The Middle Eastern and African Arbitration Review

2024

Ghana

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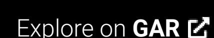

Ghana

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IN SUMMARY

This 2023 review outlines the key legislative developments and case law developments in Ghanaian arbitration. It discusses cases regarding the impact of an admission of liability on an agreement to arbitrate, the scope of the arbitrator's mandate to correct errors, the prospects of appealing arbitral awards in employment disputes and the issue of granting anti-arbitration injunctions in Ghana.

DISCUSSION POINTS

- Developments in statutory law
- Impact of an admission of liability on arbitration clauses
- Correction of arbitral awards
- Appealing arbitral awards in employment disputes
- Anti-arbitration injunctions

REFERENCED IN THIS ARTICLE

- Alternative Dispute Resolution Act 2010
- *Larry Ettah v Wonda World Property*
- *Malak Nasser v Oxford Properties*
- Labour Act 2003
- *GCB Bank v Jarvis Asiedu & Ors*
- *Attorney-General v Cassius Mining*

INTRODUCTION

Reviews of developments in the arbitration space in Ghana over the past few years point to the growing appeal of arbitration as a viable alternative to traditional dispute resolution through national courts. This appeal may be attributed to some inherent advantages that come with arbitration, including speed, flexibility, privacy and finality of the awards. Evidence of the growing appeal of arbitration is further seen in the practice of lawmakers incorporating the terms of the Alternative Dispute Resolution Act 2010 (Act 798 (the ADR Act)) into various statutes.

This 2023 review is divided into two main parts. The first part concentrates on legislative developments. The second part considers case law developments in the space, more specifically the impact of an admission of liability on an agreement to arbitrate, the scope of the arbitrator's mandate to correct errors, the prospects of appealing arbitral awards in employment disputes and the issue of granting anti-arbitration injunctions in Ghana.

DEVELOPMENTS IN STATUTORY LAW

Even though there have been no radical changes to Ghanaian arbitration law in the past year, several statutes have come into force affirming the growing importance and significance of arbitration as a dispute resolution mechanism. The Energy Commission's Electrical Wiring

Cables and Accessories Regulations 2023 (LI2478) constitute one such example. The Regulations contain provisions for the enforcement of minimum standards for electrical wiring cables and accessories, and the testing of electrical wiring cables and accessories, among other related matters. They apply to manufacturers, importers, suppliers, retailers, designers and installers of electrical wiring cable and accessories.

The Regulations acknowledge that an enforcement authority may act in a manner that justifies the payment of compensation. To that end, the Regulations provide that a dispute regarding a person's right to compensation or the amount payable to a person shall be determined under the ADR Act in the first instance.

The reference to the ADR Act is not novel, as the following regulations passed in 2022 contained similar provisions:

- the Energy Commission (Energy Efficiency Standards and Labelling) (Microwave Ovens) Regulations 2022 (LI 2450);
- the Energy Commission (Energy Efficiency Standards and Labelling)) (Public Lighting) Regulations 2022 (LI 2453);
- the Energy Commission (Energy Efficiency Standards and Labelling) (Clothes Washing Machines) Regulations 2022 (LI 2443);
- the Energy Commission (Energy Efficiency Standards and Labelling) (Refrigerating Appliances) Regulations 2022 (LI 2441);
- the Energy Commission (Energy Efficiency Standards and Labelling) (Television Sets and Monitors) Regulations 2022 (LI 2455);
- the Energy Commission (Energy Efficiency Standards and Labelling) (Air Conditioners) Regulations 2022 (LI 2458);
- the Energy Commission (Energy Efficiency Standards and Labelling) (Industrial Fans) Regulations 2022 (LI 2444);
- the Energy Commission (Energy Efficiency Standards and Labelling) (Rice Cookers) Regulations 2022 (LI 2445); and
- the Energy Commission (Energy Efficiency Standards and Labelling) (Solar Panels) Regulations, 2022 (LI 2449).

