Dispute Resolution in Ghana

Written by Clyde & Co
Introduction

It is important that an investor considers the issue of dispute resolution at the outset of the transaction. It should form part of the investor's evaluation of the risk of the investment and not left as a minor point to be addressed at the end of the contract drafting process.

As a starting point, it is not always possible for an investor to have disputes adjudicated in one's local court or arbitrated using international arbitration rules with which the investor is familiar. Furthermore, in certain instances matters pertaining to the investment will come squarely within the ambit of mandatory local laws, regulations or procedures, such that disputes arising as a consequence will need to be dealt with locally (irrespective of what other terms are expressly agreed). Examples of these may be issues relating to tax, company laws, employment, real estate, local content legislation etc.

As a consequence, an investor will need to understand the Ghanaian approach to dispute resolution. As Ghana is a common law system, for an investor from a common law jurisdiction or one familiar with the common law system, a number of the features of the Ghanaian legal system will be familiar and so easy to understand.

Ghana’s Legal System

The Ghana legal system is based on English common law, customary (traditional) law, and the 1992 Constitution. Ghana operates an adversarial court system. The court structure comprises Lower Courts (the Circuit Court, the District Court and the Juvenile Courts) and the Superior Courts as follows:

I. The Supreme Court which is the final court of appeal and has jurisdiction over matters relating to the enforcement or the interpretation of the Constitution;

II. The Court of Appeal which has jurisdiction to hear and to determine appeals from any judgment, decree, or High Court order;

III. The High Court which has jurisdiction in all matters, civil and criminal, other than those involving treason and supervisory
jurisdiction over the Lower Courts. Within the High Court, there are specialised divisions such as the Commercial Court which adjudicates on commercial disputes;

IV. In addition there are Regional Tribunals which have criminal jurisdiction (concurrent with that of the High Court) in relation to offences involving serious economic fraud against the State.

**Alternative Dispute Resolution (ADR)**

The majority of investors prefer to use ADR to resolve their disputes. ADR certainly can prove to be a quicker and more efficient means of resolving disputes. Furthermore, within Ghana (and elsewhere in the West African region), there is an established and recognised mechanism for the enforcement of foreign arbitral awards.

Ghana's law and practice in the ADR arena was brought up to date with the enactment of the Alternative Dispute Resolution Act 2010 (the Act). The Act deals with arbitration, mediation and customary arbitration (i.e. arbitration by traditional authorities). This guide focuses on the provisions of the Act dealing with arbitration.

The section of the Act that deals with arbitration draws on aspects of the UNCITRAL Model Law on International Commercial Arbitration, as well as the English Arbitration Act 1996. The Act governs the conduct of arbitral proceedings in Ghana, as well as the enforcement of domestic and foreign arbitral awards. Some key provisions of the Act are as follows:

1. As set out in Section 1, the Act applies to all matters save for those relating to the following listed exceptions:
   a. "the national or public interest";
   b. "the environment";
   c. "the enforcement and interpretation of the Constitution"; and
   d. "any other matter that by law cannot be settled by an alternative dispute resolution method".
The broad description of some of the exceptions above has led to debate regarding their scope, notably the exception concerning "national or public interest". In particular, there is a perceived risk in transactions with a government entity that such entity may seek to rely upon this exception to deny determination of a dispute by arbitration or the enforcement of an award, in circumstances where the Act would otherwise apply. It is unclear to what extent this risk materialises in practice.

2. The Act recognises and upholds the right of the parties to agree to arbitrate. Furthermore, by Section 48(1)(a) of the Act, the choice of the parties as to the substantive law of the arbitration is recognised and upheld.

The parties are also at liberty to determine the rules and procedures that will apply to the arbitration, as well as the general conduct of the arbitration including the seat of the arbitration and matters concerning the appointment of arbitrators. However, where the arbitration is referred to the Alternative Dispute Resolution Centre (the main national arbitration institute in Ghana which was set up under the Act), the rules of the Centre as set out in the schedule to the Act will apply.

3. Under the Act, the Ghanaian Courts have a role in facilitating the effective and efficient determination of the dispute. In support of the arbitral proceedings, the Court is empowered to make orders with regards to the taking and preservation of evidence, the granting of interim injunction, the inspection of property and determining a preliminary question of law.

In addition, the Courts will uphold the parties' wishes by staying court proceedings where there is an agreement to arbitrate and they also encourage the parties to arbitrate where there is no prior arbitration agreement.

4. The Ghanaian Courts have the power to enforce or set aside both domestic and foreign arbitral awards. Domestic awards are deemed to be final and binding on all the parties and can be enforced, by leave of the High Court of Ghana, in the same manner as a judgement or order of the High Court. However, under Section 58 of the Act, the parties may apply to the High
Court to set aside an award in any of the following circumstances:

a. a party to the arbitration award was under some disability or incapacity

b. the law applicable to the arbitration agreement was not valid

c. the applicant was not given notice of the appointment of the arbitrator or of the proceedings or was unable to present its case

d. the award dealt with a dispute not within the scope of the arbitration agreement or outside the agreement, except that the court will not set aside any part of the award that falls within the agreement

e. there has been a failure to conform to the agreed procedure by the parties and/or

f. the arbitrator had an interest in the subject matter of the arbitration, which he/she failed to disclose.

5. With regards to foreign arbitral awards, Section 59 of the Act provides that the High Court of Ghana will enforce a foreign award that satisfies the requirements of that section. The requirements include that:

a. the award is made by a competent authority under the laws of the country in which the award was made;

b. there is no appeal pending against the award in that country; and

c. 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 (as further explained below) or other international convention on arbitration to which Ghana is a party.

