Journal of African Law, 65, 2 (2021), 205–222 © The Author(s), 2021. Published by Cambridge University Press on behalf of SOAS University of London
doi:10.1017/S002185532100019X First published online 14 June 2021

The Nature and Constitutionality of Statutorily-Imposed (Non-Contractual) Arbitration in Ghana

Richard Frimpong Oppong*
University of Bradford, Bradford, UK
r.oppong@bradford.ac.uk

Abstract

Ghanaian law contains a number of statutes that broadly provide that certain disputes shall be settled by arbitration. This compulsory approach to arbitration departs significantly from the consent-based model of arbitration. This article considers the legal framework for statutory arbitration in Ghana. It examines the origins of statutory arbitration, documents some of the statutes that provide for statutory arbitration and assesses the rationale for statutory arbitration. The article also examines the issue of consent in statutory arbitration, the procedural aspects of statutory arbitration, as well as the constitutionality of this form of arbitration.

Keywords

Ghana, arbitration, statutorily imposed on parties, non-contractual, constitutionality

INTRODUCTION

Ghanaian law is replete with statutes that broadly provide that certain disputes "shall be settled by arbitration".[1] These statutory provisions impose arbitration on defined persons as the means for settling their disputes with various public bodies and institutions (statutory arbitration). Thus, statutory arbitration can be defined as arbitration pursuant to an enactment that provides for a dispute to be submitted to arbitration. Until recently, statutory arbitration had not given rise to litigation and there was hardly any jurisprudence on the subject.[2] This may be due to the fact that the provisions are not often invoked or have worked well enough when invoked. However, in two

* Associate professor, School of Law, University of Bradford.

1 See, for example: Labour Act 2003, secs 160(2) and 162(2); Banks and Specialised Deposit-Taking Institutions Act 2016, sec 141(1); Ghana Water and Sewerage Corporation Act 1965, sec 2(4); Ghana Broadcasting Corporation Act 1968, sec 13(7); Ghana Ports and Harbours Authority Act 1986, sec 23(2); Plants and Fertilizer Act 2010, sec 16(3); Ghana Railway Corporations Act 1977, sec 8(3); Rivers Act 1903, third sched, sec 10; and University of Ghana Act 1961, sec 16(4)(c) and (d).

2 *Maritime and Dockworkers Union of the Trades Union Congress of Ghana v State Shipping Corporation (Black Star Line)* [1982–83] GLR 671.

recent decisions,[3] and an arbitral award[4] resulting from the revocation of Unibank Ghana Limited's banking licence by the Bank of Ghana (the Bank), the legal implications of statutory arbitration have come to the fore. This article does not seek to examine the merits of the court's two decisions or the arbitration award. Rather, it seeks to conceptualize the nature of these statutory provisions.

This article argues that, while arbitration is generally seen as a private consent-based means of dispute resolution, the statutorily-imposed arbitration provisions are, and should be, conceptualized as instruments of administrative law, because "a statutory arbitration takes its character from the statute".[5] Private law arbitration or contractual arbitration (under which the parties agree to submit to the jurisdiction of an arbitral tribunal) should be distinguished from statutory arbitration. The article argues that, when so conceptualized, it becomes evident that it is inappropriate to apply the jurisprudence developed in the context of private law arbitration to statutory arbitration, and that statutory arbitration has a safe home in the Constitution of the Republic of Ghana 1992 (the Constitution).

Following this introduction, the article examines the legal framework for statutory arbitration in Ghana and briefly examines the origins of statutory arbitration. Without pretending to be exhaustive, the article also documents some of the statutes that provide for statutory arbitration and assesses the rationale for statutory arbitration. It examines the issue of consent in statutory arbitration, and the procedural aspects of statutory arbitration. It also discusses the topical subject of the constitutionality of statutory arbitration, both as a concept and in terms of specific enactments, such as section 141 (1) of the Banks and Specialised Deposit-Taking Institutions Act 2016.

THE LEGAL FRAMEWORK FOR STATUTORY ARBITRATION

Statutes that provide for statutory arbitration

Statutory arbitration in the Ghanaian legal system predates Ghana's independence. It appears to have been borrowed from the United Kingdom,[6] and it

3 *Nii Amanor Dodoo v Dr Kwabena Duffour* suit no CM/RPC/0624/2018 (High Court, Accra, ruling of Justice Jennifer Abena Dadzie, 17 May 2019); *Dr Kwabena Duffour v Nii Amanor Dodoo* suit no CM/MISC/0121/2020 (High Court, Accra, judgment of Justice Jennifer Abena Dadzie, 24 February 2020). See also *Dr Paa Kwesi Nduom v Bank of Ghana* suit no HR/094/2019 (High Court, Accra, judgment of Justice Gifty Agyei Addo, 19 December 2019).

4 *Dr Kwabena Duffour v Nii Amanor Dodoo* (award of Justice Samuel Kofi Date-Bah, 23 October 2019).

5 *Maritime and Dockworkers Union*, above at note 2 at 679.

