

An Analysis of Judicial Intervention and Assistance for Arbitral Proceedings: A Look at the Courts of Ghana

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Abstract

Without the support of national courts, arbitral tribunals are unable to function properly, particularly in situations involving the enforcement of arbitration agreements, procedural orders, and arbitral awards, among other things. The arbitral tribunal cannot compel a party to carry out a task, or obligation, or fulfil an obligation. The court has the authority to order a party to carry out an order and can also impose harsh consequences for contempt of court, such as fines, imprisonment, or other punishments. Unless the issue(s) before the court are non-arbitrable pursuant to section 1 of the Alternative Disputes Resolution Act, 2010. The courts of Ghana have the capacity and jurisdiction to enforce applications by a party for arbitration. The New York Convention, which also grants national courts of contracting states authority to hear cases involving the enforcement of arbitration agreements, has been ratified and domesticated by Act 798 under the First Schedule. The paper argues that even though national courts are permitted by statutory laws and international conventions to assist in arbitral proceedings, courts must exercise some restraint and must not be in a hurry to inherit jurisdiction and interfere with disputes before arbitration, since arbitration proceedings are considered alternative methods of resolution of disputes to litigation,

and unless expressly provided for and in obvious instances devoid of any controversy. A purported judicial assistance should not be used to whittle away the function of arbitral tribunals and render nugatory the benefits that are to be derived from these proceedings as it would defeat the concept of Alternative Dispute Resolution (ADR). The paper concludes by suggesting that unnecessary interventions by some national courts including Ghana appear to be interfering with party autonomy as well as the competence of the arbitral tribunal, hence, hindering the purpose for which the Alternative Dispute Resolution Act 2010 was enacted and other supporting legislations and conventions as an alternative to litigation which is non-voluntary, expensive, acrimonious and complicated.

Keywords: Arbitration, Arbitral tribunal, National court, Intervention, interference, ADR, Ghana.

Introduction

The practice of arbitration as a dispute resolution mechanism is where parties rely on a neutral third-party called the arbitrator(s) without necessarily having recourse to a court of law. However, it appears not to be wholly the case. This perception appears more of a fiction as the court may be called upon to assist parties or the arbitral proceeding continues. This even starts at the very beginning which initiates the whole arbitral process. The discussion is centred on judicial intervention in arbitration. The first part of the discussion is dedicated to the theoretical perspective of judicial intervention, where attention is given to various legal doctrines, conventions, and treaties as well as jurisprudence and case law. The second part dovetails into a critical look at judicial intervention by the national courts of Ghana when it comes to the enforcement of arbitration agreements or clauses.

Judicial Intervention for Arbitration: A Theoretical Perspective

Arbitration, even though a private dispute resolution mechanism between parties, is structured in such a way that the courts system plays a supervisory role in one way or the other, such as when it comes to the rules and procedures selected, the governing laws such as the *lex arbitri* of the seat of the arbitration. This is required in retaining some level of control to ensure that the private system of justice meets the standards of due process, transparency, fairness, and natural justice to avoid undue fraud and corruption. Judicial intervention or assistance in international

arbitration appears to have different effects from the perspective one looks at it, either from the arbitrators' point of view or the point of view of a national court and its legal system, from the perspective of parties or even gauging from the international public and commercial law perspective.

However, from the common law view, the arbitrators have a quasi-judicial role and are given immunity over negligence and of mistakes in law or fact unless for gross negligence, bias, dishonesty, and bad faith. On the other hand, with regard to civil law jurisdictions, it is founded on a contractual analysis in the sense that the arbitrator performs the service of resolving a dispute for a fee, and by the imposition of law, he has a duty of care to act with due diligence and the duty to act judicially. Arbitrators and parties are subject to national laws and the court under the civil jurisdictions is in sharp contrast with the common law jurisdiction¹.

Enforcement of Arbitration Agreements or Clauses

When it comes to the enforcement of an arbitration agreement or clause, before any arbitration proceedings begin, a party or parties to the dispute must submit it before an arbitral tribunal. This process comes with its own challenges where a party may be dragging its feet to submit to it. This is based on the fact that the arbitration tribunal does not have coercive power, which the national court has. Therefore, courts have some powers that are lacking in a tribunal such as the coercive powers, to compel a party to perform a task or carry out a responsibility or duty. And any refusal from a party may lead to the imposition of negative sanctions such as fines, incarceration, or other penalties for contempt of court.²

Parties, therefore, call on the court for the enforcement of arbitration agreements or clauses for these reasons. According to the UNCITRAL Model Law under article 7(1):

Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a

¹ Indian Institute of Technical Arbitrators, *International Conference on Challenges in Domestic and International Arbitration*. Crowne Plaza Chennai Park, Chennai, 23-24 September, 2016

² Moses, ML. *The principles and practice of international commercial arbitration*. Cambridge University Press; 2017 Apr 6.

contract or in the form of a separate agreement.³ Article 8 (1) indicates that "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

The New York Convention⁴, under Article II (2) provides that "the term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Mordi (2016) indicates that the foundation of international commercial arbitration and the authority of the arbitral tribunal is anchored on the validity of an arbitration agreement existing between the parties, pointing to the fact that an arbitration proceeding must be based on a valid arbitration agreement or clause. The New York Convention mentioned above provides that an arbitration agreement must be in writing and signed by the parties. For a valid arbitration to be enforceable must be in writing and signed by the parties⁵. When disputes arise, a party may request the court to enforce an agreement to compel parties to submit to arbitration as contained in their agreement or clause. A party may also request a stay of proceeding from the court in order to make room for the arbitral process to progress.

³ UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, p4.

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations, 1958

⁵ Mordi, CA. An Analysis of National Courts Involvement in International Commercial Arbitration; Can International Commercial Arbitration Be Effective without National Courts?. *Open Journal of Political Science*. 2016;6(02):95.

When a party, therefore, requests the court to order the enforcement of the arbitration agreement or clause, what comes to play has to do with determining whether or not the arbitration agreement is valid. With this, Moses (2017)⁶ indicates that two question arises, the first being, whether the court should engage in a *complete review* of the facts and circumstances of the arbitration agreement or clause, and the second, whether to engage in a *prima facie* review. With the *prima facie* review, the court would refer the matter to arbitration if there was a reasonable likelihood that the party who brought the court action was in breach of a duty to arbitrate. This does not take a detailed look into the entire agreement. On the other hand, the *complete review* takes a look at the entire agreement. This approach appears more likely to prevent a defective arbitration agreement or clause from ultimately causing a final award to risk being set aside, which may appear to be a waste of resources, time, and energy. Notwithstanding this line of reasoning, those in favour of the *prima facie* review school, are still of the view that the complete review is likely to prevent a party from being able to engage in delay and obstructionist tactics.

When these issues confronted the U.S. Fifth Circuit in the case of *Ernesto Francisco v. Stolt Achievement Mt*⁷, the New York Convention was called upon, where the Court indicated that the Convention contemplates a very limited inquiry by courts when considering a motion to compel arbitration. It held that the following element should be considered whether the court should compel arbitration, whether “(1) there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen.” And if the answer to these pertinent questions is to the affirmative, then the letter and spirit of the New York Convention requires of the Court to order for arbitration. In essence, the need for the application of the complete review or *Prima facie* review when called upon by a party to trigger or order for the enforcement of an arbitration agreement is dependent on these requirements. If the four requirements are not met, they may be the need for a complete review approach. The enforcement of arbitration agreement under the Ghana

⁶ Ibid (n1) 86

⁷ 293 F.3d 270, 273 (5th Cir. 2002)

perspective would be discussed in detailed in the next section. Therefore, a brief discussion would be carried here.

The Alternative Dispute Resolution Act 2010⁸ of Ghana has made provisions for the Court to provide assistance to the arbitral proceedings which include for the enforcement of arbitration agreements. Act 798 provides under section 6 for the enforcement of arbitration agreement, the court is required to assist a party who brings an application before it, to order parties to submit their dispute to arbitration. The Act also provides under section 7, for the court its own motion with the consent of the parties to refer to arbitration an issue arising out of the dispute is arbitrable. However, the Act appear to side with the *Prima facie school* of thought when it comes to enforcement of the arbitration agreement, by referring parties to arbitration, it would avoid attempting to carry out a complete review of the arbitration agreement. *However, in the cases Westchester Resources Limited v Ashanti Goldfields Company Limited and Africore Ghana Limited v Ashanti Goldfields Limited*, the Supreme Court held that the high court trying a case on its own merits even though it was already referred to arbitration amounted to a nullity for lack of jurisdiction of the court. In a unanimous decision the Supreme Court indicated that the moment the disputes was submitted to arbitration under the Arbitration Act, 1961 (Act 38) (repealed by ADR, 2010), the arbitral tribunal had full capacity to handle the dispute under Act 38 and that the court lacked the jurisdiction. And that under the Act no provision granted or warranted the resumption of jurisdiction by the court over the matter in the circumstances that transpired after the case had been referred by the court itself to arbitration. Per the facts of the case, the Supreme Court reasoned that filling vacancies of arbitrators was provided for under Act 38 and that being the case, the trial court was not cloth with the capacity to resume jurisdiction simply because the parties could not agree on the procedural rules. And therefore, assuming jurisdiction amounted to a nullity.

However, the high court has capacity to review the arbitrators' ruling on its competence or at the stage of setting aside the award. This was the case of *Westchester Resources Ltd v. CAML Ghana Ltd*, when the issue had to do with fraud. The issue before the High Court bordered of the plaintiff pleading fraud in its statement of claim and arguing that any suit where fraud is alleged, was not arbitrable. The High Court held that felonious crimes such as fraud and forgery cannot be resolved by an

⁸ Alternative Dispute Resolution Act 2010 (Act 798)

arbitral tribunal but only court have the capacity and jurisdiction to resolve that. The court reasoned that where a party alleges fraud such as issue is not arbitrable, hence is an issue to be determined by only the court. Same was the position of the High Court in the case of *CP Construction Pioneers Baugesellschaft Anstalt (CPConstruction) v. Government of Ghana*. Section 58(3) provides that Court shall set aside an arbitral award where it finds that the subject-matter of the dispute is “*incapable of being settled by arbitration or the arbitral award was induced by fraud or corruption*”. It is observed that even though the ADR Act, 2010 provides for the court to intervene in arbitral proceeding, the court can only intervene where it has capacity and jurisdiction. The Act has provided limitations for court intervention.

