

GUIDE TO ARBITRATION PLACES (GAP)

GHANA

CHAPTER PREPARED BY

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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| 1. Law                                       | ● |
| a. Framework                                 | ● |
| b. Adherence to international treaties       | ● |
| c. Limited court intervention                | ● |
| d. Arbitrator immunity from civil liability  | ● |
| 2. Judiciary                                 | ● |
| 3. Legal expertise                           | ● |
| 4. Rights of representation                  | ● |
| 5. Accessibility and safety                  | ● |
| 6. Ethics                                    | ● |
| Evolution of above compared to previous year | ☰ |
| 7. Tech friendliness                         | ● |
| 8. Compatibility with the Delos Rules        | ● |

VERSION: 2 JULY 2021 (v01.00)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

## IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration is quickly becoming the preferred method of settling disputes arising under commercial contracts in Ghana. The state's efforts to promote alternatives to litigation as the primary means of resolving disputes led to the repeal of the Arbitration Act, 1961 (Act 38) and its replacement with the Alternative Dispute Resolution Act, 2010 (Act 798) (the "**ADR Act**"). The ADR Act provides a modern framework which governs the commencement and conduct of arbitral proceedings as well as the enforcement of foreign and domestic arbitral awards in Ghana. Recognising the expediency of arbitration over litigation, several legislations in Ghana also encourage and/or require the settlement of disputes by arbitration as well as other ADR methods.

Key places of arbitration in the jurisdiction?	Accra.
Civil law / Common law environment? (if mixed or other, specify)	Common law.
Confidentiality of arbitrations?	Yes. Unless otherwise agreed by the parties or otherwise provided by law, arbitration proceedings and the arbitral award are confidential.
Requirement to retain (local) counsel?	None. A party may be represented by local or foreign counsel or any other person, or be self-represented, unless the parties agree otherwise.
Ability to present party employee witness testimony?	Yes. Parties are permitted to present employee witness testimony.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	Yes. The parties may agree to hold meetings or hearings outside the seat and/or remotely.
Availability of interest as a remedy?	Yes. The tribunal may grant a monetary award at simple or compound interest in accordance with the terms of the contract and the applicable law.
Ability to claim for reasonable costs incurred for the arbitration?	Yes. If there is no agreement on who bears the costs of the arbitration, all costs of the arbitration shall be paid for equally by the parties, unless a party claims and the tribunal decides to include reasonable costs in the award against the other party(ies).
Restrictions regarding contingency fee arrangements and/or third-party funding?	None. Contingency fee arrangements and/or third-party funding are not restricted under the laws of Ghana.
Party to the New York Convention?	Yes. Ghana acceded to the New York Convention on April 9, 1968.

Party to the ICSID Convention?	Yes. Ghana has ratified the ICSID Convention and is a party.
Compatibility with Delos Rules?	Yes, to the extent that the parties have the right to refer the dispute to any arbitral institution of their choice. The parties will be subject to the rules and procedures of the chosen institution, which rules need not be compatible with the ADR Act, except the ADR Act's rules and Ghana's civil procedure rules on recognition and enforcement of foreign arbitral awards.
Default-time limitations period for civil action (including contractual)?	Yes. Actions founded on contract, enforcement of an arbitral award and recovery of money are barred after six (6) years from when the cause of action accrued.  The time limit to enforce an award when the arbitration agreement is under seal (i.e., executed as a deed), is within twelve (12) years.
Other key points to note?	<ul style="list-style-type: none"> <li>• Non-arbitrable matters include matters relating to national or public interest, the environment, the enforcement and interpretation of the Constitution, and any other matter that by law cannot be settled by an alternative dispute resolution method.</li> <li>• The ADR Act makes provision for expedited arbitration proceedings under which parties may opt for a fast track to resolve their dispute. The Centre is mandated to appoint a sole Arbitrator to the exclusion of the Parties, only where the threshold of the claim is below US\$100,000. The estimated time frame from the hearing to the delivery of the award is 18 working days.</li> </ul>
World Bank, Enforcing Contracts: <i>Doing Business</i> score for 2020, if available?	54.0
World Justice Project, Rule of Law Index: <i>Civil Justice</i> score for 2020, if available?	0.57. Ghana is ranked 51 out of 128 globally in a competitive ranking on adherence to Rule of Law.

## ARBITRATION PRACTITIONER SUMMARY

The ADR Act contains several provisions that are consistent with the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) but UNCITRAL does not consider the ADR Act to be an enactment of the UNCITRAL Model Law. As we detail further in this chapter, the ADR Act is indeed broader in scope than the UNCITRAL Model Law and contains provisions on certain matters on which the latter is silent.