6 Various UK legislation provides for statutory arbitration. See, for example: Agricultural Holdings Act 1986, sec 84; Agricultural Tenancies Act 1995, sec 22; New Roads and Street Works Act 1991, sec 62(5); Acquisition of Land Act 1981, sched 2, para 6(2); Railways Clauses Consolidation Act 1845, sec 81; Water Industry Act 1991, secs 49(3), 56(3), 148(5), 161(6), 162(8), 166(6), 176(4), 177(3), 186(7), 205(2), sched 6, sec 11(3),

https://doi.org/10.1017/S002185532100019X Published online by Cambridge University Press

exists in other common law countries such as Australia, Canada, India and New Zealand.[7] In England, it has been suggested that: "[s]tatutory arbitration in English history was introduced in 19th century compulsory purchase statutes on a basis that the issues, particularly on valuation, were not appropriate for courts. Arbitration, despite the general distrust of it then current was the only obvious alternative. Tribunals had not then been 'invented'".[8]

Writing in 1951, JRW Alexander noted that statutory arbitration had become increasingly common and important; examples are to be found in enactments dealing with land, construction, housing, town and country planning, rating, health and nationalization.[9] Crease was, however, of the view that "statutory arbitrations have departed furthest from the ideas which lay behind the common law arbitration [and] it is indeed doubtful whether they should be classified as arbitrations at all".[10]

One of the earliest statutes in Ghana (then Gold Coast) that provided for statutory arbitration was the Rivers Act 1903. Section 10 of the third schedule to the act provided that, "in case, and so often as a question, difference, or dispute arises as to the true intent and meaning of these Regulations, or a part of these Regulations that question, difference, or dispute shall be referred to the sole arbitration and award of the Minister".

A more recent example is section 141 of the Banks and Specialised Deposit-Taking Institutions Act, which provides that "where a person is aggrieved with a decision of the Bank of Ghana in respect of … And that person desires redress of such grievances, that person shall resort to arbitration under the rules of the Alternative Dispute Resolution Centre established under the Alternative Dispute Resolution Act 2010 (Act 798)". This is the provision that was at issue in the recent jurisprudence on statutory arbitration in Ghana.[11]

---

contd
sched 12, secs 1(3), 4(2), 5(2) and 6(3), sched 13, secs 1(4), 3(4) and 5(4), and sched 14, sec 4(2). For some judicial decisions arising from awards in statutory arbitrations, see: *Durham County Council v Darlington Borough Council* [2003] EWHC 2598 (admin); *In Re an Arbitration between Knight and the Tabernacle Permanent Building Society* [1891] 2 QB 63; *In Re the County Council of Kent and the Sandgate Local Board* [1895] 2 QB 43.

7 See, for example: Arbitration Act, RSBC 1996 cap 55, sec 2(1)(b) (British Columbia); Arbitration Act 1996, sec 9 (New Zealand); Arbitration and Reconciliation Act 1996, sec 2(4) (India); Commercial Arbitration Act 2010, sec 1(6) (New South Wales, Australia); and Commercial Arbitration Act 2011, sec 1(6) (Victoria, Australia). See also: Arbitration Act, 1965, sec 40 (South Africa); Arbitration Act 1986, sec 43 (Bermuda); and Arbitration Act 1965, sec 40 (Namibia).

8 New Zealand Law Commission *Arbitration: Report No 20* (1991) at 100, citing Prof Ross Cranston of the University of London.

9 JRW Alexander "Outline of arbitration" (1951) 17/2 *Arbitration* 32 at 33. The same point was made in D Waterhouse "Institute of Arbitrators lectures on arbitration: 1964: First lecture Thursday, 1st October, 1964" (1965) 31/2 *Arbitration* 32 at 40.

10 JL Crease "Arbitration and the Lands Tribunal Act, 1949: 'It is certainly justice; it is probably the law for that reason'" (1951) 17/1 *Arbitration* 12 at 15.

11 *Dodoo v Duffour*, above at note 3; *Duffour v Dodoo*, above at note 3.

https://doi.org/10.1017/S002185532100019X Published online by Cambridge University Press

Some statutes provide for arbitration, but they can be interpreted as not *compelling* resort to arbitration. Section 11(4) of the Public Services (Negotiating Committees) Act 1992 provides that, "the President *may* after receiving the report referred to in subsection (3), submit the matter to arbitration for settlement in accordance with the Arbitration Act 1961 (Act 38)".[12] Similarly, section 37(2) of the Ghana Highway Authority Act 1977 provides that, "[a] dispute as to the amount of compensation to be paid *may* be settled by arbitration in accordance with the Arbitration Act 1961 (Act 38)".[13] Section 21 of the Energy Commission Act 1997 provides that, "the Board shall *at the request of a person licenced under this Act* set up an arbitration panel under the Arbitration Act 1961 (Act 38) to arbitrate and settle a dispute arising between licensees where the parties cannot reach an agreement".[14] Section 47(2)(3) of the National Petroleum Authority Act 2005 also provides that, "where the dispute cannot be amicably settled through negotiation, the aggrieved party may submit the dispute to the Board for arbitration. The Board shall after consultation with the Minister, set up an arbitration panel under the Arbitration Act 1961 (Act 38) to arbitrate and settle the dispute". These provisions make the decision to resort to arbitration discretionary or allow one party to request that a matter be referred to an arbitrator. Implicit in the latter is the fact that a party is allowed to renounce submission of the matter to an arbitrator. This means that, unlike statutory arbitration, arbitration under these enactments is consensual.

The nature of the disputes that have historically been subject to statutory arbitration has been varied. They include defined decisions of the Bank,[15] "a question, difference or dispute aris[ing] as to the true intent and meaning of these Regulations,"[16] "a dispute … as to whether the employed person had been offered equivalent employment in the Republic"[17] or "as to the amount of compensation assessed by the Minister".[18] A significant number, however, deal with disputes regarding the determination of the amount of compensation owed in respect of damage done to property following the exercise of powers under the relevant statute.[19]

A common feature of the provisions on statutory arbitration is that they all deal with disputes arising from the operations or decisions of what may be broadly characterized as public officers, state institutions and agencies,

12 Emphasis added.
13 Emphasis added.
14 Emphasis added.
15 Banks and Specialised Deposit-Taking Institutions Act, sec 141(1)(a)–(d).
16 Rivers Act 1903, third sched, sec 10.
17 University of Ghana Act 1961, sec 16(c).
18 Ibid.
19 Ghana Water and Sewage Corporation Act 1965, sec 2(3); Ghana Broadcasting Act 1968, sec 13(1) and (5); Ghana Ports and Harbours Authority Act 1986, secs 19–21; Plants and Fertilizer Act 2010, sec 16(1), (2) and (4); Ghana Railway Corporations Act 1997, sec 8(1) and (2); Ghana Highway Authority Act 1977, secs 36 and 37(1).

such as the Ghana Broadcasting Corporation, Ghana Highway Authority and the Bank.

