispute resolution methods before being heard in court. The challenge

with the insistence on the use of an alternative dispute resolution mechanism as a precondition for presenting a claim before a court is that the provision fails to recognise that these alternative dispute resolution mechanisms are fully-fledged and independent dispute resolution processes. In sum, alternative dispute resolution methods are 'alternatives' and not appendages to traditional dispute resolution methods. On the second challenge, we noted that 'It is further an open question whether taking away the rights of persons to resort to national courts, with specialised land courts, is a desirable outcome' (the Supreme Court).[1]

On 26 July 2022, Ghana's Supreme Court in *Republic v High Court (Labour Court 1), Accra; Ex Parte A & C Development Company Limited,*[2] pronounced on the utility and scope of section 98 of Act 1036. In the original proceedings before the High Court, the plaintiff brought an action for, among other things, the recovery of possession of immovable property in a registration district. On receipt of the writ, the defendant entered appearance under protest. It subsequently brought an application to set aside the writ of summons and statement of claim. The defendant's motion to set aside the writ was premised on two grounds. First, the defendant argued that the land in question fell within a registration district. Second, the defendant contended that section 98 insists on parties exhausting alternative dispute resolution methods as a condition precedent to accessing the courts. The defendant lost the motion before the High Court; however, emboldened by the rather clear words of section 98, the defendant applied for certiorari in the Supreme Court to quash the ruling of the High Court. The defendant's application failed. The Supreme Court concluded that section 98 could not be properly understood to completely oust the jurisdiction of the court in favour of alternative dispute resolution methods in land disputes falling within a registration district. In coming to this conclusion, the court took a historical path – comparing section 98 of Act 1036 with another similarly worded provision in the repealed legislation. 'The similarity in the two statutes convinces us that the lawmaker did not intend to change the existing arrangement for dispute resolution in land matters as they relate to the nature of the issues that were to be dealt with by a body other than the regular courts.'[3]

The court reasoned that:

> *Section 98 of Act 1036 refers to only disputes that arise in the course of the process of registration of title or interest in land falling within a registration district. The section is not meant to affect the well-established and long-standing jurisdiction of the regular courts in land dispute even if the land falls within a registration district.*[4]

1 AND Kotey and S Alesu-Dordzi, 'Recent Developments in Arbitration in Ghana', *The Middle Eastern and African Arbitration Review 2022*, GAR, p. 172.
2 (Civil Motion No. J5/63/2022) Ruling delivered on 26 July 2022.
3 ibid, p. 5.
4 ibid, p. 7.

The court, in taking a narrow view of section 98, further stated that:

> *The Complicated rules that apply in the determination of land ownership disputes makes the courts more suitable, competent and the tested forum for resolving such disputes, while matters of a technical nature about the land title registration process may be settled by arbitration under Act 798.*[5]

The Supreme Court, therefore, confined section 98 of Act 1036 to disputes concerning the registration of titles, and not all disputes concerning any interest in land in a registration district. On the basis of the conclusion reached by the Supreme Court, it can be said that section 98 is wide in its scope but limited in its application.

## Enforcement of interim arbitral awards

The enforcement of interim arbitral awards remains a contested issue across the globe. Ghana is no exception. Albert Van Den Berg, Honorary President of the International Council for Commercial Arbitration (ICCA), citing the United Nations Commission on International Trade Law (UNCITRAL) Secretary-General report, explained that interim measures could take a number of forms, including:

- measures aimed at facilitating the conduct of arbitral proceedings;
- measures to avoid loss or damage pending the arbitral proceedings; and
- measures to facilitate later enforcement of the award.[6]

The enforceability or otherwise of interim arbitral awards is, therefore, crucial because it has the potential of influencing the usefulness and relevance of arbitration as a viable dispute resolution mechanism. Without enforceable interim arbitral awards, arbitral proceedings risk being undermined and emptied of their substance.

The Alternative Dispute Resolution Act 2010 (Act 798) (the ADR Act) recognises the right of a party to arbitration to seek interim measures and obtain interim awards prior to or in the course of an arbitration. To this end, the ADR Act creates a dual channel for obtaining interim relief.

The first channel is through the courts. A party to an arbitration seeking interim relief may approach the court under section 39(1)(e) for an interim injunction or the appointment of a receiver. From an enforcement point of view, this first

5 ibid.