The Sports Regulations 2023 were also passed. The Regulations focus on various actors in sports, including associations, practitioners, teams, clubs, institutions, colleges and any other organised group of individuals formed to play in a public sporting event or engaged in a public or commercial sporting event. Although the Regulations do not expressly refer to the ADR Act, they outline a preference for disputes to be settle outside formal court structures. The Regulations, therefore, give the National Sports Authority the mandate to establish a dispute resolution procedure for the settlement of disputes arising out of, related to or in connection with sports.

CASE LAW DEVELOPMENTS

Impact Of An Admission Of Liability On Arbitration Clauses

The terms of an arbitration clause contain the preconditions for its successful invocation. One precondition is the existence of a dispute. This section considers the impact of an admission of liability on an agreement to resolve a dispute by arbitration.

In *Larry Ettah v Wonda World Property*,[1] the question before the Court of Appeal was whether a party that had admitted liability in an agreement containing an arbitration clause could invoke the clause.

The case arose in the context of a construction contract. The appellants are in the construction and real estate development field, and the respondents are investors. The respondents had made several investments into the appellant's business. The agreement entered into between the appellants and the respondents contained a dispute resolution clause. The clause required that all disputes arising in connection to the agreement be referred to arbitration. The appellant defaulted in its payment obligation, and the respondent (as plaintiff) took out a writ and statement of claim.

The appellant [as defendant] brought an action asking the court to stay the proceedings and refer the dispute to arbitration. The appellant based its application on the ground that the agreement entered into between the parties contained an arbitration clause. The respondents opposed the application, stating that there was no dispute to refer to arbitration because, in their view, there was no dispute to be pursued in arbitration given that the appellant had already admitted to the debt, as follows:

> We acknowledge the intimations in your letter relating to the agreements executed between the parties. However, as you are aware, we anticipated to be able to make final payments on or before the 1*st* of February 2021. Unfortunately, due to circumstances beyond our control in addition to the covid situation which has affected our hospitality and real estate business, we have not been able to fulfill our obligations to you.[2]

The High Court sided with the respondent. Relying on the document in which the appellant admitted liability, the High Court stated that there was no dispute in view of the admissions that the appellant had made regarding its liability. According to the High Court, the fact that there was an arbitration clause in an agreement did not mean that even where there was no dispute, the matter should be referred to arbitration.

Dissatisfied with the High Court's ruling, the appellant mounted an appeal before the Court of Appeal. The appellant contended that the High Court had erred when it ruled that there was no dispute.

The Court of Appeal came to a similar conclusion as the High Court, reasoning that there was no dispute once the appellant had admitted the debt. The Court of Appeal noted that:

> It is clear . . . that appellants evinced an intention to pay the quantum of debt which was subsequently endorsed on the writ of summons. In the exhibit, appellants described their failure to fulfill their obligations to respondent as "unfortunate" and explained that it was due to "circumstances beyond our control in addition to the covid situation which has affected our hospitality and real estate business." It pertinent to note that this letter was written in response to respondent's demand notice.[3]

It went on to say that:

> The cornerstone of any arbitral agreement is that the subject matter of the dispute must be of the type referable to arbitration. A careful reading of section 6(2) of the ADR Act would show that it was not intended that once there was an arbitral agreement, an applicant was entitled to automatic stay and an order of referral. Where as in the instant case, the affidavit in opposition discloses an admission of liability the existence of a valid arbitration agreement per se will not estop the court from hearing the suit.[4]

The decision on whether to stay proceedings and refer a matter to arbitration depends on the facts and circumstances of each case.

The decisions of the High Court and the Court of Appeal are consistent with English law precedent. The leading English law case in this area is ***Halki Shipping Corp v Sopex Oils Ltd***.[5] The English Court of Appeal was confronted with the question of whether a dispute could be said to exist in the face of an admission of liability under a charter party. In determining whether there was a dispute for the purpose of arbitration, Lord Justice Thomas noted that there was a dispute that arose once the plaintiff claimed damages for breach of the charter party; therefore, until the defendant admitted that the sum was due and payable, the matter had to be referred to arbitration for determination.

