GHANA BAR ASSOCIATION ANNUAL CONFERENCE
CONTINUOUS LEGAL EDUCATION WORKSHOP
ELMINA-TUESDAY 20TH SEPTEMBER 2011

A Daniel Come To judgment:

Ghana's ADR Act, a progressive or retrogressive piece of legislation?

NENE A. O. AMEGATCHER[1]

[1] Writer is the Managing Partner of Sam Okudzeto & Associates Law Firm and an Adjunct Lecturer in Advocacy, Ethics and ADR at the Ghana School of Law, Accra, Ghana and member of the Chartered Institute of Arbitrators.

INTRODUCTION

A brief foray into the history of Ghana's judicial system would reveal that the country has practiced an adversarial system of justice delivery from the inception of the judicial service in the then Gold Coast. The adversarial system of dispute resolution and its only son, litigation, is a colonial import from the former colonial rulers-the British. As part of the colonial structures for establishing British rule in Ghana the British colonial authorities established a court system with a judge more often the district commissioner for the area as a judicial officer who adjudicated on disputes between the inhabitants of the colony and between the European merchants and the local inhabitants[2] (the term used then was natives which as you can see I have studiously avoided). This was a winner-take-all system and quite alien to local jurisprudence.

History teaches us that before the advent of British colonial rule and well into the years of British colonial rule, the communities of the Gold Coast had elaborate and effective dispute resolution systems. Mediation, arbitration, negotiated settlements, to mention just a few, were the mainstream dispute resolution processes employed by the people to resolve their disputes. It must be mentioned however that the colonial authorities systematically dismantled the local dispute resolution system and even in those places where so-called "Native" courts were set up the adversarial system predominated. The inherent disadvantages of the adversarial system of dispute resolution gave rise to alternative systems of dispute resolution.

My paper today will do a critical analysis of Ghana's new Alternative Dispute Resolution (ADR) Act, 2010, Act 798, examine its strength and weaknesses and whether it advances our jurisprudence in the area of dispute resolution. The title of

[2] Historical Development of the Courts before Independence-The Supreme Court Ordinance, 1876. See Official Website, Judicial Service of Ghana www.judicial.gov.gh/history/before_indp/page.2

my paper is strategic. The quotation is taken from the play: **The Merchant of Venice** by the celebrated English Playwright William Shakespeare. In the play a commercial transaction between a well known merchant and another well known moneylender had gone bad with the merchant defaulting on a guarantee he had given on behalf of a friend. I am sure if that transaction had occurred today it would have ended at the Commercial Court. However it occurred in Venice and the case was listed before the court of justice presided over by the Duke of Venice and his noblemen. The court first attempted a settlement of the dispute by trying to encourage the Plaintiff to settle because to insist on his strict legal rights will result in the death of the defendant. The Duke who was the presiding judge acknowledged however that under the law he was unable to compel the Plaintiff to settle the matter. This is what he told the defendant:

"I am sorry for thee: thou art come to answer a stony adversary, an inhuman wretch uncapable of pity, void and empty from any dram of mercy[3]"

Unfortunately for the Plaintiff he is out-maneuvered by clever interpretation of the deed of guarantee by a brilliant lawyer called to advice the Judge.

Is the new ADR Act of Ghana the Daniel that has come to save our judicial system drowning under the weight of the huge backlog of cases, interminable delays, high costs and unsuspected litigants unwilling to try other alternative systems of dispute resolution? This paper thus seeks to appraise the new ADR Act to determine whether it is a progressive or retrogressive piece of legislation, and whether its provisions attain the object of providing dispute resolution mechanisms far less expensive, non- adversarial and cost-effective than the normal court process.

[3] Act 4 Scene 1-Merchant of Venice by William Shakespeare

On 31st May 2010, Ghana enacted a new Alternative Dispute Resolution (ADR) Act. This piece of legislation has been applauded by Torgbor[4] and other people as a positive step toward finding alternatives to the current litigation system which is bedeviled with its varying problems. The purpose of the Act, reading from the memorandum accompanying the then Bill, is to bring the law governing arbitration into harmony with international conventions, rules and practices in arbitration, provide the legal and institutional framework that will facilitate and encourage the settlement of disputes through alternative dispute resolution procedures; and provide by legislation, for the subject of customary arbitration which we have been practicing for years.

The object of most ADR legislations is to achieve conflict resolution through a negotiated approach which is acceptable to both parties. Further, ADR legislation must seek to address parties' conflict in a timely, particularized, efficient, cost-effective and amicable non-adversary manner. The paper will commence with a structure of the Act, following then with the objectives and purpose of the Act. The paper shall then delve into the weaknesses and strengths of the Act to determine whether the stated objectives and purpose will be achieved by the provisions of the Act.

Structure of the Act

The Act is written in five parts:

Part 1 deals with arbitration in 62 sections and covers the following issues:

[4] Hon. Justice Edward Torgbor is a former Judge of the High Court of Kenya, Nairobi and currently a member of the London Court of International Arbitration.

- The arbitration agreement
- Qualification and appointment of arbitrators
- Impartiality and challenge of arbitrator
- Revocation of arbitrator's authority
- Vacancy in the tribunal
- Fees and Immunity of the arbitrator from legal liability
- Jurisdiction of Arbitral Tribunal
- The Arbitral process
- Powers of the high court in relation to the award.