6 Albert Van Den Berg, 'The 1958 New York Arbitration Convention Revisited' in P Karrer (ed), *Arbitral Tribunals or State Courts: Who Must Defer to Whom?* 125 (ASA Special Series No. 15, 2001).

channel (involving the courts) does not pose a significant challenge as the orders of the court do not require further validation to be enforceable.

The second channel is through the arbitral tribunal. Section 31(2) of the ADR Act empowers the arbitrator to conduct proceedings in a manner that the 'arbitrator considers appropriate'. Section 31(8) further provides that the arbitrator may give directions in respect of property that is the subject matter of the arbitration or is in the possession of a party. Therefore, even in the absence of a specific provision allowing for interim relief, the arbitrator's power to grant interim relief may be inferred from the language of section 31(2). However, such an inference will not be necessary as section 38 explicitly provides that an arbitrator may grant interim relief, at the request of a party, for the protection or preservation of property. The ADR Act acknowledges that the interim relief may take the form of an interim award.[7]

As alluded to above, while the legal foundation to request and grant interim relief is not in doubt, the ADR Act leaves open the extent to which interim arbitral awards are enforceable. This section therefore considers the enforcement mechanism under the ADR Act for interim awards or relief in the light of a recent decision by the Commercial Division of the High Court, Accra.

The ADR Act does not specifically set out a mechanism for the enforcement of interim arbitral awards. This leaves the question open as to how a court should approach an application seeking enforcement of an interim injunction or relief granted by an arbitral tribunal.

This was the crux of the question presented before the Commercial Division of the High Court in *African Champion Industries v Adamus Resources Ltd & Anor.*[8] The applicant, a party to an ongoing arbitration before the Ghana Arbitration Centre, brought an application for leave to enforce an interim award under section 57 of the ADR Act. This section falls within the part of the ADR Act dealing with the 'Powers of the High Court in relation to award'. Section 57(1) provides that:

> *An award made by an arbitrator pursuant to an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order of the Court to the same effect.*

The challenge posed by the framing and wording of section 57 is that it leaves open the question of the kind of award that is being contemplated. Does it only apply to final awards? Or does it apply to interim awards? This leaves the door open for a liberal or restrictive interpretation to be placed on the meaning of 'award' (the ADR Act simply defines an 'award' to include an arbitration award on agreed terms). The court in the *African Champion Industries* case opted for

7 ADR Act, section 38(2).
8 Suit No. CM/MISC/0116/2021, dated 22 June 2022.

the more restrictive approach. We would argue that the court took a wrong turn in opting for a restrictive interpretation of the word 'award'.

In *African Champion Industries v Adamus Resources Ltd & Anor* (see above), the applicant sought to enforce the following orders made by the arbitral tribunal:

- that the respondents are jointly and severally 'restrained from selling and exporting gold realised from the mining concession known as the Nzema Mine pending the final determination of this matter; and
- that all gold bullion or concentrate produced at the Nzema Mine be delivered to the custody of the Bank of Ghana pending the conclusion of these proceedings.

The respondent opposed the application for the court's assistance in enforcing the interim awards made by the arbitral tribunal. The respondent's opposition was on two grounds. The first ground was that the interim relief granted by the arbitral tribunal was not an award, properly so-called, under section 57 of the ADR Act. And second, since the interim award was not an award in the context of section 57, the court did not have jurisdiction to grant leave for the enforcement of the award.

The court approached the dispute as follows. First, it confined itself to section 57 in dealing with the enforcement of arbitral awards rather than looking at Act 798 as a whole. Second, it construed the meaning of 'award' under section 57 to mean a final award. In the words of the court: 'This "Award" when used within the context of an Arbitration is supposed to be a "Final Judgment or decision" of an Arbitrator.' The court, in adopting this restrictive approach to the meaning of the word 'award' as contained in *Black's Law Dictionary*, concluded that the High Court's mandate was only confined to enforcing final arbitral awards, and to the extent that an interim award was lacking in finality, it could not be enforced.