Further, in ***Hayter v Nelson***, Mr Justice Saville explained the following:

> [I]f a claim is indisputable, then it cannot form the subject of a "dispute" or "difference" within the meaning of the arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so.[6]

Correction Of Arbitral Awards

In ***The Montan***, Sir John Donaldson MR stated that 'mistakes will occur even in the practices of the best of arbitrators'.[7] In those cases, an arbitral award may need to be corrected.

Two significant developments take place when an award is made: first, the arbitrator becomes ***functus officio***; second the award becomes final and binding. This essentially means that the substance of the award cannot be tampered with.

Nevertheless, section 53 of the ADR Act allows arbitrators to correct errors in arbitral awards; however, a section 53 application to correct an arbitral award requires the arbitrator to walk a tightrope as the power to correct errors is highly restricted.

Section 53 provides an arbitrator with a legal basis to correct clerical, typographical, technical or computational errors in an award. The arbitrator's mandate to correct clerical, typographical, technical or computational errors may be triggered by a party or the arbitrator. The correction must be made within 28 days of the delivery of the award, and 14 days' notice must be given to the parties before the correction is made.

Although the procedural steps and time frames are clear, what constitutes a clerical, typographical, technical or computation error in an award is less so. This was one of the key questions before the Commercial Division of the High Court in ***Malak Nasser v Oxford Properties*** (*Malak Nasser*).[8]

Background

Proceedings Before Ghana Arbitration Centre

On 30 November 2022, an arbitrator issued an award in favour of a claimant in arbitration. The respondent served a process on the claimant 48 days later, on 17 January 2023. The process was titled 'Notice of Correction of and Addition to Award Per Section 53 of the Alternative Dispute Resolution Act, 2010 (Act 798)'. The notice had one aim: to correct an error in the arbitrator's prescription of how interest was to be computed on the award. The transaction was a dollar denominated transaction, but the arbitrator awarded interest based on a generous formula denominated in cedis.

The claimant responded to the application for the correction of error in the arbitral award. The claimant's opposition was based on two grounds:

- the claimant asserted that the award of interest was a question of applicable law and not a computational error and, to that extent, the arbitrator did not have jurisdiction to correct the award; and
- the respondent did not provide any additional claim before the tribunal to trigger the making of an additional award.

Disregarding the claimant's protests, the arbitrator formed the view that there was a computational error and proceeded to change the basis for the award of interest.

Aggrieved by this, the claimant challenged the arbitrator's decision in the High Court.

Proceedings Before The Commercial Division Of The High Court

The claimant's case was that the arbitrator's jurisdiction under section 53 of the ADR Act had not been properly triggered and, to that extent, the arbitrator did not have the jurisdiction to correct the basis on which interest was to be awarded.

The respondent maintained its stance: all it sought was a correction of the award dated 30 November 2022 to reflect the proper basis for the award of interest. For the respondent, not correcting the basis for the award of interest would amount to unjustly enriching the claimant.

The High Court understood its mandate as follows: '[the] Court is not being called upon to assess or evaluate the soundness or otherwise of the reasoning or conclusions reached by the arbitrator in the "corrected" and Additional award'.[9] It understood its mandate as deciding 'whether the arbitrator had legal capacity to make [the correction]'.[10]

The High Court sided with the claimant. The Court did not think that an error in the basis for the award of interest was a computational error. In the its view, a computational error was an error that could not be 'assigned any other meaning than a mistake in calculation'.[11] The Court further noted that for an error to be corrected under section 53 of the ADR Act, it must be 'minor, inconsequential and inadvertent',[12] 'must not be fundamental in nature'[13] and 'must not relate to a determination consciously made'.[14] In other words, the error must be accidental.

