

Enforcement of international and national arbitration awards in Ghana – legal basis, challenges and obstacles.

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ABSTRACT

This article describes the requirements and procedures for enforcing international and national arbitration awards in Ghana. The author examines the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, the Alternative Dispute Resolution Act of Ghana and other analogous laws to describe the process of enforcing arbitration awards in Ghana. The paper focuses on challenges and obstacles in enforcing arbitral awards in Ghana and reviews the relevant case law.

Introduction

Over the years, Ghanaian jurisprudence has recognized the importance of arbitration as a dispute resolution mechanism. In 1928, Ghana, then known as the Gold Coast promulgated the Arbitration Ordinance (Cap. 16) to bring into force the 1923 Geneva Protocol on Arbitration Clauses. Then in 1932, the then Gold Coast passed the Arbitration (Foreign Awards) Ordinance (Cap 17) to give effect to the 1927 General Convention on the Execution of Foreign Arbitral Awards. In 1961, after Ghana had acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (The New York Convention), it passed into law the Arbitration Act, 1961 (Act 38). The Arbitration Act of 1961 expressly incorporated the provisions of the New York Convention into domestic law in Ghana.

Today, as a growing middle income country with a stable democracy, Ghana has become a hub for global business attracting foreign direct investment from all parts of the world.¹ Disputes and disagreements are seen as part of the process of doing business especially when businesses cross borders, jurisdictions and cultures. Increasingly, arbitration of disputes is seen as an important mix in the dispute resolution processes in Ghana. Arbitration has become a viable choice for dispute resolution because it presents a good alternative to the habitually slow and adversarial nature of litigation as a dispute resolution mechanism. Arbitration is now encouraged and actively practiced in all levels of court in Ghana.²

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1 Foreign Investor Confidence Soars. Ghana Investment Promotion Center (GIPC) available at <http://www.gipcghana.com/press-and-media/42-foreign-investor-confidence-soars.html>. Last assessed on 10th March 2017.

2 *Brobby, S. A.* The Law of Chieftaincy in Ghana, Accra, 2008. P. 370.

However, it is important to note that success in the arbitration process is as important as the ability of the successful party to enforce the success as contained in the arbitral award. The arbitration process therefore goes hand-in-hand with provisions for the enforcement of the arbitral award.

At present, the process of arbitration in Ghana is governed by the Alternative Dispute Resolution Act, 2010 (Act 798), commonly referred to as the ADR Act. The ADR Act covers the full gamut of alternative dispute resolutions and therefore makes provision for negotiations, mediation and arbitration. With respect to arbitration, the ADR Act draws a distinction between foreign arbitration, common law arbitration and customary arbitration. The ADR Act then provides the blue print for the processes leading to arbitration and the enforcement of each of the three types of arbitration mentioned. Thus, to be able to follow due process in enforcing arbitral awards in Ghana, it is imperative to draw a distinction between foreign awards, common law arbitral awards and customary arbitral awards. It is important to note that the distinctions between the different types of arbitration are not without controversy, as there are different criteria employed to define one type of arbitration from the other. However, the distinction is important because, it is the distinction that determines the process and procedure through which a party may follow to translate an arbitral award in Ghana into an enforceable document which will give meaning to the decision of the arbitrators.

This paper examines the process and procedure for the enforcement of arbitration awards in Ghana. Specifically, the paper looks at the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, the Alternative Dispute Resolution Act of Ghana and other analogous laws and case law to describe the process of enforcing arbitral awards in Ghana. The paper also studies the many challenges and obstacles that one encounters in enforcing arbitral awards in Ghana. In this paper, foreign arbitral award and international arbitral award will be used interchangeably.

A. What is Arbitration

At its core, arbitration is a procedure where a dispute between parties is submitted, by agreement of the parties, to one or more independent arbitrators who make a decision on the dispute which is final and binding on the parties.³ When parties choose arbitration as a form for dispute resolution mechanism, the parties select for themselves a private dispute resolution procedure instead of submitting the dispute to a court for determination. The arbitration hearing may involve the use of one or more individual arbitrators or a tribunal established for the purpose of adjudicating disputes between parties through the arbitration process. In an arbitration proceeding, whether by individual arbitrators or an arbitration tribunal, the parties by agreement choose to hand over the power to adjudicate disputes between them to their chosen arbitrators as opposed to court litigation. In this regard, arbitra-

3 *BA Garner* (ed), *Black's Law Dictionary* (8th edn, St. Paul, MN: West Group, 2004.).