Date of arbitration law?	31 May 2010.
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	No. The ADR Act is not considered by UNCITRAL to be an enactment of the UNCITRAL Model Law. Part 1 of the Act is however, largely based on the UNCITRAL Model Law. Key differences include wider scope of application of the ADR Act, provisions on mediation and customary arbitration under the ADR Act, absence of express provisions restricting intervention of courts and empowerment of arbitral tribunals to subpoena witnesses.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No specialised courts on arbitration have been set up. However, there are judges who specialise in arbitration law and are equipped to handle arbitration-related matters. Hence, matters involving arbitration may be referred to them, although not exclusively.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes, but only in urgent cases, where the court deems it necessary for the purpose of preserving evidence or property.
Courts' attitude towards the competence-competence principle?	The principle is recognised by the courts and in practice, the courts respect an arbitral tribunal's competence to rule on questions concerning its jurisdiction. However, a decision by an arbitral tribunal on its own jurisdiction may be reviewed by the courts on an application made to it by a dissatisfied party.
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	The arbitral tribunal will have to render a ruling on its jurisdiction and provide reasons as part of the ruling. Reasons on jurisdiction may not be deferred to a subsequent award.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Additional grounds include: (i) where the law applicable to the arbitration agreement is not valid (e.g. if it is contrary to public policy, equity and good conscience); (ii) where an arbitrator fails to disclose his interest in the subject matter of arbitration (conflict of interest); or (iii) the award was induced by fraud or corruption.
Do annulment proceedings typically suspend enforcement proceedings?	Yes, annulment proceedings will suspend enforcement proceedings.
Courts' attitude towards the recognition and enforcement of	A foreign arbitral award annulled at the seat of the arbitration will not be enforced by Ghanaian courts.

<p>foreign awards annulled at the seat of the arbitration?</p>	
<p>If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?</p>	<p>No, except if there is a legal challenge to the recognition and enforcement of the award such as an appeal or application to set aside. In Ghana, an objecting party may have to seek interim relief from court on how evidence should be taken for the arbitral hearing, where there's disagreement on the mode. If not, it may be considered that the party was given a fair opportunity to present its case, which was spurned.</p>
<p>Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?</p>	<p>Certain preconditions will have to be met before awards in arbitrations to which the Ghanaian State is a party can be enforced. A certificate with particulars of the award must be issued by a Ghanaian Court, and then served on the Auditor General (in the case of an award for payment of money) or the Attorney General (in any other case). The application to the court must be made within twenty-one (21) days of the date of the award.</p>
<p>Is the validity of block chain-based evidence recognised?</p>	<p>Yes, to the extent that, as an electronic or digital record, how the record was generated and stored, its reliability and other matters in the court's discretion can readily be assessed. In Ghana, the admissibility of electronic evidence is relatively novel and evolving.</p>
<p>Where an arbitration agreement and/or award is recorded on a block chain, is it recognised as valid?</p>	<p>Untested but likely yes, if the arbitration agreement or award recorded on blockchain is a clear record of the agreement or award.</p>
<p>Would a court consider a block chain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?</p>	<p>Untested but likely yes, if the agreement or award can be authenticated in a manner deemed sufficient under the laws of Ghana.</p>
<p>Other key points to note?</p>	<ul style="list-style-type: none"> <li>• Unless otherwise agreed by the parties, an arbitral tribunal must hold a case management conference within 14 days of being constituted and on 7 days' written notice to the Parties.</li> <li>• An application to set aside an arbitral award may not be made after 3 months from the date on which the applicant received the award, unless the court otherwise orders.</li> <li>• In an application to recognise and enforce an arbitral award, documents that are not in English must be translated and certified before production in court. The original award and the arbitration agreement or validly authenticated copies of both must also be produced in court.</li> </ul>

## JURISDICTION DETAILED ANALYSIS

### 1. The legal framework of the jurisdiction

#### 1.1 Is the arbitration law based on the UNCITRAL Model Law? 1985 or 2006 version? If yes, what key modifications if any have been made to it? If no, what form does the arbitration law take?

Part 1 of the ADR Act is largely based on the UNCITRAL Model Law, but the entire Act is much broader in scope. As such, UNCITRAL does not consider the ADR Act to be an enactment of the UNCITRAL Model Law.<sup>1</sup> Key differences between the ADR Act and the UNCITRAL Model Law include:

- (a) the broad application of the ADR Act to both commercial and non-commercial matters, other than those considered to be non-arbitrable, whether domestic or international;<sup>2</sup>
- (b) provisions under the ADR Act on mediation and customary arbitration;<sup>3</sup>
- (c) the absence of any provision in the ADR Act that expressly limits the intrusiveness of the courts in arbitration. As illustrated by the examples in sub-paragraphs (d) and (e) below, the ADR Act gives expansive powers to the court, in certain circumstances, to intervene in the arbitral process;<sup>4</sup>
- (d) whereas under the UNCITRAL Model Law, the decision of a court, with regards to any application by a party challenging the appointment of an arbitrator or the arbitral tribunal's ruling on its jurisdiction, is not subject to appeal, the ADR Act does not contain any such limitation on decisions of the High Court with regards to such matters; except that the High Court's decision regarding the review of an arbitral tribunal's ruling on its jurisdiction may only be appealed against with leave of the High Court; and
- (e) unless otherwise agreed by parties, section 40 (1) of the ADR Act mandates the High Court to determine any question of law, arising in the course of arbitration proceedings, that is submitted by a party to the arbitration – no such authority is conferred under the UNCITRAL Model Law;
- (f) the power granted under the ADR Act to the arbitral tribunal to subpoena witnesses;
- (g) the modification by the ADR Act of Article 28(3) of the UNCITRAL Model Law which provides for the application of rules of equity, subject to agreement by the parties and consent of the parties. Under the ADR Act, disputes may be resolved on the basis of the applicable substantive law as well as the rules of equity, that is, what the tribunal believes to be just and fair.<sup>5</sup> Thus, the ADR Act eliminates the requirement to obtain the consent of the parties on the applicability of the rules of equity; and
- (h) the joint mandate given under the ADR Act to parties and arbitrators to determine the procedures and rules to be used for an arbitration.<sup>6</sup> This is unlike the UNCITRAL Model Law which simply states that the parties are free to decide procedure. The inclusion of arbitrators under the Act in determining rules and procedure brings to question autonomy of the parties in dictating how the arbitral process is to be conducted.