The judge went on to restate the issue for determination as follows: '[w]hat this court must establish therefore is whether "correction" sought by the respondent qualified as a computation error within the meaning of Section 53'.[15] The judge concluded that:

> on the evidence before me, there can be no reason to suppose or suggest that the Arbitrator's conclusion on the rate of interest applicable to the debt was minor, a slip, or inadvertent. It was a deliberate decision he came to after a careful evaluation of the applicable law as mandated by Section 48(7).[16]

According to the judge, an example of a computational error would be where a judge arrives at the figure US$2,000 instead of US$20,000 when computing the sum of US$10,000 and US$10,000.[17]

Case Comment

The High Court's conclusion seems to have been influenced by specific words and phrases, including 'accidental', 'not fundamental', 'arithmetic slip' and 'not deliberate'. In the Court's words, 'to qualify as a computational error in terms of Section 53(a), the error must be accidental or arithmetic slip'; however, it did not give any indication about what it considered to be an accident slip.

For example, the arbitrator awarded interest based on the Court (Award of Interest and Post Judgment Interest) Rules, 2005 (CI 52) as opposed to the rates prescribed by the Federal Reserve or the Applicable Commercial Rate for Dollar Transactions. The question arises as to whether this choice could have been accidental.

The High Court used the ***noscitur a sociis*** rule of interpretation and arrived at the conclusion that all the errors referred to under section 53 of the ADR Act had one thing in common: they were all errors that had a trivial or accidental impact, not a fundamental one. This approach deprived the Court of the opportunity to consider the grounds for effecting corrections in an award independently.

Using clerical errors as an example, the authorities agree that clerical errors are those that arise from the mechanical process of writing or transcribing; therefore, in *R v Commissioner of Patents, ex parte Martin*, Mr Justice Fullager explained that 'the characteristic of a clerical error is not that it is in itself trivial or unimportant, but that it arises in the mechanical process of writing or transcribing'.[18] Triviality, therefore, does not arise in the case of a clerical error.

In *Bayer AG v Commissioner of Patents*, Mr Justice Mahoney summed up a clerical error as 'an error that arises in the mechanical process of writing or transcribing and that its characteristic does not depend at all on its relative obviousness or the relative gravity or triviality of its consequences'.[19]

A clerical error is a clerical error only in terms of how it arises: it does not 'depend at all on its relative obviousness or the relative gravity or triviality of the consequences'.[20] The impact of a clerical error may therefore be fundamental, such as inserting a 'not' where it ought not to be.

Typographical errors are fundamentally different from clerical errors. As noted in *R v Dacorum Gaming Licensing Committee, ex parte EMI Cinemas and Leisure Ltd*,[21] a

typographical is an error that is 'trifling' and 'could not have misled anybody'. An example of a typographical error is where an arbitrator spells 'respondent' as 'despondent'.

The common thread between typographical errors and clerical errors is not so much whether the errors raised are fundamental, but rather whether the errors are ones that a prudent arbitrator cannot be deemed to have intended to make and therefore should be considered as errors.

Computational Error

The High Court stated that a computational error was one that arises during a computation, and the Court was correct in its scenario that a computational error arose where an arbitrator adds US$10,000 and US$10,000 and arrives at US$2,000 instead of US$20,000. A computational error may also arise where a wrong basis is prescribed by the arbitrator in computing interest.

In the English case of ***Doglemor Trade v Caledor Consulting***,[22] the tribunal made a computational error in estimating the value of the damages: it added rather than subtracted an adjustment in relation to the business's historic tax liability, resulting in an assessment of US$58 million instead of US$4 million. The tribunal acknowledged the error but refused to amend the award.

An application was brought under section 68 of the UK Arbitration Act 1996. The claimant contended that the tribunal's mistake was a serious irregularity and had the effect of causing substantial injustice. The respondent countered, arguing that the computational error was an error of fact.

The English High Court made an order for the tribunal to correct its computational error. As in the case under review, ***Malak Nasser***, the court was swayed by the fact that the tribunal had acknowledged the error. The court also formed the view that the award of damages was an error neither of fact nor of law (as contended by the claimant in ***Malak Nasser***).

