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Jurisdiction and Its Ramifications in Ghanaian Arbitration Proceedings

Ogochukwu C. Nweke[1], Samuel N. K. Agbenyega[2], Peter Awuni Apuko[3]

[1]School of Business and Leadership (SBL), Regent University College of Science and Technology (RUCST), Accra, Ghana
[2]National Labour Commission (NLC), Accra, Ghana
[3]Regentrofen College of Applied Sciences, Centre of Traditional Leadership, Culture, Conflict, Law & Development (CCCLaD), Accra, Ghana
Email: bravellb@yahoo.co.uk

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Abstract

Jurisdiction, defined as the legal capacity of a judicial body to adjudicate a matter, is crucial. Even the most solid of cases may be rendered a nullity if presented before a forum lacking the appropriate jurisdiction. In the Republic of Ghana, the adoption of arbitration as an alternative to the traditional dispute resolution mechanisms hinges on various types of jurisdiction: personal, subject matter, or forum-based; as well as on the arbitrability of the matter and competence of the tribunal. Locus standi forms the foundation for both disputing parties and the tribunal in processing, adjudicating, and issuing valid and enforceable arbitral awards. Such awards must be recognisable and enforceable by a competent national court, specifically the high court in Ghana's context.

Keywords

ADR, Arbitration, Jurisdiction, Recognition, Enforcement, Locus Standi

1. Introduction

Arbitration means the voluntary submission of a dispute to one or more impartial persons for a final and binding determination as provided under section 135 of the Alternative Dispute Resolution (ADR) Act, 2010 (Act 798). Fiadjoe (2013) indicates that when it comes to arbitration, a decision is made on the basis of the merits of the case by a neutral third party or an even-numbered panel of impartial parties. The arbitration process' design is under the control of the disputing parties. In some cases, a statute or a contract specifies the parameters of the arbitration procedures; in other cases, the parties collaborate to create an arbitra-

tion procedure that is suitable for their particular dispute (Fiadjoe, 2013). Arbitration can therefore be seen as medium disputes resolution where the parties voluntarily select a third party or parties, giving them the power to pass a binding resolution by way of an award which shall be binding. In simple terms, arbitration can be referred as the appointment of a private judge as in Gardners Plumbing Co Ltd v. GIMPA (2016-2017) to determine a matter for disputing parties on such as case which is amenable (Sarkodie, 2011) to ADR. To this extent, it can be seen as some form of a private civil litigation.

When it comes to the various forms of arbitration, the ADR Act, 2010 has provided under Part One for Arbitration and Part Three deals with Customary Arbitration. On the other hand, the learned Brobbey and Brobbey (2022) submit that arbitration in Ghana may be classified under groups, namely, Statutory Arbitration; Customary Arbitration, Expedited Arbitration as well as International Arbitration. Similarly, Adjei and Ackah-Yensu (2021) provide the following as types of arbitration, namely, Domestic arbitration, international arbitration, Treaty-Based arbitration (Investment), Contract-Based Arbitration (Commercial), Institutional Arbitration as well as Ad Hoc Arbitration.

The discussion on the issue jurisdiction in the practice of arbitration in this paper must therefore be understood in this light, which may depend on the terms of the arbitration agreement or clause, subject matter of the dispute or the governing law among others relevant factors and circumstances (Adjei & Ackah-Yensu, 2021).

2. The Principle of Jurisdiction

Jurisdiction in Latin refers to "*ius*" which stands for "*the right*"; iuris meaning "*law*" and "*dicere*" which stands for "*to speak*". It can therefore the said to be the right under the law to speak. It has to with the power of a court or tribunal within a particular territory to adjudicate cases or disputes and issue orders which binds the disputing parties.

Jurisdiction in arbitration can therefore be said to refer to the power or authority of an arbitral tribunal to hear and determine a dispute between parties. It is the legal or statutory authority to make a legal decision or enforce the law. Brobbey and Brobbey (2022) note that it has to do with the power or the authority of the arbitrator, mediator or negotiator to resolve a dispute submitted to him or her. It stands to reason that the issue of jurisdiction can be called upon at any stage of the arbitral proceedings such as at the stage of initiating the arbitral proceedings, during the pendency of arbitral proceedings, at the drawing that award as well as the recognition and enforcement of the arbitral awards.

In arbitral proceedings, jurisdiction is of the key concern. The arbitral tribunal must jealously exercise its jurisdiction within which it has been granted its powers (Damas, 2016). According to Fouchard & Goldman (1999), the jurisdiction of an arbitral tribunal usually originates from an arbitration agreement between the disputing parties, which may be a clause within a main contract or a separate

agreement. In other words, it is the authority granted to an arbitral tribunal to adjudicate a particular dispute. This authority may come from an agreement between the parties (such as an arbitration clause in a contract) or from the statutory legislation of a particular jurisdiction. Furthermore, it needs to be noted that the notion of jurisdiction in arbitration refers to the legal capacity of an arbitral tribunal to adjudicate disputes presented before it (Blackaby et al., 2015). Jurisdiction therefore encompasses the power to determine the scope of its own authority, a principle commonly referred to as Kompetenz-Kompetenz (Moses, 2012). Jurisdiction in arbitration is therefore the authority or power of the arbitral tribunal to determine a dispute between disputing parties as well as the territory over which the legal framework of a tribunal extends.