<sup>1</sup> Ghana is not included in the list of countries, maintained by UNCITRAL, whose arbitration legislations are considered to be an enactment of the UNCITRAL Model Law. The list is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html).

<sup>2</sup> Section 1 of the ADR Act. An electronic copy of the ADR Act is available online at <https://www.wipo.int/edocs/lexdocs/laws/en/gh/gh036en.pdf>.

<sup>3</sup> Parts 2 and 3 of the ADR Act.

<sup>4</sup> Sections 6, 7, 16 (3) (b), 18 and 19 of the ADR Act.

<sup>5</sup> Section 50 of the ADR Act.

<sup>6</sup> Section 5(2) of Alternative Dispute Resolution Act, 2010 (Act 798).

## 1.2 When was the arbitration law last revised?

Since its coming into force on May 31, 2010, no amendments have been made to the ADR Act.

## 2. The arbitration agreement

### 2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Section 54 of the Courts Act, 1993 (Act 459) and section 48 (1) of the ADR Act, mandate Ghanaian courts to recognise and apply the system of law designated by the parties to an agreement as the governing law of the agreement. Under the ADR Act, where the parties fail to designate the governing law of the agreement, the court shall determine the governing law according to the conflict of laws rules it considers applicable.<sup>7</sup> In practice, where the governing law is not expressly stated and cannot be inferred from the agreement, Ghanaian courts will apply the system of law with which the agreement has its closest and most real connection.<sup>8</sup> The court will take into consideration all relevant factors such as where the contract was made, the parties to the contract and where the contract is to be executed in determining the governing law.

### 2.2 In the absence of an express designation of a 'seat' in the arbitration agreement, how do the courts deal with references therein to a 'venue' or 'place' of arbitration?

The venue or place of arbitration is not synonymous with the seat: the venue or place refers to the physical or geographical location where hearings or meetings are conducted. Where the parties have not expressly designated the seat applicable to the arbitration agreement, the Ghanaian courts will apply the test of "the closest and most intimate connection" to determine the seat of arbitration. This may be determined by having regard to the circumstances of the case such as the place of arbitration, the nationality of the parties, the subject matter of the agreement as well as the implied intention of the parties. The seat, once determined may influence the choice of law and procedural rules.

### 2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

The ADR Act provides that, unless otherwise agreed by the parties, an arbitration agreement which forms (or is intended to form) part of another agreement, shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective and shall for that purpose be treated as a distinct agreement.<sup>9</sup> Thus, under the ADR Act, the arbitration clause or agreement is considered to be independent from the rest of the substantive contract.

Nevertheless, the Supreme Court in the case of *Attorney General v. Balkan Energy Ghana Ltd And 2 Ors.*<sup>10</sup> took a contrary position in relation to the provision of the ADR Act and held *inter alia* as follows:

*"An international commercial arbitration draws its life from the transaction whose dispute-resolution it deals with. We therefore have difficulty in conceiving of it as a transaction separate and independent from the transaction that has generated the dispute it is required to resolve."*

In the opinion of the authors, this decision of the Supreme Court is inconsistent with the provisions of the ADR Act relating to separability of the arbitration clause. Given the clear language of the ADR Act on the separability of an arbitration clause from the agreement which it is intended to form part of, the Supreme Court's decision in the *Balkan Energy* case can only, respectfully, be regarded as having been held *per incuriam*.

<sup>7</sup> Section 48 (1), (2) and (3) of the ADR Act.

<sup>8</sup> This principle was established in the Court of Appeal case of *Société Générale de Compensation v Ackerman* (1972) 1 GLR 413.

<sup>9</sup> Section 3 of the ADR Act.

<sup>10</sup> *Attorney General v. Balkan Energy Ghana Ltd And 2 Ors.* [2012] 2 SCGLR 998.

## 2.4 What are the formal requirements (if any) for an enforceable arbitration agreement?

Under the ADR Act, an arbitration agreement shall not be enforced unless the following requirements are satisfied:

- the parties' consent to the agreement;
- the parties have legal capacity;
- the agreement is reduced into writing;<sup>11</sup> and
- the subject matter is arbitrable.

A provision to submit to arbitration can be in the form of:

- an arbitration clause in the agreement;
- a separate agreement;
- any other modern electronic means of communication; or
- an exchange of pleadings where an assertion of an arbitration agreement is not denied.