The second feature, which has been the source of the recent jurisprudential contentions, is that, contrary to the norm in private law arbitration, the statutes at issue provide no requirement for consent. This is especially so from the perspective of the private person in dispute with a public officer, state institution or agency. It is arguable that the state implicitly consents to arbitration by enacting arbitration as the mode of dispute settlement with the respective public officer, state institution or agency. However, it is misplaced to try to ground statutory arbitration on implicit consent. This is because, in the words of Osei-Hwere J, the statutes provide for "a compulsory reference to arbitration".[20] The simple truth is that the statutes dispense with the need for the parties to consent, expressly or impliedly, to arbitration.

The rationale for providing for statutory arbitration is not documented in the statutes at issue. However, one can surmise that they are intended to provide a cheap dispute settlement mechanism that is easy to resort to, compared to litigation, for persons affected by the operations of state institutions and agencies, or public officers. Statutory arbitration also avoids the risk of lengthy delays in litigation. As the New Zealand Law Commission once observed, "[m]any of the statutory arbitration provisions are concerned with the relationship between individuals and government or local government (or in some cases between different government or local government bodies). If any overall aim can be discerned here, it seems to be to provide a dispute resolution mechanism which is simpler and less adversarial than going to court and provides greater practical expertise".[21]

Arbitration can sometimes have real practical advantages for settling some disputes arising under statute, even if the matter is not submitted by agreement. However, the extent to which these statutory arbitration provisions have been invoked in Ghana in the past is unknown. If measured through the lens of how the existing provisions have been invoked in reported court cases, then it appears that the numbers may be very low.[22]

Consent and statutory arbitration

In private law arbitration or contractual arbitration, whether domestic or international, the parties' agreement is "the foundation stone".[23] That agreement "records the consent of the parties to submit to arbitration - a consent which is indispensable to any process of dispute resolution outside national courts".[24]

---

20 *Maritime and Dockworkers Union*, above at note 2 at 681.

21 New Zealand Law Commission "Arbitration: Preliminary paper no 7" (1988), para 176.

22 *Maritime and Dockworkers Union*, above at note 2 appears to be the only reported case arising from one such statutory arbitration.

23 N Blackaby and C Partasides *Redfern and Hunter on International Arbitration* (6th ed, 2015, Oxford University Press), para 2.01.

24 Ibid.

https://doi.org/10.1017/S002185532100019X Published online by Cambridge University Press

Although the consent of the parties is important in private law arbitration, their consent is not absolute. This is because the arbitral process still takes place within the framework of national law, even in cases where the arbitration is conducted under the auspices of an arbitral institution such as the Ghana Arbitration Centre.

Historically, the statutes providing for statutory arbitration were treated as if they "were an arbitration agreement" for the purposes of the Arbitration Act 1961.[25] However, as discussed further below, the enactment of the Alternative Dispute Resolution Act 2010 dispensed with this provision.

Statutory arbitration is not founded on consent as it is understood in private law arbitration or contractual arbitration. The arbitral tribunal and its jurisdiction are defined not by any choice or agreement of the parties but by statute. However, there is arguably still an element of choice in statutory arbitration, in that the claimant chooses to make a claim before the arbitral tribunal established by statute. The claimant invokes the jurisdiction of the tribunal and the respondent submits to it or is deemed to have submitted to it.[26]

The distinction between private law arbitration and statutory arbitration is significant in determining the source of the arbitrator's power. As Goode noted, "private arbitration derives from the agreement of the parties; statutory arbitration, from a special statute which imposes arbitration on the parties to the dispute; and conventional arbitration from an international convention or other instruments".[27] The fact that, in statutory arbitration, the arbitrator or arbitral tribunal derives their powers from the statute has implications for the relationship between the arbitrator or arbitral tribunal and the courts of law.

This article argues that the combined effect of the source of the arbitrator's power (ie statute) and the nature of the function they perform (a judicial function) is to render the arbitrator or arbitral tribunal subject to judicial review. The function of an arbitral tribunal is very similar to the public function performed by courts of law when they adjudicate cases. Indeed, in *R v Panel on Take-overs and Mergers, ex parte Datafin*, Lloyd LJ was categorical that, "if the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of *private arbitration*, then clearly the arbitration is not subject to judicial review".[28] Earlier, in the celebrated decision of *Council of Civil Service Unions v Minister for the Civil Service*, Lord Diplock noted: "[*f*]*or a decision to be susceptible to judicial*

25 Arbitration Act 1961, sec 33.

26 *Dallal v Bank Mellat* [1986] 1 All ER 239 at 251.

27 E McKendrick *Goode on Commercial Law* (4th ed, 2010, Penguin Group Ltd) at 1305–06.

28 [1987] QB 815 at 847 (emphasis added). This dictum was quoted with approval by Dadzie J in *The Republic v Ghana National Gas Company Ltd, Ex Parte: Kings City Development Company* suit no GJ/1535/2019 (High court, Accra, 2020).

https://doi.org/10.1017/S002185532100019X Published online by Cambridge University Press

review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph".[29]

Both Lloyd LJ and Lord Diplock were careful to confine their dicta to private law arbitration. Their Lordships would no doubt have been aware that statutory arbitration exists in English law. Indeed, when conceptualized as a progeny of statute, and not the private agreement of the parties, the arbitrator or arbitral tribunal in statutory arbitration is a "lower adjudication authority" and hence constitutionally subject to the supervisory jurisdiction of the High Court.[30] Judicial review allows the court to police the limits of the powers given to the arbitrator by statute and review the lawfulness of the arbitrator's decisions.