tion is an alternative to a court action and the decision is final and binding on the parties unlike mediation, negotiation and conciliation which are non-binding. In Ghana, the ADR Act provides that an arbitration agreement shall be in writing and may be in the form provided by the ADR Act.⁴ An arbitration agreement is in writing if it is made by exchange of communications in writing including exchange of letters, telex, fax, e-mail or other means of communication which provide a record of the agreement; or there is an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.⁵

Arbitration which is nicknamed the ‘businessman’s method’ of resolving disputes⁶ appeals to parties because of a number of advantages in the choice of arbitration as a dispute resolution mechanism. First, arbitration is a relatively faster way of adjudicating disputes as compared to court litigation. In arbitration, the proceedings often side step the strict procedural rules of the adversarial court system. In addition, because the parties choose their arbitrators, they often do not have to join the queue of cases filed in court for adjudication. The parties also have the choice of selecting neutral industry players with direct expertise in the specific area of dispute between the disagreeing parties.

Arbitration is also a preferred choice of adjudicating disputes because it is seen as neutral. Where the parties to the dispute are of different nationalities for instance, their ability to choose arbitrators ensures that they are able to choose neutral arbitrators to adjudicate on the matter. Further, the parties to the arbitration are able to choose important elements such as the applicable law, language and venue of the arbitration. The parties are also able to ensure confidentiality as the proceedings are often not open to the general public. For instance, the World International Property Organization’s rules (WIPO rules) on arbitration specifically protect the confidentiality of the existence of arbitration and any disclosures made during the procedure. In some circumstances, the WIPO rules make it possible for parties to restrict access to trade secrets and other confidential information that is submitted to the arbitration tribunal.

Arbitration can be categorized into many types depending on the parties involved and their nationality, the subject matter of the disputes, the seat of arbitration, the venue of the arbitration, etc. In this direction, there can be commercial arbitration which will involve dispute between two or more commercial enterprises. There can also be consumer arbitration which will involve disputes between a consumer and a supplier of goods and/or service. Then there is also labor arbitration which deals with the settlement of employment related disputes through arbitration process. For the purpose of this paper, the categorizations of interests are international or foreign arbitration and domestic arbitration.

4 ADR Act, section 2(3.).

5 Ibid, section 2(4.).

6 Mediate.com, What is Arbitration. <http://www.mediate.com/articles/grant.cfm> last assessed on 20th April, 2017.

I. International Arbitration

International arbitration is bereft of a single accepted definition and often times, people use the term international arbitration in reference to the fact that an aspect of the arbitration process may be related to a foreign jurisdiction. For instance, arbitration in London between two entities based in London and represented by lawyers from Australia and with an American arbitrator may be regarded as an international arbitration.⁷ Here, the definition is based on international connection of the parties involved in the arbitration process. Arbitration may also be international based on the nature of dispute in question. This seems to be the definition preferred by the International Chamber of Commerce Court of Arbitration in Paris (ICC). Article 1.1 of the ICC Rules defines the functions of the Court of Arbitration of the ICC as the provision of a forum for the “settlement by arbitration of business disputes of an international character”. Although the ICC does not give a direct definition of international arbitration, it offers some guidance for the categorization of international arbitration. In a publication in 1977, the ICC stated that;

*“The international nature of the arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object the contract can nevertheless extend beyond national borders, when for example a contract is concluded between two nationals of the same State for performance in another country, or where it is concluded between a State, and subsidiary of a foreign company doing business in the State.”*⁸

In addition, the UNCITRAL Model Law on International Commercial Arbitration defines international arbitration by positing that;

*“An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country”.*⁹

7 Manzoni, C. (2004) International Arbitration: The Key Elements. Presented at 39 Essex Street. Wednesday 5th May, 2004. Available at www.39essex.com/docs/articles/CMZ_International_Arbitration_050504.pdf last accessed on 25 February 2017.

8 The International Solution to International Business Disputes – ICC Arbitration (ICC Publication No. 301, 1977) at 10.

9 UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985). Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

It would appear therefore that, there are two main tests used to define international arbitration – the identity of the parties and the nature of the dispute. Thus, arbitration may be referred to as an international arbitration because the disagreeing parties may originate from different nations. It may also be referred to an international arbitration because one or more arbitrators may originate from a different nation or the nature of the dispute between the disagreeing parties may straddle across nation states as in the dispute between cross boarder resources.