## 2.5 To what extent, if at all, can a third-party to the contract containing the arbitration agreement be bound by said arbitration agreement?

The ADR Act is silent on whether a third party to a contract can be bound by an arbitration agreement contained in a contract. Since the ADR Act only provides that parties to an arbitration agreement can resolve their dispute by arbitration, it implies that a person who is not a party to the arbitration agreement cannot generally be bound by the arbitration proceedings.<sup>12</sup> However, an exchange of e-mails or other electronic means of communication in which a third person agrees to be part of or bound by the arbitration agreement, is sufficient to join that person to the proceedings.<sup>13</sup>

Note that, by virtue of section 5(1) of the Contracts Act, 1960 (Act 25), where a provision in a contract purports to confer a benefit on a person who is not a party to the contract, that provision may be enforced or relied on by that person as if the person was a party to the contract. It is therefore submitted that a third-party beneficiary to a contract should be able to enforce an arbitration agreement as if he is a party to that agreement, if the contract confers such a right on him.<sup>14</sup>

## 2.6 Are there restrictions to arbitrability? In the affirmative:

Yes, there are restrictions to arbitrability.

### 2.6.1 Do these restrictions relate to specific domains (such as anti-trust, employment law etc.)?

Section 1 of the ADR Act provides that it cannot be applied in matters relating to:<sup>15</sup>

- the national or public interest;
- the environment;

<sup>11</sup> Section 2(3) of the ADR Act.

<sup>12</sup> We are not aware of any case that deals directly with whether third parties to an arbitration agreement can be bound by its terms.

<sup>13</sup> Section 2 of the ADR Act.

<sup>14</sup> Section 5(1) of the Contracts Act provides that *"Any provision in a contract...which purports to confer a benefit on a person who is not a party to the contract, whether as a designated person or as a member of a class of persons, may, subject to the provisions of this Part, be enforced or relied upon by that person as though he were a party to the contract"*.

<sup>15</sup> Relevant sector legislations do not contain a similar provision. However, Article 130 of the 1992 Constitution confers exclusive original jurisdiction on the Supreme Court to determine matters relating to the interpretation and enforcement of the Constitution. This implies that constitutional matters may only be resolved by the Supreme Court of Ghana and not any other judicial or arbitral authority.

- (c) the enforcement and interpretation of the Constitution; or
- (d) any other matter that by law cannot be settled by an alternative dispute resolution method. This would include offences that are regarded as felonies under the criminal laws of Ghana.<sup>16</sup>

### 2.6.2 Do these restrictions relate to specific persons (i.e., State entities, consumers)?

The excluded matters do not relate to specific persons. However, as they are not defined under the ADR Act, broad interpretations may be given to them to allow the government or other public authorities avoid arbitration agreements which they have entered into on the basis of the “national or public interest.”

## 3. Intervention of domestic courts

### 3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute? If the place of the arbitration is inside of the jurisdiction? If the place of the arbitration is outside of the jurisdiction?

The ADR Act requires that the courts will stay proceedings if there is a valid arbitration agreement whether or not the “seat”<sup>17</sup> of arbitration is located in Ghana. Where there is an arbitration agreement and a party commences an action in court, the other party may, on notice to the party who commenced the action, apply to the court to refer the matter (or a part of the matter to which the arbitration agreement relates) to arbitration.<sup>18</sup> The court is required to stay proceedings and refer the matter to arbitration, if it is satisfied that the matter is one in respect of which there is an arbitration agreement and the application for a stay of proceedings has been made in a timely manner. A court will not assume jurisdiction over matters which the parties have agreed to resolve by arbitration. The Courts may refer a matter to arbitration even in the absence of an arbitration agreement, subject only to the consent of the Parties.

In the case of *BCM Ghana Limited v. Ashanti Goldfields Limited*,<sup>19</sup> a case involving a contract with an arbitration clause, the Supreme Court stayed litigation, giving effect to the parties’ wishes as contained in their agreement. In *George Kodua v Interbeton B.V.* [H1/53/2004], the Court of Appeal outlined the broad principles to be applied by courts in determining an application for staying litigation that has been commenced in breach of an arbitration agreement. The court must consider:

- (a) whether there is an arbitration agreement;
- (b) whether the party applying for the stay of the court proceedings is a party to the arbitration agreement;
- (c) whether there are any court proceedings between the parties;
- (d) whether the applicant has been served with copies of the court proceedings;
- (e) whether the applicant has taken any step before challenging the court proceedings;
- (f) whether the party who commenced the court action has been served with the application for stay of proceedings; and
- (g) whether the arbitration agreement is not null and void, inoperative or incapable of being performed.

<sup>16</sup> Section 73 of the Courts Act.

<sup>17</sup> Note our above comments in relation to the meaning of “place” in Ghanaian practice.

<sup>18</sup> Sections 6(1) and 7(5) of the ADR Act.

<sup>19</sup> *BCM Ghana Limited v. Ashanti Goldfields Limited* CAJ4/17/2005 judgment delivered on 24/5/2006. The reported facts of this case do not indicate whether it involved a reference to domestic or international arbitration. But the clear principle established in this case, which has been applied and/or cited with approval in subsequent cases, is that courts are required to enforce mandatory dispute resolution clauses in contracts as agreed by the parties.