6. As with a domestic award, a foreign award can be enforced, by leave of the High Court, in the same manner as a judgment or order of the Ghanaian court. However, under Section 59(3) of
the Act, enforcement of the foreign award will be refused in the following circumstances:

i. the award has been annulled in the country in which it was made

ii. the party against whom the award is invoked was not given sufficient notice to enable the party to present its case

iii. a party, lacking legal capacity, was not properly represented

iv. the award does not deal with the issues submitted to arbitration and/or

v. the award contains a decision beyond the scope of the matters submitted to arbitration.

The scope of the above circumstances is limited. As such, foreign awards are readily enforceable in Ghana provided that the award complies with the requirements in Section 59 (as summarised in 5. above). In practice, it is foreign awards made in a country which is a party to the New York Convention that will be readily recognised and so enforced.

7. Pursuant to Section 60 of the Act, parties can agree to the resolution of the dispute by means of expedited arbitral proceedings. A set of expedited arbitration rules, which the parties may adopt by agreement, is provided as a Schedule to the Act.

To see the ADR Act, 2010 in full click here (or type in url: http://www.wipo.int/edocs/lexdocs/laws/en/gh/gh036en.pdf)

Other considerations:

A. Limitation Periods for Civil Claims:

It is important to be aware of the limitation periods applying to a claim. The limitation periods are provided by statute and vary depending on the cause of action. For an investor, claims would commonly arise for breach of contract and/or for arrears of
interest in respect of a debt. Both these claims are subject to a 6 year limitation period.

Limitation periods may also be contractually agreed between the parties and so this point should be checked in the contract.

B. Business Transactions to which the Government is a party:

In contracting with the Government, an investor should take note of Article 181(5) of the Ghanaian Constitution. This Article imposes the requirement for parliamentary approval of an "international business or economic transaction to which the Government is a party". This covers agreements entered into between the Ghanaian government and international investors, whether directly or indirectly through a Ghanaian incorporated subsidiary. Failure to comply with Article 181(5) will render the agreement void.

There is ongoing debate (some of the debate has been before the Ghanaian Supreme Court) as to the nature and/or manner of transactions that will fall within the scope of Article 181(5). It has been suggested by the Supreme Court¹ that transactions of "ordinary commerce" or those that are not "major" do not fall within the scope of Article 181(5). Proposals to clarify the scope of Article 181(5) have been put before Parliament and pending such clarification, investors should certainly consider seeking parliamentary approval for transactions with the government.

Whether or not an agreement with the government complies with Article 181(5) of the Constitution will of course have an impact on the arbitrability of any disputes arising thereunder. In order words, where an agreement is held to be void by the Ghanaian Courts for failing to comply with Article 181(5) and the investor has referred the dispute to international arbitration (in accordance with the terms of the agreement), such an investor (if successful in the international arbitration) is likely to face difficulties with the recognition and enforcement of its award in Ghana.

C. Enforcement of foreign court judgments

¹ The Attorney General v (1) Balkan Energy Ghana Ltd (2) Balkan Energy LLC and (3) Mr Philip David Elders [2012]
The method for enforceability of a foreign court judgment in Ghana depends on whether or not the country from which the judgment originates has a reciprocal arrangement with Ghana for the enforcement of judgment. Where there is reciprocity (as there is with England under the Administration of Justice Act 1920), the High Court of Ghana will enforce a foreign court judgment that is of the superior courts and which is final and conclusive.

In the absence of reciprocity, the investor will have to institute fresh proceedings in Ghana and the foreign judgment can be relied upon in evidence.

D. Enforcement of foreign awards

Ghana is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in 1958 (the New York Convention) and which provides a regime for the enforcement and recognition of arbitral awards within contracting states. As referred to above, pursuant to Section 59 of the Act, the High Court of Ghana will enforce an arbitral award made under the New York Convention and not subject to a pending appeal.

A point to note is that Section 59(3) of the Act, in setting out the circumstances in which enforcement of a foreign award will be refused, does not include an exemption on grounds of public policy. However, this exemption exists under the provisions of the New York Convention and so it is worth bearing in mind that this ground may also be relied on to resist enforcement of a foreign award.

The party that wishes to enforce the award must produce the original award or an authenticated copy, as well as the agreement pursuant to which the award was made.

E. Investment Treaties:

As part of the investment planning process, it is important for an investor to consider whether it can take advantage of the protections offered by bilateral investment treaties, as this may allow the investor to bring claims directly before an international arbitration tribunal and avoid having to litigate in the local
courts. Ghana has concluded bilateral investment treaties with a number of countries including the United Kingdom, France, Germany and India.

F. Approaches in neighbouring countries:

In the event that an investor is also considering investments in other countries in the West African region, it is worth bearing in mind that a number of Ghana’s neighbours are parties to the Organisation for the Harmonization of Business Law in Africa (OHADA).

The OHADA treaty, which establishes a uniform regime of business law amongst its signatories, also authorises the practice and use of ADR. In particular, it provides a framework for the conduct of arbitration by providing an arbitration forum and procedural rules and enables the recognition and enforcement of arbitral awards in member states. Seventeen mainly francophone nations have signed up to OHADA (though any African Union member state is eligible to join) including Ghana’s immediate neighbours of Burkina Faso, Cote d’Ivoire and Togo.

Ultimately where disputes arise, the best approach is to seek to negotiate and reach a commercial settlement. However, should this approach prove unsuccessful or unavailable, the investor has to ensure that it takes suitable steps to protect its investment. Appropriate planning early in the investment cycle, particularly in considering what dispute resolution and enforcement options are available and should be utilised, will help the investor in protecting its investments.
Thank you for reading!

Please find more information on how to grow and strengthen your business in Africa via www.clydeco.com