Of significant attention is the fact that arbitral tribunals must satisfy themselves of the requisite jurisdiction in order to entertain a matter or dispute referred to it. This involves tracing its legal basis from various sources such as the arbitration agreement or clause, consent of the parties, statutory legal provisions, common law and other sources such as conventions, treaties, protocols, international customary laws, customs and trade usage in practice, accepted and agreed as the sources of capacity to the arbitral tribunal by the disputing parties (Damas, 2016).

Jurisdiction plays a crucial role in legal proceedings, and its improper application can lead to a hearing being dismissed or, if heard, the decision may be overturned due to lack of jurisdiction. Both individuals and corporate entities can engage in mediation, leading to a mutually agreeable solution. This resolution, whether an agreement or award, is binding, conclusive, and can be enforced in any court of competent jurisdiction in Ghana and internationally as a consent judgment (Apuko-Awuni, 2022).

3. The Principle of Kompetenz-Kompetenz

The Kompetenz-Kompetenz (Competence-Competence) doctrine is a cornerstone of both national and international arbitration when it comes to the ability of the arbitrator or arbitral tribunal have the legal capacity to consider and determine a dispute with respect to its own jurisdiction (Adjei & Ackah-Yensu, 2021). The doctrine stipulates that the arbitrators, rather than the courts, should have the first say regarding their jurisdiction (Born, 2014).

The doctrine deals with the ability of the arbitral tribunal or arbitrator to rule on the question as to whether or not it has jurisdiction before the intervention by the national courts, this is provided under Article 16(1) under the Model Law (UNCITRAL Model Law on International Commercial Arbitration, 1985). The ADR Act, 2010 provides for this under sections 24 to 26.

The doctrine promotes efficiency in dispute resolution by limiting the ability of parties to delay arbitration proceedings by contesting jurisdiction in court, however, this does not deprive a disputing to seek court intervention but such an intervention, whether or not pending does not deprive the arbitral tribunal

its competence. Despite its general acceptance, the application of Kompetenz-Kompetenz varies across jurisdictions, reflecting different legal traditions and philosophies (Bermann, 2017). The arbitrator (s) or arbitral tribunal is empowered to determine issues regarding their own jurisdiction on three grounds, namely; the power of the arbitrator, validity of arbitration agreement as well as the validity of the agreement or contract as a whole (Moses, 2012).

In *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan & Ors* (1999) the Indian Supreme Court held that the Arbitration and Conciliation Act (1996) empowers the arbitral tribunal the authority to decide on matters that fall within its jurisdiction.

However, there exists a school of thought, with the mindset that arbitrators to a very large extent may appear biased in determining an issue in their favour, claiming jurisdiction in order to keep a good job opportunity, arguable though.

On the other hand, Adjei and Ackah-Yensu (2021) draw attention to the competence of the arbitral tribunal when it comes to arbitration agreements or clauses which purport to oust the jurisdiction of the court (*Tetteh and Others vs. Essilfie and Another*, 2001-2). Notwithstanding party autonomy, such agreements or clauses which purport to oust the jurisdiction of the court are deemed automatically as a nullity (Adjei & Ackah-Yens, 2021). It is therefore submitted that the doctrine of competence-competence is not without limits before a court (UNCITRAL Model Law on International Commercial Arbitration, 1985) of competent jurisdiction in Ghana.

4. Forum Non Conveniens Doctrine

Another significant common law doctrine relevant to discussions on jurisdiction in the practice of arbitration is *"forum non conveniens"*, a Latin term meaning "inconvenient forum". This doctrine allows a court to dismiss a civil action when it determines that there is a more appropriate forum available to resolve the dispute, even if that forum is outside its jurisdiction (Rogers, 1998; Gillies, 2008). It is particularly pertinent when a case is deemed unsuitable for determination through arbitration. This occurs notwithstanding whether or not the forum or venueis proper and whether the court has jurisdiction over the dispute or issue and the parties. But, the court out of its discretionary power declines jurisdiction to a more appropriate and more convenient alternative forum such as an arbitral tribunal to determine the matter or dispute (Barrett Jr., 1947).

Under this doctrine the court even though is cloth with the jurisdiction to determine civil disputes, it encourages the court to decline jurisdiction even when called upon by one of the disputing parties; the court rather refer parties and dispute to the appropriate forum such as arbitration for the determination of the disputes.