Arbitration may be regarded as foreign where the seat of arbitral proceedings is outside the country of interest. Thus, where two disagreeing parties originate from country ‘A’ disagree over the performance of a contract in country ‘A’ submit their dispute to arbitration in country ‘B’, the arbitration may be regarded as an international arbitration. The resultant award therefore reflects the categorization that is attached to the arbitration proceedings. The arbitration award is thus regarded as international or foreign when the proceedings are so regarded and the award is likewise regarded as a domestic award when the proceedings are so regarded. According to the New York Convention, a foreign arbitral award is any award that is made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. An award may also be considered foreign when the award is not considered domestic in the State where their recognition and enforcement are sought.¹⁰ Here, a State may consider as foreign, awards rendered on their own territory, rather than abroad, if they choose to consider those awards as “non-domestic.” However, under Ghanaian law, a foreign or an international arbitral award is an award rendered in any other State other than Ghana.¹¹ In Ghana, the ADR Act makes distinct provisions for the enforcement of foreign and domestic awards. Before a discussion on the enforcement of arbitration awards in Ghana, it will be important to set out what the law in Ghana considers as domestic arbitration.

II. Domestic Arbitration

In Ghana, the process and proceedings for domestic arbitration is provided for by the ADR Act. The ADR Act provides for the conduct and enforcement of the award of common law arbitration and customary arbitration. Common law arbitration and customary arbitration are collectively referred to as domestic arbitration in this paper. Common law arbitration is as aptly described in Section A above. Its function and process is akin to a foreign or international arbitration.

The agreement to submit dispute to arbitration is often taken by the parties before the dispute arises. Under section 2 of the ADR Act;

- (1) Parties to a written agreement may provide that a dispute arising under the agreement shall be resolved by arbitration.

10 Convention on the Recognition and Enforcement of Arbitral Awards, Article I (1.).

11 ADR Act section 59.

- (2) A provision to submit a dispute to arbitration may be in the form of an arbitration clause in the agreement or in the form of a separate agreement.
- (3) An arbitration agreement shall be in writing and may be in the form provided in the Fifth Schedule to this Act.
- (4) For the purpose of this Act an arbitration agreement is in writing
 - (a) it is made by exchange of communications in writing including exchange of letters, telex, fax, e-mail or other means of communication which provide a record of the agreement; or
 - (b) there is an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

This process is deemed domestic arbitration as opposed to a foreign or international arbitration because the arbitration process and the resultant arbitral award all takes place within the political territory of Ghana. Thus, the definition of domestic common law arbitration is not based on the identity of the parties to the arbitration or the nature of the subject matter of the arbitration process, but based on the seat of Arbitration. Apart from the common law domestic arbitration, the ADR Act also provides for customary law arbitration. In the decided case of *Pong v. Mante* [1964] GLR 593 at 596, Justice Lasser, the presiding High Court judge described customary arbitration in the following manner;

“The ... practice whereby natives of this country [Ghana] constitute themselves into ad hoc tribunals popularly known and called arbitrations for the purposes of amicably settling disputes informally between them or their neighbours which has long been recognized as an essential part of our legal system; provided all the essential characteristics of holding a valid arbitration are present, the courts will undoubtedly enforce any valid award published by such ad hoc bodies.” Also in the case of *Budu II v. Caesar & Ors.* [1959] GLR 410-433 Ollennu J (as he then was) laid out the five (5) essential characteristics of a customary arbitration as opposed to negotiations for a settlement as follows;

- a) A voluntary submission of the dispute by the parties to arbitrators for the purpose of having the dispute decided informally, but on its merits;
- b) A prior agreement by both parties to accept the award of the arbitrators;
- c) The award must not be arbitrary, but must be arrived at after the hearing of both sides in a judicial manner;
- d) The practice and procedure for the time being followed in the Native Court or Tribunal of the area must be followed as nearly as possible; and
- e) Publication of the award.

Customary arbitration therefore can be described as an informal way of settling disputes between two or more disputants by a community elder or opinion leader using customary practices of the disputants or the seat of arbitration. Prior to the advent of colonialism, the people in present day Ghana had their own way of adjudicating disputes within their com-

munities.¹² Although the colonialist introduced adversarial courtroom process as part of the methods for settling disputes, the traditional form of dispute resolution was never done away with. The traditional system of dispute resolution which is known as customary arbitration has since existed side by side with the formal systems that were introduced by the colonialist. The rules of customary arbitration have now been codified in the ADR Act. Customary arbitration is generally informal and the arbitrators are traditional leaders, heads of families or any prominent citizen of the community. The arbitration proceedings takes place at the traditional leader's palace, open places or any public place of convenience to allow easy access by members of the community who wanted to witness the proceedings. Customary arbitration often involves one arbitrator or by agreement of the parties, a panel of arbitrators.¹³ The arbitrator or arbitrators then take time to hear the dispute and announce their decision to the disputants in the presence of members of public gathered at the seat of arbitration. Although traditionally, the jurisdiction of customary arbitration was both civil and criminal, the ADR Act has now limited the jurisdiction of customary arbitration to civil matters.