The Supreme Court of Ghana in the recent decision of *De Simone Limited vs. Olam Ghana Limited* (J4/03/2018) construed purposively the provisions of the ADR Act which mandates the Courts to stay proceedings, the subject of which is an arbitration agreement. The principle was established in the judicial decision that the Courts' power to intervene and refer such matters can only be exercised where there has been no mutual waiver by the Parties of their arbitration rights.

### **3.2 How do courts treat injunctions by arbitrators enjoining parties to stay litigation proceedings?**

The law does not empower arbitrators to issue injunctions enjoining courts to stay litigation proceedings. However, the courts will typically give effect to and respect the wishes of the parties as expressed in their agreement. As mentioned, the ADR Act allows a party to an arbitration agreement to make an application to the court to stay proceedings and the grant of such application, based on the principles established in the *Interbeton* case above, shall serve as a stay of proceedings before the court.<sup>20</sup>

### **3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to anti-suit injunctions/anti-arbitration injunctions or orders, but not only)**

Ghanaian courts will intervene in arbitrations seated outside of Ghana where the dispute or contract which is subject to arbitration falls outside the scope of matters that are arbitrable under the laws of Ghana or where approvals which are a pre-requisite to the execution of the contract have not been obtained by a party. The courts in Ghana have on a number of occasions intervened in agreements involving the Government of Ghana, even where the parties chose a foreign seat. Such agreements are those that require parliamentary approval under article 181 of the 1992 Constitution of Ghana by reason of them being an international business or economic transaction or loan agreement involving the government of Ghana.<sup>21</sup> In the case of *Attorney General v. Balkan Energy Ghana Ltd*,<sup>22</sup> the Supreme Court intervened and nullified a contract between the government of Ghana and a private party under which the parties had chosen a foreign seat.

Under the ADR Act, Ghanaian courts have the power to make orders for the preservation of evidence, preservation or protection of property and the grant of other interim reliefs, unless the parties agree otherwise.<sup>23</sup>

## **4. Conduct of the proceedings**

### **4.1 Can parties retain foreign counsel or be self-represented?**

Parties can retain foreign counsel or be self-represented, unless the parties agree otherwise. If foreign counsel is retained by a party, then unless a claim or an answer is filed by counsel, the party who he represents must notify the other party in writing at least 7 days before the arbitral proceedings commence, of the name and address of his appointed counsel.<sup>24</sup>

### **4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances be of a gravity such as to justify this outcome?**

Under the ADR Act, an arbitral award may be set aside by a court on the ground that an arbitrator has an interest in the subject matter of the arbitration which the arbitrator failed to disclose.<sup>25</sup> There is no requirement that the party challenging the appointment show that the undisclosed circumstances are

<sup>20</sup> Section 6(3) of the ADR Act.

<sup>21</sup> Article 181 (3) and (5) of the 1992 Constitution.

<sup>22</sup> Supra, note 10.

<sup>23</sup> Section 39 of the ADR Act.

<sup>24</sup> Section 42 of the ADR Act.

<sup>25</sup> Section 58 (2) (f) of the ADR Act.

serious enough to justify the removal of the arbitrator. The independence and impartiality of arbitrators are key to the arbitration proceedings, and hence, where there exist any circumstances likely to give reasonable cause to doubt an arbitrator's independence or impartiality, the arbitrator is required to make a prompt disclosure to the parties.<sup>26</sup> This is a continuing obligation that the arbitrator must satisfy from the inception of the case through to the end of the arbitration proceedings.

**4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?**

Under the ADR Act, parties are at liberty to determine the procedure to be followed in constituting an arbitral tribunal and may designate an appointing authority (which, in practice, may include a court) to appoint an arbitrator in the event of a failure of the agreed procedure.<sup>27</sup> The courts are also mandated to determine any application filed by a party challenging the appointment of an arbitrator by the other party.<sup>28</sup>

**4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?**

The courts are mandated to issue interim measures on an application by a party, with notice to the other party and the arbitral tribunal, and with the arbitral tribunal's permission or the written agreement of the other party.<sup>29</sup> Interim measures may only be granted *ex parte* in urgent circumstances where the court deems it necessary for the purpose of preserving evidence or property.<sup>30</sup>

**4.5 Other than arbitrators' duty to be independent and impartial does the law regulate the conduct of the arbitration?**

Yes, as further explained below.

**4.5.1 Does it provide for the confidentiality of arbitration proceedings?**

Yes. Under section 35 of the ADR Act, the arbitrator is required to ensure the confidentiality of the proceedings, unless the parties otherwise agree or a law otherwise provides. Additionally, section 49 (7) of the ADR Act provides that an arbitral award shall not be made public without the consent of the parties.

**4.5.2 Does it regulate the length of arbitration proceedings?**

No. The ADR Act only requires an arbitration management conference to be held within 14 days of the arbitral tribunal being constituted, unless the parties otherwise agree.<sup>31</sup> As part of the arbitration management conference, the parties and the tribunal shall determine, among other things, the dates, times and duration of the arbitration proceedings. The tribunal may hold further arbitration management conferences as and when necessary.

