The New Ghana ADR Act 2010: A Critical Overview

by DR EMILIA ONYEMA*

ABSTRACT

This article critically analyses the provisions on arbitration, customary arbitration and mediation in the new Ghana ADR Act 2010. The provisions on arbitration in the new Act are based on internationally recognised principles such as autonomy of the arbitration agreement and supremacy of party autonomy. It however pushes the boundary of current standards in arbitration laws by, for example granting the appointing authority an expanded role in the arbitral process. The new Act also breaks new grounds in legislating on customary arbitration and granting the settlement agreement from mediation proceedings an enhanced status akin to an arbitral award. This article concludes that this new ADR Act is comprehensive, modern and forward looking and should enhance Ghana's chances of being chosen by parties as seat of their arbitration references within sub-Sahara Africa.

Ghana enacted a new legislation that regulates various alternative dispute-resolution mechanisms in 2010.[1] The new law is titled The Alternative Dispute Resolution Act, Act 798 (the Act). In the Preamble to the new law, it states that it deals with the settlement of disputes by arbitration, mediation and customary arbitration. In addition to the regulation of these mechanisms, the new Act sets up an independent Alternative Dispute Resolution Centre (ADR Centre)[2] with the mandate to 'facilitate the practice of alternative dispute resolution'. The new law is

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1 As defined under sec. 135 of the ADR Act.

2 See secs. 114–124 of the ADR Act. The ADR Centre is a body corporate and enjoys all the privileges and liabilities of a legal person. The Centre has clearly defined objectives listed under sec. 115 which includes: to provide facilities for the settlement of disputes, maintain a list of arbitrators and mediators and conduct relevant research.

ARBITRATION INTERNATIONAL, Vol. 28, No. 1

ıe parties which may be more forced than voluntary.[88] It the legislator was more interested in the formality of sent than evidence of a genuine intention of the parties te. This may not necessarily lead to a just means of docket. It is important that the court enables the parties ntention to arbitrate and not 'force' a written consent to

t of the arbitration, the court plays a supportive role as 39 and this includes assistance with the taking and e, where there is an urgency and importantly, 'where the ıution or person vested by the parties with power in that time being to act effectively'.[89] Note that with reference to rgency, a party can still apply to the court for assistance on of all parties.[90] In the absence of such agreement, the ıut the other party and the arbitrator on notice and obtain bitrator before applying to the court. The court also has ıy point of law upon the application of a party to the an arbitrator under section 18; adjudicate on the fee under section 22 and to make a final determination of the ator under section 26.

ay be enforced as a judgment of the High Court with leav gment will be entered on the terms of the award.[91] Th to the grant of leave to enforce the award on the groun ted substantive jurisdiction to make the award so that re is no award the terms of which can be transformed into ırt.[92]

ty wishes to challenge the award, it will need to mount the e award before the High Court. It is important to note that successors-in-title or assigns) to the arbitration agreement nge the award.[93] The grounds on which an award may be Court are similar to those under article 34(2)(a) of the w.[94] The court can extend the time limit (of three months

Act, the court can refer the parties to arbitration at any time even after close of

ich is aimed at ensuring parties can always approach the court in support of the

ıarty may resort to this subsection in situations where the arbitrator lacks power, ıarty interest is involved, such as a freezing order directed to a non-party bank. ıde under sec. 29 of the 1961 Act. Note that foreign awards may be enforced in ı or on the basis of the New York Convention.

ich omits art. 34(2)(a)(iv) of the Model Law but includes the new ground under (f) disclose an interest in the subject matter of the arbitration and sec. 58(3) on lack ct matter or where the award was procured by fraud or corruption.

from the day the applicant receives the award) for an application to set aside the award under section 58.[95]

The Act makes a separate provision for the enforcement of foreign awards applications for which shall be made to the High Court as well.[96] The Act distinguishes between enforcement of New York Convention awards and non-Convention but international arbitral awards. The High Court will enforce a Convention award in accordance with the provisions of the New York Convention which is scheduled to the Act.[97] For non-Convention international awards, the High Court will enforce such awards upon satisfaction that the award was made by a competent authority under the laws of the country where the foreign award was made and there is a reciprocity arrangement between Ghana and such country, upon the production of the original copies of the award and arbitration agreement or authenticated copies of these documents and if necessary translated into English.[98] These non-Convention international awards will not be enforced in certain circumstances.[99] These include where there is an appeal pending in any court under the law applicable to the arbitration; where the award has been annulled in the country where it was made; where the applicant was not heard; where a party lacked legal capacity or was not properly represented; and where the award dealt with issues not submitted to arbitration or did not deal with issues submitted to arbitration.[100] It is important to note that parties can opt out of these sections and thereby limit their access to the court and that determinations of the court under sections 26, 28, 39 and 56 are subject to appeal (with leave) to the Court of appeal; those under sections 19 and 58 are appealable as of right, while those under sections 6, 7, 16, 18 and 22 are not appealable.