One distinct feature of customary arbitration is that there need not be prior agreement between the parties before resorting to arbitration to resolve issues. In *Yaw v Amobie* (1958) 3 WALR, 406 it was argued on behalf of the defendant that there was no valid arbitration because no evidence was led to show that the respondent and the defendants had agreed before-hand to submit their dispute to the arbitrators. In response to this contention Ollennu J, as he then was, said:

“It is very rare for two people who are quarrelling to meet and agree together that they would submit their dispute to arbitration. The usual thing is that one party makes a complaint to somebody, the other party is sent for, and if he agrees, the party to whom the complaint is made arbitrates upon the dispute. Whether a party agreed to submission to the arbitration or not is a question of fact in each case to be determined from the conduct of the party and other circumstances.”¹⁴

B. Enforcement of Arbitration Awards in Ghana

Despite arbitration's accolade of being the businessman's method of resolving disputes, its usefulness diminishes greatly if the resultant arbitral award is incapable of being enforced. Whatever advantage arbitration holds for being a preferred choice for dispute resolution will be lost if a victorious party cannot translate the arbitral award to realize the desired outcomes in the award. In Ghana, the ADR Act provides different modalities for the enforcement of the different types of arbitration enunciated here. Although the arbitration process is seen largely as an alternative dispute resolution mechanism to the adversarial court sys-

12 Brobbey at page 267.

13 ADR Act Section 95.

14 *Budu II v. Caesar & Ors.* [1959] GLR, 417.

tem, it is the traditional courts that holders of arbitral awards turn to enforce their awards. In Ghana, may resort to the High Court, Circuit Court or District Court to enforce an arbitral award. Depending on where the forum of the enforcement processes emanated, appeals may lie to other courts in the hierarchy of courts all the way to the apex court, which is the Supreme Court of Ghana.

1. The structure of the courts in Ghana

The courts in Ghana are generally divided into two broad categories. There are the superior courts and the lower courts. The superior courts comprise (in order of hierarchy) the High Courts, the Courts of Appeal and the Supreme Court.¹⁵ The Lower courts comprise the circuit courts, the district courts and the juvenile courts.¹⁶ However, there are other bodies that fall under the category of the lower court though not specifically mentioned under the Court Act. An example is the Judicial Committee of the Houses of Chiefs, and other lower courts as Parliament may by law establish.¹⁷

In general, the High Court has original jurisdiction in all matters and appellate jurisdiction in a judgement of the Circuit Court in the trial of a criminal matter and appellate jurisdiction in any judgment of a District Court or Juvenile Court. It also has jurisdiction to enforce the fundamental human rights and freedoms guaranteed by the Constitution of the Republic of Ghana.¹⁸

The High Court also has supervisory jurisdiction over all lower courts and any lower adjudicating authority. The High Court may in the exercise of its supervisory jurisdiction over lower courts issue orders and directions including orders in the nature of habeas corpus, certiorari, mandamus-prohibition and quo warranto for the purpose of enforcing or securing the enforcement of its supervisory powers.¹⁹

The Supreme Court and the Courts of Appeal have appellate jurisdiction.²⁰ In the case of the Courts of Appeal, the court has jurisdiction to hear and determine appeals from decisions of the High Court. It also has power to hear and determine any decision of the Circuit Court in a civil matter.²¹ The Supreme Court is the final appellate court and has jurisdiction to hear and determine appeals from the Court of Appeal²² and also appeals from the Judicial Committee of the National House of Chiefs. The Supreme Court also has supervisory

15 Art. 126(1) (a), 1992 Constitution of Ghana.

16 Section 39, Courts Act, 1993 (ACT 459.).

17 Art. 126(1) (b), 1992 Constitution.

18 Art. 140, 1992 Constitution; Court Act, section 16.

19 Art. 141, 1992 Constitution.

20 Art. 137, 92 Constitution. Unlike the Court of Appeal, the Supreme Court has original jurisdiction per article 129 (4) in certain matters as provided for by the 1992 Constitution of the Republic of Ghana and the Courts Act, 1993 (Act 459.).