**4.5.3 Does it regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects?**

No. If not specified in the arbitration agreement, this is decided by the parties and the arbitral tribunal at the arbitration management conference(s) mentioned above.<sup>32</sup> Practically, the decision to conduct hearings remotely will be with the consent of the parties. If a party objects, it may have to seek an interim order from court on how evidence should be taken in the arbitral hearing. If the party, without sufficient reasons, fails

<sup>26</sup> Section 15 (4) of the ADR Act.

<sup>27</sup> Section 14 of the ADR Act.

<sup>28</sup> Section 16 (3) (b) of the ADR Act.

<sup>29</sup> Section 39 (2) of the ADR Act.

<sup>30</sup> Section 39 (2) of the ADR Act.

<sup>31</sup> Section 29 (1) of the ADR Act.

<sup>32</sup> Section 29 (1) of the ADR Act.

to partake in the hearing and give evidence, the tribunal will proceed on the evidence before it and give an award, which will be difficult to challenge in court.

**4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?**

Yes. The arbitral tribunal may, upon a party's request, grant any interim relief that the tribunal deems necessary for the purpose of protecting or preserving property. The tribunal may require the payment of security for costs by the party requesting the interim measure subject to its grant.<sup>33</sup>

**4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?**

Partly. Arbitrators are at liberty to determine what evidence to admit or exclude upon consideration of any objections made against its admission by a party.<sup>34</sup> However, they are required to take into consideration principles of legal privilege in determining the admissibility of any evidence.<sup>35</sup>

**4.5.6 Does it make it mandatory to hold a hearing?**

It is not mandatory to hold an oral hearing. The ADR Act distinguishes between oral hearings and written hearings and provides that unless otherwise agreed by the parties, the arbitral tribunal shall determine whether to hold oral hearings for the presentation of evidence or for argument, or whether the proceedings should be conducted on the basis of documents and other materials.<sup>36</sup>

**4.5.7 Does it prescribe principles governing the awarding of interest?**

No concrete principles are prescribed. However, the arbitral tribunal is generally mandated to award monetary reliefs at simple or compound interest in accordance with the contract and the applicable law.<sup>37</sup> The rate of interest must also be determined by the tribunal.<sup>38</sup>

**4.5.8 Does it prescribe principles governing the allocation of arbitration costs?**

Yes. Unless otherwise agreed by the parties or a specific expense against a party is included in the award by the tribunal, the parties shall share liability for the arbitration costs equally.<sup>39</sup>

**4.6 Liability**

**4.6.1 Do arbitrators benefit from immunity from civil liability?**

Arbitrators are not liable for any act or omission in the discharge of their functions except where it can be shown that they have acted in bad faith. This immunity extends to an employee or agent of an arbitrator.<sup>40</sup> An arbitrator's immunity does not apply to liability arising out of deliberate wrong doing.<sup>41</sup>

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<sup>33</sup> Section 38 of the ADR Act.

<sup>34</sup> Section 35 (2) of the ADR Act.

<sup>35</sup> Section 35 (4) of the ADR Act.

<sup>36</sup> Section 34 (11) of the ADR Act.

<sup>37</sup> Section 48 (7) of the ADR Act.

<sup>38</sup> Section 49 (6) of the ADR Act.

<sup>39</sup> Section 55 of the ADR Act.

<sup>40</sup> Section 23 of ADR Act.

<sup>41</sup> Section 54 (1) of the ADR Act.

#### **4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?**

The ADR Act itself does not specify criminal repercussions for any participant in an arbitration as a result of the acts or omissions of that participant in the arbitration proceedings, except where a party seeks to obtain a decision in an arbitration on a criminal law matter, or serves as an arbitrator over the same.<sup>42</sup> The ADR Act prescribes this as a statutory offence and a convicted person is subject on conviction to a penal fine or imprisonment not exceeding 12 years.

The Criminal and other Offences (Procedure) Act<sup>43</sup> does not exempt any class of persons from liability if a criminal offence has been committed. Therefore, if any of the participants in an arbitration proceeding commits any act that constitutes an offence under the Criminal Offences Act,<sup>44</sup> or any other law of Ghana, they may be subject to criminal prosecution in Ghana should the commission of such offence come to the knowledge of the appropriate law enforcement agencies.

### **5. The award**

#### **5.1 Can parties waive the requirement for an award to provide reasons?**

Yes, the parties can agree that no reasons should be provided by the arbitral tribunal.<sup>45</sup>

#### **5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?**

The ADR Act does not give parties the authority to waive their right to seek an annulment of the award. However, a party may not exercise the right to seek an annulment of an award after the expiration of 3 months from the date on which the party received the award, unless the court orders otherwise.

