



CURRENT ARBITRATION LANDSCAPE IN AFRICA: THROUGH THE CASES.

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The Governing legislation

Alternative Dispute
Resolution Act,
2010 (Act 798)
("ADRA")

New York
Convention
incorporated into
the ADRA

The High Court Civil
Procedure Rules C.I
47, 2004

Stay of Proceedings and Referral to Arbitration

Section 6 of the ADRA

(1) Where there is an arbitration agreement and a party commences an action in a court, the other party may on entering appearance, and on notice to the party who commenced the action in court, apply to the court to refer the action or a part of the action to which the arbitration agreement relates, to arbitration.

(2) The court on hearing an application made under subsection (1) shall, if satisfied that the matter in respect of which the application has been made is a matter in respect of which there is an arbitration agreement, refer the matter to arbitration.

- (3) The grant of an application shall serve as stay of the proceedings in the court.
- (4) Unless otherwise agreed to by the parties, where proceedings in court are stayed for the purpose of arbitration, any security given, property detained, injunction or restraining orders imposed in the original action shall apply to the arbitration.
- The courts have construed this to mean that a defendant should apply for the reference to arbitration after entry of appearance.

Stay of Proceedings and Referral to Arbitration

- This is because a right to arbitration, like any contractual right, can be waived either expressly or by conduct. The waiver of a defendant's right to arbitration is conclusively presumed under section 6(1) of the Act if the defendant does not raise it after the entry of appearance and goes on to take fresh steps in the matter aimed at defending the claim. In those circumstances the court shall proceed to hear and determine the dispute. The underlying reason is that parties should not proceed with litigation if they do not intend to do so. Thus any objection to the court as the forum should be raised in the early stages of the process, whilst the opportunity avails the parties.

Stay of Proceedings and Referral to Arbitration

Section 7(5) of the ADRA

Where in any action before a court the court realises that the action is the subject of an arbitration agreement, the court shall stay the proceedings and refer the parties to arbitration.

- Is the above provision mandatory?

DE SIMONE LIMITED V. OLAM GHANA LIMITED (2018) JELR 65960 (SC)

- Pleadings closed and all pre-trial processes came to an end and the actual hearing of the case commenced.
- The trial court considered this provision to be mandatory. It also considered that the court has no discretion in the matter upon a realisation that the contract contains an arbitration clause. In the court's view, time is of no essence under section 7(5) of the Act. The court also relied on section 72 of the Courts Act, 1993 (Act 459) which enjoins the court to promote reconciliation.

Stay of Proceedings and Referral to Arbitration

- “We say it is not usual because if Section 7(5) is construed literally as the lower courts suggest, it would mean that even if both parties decide to waive their rights under the arbitration agreement, the court shall nonetheless compel them to resort to arbitration. Take the facts of the case at hand where the lower courts rightly found that the defendant had irrevocably waived its right to arbitration. ***The plaintiff by opposing the application for referral to arbitration clearly waived its arbitration rights too but the courts below have compelled them to go to arbitration. This interpretation of Section 7(5) leads to an absurdity because it flies in the face of fundamental principles of the law of contract namely the freedom of contract. As earlier pointed out, parties to an arbitration agreement are free to annul it if both of them act together either expressly or by their conduct.*** Almost all modern arbitration statutes globally are based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration of 1985 as amended in 2006. It does not contain such a provision that enables a court to compel contracting parties to seek arbitration against their will. Our research has not discovered a democratic country with a comparable provision in its arbitration statute.”

Stay of proceedings – Need for Interim Orders

DE SIMONE LIMITED V. OLAM GHANA LIMITED

Section 54 (2) of ADRA

“A party’s right to arbitration is not waived because the party has initiated judicial proceedings in relation to the subject matter of the arbitration. “

- the plaintiff under Section 54(2) is not deemed to waive his right to arbitration simply because he commenced proceedings in court.
- This Section is appropriate because a party to an arbitration agreement may commence proceedings in court not with an intention to waive his arbitration rights but only for the purpose of obtaining interim reliefs such as preservation of the subject matter and injunction. The plaintiff may also just have initiated summary proceedings in respect of a non-contentious claim. Such a party may thereafter start arbitration proceedings or apply to the court to stay proceedings and make a referral to arbitration. That partly explains the reason the Act by Section 6(4) preserves interim orders obtained before referral to arbitration.