21 Court Act, Section 11.

22 Art. 131, 1992 Constitution.

jurisdiction over all courts and any adjudicating authorities in Ghana.²³ In the exercise of such supervisory jurisdiction, the Supreme Court can issue orders and directions including orders such as habeas corpus, certiorari, mandamus, prohibition and quo warranto.²⁴

With respect to the lower courts, the Circuit Court has original jurisdiction is specified civil matters²⁵ that do not exceed a certain determined amount of money. Circuit Courts are established in each region of Ghana and other such circuits as the Chief Justice of Ghana may determine from time to time.²⁶ District Courts shall be established in every district in Ghana and such other places as the Chief Justice of Ghana may determine from time to time. The civil jurisdiction²⁷ of the District Court is limited to the district where the court is located and over such specified matters as determined by law and involving a sum of money which is usually set below the jurisdictional value of the Circuit Court.²⁸ Juvenile Courts are akin to the District Courts, however the jurisdiction of the Juvenile Court is usually limited to matters involving persons under the age of eighteen.²⁹

In general, the High Court in Ghana has original jurisdiction to hear and determine matters on the enforcement of arbitration awards. Appeals from the decisions of the High Court with respect to the exercise of its jurisdiction to enforce arbitration awards then lie to the Court of Appeal and further to the Supreme Court. However, the Supreme Court in the exercise of its supervisory jurisdiction may make orders which may affect the decisions of the High Court. The lower courts in Ghana however do not have any jurisdiction to hear matters involving the enforcement of arbitration awards. The jurisdiction of the lower courts is carefully specified under the Courts Act and arbitration and enforcement of arbitral awards are not included in the specified jurisdiction of the lower courts. However, under the ADR Act, when a customary arbitrator resigns before the award is given, matters with respect to the refund of the arbitrator's fees and other related matters may be settled by the District Court within the district where the dispute arose.³⁰ In addition, the customary arbitration award may be registered³¹ at the District Court or Circuit Court in whose jurisdiction the award was given for purposes of enforcing the said award. It is important to note that where the District Court or the Circuit Court exercises its jurisdiction to enforce customary arbi-

23 Ibid, Art. 132, see also Courts Act, section 5.

24 Ibid, Section 5.

25 Under Section 43 of the Courts Act, 1993 (Act 498), The Circuit Courts also have original jurisdiction in all criminal matters except treason, offences triable by indictment and offences punishable by death.

26 Courts Act, Section 42.

27 District Courts also have some limited criminal jurisdiction as determined by law and as determined by section 48 of the Courts Act.

28 Courts Act, see sections 46 and 47.

29 Courts Act, Section 49.

30 ADR Act, Section 101.

31 ADR Act, Section 110.

tration awards, the value of the award shall not exceed the jurisdictional value of the respective court.

II. Process of Enforcement of International/ Foreign Arbitration

In Ghana, a foreign arbitral award can be enforced in one of two ways. It can be enforced at common law or through statute.³² Regardless of the process of enforcement either at common law or under the statutory laws, an action to enforce a foreign arbitral award is an independent cause of action.³³ It is therefore actionable at the instance of the party who seeks to enforce the award.

1. Enforcement under common law

Common law recognition and enforcement of the foreign arbitral awards are done through the New York Convention. At common law, the conditions for the enforcement of a foreign arbitral award are:

1. The parties must have submitted their dispute voluntarily to arbitration. It is not a requirement that the submission must be in writing, but there was a clear and unambiguous intent to submit the dispute to arbitration.³⁴
2. The arbitration was conducted with the accordance with the submission and award was arrived at by limiting the inquiry to the matters that were submitted to arbitration.³⁵
3. The award is final and valid by the law of the country in which it was made. This implies that a foreign arbitral award will not be enforced in Ghana unless it has been confirmed that per the laws of the country where the award was given, the arbitral award is final and valid.³⁶

a) Procedure for enforcement

The procedure for enforcement of a foreign arbitral award under common law is that the one who seeks to enforce the award cannot directly enforce the judgment in the other party's country. The common law deems the foreign award as creating an obligation, but the person who seeks to enforce the award has to institute a fresh action and plead the facts of

32 If a foreign arbitral award is entered as a judgement abroad in accordance of the laws of that country, it can only be enforced in Ghana as a foreign judgment under the High Court (Civil Procedure) Rules C.I. 47 2004 order 71 and Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument 1993 (L.I. 1575).