Part 2 covers mediation, from section 63 to 88. In this part, there are provisions as to how mediation may be started and ended. They include:

- Powers of the mediator
- Requirement of confidentiality
- Effect of mediated settlement

Part 3 deals with customary arbitration. This is covered from section 89 to 113. This part deals with issues of:

- Commencement of customary arbitration
- Qualification of customary arbitrator
- Rules which govern customary arbitration

Part 4 deals with the establishment of the ADR centre for Ghana. It provides the administrative support for the growth and development of ADR in Ghana. This Part covers Sections 114-124. Part 4 deals with:

- Appointment of an executive board

- Executive secretary
- Functions of the centre

Part 5 covering Sections 125 to 137 deals with financial, administrative and miscellaneous matters including:

- Establishment of a fund
- Management of fund
- Financial reporting requirements
- Staff appointments
- Interpretation
- Repeals and Savings; and
- Transitional provisions.

The Act also incorporates five Schedules:

• Schedule one reproduces the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention');

• Schedule two, which is entitled 'Alternative Dispute Resolution Centre Rules', sets out the Arbitration Rules pursuant to section 5(3) and 8(2) of the Act;

• Schedule three contains the Expedited Arbitration Proceedings Rules of the ADR Centre;

• The Mediation Rules for this Centre then appear in Schedule four; and

• Schedule five contains samples of arbitration clauses or agreements.

Object and purpose of the ADR Act

The object and purpose of the Act is discoverable from the Memorandum to the ADR Bill. According to the Attorney General, the object of the Act is to "bring the law governing arbitration into harmony with international conventions, rules and practices in arbitration, provide the legal and institutional framework that will facilitate and encourage the settlement of disputes through alternative dispute resolution procedures; and provide by legislation, for the subject of customary arbitration which we have been practicing for years. The Act is also expected to help ease congestion in the courts by reducing the number of cases that go to court and to further create a congenial environment for investors.

In the words of Torgbor[5], other than the cost-effectiveness, timeliness and non-adversarial nature of arbitral (ADR) proceedings, other essential features are that the proceedings grant parties autonomy over the process, grant authority to the tribunal and have the least intervention by the courts. These essential features are what will guide this paper in determining whether Act 798 is retrogressive or progressive.

Uniqueness of the Act

A unique feature of the Act is that it combines arbitration, customary arbitration and mediation in a single statute. By including customary arbitration, the Act gives statutory legitimacy to an existent custom of submitting disputes to traditional heads and leaders of the various communities. The Act also puts to rest the longstanding dispute whether arbitration is an ADR Process[6]. The Act merges domestic and international arbitration in one statute, incorporates the New York

[5] His Lordship made this assertion in his paper "Ghana's Recently Enacted Alternative Dispute Resolution Act 2010 (Act 798): A Brief Appraisal"

[6] Section 135 of the Act defines ADR as the collective description of methods of resolving disputes otherwise than through the normal trial process. The English argue that arbitration is not part of ADR, hence, they refer to ADR and arbitration. The American position is that arbitration is a process outside courtroom litigation and therefore part of ADR. This definition clarifies Ghana's position.

Convention to give the law an international character and the provisions of Schedule five provides ready guidelines for practitioners in drafting arbitration agreements and clauses. These are novel provisions, very dynamic and a commendable achievement by the Act.

Part 1

Written arbitration agreement

Section 2 of the Act provides for an arbitration agreement in writing as the call for arbitration[7]. However the Section describes writing to include letters, telex, fax, e-mail or other means of communication which provide a record of the agreement. This expansive definition of what constitutes a written arbitration agreement is admirable and very progressive. This provision is investor friendly, avoids rigidity and leans in favor of arbitration. This is because it relaxes the need for a one literal document to be labeled as a written arbitration agreement before arbitration can commence. What this provision achieves is to look at the intent and purposes of exchange communication between parties to infer that parties have agreed to submit their dispute to arbitration.

Separability of arbitration agreement

Another laudable provision of Act 798 is the separability[8] of arbitration agreements in Section 3[9]. This concept is a critical component of international arbitration.

[7] Section 2 (2) provides that a provision to submit a dispute to arbitration may be in the form of an arbitration clause in the agreement or in the form of a separate agreement.
Subsection 4 further provides that an arbitration agreement is in writing if it is made by exchange of communications in writing including exchange of letters, telex, fax, email or other means of communication which provide a record of the agreement; or there is an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

[8] Also referred to in some jurisdictions as severability.

[9] Section 3(1) reads "Unless otherwise agreed by the parties, an arbitration agreement which forms or is intended to form part of another agreement shall not be regarded as invalid, nonexistent or ineffective because that other

Brown and Marriot in their published work *ADR Principles and Practice (1993)*[10] explained the concept succinctly as follows:

> "By separability, is meant whether the arbitration clause within a contract may be regarded as an agreement separate from the other contractual provisions, so that the disputes between the parties may be arbitrated pursuant to the clause, notwithstanding that the existence of the contract itself may be null and void *ab initio*."

Section 3 of Act 798 provides that an arbitration agreement shall not be invalidated only because the agreement which contains the arbitration agreement or is intended to form part of the agreement is invalid or has become ineffective or it did not come into existence. The arbitration agreement is separate and distinct from the agreement in which it is embodied. The policy rationale underlying this concept is to avoid the potential absurdity where an arbitrator invested with jurisdiction to pronounce on the validity or otherwise of the contract is denied the opportunity of making such determination only because a party asserts whether perfunctory or otherwise that the agreement is invalid. The arbitration agreement must be invoked in the first instance before such determination is made.