The procedural aspects of statutory arbitration

Until its repeal, statutory arbitration was governed by part II of the Arbitration Act 1961. Section 33 of the act provided that, "[part II] shall apply to every arbitration under any other enactment (whether made before or after this Act) as if the arbitration were pursuant to an arbitration agreement and as if that enactment were an arbitration agreement, except insofar as this Act is inconsistent with that other Act or with any rules or procedure authorised or recognised thereby". Section 33 was a re-enactment of section 20 of the Arbitration Ordinance 1928 (cap 16), which provided, "[t]his Ordinance shall apply to every arbitration under any ordinance passed before or after the commencement of this Ordinance as if the arbitration were pursuant to a submission; except in so far as this Ordinance is inconsistent with the Ordinance regulating the arbitration or with any rules or procedure authorised or recognised by the Ordinance". Section 20 of the Arbitration Ordinance appears to have been borrowed from section 24 of the UK Arbitration Act 1889, a provision that has been maintained, with slight changes in wording, in successive UK Arbitration Acts.[31]

Implicit in section 33 of the Arbitration Act 1961 is an acknowledgement that the arbitration at issue was not conducted pursuant to "an arbitration agreement". The effect of section 33 was that the enactment concerned was to be treated, for the purposes of part II, as if it were an arbitration agreement between the parties. As Merkin and Flannery note, "the effect of this provision is to put statutory arbitrations on an equal footing with private consensual arbitrations, so far as possible";[32] "there is no 'agreement' as such in statutory arbitration".[33]

29 [1985] AC 374 at 409 (emphasis added).
30 The Constitution, art 141.
31 See Arbitration Act 1934, sec 20; Arbitration Act 1950, sec 31; and Arbitration Act 1996, secs 94–98. See also Arbitration (Scotland) Act 2010, secs 16–17.
32 R Merkin and L Flannery *Merkin and Flannery on the Arbitration Act 1996* (6th ed, 2019, Routledge) at 835.
33 Id at 836.

https://doi.org/10.1017/S002185532100019X Published online by Cambridge University Press

In extending part II of Ghana's Arbitration Act 1961 to statutory arbitration, Parliament provided a defined legal framework for the conduct of such arbitrations and resolved the question of how consent of the parties, being the foundation of private law arbitration, should be conceptualized in them. Regrettably, when the Alternative Dispute Resolution Act was enacted to repeal the Arbitration Act 1961, it did not include provisions equivalent to section 33 of the 1961 act. This contrasts sharply with the position in the UK, where the Arbitration Act 1996 expands provisions for statutory arbitration in sections 94–98 of the act.

The rationale for not re-enacting section 33 of the Arbitration Act 1961 appears unknown. One may speculate that it is because the Alternative Dispute Resolution Act "is heavily influenced" by the UNCITRAL Model Law on International Arbitration,[34] which does not contain an equivalent provision as it focuses only on private law arbitration. However, as demonstrated below, the failure to re-enact section 33 of the Arbitration Act 1961 is not fatal to the application of the Alternative Dispute Resolution Act to statutory arbitration.

There is no gainsaying that the statutory arbitration provisions replete in various Ghanaian statutes discussed above remain in force. They have not been impliedly repealed by the legislature's failure to re-enact section 33 of the Arbitration Act 1961 in the Alternative Dispute Resolution Act. This raises the question of what legal framework can or should be used to regulate the procedures of such statutory arbitrations. As an instrument of administrative law, the parties cannot arrogate to themselves the procedure applicable to statutory arbitration. To allow the parties to dictate or control the procedures of such arbitration would be to convert it into private consent-based arbitration.

The procedures for statutory arbitration should be governed by the terms of the relevant statute. Every statutory arbitration has its seat in Ghana. Ghanaian law governs the procedure for such arbitration; unlike in private arbitration, the parties are not free to agree a seat outside Ghana. In addition to providing for statutory arbitration, section 164 of the Labour Act 2003 deals with the appointment of arbitrators and how the arbitrators' decision should be made.[35] Similarly, some of the statutes at issue provide that arbitration shall be in "accordance with the Arbitration Act 1961".[36] The effect of this is to enable the procedures on statutory arbitration to be governed by the

34 E Onyema "The new Ghana ADR Act 2010: A critical overview" (2012) 28 *Arbitration International* 101 at 102.

35 See also secs 165–67 on the powers of arbitrators, how vacancies in the arbitral tribunal should be filled and the publication of awards.

36 Ghana Water and Sewerage Corporation Act 1965, sec 2(4); Ghana Broadcasting Corporation Act 1968, sec 13(5); Ghana Ports and Harbours Authority Act 1986, sec 23(2); and Ghana Railway Corporations Act 1977, sec 8(3). The following expressly reference the Alternative Dispute Resolution Act: Plants and Fertilizer Act 2010, sec 16(3); and Banks and Specialised Deposit-Taking Institutions Act, sec 141(1).

Alternative Dispute Resolution Act. Section 35(1) and (3)(b) of the Interpretation Act 2009 provides:

> "(1) Where an enactment repeals or revokes and re-enacts, with or without modification, an enactment, a reference in any other enactment or statutory document to the enactment so repealed or revoked shall, without prejudice to the operation of subsections (2) and (3), be construed as a reference to the enactment as re-enacted.
> ….
> (3) In addition to subsection (2), where an enactment repeals or revokes an enactment and substitutes by way of amendment, revision or consolidation, another enactment -
> (b) a reference to the old enactment in an unrepealed or unrevoked enactment shall,
> (i) in relation to a subsequent transaction, matter or thing, be construed as a reference to so much of the enactment that is substituted as relates to the same subject-matter as the old enactment; and,
> (ii) if nothing in the enactment that is substituted relates to the same subject-matter, the old enactment shall stand good, and be read and construed as unrepealed or unrevoked where it is necessary to support, maintain or give effect to the unrepealed or unrevoked enactment."