In *Monegasque de Reassurances v. Nak Naftogaz of Ukraine and State of Ukraine*, 2001) the Second Circuit Court of Appeals upheld a district court's dismissal on forum non conveniens grounds. In that case, the Court was called

upon to decide whether the proper party was before the court. The answer to this depended on Ukrainian law, the U.S. court thus, held that the Ukrainian court was better placed to make that determination, hence declining jurisdiction. To cure the potential mischief, pose by forum non conveniens, it has been proposed that parties to a contract may provide in the arbitration clause as follows "*the parties consent to recognition and enforcement of any resulting award in any jurisdiction and waive any defense to recognition or enforcement based upon lack of jurisdiction over their person or property or based upon forum non conveniens.*"

Furthermore, the doctrine of *forum non conveniens* was demonstrated in the Ghanaian case of *Eurapharma Care Services Ltd v. Prof. Nicholas Ossei-Gerning*, where the Supreme Court advised the lower courts to be cautious in asserting jurisdiction, particularly when more suitable avenues exist for resolving civil disputes, holding that:

> What must be noted is that the provisions in Act 798 (Alternative Dispute Resolution Act, 2010) on arbitral proceedings must be considered as alternative methods of resolution of disputes, and therefore, in our view, the intervention of the High Court, unless expressly provided for and in clear instances devoid of any controversy, must be very slow and cautious. Otherwise, in our respective opinion, the High Court will once again use these interventions to whittle away the function of the arbitral tribunals and render nugatory the benefits that are to be derived from these proceedings as contained and provided for in Act 798.

The doctrine of "forum non conveniens", is codified in Ghanaian Legislation. This includes the Courts Act, 1993 (Act 459); High Court Civil Procedure Rules 2004 (C.I 47); the Alternative Dispute Resolution Act, 2010 (ADR Act, 2010); and the High Court (Civil Procedure) (Amendment) Rules, 2020 (C.I. 133). These statutes, complemented by case law, guide the courts in determining the most appropriate forum for the resolution of civil disputes.

5. The Principle of Arbitrability

The "*principle of arbitrability*" is indispensable when the question of jurisdiction in arbitration is called upon. The principle refers to disputes or cases which cannot be resolved through Alternative Dispute Resolution (ADR) mechanisms such as arbitration. The focus of this principle is on whether or not a dispute under consideration can be settled through arbitration, hence the arbitral tribunal lacking jurisdiction to entertain such a matter. This is where the national or domestic court becomes the only competent fora to handle with such disputes or cases (Makau, 2022). Arbitrability is provided for under section 1 of the ADR Act, 2010, providing for disputes which are not amenable to arbitration. It states that 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 reso-*

lution method.

Therefore, disputes within these parameters cannot be determined through arbitration but solely limited and the preserve of the court's jurisdiction for determination.

From above, if parties based on their autonomy enter into an arbitration agreement which is contrary to this provision (ADR Act, 2010), their dispute shall not be arbitrable within the Ghana jurisdiction, and the arbitral tribunal or arbitrator shall not have jurisdiction.

In the case of *Bankswitch Ghana Ltd v Republic of Ghana* (2014), the question of jurisdiction touching on *arbitrability* was called upon. In this case, the Government of Ghana argued that based on article 181 of the 1992 Constitution of Ghana, the arbitration agreement ought to be presented before the Parliament of Ghana for it to be approved become valid, and therefore in the absence of that, the agreement was never operational, hence is null and void. And that the Arbitral tribunal lack jurisdiction to entertain the matter.

On the other hand, the Arbitral tribunal rejected that line of argument, and basing on the doctrine of competence-competence claimed jurisdiction and determined the dispute in favour of Bankswitch. The arbitral tribunal reasoned that it was clear that in entering into the Agreement with Bankswitch, the Government of Ghana was acting in a commercial capacity and therefore is not protected as a state entity. And that notwithstanding Ghana's national law as provided under article 181, the said constitutional provision does not in any way insulate the Government of Ghana from its contractual obligations under customary international law to treat what is essentially a foreign investment fairly and equitably and not to take that investment without compensation, as the Government of Ghana sought to rely on the constitutional provision to avoid its obligations.

Similarly, in the *Attorney General v. Balkan Energy Ghana Ltd and Others* (2012), the question of jurisdiction touching of arbitrability was brought before the Supreme Court for determination. The dispute also bordered on the interpretation and enforcement of the Constitution (Republic of Ghana, 1992) which is the sole preserve of the Supreme Court as provided for under Article 130. The Supreme Court held that an international commercial arbitration is not by itself an autonomous when it comes to transactions which are commercial in nature which pertains to or impacts on the wealth and resources of the country, hence not arbitrable, and further noted that the tribunal lacked jurisdiction to entertain the dispute.

6. Competence-Competence under Alternative Dispute Resolution Act, 2010 (Act 798)

Section 24 of the Act codifies the principle of "Competence-Competence" into Ghanaian law. This principle is fundamental to arbitration proceedings and reflects the international customary laws, norms, practices and usages with respect

issues on jurisdiction in arbitral proceedings.

Section 24 of Act 798 provides that:

> "Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction particularly in respect of (a) the existence, scope or validity of the arbitration agreement; (b) the existence or validity of the agreement to which the arbitration agreement relates; (c) whether the matters submitted to arbitration are in accordance with the arbitration agreement."