A case in point is Buckeye Check Cashing v. Cardegna[11], in which case, the court reaffirmed the position in Prima Paint v. Flood Conklin[12], that as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract[13]. This Section again leans in favor of arbitration and

---

agreement is invalid or did not come into existence or has become ineffective and shall for that purpose be treated as a distinct agreement."

[10] Page 69

[11] 546 U.S. 440 (2006)

[12] 388 U.S. 87 (1967)

[13] See also Rent-a-Center v Jackson, a case discussed in the paper.

avoids situations where the arbitration agreement contained in an agreement will be held void because the overall agreement is void, and a dispute sent to court to go through long years and expense. This severability principle is universal and puts the Act on international level of recognition and standard.

Reference to arbitration

With massive acceptance of arbitration as a faster method to dispute resolution and the need to uphold arbitration agreements, it is no surprise that Section 6 of Part 1 makes provision for a reference back to arbitration where there is an arbitration agreement and a party commences an action in a court. The other party is entitled to refer the action or part of the action which the arbitration agreement relates to arbitration. The court is bound, if satisfied that the matter in respect of which the application has been made is a matter in respect of which there is an arbitration agreement, refer the matter to arbitration. The grant of an application according to Section 6 serves as a stay of the proceedings in the court. This provision together with others, enhance arbitration for the achievement of the objectives of the Act – to provide a speedy, cost-effective, non adversarial system of dispute resolution.

The court under Section 7[14] may refer a matter to arbitration if the court is of the view that the action or part of the action can be resolved through arbitration even where there is no arbitration agreement. Cases that readily come to mind include those where relationships have been built and the need to maintain same is high. This relationship may be commercial or otherwise, and the need to maintain same will be valuable. This provision affirms ADR as a non adversarial way of dispute resolution.

[14] This provision is repeated in Section 64 of the Act, where at any stage in the proceedings, a Court may refer a matter pending before it to mediation.

Power of the arbitrator

Another achievement by the Act which aligns it with international standards is Section 24 which grants the arbitral tribunal power to rule on its own jurisdiction particularly in respect of the existence, scope or validity of the arbitration agreement. This concept effectively empowers the arbitral tribunal to assert its independence without reference to a court to determine the jurisdiction of a tribunal once it is constituted. See the case of *Christopher Brown Ltd. v. Genossenschaft Oesterreitchischer Waldbesitzer Helzwirtschafts-betriebe Registrierte GmbH*[15] where the principle known in international arbitration as the Kompetenz-Kompetenz was succinctly explained. This provision also reflects the position taken by the Court in the Buckeye case[16] where the court per Justice Scalia, held that "claim that purportedly usurious contract containing an arbitration provision was void for illegality was to be determined by the arbitrator and not the court." The US Supreme Court's recent 5-4 decision in Rent-a-Center V Jackson, [17] finally nailed the coffin on seperability making it far more difficult to attack arbitration clauses and has given arbitrators more secure authority. It is this position that the Act takes, and it is commendable.

Party process

The Act in Part 1 establishes party autonomy in the process of arbitration. Party autonomy is one essential feature in arbitral proceedings, according to Torgbor[18].

[15] [1954] 1 Q.B 8

[16] Supra,

[17]. 130 S.Ct. 2772 (2010) In this case, Jackson sued Rent-a-Center for employment discrimination and challenged the enforceability of the Mutual Agreement on grounds of unconscionability. Enforcing the known principle of severability, the Court held that Jackson's challenge should fail as he failed to attack the separable delegation provision itself as unconscionable. The court required that Jackson attack the arbitration clause itself not the contract as a whole.

[18] Supra,

Under the Act, a party with a dispute in respect of which there is an arbitration agreement may subject to the terms of the arbitration agreement refer the dispute to a person, or institution for arbitration or the ADR Centre established under the Act[19]. Again, in Section 14, parties are at liberty to agree on the procedure for appointing an arbitrator. Under Section 16, parties are free to agree on a procedure for challenging the appointment of an arbitrator, and may agree also on the circumstances under which the appointment of an arbitrator may be revoked[20].

Additionally, under Section 31, parties are at liberty to agree on matters of procedure. Parties are also free to agree on the language to be used in the arbitral proceedings under Section 32. In this time and age of diversity, the language provision is highly commendable. Under Section 49, once arbitral proceedings are concluded, parties are also free to agree on the form of the award. Under Section 58, a party may set aside the award based on the grounds listed. Another interesting and commendable feature of the Act is Section 60 which provides for expedited arbitration proceedings or by the adoption by the arbitrator of the Expedited Arbitration Proceeding Rules of the Centre as set out in the Third Schedule to the Act. These provisions are all in line with the Act's objective of providing for an effective and speedy resolution of disputes, unlike the court system.

Party autonomy in the words of Torgbor[21] is not carte blanche and must be viewed in relation to the fundamental requirements for the achievement of the objectives of arbitration[22]. Thankfully, the Act has safeguard provisions to ensure that party

[19] Section 5
[20] Section 17
[21] Supra,page 43
[22] Supra, page 43

autonomy is not abused. Section 31 thus bestows the arbitrator with some powers such as determining the time within which any direction is to be complied with. Again, in nearly all the provisions where the parties are given the freedom of choice on issues, and the parties fail to act or there is an impasse, the tribunal, or court, or other relevant institution with authority to do so, steps in to break the impasse in order to move the arbitration process forward. An example is what has been already provided, where the arbitrator determines the time within which a direction is to be complied with[23]. Also, an arbitrator can set the timing for delivery of a claim or defence[24].

