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ARBITRATION IN GHANA – THE ALTERNATIVE DISPUTE RESOLUTION ACT 2010

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Ghana's abundant growth potential¹ is expected to attract and promote substantial levels of foreign investment over the coming years. This is likely to be matched, and perhaps exceeded, by domestic investment, not least as growing oil revenues are put to use. Much of this investment will be directed towards the significant modernisation, housing, energy and infrastructure projects which are planned or already underway.

This will significantly increase both the size and importance of Ghana's construction industry. In a global economy, large-scale projects will very often involve contracting parties from multiple geographic locations and legal jurisdictions, particularly as contractors, consultants and funders around the world are attracted by the growth prospects and opportunities which Ghana offers². Such projects will entail complex, often multi-layered, contractual arrangements. All of these factors serve to bring into focus the importance of a clear, modern and robust framework for the arbitration of construction disputes.

Internationally, the importance of arbitration as a means of resolving construction disputes has long been recognised. However, this has not always been the case in Ghana. Whilst it is difficult to assess the prevalence of arbitration in Ghana (given the limited availability of reliable statistics), data for the year 2008³ suggests that the number of domestic arbitrations may have been as low as seven. This bears out the anecdotal view within Ghana

that arbitration is not a favoured method of dispute resolution, and that there is a preference for "the authority of a court judgment"⁴.

This may, however, be set to change. The past decade has seen concerted efforts by the Ghanaian government and other groups to investigate and promote alternatives to the courts for the resolution of disputes, including arbitration. This has culminated with the comprehensive updating and revision of the law governing domestic and international arbitration in Ghana, with the coming into force of the Alternative Dispute Resolution Act 2010 (the "Act")⁵.

This paper will consider the provisions of Part One of the Act, which is the part which deals with arbitration (the parts of the Act dealing with mediation, customary arbitration and other matters fall outside the remit of this paper). Such consideration will include a review of the extent to which the relevant provisions are likely to succeed in supporting and facilitating arbitration as an effective means of resolving construction disputes.

Background and application

The inception of the Act can be traced back at least as far as 1998, when the Ghanaian government established a task force on alternative dispute resolution, motivated in part by concerns that the caseload of the Ghanaian courts was reaching unmanageable levels. This led to the drafting of an "Alternative Dispute Resolution Bill" which, following a



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lengthy consultation process, gave rise to the Act. In 2005 the draft bill was widely publicised and consulted upon. At the same time, numerous state training sessions, forums and events were held, directed at promoting arbitration in Ghana.

Before the Act came into force, Ghanaian arbitration was governed by the Arbitration Act 1961. The 1961 act pre-dated many important developments in commercial arbitration – not least, Ghana’s accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958 (the “New York Convention”)⁶ and the publication of the UNCITRAL Model Law on International Commercial Arbitration 1985 (the “UNCITRAL Model Law”). Accordingly, by the turn of the millennium Ghanaian arbitration law was outdated in many respects, and in need of revision and updating if it was to reflect and serve modern commercial needs, including those of the construction industry.

The Act, which wholly repeals and replaces the 1961 act⁷, governs the commencement and conduct of arbitral proceedings in Ghana, as well as the enforcement of both domestic and foreign arbitral awards. The provisions of the Act reflect many of the provisions of the UNCITRAL Model Law, although (and by way of comparison) the Act follows the UNCITRAL Model Law less closely than does the Nigerian Arbitration and Conciliation Act 1990. Indeed, the terms of the Act are more extensive and comprehensive than those of the UNCITRAL Model Law, making provision for some circumstances and eventualities in respect of which the UNCITRAL Model Law is silent (and including certain provisions which reflect those of the English Arbitration Act 1996 (the “English Arbitration Act”)), as well as providing for some innovative additional features.

Section 1 sets out the applicability of the Act, and provides that the Act applies to all matters save for the listed exceptions, comprising matters relating to:

- (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”.