Stay of Proceedings – where fraud is alleged

■ M. BARBISOTTI & SONS LTD v. EUROGET DE-INVEST S.A, DR. SAID DERAZ & CAL BANK GHANA LIMITED [UNREPORTED] CIVIL APPEAL NO. H1/162/2019, DATED JULY 8, 2021

- On 8th July 2021, the Court of Appeal of Ghana, by a majority decision in the above-mentioned suit, overturned, a decision of the High Court, (Commercial Division), Accra dated 30th July 2018 ("Ruling"). The appeal emanated from an action filed by the Respondent (M. Barbisotti & Sons Ltd) at the High Court claiming, among others, breach of a construction contract, and fraud. The 1st Appellant (Euroget De-Invest S.A), a real estate developer, had raised at the High Court a preliminary objection against the suit before it.
- The High Court rejected the Appellants' objection and dismissed the request for stay of proceedings and reference to alternative dispute resolution.
- *The Court of Appeal, in its decision, held among other things that once the alleged fraud is against the contract itself (as opposed to fraud in the arbitration agreement), the claim of fraud is arbitrable and same could be determined by an arbitral tribunal.*

Application - M. BARBISOTTI & SONS LTD

- The decision of the Court of Appeal in this case, affirms the pro arbitration stance of the Ghanaian courts. Fraud is no longer a hold-back or a constraint to the Court's ability to defer fraud claims to the ADR forum.

Stay of Proceedings – Pending an appeal on referral

Carbon Commodities DMCC v Trust Link Ventures Suit No. H1/63/2020 (delivered on 22 April 2021)

- 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 part 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.
- 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.***

Stay of Proceedings – Pending an appeal on referral

■ 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:

- *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.*

Stay of proceedings - where the arbitration clause is deficient

■ In **Damata Kaleem v Mobus Properties (GH) Limited**, (Suit No. CM/RPC/0805/2020 (Ruling delivered on 16 April 2021)) 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.

■ 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.

Referral – Mixed Claims

- **SPL Construction Limited v Blue Ocean Investments Ltd Suit No. CM/BDC/ 0362/2022 (Ruling delivered on 14 April 2022)** the court was confronted with a mixed claim.
- Part of the claim fell within the remit of the arbitration agreement while 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.
- 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 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.*

The Balkan Energy Case

- The facts were that the Government of Ghana entered into a Memorandum of Understanding with Balkan Energy LLC to revamp a power barge. Subsequently, a Power Purchase Agreement (PPA) was entered into between the Government and Balkan Energy Ghana on 27th July 2007 under which it was agreed that the Balkan Energy Ghana was to make the barge operational within ninety days. As a result of differences between the Government and the Balkans, the barge was not made operational within the stipulated ninety days. Failing subsequent attempts to resolve the differences amicably, with both parties alleging breach of the PPA, the Balkans served notice of commencement of arbitration of the PPA.
- Whilst the arbitration was ongoing, Government of Ghana filed an action in the High Court seeking to restrain the tribunal from hearing the dispute. The Attorney-General argued, inter alia, that the Power Purchase Agreement, as an international transaction, required parliamentary approval for it to be legally binding according to Article 181(5) of the 1992 Constitution of Ghana. In the absence of such an approval, the whole transaction was a nullity including the arbitration agreement.
- It was further argued that the nature of the said transaction was a matter of interpretation and enforcement of the Constitution of Ghana and thus excluded from the arbitrable subject-matters under Act 798. The Balkans argued that assuming the Attorney General's position was to be accepted, the arbitration agreement was separable from the main agreement. The matter was eventually referred to the Supreme Court.
- The Supreme Court held that an international commercial arbitration is not by itself autonomous when it comes to transactions which are commercial in nature which pertains to or impacts on the wealth and resources of the country, hence not arbitrable, and further noted that the tribunal lacked jurisdiction to entertain the dispute.

Intervention of the courts during arbitration

THE REPUBLIC V. HIGH COURT (COMMERCIAL DIVISION, ACCRA) EX-PARTE: GHACEM LIMITED (AJ FANJ CONSTRUCTION & ENGINEERING LIMITED AS AN INTERESTED PARTY) CIVIL MOTION NO. J5/29/2018, 30TH MAY 2018

- The case involves an application for an order of Certiorari directed at the High Court (Commercial Division), Accra to quash a ruling that allowed the joinder of GHACEM Limited, a non-signatory party, to an ongoing arbitration between AJ FANJ Construction Limited and West Africa Quarries Limited (WAQL).
- The sole arbitrator refused to join GHACEM because GHACEM was not a party to the arbitration agreement. AJ FANJ, being dissatisfied with the ruling of the sole arbitrator brought an application under Section 40 of the Alternative Dispute Resolution Act, 2010 (Act 798) seeking the determination of a preliminary point of law. The specific question AJ FANJ asked the High Court to determine was whether a non-signatory to an arbitration agreement can be made a party to an arbitral proceeding.
- The learned High Court Judge, joined GHACEM to the arbitration proceedings. GHACEM, sought to quash the decision of the High Court.