Arbitral Processes

This is perhaps one of the most elaborate provisions of Act 798. In a large measure, the provisions on the arbitral process under Act 798 are new. The arbitrator shall within fourteen days after the arbitral tribunal has been constituted and upon giving seven days written notice to the parties, conduct an arbitration management conference with the parties or their representatives personally or through electronic or telecommunication media. The arbitration management conference enables the parties and the tribunal to decide on the procedure for the arbitration proceedings and will include matters such as the issue(s) to be resolved by arbitration, the date, time, place and estimated duration of the hearing, whether summary of evidence of parties should be oral or in writing, the form of award, costs and arbitrator's fees among others[25]. The arbitration management conference is indeed a welcome provision aimed at setting timelines as well as involving the

[23] Section 31(5)
[24] Section 33(2)
[25] Section 29

parties in early case management conference for an expeditious disposal of the dispute. This is a very welcome innovation indeed.

Arbitrator as Amiable Compositeur

Yet another novel provision in the Act is the introduction of the concept of amiable composition. By submitting to amiable composition, the parties accept that their disputes are not exclusively resolved on the basis of the rules of the applicable substantive law, but also equity or what the arbitrator believes to be just and fair[26] Article 28(3) of the UNCITRAL Model Law acknowledges this concept if the parties agree and authorizes the tribunal as such. The Ghana ADR Act[27] has leaped beyond the Model Law provision by vesting power in the tribunal with or without the agreement of the parties to grant any relief that the arbitrator considers just and equitable.

Finality of Award

As noted earlier a key feature of arbitration is the finality of the award. Under Section 52 of Act 798, an arbitration award is final and binding as between the parties and any person claiming through or under them subject however, to the right of a party to set aside an award under the Act.

Enforcement of domestic Award

Act 798 makes provisions for enforcement of awards. An award made by an arbitrator pursuant to an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order of the Court to the same

[26] This principle is borrowed from Brown & Marriot, 'ADR Principles and Practice'
[27] Section 50

effect[28]. Where leave is so given, judgment may be entered in terms of the award[29]. This is also a progressive innovation allowing arbitration awards to be enforced in the same manner as a judgment of the courts.

Enforcement of foreign arbitral awards.

The Act, in its stead to bring it in line with international standards makes provision for enforcement of foreign awards under Section 59. A foreign award will be enforced if made by a competent authority under the laws of the country in which the award was made, or a reciprocal arrangement exists between Ghana and the country in which the award was made, or the award was made under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). This provision, without doubt, brings satisfaction to especially foreign investors who receive an award, the terms of which are operative in Ghana. Such investors are assured of the enforceability of such awards. On the other hand, the reciprocity of this provision provides same assurance to Ghanaian investors who may also obtain arbitration awards here in Ghana and be able to enforce them abroad. Needless to say, this provision aligns Ghana's ADR Act with international standards.

Part Two

Part two of the Act deals with mediation. Party autonomy is emphasized again in Part Two. In section 63, a party to an agreement may with the consent of the other party submit any dispute arising out of that agreement to mediation by an institution or a person agreed on by the parties.

[28] Section 57(1)
[29] Section 57(2)

Parties to mediation agree on the number of mediator(s)[30], who to appoint as a mediator, be it a person or institution[31], appoint another mediator to replace a mediator[32], and determine the place for the mediation subject to the mediator choosing a convenient place[33]. A party to mediation may also withdraw from mediation at any time before mediation ends by making a declaration to the mediator and the other party that the mediation is terminated[34]. This affirmation of party autonomy in dispute resolution provides satisfaction for parties and the readiness to comply with settlement agreements, a feature very different from the court system, where lawyers and judges rather take control of the dispute resolution process making parties whose disputes are in court feel sidelined.

Besides, under Part Two, there are less stringent ways of submitting to mediation. Mediation may be made by writing, telephone or other form of verbal communication, fax, telex, email or any other electronic mode of communication and shall briefly state the nature of the dispute. A verbal submission to mediation, unless the parties agree otherwise, shall be confirmed in writing. Mediation proceedings commence when the other party accepts the invitation for mediation. Acceptance of an invitation for mediation may be by letter, telephone or other form of verbal communication, fax, telex or email or other mode of electronic communication. Acceptance by verbal means shall be confirmed in writing but failure to confirm in writing shall not invalidate the proceedings[35].

[30] Section 65
[31] Section 66
[32] Section 70
[33] Section 72
[34] Section 80
[35] Section 63

Similar to the provisions on arbitration, a court before which an action is pending may at any stage in the proceedings refer the matter or any part of the matter to mediation, if the court is of the view that mediation will facilitate the resolution of the matter or a part of the matter. Even more, a party to an action before a court may, with the agreement of the other party and at any time before final judgment is given, apply to the court on notice to have the whole action or part of the action referred to mediation[36].

Although mediation is a party process, Section 74 still bestows the mediator with some powers all in a bid to facilitate the mediation process. Caucusing, a popular procedure in mediation is statutorily affirmed by the Act. Under Section 74, a mediator may conduct joint or separate meetings with the parties and make suggestions to facilitate settlement. The mediator may where necessary and if the parties also agree to pay the expenses, obtain expert advice on a technical aspect of the dispute[37]. This latter provision is commendable. Realistically, not every issue in the mediation can be expertly dealt with by the mediator. Thus, it is necessary to obtain the advice of an expert where necessary to resolve the dispute efficiently. Under Section 82, where the parties agree that a settlement is binding, the settlement agreement has the same effect as if it is an arbitral award[38].

