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TEMPLARS ThoughtLab

Breaking Arbitrator Appointment Deadlocks in Ghana

Introduction

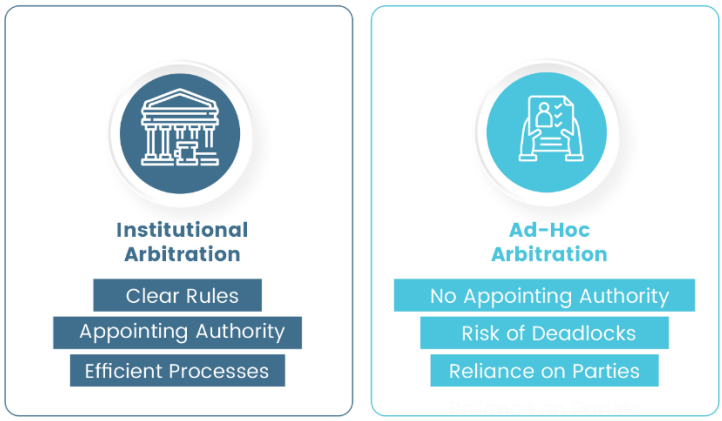
One of the advantages of arbitration over litigation is its efficiency and flexibility. However, in our experience, poorly drafted arbitration agreements can render the arbitration process cumbersome. This risk is accentuated in the context of arbitrator appointments in Ad Hoc arbitration.

In Ad-hoc arbitration—where parties administer the arbitration process themselves - the risk of deadlocks in arbitrator appointments is elevated by the absence of an appointing authority in most ad-hoc arbitration agreements and the presence of an unsatisfactory statutory failsafe. While parties have the prerogative to choose ad-hoc arbitration, this choice has significant strategic implications which can be an obstacle to efficient arbitration if poorly handled.

In this article, we explore the peculiar potential for deadlocks in arbitrator appointments in ad-hoc arbitration and recommend some practical strategies to resolve deadlocks.

This piece does not and is not intended to provide legal advice to anybody. It is merely the authors' views on the topic.

Comparison Chart



The Deadlock Problem

For Ad-Hoc arbitration under the Alternative Dispute Resolution Act (ADR Act)[1], there is ample room for an obstructive party to frustrate the arbitral process by refusing to appoint an arbitrator or unreasonably frustrate the process for appointing arbitrators if the arbitration agreement is not properly drafted.

Generally, the parties to an arbitration agreement may agree on their preferred procedure for the appointment of arbitrators but where the parties do not contractually settle on a procedure for appointing an arbitrator or a procedure for resolving an impasse on the procedure for appointing an arbitrator, the statutory failsafe would apply. In Ghana, the statutory failsafe for breaking the deadlock relies on party-intervention which complicates the issue where one party remains adamant that they will not cooperate.

The ADR Act stipulates that in the absence of an agreed procedure for appointing arbitrators, the default number of arbitrators is three (3).[2] Out of this number, each party shall appoint one arbitrator, and both party-appointed arbitrators shall appoint the third arbitrator who shall be the chairperson of the arbitral tribunal.[3] Each party is required to appoint an arbitrator within fourteen (14) days from receiving a request from the other party to do so.[4] In the case of the party-appointed arbitrators, there is also a similar fourteen (14) day timeline. If the parties do not meet the timelines, the law requires that an appointing authority make the required appointment upon a request by a party.[5]

In the case of a sole arbitrator, the law prescribes the same solution of an appointing authority when the parties fail to agree on the arbitrator within fourteen (14) days after receiving the request for arbitration.[6] Thus, the statutory failsafe in Ghana invariably relies on the parties, except where there is an appointing authority. Herein lies the problem for ad-hoc arbitration.

[1] Alternative Dispute Resolution Act, 2010 (Act 798).
[2] Section 13 of the Alternative Dispute Resolution Act, 2010 (Act 798).
[3] Section 14(1) & (2) of the Alternative Dispute Resolution Act, 2010 (Act 798).
[4] Section 14 (3) of the Alternative Dispute Resolution Act, 2010 (Act 798).
[5] Section 14(3) of the Alternative Dispute Resolution Act, 2010 (Act 798).
[6] Section 14(4) of the Alternative Dispute Resolution Act, 2010 (Act 798).

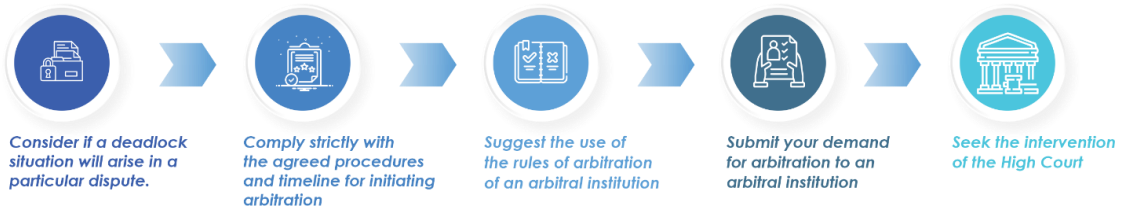
One will usually find that for most ad-hoc arbitration agreement models adopted in Ghana, there is a single arbitration clause that has no appointing authority and does not address the deadlock problem. In the absence of a party-designated appointing authority, the ADR Act offers no further help as the circumstances under which the ADR Act permits judicial intervention to support arbitration proceedings do not expressly include appointment of arbitrators.[7]

While it is recognized that the High Court has inherent jurisdiction outside of the specific powers it has under the Constitution and enactments,[8] there is uncertainty regarding the High Court's jurisdiction to intervene in arbitrator appointments.[9] Where there are statutory provisions regulating a specific matter, it is unlikely that the High Court will fall upon its inherent jurisdiction. There is also the question of whether the High Court will be usurping party autonomy by interfering with the parties' agreed mechanism for appointing arbitrators, even if that mechanism is not ideal.