Intervention of the courts during arbitration

- Sections 40 (2) and (3) in particular of Act 798 reinforces the view that the determination of the question of law mentioned therein in Section 40 (1) is ***a determination arising out of the course of the arbitration proper***. This is the only logical interpretation that can be given when the fact that the arbitrator may continue the arbitral proceedings and even make an award whilst the application for the determination of the question of law is pending. This makes it clear that, the question of law envisaged are not the type of determination of issues of joinder of a non-signatory party that arose in this case.
- *What must be noted is that the provisions in Act 798 on arbitral proceedings must be considered as alternative methods of resolution of disputes, and therefore, in our view, the intervention of the High Court, unless expressly provided for and in clear instances devoid of any controversy, must be very slow and cautious.* Otherwise, in our respective opinion, the High Courts will once again use these interventions to whittle away the functions of the arbitral tribunals and render nugatory the benefits that are to be derived from these arbitral proceedings as contained and provided for in Act 798.

Intervention of the courts during Arbitration

Determination of preliminary point of law

40. (1) Unless otherwise agreed by the parties, the High Court may, on an application on

- notice to the other party by a party to arbitral proceedings, *determine any question of law* that arises in the course of the proceedings if the Court is satisfied that the question substantially affects the rights of the other party.
- (2) The application shall identify the question of law to be determined, and shall state the grounds which requires that the question should be decided by the Court.
- (3) Unless otherwise agreed by the parties, the arbitrator may continue the arbitral proceedings and make an award while the application to the Court under this section is pending.
- (4) The decision of the Court on the question of law shall be treated as a judgment of the Court for the purpose of an appeal; except that no appeal lies without the leave of the Court, which leave shall not be given unless the Court considers that the question is one of importance or is one which for some other special reason should be considered by the Court of Appeal.

Enforcement of Interim awards

- Section 57(1) of the ADRA 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.*
- 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 -Suit No. CM/MISC/0116/2021, dated 22 June 2022**. 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.
- The interim award consisted of 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.*

Enforcement of Interim awards

- The respondent opposed the application to enforce 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.*
 - *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 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.

Enforcement of awards

57 of ADRA

(1) 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.

(2) Where leave is so given, judgment may be entered in terms of the award.

(3) Leave to enforce an award shall not be given where, or to the extent, that a person against whom the award is sought to be enforced shows that the arbitrator lacked substantive jurisdiction to make the award.

Procedure

- Enforcement is by way of application to the High court by motion with an affidavit to which the arbitration agreement and the award, or certified copies of them, are attached.
- Once leave is granted, the award can then be enforced in the same manner as a judgment of the court.
- This normally involves serving a Notice of Entry of Judgment on the losing party to notify them of the terms of court order (which reflects the arbitration award) and informing them that if they do not comply with the order within seven days, execution will be carried out against their assets. If the award/judgment remains unpaid or unsatisfied, execution then proceeds by regular execution processes such as *writ of fieri facias*, garnishee orders, charging orders, winding up proceedings etc

Enforcement /Attachment of Awards – By Third Parties

- **THE REPUBLIC V. THE HIGH COURT (COMMERCIAL DIVISION) ACCRA EX PARTE: ATTORNEY-GENERAL ZENITH BANK (2019) JELR 68897 (SC)**
- Bank Ghana Limited won a judgment of USD44,155,258.39 against Balkan Energy Ghana Limited. Balkan Energy was also awarded USD 13.3 million against the Republic of Ghana due to a breach of a power purchase agreement.
- Zenith Bank enforced the judgment against Balkan Energy and obtained a garnishee order against the Attorney General for the arbitral award to be assigned to it.
- The Garnishee order absolute was granted on the 13th of October 2017. By a letter dated 16th February 2018 the Attorney - General instructed the Minister of Finance to pay Zenith Bank.