The restrictive approach adopted by the High Court and the conclusions reached by it are not supported by the terms of the ADR Act. First, the definition under the ADR Act for an 'award' is wider than definition under *Black's Law Dictionary*. Section 135 of the ADR Act says that an award 'includes an arbitration award on agreed terms'. The use of the word 'includes' in section 135 of the ADR Act leaves the door open for the enforcement of urgent and necessary awards that are not final arbitration awards. In *Dilworth v Stamps Comrs, Dilworth v Land & Income Tax Comrs*,[9] the effect of the word 'include' was summed up as follows:

> *The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify*

9 [1899] AC 99 PC.

> *according to their natural import, but also those things which the interpretation clause declares that they shall include.*[10]

Thus, the use of the word 'include' in the definition of the word 'award' points to a clear legislative intent to treat interim arbitral awards as awards in the context of the ADR Act. Second, there is a presumption against otiose meanings in legislation. As explained in *Bennion on Statutory Interpretation*, 'Every word of an enactment is presumed to have been put there for a purpose.'[11] Therefore, relying on the rule against otiose meanings in statutes, the question worth asking is: is section 38 of the ADR Act (which empowers an arbitrator to grant an interim relief) merely declaratory of the powers of the arbitrator and therefore not intended to be enforced? Certainly not.

To the extent that the ADR Act provides for the granting of interim relief, there must be a forum for the enforcement of that relief. Courts have an essential role in supporting arbitration proceedings. Declining jurisdiction to enforce interim arbitral awards on the basis that they are not final awards negatively impacts the efficacy of arbitration as a viable mode of dispute resolution.

It is the considered view of the authors that the court was incorrect in its interpretation of the word 'award', and that had it considered the fact that the ADR Act does not construe that word narrowly, it would have arrived at a conclusion that gives substance and meaning to section 38 of the ADR Act. To treat interim arbitral awards differently requires a convincing and clearly statutory basis that is not present in this case. As Van Den Berg notes in his piece 'The 1958 New York Arbitration Convention Revisited':

> *As regards the question of whether an interim award can be considered 'binding' under article V(1)(e) of the Convention, no major obstacles to the enforcement of a 'temporary' award seem to exist. An award will be enforced in accordance with its terms. If one of the terms is that the order contained in the award is for a limited period of time, the enforcement will correspondingly cover that period of time. If the interim award is subsequently rescinded, suspended or varied by an arbitral tribunal, that will as a rule be laid down in a subsequent interim award, which can also be enforced.*[12]

## Court stays proceedings to preserve right of party to arbitrate

A party seeking to stay proceedings in a matter before a court must demonstrate that there are special circumstances justifying such a request. The determination of an exceptional circumstance requirement is very demanding, and it is

10 ibid, pp. 105–106.
11 See *Bennion on Statutory Interpretation, 5th. ed*, p. 1157.
12 Van Den Berg Albert, 'The 1958 New York Arbitration Convention Revisited', p. 143.

often the graveyard of many stay-of-proceedings applications. Previous court decisions have been to the effect that a stay will only be granted in cases where not granting a stay would lead to significant injustice or where the matter raises jurisdictional issues.[13] Further requests for a stay of proceedings are often not granted because courts are concerned that such stays may delay or frustrate trials and other court proceedings. However, in a significant break away from the long list of failed cases on the granting of stays of proceedings, the Commercial Division of the High Court, Accra agreed to stay proceedings pending the decision of the Court of Appeal on whether a clause in an agreement qualified as an arbitration agreement.

By way of procedural history, the plaintiff brought an action in the Commercial Division of the High Court seeking a number of reliefs concerning an agreement with an arbitration clause. The defendant entered conditional appearance. The defendant went on to file an application asking the court to refer the matter to arbitration. The defendant's contention was that there was an arbitration clause present in the parties' agreement, and therefore the court's jurisdiction was invoked prematurely.

The defendant, in arguing out the existence of the arbitration clause, relied on a separate document, and asserted that the document was incorporated into the agreement of the parties. The plaintiff resisted the application, insisting that the separate document relied on by the defendant was not incorporated into the parties' agreement. The plaintiff further alleged fraud on the side of the defendant.

The Commercial Division of the High Court, on the basis of the contention of the parties, and the fact that the plaintiff had alleged that the document relied on by the defendant was procured by fraud, refused to refer the matter to arbitration. The Court argued that evidence needed to be taken in determining the respective contention of the parties.