The arbitral tribunal therefore has the authority to determine disputes which touches on its own jurisdiction when it falls within the above-mentioned parameters.

Section 24 of the Act recognises the power of the arbitral tribunal or arbitrator to rule on its own jurisdiction unless otherwise agreed by the parties. This effectively means that the tribunal has the right to examine and decide on matters concerning its authority to arbitrate the dispute in question, which are arbitrable.

Section 24(a) of Act 798, empowers the arbitral tribunal to rule on the existence, scope, or validity of the arbitration agreement. This gives the tribunal the authority to determine whether an arbitration agreement exists between the parties, what its boundaries are, and whether it is legally enforceable.

Under section 24(b) of Act 798, focus relates to the underlying contract that contains the arbitration agreement or clause. The tribunal can decide whether the contract is existent and legally valid. This point is significant because it allows the tribunal to examine the validity of the contract independently of the arbitration agreement or clause. Thus, even if the main contract is invalid, the arbitration clause may still be valid and upheld, dictated by the concept known as the '*doctrine of separability* (ADR Act, 2010).

Similarly, Section 24(c) of Act 798 empowers the tribunal to determine if the issues submitted for arbitration align with the arbitration agreement. This means the tribunal can decide if the subjects of the dispute fall within the parameters defined by the arbitration agreement.

In *Westchester Resources Ltd v. CAML Ghana Ltd* (2012), the court noted that the "*Kompetenz-Kompetenz principle*" is recognised by the Act (ADR Act, 2010). The arbitral tribunal has power to examine and decide on matters pertaining to its own jurisdiction provided under section 24 to 26. However, the High Court has capacity to review the arbitrators' ruling on competence or at the stage of setting aside the award, the instant issue before the court bothered on fraud.

7. Forms of Jurisdiction in Arbitration

Jurisdiction in arbitration may be divided into three types as follows:

1) Personal Jurisdiction

This refers to the power of the arbitrator or arbitral tribunal over the parties to the arbitration. The tribunal must have the authority to hear the dispute and make a binding decision or award that is valid and enforceable against the par-

ties involved. The power is derived out of the disputing parties based on party autonomy and by consensus, extending such a power to the arbitrator or tribunal to determine the matter which becomes final and binding upon the disputing without prejudice.

Personal jurisdiction in an arbitration is typically derived from an agreement between the parties, such as an arbitration agreement or clause in a contract. Or a submission agreement to arbitration subsequent to a dispute arising out of the main contract agreement; this occurs where such an arbitration agreement or clause was never provided for by the contracting parties.

When parties agree to resolve their disputes through arbitration, it automatically means they also agreed to submit to the jurisdiction of the arbitral tribunal or arbitrator.

The jurisdictional scope of the arbitration clause is typically determined by the language used in the clause itself. The clause will usually specify the types of disputes that can be submitted to arbitration, the rules (Maley, 1985) that will govern the arbitration, and the location where the arbitration will take place.

The Latin phrase "law of the place where arbitration is to occur" is known as the "*lex loci arbitri*" in the context of a conflict of laws. Lex arbitri, or the law of arbitration, is the proper name for the fundamental legal basis for arbitration. The arbitration venue is referred to as Lex Arbitri. It is of utmost importance to the Seat of Arbitration because it is its courts that have supervisory jurisdiction over the arbitral process. The Model Law states that the law that governs an arbitration (*lex arbitri*) is the law of the nation in which the arbitration is held (*lex loci arbitri*), along with the arbitration's choice of venue (*seat*).

If one party later challenges the jurisdiction of the arbitral tribunal, the tribunal must determine whether it has personal jurisdiction to determine such an issue. This determination is typically made by looking at the language of the arbitration agreement or clause and the circumstances surrounding its formation and the statutory implication for the determination as far as the recognition and enforcement of such a determination on the national laws contracting parties.

In some cases, personal jurisdiction in an arbitration may also be based on the national laws of a particular jurisdiction. For example, some countries such Ghana has legislations that provide for compulsory arbitration (Labour Act, 2003) in certain types of disputes, such as labour disputes or consumer disputes. In these cases, personal jurisdiction may be derived from the law rather than from an agreement between the parties. In the Ghanaian situation, the National Labour Commission is vested with authority to handle certain labour disputes through compulsory arbitration within the public sector, where the Government is a party, such as disputes bordering on remuneration, salaries, allowances and benefits of public sector workers. Also, where a court of competent jurisdiction orders an arbitration. These proceedings would be considered a compulsory arbitration, especially when it comes this category of disputes between the government or state and its public entities.

On the other hand, this is not the instance of private parties, where the Supreme Court called for limited court intervention in assuming jurisdiction in arbitral proceedings, as held in the *Republic v. High Court* (2018).