The Doctrine of Kompetenz-Kompetenz

Under this doctrine, the discussion would consider the application of the doctrine of kompetenz-kompetenz by some jurisdictions such as France, United States, China, United Kingdom as well as the Ghanaian jurisdiction. To begin with, the doctrine of kompetenz-kompetenz has to do with the capacity of the arbitral tribunal to determine on whether it has jurisdiction to determine its own jurisdiction without assistance of any court. The doctrine of kompetenz-kompetenz is well grounded in international arbitration and acknowledged by many jurisdictions and national courts. The doctrine therefore empowers arbitrator with the capacity to determine their own competence, that is, they are empowered to decide on their own jurisdiction to hear and determine the dispute before them. Parties submitting their disputes to arbitration through an arbitration clause or agreement, appears parties to intend for an arbitrator to decide all disputes arising out of the contract such as jurisdiction of the arbitrator(s). Notwithstanding, the principle of kompetenz-kompetenz as a well-established principle, some jurisdictions do not endorse and submit to this doctrine, thereby, bringing about varied application of the doctrine in different countries. This therefore requires an inquiry when entering into an arbitration agreement as to whether the Contracting State of a party or the *lex arbitri* is amendable to the doctrine of kompetenz-kompetenz. It implies that when it comes the kompetenz-kompetenz doctrine, the court’s intervention may be sought on the validity of the arbitrator(s) determining their own jurisdictions.

Under the UNCITRAL Model Law⁹, the doctrine of kompetenz-kompetenz is provided for under article 16. It provides that the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. It provides that the arbitral tribunal has the capacity to determine matters bordering on its own jurisdiction such as objections on the existence or validity of the arbitration agreement or clause among others. It notes that where the tribunal rules that the contract is null and void, does not in any way affect the arbitration clause or agreement. It also gives a party the capacity to raise an objection as to the capacity of the arbitral tribunal, but which must come within submission of defence statement. In the case of *France*¹⁰, the court would adopt the prima facie approach, by conducting a very slight review. The *United States*¹¹ arbitration law appeared not expressly addressing the principle of kompetenz-kompetenz as a general principle but was granted based on meeting certain requirements known as the “*wholly groundless*” rule, where some federal courts entertained the issue to pre-empt the arbitrators’ exercise of power. However, in the recent case of *Henry Schein, Inc. v. Archer & White Sales, Inc*¹², the Supreme Court in a unanimous decision held that: “The United States is a pro-arbitration jurisdiction that will honor parties’ agreements to arbitrate their dispute. Specifically, where an arbitration clause clearly delegates the decision of arbitrability to the arbitrators, courts should have no say in the matter, even if they perceive the argument in favour of arbitration as “*wholly groundless.*”

The judgement brought about clarity and predictability for potential disputants as well as arbitrators. As it sought to prohibit courts from reviewing the merits of a dispute when properly submitted to arbitrator(s) for arbitration proceedings. And parties’ agreement on who decides the question of arbitrability must be honoured by the courts. The US Supreme Court through the *Henry Schein* case made it clear that the doctrine of kompetenz-kompetenz is well-established in the US, meaning non-interference by the court when parties have entered into an arbitration agreement or clause to submit their dispute to arbitration.

⁹ Ibid (n2) at 8-9

¹⁰ Ibid (n1) at 88, French Jurisdiction

¹¹ United States Jurisdiction

¹² 586 US (2019)

Similarly in *Ghana*¹³ the legal system recognises the doctrine of kompetenz-kompetenz. This has been considered under the Alternative Dispute Resolution Act 2010¹⁴. It provides that the arbitral tribunal has the capacity rule on its own jurisdiction on issues such as the validity of the arbitration clause or agreement, the existence of an arbitration clause or agreement. Additionally, the tribunal can determine the validity of issues before arbitration, whether they are in consonance with the arbitration agreement. Notwithstanding the capacity given to the tribunal by Act 798, it also makes room for the intervention of the Court for an aggrieved party who has an objection. It provides that the party to the arbitration raise an objection that the arbitrator(s) are exceeding their capacity or jurisdiction. This objection must be raised immediately upon discovery by the party. What needs to be noted there is that under section 25 of Act 798, the participation of the aggrieved party in appointing arbitrator(s) does not constitute a bar to raise an objection on jurisdiction of the arbitrator(s). On the other hand, the *Republic of China*¹⁵ does not submit to the doctrine of kompetenz-kompetenz. Therefore, arbitration conducted within the jurisdiction does not give capacity to arbitral tribunal to determine their own capacity, but that fall within the competence of the national court to determine same.

The *English*¹⁶ Court of Appeal recently clarified its position as to the competence of an arbitrator(s) ruling on their own jurisdiction in *Fiona Trust Case*¹⁷. It held that “even in cases where bribery was alleged, this would not cause the arbitration clause to be ineffective, so that arbitrators would still have jurisdiction to determine their jurisdiction.” This was opposite to the previous position established in the case of *Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance*¹⁸, where it was held that an arbitration clause could be invalidated under two main circumstances: firstly, where a party denied that an agreement had been concluded and secondly, where there was a mistake as to who the other contracting party was and not illegality. Following these grounds, the

¹³ Ghanaian Jurisdiction

¹⁴ Ibid (n6) at sections 24

¹⁵ Chinese Jurisdiction

¹⁶ English Jurisdiction

¹⁷ *Fiona Trust & Holding Corporation (and 20 Others) v. Yuri Privalov (and 17 Others)* EWCA Civ (Jan, 24, 2007)

¹⁸ CA 7 Apr 1993

court indicated that the arbitration clause could be set aside, hence the arbitral tribunal would have no jurisdiction in the matter.