33 *Agromat Motoimport v Maulden Engineering Co (Beds) Ltd* [1985] 2 All ER 436; [1985] 1 WLR 762.

34 *Alfred C. Toepfer v Edokpolor*[1965] ALR Comm. 505, [1965] 1 All NLR 292 (reversing *Edokpolor v. Alfred C Toepfer* 1964 (1) ALR Comm. 322).

35 *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2010] EWCA Civ 1100.

36 *CF Union Nationale des Cooperatives Agricoles de Cereales v R Catterall & Co Ltd* [1959] 2 QB 44; [1959] 1 ALL ER 721.

the arbitral award. In Ghana, the party seeking to rely on the arbitral award must issue a writ of summons in accordance with the civil procedure rules and have same served on the other party. Here, the writ of summons may be issued out of the registry of the High Court, the Circuit Court or the District Court depending on the facts and monetary value of the case in question.

2. Enforcement under statutory law

In general, a foreign arbitral award shall be treated as binding for all purposes on the persons or parties to the arbitration process. Accordingly, the arbitral award may be relied on by those persons or parties by way of defence to an action, as set off in an action or relied on otherwise in any legal proceedings.

Under the ADR Act, the High Court is given exclusive jurisdiction to enforce foreign arbitral awards.³⁷ Thus, the Circuit Court and the District Court do not have any jurisdiction to enforce a foreign award where the party seeking to enforce same is relying on the ADR Act. At the High Court, before leave is granted by the court to enforce the arbitral award, the court must satisfy itself that;

1. The award was granted by competent authority under the laws of the country where it was made.³⁸ The determination of competency of the authority is based on the *lex fori*.³⁹
2. There should be a reciprocal agreement between Ghana and the country the arbitral award was made. Here, the existence of reciprocity agreement is determined by the President of Ghana listing countries that have reciprocal agreements with Ghana to enforce each other's arbitral awards. The arbitral award may also be enforced if it made pursuant to the New York Convention.⁴⁰

a) Procedure for enforcement

A person who seeks to enforce a foreign award must produce the original or duly authenticated copies of the award in accordance with the law of the country where the award was made.⁴¹ The person must also produce the agreement pursuant to which the award was made. Where the agreement is for any reason unavailable, then the person must produce a copy of the said agreement duly authenticated in the manner prescribed by the law of the country where award was made or any other authenticating method which shall be deemed by the High Court to be sufficient under the laws of Ghana.⁴² Also, the party seeking to enforce the award must establish before the High Court that there is no appeal pending

37 ADR Act section 59.

38 *Ibid*, s 59(1) (a.).

39 *Lex fori* is the law of the forum of the arbitral award.

40 ADR Act section 59(1) (b) (c.).

41 *Ibid* section 59 (1) (d.).

42 *Ibid*.

against the award in any court under the law applicable to the arbitration.⁴³ In addition, if any of the documents which the applicant is relying on before the High Court is not in the English language, then the applicant must produce before the court a certified true translation of that document in English.⁴⁴ Unlike enforcement of foreign arbitral award under common law which is by the issuance of a writ of summons, where the enforcement is based on the ADR Act, an application is made to the High Court pursuant to the High Court Civil Procedure Rules.⁴⁵ When the application is so made, the relief that would be sought would be for the High Court to grant the applicant leave to enforce the arbitral award as the judgment of the High Court.

3. Limits and Defences

The person who seeks to enforce the award must do so within six (6) years because actions to enforce an award, where the arbitration is under any enactment other than the ADR Act shall be brought before the expiration of six years from the date on which the cause of action accrued.⁴⁶ Accordingly, time will begin to run for an applicant who seeks to enforce a foreign arbitral award from the date when a copy of the said arbitral award was made available to the person.⁴⁷

In addition to a defence of limitation as enunciated above, a respondent to an action to enforce a foreign arbitral award may raise the following defences. The respondent may state and prove that the award has been annulled in the country in which it was made. The respondent may also raise the issue that the respondent was not given sufficient notice of the arbitration proceeding to enable the respondent participate in the processes that lead to the award being made. Other defences available to the respondent are that a party that lacked legal capacity was not properly represented. Another defence is that the arbitral award does not deal with the issues that were presented to arbitration or the award contains a decision which is beyond the scope of the matters submitted for arbitration. Another important defence that a respondent can raise is that the lack of competence of the arbitration tribunal, breach of the rules of natural justice, fraud and an award whose enforcement will be inconsistent with public policy and decency.⁴⁸ Once the respondent has been able to prove any of the defences listed above on the preponderance of possibilities, the High Court shall not grant leave for the foreign award to be enforced.