On the back of the Commercial Court's refusal to stay proceedings and refer the matter to arbitration, the defendant appealed. The defendant subsequently filed an application for a stay of proceedings before the High Court. The thrust of the defendant's case is that, should a stay not be granted in its favour, it would be compelled under the rules of court to file a defence – an act that would be interpreted as a waiver of its right to arbitrate.[14]

The High Court granted the defendant's application for stay of proceedings pending the determination of the appeal. The court rightly reasoned that opting not to stay proceedings would have led to a grave injury to the defendant. It would have effectively wiped out the defendant's right to arbitrate. In the words of the court:

13 See *Republic v Stephen Kwabena Opuni & Ors* [2020] Crim LR 581.
14 See *Carbon Commodities DMCC v Trust Link Ventures* Suit No. H1/63/2020 (delivered on 22 April 2021).

> *It stands to reason then that in the case at hand if the proceedings are not stayed while the appeal is pending determination, the corollary would be for this court to order the Defendant to file its statement of defence and for the trial to take its normal course, thereafter. The Defendant upon compliance, would then be deemed to have waived its rights to arbitration conclusively, having taken fresh steps in the case evincing an interest to contest the action on its merits. Put differently, the Defendant stands to lose its right to arbitration in these circumstances and the appeal, which is by way of rehearing, in any event, if successful, same would be rendered nugatory.*[15]

## Upholding the intent of parties to arbitrate despite the challenges of the arbitration clause

If a party has signed an agreement containing an arbitration clause, that is no guarantee that the party will willingly submit itself to arbitration. It is this very same conduct that justifies the invocation of the jurisdiction of the court to not only stay proceedings but refer the matter to arbitration. The court's power to stay proceedings and refer a matter to arbitration is not only invoked in situations where the parties' arbitration agreement is perfectly worded. The court may similarly give effect to the intention of the parties to arbitrate even in cases where key terms of an arbitration agreement are absent, including situations where the arbitration clause does not make reference to an arbitral institution or makes reference to a non-existent arbitral institution. In *Damata Kaleem v Mobus Properties (GH) Limited*,[16] the arbitration clause provided that:

> *Any dispute between the Parties arising from the interpretation of this Agreement or the respective rights of the Parties and obligations under or any breach of any covenant of this Agreement shall be decided by arbitration in accordance with the Arbitration Act of the Republic of Ghana.*

The respondent brought an action in court, and the applicant filed an application for a stay of proceedings on the grounds that there was an arbitration agreement in place. The respondent challenged the validity of the arbitration clause, arguing that the 'Arbitration Act' was repealed and therefore conferred no valid right on the parties to arbitrate. Second, the respondent argued that the arbitration clause in question did not make reference to an arbitral institution – a fact that, in the respondent's view, made it impossible for the parties to arbitrate.

15 *Petronia City Development Ltd v. Energoprojekt Ghana Ltd* Suit No. Cm/0395/2022 (Ruling delivered on 12 October 2022), p. 3.

16 Suit No. CM/RPC/0805/2020 (Ruling delivered on 16 April 2021).

While acknowledging the deficiencies with the arbitration clause, the court took the pragmatic view of staying proceedings and referring the parties to arbitration. In the view of the court, it was the manifest intention of the parties to resolve their disputes by arbitration. The reference was also made easy by the respondent's own assertion that it was not opposed to arbitration per se, as it had previously tried to get the applicant to confer jurisdiction on the Ghana Arbitration Centre for the purpose of carrying on the arbitration.

## Bifurcation of proceedings in favour of arbitration

Mixed claims often raise a number of difficult questions for a court deciding whether or not to refer a matter to arbitration. Does the court grant or refuse (wholesale) such an application for reference? Or does the court nitpick those claims falling within the terms of the arbitration agreement and refer them to arbitration? And, should the court do this, is there a risk that the court may stray into matters covered by the arbitration agreement?

In *SPL Construction Limited v Blue Ocean Investments Ltd*,[17] the court was confronted with a mixed claim. Part of the claim fell within the remit of the arbitration agreement. The other parts fell outside the remit. In the court's view, the path it would take in response to an application for stay of proceedings and for reference to arbitration was largely dependent on the terms of the arbitration agreement.