However, the Fiona Trust case has sought to clarify that the position of the English court when it comes to the competence of the arbitrator(s) to determine its own jurisdiction, to mean that the arbitrator has the ability to rule on its own jurisdiction including even an allegation bribery. This has, therefore, strengthened the capacity of the arbitrator(s) to determine their own competence. Fundamentally, countries that have adopted the UNCITRAL Model Law permit arbitrators in most instances to rule or determine issues bordering on an arbitration clause or agreement's validity without obstruction from the courts.

Court Assistance in Enforcing Procedural Orders

Procedural orders are orders which are used by arbitral tribunals to regulate and manage effectively arbitral proceedings. These are used to ensure that parties to arbitration adhere to the agreed timeline on pleadings, filing of documents as well as schedule of hearing. These are, therefore, specifically used by the tribunal in carrying out its functions and do not necessarily need any intervention or assistance from any court. However, there are some instances that some parties do not comply the orders granted by the tribunal which frustrates the arbitral proceedings. Moses (2017)¹⁹ indicates that compliance to procedural orders is usually forthcoming and hence no need for frequently approaching the court to order compliance. However, the need of the assistance of the court becomes critical which order is place on a third party to conduct a function such as production of evidential documents, third party control over witnesses and their attendance. These require the intervention of the court to compel third parties to compile with such procedural orders as in the case of litigation. However, this kind of assistance from the court varies from one jurisdiction to another. Therefore, what needs to be noted when it comes to the grant of procedural orders by the arbitral tribunal is the fact that, orders such as demand for the production or disclosure of some documents²⁰ or attendance of proceedings by witnesses under the control of third parties may require the assistance of the court to compel parties or third parties who may be reluctant or not willing to submit to the

¹⁹ Ibid (n1)

²⁰ Rutledge, PB. Discovery, Judicial Assistance and Arbitration: A New Tool for Cases Involving US Entities? *Journal of International Arbitration*. 2008 Feb 1;25(1).

arbitration proceeding in order frustrate it; thereby making the courts intervention very instrumental to facilitating a smooth arbitral process. In the case of Ghana, under section 39 of Act 798, the High Court is empowered with the jurisdiction to assist in the arbitral proceedings by granting orders such as taking evidence of witnesses, preservation of evidence, determining questions or issues affecting any property rights and; order for inspection, photographing, preservation, custody or detention of property. The High Court also has the jurisdiction to order the taking of samples, observation of experiments, entry in premises under the control of a party, sale of any goods as well as granting an order for interim injunction or the appointment of a receiver.

Negative Impact of Judicial Intervention

Notwithstanding the many advantages derived from the intervention of the national court in the arbitral proceedings. However, there are some interventions of the court which tend to impact negatively on the arbitral process. Most parties enter into arbitration agreements even though they know other means of resolving their commercial disputes such as litigation; their reason is largely founded on the need of privacy. Most of these disputes involve parties such as States and multinationals entities, which need to preserve the sanctity of its image from public. Therefore, bringing such as disputes before the court puts them before the public, with the high tendency of tarnishing the hard-earned reputation of the contracting parties. Therefore, when the assistance of the court is called upon in affects the guarantee of privacy parties which the parties envisaged when they entered into the arbitration agreement. This is because court proceedings are public and accessible to the general public²¹. Secondly, court intervention may also be used as a means for delaying the speedy and smooth progress of the arbitral proceedings. An important reason for selecting arbitration to regulate their dispute commercial dispute rather than litigation is the assumption that arbitration appears quite speedy as compared to arbitration. The intervention of the court may bring about uncertainty, rising cost in the arbitral process and therefore may frustrate the entire arbitration process.

²¹ Ibid (n4)

National Laws Concerning Court Assistance in Arbitration

The discussion here would focus of various legislations which has provided room for national courts to assist in arbitration proceedings. Legislations to be considered include: High Court Civil Procedure Rules 2004 (C.I 47), Labour Act, 2003 (Act 651), Ghana Investment Promotion Centre Act, 2013 (Act 865) and the Alternative Dispute Resolution Act, 2010 (Act 798)

High Court Civil Procedure Rules 2004 (C.I 47)

Order 58 of C. I. 47 deals with commercial court matters such as disputes arising from trade and commercial transactions. Order 64 provides for arbitration. It indicates that a party or both may apply to the court for the dispute to be referred arbitration, which the court may grant. It also provides that where parties fail to agree on the appointment of the arbitrator, they court shall assist parties by appointing the arbitrator(s). It further provides Court to intervene when it comes to cases of incapacity of the arbitrator(s), where an arbitrator(s) dies or fails or refuses to act or becomes incapable of acting to make appointment of new arbitrator or umpire as replacement. It also provides the court with the power of modification or correction of an award²². It indicates that the Court may, on the application of any party, modify or correct an award (a) where it appears that a part of the award is on matters not referred to the arbitrator, if that part can be separated from the other part, and does not affect the decision on the matter referred; or (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting the decision on the matters referred. The Court may also set aside an arbitral award except on the ground of perverseness or misconduct of the arbitrator(s) made at any time within six weeks after the award has been made and published to the parties. The Court may also order an extension for the arbitral proceedings.