It can therefore be summarized that the provisions of Part One of the new Act evidences a more progressive and arbitration-friendly regime which has not only taken into cognisance modern developments in the law and practice of arbitration but has made innovative provisions whose efficacy and impact will be determined by time and practice.

II. CUSTOMARY ARBITRATION

This part of the Act is a bold step by the Ghanaian legislator especially with its inclusion in the substantive parts of the new Act. It practically has brought customary law and practice within mainstream legal statutes and procedures in Ghana. It is hoped that other jurisdictions in sub-Sahara Africa will be encouraged

95 See sec. 58(4) ADR Act.

96 See sec. 59(1) ADR Act.

97 The party will need to produce the documents listed under art. IV of the New York Convention (translated into English if necessary) and the award must not be subject to appeal in any court under the law applicable to the arbitration, so effectively in the courts at the seat of arbitration. The same status will be accorded to any arbitral award made pursuant to any other Conventions binding on Ghana.

98 See sec. 58(1) and (2) ADR Act.

99 The provisions of art. V of the New York Convention apply to Convention awards.

100 See sec. 58(3) of the Act which closely follows the requirements under art. V.I of the New York Convention.

to follow this example set by Ghana. The Act defines customary arbitration as, 'the voluntary submission of a dispute, whether or not relating to a written agreement for a final binding determination under Part Three of this Act'.[101] One major distinguishing feature of customary arbitration is the little or no emphasis on writing.[102] Another distinguishing feature (from arbitration under Part One of the Act) is the provision that the arbitrator is not obliged to apply legal rules of procedure but be guided by rules of natural justice and fairness,[103] though the parties can also opt to apply the rules of the ADR Centre which provides very similar guarantees.

In most communities in Africa since well before colonial times, disputes between aggrieved members of the family, clan or community were resolved through informal dispute-resolution processes. For example an aggrieved member of the community having identified the member or members of the community he perceived had injured him, went before a recognised body of elders within his family, clan or the larger community and laid his complaints. This body then invited the respondent to attend an oral hearing. The respondent decided whether to attend or reject the invitation (which usually had consequences). Upon accepting the invitation, a date was fixed for a public hearing at which a decision may be reached on the dispute and compensation and/or punishment also imposed and usually executed immediately. This very general description of the nature of customary arbitration evidences the voluntary and oral nature of the proces which has been retained in the new Act.[104]

The Act recognizes that certain types of disputes may not be suitable fo resolution under customary arbitration proceedings and that the arbitrator should be knowledgeable in the customs and practices of the relevant locality sinc most disputes that will feed through this mechanism for resolution will invariabl involve infractions or assertion of rights under such customs and practices. Thi realization also informs the provision for its application on the basis of geographical areas.[105] This is important because customary law by its nature differs from one community to another since it is rooted in the culture, customs and practices accepted by the people of a particular area, community or tribe as binding on them. This section examines the remit of customary arbitration (2.1), the nature of the customary arbitrator (2.2) and the customary arbitration procedure (2.3) under the new Act.

101 See sec. 135 ADR Act. The provisions on customary arbitration are contained in secs. 89–113.

102 Customary practices in various communities in Africa historically are transmitted orally though, written records of these has been encouraged since pre-colonial times.

103 In the practice of customary arbitration, this includes the indispensable obligation to hear each party and his witnesses (if any) and weigh whatever evidence each party adduces in support of its case. No party is generally required to put before the tribunal evidence that is not favourable to its case or that favours its opponent. Each party adduces evidence to support his own case.

104 See A. Allott, *Essays in African Law, with Special reference to the Law of Ghana* 117–149 (Butterworths, 1960).

105 See sec. 92(2) ADR Act. This is particularly to be lauded since customs and practices differ from one geographical area to another.

(a) Remit of Customary Arbitration

Section 89 of the Act provides that disputes over any matter with th crimes, may be submitted for resolution under customary arbitr provision may be a misleading over-generalization since not all matters fall within the remit of customary law.[107] It therefore fo section should be qualified to apply only to disputes arising from m regulated under customary law in accordance with the Constitutio One important observation that should be made at the outset is new Act a party who opts for customary arbitration cannot with process before completion.[109] The Act expects the process to run its terminate in a binding decision.[110] Therefore, parties must duly options before embarking on a customary arbitration hearing unde the Act. It is suggested that other jurisdictions may wish to give pa to change over to arbitrate their dispute under Part One even thou under Part Three. To avoid abuse, a time limit when such a right c may be included. This will give parties proceeding under the Act make the process of customary arbitration more attractive and still possible scope for abuse is limited.

(b) Customary Arbitrator

Under the Act any individual agreed upon by the disputing parti customary arbitrator.[111] Such an individual may also be chosen by accepted by the other party[112] or may be appointed by the ADR customary arbitrator like the arbitrator under Part One is under th remain independent and impartial of the parties and to disclose an likely to give rise to reasonable doubts as to his complian obligations.[114] He is also subject to challenge proceedings where rea exist of his impartiality or lack of independence or failure to posse

106 Section 89(2)–(4) of the Act makes it a criminal offence both for the arbitrator and th matters of a criminal nature.