The Supreme Court of Ghana noted quite strongly in this case as follows:

> "What must be noted is that the provisions in Act 798 on arbitral proceedings must be considered as alternative methods of resolution of disputes, and therefore, in our view, the intervention of the High Court, unless expressly provided for and in clear instances devoid of any controversy, must be very slow and cautious. …"

The court's decision was motivated by the need to encourage courts from abusing the provisions of the Alternative Dispute Resolution Act, 2010 (Act 798), and it the words of the Supreme in the case supra, indicates that the court must hasten slowly not to:

> "…whittle away the functions of the arbitral tribunals and render nugatory the benefits that are to be derived from these arbitral proceedings as contained and provided for in Act 798…The court went on to state that "the only logical interpretation that can be given when the fact that the arbitrator may continue the arbitral proceedings and even make an award whilst the application for the determination of the question of law is pending. This makes it clear that the question of law envisaged is not the type of determination of issues of joinder of a non-signatory party that arose in this case."

Therefore, the High Court's judgment was overturned by the Supreme Court. The Supreme Court used the occasion to reiterate its willingness to respect the party autonomy to enable them proceed with arbitration. According to the court, "*the main purpose of an arbitration is to settle the dispute outside of court or without the influence and intervention of the courts, as we have stated elsewhere in this rendition.*"

2) Subject Matter Jurisdiction

This form of jurisdiction refers to the power of the arbitral tribunal cloth with the competence determine a particular issue in dispute. The tribunal must have the authority to hear that specific claims or question or dispute and make a decision on them. In essence, the issue must be suitable or eligible for resolution through arbitration, this is referred as the principle of arbitrability as mentioned above. Before an arbitral tribunal can proceed with an arbitration, it must determine whether it has jurisdiction over the dispute. This determination can be made by the tribunal itself or by a court in the jurisdiction where the arbitration is taking place.

Lew et al. (2003) suggest that the arbitration agreement is critical because it does not only provide the tribunal with the requisite jurisdiction but also defines its scope. For instance, if an agreement or clause stipulates that the tribunal can resolve "*all disputes arising from this contract*," the arbitrators may determine any dispute that is even remotely related to the contractual relationship so far as

it arises out of the contract or agreement.

Furthermore, subject matter jurisdiction in arbitration may be derived from the agreement between the parties and the applicable law. The parties must agree to submit the dispute to arbitration, and the arbitrators must have the legal authority or governing laws to be considered in the determination of such a dispute.

The scope of subject matter jurisdiction in an arbitration is usually determined by the arbitration agreement. The agreement would typically specify the types of disputes that can be submitted to arbitration, such as disputes arising out of a particular contract or disputes related to a particular area of law.

If a party challenges the subject matter jurisdiction of the arbitral tribunal, the tribunal must determine whether it has the legal authority to decide that particular issue(s) in dispute. This determination is typically made by looking at the language of the arbitration agreement and the applicable law. In some cases, the applicable law may limit the scope of subject matter jurisdiction in arbitration. For example, some jurisdictions may prohibit certain types of disputes from being resolved through arbitration, such as disputes involving public policy issues, criminal matters, human rights matters and matters related to the environment (ADR Act, 2010).

It is worth noting that subject matter jurisdiction in arbitration is generally broader than in court proceedings. This is because the parties are free to choose rules and procedures that will govern the arbitration, and can therefore tailor the arbitration to their particular needs and concerns. However, this freedom is subject to any national legal restrictions that may apply disputes that are amenable to arbitration.

3) Forum Based Jurisdiction

The forum for which the dispute is submitted comes with its set of criteria on the competence of the arbitral tribunal. As far as Ghana is concerned these fora include Domestic Arbitration, Customary Arbitration and International Arbitration.

a) Domestic Arbitration

This is also known as national arbitration (ADR Act, 2010). When the parties to the arbitration are nationals of the country in which the arbitration is being held, it is referred to as domestic arbitration and the country's substantive law, such as the Alternative Dispute Resolution Act, 2010 in the case of Ghana, is used to resolve the dispute. The term "governing law" can also refer to the "law of the seat of arbitration," "substantive law," or "applicable law." The substantive law or set of rules is applied to control or direct the arbitral tribunal's decision-making. Therefore, it is the law that applies to the jurisdiction where the arbitration will take place (ADR Act, 2010). The High Court has supervisory jurisdiction (Republic of Ghana, 1992) on the competence of the arbitral tribunal. Section 26 of Act 798 provides that a party dissatisfied with the arbitrator's ruling on jurisdiction may on notice to the arbitrator and the other party apply to the appointing authority or the High Court for a determination of the arbitrator's jurisdiction. And must be made within seven days of the arbitrator's deci-

sion and explain why the application was made. And the Court may intervene by revoking competence of the arbitral tribunal (Republic of Ghana, 1992).

b) Customary Arbitration

Act 798 provides under section 135 for "customary arbitration" as the voluntary submission of a dispute, whether or not relating to a written agreement for a final binding determination under Part Three of this Act." Similarly, the definition of a "*Customary Arbitrator*" *is provided as a*n impartial person appointed or qualified to be appointed as an arbitrator in customary arbitration. This is a special type of arbitration, which is birthed from customary laws, norms, practices and usages of the people of any given community in Ghana. These types of arbitration may be referred as traditional and the oldest approach used by traditional authorities such as chiefs in the resolution of disputes.