Labour Act, 2003 (Act 651)

Sub-Part II of the Labour Act, 2003 provides for Settlement of Industrial Disputes in the working environment or labour front. The Act places the jurisdiction of arbitration with the labour front within the confines of the Labour Commission and has not provided any room for the assistance of the court expect for limited intervention. Under section 167 it provides that

²² Order 64 Rule 10

“(2) An award published under subsection (1) shall be final and binding on the parties unless challenged in the Court of Appeal on questions of law within seven days after the publication of the award.” It provides under Section 165 that the arbitrator(s) shall have the powers of the High Court in respect of enforcing attendance of persons before the arbitrator or examining such persons on oath or affirmation and compelling the production of documents. However, due to the National Labour Commission’s lack of punitive authority calls for the court’s assistance with various applications for the enforcement of directive when they find it difficult to compel parties to submit to the arbitration process.

Ghana Investment Promotion Centre Act, 2013 (Act 865) (GIPC)

The GIPC Act is dedicated to creating an enhanced, transparent and responsive environment for investment and the development of the Ghanaian economy through investment and as well as encouraging, promoting and facilitating investment.²³ It therefore provides dispute resolution under section 33. Arbitration is provided as one of the mediums for resolving dispute arises between a foreign investor and the Government in respect of an enterprise. If an amicably settled through mutual discussions fails within six months the parties may submit their dispute to arbitration. When it comes to international disputes under GIPC, premium is placed on resolving disputes amicably through mediation as the first option. Under section 33(3) refers the dispute to be regulated by arbitration under the Alternative Dispute Resolution Act, 2010. However, it provides under section 39(6) for a party dissatisfied with the decision of the Board to apply to the High Court for judicial review on the arbitration.

The Alternative Dispute Resolution Act, 2010

The Alternative Dispute Resolution Act, 2010 is the main legislation that regulates our arbitration in Ghana. Act 798 has provided various means by which the court can provide assistance to the arbitration process which includes parties and arbitrators. Section 6 provides for application to court by a party. It indicates that 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

²³ Ibid (n6) at section 3

the arbitration agreement relates, to referred to arbitration by the court. Under section 7, it provides for the reference to arbitration by court, on its own motion. It states that where a court before which an action is pending is of the view that the action or a part of the action can be resolved through arbitration, that court may with the consent of the parties in writing, despite that there is no arbitration agreement in respect of the matter in dispute, refer the action or any part of the action for arbitration. Act 798 section 18 also makes room for parties to approach the high court for assistance when it comes to Revocation of arbitrator's authority on the basis of allegation of impartiality, mental incapability, conflict of interest and bias. Section 26 specifically provides for the application to High Court on issues bordering on jurisdiction. It indicates that a party dissatisfied with the ruling on jurisdiction may on notice to the arbitrator and the other party bring an action within seven days before the High Court for a determination and makes room for further appeal. However, the national court lacks the capacity to grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement or clause. The Act also provides for the intervention of the High Court when it comes to supporting arbitral proceedings²⁴ such as taking evidence from witnesses, preservation of evidence; issue affecting any property rights as well as determination of preliminary point of law²⁵ and the enforcement of arbitral awards²⁶ and challenging of arbitral award.²⁷ Section 59 provides specifically with enforcement of foreign awards. The Act empowers that High Court to enforce foreign arbitral award if the award meets certain requirement. There include the competent arbitral tribunal, reciprocal arrangement existing between the Republic of Ghana and the country in which the award was granted and award made under the New York Convention or under any other international convention on arbitration ratified by Parliament. Other requirements includes that the party seeking to enforce the foreign arbitral award must produce the original award or a copy which can be duly authenticated, the arbitration agreement upon which award was granted or a copy which can be duly authenticated and that no appeal is pending in any court on the arbitral award.

²⁴ Ibid (n6) at section 39

²⁵ Ibid (n6) at section 40

²⁶ Ibid (n6) at section 57

²⁷ Ibid (n6) at section 58

Enforcement of Anti-Suit Injunctions by the Court

Another assistance of the court to the arbitral process is making room for anti-suit injunction. An anti-suit injunction²⁸ is an order granted by the court to an aggrieved party. This order can only be granted by court with the necessary jurisdiction. An anti-suit injunction is a suit which requires the party to a dispute either not to file a claim in a foreign jurisdiction or not to proceed with a claim that has already been filed. Anti-suit injunction is usually based on preserving the same issues between the same parties are undergoing litigation or arbitration within the jurisdiction of the court issuing the anti-suit injunction order. The injunction is sought as a way of protecting the litigation or arbitral process from foreign interference to frustrate efficient progress of proceedings as well as interfering strong national public policy. It is perceived that parties seeking foreign intervention by way of litigations is engaged in bad faith as a means of harass the other party and not in the utmost good for an appropriate resolution²⁹. According to Moses (2017) when an anti-suit injunction is granted restraining a party from bringing a suit from a foreign jurisdiction, the call for international comity is brought to question, which deals with respect for and deference towards another country's laws and court decisions. It appears common law jurisdictions are mostly likely grant anti-suit injunctions as compare to civil law jurisdictions.

In the case of *Turner v. Grovit*³⁰ the European Court of Justice indicated that a restraining order granted by a court on a party from initiating or continuing a legal process before a foreign court undermines foreign court's jurisdiction to determine the dispute. Such a restraining is amounts to interference with the jurisdiction of the foreign court. The English Courts³¹ has jurisdiction to award anti-arbitration injunctions. However, this is done under exceptional circumstances where they exist a clear that the arbitration proceedings invoked was in breach. In the case of *Elektrim v. Vivendi Universal*³² the claimant sought for an injunction order before the court to restrain the respondent from pursuing an arbitration being conducted before the LCIA. The Court rejected that application, noting that under the Arbitration Act, the scope for the court to intervene

²⁸ Ibid (n1) at 92

²⁹ *Quaak v. Klynvoeld Peat Marwick Goerdeler Bedrijfsrevisoren ("KPMG-B")*, 361 F.3d 11 (1st Cir. 2004))

³⁰ ECJ 27 Apr 2004

³¹ United Kingdom has incorporated the Model Law in the Arbitration Act, 1996.