107 Note that not all customs or practices attain the status of customary law.

108 Some examples of such matters include matrimonial causes, devolution of property an

109 See sec. 105 ADR Act.

110 See sec. 109 ADR Act.

111 This is in recognition of the principle of party autonomy. However, it is for the parties t persons with some knowledge of the local customs and practices of the geographical particular transaction.

112 See sec. 92 of the Act and such an individual can be selected from a list of custom maintained by the ADR Centre.

113 See sec. 96 ADR Act.

114 See sec. 98 of the Act but note that generally under customary arbitration, an inte appointed by a party onto the arbitral tribunal upon proper disclosures. Usually s constituted by families known to each other, so there is little scope of concealing therefore means that the views of the interested tribunal member on the dispute will other members of the tribunal on the basis of such disclosed or known interests. This to be attached to his views or opinion on the dispute.

qualifications agreed by the parties.[115] The customary arbitrator can also resign his appointment at any time though he may be liable to refund some of the fees already paid to him.[116] The mandate of the customary arbitrator is also personal to him so that upon his death or resignation or a successful challenge, his authority ceases and comes to an end.[117] It is evident that the role and status assigned to the customary arbitrator under Part Three of the Act is heavily influenced by Western style modern arbitration practices. This updates the role and makes it more familiar to the modern arbitration practitioner.

(c) Customary Arbitration Proceeding

The parties can adopt their own procedures but where they opt to conduct the arbitration under the auspices of the ADR Centre, the applicant will need to register the dispute with the relevant local office of the Centre indicating the names and addresses of the parties, the arbitrator (if already known) and the nature of the dispute.[118] The dispute can be heard by any number of arbitrators agreed by the parties with the default number being a sole arbitrator.[119] Where a vacancy occurs in the composition of the arbitral tribunal, upon the appointment of a replacement arbitrator, the proceedings if recorded may be adopted by the new tribunal but if not recorded the proceeding will be started afresh. This clearly is a very reasonable requirement since without a recording of what had already taken place the new tribunal will be unable to execute its obligation of ensuring a fair hearing of the dispute. This provision is particularly relevant because as already mentioned one of the hallmarks of customary arbitration is the unwritten or unrecorded nature of its proceedings.

The customary arbitral hearing under the Act terminates in the arbitrator making and publishing a binding award within twenty-one days after the first hearing. The Act in recognition of the customary nature of the process provides that the award does not have to be in writing. As a matter of fact the default position in the Act is for the arbitrator to render a verbal award which if a party wishes to have recorded in a written form such party will then pay for this recording.[120] Note however that the Act requires the award to be in writing if it will

115 See sec. 99 of the Act but note the shorter time limit within which to mount a challenge. Also note that upon the filing of a challenge application, the customary arbitrator shall step down. This is regardless of whether the challenge is meritorious or not. Under sec. 100 the parties can jointly revoke the appointment of the arbitrator for any reason including those listed under sec. 100(2).

116 See sec. 101 of the Act and note that disputes as to fees payable may be referred to the relevant District Court or in the first instance to a third party as agreed between the parties and the arbitrator. It should be observed that in traditional customary arbitration, the tribunal members are not usually paid a fee for their services. This is simply because the goal of such customary arbitration is the restoration of family or communal cohesion. This view is supported by the fact that it is commonly the case that upon settlement of the dispute (which is when a decision is reached and accepted by the disputants), all persons present partake of a 'peace' drink as a sign of the restoration of that cohesion.

117 See, e.g., sec. 102 ADR Act.

118 See sec. 94 ADR Act.

119 See sec. 95 ADR Act.

120 See sec. 108 ADR Act. Note that if the arbitration took place as a result of a court reference, the arbitrator must make the award in writing.

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The provisions on customary arbitration in the new Act by some aspects of modern arbitration law and practice, t of modern technological tools by Ghanaians and the in peoples bound by such customs. These influences do not n essence of custom which in itself is dynamic and so well su Leaving its adoption and application to the discret commendable and hopefully will lead to an increase in the that will have recourse to this form of dispute-resolution involved in international arbitration can opt to arbitrate provisions of this part of the Act, it may not be suitable f that arise under international transactions.

III. MEDIATION

The Act defines mediation as, 'a nonbinding process unde parties discuss their dispute with an impartial person wh resolution'.[125] This description of mediation includes the h dispute-resolution process that terminates in a non-bindi which may be evidenced in writing. Mediation as contemp is therefore a 'parties-centered' process. Part Two of the and non-prescriptive provisions on the procedure to be process.[126] Though this definition of mediation express disputes, it is suggested that it may also apply to all man amenable to mediation.[127] Section 63 of the Act does not the agreement contains an arbitration or a jurisdiction cl face of such clauses, the parties may still agree to mediat

121 See sec. 110 ADR Act.

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