The effect of section 35(1) and (3)(b) of the Interpretation Act 2009 is that the statutes currently in force that provide that arbitration shall be in "accordance with the Arbitration Act 1961"[37] must now be read as "in accordance with the Alternative Dispute Resolution Act 2010".

Even without invoking section 35(1) and (3)(b) of the Interpretation Act 2009, it is arguable that the Alternative Dispute Resolution Act applies to statutory arbitration because such arbitration is not excluded from the scope of the act. Section 1 of the Alternative Dispute Resolution Act provides: "[t]his act applies to matters other than those that relate to: (a) the national or public interest; (b) the environment; (c) the enforcement and interpretation of the Constitution; or (d) any other matter that by law cannot be settled by an alternative dispute resolution method".

Section 1 of the Alternative Dispute Resolution Act clearly defines the matters to which the act does *not* apply. Statutory arbitration is not one of those matters. Because statutory arbitration deals with matters that can be settled by arbitration, excluding it from the scope of the act would be inconsistent with the terms of section 1(d). To exclude statutory arbitration from the scope of the act would be to treat it like an offence amounting to a felony, which, under section 73 of the Courts Act 1993, cannot be settled through

37 See above at note 36.

https://doi.org/10.1017/S002185532100019X Published online by Cambridge University Press

reconciliation, an alternative dispute resolution method.[38] The Alternative Dispute Resolution Act can only apply to procedures for statutory arbitration to the extent that it is consistent with the provisions of the enactment that provides for statutory arbitration, or with any rules or procedure authorized or recognized by, or excluded by, that enactment.[39]

Where a statute provides for statutory arbitration but is silent on the procedures for the arbitration, or makes no reference to either the Arbitration Act 1961 or the Alternative Dispute Resolution Act,[40] it should be within the court's jurisdiction to order the procedures for statutory arbitration. This should be conceptualized as reflecting the court's duty to ensure that statutes are effective, and not as an equitable attempt to aid parties to comply with the statute.

The arbitrator or arbitral tribunal in statutory arbitration is subject to judicial review and the supervisory jurisdiction of the High Court. What this means is that a person aggrieved by the decision or award of the arbitrator can apply to the court for the award to be judicially reviewed. Certiorari lies to quash the award of an arbitrator in statutory arbitration in the same way that an award resulting from an arbitration agreement can be set aside under section 58 of the Alternative Dispute Resolution Act.

The constitutionality of statutory arbitration

Statutory arbitration is not voluntary, but imposed. However, the mere fact that the element of consent or agreement is lacking in statutory arbitration should not be a reason for avoiding it. The better test is whether it provides a fair and legally acceptable means of resolving the issues that Parliament has entrusted to statutory arbitration. Also, in examining the constitutionality of statutory arbitration, it is important to avoid "perpetuat[ing] a concept of arbitration that makes it a form of justice that is inferior to the justice offered by the courts".[41] The days when the courts, in the words of Lord Campbell, "had great jealousy of arbitrations [and] … Therefore, they said that the courts ought not to be ousted of their jurisdiction, and that it was

38 See Alternative Dispute Resolution Act, sec 135, which defines alternative dispute resolution as "the collective description of methods of resolving disputes otherwise than through the normal trial process".

39 See S Gupta "Maladies of Indian arbitration: A case for a dualist regime" (2013) 16/2 *International Arbitration Law Review* 60 at 73, noting "India also provides for statutory arbitrations under various legislations like electricity, labour laws, etc. When such provisions exist, clearly they override the Arbitration Act 1996. In *Gujarat Urja Vikash Nigam Ltd v Essar Power Ltd* [appeal (civil) 1940 of 2008, judgment 13 March 2008] the Supreme Court held that provisions for dispute resolution between the licensees and generating companies contained in the Electricity Act, 2003 will prevail over the provisions of the 1996 Act, dealing with the appointment of arbitrators."

40 None of the statutes examined for this study falls into this category.

41 *Desputeaux v Éditions Chouette (1987) Inc* 2003 SCC 17, [2003] 1 SCR 178, para 66.

https://doi.org/10.1017/S002185532100019X Published online by Cambridge University Press

contrary to the policy of the law",[42] are long gone, even if there once was such an era.[43]

There is arguably nothing unconstitutional in statutorily compelling parties to resort to arbitration as a means of settling their disputes. There are a number of reasons why this is the case. First, there is nothing in the Constitution that provides a right of access to the court as the *only* means of resolving disputes. Indeed, it is not unusual in law for certain means of dispute settlement to be foreclosed to parties. For example, there are strict legal limits on self-help as a means of dispute settlement. It can hardly be argued that this is unconstitutional.

Secondly, the jurisprudence of the Supreme Court of Ghana affirms as unconstitutional "statutory provisions [that] take away the right of access to the courts".[44] In *Adofo v The Attorney General*, Dr Date-Bah JSC, writing for the unanimous court, was emphatic that "a total ouster of the jurisdiction of the courts in relation to any justiciable rights is unconstitutional".[45] However, statutory arbitration does not amount to a total ouster of the jurisdiction of the courts. In statutory arbitration, the courts remain accessible to the parties, both during the arbitral proceedings (for example, the parties can raise questions of law for adjudication in the High Court) and after an award has been made (for example, an aggrieved party can apply to subject the award to the searching scrutiny of judicial review). In other words, statutory arbitration should be distinguished from statutes that provide that, for example, "no action shall be brought and no Court shall entertain any proceedings against the State"[46] or "no action shall be brought against the Board".[47] The latter prohibits access to the courts, the former provides an alternative means for vindicating justiciable rights but under the courts' supervision. There are various aspects of Ghanaian law, including section 72 of the Courts Act 1993, that give courts jurisdiction to "encourage and facilitate the settlement of disputes in an amicable manner".[48] Arguably, this includes arbitration and reflects Parliament's intention to encourage procedures for dispute resolution outside the courts.