Accordingly, there are potentially wide categories of dispute which might be deemed to fall outside the scope and application of the Act. The exemption with regard to the enforcement and interpretation of the Ghanaian constitution appears clear and sensible. However, the purpose, scope and application of some of the other exceptions is more questionable. The concepts of “the national or public interest” and “the environment” are potentially broad and lacking in clear definition (they are not defined anywhere within the Act). The final category – matters “that by law cannot be settled by an alternative dispute resolution⁸ method” – is similarly nebulous, if not more so. There is a real risk that the question of which matters fall within these categories will be the subject of extensive, and perhaps persistent, debate.

While some exceptions to the application of the Act will always be necessary, the inclusion of imprecisely-defined exceptions risks both:

- (a) limiting the scope of the Act, and thus restricting the range of circumstances in which advantage may be taken of the Act’s many undoubted benefits; and
- (b) prompting protracted legal argument in respect of challenges to arbitral awards and/or the applicability of the Act.

One notable risk area concerns government entities and parastatal bodies. Section 1(a) may leave the way open for such bodies to challenge unfavourable arbitration awards by claiming that the award in question concerned the “national or public interest”. This added uncertainty over enforcement could serve to

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deter those contracting with such entities from entering into arbitration agreements or agreeing to Ghana as a seat of arbitration.

The framing of the exceptions to the applicability of the Act in this way is therefore unfortunate. A more clearly delineated, and narrowly defined, set of exceptions might well have served to better promote and facilitate arbitration. If and when the courts of Ghana come to consider the exceptions within section 1, it is hoped that not only will they supply further clarity as to the meaning of such exceptions, but also that they will apply a suitably narrow interpretation.

Party autonomy

The Act does much to recognise and uphold the general principle of party autonomy, respecting and securing the ability of parties to choose that disputes between them be finally dealt with by arbitration and to determine how such arbitration will be conducted⁹.

Section 5(1) provides that a party to a dispute in respect of which there is an arbitration agreement may, subject to the terms of that agreement, refer the dispute to arbitration. In this way the Act recognises and upholds the right of contracting parties to agree to arbitrate.

Sections 12 to 14 provide that the parties are free to agree the identity and make-up of the tribunal, stipulate any requirements as to the arbitrator or arbitrators' experience, qualifications or nationality, designate an appointing authority, determine the number of arbitrators (the default number being three) and determine the procedure for appointment. Section 17 provides that the parties may, acting jointly, revoke the authority of the arbitrator(s).

Pursuant to section 48(1)(a), the arbitral tribunal is required to decide the dispute according to the law "chosen by the parties as applicable to the substance of the dispute". Thus the freedom of the parties to decide the substantive law of the arbitration is expressly recognised.

The ability of parties to choose and utilise arbitration as the means by which to finally resolve their disputes would of course be undermined without a robust and effective mechanism for the recognition and enforcement of arbitral awards. Under the Act this is provided for by section 57(1), which states that an arbitral award shall be given the status of a judgment of the court and, by leave of the High Court, may be enforced in the same manner.

Rules and conduct of the arbitration

The Act confers extensive autonomy on the parties to determine how the arbitration will be conducted.

Section 5(2) provides that, save for when the dispute is referred to the Alternative Dispute Resolution Centre¹⁰, the procedure and rules governing the arbitral proceedings shall be "as the parties and arbitrators determine". Accordingly the parties may agree on a set of arbitration rules to govern the arbitration. It should be noted, however, that the inclusion of the words "and arbitrators" in this section perhaps reflects a slight difference in approach to the equivalent provision under the UNCITRAL Model Law¹¹, which simply provides that "the parties" are free to determine procedure. This raises a question as to whether the wishes of the parties or the tribunal are paramount with regard to determining procedure, and therefore whether the parties are fully autonomous in this regard.

This question appears to be resolved in favour of the parties by section 31(3) of the Act. This section provides that the parties have the right to agree matters of procedure, and that the tribunal shall only determine such matters in the event that agreement between the parties cannot be reached.