³² *Elektrim S. A. v. Vivendi Universal S. A.*, [2007] EWHC 571 (Comm.).

by injunction before an award had been very limited. The court also held that even if the claimant could establish that some right had been infringed or was threatened by the continuation of the London arbitration or that continuation of the arbitration was otherwise vexatious or oppressive; the court would not grant an injunction under section 37 of the Supreme Court Act because that would be contrary to the parties' agreement to refer their disputes under the investment agreement to LCIA arbitration. And that, since the arbitrators had previously refused to stay the LCIA arbitration and the court had "no express power under the Arbitration Act to review or overrule those procedural decisions in advance of an award by the LCIA arbitrators. This case therefore establishes that the English courts appear to be reluctant in interfering with arbitral tribunals and proceedings, by respecting their autonomy.

Also in the *Turner Case*, the claimant had been employed as a solicitor by the respondent at locations across Europe, and came to claim in England that they had wrongly implicated him in unlawful activity. However, legal proceedings were initiated in Spain by the company against the claimant. The House of Lord held that, the Brussels Convention was founded trust and respect between contracting states. It therefore does not empower any State to restrain another from hearing a claim place before it, except special and limited circumstances provided by the Convention. No matter the extended on bad faith displayed by a party to litigation in starting the proceedings in the contracting State, the contracting State must always be given the opportunity to assume jurisdiction or decline jurisdiction, this is based on the assumption the decision of the court is likely to be the same since the rules on jurisdiction that the Brussels Convention lays down are common to all courts of the Contracting States to be interpreted and applied with the same authority by each of them. Hence invariably on the balance of probabilities all courts ought to hand down a similar outcome. In the United States of America (USA), anti-suit injunctions, has had varied opinions form different courts whether to grant an anti-suit injunction or not. The following elements are taken into consideration when it comes to granting preliminary injunction application. They include (i) likelihood of success on the merits, (ii) irreparable injury to a party if relief not granted, (iii) a balancing of the equities and; (iv) granting the injunction will not be against public interest

of a contracting State. That was established in the case of *Karaha Bodas v. Negara*.³³

In *Paramedics Electromedicina Commercial Ltd. (Tecnimed) v. GE Medical Systems Information Technologies, Inc (ME)*. The court was confronted with even a much complex case. GE initiated arbitral proceedings. On the other hand, Tecnimed commenced a lawsuit in Brazil and additionally petitioned the New York state court for a stay of the arbitration. GE removed Tecnimed's New York state case to federal court, and a counterclaim was put forward. The counterclaim was seeking to compel submission to arbitration and sought for an anti-suit injunction to stop the action in Brazil. In general, three proceedings were commenced; an arbitration proceeding in the United States, secondly, an action before the Brazilian lawsuit for a determination of the substantive claims by court rather than submitting to arbitration, and thirdly, a suit before the U.S. federal court where Tecnimed wanted to enjoin the arbitration proceeding, and GE also wanted to enjoin the Brazilian lawsuit and force Tecnimed to arbitrate. The US Federal Court order Tecnimed to submit to arbitration and to discontinue the Brazilian lawsuit. In the beginning Tecnimed refused to comply with the order, hence held in to be in contempt. The judgment of the Federal Court was therefore complied by Tecnimed.

Court Assistance in Interim Measures

Interim measures can also be referred as measures of protection. These are temporary measures which are orders made by an arbitral tribunal during proceedings before the final award is granted. According to Moses (2017)³⁴ for some jurisdictions, once a party submit to arbitration, he is barred from approaching the court for any assistance in terms of provisional reliefs, however, the current general position is that a party to arbitration is permitted to seek the intervention of the court for reliefs without losing the right to arbitrate. The court, therefore has capacity to grant orders preventing a party from concealing or removing assets, preservation of property from devaluation under the custody of the other party, preservation of evidence from destruction, etc. It also has the jurisdiction to enforce interim measures granted by the arbitral tribunal. The New York Convention has not made provisions for interim measures but the

³³ 335 F. 3d 357, 363 (5th Cir. 2003)

³⁴ *Ibid* (n1) at 100

provisions are towards the enforcement of final awards. However, it has occasionally enforced reliefs granted by the tribunal was termed a partial award, or the measure was determined by a court to be a final and enforceable award. With Model Law, before it can be enforced, depends largely on whether the interim measure ordered from the tribunal conforms to the Model Law definition of interim measure to be enforced, however the country for which the court is located should have adopted the UNCITRAL Model Law to be binding.

Enforcement of the Arbitration Agreements: A Look at the Ghanaian Perspective Enforcement of the Arbitration Agreement

With respect to Ghana and the enforcement of the arbitration agreement and by extension arbitral proceedings, it must first be noted that Ghana is bound by the New York Convention. It has not only ratified the convention but has domesticated it into its act of parliament, the Alternative Dispute Resolution Act, 2010. The first schedule of the Act captures the whole of the New York Convention 1958. Even though Ghana is a dualist state, this domestication has made it now a Ghanaian national law rather simply than an international convention that it has ratified as in the case of the UNCITRAL Model law.

