

An Examination of Commercial International Dispute Resolution Framework in Ghana and the United Kingdom Arbitration System

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Abstract

Over the last decade, the Administration of Justice through the Ghana's regular courts has encountered with a lot of international commercial activity problems. Among them are constant delays. An attempt to eliminate these delays and ensure faster justice delivery has seen the importance of arbitration in Ghana. The expedition for speedy and vigorous implementation, resulting in more efficiency in contract drafting, has at all times dominated international commercial dealings. Hence the need for resorting to arbitration is more compelling, overlooking the lethargic attitude of Ghanaian courts, to the resolution of sophisticated commercial disputes. The study therefore examined commercial international dispute resolution framework in Ghana and the United Kingdom arbitration system. The paper used stratified random sampling technique to sample 100 respondents for the data analyses. The study underscored that the commercial arbitration (both international and local) was in common use of resolving commercial dispute. Also, the study further posited that commercial arbitration (both local and international) is more effective in resolving commercial disputes as compared to the traditional courts systems. Finally, the study recommended that when adjudicating over disputes that have foreign elements, the Ghana's judicial officers must approach it with prudence, most especially when the issues before relates to public policy.

Keywords: Trade, Law, Arbitration, Resolution, Commercial Markets, and Disputes

Introduction

Arbitration is an adjudicative system of resolving disputes where parties by consent submit their dispute before a neutral third party to seek his decision. The consent of the parties to present their dispute for arbitration is the first and basic necessity in order to exhaust the procedure (United Nations Commission on International Trade Law Arbitration Rules, 1976). Considering the extent to which Ghana's international commercial activities are on the increase and the need to sustain it for effective growth, her neighbouring sister commercial markets and the indisputable right of international parties to resolve disputes through arbitration, there is the need to have a second look at commercial dispute resolution framework in Ghana.

On July 8, 1968, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards came into existence of which Ghana is a member. No declarations or notifications were made under articles I, X and XI of the New York Convention. Also, the country is a party to many international conventions such as the International Convention on the Settlement of Investment Disputes (ICSID) of 1966 and the United Nations Commission on International Trade Law (UNCITRAL). The recently enacted Alternative Dispute Resolution Act, 2010 (Act 798) (Arbitration Act or law) provides a platform for the enforcement of foreign arbitral awards.

Undeniably, the administration of justice through Ghana regular courts has to deal with a lot of international commercial activities problems. Among them are constant delays. An attempt to eliminate these delays and ensure faster justice delivery has seen the importance of arbitration in Ghana. The quest for quick and brisk implementation, resulting in more efficiency and economy in contract drafting, has always dominated international commercial transactions; hence the need for resorting to arbitration is more compelling, overlooking the lethargic attitude of Ghanaian courts, to the resolution of sophisticated commercial disputes.