Management conference

The prospects for agreement by the parties and the tribunal as to the procedure and conduct of the arbitration are increased by the provision under section 29 of the Act for an

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“arbitration management conference”. A conference is to take place within 14 days of the tribunal’s appointment, in which the parties and the tribunal, acting together, are to seek to agree matters with regard to the arbitration process. The matters to be covered by the management conference include:

- (a) the issue to be resolved in the arbitration;
- (b) the date, time and duration of any hearing(s);
- (c) issues of discovery, document production etc.;
- (d) the applicable law, rules of evidence and burden of proof;
- (e) how evidence is to be given;
- (f) the form of the award; and
- (g) costs and the fees of the tribunal.

Section 29(3) provides that further arbitration management conferences may be held if and when considered necessary by the tribunal.

The role of the courts

The Act expressly provides for the courts of Ghana to play a significant role in relation to arbitration, both in upholding the right to arbitrate and in facilitating the just and effective conduct of the arbitration itself.

Powers to refer parties to arbitration

Under section 7(5), where a court becomes aware that any action before it is the subject of an arbitration agreement, the court “shall stay the proceedings and refer the parties to arbitration”. Accordingly, the Act expressly obliges the courts to uphold the wishes and autonomy of contracting parties as expressed in the arbitration agreement.

Additionally, it should be noted that, pursuant to section 7(1), even where there is no arbitration agreement the court may, with the consent of the parties, refer all or part of any action pending before the court to arbitration if it considers that arbitration would be appropriate. This allows for the court to

“steer” parties towards arbitration in circumstances where it is considered that a dispute proceeding before the court could be more effectively resolved by arbitration, even in the absence of a clear arbitration agreement.

Support of arbitral procedure

The Act confers extensive powers on the courts to assist and support the arbitral process. In relation to the constitution, fee entitlement and liability of the tribunal, the court is empowered to:

- (a) determine a challenge to the appointment of a sole arbitrator (section 16(3)(b));
- (b) remove an arbitrator (section 18);
- (c) make a determination regarding the entitlement to fees/expenses and/or liability of an arbitrator who has resigned (section 19); and
- (d) make a determination regarding the fees payable to an arbitrator (section 22).

In relation to the conduct of the arbitral proceedings, the court is empowered to:

- (a) make a determination regarding the arbitrator’s jurisdiction (section 26);
- (b) hear a challenge by a party who is subject to arbitration proceedings of which he had not been notified (section 28);
- (c) make orders with regard to evidence, property and goods, grant an interim injunction and appoint a receiver (section 39); and
- (d) determine a preliminary question of law (section 40).

With regard to the award, the court has the power to:

- (a) order the tribunal to deliver the award (and determine the fees/expenses payable to the tribunal if the award has been withheld pending payment) (section 56(2)); and

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(b) enforce or set aside arbitral awards, both domestic and foreign (sections 57 to 59).

Achieving balance

There is a balance to be struck between allowing the courts adequate powers to support arbitral proceedings on the one hand¹³, and avoiding excessive court interference on the other. Indeed, limited court intervention in arbitral proceedings is widely recognised as a central underlying principle of arbitration law¹³.

Whilst the Act identifies the circumstances in which the courts may intervene in arbitral proceedings, it does not include a statement that the stated circumstances are exhaustive. The fact that the courts' powers of intervention under the Act are not limited to expressly identified circumstances may leave open the risk of excessive court intervention.

Under section 40(1), on the application of a party the court may determine "any question of law that arises in the course of proceedings", provided that the court takes the view that the question substantially affects the rights of the other party. Section 40(4) provides for a right of appeal against such determinations. The courts' wide powers under section 40(1) risk leading to a proliferation of costly and time-consuming applications. It is accepted that these potential negative effects are somewhat mitigated by the confirmation that while such an application is pending¹⁴ the arbitral proceedings shall continue, and that leave to appeal shall not be given unless the question is one of importance (or there is some other special reason)¹⁵. However, the key determining factor will be whether the courts limit their discretion to intervene under section 40(1) to circumstances where there is a substantial and material question which cannot be adequately resolved by the arbitral tribunal.