Enforcement /Attachment of Awards – By Third Parties

- In the meantime Balkan Energy Ghana Ltd. petitioned the United States District Court for the District of Columbia to confirm, recognize and enforce the arbitral award. On the 22nd of March 2018 the District Court for the District of Columbia confirmed the arbitral award and assigned same to Balkan Energy UK.
- In view of the above development the Attorney General on the 19th of July 2018 wrote to the Minister of Finance withdrawing its earlier instruction dated 19th February 2018 thereby stopping payment to Zenith Bank; payment to Zenith bank would mean paying the debt twice. The solicitors of the interested party were notified of this development per a letter dated 31st July 2018.
- Following the judgment of the District Court for the District of Columbia, Balkan Energy UK took steps to enforce the arbitral award and attached assets of the Government of Ghana in France. The Government of Ghana promptly payed Balkan UK a total of USD 13,678,263.30 being the settlement of the arbitral award. This payment was done on the 2nd of October 2018.

Enforcement / Attachment of Awards – By Third Parties

- *“Section 59 of the Alternative Dispute Resolution Act, 2006 (Act 796) enjoins specific steps to be taken to register an arbitral award in the High Court of Ghana, before an arbitral award may be recognized or enforced in Ghana. This is in accordance with the provisions of the New York Convention, specifically incorporated into Ghana’s domestic law by Act 796. To the extent that there had not been any enforcement proceedings regarding the arbitral award on the strength of which Zenith Bank instituted the garnishee proceedings, there was no debt enforceable in Ghana. The garnishee proceedings were null, void and of no effect.”*



Recognition and Enforcement of Foreign Awards

In respect of foreign arbitral awards, Ghana is a signatory to the **New York Convention**, which has been directly incorporated into our laws through the First Schedule to the Alternative Dispute Resolution Act, 2010 (Act 798) (the "ADRA").

Ghanaian courts are generally willing to enforce arbitration awards and do not interfere with enforcement unless one of the grounds set out under **Section 58** of the ADRA or **Article V** of the New York Convention has been raised. The grounds under Section 58 of the ADRA are limited and broadly reflect the grounds under the New York Convention. These grounds are as follows:

The award has not yet become binding on the parties or has been suspended or annulled at the seat of the arbitration.

The losing party was not given sufficient notice of the arbitration proceedings to enable them to present their case at the proceedings or proper notice of the appointment of the arbitrator.

A party that lacked capacity was not properly represented.

Recognition and Enforcement of Foreign Awards

The award does not deal with the issues submitted to arbitration.

Contains a decision beyond the scope of the matters submitted to arbitration.

Proof that the parties were under some incapacity or that the arbitration agreement is not valid under Ghana law or the law of the seat of arbitration.

The subject matter of the dispute is not capable of settlement by arbitration under Ghana law.

The composition of the tribunal or procedure was not in accordance with the agreement of the parties or the law of the seat or

Recognition and enforcement would be contrary to the public policy of Ghana.

Recognition and Enforcement of Foreign Awards

- **Article V(2)(a)** of the New York Convention provides that a state may refuse to recognise or enforce an award if the subject matter of the dispute that led to the award is 'not capable of settlement by arbitration' under the state's domestic law.
- **Section 1** of the ADRA expressly carves out matters relating to the "national or public interest", the "environment", the "enforcement or interpretation of the Constitution" and the omnibus "any other matter that by law cannot be resolved by an alternative dispute resolution method" from matters that can be resolved by arbitration. Consequently, enforcement of a foreign arbitral award may be refused if the subject matter of the dispute relates to any of these four areas.
- It is particularly insightful that in both Balkan and Bankswitch, the parties who obtained the arbitral awards in their favour in spite of the position taken by the Supreme Court did not seek to enforce the awards in Ghana where naturally, the majority of the state's assets is located.

Enforcement against Government

- **Pre-conditions under the State proceedings Act to State Parties**
 - Under **Section 15** of the State Proceedings Act, 1998 (Act 555), certain pre-conditions must be satisfied before enforcement proceedings are commenced against the state.
 - The court must first issue a certificate in favour of the enforcing party containing particulars of the award, which is then served on the Attorney-General and also on the Accountant General where the award contains an order for payment.
 - The application to the court can only be brought after twenty-one days have lapsed from the date the arbitral award was issued.
 - Both pre-conditions must be satisfied, which inevitably lengthens the enforcement process.

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Thank you



Any questions?