Article II of the New York Convention provides that: “3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” It is observed the New York Convention empowers national courts Contracting States with the jurisdiction of entertain matters having to do with the enforcement of arbitration agreement. It has also given the national court the capacity to determine the arbitrability of the said arbitral agreement and declare it null and void if the court is of the opinion that such a case is incapable of a resolution through arbitration. Secondly, the UNCITRAL Model Law is not any different when it comes to the jurisdiction of the national court. It provides under article 8(1) that:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative

or incapable of being performed. (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

The Model law also empowers the national court of contracting states when confronted with an application by a party for arbitration, same should be granted unless in the view of the court is matter is non arbitrable. When the court comes to the conclusion, it can declare the agreement as null and void. In the case of Ghana therefore, the Alternative Dispute Resolution Act 2010³⁵ regulates the practice of arbitration and therefore provides for the enforcement of an arbitration agreement or clause under section 6. For a party seeking to enforce the arbitration agreement or clause, elements such as parties' consent, legal capacity, agreement been in writing as well as the subject matter being arbitrable are very cardinal requirement when it comes to seeking to enforce arbitration agreement or clause. Section 6(1)³⁶ provides that: "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."

It, therefore, implies that notwithstanding a party to an arbitration agreement initiating proceedings in court, the Act³⁷ gives the other party the capacity to draw the attention of the court to the arbitration agreement or clause to refer the matter or that part which parties agreed to be submitted to arbitration and proceedings put on stay as provided by section 7(5). It states that 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. In *De Simone Limited v. Olam Ghana Ltd*³⁸ the Supreme Court of Ghana was confronted with an issue having to do with where the other party filed a defence to an action commenced in court in breach of the arbitration agreement. The facts of the case are that, parties to a construction agreement with an

³⁵ Alternative Dispute Resolution Act 2010 (Act 798)

³⁶ Ibid (n6)

³⁷ Ibid (n6)

³⁸ (J4/03/2018) [2018]

arbitration agreement, started litigation proceedings for breach of contract. They concluded pleadings, pre-trial processes and after hearings commenced, the defendant applied to the court to refer the parties to arbitration as contained in the contract for arbitration. The trial High Court did not accede to the application in its terms, because it was filed out of time in view of the provisions of section 6(1) of the Act 798, which required a party (defendant) to apply for the reference to arbitration after entry of appearance.

This notwithstanding, the High Court on its own motion, relying under section 7(5) referred the parties to arbitration. This decision was upheld upon an appeal before the Court of Appeal by the plaintiff. The Supreme Court was confronted with an appeal with the following questions, whether parties to a contract with an arbitration clause, can resort to court litigation in respect of matters covered by the arbitration clause; and secondly if they can, what standards should apply to determine the question. The Supreme Court held that the parties had irrevocably waived their right to arbitration, and as such, the High court had no right or power to compel them to resort to arbitration. The Supreme Court supported its judgment with sections 6(1), 7(5) and 54(2) of the Act 798. It indicated that the Court cannot compel parties to arbitrate as it must be done voluntarily with the consent of both parties. If the defendant fails to plead lack of jurisdiction prior to pleading on the merits, the Court will affirm its jurisdiction. This is a tacit mutual waiver of the arbitration agreement.

Grounds for the Non-Enforcement of Arbitration Agreement or Clause by the Courts of Ghana

i. Arbitrability under section 1 of Act 798 provides grounds for setting aside an arbitration agreement or clause.

Section 1 provides for disputes which cannot resolved through amenable to arbitration. It states that matters such as national or public interest, environment issues, enforcement and interpretation of the 1992 Constitution and any other matter that by law cannot be settled by an alternative dispute resolution method cannot be resolved through arbitration. Therefore, arbitration agreement or clause which has been entered into by parties bordering on these issues shall to be enforced by the court is a party applies to the court for enforcement.

Enforcement and Interpretation of the 1992 Constitution under Section 1(c)

Attorney General v. Balkan Energy Ghana Ltd and Others

In *Attorney General v. Balkan Energy Ghana Ltd and Others*, the dispute bordered on the interpretation and enforcement of the 1992 constitution in which Act 798 cannot resolve the issues through arbitration. Briefs facts of the disputes are that, the first defendant initiates arbitration proceedings against the other party, the Government of Ghana at the Permanent Court of Arbitration at the Hague, the Netherlands. The Before the arbitration proceedings, the Ghana Government argued that the PPA needed prior Parliamentary approval under article 181(5) of the 1992 Constitution, but that this approval had not been sought and therefore the PPA was invalid. Which means it was executed in breach of a constitutional provision and that the non-compliance with the constitutional provision made the PPA invalid, null and void including its arbitration clause since it was not arbitrable? It added that the arbitral tribunal therefore had no capacity and jurisdiction to entertain the dispute. On the other hand, the arbitration tribunal ruled, it had the jurisdiction to determine the issue but expressed a willingness to take account of Ghana's Court interpretation of article 181(5). The Government of Ghana through the Attorney-General initiated litigation before the courts of the High Court of Ghanaian claiming a declaration that the PPA is an international business transaction that needed parliamentary approval and was therefore unenforceable due to the lack that approval. It further claimed that the arbitration agreement contained in clause 22.2 of the PPA was an international business transaction and was also in breach of article 181(5) and therefore unenforceable. The case was referred to Supreme Court of Ghana for interpretation where the Court held that the arbitration agreement did not constitute an international business transaction within the meaning of article 181(5) of the 1992 Constitution. The case was therefore referred back to the High Court to apply the interpretation article 181(5) by the Supreme Court.