Under section 58(2)(e) the courts may set aside the arbitral award where "there has been a failure to conform to the agreed procedure by the parties". This is worded so as potentially to

encompass not merely a failure by the tribunal, but also a failure by either party, to comply with the agreed procedure. Therefore the failure to comply with a procedural step (whether major or minor) during the course of the arbitration could give the courts grounds to set aside an otherwise sound arbitral award. This risks encouraging court applications by parties opposing arbitral awards, and necessitating detailed enquiry by the court into the parties' compliance with arbitral procedure.

It therefore appears that under the Act there is the potential for excessive court intervention in arbitral proceedings, which could potentially be exploited by parties aiming to prolong and frustrate the arbitral process or impugn an arbitral award. Whether these issues do in fact have a detrimental effect will depend on the approach which the courts take. It is hoped that, in exercising the powers conferred by the Act, the courts of Ghana will be mindful of the overriding aims and spirit of the Act – that is to say the promotion of arbitration as an efficient, effective and final means of dispute resolution, which works in harmony, rather than in competition, with the courts.

Powers and duties of the tribunal

Underlying obligations

The Act confers broad powers on the tribunal with regard to the conduct of arbitral proceedings whilst also providing that, in the exercise of these powers, the tribunal is subject to certain fundamental obligations.

Section 31(1) serves to uphold the fundamental principle of fairness in the conduct of arbitration, obliging the tribunal to be "fair and impartial to the parties" and allow "each party the opportunity to present its case"¹⁶. Section 31(2) obliges the tribunal, subject to the other requirements of the Act, to conduct the arbitration so as to "avoid unnecessary delay and expenses [sic] and adopt measures that will expedite resolution of the dispute". Further, by section 41(4), the exercise of the tribunal's

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powers to judge the relevance and materiality of evidence is subject to the requirement to uphold the rules of natural justice.

The tribunal is required to be impartial. Section 18(2)(a) allows the court to remove an arbitrator if there is “sufficient reason to doubt the impartiality of the arbitrator”. The Act differs in this regard from the UNCITRAL Model Law¹⁷, which requires “independence” as well as impartiality¹⁸.

Jurisdiction

The fundamental issue of the tribunal’s power to rule on its own substantive jurisdiction is addressed in the Act by section 24, which expressly provides that (unless the parties otherwise agree) the tribunal may rule on its own jurisdiction. This section confirms that the tribunal may do so “particularly in respect of”:

- (a) the existence, scope and validity of the arbitration agreement;¹⁹
- (b) the existence or validity of the principal agreement; and
- (c) whether the matters submitted to arbitration are in accordance with the arbitration agreement.

The inclusion of the word “particularly” suggests that the wording of section 24 is not exhaustive, and that the tribunal’s power to rule on its own substantive jurisdiction is therefore not limited to the matters listed.

It should be noted that, following the tribunal’s ruling with regard to its jurisdiction, a dissatisfied party may apply to the appointing authority or the High Court²⁰ for the determination of the tribunal’s jurisdiction. Section 26(4) confirms that (unless the parties agree to the contrary) such an application shall not operate as a stay of the arbitral proceedings. This therefore allows a tribunal which has ruled positively regarding its jurisdiction to proceed to hear the dispute, notwithstanding continuing jurisdictional disputes.

Conduct of the arbitration

Subject to any other requirements of the Act, the tribunal is given the power under section 31 to conduct the arbitration “in a manner that the arbitrator considers appropriate”²¹, “decide on matters of procedure and evidence” (subject to the right of the parties to agree any matter)²² and “determine the time within which any direction is to be complied with”²³.

Where, therefore, the parties fail to agree as to the conduct of the arbitration and/or any procedural or evidential questions which arise in the course of the arbitration, the tribunal is explicitly empowered to determine how matters shall proceed. Such clarity is welcome, and should serve both to promote the effective disposal of disputes and to minimise wrangling over procedural issues.