Effect Of And Enforcement Of Mediation Agreements

The Act 798 provides that where the parties agree that a settlement agreement is binding, the settlement agreement has the same effect as if it is an arbitral award[39]. In effect what the Act seeks to do is to equate a mediation agreement to that of an

[36] Section 64.
[37] Section 74(3)
[38] Section 82
[39] Section 82

arbitration award and enforceable in the same way as an arbitration award under section 57. Thus a settlement agreement pursuant to a mediation proceeding may, by leave of the High Court, be enforced in the same manner as a judgment or order of the Court[40]. Where leave is so given, judgment may be entered in terms of the agreement[41]. This is also a progressive innovation introduced by the Act.

Part Three

A unique feature as already mentioned is the statutory legitimacy given to customary arbitration. This is an endorsement of legal pluralism. For a culturally oriented country as Ghana, this is unsurprising and commendable. In the memorandum to the ADR Bill, the Attorney General explained that arbitration in the customary form was known and practiced in the territories that comprise this country before the passing of the Arbitration Ordinance (No. 9 of 1928) and continues to be practised to date. Judicial recognition was given to customary arbitration as far back as 1959 in the case of Budu v Caesar[42] where Ollenu J (as he then was[43]) set out the principles of customary arbitration as follows:

1. Voluntary submission of the dispute to arbitrators by the parties to arbitrators for the purpose of having the dispute decided informally but on its merit;
2. A prior agreement by both parties to accept the award of the arbitrators;
3. The award must not be arbitrary but must be arrived at after the hearing of both sides in a judicial manner
4. The practice and procedure for the time being followed in the Local Court or Tribunal of the area must be followed as nearly as possible; and

[40] Section 57(1)
[41] Section 57(2)
[42] 1959 GLR 410
[43] At the time of hearing, Justice Ollenu was a High Court Judge but he went on to become a Supreme Court Judge.

5. Publication of the award.

According to the Attorney General, account is taken of the customary arbitration as practised now in various communities as well as the overall object of the Act to popularize and facilitate ADR.

Party autonomy is also ensured under this part. No party can be coerced or forced by another person or institution or authority to submit to customary arbitration[44]. Parties have to agree to submit to customary arbitration. Similar to Parts 1 and 2, the court may with the consent of parties refer a dispute pending before it to customary arbitration[45]. Parties may decide on the number of customary arbitrators, but normally there shall be one customary arbitrator[46]. Parties may also agree on the circumstances under which the appointment of a customary arbitrator may be revoked and they may in any case acting jointly revoke the appointment of the customary arbitrator[47]. Parties may also appoint another person to replace the customary arbitrator who resigns, dies, or has his appointment revoked[48]. A customary award may for the purpose of record and enforcement be registered at the nearest District Court, Circuit Court or High Court as appropriate[49]. A customary award may be enforced in the same manner as a judgment of the court[50]. These far reaching provisions which give statutory backing to customary arbitration for the first time in this country is progressive.

Part Four

[44] Section 90 (6)
[45] Section 91
[46] Section 95
[47] Section 100 (1)
[48] Section 103
[49] Section 110
[50] Section 111

Under Part Four, the ADR Center is established. The Centre is a body corporate with perpetual succession. The object of the Centre is to facilitate the practice of alternative dispute resolution[51]. The Centre is to have a governing Board composed of a chairperson who is a lawyer of not less than twelve years standing. The other members are to be nominated by the Ghana Chamber of Mines, the Ghana Bar Association, and the Ghana Institute of Surveyors, the Judiciary, the Institute of Chartered Accountants and a woman to be nominated by the President. Also on the Board is a representative each from organized labour and industry and the Executive Secretary of the Center[52]

Part Five

Under this Part, there is established a Fund to be known as the Alternative Dispute Resolution Fund[53]. Moneys of the Fund shall be applied for education of the public on ADR, research and studies relating to the functions of the Centre, human resource development for ADR and any other purposes as the Board in Consultation with the Minister of Justice may determine.

The Act and Ethics

Another notable and commendable feature of the Act is the incorporation of ethical provisions in all the three parts dealing with arbitration, mediation and customary arbitration. In all three Parts, as well as the Second and Fourth Schedules, are ethical provisions dealing with fairness, confidentiality, conflict of interest and fees and other financial arrangements. For instance, an arbitrator under the Act must be impartial, and shall from the time of appointment and throughout the arbitral proceedings without delay, disclose to the parties in writing any circumstances

[51] Section 115
[52] Section 117
[53] Section 125(1)

likely to give reasonable doubt as to his independence or impartiality[54]. As Dapaah rightly wrote in her paper, "If an arbitrator seeks to ensure fairness and integrity of his person and invariably fairness and integrity of the process, she must advert her mind to all issues of conflicts of interest and address them properly.[55]" The Act reflects this concern of ensuring the integrity of the arbitrator and the process. This provision on impartiality is repeated in Parts 2[56] and 3[57].

An arbitrator shall, except as otherwise agreed by the parties or provided by law, ensure the confidentiality of the arbitration[58]. More specifically, under Part Two, a mediator shall not be made a party in any court proceedings relating to mediation. Even more, parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, views expressed or suggestions made by the other party in mediation in respect of a possible settlement of the dispute, nor admissions made in the course of the mediation proceedings or the fact that the other party had indicated his willingness to accept a proposal for settlement made by the mediator. It does not matter that the later proceedings relate to the dispute that is the subject of the mediation proceedings or not[59]. Customary arbitrators are also obliged to apply the rules of natural justice and fairness.