The Chieftaincy Act, 2008 provides under section 30 for customary arbitration, it states that "*the power of a chief to act as an arbitrator in customary arbitration in any dispute where the parties consent to the arbitration is guaranteed.*" This meaning that all traditional authorities are deemed as customary arbitrators in Ghana.

The term "Chief" as a traditional authority is gender neutral in Ghana. It can be used to refer a male or female (Republic of Ghana, 1992). The Supreme Court held in *Dzasimatu v. Dokosi* (1993-1994) that Article 181 of the Constitution of 1979 and Article 277 of the 1992 Constitution both reiterate its definition of a chief as including the customary position of the queen mother as a chief. Therefore, if a queen mother passes through the same requirements as a male chief, she is equally a chief.

Apart from the restriction placed under section 1 of Act 798 on disputes which cannot undergo arbitration, section 89 of the same Act specifically provides that customary arbitral tribunal does not have the competence of handle criminal matters. Customary arbitration is used in resolving civil cases (Brobbey, 2008). A person who serves as an arbitrator in such as matter commits an offence and is liable on summary conviction to a fine or a term of imprisonment not exceeding twelve months or to both.

In the case of *Republic v Adrie; Ex parte Kpordoave III* (1987-88) the jurisdiction of customary arbitration was clarified. The Court held that "a customary arbitration was an adjudicating authority created by custom and as such as a creature of the common law of Ghana. They had jurisdiction as an adjudicating authority to determine questions affecting the rights of subjects of the country and any decision of theirs was recognised by law as binding on the parties who submitted to its jurisdiction. The courts were clothed with power to enforce the decisions of such customary arbitration and that apart, an award of a customary arbitration could operate as estoppel per rem judicatam. Therefore, such a body could not be described as a private domestic body. If the courts had to enforce awards of the arbitration bodies, then as inferior tribunals, they had to be amenable to the supervisory jurisdiction of the High Court."

8. Jurisdiction under Causes or Matters Affecting Chieftaincy (Chieftaincy Act, 2008)

Resolution of chieftaincy disputes such as causes or matters affecting chieftaincy are not subject to the District Court, Circuit Court, High Court, or Court of Appeal's jurisdiction or constitutional mandate. The Judicial Committees of the Traditional Council, Regional House of Chiefs, National House of Chiefs, as well as the Supreme Court (Chieftaincy Act, 2008) have jurisdiction to determine these disputes or cases (Chieftaincy Act, 2008). In the case of the Traditional Councils and various Houses of Chiefs, jurisdiction to determine the matter placed on the Judicial Committee (Ablakwa and Another v. Attorney General and Another, 2013) and not the whole council or house. It should be noted that the Supreme Court has appellate jurisdiction in matter affecting chieftaincy. The Supreme Court serves as the final appellate jurisdiction and last arbiter in matters affecting chieftaincy. The law does not remove the High Court's supervisory jurisdiction (Chieftaincy Act, 2008) over the judicial committees of the Traditional Councils, Regional Houses of Chiefs, and that of the National Houses of Chiefs, even though the High Court is barred from entertaining or determining any cause or matter chieftaincy. This supervisory jurisdiction is conferred on the High Court to ensure that the traditional institutions adhere to requisite legal requirements in the resolution of disputes brought before them; the most fundamental being the rules of natural justice (Korang, 2013); providing all disputing fair hearing and the arbitrators not being judges in their own cause, thus not having beneficial interest which is likely to make one bias.

However, appeals of the supervisory jurisdiction of the High Court arising from a cause or matter affecting chieftaincy lies at the Court of Appeal and Supreme Court respectfully.

On the other hand, initiating actions under customary arbitration specifically under causes or matters affecting chieftaincy as provided under section 76 of Act 759 is limited to only a person or persons with the legal competence and direct interest to initiate such as action. The capacity to bring such an action is restricted to only a person(s) who have suffered or likely to suffer directly an injury from an act or the omission on the issue in dispute. Brobbey and Brobbey (2022) that is well established in proceedings particularly when it comes to deposition in a matter affection chieftaincy. Only a person or persons who can enstool or enskin or enstool a chief can initiate an action for the deposition, thus only kingmakers, those persons who can make one a chief are the same persons cloth with the legal capacity to initiate actions to destool or deskin a chief (Brobbey & Brobbey, 2022).

1) International Arbitration

If any of the disputing parties reside in or are located outside the nation where the dispute has arisen or if the dispute involves a matter that is foreign or international, the arbitration is referred to as an international arbitration. If a party has more than one place of business, the location with the closest connection to

the arbitration agreement shall be considered in international arbitration under the Model Law. If the place of arbitration is located outside the country in which the parties have their business, any location where the parties have conducted a significant portion of their business or are closely associated, or any location where the parties in the arbitration.