Further powers

Section 31 goes on to give the tribunal specific powers to address issues which may arise in the course of the arbitral proceedings, including the power to:

- (a) order a claimant to provide security for the costs of the arbitration²⁴;
- (b) give directions for the inspection, preservation, sampling etc. of property²⁵;
- (c) subpoena a witness²⁶;
- (d) hold an oral hearing; and²⁷
- (e) determine the manner in which witnesses are examined²⁸.

Of these powers, the explicit power of subpoena, provided for by section 31(9), is one that is not provided for by the UNCITRAL Model Law. In this respect, the Act provides a useful improvement over the UNCITRAL Model Law provisions, conferring on the tribunal a powerful tool with which to ensure that the dispute is fairly and effectively dealt with. It should be noted, however, that section 31(9) states that the tribunal “shall at the request of a party subpoena a witness”

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[emphasis added]. This could oblige the tribunal to subpoena a witness if one party requests that it do so, even if against the wishes of the other party and the tribunal. The tribunal would, surely, be better able to ensure the expeditious conduct of proceedings if it had the discretion to decline to subpoena a witness in such circumstances. This would also provide a better fit with section 34(6)(a), which confers the power to exclude a non-party witness from a hearing.

Hearings

Under section 34(12), unless the parties have agreed that there should be no oral hearing, the tribunal “shall at the request of a party” hold an oral hearing “at any point in the proceedings”. Section 34(12) applies despite the discretion of the tribunal pursuant to section 34(11) to decide (in the absence of agreement between the parties) “whether to hold [an] oral hearing ... or whether the proceedings are to be conducted on the basis of documents and other materials”. This gives a single party the power to compel an oral hearing, and is a feature which the Act shares with the UNCITRAL Model Law²⁹.

A point of comparison is provided by the English Arbitration Act³⁰, under which the tribunal retains the discretion to resolve a disagreement between the parties as to whether a hearing should be held or whether proceedings should be conducted on a documents-only basis.

Party default

In the event that a party fails, without sufficient reason, to take a step in the proceedings or give evidence, the tribunal is empowered to proceed to an award on the evidence before it. This is provided for by section 44(3), and there is no right of appeal against a decision of the tribunal to do so. The tribunal must, of course, have given the party the opportunity to present its case, as required by section 31(1).

Foreign awards

The Act governs the enforcement of foreign arbitral awards in Ghana, providing for enforcement pursuant to the provisions of the New York Convention³¹. The Act provides, at section 59, that the High Court of Ghana will enforce a foreign arbitral award made under the New York Convention and not subject to a pending appeal. The party wishing to enforce the award must produce the award in question and the agreement pursuant to which the award was made (or authenticated copies). The Act does not limit the arbitral awards which may thus be enforced to those made in the territory of a state which is party to the New York Convention³².

The circumstances in which the enforcement of a foreign arbitral award will be refused are set out at section 59(3). These comprise the following:

- (a) the award has been annulled in the country in which it was made;
- (b) that party against whom the award is being enforced was not given sufficient notice to enable it to present its case;
- (c) a party, lacking legal capacity, was not properly represented;
- (d) the award does not deal with the issues submitted to arbitration; and
- (e) the award contains a decision beyond the scope of the matters submitted for arbitration.

The scope of these circumstances is thus limited. This is welcome, since it potentially reduces the circumstances in which foreign arbitral awards will not be upheld by the Ghanaian courts.

Notably, section 59(3) does not include an explicit exemption on grounds of public policy (whether domestic or international)³³. This leaves open the theoretical possibility that the

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Ghanaian courts could enforce a foreign arbitral award in circumstances where such enforcement would contravene public policy³⁴. Since it is expected that in practice the courts would be loath to do so (and given that a public policy exemption is provided for in article V(2)(b) of the New York Convention) it is perhaps unfortunate that the Act has not dealt with this position more clearly.

Since the circumstances listed in section 59(3) are not stated to be exhaustive³⁵, the possibility is left open that the courts may recognise other circumstances in which enforcement might be refused. Whilst this could resolve the issue with regard to public policy discussed above, it also risks introducing uncertainty, and conferring what may be an excessive discretion on the courts to refuse recognition and enforcement.