On the issue of fees, one of the functions of the Centre is to provide guidelines on fees for arbitrators and mediators. With the Centre still not in physical existence, guidelines on fees are still discoverable. Under Section 90, a party may decide not to pay the fee demanded by the customary arbitrator. This failure is also rejection

[54] Section 15(1) (2)
[55] Diana Asonaba Dapaah, "Fairness and Integrity of the Arbitrator under the ADR Act of Ghana". This was a paper written by the author while an LL.M. candidate at Fordham University.
[56] Sections 67 and 68
[57] Section 98
[58] Section 34(5)
[59] Sections 79 and 85

of the invitation by the customary arbitrator. Under Section 87, unless the parties otherwise agree, the parties shall equally pay the expenses of the mediation including the fees and expenses of the mediator. Also under Section 88, on termination of the mediation proceedings, the mediator shall render an account to the parties of the deposits received and shall return any unexpended balance of the deposits of the parties back to the parties. It is therefore, submitted that the inclusion of these ethical provisions among others has made the Act a one-stop forum for disputants and ADR practitioners. The Act makes provision for all forms of ADR[60], incorporating in it, international rules and ethics.

Weaknesses of the Act.

Arbitrability

An unfortunate provision that sets the Act backward is the provision on arbitrability. Section 1 provides that the Act applies to matters other than those that relate to national or public interest, the environment, the enforcement and interpretation of the Constitution; or any other matter that by law cannot be settled by ADR method. While I agree that constitutional interpretation should be left to the courts to guide every Ghanaian, the mention of national or public interest is ambiguous, and the specific exclusion of criminal cases (which can be subsumed under national interest) from customary arbitration is particularly unexplainable

[60] Although the Long title provides that the Act is to provide for the settlement of disputes by arbitration, mediation and customary arbitration, to establish an ADR Centre and to provide related matters, the interpretation Section 135 provides for ADR as the collective description of methods of resolving disputes otherwise than through the normal trial process. Impliedly, the Act seeks to regulate all forms of dispute resolution other than through the normal court process. In the memorandum, the Attorney General also alludes to the fact that the Act is to facilitate the resolution of disputes through ADR processes. Beside, the short title of the Act itself shows that it is an Act that encompasses all forms of dispute resolution through ADR procedures.

considering the fact that the Courts Act[61] provide for mediation in criminal cases under Victim Offender mediation.

Exclusion of environmental issues from the ambit of the Act is one setback to the purpose of bringing the Act in line with international standards. Most environmental issues are now resolved through ADR. In Ghana, ADR can be employed to settle some disputes such as refuse dumping sites, resettlement of communities like "Sodom and Gomorrah[62]". Recently, in the spring of 2011, a conference was held at the Pace University School of Law in New York. This conference brought together environmental experts and advocates. The topic for the conference related to resolving environmental issues through ADR[63]. It is thus unfortunate, that this issue has been excluded from the Act. The other challenge that comes with the exclusion of environmental issues is that while arbitration cannot deal with matters reserved exclusively for the courts, there is however an anticipated difficulty when it comes to the enforcement of a foreign arbitral award where the subject matter cannot be settled by alternative dispute resolution in Ghana such as the environment. It is my submission that the subject matter of alternative dispute resolution should be made flexible and broader in scope.

Exclusion Of ADR Primary Process Negotiation From The Act

[61] Section 73 of the Courts Act 1993, Act 459 : "Any Court, with criminal jurisdiction may promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offence not amounting to felony and not aggravated in degree, on payment of compensation or on other terms approved by the Court before which the case is tried, and may during the pendency of the negotiations for a settlement stay the proceedings for a reasonable time and in the event of a settlement being effected, shall dismiss the case and discharge the accused person."

[62] "Sodom and Gomorrah" is a slum dwelling in Accra created by traders who do not have houses to live in at the bank of the Korle Lagoon leading to serious pollution of the Lagoon.

[63] I attended one of the sessions and was amazed to see the progress being made in resolving environmental issues through ADR.

Some people have argued that the Act does not regulate negotiation[64], the bedrock of almost all ADR processes. These people take the view based on the long title of the Act which conspicuously omits negotiation. Others have however argued that since the Interpretation Section of the Act[65] defines ADR to include resolution of all forms of dispute otherwise than through the normal trial process, impliedly, the law regulates negotiation. In my opinion, this is a serious omission. If arbitration awards and mediation agreements can be enforced as judgments of the courts, what happens to agreements reached and signed by the parties as a result of negotiation? Will parties who seek to enforce such negotiated agreements have to initiate fresh suits at the courts? In the absence of any specific provision for the enforcement of negotiated agreements as there are for arbitration and mediation, the omission clearly defeats the object of the Act to use all ADR mechanisms to ensure speedy and less expensive methods of dispute resolution.