In ***Ducat Maritime v Lavender Shipmanagement***,[23] the English High Court noted that it was 'unjust that a party should, by reason of an error such as that made by the Arbitrator here, be ordered to pay about 33% more than was due by way of principal, and be ordered to pay interest on its own unsuccessful counterclaim'.

Appealing Arbitral Awards In Employment Disputes

The Labour Act 2003 (Act 651 (the Labour Act)) offers disputing parties before the National Labour Commission the option of settling their disputes through arbitration. There are two types of arbitration: the first is compulsory arbitration, which takes place under the aegis of the National Labour Commission, and the second is voluntary arbitration, under which the parties can choose their own arbitrator and proceed as if they were acting under the ADR Act.

Section 134 of the Labour Act provides that a person may appeal against the decision of the National Labour Commission to the Court of Appeal. The question before the Court of Appeal in ***GCB Bank v Jarvis Asiedu & Ors*** was whether an appeal could be made against an arbitral award from a voluntary arbitration.[24] The Court of Appeal explained that section 134 was only concerned with appeals from decisions of the National Labour Commission. In the Court's view, the outcome of the voluntary arbitration proceedings could not be said

to be a decision of the National Labour Commission and, to that extent, was not appealable. According to the Court:

> the Commission's role in a voluntary arbitration is that of a facilitator and not a decision-maker. The argument therefore that the award of the voluntary arbitrator was by extension the decision of the Commission is erroneous and ought to be rejected. It cannot be suggested, indeed, we have not come across a case where the Commission is in court seeking to enforce an award made by a voluntary arbitrator as it would, for its own award in a compulsory arbitration, which to all intents and purposes is its own decision and enforceable as such.-[25]

The key takeaway is that awards arising from voluntary arbitration are treated like any other arbitration award. As a result, enforcement and challenge to the enforcement of such awards are to be treated in compliance with the ADR Act. This decision also puts parties opting for voluntary arbitration under the Labour Act on notice regarding the limitations associated with such an option – especially the option of contesting the award on its merits.

Anti-arbitration Injunctions

Anti-arbitrations are somewhat rare in Ghanaian arbitration. Notionally, anti-arbitration injunctions are injunctions aimed at preventing the commencement or continuance of an arbitration under specific circumstances. In his ***Injunctive Relief and International Arbitration***, Hakeem Seriki sets out some of the circumstances that may merit the grant of an anti-arbitration injunction:

- where there are concurrent proceedings in respect of the same matter, with one before a court and another before an arbitral tribunal, and an application is brought to the court for the stay of the arbitral proceedings;
- where there are two sets of arbitral proceedings under way with the same or similar issues;
- where there is no arbitration agreement in place or the arbitration agreement is alleged to be forged; and
- where it is clear that the applicant is not a party to the arbitration agreement but the respondent keeps compelling the applicant to participate in arbitration.[26]

In ***Attorney-General v Cassius Mining***, the Commercial Division of the High Court dealt with an application for the grant of an anti-arbitration injunction against an Australian mining company operating in Ghana.[27] The respondent, Cassius Mining, applied and was granted a prospecting licence by the Ghanaian government. This led to the execution of a prospecting licence agreement (PLA) between the parties.

A dispute arose. Clause 21 of the PLA required the parties to refer disputes arising regarding the rights, powers, duties and liabilities to arbitration in line with the ADR Act:

> Subject to the provisions of this Agreement if at any time during the continuance of this Agreement or after its termination any question or dispute shall arise regarding the rights, powers, duties and liabilities of the parties

> such question or dispute shall be referred to arbitration in accordance with the Alternative Dispute Resolution Act, 2010 (798).[28]

In this case, Cassius Mining's complaint revolves around the government's refusal to renew Cassius Mining's licence and the unlawful re-demarcation of its licence area.

The attorney general's application was based on a number of steps taken by Cassius Mining. The attorney general argued that Cassius Mining had commenced arbitration proceedings at the Ghana Arbitration Centre under the Minerals and Mining Act 2006 (Act 703) and Clause 21 of the PLA.