Thirdly, the common law and the Constitution provide adequate protection for parties engaged in statutory arbitration through judicial review and the supervisory jurisdiction of the High Court. Under section 40 of the

42 *Scott v Avery* [1843–60] All ER Rep 1 at 7.

43 S Brekoulakis "The historical treatment of arbitration under English law and the development of the policy favouring arbitration" (2019) 39 *Oxford Journal of Legal Studies* 124, arguing that the attitude of English judges to arbitration was never fundamentally hostile.

44 *Adofo v The Attorney General* [2005–06] SCGLR 42 at 56.

45 Id at 52.

46 Divestiture of State Interests (Implementation) Law 1993 (PNDCL 326), sec 15.

47 Ghana Cocoa Board Re-Organisation and Indemnity Law 1985 (PNDCL 125), sec 5.

48 See also Alternative Dispute Resolution Act, sec 7, which empowers courts to refer parties to arbitration, albeit with the "consent of the parties in writing".

Alternative Dispute Resolution Act, the High Court has powers to determine any point of law upon the application of a party to arbitration while the arbitration is on-going. Thus, no injustice is caused when a statute refers particular disputes to arbitration.

As noted above, some statutes in Ghana make the decision to resort to arbitration discretionary, or allow one party to request that a matter be referred to an arbitrator. These statutes provide access to arbitration but do not fetter direct access to the courts, if a party prefers the latter. Statutory arbitration does not leave the individual with the *option* to choose. A residual issue that arises from this is whether the degree to which statutory arbitration fetters access to the court is constitutional, even if arbitral proceedings are subject to judicial review. For the reasons articulated above, there is arguably nothing unconstitutional about such fetter on direct access to the court. In the Ghanaian legal system, individuals do not enjoy unfettered access to the courts. The rules on procedure represent a significant obstacle to accessing the courts: even the worthiest of claims is likely to be thrown out if the correct procedure is not followed. Also, there are several adjudicating authorities outside the courts that derive their authority from the Constitution or statute that exercise jurisdiction in respect of justiciable rights. These include: the jurisdiction of the Judicial Committees of Traditional Councils and Regional and National Houses of Chiefs to adjudicate causes or matters affecting chieftaincy;[49] the jurisdiction of the Commission on Human Rights and Administrative Justice to investigate complaints regarding the violation of fundamental rights and freedoms, and to make adverse findings against persons in the public service in such matters;[50] the jurisdiction of commissions of enquiry to investigate and make adverse findings against citizens;[51] and the jurisdiction of the Settlement Committee of the National Media Commission to investigate complaints against journalists, newspaper proprietors and publishers.[52]

In all of these, the Constitution or statute have prescribed alternative routes to remedies, involving a diversion from direct access to the courts, without provoking an outcry that core values of the Constitution have been violated. The policy seems to be informed by the need to provide for utilization of special bodies with peculiar expertise in the resolution of disputes, or in dispensing administrative justice, without ousting the final judicial power of the courts. What underlies the adjudicatory role of these institutions is the solemn recognition that certain matters are better resolved outside the courts, so long as the supervisory jurisdiction of the High Court is available to a person aggrieved by decisions by those institutions. Statutory arbitration reflects a similar underlying ethos. If statutory arbitration is unconstitutional on the ground that it impedes direct access to the courts, then one can question the

49 The Constitution, art 273.
50 Id, arts 218 and 219.
51 Id, art 280.
52 National Media Commission Act 1993, secs 13–15.

legitimacy of the above-mentioned procedures. However, this is clearly not the case.

This still leaves open the possibility that some specific statutory provisions on statutory arbitration may be unconstitutional. This article addresses two potential objections. First, one may object to the constitutionality of the statutory reference to arbitration under section 141(1) of the Banks and Specialised Deposit-Taking Institutions Act, on the ground that the Bank's decision to withdraw a licence is an exercise of discretionary powers that must be subject to challenge under article 296 of the Constitution. In other words, a person aggrieved by such a decision should be able to challenge it for non-compliance with article 296, since the governor of the Bank is a public officer. It may be argued that any enactment of Parliament that denies the aggrieved party the opportunity to challenge the Bank's decision under article 296 of the Constitution by virtue of a mandatory reference to arbitration is unconstitutional. In the author's view, such an objection to the constitutionality of section 141(1) of the Banks and Specialised Deposit-Taking Institutions Act cannot be sustained. Article 296 of the Constitution provides:

> "Where in this Constitution or in any other law discretionary power is vested in any person or authority -
> (a) that discretionary power shall be deemed to imply a duty to be fair and candid;
> (b) the exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and
> (c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power."

Article 296 deals with the *mode* of exercising discretionary power. It does not dictate the specific forum where an alleged inappropriate exercise of discretionary power can be challenged. For that, one has to look at other provisions of the Constitution, including article 23. Article 23 provides, "[a]dministrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or *other tribunal*".[53]

From article 23, it is evident that the courts are not the only institution before which one can challenge an alleged inappropriate exercise of discretionary power. Such a challenge can also be made before an "other tribunal".

53 Emphasis added.

https://doi.org/10.1017/S002185532100019X Published online by Cambridge University Press

The Constitution does not define what an "other tribunal" is. Arguably it includes an arbitral tribunal that derives its power from statute. Challenging an alleged breach of article 296 of the Constitution before an arbitral tribunal that derives its power from statute does not undermine or conflict with the exclusive jurisdiction conferred on the Supreme Court and the High Court under articles 130 and 33 of the Constitution.