Unlimited Court Intrusion In Arbitral Proceedings

Another weakness is again identified by Torgbor[66] in his paper. According to the learned Justice, unlike what is found in the UNCITRAL model law[67] and some post colonial common law countries like Kenya and Nigeria, there is no provision which would limit the intrusiveness of the courts in arbitration, given the expansive powers of the court to intervene at some point in the arbitral process. According to the learned Justice, the Act does not include vital language that would prevent the

[64] In a discussion in class, some of my students in ADR at the Ghana School of Law bemoaned the omission of negotiation in the long title of the Act while others defended the omission using Section 135 of the Act.
[65] Section 135
[66] Supra,
[67] Article 5 of the Model Law which should guide all nations in arbitration states: "In matters governed by this law, no court shall intervene except where so provided in this law. Will a similar explicit provision in the Act be respected by the courts, as such provision will be deemed to be an ouster clause, and in the light of the decision in Republic v. Military Tribunal; ex parte Ofosu-Amaah and Another, [1973] 2GLR 227 at 237,where Abban J (as he then was) said: "It is therefore well established that it is only by an exceptionally strongly-worded formula that a legislature can effectively deprive the High Court of its supervisory jurisdiction over inferior tribunals."

intrusion of the judiciary into the arbitration process[68]. His Lordship compares the Act to Section 10 of the Kenyan Arbitration Act of 1995 which explicitly provides that no court shall intervene in matters governed by the Act. His Lordship quotes a similar provision in the Nigerian Act which provides that no court shall intervene in any matter governed by the Nigerian Act except where so provided for in the Act. In the words of the learned Justice, "given that there has always been persistent and intense litigation wherever the English Common Law cuckoo has nested and laid its eggs, the lack of similar provisions in the Ghanaian Act is troublesome-as it opens the door, perhaps, for extensive judicial intervention[69] in arbitration.[70]"

As we have noted, arbitration is a private mechanism for the resolution of disputes between parties who have, by the arbitration agreement chosen arbitration as a means to resolve their present or future disputes. It is pertinent that parties who have opted to settle their dispute through arbitration be made to comply with their own agreement. In this regard, Act 798, similar to the repealed Act 38 vests the High Court with powers to support the arbitral process.

I shall now proceed to address the supportive role of the High Court prior to the commencement of the arbitral process and in the course of the arbitral process as contained in Act 798.

Section 6(1) grants the High Court the power to stay proceedings in court where a party to an arbitration agreement has commenced an action in Court in defiance of the arbitration agreement. Section 6(1) is in the following terms:

[68] Page 45
[69] Sections 18 and 26 are the few examples.
[70] Page 46

> "Where there is an arbitration agreement and a party commences an action in a court, the other party may on entering appearance and on notice to the other party who commenced the action in court, apply to the court to refer the action or a part of the action to which the arbitration agreement relates, to arbitration."

A court will order a stay of proceedings even if the matter in dispute involved both questions of fact and of law. In the case of Khoury v. Khoury[71], the Supreme Court held that both questions of law and of fact can be determined by an arbitrator. This was a case in which the Respondent instituted action in the High Court against the appellant in respect of a partnership agreement which contained an arbitration clause. The appellant brought an application for stay of proceedings which was dismissed by the High Court on the ground that since the dispute involved questions of fact as well as law, the court would be the more appropriate forum for settling the dispute. The Supreme Court further held that the governing consideration in every case of this nature must be the precise terms and language in which the arbitration clause is framed. In this case, the arbitration clause was comprehensive and there was no doubt that each and every question raised by the dispute fell within the ambit of the arbitration clause.

The courts have also stayed court proceedings initiated in court in defiance of the said arbitration clause in a case where a party to a contract repudiates liability for a claim without repudiating the contract which contained the arbitration clause[72].

[71] [1962] 1GLR 98
[72] Royal Exchange Assurance v. Koomson [1966] GLR 678

An interesting provision introduced by Act 798 which will have profound implications for the arbitral tribunal in Ghana is the power of judicial review conferred on the High Court, and the appointing authority to make a determination of the arbitrator's jurisdiction where a party is dissatisfied with the arbitrator's ruling[73]. Again the High Court shall grant leave for a judicial review or to appeal where it is satisfied that the appeal or judicial review,

a) involves a point of law which is fundamental to the case; or

b) is one which for some special reason deserves consideration by the Court or the Court of Appeal.

Without any stretch of imagination, Section 26 of Act 798 is likely to undermine the principle which confers jurisdiction on arbitral tribunal to rule on its jurisdiction where the law applicable to the arbitration agreement is Act 798. It is respectfully submitted that the choice of applying to the High Court or the appointing authority to review the decision of the arbitral tribunal should be left to the parties and not imposed by law as it takes the whole arbitral process back into the court room.

Another critical assistance offered by the High Court to the arbitral process under Act 798 is the determination of a preliminary point of law by the High Court. Unless otherwise agreed by the parties, the High Court may on an application on notice to the other party by a party to arbitral proceedings, determine any question of law that arises in the course of the proceedings if the court is satisfied that the question substantially affects the rights of the other party[74]. The decision of the High Court on the question of law shall be treated as a judgment of the Court for

[73] Section 26
[74] Section 40

the purpose of an appeal. It must be observed that with the emergence of legal expertise of persons acting or serving as arbitrators on very reputable arbitral institutions, I have serious doubt as to the relevance of that provision. My main reservation is that modern arbitration practice revolves around very intricate issues of law and fact which are resolved by well-trained and highly experienced arbitrators. It would be a serious setback to the arbitral process if at any point in time a party is empowered to apply to the High Court to seek a determination of a question of law which can otherwise be determined by the arbitral tribunal.

Whatever the challenges or issues regarding the new Act, it is hoped that Courts will interpret the provisions liberally to uphold the parties' intention to use arbitration to resolve their disputes and thereby reduce the congestion in the Courts and resolve disputes expeditiously.

Too Much Stress On Position Of Parties

Another issue affecting the progressive nature of the Act is the emphasis on the position[75] of the parties in mediation sessions rather than the interest. This I believe may be an oversight for in mediation sessions, a mediator's competency to facilitate negotiations between the parties will to a large extent depend on getting the parties to focus on their interests rather than positions. It is a fact that in mediation position can be satisfied in one way but interest could be satisfied in several ways. Unfortunately the Act reverses the roles.