Under section 59 of Act 798, the High Court is required to recognise the jurisdiction of the foreign arbitral tribunal as well as enforcing awards from such tribunals. When it comes to the legal requirements for the recognition and enforcement, the High Court must be satisfied that the award was made by a competent arbitral tribunal under the laws of the country in which the award was made, that a reciprocal arrangement must exists between that State and Ghana as well as or under the New York Convention, 1985 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958) specified in the First Schedule of Act 798 or any international convention on arbitration ratified by Parliament such as UNCITRAL Model Law.

Therefore, when it comes to issues of jurisdiction with international arbitration and particularly in Ghana with respect to the recognition and enforcement of arbitral agreement, clauses or awards section 59 of Act 798 sets out the legal requirements which must be met.

2) Ad Hoc Arbitration

The phrase Ad hoc in Latin means "for this" or "for this situation." This is used to describe something that has been formed or used for a special and immediate purpose, without previous planning. Thus, parties did not enter into arbitration agreement or clause in the main contract, but this keeps in as a submission to arbitration when a dispute arises out the contract.

In ad hoc arbitration, the parties agree on the rules and procedures to be followed in the arbitration. This is in contrast to institutional arbitration, where the rules and procedures are provided by an arbitration institution. Adjei and Ackah-Yensu (2021) note that ad hoc arbitration may occur in the form of domestic, international or foreign arbitration. What is essence worth noting is the fact that parties have arbitration agreement or clause in entering into the contract.

3) Institutional Arbitration

With Institutional arbitration, the arbitration is administered by an arbitration institution, such as the Ghana Arbitration Centre (GAC), International Chamber of Commerce (ICC) or the American Arbitration Association (AAA). In Ghana, the National Labour Commission (NLC) can be considered an Arbitration Institution when it comes to the resolution of industrial disputes. The NLC has its own rules on process and procedures for arbitration. Legislations and regulations such as the ADR Act, 2010, the Labour Act, 2003, and the Labour Regulations, 2007 are for consideration. It is worth noting that the competence of the NLC to facilitate or oversee the resolution of a dispute is dependent largely on whether or not the subject matter is linked to labour relations. The NLC would usually step in to address a matter brought before it if it is a labour

dispute. Arbitration with the NLC may well as designated as a subject matter-based jurisdiction, since its competence is limited to labour and industrial disputes.

Institutional arbitration can be either voluntary or compulsory, depending on whether the parties have agreed to submit their dispute to the arbitration institution or whether the use of the institution is required by law or contract.

The type of arbitration chosen will depend on the needs and circumstances of the parties involved, as well as the legal and regulatory framework in the jurisdiction where the arbitration is taking place. See Regulations 17 and 26 of the National Labour Commission Regulations (NLC), 2006 LI 1822.

9. Locus Standi in Arbitral Proceeding

The Latin phrase locus standi implies "the proper place to stand." It is the ability of a person or group of persons to file a lawsuit in court action. In other terms, locus standi refers to the person who has the authority to present a dispute before a court of competent jurisdiction or adjudicatory body. Locus standi is therefore the legal capacity of a person to maintain an action or the right a party must have in order to maintain an action in court. According to Brobbey and Brobbey (2022) capacity and locus standi is indispensable. They indicate that capacity deals with the legal authority of a plaintiff to initiate proceedings and that competence of the defendant to mount a defence to the action (Korang, 2013).

The accepted practice is that the person starting the action that leads to the ADR proceedings such as arbitration should have the legal authority, power, and legal competence. From above, ADR proceedings being civil disputes requires that the disputing parties must possess the above-mentioned legal criteria.

EFFECT OF ARBITRATION WHERE THE ISSUE OF JURISDICTION IS NOT FIRST RESOLVED

If an arbitrator or arbitration proceeding proceeds without first resolving the issue of jurisdiction, it could lead to further disputes. This is because jurisdictional issues go to the very heart of whether the arbitrator has the legal authority to decide the dispute.

Where an arbitrator decides a dispute without first determining whether they have jurisdiction, thus the competence to entertain the matter and it later turns out that they did not have jurisdiction, the entire arbitration award could set aside as invalid or risk non-recognition and enforcement. This could result in the parties having to start the arbitration process all over again, which can be time-consuming and expensive.

In addition, where the tribunal decides a dispute without first determining whether they have jurisdiction, the losing party could challenge the award in court. This could lead to further legal proceedings and additional costs for the parties.

Therefore, it is important for arbitrators to determine whether they have ju-

risdiction over a dispute before proceeding with the arbitration. This can be done by considering the language of the arbitration agreement, the applicable law, and any other relevant factors.

Also, where there is a dispute over jurisdiction, the arbitrator should resolve the issue before proceeding with the arbitration. This would help in ensuring that any subsequent arbitration award is valid, recognizable and enforceable.