There is equally a compelling argument to the contrary that relies on 'judicial legislation' to fill gaps in a statute if that power is exercised within the boundaries of the law. This approach requires the court to adopt an interpretive approach that gives effect to the intent and purpose of the ADR Act and the overall legal framework on ADR in Ghana.

Thus, in the absence of binding precedent on the matter, there is significant uncertainty on questions of whether the High Court can and will intervene as an appointing authority or designate an appointing authority on behalf of the disputing parties.

Breaking the Deadlock



Breaking the Deadlock

We propose the following strategies for preventing or resolving the deadlock problem in arbitrator appointments in Ad-Hoc arbitration.

1. ***Consider if a deadlock situation will arise in a particular dispute***
   A poorly drafted arbitration clause will not always result in a deadlock situation if both parties are genuinely interested in a resolution of the dispute. The claimant must thoroughly understand the motivations of the potential respondent before the claimant issues a demand for arbitration. Does the respondent appear to have a genuine disagreement with the claim or is the respondent simply disinterested in resolving the disagreement? The correspondence and conversations leading to the

[7] Section 39 of the Alternative Dispute Resolution Act, 2010 (Act 798).
[8] Attoh Quarshie v. Okpote [1973] 1 GLR 59.
[9] The Dutch African Trading Company BV v. The West African Mills Company Limited (Suit No. MISC/0015/2016) (unreported decision of the High Court dated 28 April 2016).

dispute may offer valuable insights. For example, a respondent who does not dispute the existence of a liability but nevertheless fails to submit a good faith proposal for an amicable resolution of the disagreement will usually not cooperate in the appointment of arbitrators because a deadlock will benefit the respondent, even if temporary. If the claimant assesses that the respondent is disinterested in a genuine resolution of the dispute, then the claimant can better prepare a strategy for breaking the potential deadlock.

2. ***Comply strictly with the agreed procedures and timeline for initiating arbitration***
An unwilling participant will seize on the least non-compliance with agreed procedures to frustrate the arbitration process. By complying strictly with agreed procedures and timelines, the claimant stands a better chance of winning the court over if matters come to a head and point 5 (below) becomes necessary.

3. ***Suggest the use of the rules of arbitration of an arbitral institution***
Most of the poorly drafted ad-hoc arbitration clauses will usually not include procedures for arbitration, leaving the parties and their arbitrators to fashion the rules arbitration of a particular institution should be used for arbitration. Most institutional arbitration rules contain mechanisms for resolving deadlocks by vesting the institution with the mandate to appoint for a party who fails to appoint within the agreed timeline.

4. ***Submit your demand for arbitration to an arbitral institution***

Like point 3, the parties will be subject to institutional arbitration if they submit the dispute to the institution for arbitration. The rules of most arbitral institutions assert jurisdiction to administer a particular arbitration if the parties submit the dispute to the institution. This will invariably depend on what constitutes 'submission' under the rules of the institution.

For example, under the rules of arbitration of the Ghana Arbitration Centre, a dispute is submitted to the Centre for administration if the parties to an existing dispute commence arbitration under the rules by filing at the Centre a written agreement to arbitrate under the rules of the Centre. If the respondent submits an answer to the claim without objecting to the mandate of the institution, the two documents may, arguably, be read together as an agreement by the parties to submit the dispute to institutional arbitration. It is important for the arbitral tribunal to reflect this agreement in its first procedural order to avoid a challenge to the tribunal's jurisdiction later. Like the preceding point 3, this is a controversial one. But it might work if the respondent takes the bait.

5. ***Seek the intervention of the High Court***

As a last resort, one may file an application to the High Court for assistance in the appointment of an arbitrator. However, as explained, this strategy of invoking the inherent jurisdiction of the High Court is fertile ground for litigation. Considering the arbitration-friendly approach of the Ghanaian courts, it is likely that the High Court may intervene in appropriate cases to hold the parties to their contract. In a recent dispute in which our Firm acted for the claimant, the High Court resolved the deadlock by designating the Ghana Arbitration Centre as the appointing authority.

Conclusion

While Ad-Hoc arbitration has its own appeal and may be better suited for certain disputes, we cannot emphasize enough the importance of drafting a detailed arbitration agreement. One of the elements to include in the language should be a mechanism for breaking a deadlock in the appointment of arbitrators. There is no need for complicated drafting here, it is sufficient to designate an appointing authority. The authority may be an institution or an individual who will be called upon to intervene only if the parties fail to appoint arbitrators after the lapse of the agreed time for making the appointment. The designation of an appointing authority empowers that person or institution to break the deadlock in arbitrator appointments as contemplated under the ADR Act.

As a matter of practice, we recommend the adoption of institutional arbitration over ad-hoc arbitration. It is easier to speed up the arbitration process if there is an administrator to move the process along. The robust rules of most arbitral institutions provide sufficient safeguards against the use of procedural technicalities to frustrate arbitration. Institutional arbitration rules are by no means airtight against a determined litigant, but they provide better safeguards than the bland texts we see in some ad-hoc arbitration clauses.