The attorney general further argued that despite the pendency of the arbitration proceedings before the Ghana Arbitration Centre, Cassius Mining had sought to commence two other arbitration proceedings outside Ghana: first, it had sought to commence arbitration under the UNCITRAL Arbitration Rules before the Permanent Court of Arbitration in The Hague; second, it had allegedly commenced another arbitration under the title 'Amended Notice of Arbitration – In the Matter of An Arbitration under the UNCITRAL Arbitration Rules (2021)'. In this second arbitration, London was proposed as the seat of arbitration.

The Court upheld the view and position advocated by the attorney general, stating the following:

> Arbitration Agreements as a matter of established law, are like any other contract, binding and enforceable. This is the very essence of principle of pacta sunt servanda which requires that parties honour agreements that they have freely and voluntarily entered into.
>
> Consequently, the Respondent cannot now be heard to say that "proper practice" requires that that a neutral seat be chosen because the dispute involves the GoG. It was for the Respondent who entered into the PLA voluntarily to have negotiated for the terms of the PLA to reflect the so called' proper practice" at that time of entering into same.[29]

In granting the injunction application, the Court noted that the balance of convenience tipped in favour of the applicant:

> The balance of convenience also tips in Applicant's favour since permitting the Respondent to continue in its unwarranted pursuit of foreign arbitral proceedings, is not only oppressive and vexatious to the Applicant but will result in waste of this country's scarce resources which no doubt will be at great cost to the Ghanaian taxpayer.[30]

In particular, the Court noted the exorbitant cost of engaging foreign counsel to represent the Ghanaian government.[31]

ENDNOTES

[1] *Larry Ettah v Wonda World Property Ltd and Nana Kwame Bediako*, Suit No. H1/52/2023 (4 May 2023).

[2] ibid, p. 12.

[3] ibid, p. 14.

[4] ibid, p. 14.

[5] *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 2 All ER 23.

[6] *Hayter v Nelson* [1990] 2 Lloyd's Rep 265 at 268.

[7] *Mutual Shipping Corporation v Bayshore Shipping Company Ltd (The Montan)* [1985] 1 WLR 625.

[8] *Malak Nasser v Oxford Properties Ltd*, Suit No. CM/MISC/0367/2023.

[9] ibid, p. 4, paragraph 5.

[10] ibid.

[11] ibid, p. 7, paragraph 3.

[12] ibid, p. 8, paragraph 2.

[13] ibid.

[14] ibid.

[15] ibid, p. 8, paragraph 3.

[16] ibid, p. 9, paragraph 2.

[17] ibid, p. 9, paragraph 3.

[18] *R v Commissioner of Patents; Ex parte Martin* (1953) 89 CLR 381 at 406.

[19] *Bayer AG v Commissioner of Patents* (1980) 53 CPR (2d) 70 (FCTD).

[20] ibid, paragraph 35.

[21] *R v Dacorum Gaming Licensing Committee, ex parte EMI Cinemas and Leisure Ltd* [1971] 3 All ER 666, QBD.

[22] *Doglemor Trade Ltd and others v Caledor Consulting Ltd and others* [2020] EWHC 3342 (Comm).

[23] *Ducat Maritime Ltd v Lavender Shipmanagement Incorporated* [2022] EWHC 766 (Comm) at 47.

[24] G*CB Bank Limited v Jarvis Asiedu, Mariam Abdullah and Robert Kweinoo Amamoo*, Suit No. H1/74/2023 (11 May 2023).

[25] ibid, p. 11.

[26] Hakeem Seriki, *Injunctive Relief and International Arbitration*, Informa Law from Routledge, 2014.

[27] *Attorney-General v Cassius Mining Ltd*, Suit No. CM/MISC/0568/2023 (31 July 2023).

[28] ibid at 73.

[29] ibid, at 75 to 76.

[30] ibid, at 83.

[31] ibid, at 84.

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