Establishment Of The ADR Centre

Again, while some people commend the establishment of an ADR Centre under the Act to facilitate ADR in Ghana, others are skeptical of the fact that it is a State

[75] Section 73

institution as the Chair and some of the members of the Board are appointed by the president[76]. According to the skeptics, the involvement of government in the Board membership makes it unattractive to investors who normally do not trust governments so much. A critical issue worth considering is whether the Alternative Dispute Resolution Centre to be established under the Act is in consonance with best practices and modern trends in international arbitration. I have not come across an institution set up by Government in any country with the object of resolving disputes through any alternative dispute resolution mechanism. The most worrying provision in the creation of the ADR Centre is while the Centre on the one hand is described in the Act as independent and shall not be under the direction or control of any person or authority in the performance of its functions[77], in another breath the President has been vested with power to appoint[78] and revoke[79] the appointment of the chairperson and members of the governing Board of the Centre. No investor will want to be part of an arbitration Centre under the control of Government. This is indeed a minus and the most regressive part of the Act. So serious is this provision that if the Centre will not be patronized by its key players then the provision alone could erode all the advantages pointed above.

It is also mind boggling why an arbitration Centre should be established by government and supported with funds from the consolidated fund[80]. Government is under serious disability when it comes to funding of state institutions. Budgets of existing bodies such as ministries, departments and agencies, the Judiciary and Commission For Human Rights and Administrative Justice have all been slashed on account of insufficient funds to support their work. Why should Government

[76] This has been the two positions argued by my students.
[77] Section 116
[78] Section 117 (2)
[79] Section 118 (5)
[80] Section 125 (2) (a)

create another state institution which will be an albatross around its neck with regional and district offices[81] when infrastructure is a challenge for existing state institutions? Are we going to have another state institution which is going to rely mostly on support from development partners to survive? Arbitration Centres all over the world are left for the private sector[82] to set up and manage and Ghana must follow suit. Government's role is to create the most conducive environment for the private sector which is the engine for economic growth to function. In any case when one examines critically the object and functions of the Centre[83], one wonders why a whole state machinery should be established to keep a register of arbitrators and mediators[84], provide the list of arbitrators and mediators to persons who request their services[85], provide guidelines on fees for arbitrators and mediators[86], examine and recommend changes to the rules of arbitration and mediation provided in the Act[87], conduct research, provide education and issue specialized publications on ADR[88], set up regional and district offices of the Centre[89] and register experienced or qualified persons to serve as customary arbitrators[90] among others.

My recommendation is that Parliament should seriously review the part of the Act providing for a Centre under governmental control. If this is necessary to facilitate the propagation of ADR in the country, the ADR Centre should be a division within the Ministry of Justice which is already established with offices in all the

[81] Section 124
[82] Examples are the American Arbitration Association, Chartered Institute of Arbitrators, London Court of International Arbitration, Centre For Dispute Resolution.
[83] Section 115
[84] Section 115(2)(c)
[85] Section 115(2)(d)
[86] Section 115(2)(e)
[87] Section 115(2)(g)
[88] Section 115(2)(h)
[89] Section 115(2)(i)
[90] Section 115(2)(j)

regions and not a new institution with an Executive Secretary, staff and a governing Board.

While some people have praised the Act as being a one-stop shop for ADR, others have argued that the Act is too bulky compared to that of other legislations, and is not reader friendly. Opponents of this argument have however explained that since this Act which comprises of all forms of ADR processes is the first of its kind in Ghana, there is the need to extensively lay down the rules governing the various processes, explaining the bulkiness.

Other people[91] have also argued that the Act seems to circumvent party autonomy since there are still court's interventions. Others also argue that the Act does not necessarily ensure a cost-effective resolution of disputes since some issues still end up in the court stream, which is known for its expense and delays[92].

Conclusion

Notwithstanding its enumerated setbacks, the ADR Act of Ghana is phenomenal – an Act that has provided for majority of ADR processes in one legal document, concurrently dealing with rules of ethics, the New York Convention, the ADR Centre and the ADR Fund. It is indeed a Daniel come to judgment, solving what was once the predicament of Ghanaians who had to resort to the expense, delay and adversarial nature noted with the normal court process. In an age declared in Ghana as the Golden age of business[93], an age where Accra has taken over from

[91] Justice Torgbor makes this assertion.
[92] These criticisms came from my students during an appraisal of the Act in class.
[93] This declaration was made by President Kufuor during his first term in office as President in 2001

Lagos as the hub of Air Traffic in the Region[94], an age where there is an urgent need for a regional Court of International Arbitration, Ghana's ADR Act has been well- timed to position itself in the competition for such a regional hub. It is a progressive piece of legislation and when the critical issues about the Centre and intrusion by the courts are addressed, it should qualify as a masterpiece of legislation many developed countries have shuddered to venture. Torgbor[95] welcomes the legislation using the Ga expression 'atuu' and the Kenyan 'Karibu' and pleads for time to try and test it. I on my part will wish the Act a pleasant stay among us, a stay that will be remembered in the future for the academic discussions it has generated and its contribution towards institutionalizing ADR in Ghana.

[94] Business Day Newspaper Wednesday August 3, 2011 reproduced at www.ghanawed.com/GhanaHomePage/NewsArchive/artikel.php?ID=215421
[95] supra