Interesting features

Included within the Act are a number of novel provisions, many of which are not found in arbitration legislation in comparable jurisdictions. The arbitration management conference, as discussed above, is one such example and others are discussed below. It will of course take time to gain a true impression of how some of these provisions will operate in practice, how widely they will be adopted and what their benefits may ultimately be. However, it is very welcome that the Act has innovated in this way, adding provisions which may offer lessons for other jurisdictions.

Measures to encourage settlement

Under section 47, the tribunal may, subject to the agreement of the parties, “encourage the settlement of the dispute” and in doing so, may use “mediation or other procedures at any time during the arbitral proceedings”. This encourages and empowers the tribunal to take steps (including some which may not traditionally be associated with arbitration) to promote an amicable settlement of the dispute.

However, it is not clear exactly how this would work in practice. That is to say, whether it would amount to, in effect, a stay of the arbitral proceedings to mediation, following which (in the absence of settlement) proceedings would resume. Further, the Act does not clarify the role of the tribunal in any such mediation. It is presumed that the tribunal would not take any direct involvement in the mediation itself, given that statements made in the mediation could of course prejudice the arbitration³⁶. It will be interesting to see whether, and if so how, the provisions of section 47 are utilised in practice.

Expedited proceedings

By section 60, the Act gives the parties the right to agree to the resolution of the dispute by means of expedited arbitral proceedings. An award made pursuant to expedited procedures shall have the same effect as an ordinary arbitration award³⁷.

A set of expedited arbitration rules, which the parties may adopt by agreement, is provided at the Schedule 3 of the Act. These rules include provision for the giving of notice of arbitration by telephone (and by electronic means of communication), the referral of claims under US\$100,000 in value to a sole arbitrator and the making of the award within seven days of the close of the hearing.

This provides parties who wish to dispense with formality, while seeking a cheaper and more speedy resolution of the dispute, with a framework to do so, offering the potential for significant savings of costs and time in appropriate circumstances.

Electronic communications

Communication by electronic and other means is explicitly recognised and provided for by the Act.

Section 2(4)(a) provides that a valid, written agreement to arbitrate may come into being by the exchange of communications by “telex, fax, e-mail or other means of communication

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which provide a record of the agreement”. Thus agreements by exchange of email are expressly recognised, and by also referring to other means of communication which “provide a record”, the definition is sufficiently broad to draw in other means of electronic communication. Section 29(1) provides that the arbitration management conference may take place “through electronic or telecommunication media”.

These provisions are commendable, since not only do they reflect the commercial reality both in Ghana and worldwide, but they are also drafted with sufficient flexibility to accommodate further technological developments and changes in common practice with regard to communications.

Alternative Dispute Resolution Centre

The Act provides for the establishment of a body termed the “Alternative Dispute Resolution Centre” (the “ADR Centre”), the stated objective of which is “to facilitate the practice of alternative dispute resolution”³⁸.

The extensive functions of the ADR Centre include the maintenance of a register of arbitrators, the provision of a list of arbitrators to persons requesting the services of arbitrators, the provision of guidelines with regard to arbitrators’ fees and the periodic review of the terms of the Act (recommending changes if necessary)³⁹. The activities of the ADR Centre are to be coordinated by a governing board comprising a chairman, members appointed by various bodies (such as the Ghana Chamber of Commerce, the Ghana Bar Association etc.) and representatives from organised labour and industry⁴⁰.

The independent status of the ADR Centre is reflected by section 116, which states that the ADR Centre “shall not be under the direction or control of any person or authority in the performance of its functions” (although subject to any provision to the contrary elsewhere in the Act, in other legislation or the

Ghanaian Constitution). However, such independence may potentially be undermined by the power of the President of Ghana both to appoint members to the board and to revoke an appointment (pursuant to sections 117(2) and 118(5) respectively). It therefore remains to be seen whether the ADR Centre will carry out its functions as a truly independent body, free from political influence or interference.