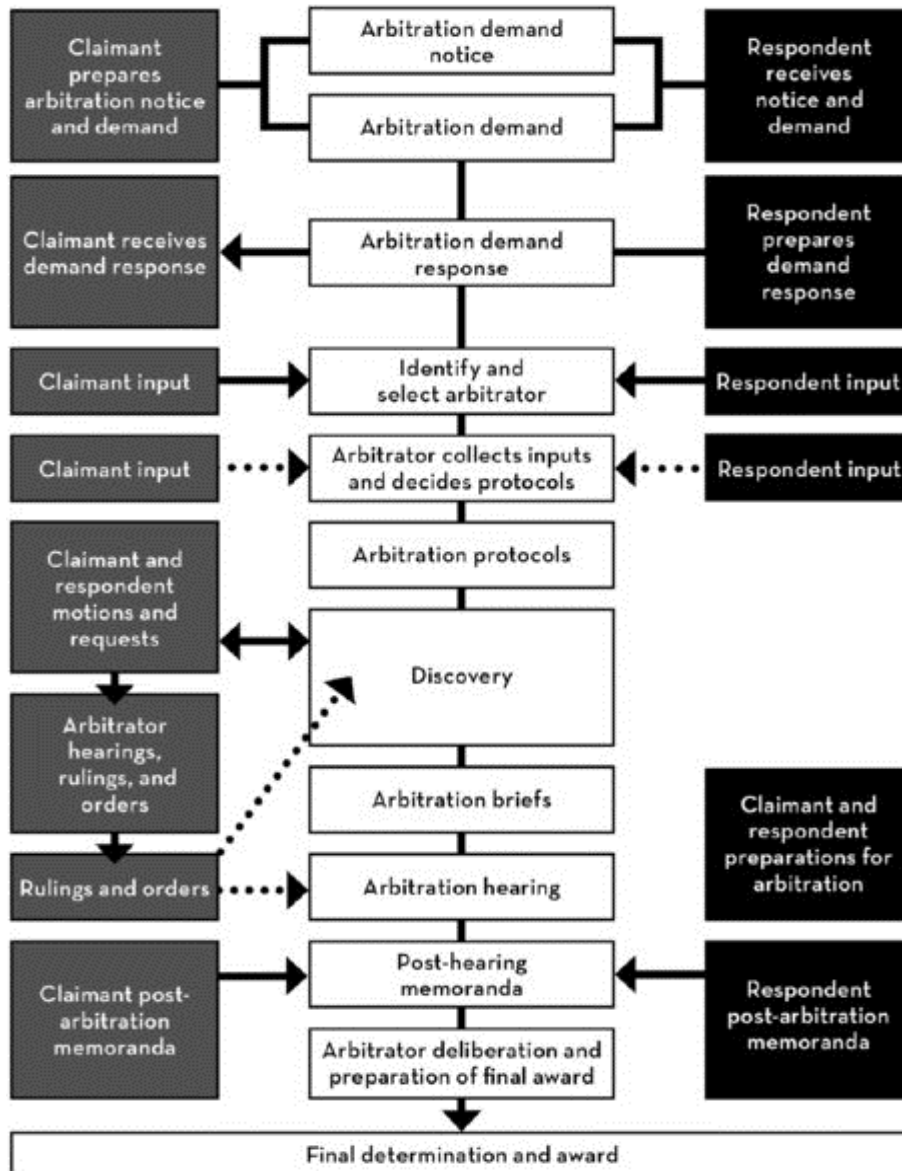
This current study seeks to examine the processes through which there has been an implementation of international commercial arbitration legalities in Ghana and assess its effectiveness of resolving commercial disputes. The critical work analyses the legal frameworks in Ghana and its efficacy as well as a comparative study of the International Dispute Resolution Framework between Ghana and the United Kingdom. An effective resolution of commercial disputes is mandatory to strengthening Ghana as the bedrock of sustainable platform for conflict resolution within the business sector in sub-Saharan Africa. The work thus takes a second look at our national courts towards the enforcement of the foreign arbitral award.

Literature Review

Conceptual Framework of Arbitration System

Under the arbitration system, the parties involved in the dispute bargain to conclude on the arbitration and agreed-upon to have the process controlled by a set of principles during the arbitration process. Very importantly, arbitration principles or processes are not static. As summarized below:

Diagram 1: The Arbitration Process



Source: *Arbitration Act 1996 in the United Kingdom*

The initiation of arbitration mostly starts with two parties coming into consensus about a potential dispute where a decision is made to demand the commencement of an arbitration proceeding to resolve the dispute. After the notice, the parties enter into agreement to proceed to arbitration where a professional arbitrator is contacted to begin the proceedings. Once arbitration principles are set, the claimant prepares and delivers a formal written demand for arbitration to the opposing party. The parties attending arbitration proceedings include the disputing parties with their legal counsels, the arbitrator or panel of arbitrators, and a court reporter, if agreed on.

A neutral location is often chosen for the proceedings. During the proceedings, there are opportunities for opening statements, the presentation of the claimants' positions and witnesses, the presentation of the respondents' defences and witnesses, testimony of rebuttal witnesses, and closing arguments. Once a decision is reached by the arbitrator or panel, it is communicated to the disputing parties in a signed written opinion. These rulings are typically less detailed than a trial decision, with some as brief as one page. There are a few unique types of decisions that can be agreed upon by the parties in advance of the arbitration proceeding.

The Arbitration Act 1996 in the United Kingdom

Arbitration falls somewhere between litigation (as it is an adjudicatory process) and ADR (as it is privately agreed rather than state ordered). It is particularly appropriate for disputes arising out of complex transactions with highly technical content as the parties can appoint arbitrators who have considerable experience of the subject matter of the dispute. It is commonly used in the insurance, construction, engineering, oil, gas and shipping industries. It is increasingly used in banking and financial services.