43 ADR Act section 59 (1) (e).

44 Ibid section 59 (2.).

45 High Court Civil Procedure Rules 2004 (CI 47) Order 19 rule 2.

46 Limitations Decree, 1972 (NRCD 54) s 4.

47 *Agromat Motoimport v Maulden Engineering Co (Beds) Ltd* [1985] 2 All ER 436; [1985] 1 WLR 762.

48 *Oppenheim & Co v Mahomed Haneef* [1922] 1 AC 482 AT 487.

Under the common law, one of the notable defences was that the arbitrator lacked jurisdiction.⁴⁹ Here, if the Defendant to the action is able to prove that the arbitrator lacked jurisdiction, the entire action must fail.

The New York Convention⁵⁰ specifically lists some defences as follows:

1. Where the composition of the arbitral authority was not in accordance with the agreement of the parties or with the law of the place where the hearing took place ("lex loci arbitri");
2. Where a party to the arbitration agreement was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
3. When the arbitration agreement was not valid under its governing law.

III. Process of enforcement of Domestic Arbitration

Common law domestic arbitration may be enforced under the ADR Act by an application before the High Court.⁵¹ Where the application is so made before the High Court, the court may grant leave for the award to be enforced in the same manner as a judgment of the High Court. When the court grants leave, the court will enter judgment against the respondent in terms of arbitration award. However, the court shall not grant leave to enforce an arbitration award to the extent that the arbitrator lacked substantive jurisdiction to make the award.

Under customary arbitration, the customary award once announced publicly became binding between the parties. The award, once made need not be registered in a court before it becomes enforceable.⁵² The enforcement of customary award may also be enforced in the same manner as a judgment of the court.⁵³ One can also set aside a customary arbitration award by an application to the District, Circuit or High Court to set aside the award on the grounds that the award was made in breach of the rules of natural justice, constitutes a miscarriage of justice, or is in contradiction with the known customs of the area concerned.⁵⁴ The application to set aside the award must be made to the court within three months of the award, and on notice to the other party to the arbitration.⁵⁵

49 *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 22 at 272, 275, 301-303.

50 Convention on the Recognition and Enforcement of Arbitral Awards, New York, (1958.).

51 ADR Act section 57.

52 ADR Act section 109.

53 *Ibid* s 111.

54 *Ibid* s 112.

55 *Ibid* s 112(2).

1. Procedure for enforcement

The customary arbitration award may be enforced in the same manner as a judgment of the court. Thus, based on the monetary value of the award, the application to enforce the said customary arbitration may be filed either at the High Court, the Circuit Court or the District Court.

In a domestic arbitration, 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.⁵⁶ The court on hearing the application made, 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.⁵⁷ The grant of the application shall serve as stay of the proceedings in the court until the arbitration terminates. 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.⁵⁸

Where the arbitration terminates with an award, a party may then make an application to the court for leave to enforce the award in the same manner as a judgment or order of the Court.⁵⁹

2. Limits and Defences

Just like the international award, the person who seeks to enforce the domestic award must do so within six (6) years in accordance with the Limitations Decree.⁶⁰ The cause of action pursuant to the arbitration award will be extinguished after the six (6) years period so that an action cannot be successfully mounted after the limitation period.

A defendant to an action for recognition and enforcement may raise a number of defences. Under the ADR Act, one of the notable defences to enforcement of a domestic award is that the arbitrator lacked jurisdiction. The court will refrain from granting leave to enforce an arbitral award where the person against whom the award is being sought to be enforced shows that the arbitrator lacked substantive jurisdiction to make the award.⁶¹ The courts will not enforce an arbitral award where there was misconduct on the part of the arbitrator relating to the award. An arbitrator is guilty of misconduct if he acts in apparent violation of the rules of natural justice to the detriment of either party or had an interest in

⁵⁶ *Ibid* s 6.

⁵⁷ *Ibid* s 6 (2.).

⁵⁸ *Ibid* s 6 (3) – (4.).

⁵⁹ *Ibid* s 57(1)-(2.).

⁶⁰ NRCD 54 (no 30) s 4.