Compatibility with OHADA⁴¹

A number of states in West and Central Africa, including many of Ghana’s near neighbours⁴², are parties to the OHADA Treaty⁴³, which establishes a uniform regime of business law among its signatories. The OHADA member states adopted a Uniform Act on Arbitration (the “OHADA Uniform Act”) on 11 March 1999, which provides a framework for the conduct of arbitration, as well as for the recognition and enforcement of arbitration agreements and arbitral awards.

The OHADA Treaty⁴⁴ expressly provides that any African state may join OHADA. Thus far, however, of the states which have joined OHADA, all have legal systems based on the civil law tradition and none are Anglophone⁴⁵. There is a strong argument that joining OHADA, or at least aligning itself more closely with some of its legal provisions, would allow Ghana to participate in, and benefit from, the development of a uniform structure of business law applicable across large parts of West and Central Africa.

The adoption of new arbitration legislation presented Ghana with an opportunity to move towards the alignment of its arbitration law with that of its OHADA neighbours, and perhaps even towards full membership of OHADA. However, it appears that, in adopting the Act – which is not based upon, or closely aligned with, the OHADA Uniform Act⁴⁶ – Ghana has taken the decision to move in a different direction, or at least to defer for some time any determined move towards OHADA.

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It remains to be seen whether Ghana will take concrete steps towards the OHADA grouping, or whether, given the undoubted challenges in reconciling civil and common law legal concepts, as well as those posed by linguistic differences⁴⁷, it declines to do so. However, should Ghana in future move further towards regional integration, and opt for closer alignment with OHADA (or indeed membership), it is likely that some important provisions of the Act would need to be revisited.

Conclusion

A clear, comprehensive and up-to-date framework for commercial arbitration is widely recognised as being key to supporting the needs of the modern construction industry (both domestically and internationally). Such importance is perhaps magnified in a jurisdiction such as Ghana, where the alternative to arbitration may very well be the slow progress of cases in the (often overburdened) domestic courts.

The Act has only recently come into force, and whether it achieves its aims will only be seen with time. It can however be appreciated from the foregoing discussion that the Act combines a comprehensive approach with innovative features, and its terms reflect the laudable aim of seeking to provide for, and address, many of the difficult issues which commonly arise in connection with arbitration. Moreover, despite the risk of unwarranted court (and perhaps state) intervention in some circumstances, and what may be one or two missed opportunities, the Act is likely to succeed in providing Ghana with an effective, modern arbitration framework which compares very favourably in many respects with equivalent legislation in other jurisdictions. As such the Act is expected to support the needs of the domestic and international construction industry in Ghana both now, at what is a crucial stage in Ghana's economic development, and into the future.

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¹ Ghana commenced the commercial exploitation of significant oil deposits at the start of 2011. The World Bank estimates that the Ghanaian economy could grow by as much as 13.4 per cent in 2011 (World Bank, "Navigating Strong Currents", Global Economic Prospects, vol. 2, January 2011, p.123).

² A recent report (see Global Construction Perspectives and Oxford Economics, Global Construction 2020, 2010) concludes that emerging markets will account for the majority of the global construction sector's growth by 2020.

³ Op. cit. n. 1; figures from Ghana Arbitration Centre.

⁴ AfriMAP, Initiative for West Africa and The Institute for Democratic Governance, Ghana: Justice Sector and the Rule of Law, Open Society Institute Network, 2007, p.132.

⁵ The Act received assent on 31 May 2010

⁶ Ghana acceded to the New York Convention in 1968.

⁷ The Act provides that ongoing actions commenced before the coming into force of the Act will be dealt with pursuant to the Act's terms.

⁸ It should be noted that "Alternative Dispute Resolution" is given a sufficiently broad definition in s.135 of the Act to encompass arbitration.

⁹ Whether the arbitration is conducted on an ad hoc basis or pursuant to an institutional set of arbitration rules.

¹⁰ The Alternative Dispute Resolution Centre is discussed further in the "Interesting features" section of this paper.