The Arbitration Act 1996 provides a framework where no other rules are specified in the arbitration agreement and provides a mechanism for the enforcement of arbitration awards in the UK. The UK is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. There are 142 member countries and the Convention provides a robust mechanism for enforcing arbitral awards in courts worldwide.

If parties wish their disputes to be subject to arbitration in London, a clause to this effect should be included in the contract. It is important to specify both the seat of the arbitration (where it will take place) and the governing law. By specifying that the seat of arbitration will be in London, the arbitration will be subject to the Arbitration Act of 1996, thus enabling the parties to benefit from a modern arbitration law.

Review of Related Literatures

Kumar (2014) did a study on international commercial dispute resolution system as a comparative study between India and Australia. The author argued that disputes arose from the following: payment default on delivery of goods, or the payment and/or finalisation of projects. He asserted to the fact that dispute settlement clause in a commercial contract indicated the forum at which an existing or a future dispute should be settled. He further explicated that this could be a local court via litigation as per the agreed applicable law or an arbitration court as per the agreed arbitration rules. He theorized that in the absence of such dispute settlement clause, rules of international private law decide in which jurisdiction and at which forum a claim can be brought.

Meanwhile, Collier and Lowe (1999) argued that among the problems associated with the development of arbitration are the increasingly complicated agreements between the parties for prescribing procedural rules which is to ensure the orderly conduct of proceeding, the rule that no party could be forced to accept the outcome of the arbitration as well as the concept that should be an agreement between states on the manner in which each State's legal system would treat foreign arbitrations for effective dispute resolutions.

Lastly, Surridge and Beecheno (2006) bickered that with the exception of treaties, individual contracts may also give provisions for conflict resolution clauses. In addition, they spelled-out that the mechanisms of arbitral resolution ensures transparent, inexpensive, speedy and accessible conflict resolution to foreign investors.

Methods and Materials

The study was purely descriptive in nature. Both nominal and ordinal variables were used for the data analysis. The research used legal analysis, case studies, and comparative law methods to solicited information from lawyers, law professors and representatives of Alternative Dispute Resolution (ADR). The paper used stratified random sampling technique to sampled 100 respondents for the study. The study was coded and analyzed with the help of SPSS 16.0 and Microsoft-Excel. The data was presented and discussed with the help of bar-chart, tables and Chi-square analysis. Perhaps, since the study explore to test to see whether a frequency distribution fits a specific pattern, therefore, the chi-square goodness-of-fit test is used. Before computing the test value for Chi-square goodness of fit test, there is the need to state the hypothesis.

H₀: Respondents assessment criteria do not fit into specific arbitration effectiveness

H₁: Respondents assessment criteria do fit into specific arbitration effectiveness

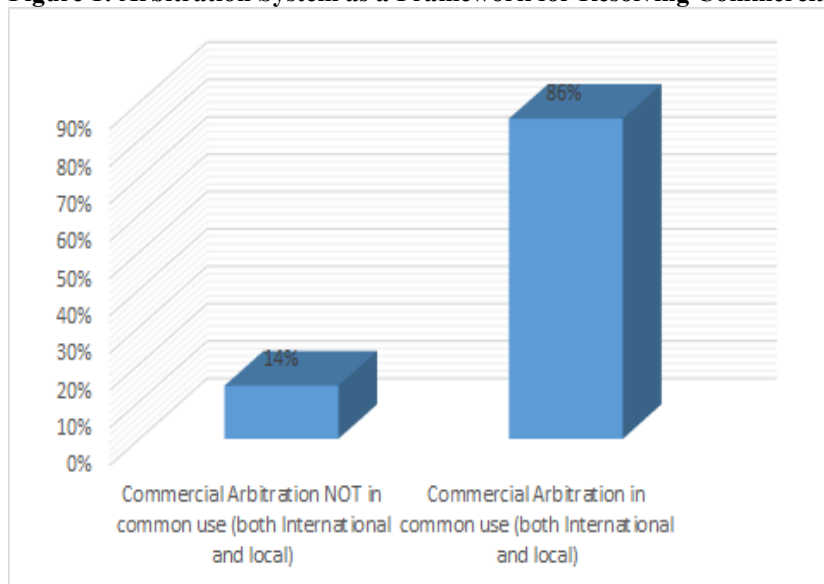
Formula for the Chi-Square Goodness-of-Fit Test

$$X^2 = \sum \frac{(O-E)^2}{E}$$

With degrees of freedom equal to the number of categories minus 1, and where: O = observed frequency, and E = expected frequency. It is very important to know that in order to apply chi-square goodness of fit test the following two assumptions should be valid for the data. These assumptions are given as: (1) The data are obtained from a random sample, and (2) The expected frequency for each category must be 5 or more.