However, whether or not an arbitral proceeding is voluntary or compulsory (involuntary) is of significant attention to be considered by the arbitral tribunal on the question of jurisdiction and the competence in determining a dispute. The main difference between a voluntary arbitration and a compulsory arbitration is the consent of the parties to the process. In a voluntary arbitration, the parties under party autonomy agrees to submit the dispute to arbitration and this is done without compulsion from any legislation, court or any state or private entity. On the other hand, in a compulsory arbitration, the parties are required by law or by contract to submit their dispute to arbitration, even if they may not have voluntarily chosen to do so.

In some jurisdictions, compulsory arbitration may be required in certain industries or for certain types of disputes, such as labour disputes or disputes involving certain government agencies.

10. Components of an Arbitration Proceeding

An arbitration management conference is a meeting that is typically held between the arbitrator(s) and the parties, either in person, virtually or by telephone, to discuss the procedural aspects of the arbitration.

Section 29 of the ADR Act, 2010 delineates the concept and implementation of an "Arbitration Management Conference". This provision stipulates the organisation of a conference between the arbitrator and the parties involved within fourteen days of the arbitrator's appointment, unless the parties decide otherwise.

The arbitrator is required to give a seven-day written notice prior to the conference. The meeting can be conducted in person or through electronic or telecommunication media. This conference's purpose is to determine a series of critical aspects relating to the arbitration process, including:

1) Timetable: The arbitrator(s) will set out a timetable for the various stages of the arbitration process, such as the submission of pleadings, the exchange of evidence, and the hearing itself.

2) Discovery: The parties may discuss the scope and timing of discovery, including the types of documents that will be exchanged, and whether or not depositions will be permitted.

3) Expert witnesses: The parties may discuss the use of expert witnesses, including the appointment of experts, the scope of their testimony, and the timing of their reports.

4) Preliminary issues: The parties may identify any preliminary issues that

need to be addressed before the hearing, such as questions of jurisdiction, the admissibility of evidence, or the scope of the dispute.

5) Hearings: The parties may discuss the format and duration of the hearing, including whether it will be conducted in person or remotely, and the estimated length of time required.

6) Interim measures: The parties may discuss any interim measures that need to be put in place pending the outcome of the arbitration, such as requirements to preserve evidence or maintain the status quo.

7) Costs: The parties may discuss the allocation of costs associated with the arbitration, such as the fees charged by the arbitrator(s), and any other expenses that may be incurred.

8) Any other issues pertinent to the arbitration

The arbitrator's or tribunal's decisions made during the conference must be documented in writing and served to all parties. These issuances are termed procedural orders.

9) **Outlining the activities to be undertaken by parties**

Additionally, to ensure effective case management and timely resolution, the arbitrator or tribunal may hold further arbitration management conferences as necessary. However, this is subject to the provision of adequate written notice to all parties involved, allowing them to prepare and participate effectively in these conferences.

11. Forms of Arbitral Awards

Arbitral awards may come in various forms. In an arbitration, the tribunal can make various types of awards depending on the nature of the dispute and the relief sought by the parties. Here are some forms of awards in arbitration:

1) Final Award: This is the award that is typically made at the end of the arbitration process, and it usually resolves all the issues in dispute.

2) Partial Award: A partial award can be made on a specific issue or set of issues that have been resolved, while the other issues in dispute are still pending for a final determination.

3) Interim Award: An interim award can be made during the course of the arbitration proceedings to address temporary or urgent matters, such as the preservation of evidence or the grant of an injunction.

4) Consent Award: A consent award is made when the parties agree to settle their dispute and ask the arbitrator(s) to record the terms of the settlement in the form of an award is termed as consent award.

5) Default Award: A default award may be made when one party fails to participate in the arbitration or comply with the rules of the arbitration process, and the arbitrator(s) are therefore required to make a decision in the absence of that party.

6) Remedial Award: This type of award is made when the arbitrator(s) or tribunal requires a party to take specific actions to remedy a breach of contract

or other wrongdoing.

7) Punitive Award: In some disputes, the arbitrator(s) or tribunal may award damages as remedy to one party for the actions of the defaulting party, particularly if those actions were wilful or malicious.

12. Conclusion

The competence of the arbitral tribunal lies on jurisdiction to determine a dispute, which would become a valid final award that brings to an end the arbitral proceedings or resolution of the dispute by the tribunal. And the tribunal deemed to have completed its work, referred in Latin as functus officio.

The doctrine of functus officio in Latin stands for "having performed the office", meaning that once an arbitrator renders an award or determines a dispute regarding the issues submitted, the arbitrator or tribunal lacks any jurisdiction to re-examine that decision. The work of the tribunal is completed. The tribunal has no further jurisdiction and competence any further that entertain the matter such as the enforcement of the award. This is now left to the parties willing submission to performing the award so-granted and in the absence of voluntary submission, the aggrieved party seeking the intervention of the court for recognition and enforcement of the award.

When it comes to the recognition and enforcement of arbitral awards, the national court where the application is sort has exclusive jurisdiction to the exclusion of the arbitral tribunal. In the Ghanaian situation, this power lies with the High Court for the recognition and enforcement of arbitral awards.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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