The arbitration clause in this case, while preventing the parties from taking any steps to resolve their differences outside the framework of arbitration, made an exception in respect of urgent interlocutory relief. Thus, the parties to the arbitration agreement were at liberty to seek such relief from the courts. The plaintiff therefore brought an action seeking, among other things, a declaration of breach of contract, an order for the appointment of an accounting firm to compute sums that the plaintiff was entitled to, orders for the defendants to pay various sums to the plaintiff and an award for interlocutory injunction. Having examined the reliefs sought by the parties, and the scope of the arbitration agreement, the court refused to make a complete reference to arbitration. Rather, the court bifurcated the claims, referring the aspects that were not urgent and interlocutory to arbitration while accepting jurisdiction over the equitable injunctive reliefs sought by the plaintiffs. The court asked:

> *will the ends of justice be served if this court stays proceedings entirely just because the Plaintiff has chosen to approach it seeking a potpourri of interlocutory and final remedies? I do not think so. My understanding of Section 6 (1) of Act 798 (the provision on which the present application is grounded) is that a court is empowered to refer that part of the*

17 Suit No. CM/BDC/ 0362/2022 (Ruling delivered on 14 April 2022).

> *action to which the arbitration agreement relates to arbitration, whilst proceeding to resolve issues that fall within the court's purview.*
>
> *The proper course therefore, in my view, will be for this court to stay proceedings in respect of the substantive reliefs sought by the Plaintiff and to refer the dispute as far as they relate to those substantive reliefs to arbitration, whilst proceeding to determine those of an interlocutory nature.*[18]

The court's decision to bifurcate the claims is highly encouraging and further demonstrates the court's posture to give meaning to the contractual intention of the parties – including their mutually agreed decision to reserve some matters for arbitration and some other matters for the jurisdiction of the court.

## Arbitral award annulled on grounds that the dispute was resolved on points other than those canvassed by the parties

In *Agricult Ghana Limited v Ghana Cocoa*,[19] the Commercial Division of the High Court, Accra held that it was improper for an arbitral tribunal to unilaterally raise and determine a dispute on points other than those canvassed by the parties. As the court noted:

> *arbitral tribunals are bound by the principle of impartiality and should therefore avoid being perceived as siding with one of the parties by raising, on their own initiative, legal grounds that may advantage one party.*[20]

In this suit, the parties were in a just-concluded arbitration, with the final award being made in favour of the respondent. The applicant brought an application challenging the validity of the award on the grounds of the arbitrator's impartiality. The applicant based its argument that the arbitrator was impartial on two grounds. The first was that the arbitrator had failed to disclose that his daughter was a senior policy adviser in the government (which had significant control over how the respondent conducted its activities). The second ground of attack on the arbitrator's impartiality was that he concluded the dispute in favour of the respondent on 'public policy' grounds – an argument not canvassed by the parties.

The first ground of attack, based on the arbitrator's daughter's affiliation with the government, failed. The court, while acknowledging the relationship between the government of Ghana and the respondent, explained that it was a far cry to

18 ibid, p. 5.
19 Suit No. CM/MISC/0749/2019 (Ruling Delivered on 9 October 2019).
20 ibid, p. 11.

expect the arbitrator to disclose his familial relationship when he was operating in a context that was in no way connected with the dispute in question.

On the second ground, however, the court was convinced that the arbitral tribunal was not neutral and that its use of public policy to conclude the dispute in the respondent's favour smacked of partiality, which was in breach of the ADR Act. In the view of the court:

> *Arbitral Tribunals must endeavour to reduce the risk of annulment or non-enforceability of award by avoiding the reliance on public policy when clearly, its application will raise impartiality. Arbitral Tribunals must be guided by pragmatism when they decide to raise issues of law that have [not] been raised or pleaded by the parties. Furthermore, arbitral tribunals must ensure that that their proactive application of questions of law in a case at hand, does not violate any of the fundamental procedural rights of the parties, such as the right to be heard and their obligation of impartiality, as otherwise they would again expose their award to being set aside and/or declared unenforceable by a reviewing court.*[21]

## Conclusion

The arbitral developments detailed in this article show the continuous growth in popularity and acceptance of arbitration as a dispute resolution method. The jurisprudence on most of the issues are fairly established and grounded. However, the next frontier will be for the courts, lawyers and academia to engage vigorously on the issue of enforcement of interim arbitral awards, considering their importance to the arbitration process. Until then, it is recommended that parties contemplating interim reliefs should specifically carve out those reliefs for the court.

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21 ibid, p. 13.

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