#### **5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?**

The requirements for rendering a valid award under the ADR Act are not unusual. The arbitral tribunal, by a majority decision, must decide the dispute in accordance with the applicable law, taking due consideration of the terms of the contract and the chosen law of the parties, or principles of conflict of law in the absence of a clear choice of law by the parties. A monetary award is required to be made in the same currency as the contract, unless the tribunal decides that another currency is more appropriate. With regards to form, the parties are at liberty to agree on the form of the award. Where no such agreement exists, the award must be in writing, stating the date and place where it was made and the reasons for the award. It must be signed by all the arbitrators or a majority of the arbitrators stating the reasons for the omission of the signatures of the remaining arbitrator(s).<sup>46</sup>

In addition to the criteria listed in the New York Convention, an arbitral award may be found to be invalid and annulled where the applicant satisfies the court that (a) the law applicable to the arbitration agreement is not valid; or (b) an arbitrator has an interest in the subject matter of arbitration which the arbitrator failed to disclose; or (c) the award was induced by fraud or corruption. An application to set aside an arbitral award may not be made after 3 months from the date on which the applicant received the award unless the court otherwise orders.

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<sup>42</sup> Section 89 of the ADR Act.

<sup>43</sup> The Criminal and Other Offences (Procedure) Act, 1960 (Act 30).

<sup>44</sup> The Criminal Offences Act, 1960 (Act 29).

<sup>45</sup> Section 49 (3) (c).

<sup>46</sup> Section 49 of the ADR Act.

#### 5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

No. An arbitral award is not subject to appeal under the ADR Act. Subject to parties' rights to seek an annulment on limited grounds, an arbitral award is final and binding as between the parties and their successors or assigns.<sup>47</sup>

#### 5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Local and foreign arbitral awards are enforced by the same procedure – through an application to the High Court for leave to enforce the arbitral award.<sup>48</sup> For a local arbitral award, leave shall be granted unless it is shown that the arbitral tribunal lacked jurisdiction to render the award.<sup>49</sup> A party that seeks to enforce a foreign arbitral award must however satisfy certain additional conditions. The party must satisfy the court that:

- (a) the award was made by a competent authority and under the laws of the country in which the award was made;
- (b) a reciprocal arrangement exists between the Republic of Ghana and the country in which the award was made or the award was made under the New York Convention or under any other international convention on arbitration ratified by the Parliament of Ghana;
- (c) the original award and the agreement pursuant to which the award was made or duly authenticated copies of both the award and the agreement have been produced to the court;<sup>50</sup> and
- (d) there is no appeal pending against the award in any court under the law applicable to the arbitration.<sup>51</sup>

Leave shall be granted to enforce a foreign arbitral award if the above requirements are satisfied and there is no evidence that:

- (a) the award has been annulled at the seat of arbitration;
- (b) the party against whom it is invoked was given insufficient notice to enable the party present his case;
- (c) a party lacking legal capacity was not properly represented;
- (d) the award does not deal with the issues submitted to arbitration; or
- (e) the award contains a decision that is beyond the scope of matters submitted for the arbitration.<sup>52</sup>

Should leave be granted to enforce a domestic or foreign arbitral award, judgment shall be entered in terms of the award and the award shall be enforced in the same manner as a judgment of the court.<sup>53</sup> This implies the use of any of the execution processes permitted under the civil procedure rules of the High Court. An arbitral award made in respect of an agreement not under seal is time-barred after 6 years from the date on

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<sup>47</sup> Section 52 of ADR Act.

<sup>48</sup> Section 57 (1) of the ADR Act.

<sup>49</sup> Section 57 (3) of the ADR Act.

<sup>50</sup> The copies must be authenticated in a manner prescribed by the law of the country in which it was made. If a party relies on any document that is in a foreign language, an English translated copy, duly certified, must also be provided to the court.

<sup>51</sup> Section 59 (1) of the ADR Act.

<sup>52</sup> Section 59 (3) of the ADR Act.

<sup>53</sup> Section 57 (2) of the ADR Act.

which the award became enforceable, and no action may thereafter be brought by a party to enforce the award.<sup>54</sup> In respect of an arbitration agreement made under seal,<sup>55</sup> no action to enforce the award may be brought after 12 years from the date on which the award became enforceable.<sup>56</sup>

#### **5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?**

Under the ADR Act, leave to enforce an arbitral award shall be granted if the court is satisfied that there is no appeal pending against the award and that the award has not been annulled.<sup>57</sup> Given that annulled arbitral awards are not enforceable, it stands to reason that, where annulment or appeal proceedings have been initiated by a party, the court will not grant leave for the award to be enforced until the annulment or proceedings are determined.

#### **5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?**

Yes, Ghanaian courts will not enforce a foreign arbitral award that has been annulled or appealed at the seat of arbitration.<sup>58</sup>

#### **5.8 Are foreign awards readily enforceable in practice?**

In practice, foreign arbitral awards that meet the criteria set out under section 59 of the ADR Act are recognised and readily enforceable. The procedure for enforcing a foreign arbitral award is the same, regardless of whether the party seeking to enforce it relies on the New York Convention or a reciprocal arrangement with Ghana. Ghanaian courts will determine whether the basis for granting leave, as set out in section 59 of the ADR Act, have been met and once such leave is granted, the award is enforceable in the same manner as an ordinary judgment of the High Court.

### **6. Funding arrangements**

#### **6.1 Are there laws or regulations relating to, or restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such laws, regulations or restrictions?**

No. There are no known laws or regulations in Ghana that relate to or restrict the use of contingency or alternative fee arrangements or third-party funding.