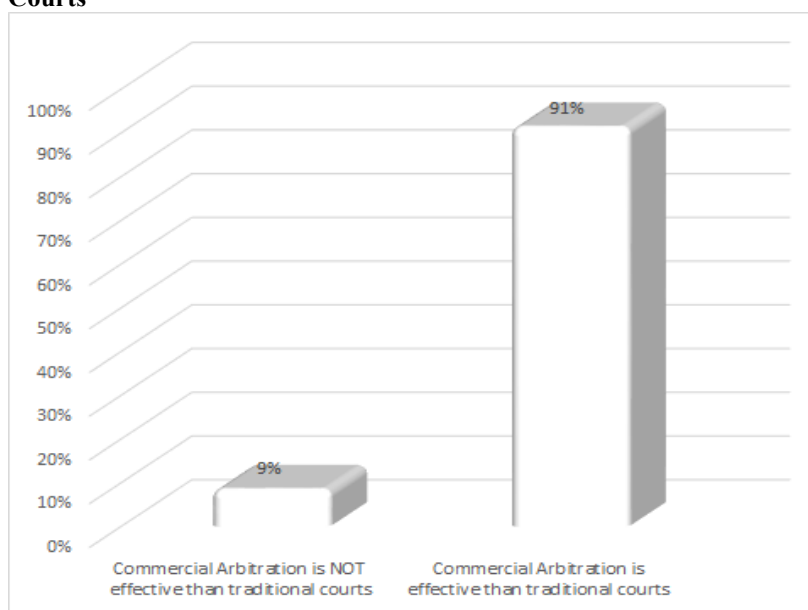
Data Presentation and Discussion

Figure 1: Arbitration System as a Framework for Resolving Commercial Disputes in Ghana



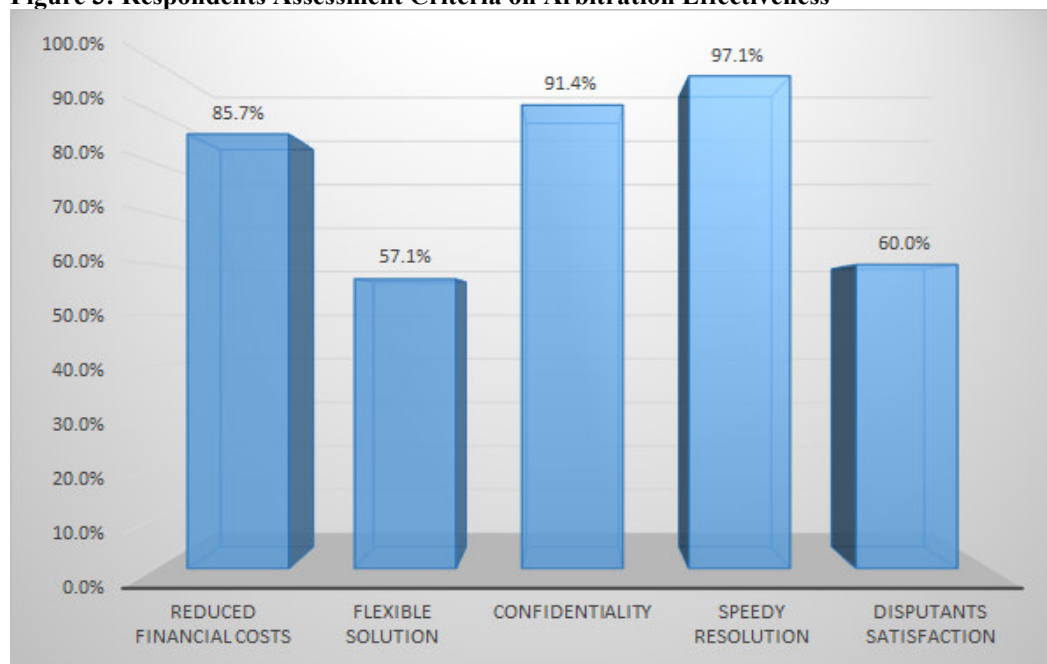
Source of Data: Field Data August, 2017

Figure 2: Comparison of the Effectiveness of Arbitration System (local and international) and Traditional Courts