¹¹ UNCITRAL Model Law, Art 19(1)

¹² See World Bank, Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, 2010, p.61. The report found court "assistance" to arbitration in the Sub-Saharan African region to be below the average of the countries

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polled, but greater than in Eastern Europe and Asia.

¹³This is reflected in arbitration legislation in numerous jurisdictions, including the English Arbitration Act, which identifies limited court intervention as a “general principle” (s.1(c)) and the UNCITRAL Model Law, which provides that, save for where expressly provided, the courts shall not intervene (Art 5).

¹⁴The Act, s.40(3)

¹⁵Ibid. s.40(4)

¹⁶This reflects the requirements of Art 18 of the UNCITRAL Model Law.

¹⁷Although not the English Arbitration Act

¹⁸Op. cit. n. 11, Art 12

¹⁹The principle of separability is recognised in the Act by s.3, which provides that (unless otherwise agreed by the parties) an arbitration agreement forming, or intended to form, part of another agreement shall be treated as a separate agreement, and its validity, existence and/or effect shall not be affected by that other agreement.

²⁰Op. cit. n. 14, s.26(1)

²¹Ibid. s.31(2)

²²Ibid. s.31(3)

²³Ibid. s.31(5)

²⁴Ibid. s.31(7)

²⁵Ibid. s.31(8)

²⁶Ibid. s.31(9)

²⁷Ibid. s.34(12)

²⁸Ibid. s.41(1)

²⁹Which provides that the tribunal “shall hold such hearings ... if so requested by a party” (Art 24(1)). See also Arts 20.2 and 20.6 of the ICC Rules of Arbitration and Art 19.1 of the LCIA Arbitration Rules.

³⁰Which gives the tribunal the ability, in the absence of agreement of the parties, to “decide all procedural and evidential matters”, including “whether and to what extent there should be oral or written evidence or submissions” (s.34).

³¹The text of the New York Convention is set out in full at Schedule 1 of the Act.

³²S.59 of the Act is therefore broader in its application than s.100(1) of the English Arbitration Act.

³³Unlike, for example, s.103(3) of the English Arbitration Act or s.48(b)(ii) of the Nigerian Arbitration and Conciliation Act 1990.

³⁴However, it is perhaps possible that a decision which contravened public policy could be deemed to constitute a matter of “national or public interest”, which would therefore be excluded from the ambit of the Act altogether pursuant to s.1(a).

³⁵Where the equivalent circumstances are listed in the English Arbitration Act they are preceded by the statement that enforcement shall not be refused “except in the following cases”, and the New York Convention itself states that recognition and enforcement will be refused “only if” proof of one of the stated conditions is furnished (Art V(1)).

³⁶In *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207, the English courts held that the participation of an adjudicator in a mediation between the parties gave rise to a real possibility of bias.

³⁷Op. cit. n. 14, s.62

³⁸Ibid. s.115(1)

³⁹Ibid. s.115(2)

⁴⁰Op. cit. n. 14, s.117

⁴¹The acronym, in French, for “Organisation for the Harmonisation of Business Law in Africa”.

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⁴²Indeed all three nations with which Ghana shares a border (Burkina Faso, Côte d'Ivoire and Togo) are members of OHADA.

⁴³Treaty of Port Louis 1993

⁴⁴Ibid. Art 53

⁴⁵Although Cameroon, which is an OHADA member, includes both Francophone and Anglophone regions and draws its law from both civil and common law traditions.

⁴⁶The OHADA Uniform Act is, in many respects, closer to the UNCITRAL Model Law (some of the differences between the UNCITRAL Model Law and the Act have been identified in the foregoing discussion).

⁴⁷These should not prove insurmountable, since, in addition to its Francophone members, OHADA encompasses Equatorial Guinea (where Spanish is an official language), Guinea-Bissau (where Portuguese is the official language) and Anglophone regions of Cameroon (and, of course, numerous native languages are also spoken in each member state). Further, in October 2005, English, Spanish and Portuguese were added to French as working languages of OHADA.

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