The exclusive jurisdiction of the Supreme Court to interpret and enforce the Constitution does not prevent an arbitral tribunal from engaging with the Constitution as a source or type of Ghanaian law. Similarly, the fact that a claim is founded on a fundamental human right or freedom does not mean it can only be resolved by the High Court. The Constitution is part of the laws of Ghana. Thus, in an arbitration governed by Ghanaian law, which will be the case in statutory arbitration, the arbitral tribunal cannot shut its eyes to the Constitution, or refuse to engage with it. Courts, other state institutions or, indeed, individuals in Ghana routinely apply and give effect to the Constitution. It has never been part of Ghanaian law that only the Supreme Court or High Court can apply or give effect to the Constitution. The courts of Ghana have explicitly repudiated any such understanding of Ghanaian constitutional law. Indeed, all courts in Ghana have the power to apply or give effect to the Constitution. It is only when they envisage a genuine and real issue of constitutional interpretation that they are bound to refer the matter to the Supreme Court. Moreover, the lower court must be satisfied that there is a genuine and real issue of interpretation. In other words, it is not every mention or invocation of a constitutional provision in court that will automatically shut out the jurisdiction of the trial court and propel the case to the Supreme Court.

The exclusive jurisdiction of the Supreme Court under article 130 is founded on the existence of a real or genuine controversy concerning the meaning of a particular provision. It is the existence of such genuine controversy, founded on a lack of clarity or ambiguity about a constitutional provision, that triggers the interpretive jurisdiction of the Supreme Court. As Justice Date-Bah perceptively observed, Ghanaian case law demonstrates "a conceptual distinction between the application of a clear provision of the Constitution, 1992 and the enforcement or interpretation of the Constitution 1992. Lower courts may apply the Constitution, 1992 but only the Supreme Court may, under its original jurisdiction, interpret or enforce the Constitution 1992".[54] This is what is referred to as "the doctrine of the application of a clear and unambiguous provision of the Constitution 1992".[55] Earlier, the Supreme Court observed:

> "Whereas the original jurisdiction to interpret and enforce the provisions of the Constitution, 1992 is vested solely in the Supreme Court, every court and

54 *Bimpong-Buta v General Legal Council* [2003–05] 1 GLR 738 at 790.
55 Ibid.

https://doi.org/10.1017/S002185532100019X Published online by Cambridge University Press

> tribunal is duty-bound or vested with jurisdiction to apply the provisions of the Constitution in the adjudication of disputes before it. And this jurisdiction is not taken away merely by a party's reference to or reliance on a provision of the Constitution. If the language of that provision is clear, precise and unambiguous, no interpretation arises and the court is to give effect to that provision."[56]

There can be no doubt that an arbitral tribunal is duty-bound to apply the Constitution as part of the laws of Ghana, if the parties have agreed that the applicable law is Ghanaian law. Hence, it is very clear that not every invocation of a constitutional provision in an arbitration renders the arbitral tribunal impotent to hear the claim or defence.

The preceding quote raises the question of what is meant by "exclusive jurisdiction" in article 130 of the Constitution. Article 126 of the Constitution sets out the courts that comprise Ghana's judiciary. The concept of exclusive jurisdiction is used to indicate that, as between the courts in Ghana's judiciary, defined subject matter shall only be brought before the named court and no other court. For example, as between the Supreme Court and other courts in the judiciary, a matter of constitutional interpretation must be brought before the Supreme Court (article 130), although ordinarily this would have been a civil claim and, thus, within the jurisdiction of the High Court under article 140; as between the High Court and other courts in Ghana's judiciary, a human rights claim must be brought before the High Court (article 33), and only the Supreme Court can determine whether an official document should be produced (article 135); without this provision, that would have been an ordinary civil claim and hence within the jurisdiction of the High Court (article 140).

It is therefore evident that the concept of exclusive jurisdiction is used internally to allocate subject matter jurisdiction to courts within the same judicial structure. It is not, however, a provision that forces persons to litigate. There is no law in Ghana that compels disputing parties to go to court to resolve their civil disputes. On the other hand, it is the law that, if disputing parties want to go to court to resolve their differences, then they must institute their action before the designated court, in line with the subject matter jurisdiction constitutionally allocated to each branch of the judiciary. Conversely, if the parties have agreed to resolve their differences through arbitration, it is largely irrelevant which court in Ghana has exclusive jurisdiction over what. It is only when parties are proceeding to court that they should carefully consider before which court they will institute their action, or risk their case being dismissed for want of jurisdiction. For parties to a legal dispute (including a dispute that they are compelled by statute to resolve by arbitration), this is the significance or essence of exclusive jurisdiction.[57]

---

56 *Aduamoa II v Twum II* [1999–2000] 2 GLR 409 at 416.

57 See RF Oppong "International business transactions, arbitration and the Constitution of the Republic of Ghana" in RF Oppong and K Agyebeng (eds) *A Commitment to Law,*

https://doi.org/10.1017/S002185532100019X Published online by Cambridge University Press

Where the Bank's exercise of discretion that falls within the terms of section 141 of the Banks and Specialised Deposit-Taking Institutions Act is challenged for breaching article 296 of the Constitution before an arbitral tribunal that derives its powers from the act, a person aggrieved by the tribunal's decision has recourse to judicial review before the High Court. Furthermore, a party to such arbitral proceedings can apply to the High Court to determine any question of law that arises in the course of the proceedings.[58] On such an application, if the High Court considers that a constitutional question is raised, it can make a reference to the Supreme Court for determination. Thus, Ghanaian law contains adequate judicial protection for parties engaged in both statutory arbitration and consensual arbitration. An arbitral tribunal does not operate on a legal island but within a framework of Ghanaian laws, including the jurisdiction of the High Court.