⁶¹ ADR Act Section 57(3.).

the subject matter of arbitration which the arbitrator failed to disclose.⁶² It is sufficient, if it can be shown that ordinary people hearing of such conduct of the arbitrator would immediately assume that it might affect the award to the detriment of one party. This also means that where the applicant was not given notice of the appointment of the arbitrator or notice of the proceedings or the applicant was unable to present his case before the arbitrator⁶³ the court will deem these practices as breach of natural justice and thereby refuse to grant leave for the award to be enforced.

Where a party to the arbitration was under some disability or incapacity and the law applicable to the arbitration agreement is not valid, the court shall not enforce the award.⁶⁴ Also, if there has been failure to conform to the agreed procedure by the parties,⁶⁵ the court shall not enforce the award and the applicant may move for an order to set aside the entire arbitral award. The 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. An application to set aside an award may not be made after three months from the date on which the applicant received the award.⁶⁶

IV. Obstacles to Arbitration in Ghana

The duration of arbitration proceedings can negatively affect one of its touted advantages of being an expedited means of dispute resolution as opposed to the adversarial court action. However, since lawyers have increasingly been used to represent parties in arbitration, there are often challenges on procedural grounds and evidential weight attached to exhibits. With each part having a right to go to court to challenge the procedure as well as other internal mechanisms used in running arbitration, there is the likelihood of unnecessary delays which may wipe out the advantage of speed.

The increasing cost of international arbitration is also a worrying trend. Although costs necessarily vary from case to case, arbitration conducted under the auspices of arbitral tribunals can be very expensive. Parties will have to pay money to the tribunals as a condition for the tribunal to accept the case. Then there is the issue of selecting and paying arbitrators to adjudicate the matters. International arbitrators are often highly trained arbitrators who set their fees using a combination of daily and attendance fees. Bearing in mind that arbitration may sometimes have the propensity to encounter delays, the cost overruns may be a huge disincentive to parties. In fact the element of cost is not limited to international arbitration only, domestic arbitration proceedings are also known to be costly sometimes for the same reasons of time and exorbitant arbitrator fees.

62 ADR Act section 58.

63 *ibid.*

64 *ibid.*

65 *ibid.*

66 ADR Act section 58 (4).

In addition, people are finding clever ways to avoid arbitration in favor of litigation. In Ghana, where the court litigation process can be cumbersome and time wasting, a party who is likely to benefit from the delay in court litigation may be able to set aside an arbitration clause in favor of a court action. It is generally the case that certain matters such as constitutional interpretation and criminal offences cannot be properly dealt with under arbitration. The courts are likely to assume jurisdiction in a dispute that has an arbitration as the selected dispute resolution mechanism where a party alleges fraud. The courts are likely to argue that since fraud is in the nature of criminality, the proper forum to hear that dispute between the parties is the court and not arbitration.

In Ghana, to help deal with the issue of delays, the rules on arbitration offers a pre-hearing conference where certain preliminary matters are dealt with expeditiously. The purpose of such a conference is to expedite the arbitral proceedings by permitting early identification of undisputed facts, thereby limiting the proceeding to the real areas of contention. In addition, the rules also give the parties the right to request the convening of a prehearing conference between the tribunal and the parties in the hope that it will give them an opportunity to reach an amicable settlement. In fact, the ADR Act under section 29 provides for an arbitration management conference where preliminary matters which have the propensity to be a clog in the arbitration proceedings are identified at the front end and dealt with before the hearing starts.

With the issue of cost, introducing innovative financial support to disputants will greatly help them to meet their financial obligations towards the arbitration process. Also, effort to increase local capacity to develop more experienced professional such as lawyers and arbitrators would encourage disputants to choose domestic arbitration which is relatively cheaper than foreign arbitration.

C. Conclusion

In conclusion, it is clear that Ghana recognizes the importance of arbitration as a viable means of dispute resolution and has therefore adequately provided the necessary structures to facilitate same. By being a signatory to the New York Convention, Ghana has taken the necessary steps to provide the blue print for the practice of arbitration. The ADR Act has among other things incorporated the New York Convention to bring the rules of arbitration in Ghana in line with the international community. The development and codification of customary arbitration is also very commendable. Customary arbitration is the way of life of rural folks and has been part of the avenues for adjudicating disputes for a long time. By codifying the system of customary arbitration, the ADR Act has set a uniform standard for customary arbitration in Ghana. The ADR Act has also incorporated certain time tested rules of justice delivery in the customary arbitration process such as the rules of natural justice and the rules against conflict of interest. Rural folks who may often times be far away from traditional courts or may not have the money and sophistication to engage lawyers and

pay for court litigation can safely resort to customary arbitration for the resolution of their disputes.