Source of Data: Field Data August, 2017

Figure 3: Respondents Assessment Criteria on Arbitration Effectiveness



Source of Data: Field Data August, 2017

Chi-Square Goodness of Fit-Test Estimation for Respondents Assessment Criteria on Arbitration

Effectiveness –Given the Chi-Square Critical Value of 9.488 at 4 degrees of freedom (5 – 1 = 4) and $\alpha = 0.05$.

H_0 : Respondents assessment criteria do not fit into specific arbitration effectiveness

H_1 : Respondents assessment criteria do fit into specific arbitration effectiveness

Frequency	Flexible Solution	Reduce Financial Cost	Confidentiality	Speedy Resolution	Disputants Satisfaction
Observed	28	32	16	14	10
Expected	20	20	20	20	20

Chi-Square Estimation	Equation
	$X^2 = \sum \frac{(O-E)^2}{E}$ $= \frac{(28-20)^2}{20} + \frac{(32-20)^2}{20} + \frac{(16-20)^2}{20} + \frac{(14-20)^2}{20} + \frac{(10-20)^2}{20}$ $= 18.0$

Source of Data: Field Data August, 2017

Discussion

The Figure 1 discussed the effectiveness of resolving commercial disputes through arbitration in Ghana using a sampled field data of 80 lawyers, 10 law professors and 10 representatives of Alternative Dispute Resolution (ADR). In fact, all the lawyers underscored that their jurisdiction use mediation and other forms of ADR. In addition, majority of the respondents, representing 86% concluded that commercial arbitration (both international and local) was in common use.

The Figure 2 compares of the effectiveness of Arbitration System of local and international level, and Traditional Courts systems in Ghana. Altogether, majority (91%) of the respondents agreed to the notion that commercial arbitration (both local and international) is more effective as compared to the traditional courts.

Figure 3 presents respondents’ assessment criteria of evaluating the effectiveness of Arbitration System as compare to the traditional court systems toward the settlement of commercial disputes. In all, the study suggested five (5) criteria for the respondents to use as the basis for assessing the two systems effectiveness. The five (5) basic criteria used for the evaluation are as follows: reduced financial costs, flexible solution, confidentiality, speedy resolution, and disputants’ satisfaction.

Very impressively, regarding the criterion of reduced financial costs, 85% of the respondents were of the conception that the activities of the arbitration system are more effective towards the reduction of financial costs than the activities of the traditional court systems. Nonetheless, 57.1% of the respondents were of the notion that the actions of the arbitration system have more flexible solutions than the actions of the traditional court systems.

Also, 91.4% of the respondents were of the concept that the activities of the arbitration system are very strict on confidentiality issues than the activities of the traditional court systems.

Nevertheless, 97.1% of the respondents were of the impression that the activities of the arbitration system have more speedy resolution mechanisms than the activities of the traditional court systems. Lastly, it was accentuated by 60% of the respondents that the activities of the arbitration system have more records of disputants' satisfactions than the activities of the traditional court systems.

Regarding the chi-square goodness of fit test, there is enough evidence to reject the null hypothesis which claims that respondent's assessment criteria do not fit into specific arbitration effectiveness since the Chi-square estimated value of 18.0 is greater than the Chi-square critical value of 9.488.

Conclusion and Policy Recommendation

The study underscored that the commercial arbitration (both international and local) was in common use of resolving commercial dispute. Also, the study further posited that commercial arbitration (both local and international) is more effective in resolving commercial disputes as compared to the traditional courts systems. Among the factors/ criteria the study used to examine the effective of the two systems in resolving commercial disputes include the following: reduction in financial costs, solution flexibility, confidentiality, speedy resolution, and disputants' satisfaction. Based on the findings the following policies were recommended:

- When adjudicating over disputes that have foreign elements, it is highly recommended that Ghana's judicial officers must approach it with prudence, most especially where such issues before it relates to public policy.
- Most legal systems support such repudiation of judicial authority should either be done by implementing agreements and awards, ordering attachments of assets to secure payment of awards, and making defective arbitration clauses workable.

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