Bankswitch Ghana Ltd v Republic of Ghana [2007]

In the Bankswitch Case, the question on the interpretation and enforcement of the 1992 Constitution as the sole preserve of the Court, and not arbitrable was argued by the Government of Ghana. The case of Balkan Energy Case was a source reference.

The argument of the Respondent's (the Government of Ghana) was that based on article 181 of the 1992 Constitution of Ghana, the arbitration agreement ought to be presented before Parliament for it to be approved become valid, and, therefore, in the absence of that, the agreement never was never operational, hence is null and void. Reference was made to the *Balkan Energy Case*, where the Supreme Court held that a transaction will be deemed a "business transaction" where (i) it is commercial in nature or (ii) impacts on the wealth and resources of Ghana. The Respondent contended that the transaction contemplated by the Agreement envisaged the development of a sophisticated IT system in consideration for significant fees which would potentially impact on the wealth and resources of Ghana making the transaction a "major transaction of an international business or economic transaction. Being so it could not valid without until it was approved by a resolution supported by majority of all the Members of Parliament, and in the absence of this approval the said agreement was invalid, void and of no effect. The Arbitral Tribunal claimed jurisdiction in determining the issue raised by Respondent. The Tribunal acknowledged Article 181(5) of the 1992 Constitution to be considered in determining the issue whether the Agreement falls under the parameter of an "international business or economic transaction" requiring the approval of Parliament as argued by the Respondent. The tribunal indicated that it is clear that in entering into the Agreement with Bankswitch, the Government was acting in a commercial capacity and therefore is not protected as a state entity. Therefore, the Tribunal supports the propositions that:

- (i) international law can be invoked in matters involving a State and a non-State foreign party and;
- (ii) a governing law clause providing *for the application of national law does not preclude an international tribunal from resorting to relevant customary international law principles*³⁹, if applicable.

The Tribunal held that this is a situation where such an application is available and warranted, and as provided under Clause 22 of the Agreement which states that the Agreement "shall be governed by the Laws of the Republic of Ghana", *that choice of law clause does not insulate the Government from its obligations under customary international law to treat what is essentially a foreign investment fairly and equitably and not to take that*

³⁹ Emphasis

investment without compensation ⁴⁰. Therefore, Contracts entered into between a Contracting State and a foreign entity are typically governed by the law of the State, but it would be untenable for that reason to allow a State to act freely in order to absolve itself of its obligations towards the foreign entity by altering the content of its governing law to evade the terms of its commitments without regard to the State's obligations under international law. The Tribunal holds on to the principle that, if a State repudiates or violates its obligations under a contract with a foreign entity, it is that the contract is repudiated or breached for governmental rather than commercial reasons. Such a breach is considered to be "arbitrary" and subjects the breach to international standards. The action or inaction by a State vis-à-vis a foreign entity may be perfectly lawful in terms of its municipal law, but may still engage its international responsibility. In simple terms, the arbitral tribunal claimed jurisdiction and ruled in favour of the Bankswitch, indicating that notwithstanding Ghana's national law as provided under article 181 of the 1992 Constitution, the said provision does not in any way insulate the Government of Ghana from its contractual obligations under customary international law to treat what is essentially a foreign investment fairly and equitably and not to take that investment without compensation, as it sought to rely on the provision to avoid its obligations.

Other Matter that by Law cannot be settled by an Alternative Dispute Resolution Method under Section 1(d)

Westchester Resources Ltd v. CAML Ghana Ltd

In the case of *Westchester Resources Ltd v. CAML Ghana Ltd*, the issue which confronted the High Court was an alleged claim of fraud against a party. The case had to do with joint venture agreement governed by Ghanaian law. The parties agreed to prospect for gold on a plot in Ghana's Ashanti Gold Belt. Upon a break in the relationship, CAML Ghana initiated arbitral proceedings before LCIA. Westchester on the other hand files a suit in Ghana, contending that fraud under the law of Ghana was not arbitrable. Therefore, the issue for determination before the High Court had to do with the plaintiff pleadings on fraud claim. The plaintiff contended that any suit where fraud is alleged was not arbitrable. The High Court held that felonious crimes such as fraud and forgery cannot

⁴⁰ Emphasis

be resolved by an arbitral tribunal but only the court has capacity and jurisdiction to resolve that.

Conclusion

Even though the National Court is permitted by law and convention to assist or intervention in arbitral proceedings, the court must exercise some restraint and must not be in the haste to inherit jurisdiction on an issue before arbitration. The Supreme Court in the case of *Eurapharma Care Services Ltd v. Prof. Nicholas Ossei-Gerning*, stated that: “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 Court will once again use these interventions to whittle away the function of the arbitral tribunals and render nugatory the benefits that are to be derived from these proceedings as contained and provided for in Act 798.” In conclusion, it appears that if care is not taken the seemingly unnecessary interference of the court may appear to be interfering party autonomy as well as the competence of the arbitral tribunal, hence may be defeating the purpose of the purpose for which the Alternative Dispute Resolution Act 2010 was promulgated and other supporting legislations as an alternative to litigation which seems to be acrimonious and complicated hence not suitable for business and relationship disputes etc.

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