The second potential objection relates to the statutes that provide for statutory arbitration to determine the amount of compensation owed from damage done to property following the exercise of powers under the relevant act.[59] The issue is whether the provisions violate article 20 of the Constitution on compulsory acquisition of property. Again, such an objection arguably cannot be sustained because none of the provisions at issue deals with compulsory acquisition. Rather, they deal with damage to property arising from the performance of the functions of the affected state institutions.

This discussion demonstrates that neither the concept of statutory arbitration nor the specific provisions that provide for statutory arbitration in respect of defined matters violate the Constitution. The fact that statutory arbitration is constitutional does not mean that Parliament should be cavalier in mandating it as the means for settling disputes. What is required in each particular statutory area is a thorough and informed assessment of the aptness of the different methods of dispute settlement for the area. This assessment should be undertaken whenever statutory arbitration is considered for inclusion in new legislation.

Specifically, regarding section 141 of the Banks and Specialised Deposit-Taking Institutions Act, the issues that could be generated by a decision of the Bank are so weighty that they are likely to engage the public interest. The potential number of aggrieved persons is also likely to be very large. It is therefore arguable that arbitration would not be an appropriate mechanism for resolving such issues. There were 16 claimants in the arbitration that resulted from the revocation of Unibank Ghana Limited's banking

---

contd
Development and Public Policy: A Festschrift in Honour of Nana Dr SKB Asante (2016, Wildy, Simmonds and Hill Publishing) 237 at 239.

58 Alternative Dispute Resolution Act, sec 40.

59 Ghana Water and Sewage Corporation Act 1965, sec 2(3); Ghana Broadcasting Act 1968, sec 13(1) and (7); Ghana Ports and Harbours Authority Act 1986, secs 19–21; Plants and Fertilizer Act 2010, sec 16(1), (2) and (4); Ghana Railway Corporations Act 1997, sec 8(1) and (2); and Ghana Highway Authority Act 1977, secs 36 and 37(1).

licence,[60] not to mention the fact that some issues pending in court are outside the scope of the arbitration. Further, one may argue that arbitrating the disputes likely to arise under section 141 could potentially erode public confidence in the Bank, a critically important state institution in the area of the economy and finance. This is because arbitral proceedings are private. Any award that goes against the Bank would have been made in the absence of the public knowing the case that underpinned the Bank's decision. The victor can publicly flaunt its award, but the Bank will not be able, once the arbitration is over, to litigate its case before the public eye if it were aggrieved. The damage that this could do to public confidence and, equally, to the financial stability of the banking sector and the economy could be enormous. These are legitimate concerns. However, because statutory arbitration brings the process within the purview of administrative law, one can argue that all proceedings including awards should be made public.[61]

That said, taking all the above into account, section 141 appears to be a situation in which it would have been more prudent for Parliament not to mandate statutory arbitration, instead leaving it to the High Court, which has "jurisdiction in all matters",[62] to resolve the issues for persons aggrieved by the Bank's decisions. However, of course, legislative imprudence and unconstitutionality are not the same thing. It is recommended that Parliament amend the Banks and Specialised Deposit-Taking Institutions Act and excise section 141 from it. This would give persons aggrieved by the Bank's decisions direct and immediate access to the High Court. It is worth highlighting that an amendment to remove statutory arbitration from the act should not be on the basis that it is unconstitutional but that, as discussed above, it is inexpedient or ill-considered.

CONCLUSION

The idea that parties can be compelled to arbitrate their dispute may puzzle many lawyers who are more conversant with or may have a developed practice in contractual arbitration. The author was equally flummoxed when his attention was drawn to it. However, as this article demonstrates, statutory arbitration has been part of Ghanaian law since before independence. The extent to which statutory arbitration has been used to resolve disputes in the past is a matter of speculation. Until recently, there appears to be only one reported Ghanaian case arising from statutory arbitration. The events following the Bank's decision to withdraw Unibank Ghana Limited's banking licence have brought statutory arbitration into the legal limelight, and some have even questioned its constitutionality.

60 *Duffour v Dodoo*, above at note 4.

61 See, for example, Labour Act 2003, sec 167(1), which provides for the publication of awards given by the Labour Commission in a compulsory arbitration.

62 The Constitution, art 140(1).

https://doi.org/10.1017/S002185532100019X Published online by Cambridge University Press

This article has argued for a proper conceptualization of statutory arbitration as an instrument of administrative law deriving its legitimacy from statute, and not, as with contractual arbitration, consent of the parties. It has argued that arbitral tribunals in statutory arbitration are subject to judicial review and the supervisory jurisdiction of the High Court. Parties to statutory arbitration may also apply to the High Court to determine any point of law arising during arbitral proceedings. The article has argued that there is nothing unconstitutional about statutory arbitration as a concept or the provisions in the specific statutes that provide for statutory arbitration.

With its legal foundations so assured, it is recommended that the government should explore other areas where statutory arbitration may be utilized as an alternative to litigation. It could provide a cheaper and expedited means for settling disputes between public institutions and persons. However, statutory arbitration cannot, and should not, be imposed in respect of disputes between private persons; parties' autonomy that underlies contractual arbitration, and the right of private persons to access the courts for a trial of their private law disputes should be upheld.

The discussion in this article, however, reveals that statutory arbitration can be placed on a more certain and robust legal framework, especially regarding the procedures that should govern such arbitration. It is recommended that the minister of justice should exercise his powers under section 134 of the Alternative Dispute Resolution Act and enact a legislative instrument to address the procedures governing statutory arbitration.

It has been argued that section 141 of the Banks and Specialised Deposit-Taking Institutions Act is not unconstitutional; it should withstand constitutional scrutiny. However, given the nature and likely effects of the Bank's decisions, it was not prudent for Parliament to provide statutory arbitration as the means for resolving disputes with the Bank. It is recommended that Parliament should amend the act, excising section 141 from it.

CONFLICTS OF INTEREST

None

https://doi.org/10.1017/S002185532100019X Published online by Cambridge University Press