### **7. Arbitration and technology**

#### **7.1 Is the validity of block chain-based evidence recognised?**

There is currently no specific law regulating the validity of blockchain-based evidence in Ghana. However, its validity can be derived from our Evidence Act, 1973 (N.R.C.D 323)) which regulates the relevancy and admissibility of evidence and our Electronic Transactions Act, 2008 (Act 772) which provides the general criteria for the admissibility of electronic data as evidence. The evidential weight to be placed on the electronic record will be assessed in accordance with how the record was generated, stored or communicated, reliability and other factors in the courts' discretion.<sup>59</sup> The court will determine the authenticity of the block chain-based evidence and its integrity, which should not be compromised.

<sup>54</sup> Section 4(1)(e) of the Limitations Act, 1972 (NRCD 54), available at: <http://laws.ghanalegal.com/acts/id/374#>.

<sup>55</sup> Unlike a simple contract, a contract made under seal is a specialty contract executed as a deed and for which no consideration is required.

<sup>56</sup> Section 5 (1) (b) of Limitations Act, supra.

<sup>57</sup> Sections 59 (1) (e) and 59 (3) of the ADR Act.

<sup>58</sup> Section 59 (3) of ADR Act.

<sup>59</sup> Section 7 of Electronic Transactions Act 772

## **7.2 Where an arbitration agreement and/or award is recorded on a block chain, is it recognised as valid?**

Untested but likely yes. Agreements concluded through electronic media are recognised as valid in Ghana.<sup>60</sup> For an arbitration agreement to be considered valid, it must be in writing and made by exchange of communications including exchange of letters, telex, fax, e-mail, or other means of communication which provide a record of the agreement. If the arbitration agreement recorded on a block chain can be decrypted and provides a clear record of agreement, it will be considered as valid.

## **7.3 Would a court consider a block chain arbitration agreement and/or awards as original for the purposes of recognition and enforcement?**

Untested. The courts will most likely consider a blockchain award as an original award for the purposes of recognition and enforcement if the award can be authenticated in a manner which is deemed sufficient according to the laws of Ghana. Where, however, the agreement or award relates to virtual or digital currencies known as cryptocurrencies, it may not be capable of enforcement as it is not a sanctioned activity in Ghana.<sup>61</sup>

## **8. Is there likely to be any significant reform of the arbitration law in the near future?**

No, this is not likely. No proposals for reform of the ADR Act have as yet been made.

## **9. Compatibility of the Delos Rules with local arbitration law.**

Compatible, to the extent that the parties have the right to refer the dispute to any arbitral institution of their choice. The parties will be subject to the rules and procedures of the chosen institution, which rules need not be compatible with the ADR Act. However, a foreign award will only be enforced in Ghana if it is made by a competent authority under the laws of the seat. Reciprocal arrangements should also exist between Ghana and the country of the seat. Awards made under the New York Convention or any international convention on arbitration to which Ghana is a party will be enforceable.

## **10. Further reading**

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<sup>60</sup> Section 23 of Act 772, *supra*

<sup>61</sup> Notice No. BG/GOV/SEC/2018/02

## ARBITRATION INFRASTRUCTURE IN THE JURISDICTION

<p>Leading national, regional and international arbitral institutions based out of the jurisdiction, <i>i.e.</i>, with offices and a case team?</p>	<p>Ghana Arbitration Centre (most widely used arbitration centre in Ghana)            Email address: <a href="mailto:info@arbitrationcentreggh.com">info@arbitrationcentreggh.com</a>            The website is currently under construction</p> <p>Ghana Association of Certified Mediators and Arbitrators            Email address: <a href="mailto:info@ghacma.org">info@ghacma.org</a>            Web address: <a href="http://www.ghacma.org">www.ghacma.org</a></p> <p>Marian Dispute Resolution Centre            Email address: <a href="mailto:cugaadmin@cug.edu.gh">cugaadmin@cug.edu.gh</a></p>
<p>Main arbitration hearing facilities for in-person hearings?</p>	<p>A conference room is provided at the Ghana Arbitration Centre. This Conference room is equipped with audio recording services as well as a transcription of hearings.</p>
<p>Main reprographics facilities in reasonable proximity to the above main arbitration hearing facilities?</p>	<p>Printing facility at the Ghana Arbitration Centre, which offers its services for a minimal fee.            Soft-copy services delivered electronically in PDF format are provided by the Ghana Arbitration Centre</p>
<p>Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?</p>	<ul style="list-style-type: none"> <li>• Council for Law Reporting (Ghana Law Report)</li> <li>• Supreme Court of Ghana Law Report</li> <li>• Ghana Monthly Law Journal</li> <li>• Dennis Law Digest</li> </ul>
<p>Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?</p>	<p>Local court interpreters: informal in-house interpreters at the Ghana Arbitration Centre.            Where the language is not English, the client and their representatives provide the interpreters. For French, the <i>Alliance Francaise</i> in Accra is a good starting point.</p>
<p>Other leading arbitral bodies with offices in the jurisdiction?</p>	<p>∅</p>