

10

**REPORT OF THE COMMITTEE ON CONSTITUTIONAL, LEGAL AND  
PARLIAMENTARY AFFAIRS ON THE ALTERNATIVE DISPUTE RESOLUTION  
BILL**

1.0 **INTRODUCTION**

1.1 The Alternative Dispute Resolution Bill was re-presented and read the first time in Parliament on the 7<sup>th</sup> of July 2009. Rt. Hon. Speaker referred the Bill to the Committee on Constitutional, Legal and Parliamentary Affairs for consideration and report pursuant to Article 106 (4) and (5) of the Constitution and Standing Order 179 of the House.

2.0 **DELIBERATION**

2.1 The Committee held a total of three sittings to consider the Bill. Prof. Justice V.C.R.A.C. Crabb, Statute Law Revision Commissioner and Mr. Henry Tackie, Principal State Attorney, both of the Attorney-General's Office, were amongst others in attendance on the invitation of the Committee to assist in deliberations.

The Committee however took note of the fact that the Fourth Parliament was actually ceased with the Bill and carried out extensive work on it up to the consideration stage. Work on the Bill was stalled just before the end of the last Meeting due to the tall agenda of the House. The current text of the Bill has thus been enriched by the outcome of broad consultations and extensive discussions with critical stakeholders ranging from the Bar and the Bench, academia, practitioners, a cross section of Public Servants, non governmental organisations and civil society groups during the Committee stage as well as the second reading at plenary.

Among the experts who participated in the above consultation and discussion sessions were Justice Anin Yeboa of the Supreme Court and Justice Nasiru Sulemana Gbadegbe then of the Court of Appeal, Prof Edward Kofi Quarshigah, Dean of the Faculty of Law, University of Ghana, Legon, Mr. Austin Gamey and Mr. Ben Akafia from Gamey and Gamey Academy. The Attorney-General's Office was also adequately represented in the consultative sessions. The Committee is grateful to the above resource persons for their valuable input and is pleased to report as follows:

### 3.0 **REFERENCE DOCUMENTS**

- 3.1 The Committee had recourse to the under-listed documents during deliberations on the Bill:
- a. The 1992 Constitution,
  - b. The Standing Orders of Parliament,
  - c. The Courts Act, 1993,(Act 459),
  - d. The Arbitration Act, 1961, (Act 38), and
  - e. The United Nations Commission on International Trade Law (UNCITRAL) Rules

### 4.0 **BACKGROUND**

- 4.1 The Arbitration Act, 1961 (Act 38) is currently the only existing legal framework which guides alternative dispute resolution in the country. The Act 38 which replaced the Arbitration Ordinance of 1928 was based on the then English Arbitration Act of 1950. Since the passage of the Act 38 the English Arbitration Act has undergone several revisions resulting in the current Arbitration Act of 1996 which encapsulates the rules of the United Nations Commission on International Trade Law (UNCITRAL). Lack of a comprehensive established

legal framework for the settlement of disputes outside the traditional legal system of administration of justice has resulted in protracted court processes in which cases that could otherwise be resolved without recourse to court are found pending for years thus delaying the administration of justice.

Arbitration provides an alternate means of resolving disputes without recourse to all the technical and formal procedures as well as the frustrations which characterise the court process, including the protracted nature of the court process.

The need to establish a comprehensive legal framework for alternative forms of dispute settlement procedures in addition to arbitration and to incorporate customary arbitration without unduly changing its nature necessitated the introduction of this Bill.

## 5.0 **OBJECT AND PURPOSE OF THE BILL**

5.1 The Bill seeks to replace the existing Arbitration Act, 1961 (Act 38) and harmonise the law governing arbitration with international conventions, rules and practices in arbitration, mediation and customary arbitration. It further seeks to establish an Alternative Dispute Resolution Centre to facilitate and encourage the settlement of disputes through alternative dispute resolution procedures and to provide for related matters.

## 6.0 **PROVISIONS OF THE BILL**

6.1 The Bill is organised into five main parts consisting of arbitration, mediation of disputes, customary arbitration, the Alternative Dispute Resolution Centre and financial, administrative and miscellaneous provisions.

### 6.1.1 **Part 1 - Arbitration**

This part covers clauses 1 to 63 and provides for an arbitration agreement, the qualification and appointment of an arbitrator, the impartiality and challenge of an arbitrator, the revocation of arbitrator's authority, vacancy in the arbitral tribunal, the jurisdiction of an arbitral tribunal, the arbitral process and powers of the Court in relation to awards.

#### **Clause 1**

This clause provides for matters to which this Act does not apply. These include matters relating to the national or public interest, the environment, the constitution or any other matter which cannot be settled by the alternative dispute resolution method.

#### **Clause 2**

Clause 2 makes provision for parties to a written agreement to resolve disputes arising from the agreement through arbitration as provided for in the agreement or in a separate agreement.

#### **Clause 3**

Clause 3 provides for the validity or otherwise of an arbitration agreement and the basis for its revocation.

#### **Clause 4**

Clause 4 establishes the fact that an arbitration agreement is not discharged by death and makes such agreement enforceable against the legal representative of a deceased party to the agreement.

#### **Clause 5**

Clause 5 empowers a party to a dispute in respect of which an arbitration agreement exists to refer the dispute to any person, institution or the Alternative Dispute Resolution Centre established under the Act for arbitration. It further indicates the specific rules and procedures applicable to the arbitration subject to the entity conducting the arbitration.

#### **Clause 6**

This clause provides for a party to an action brought before a court to make application to that court for the action or part of it to which an arbitration agreement relates to be referred to arbitration upon notice to the party who commenced the action.

#### **Clause 7**

Under this clause, a court before which an action is pending is empowered, subject to the consent of the parties to refer that action to arbitration whether or not an arbitration agreement exists between the parties.

#### **Clause 8**

Clause 8 empowers a party to an arbitration agreement to make a new claim or a counterclaim or even change a defence subject to a procedure agreed upon by the parties.

### **Clauses 9, 10 & 11**

Clause 9 allows for modification of time with regards to arbitration or other dispute resolution subject to agreement by the parties and the conditions for making an award. Clause 10 on the other hand empowers parties to an arbitration to agree on their own methods of reckoning time in relation to the arbitration while clause 11 provides the power for determination of venue and the conditions for the exercise of such power.

### **Clauses 12 & 13**

Clause 12 relates to the qualification of an arbitrator and makes it determinable based on agreement by the parties and clause 13 gives the parties the liberty to determine the number of arbitrators.

### **Clause 14**

Clause 14 indicates the procedure for appointing an arbitrator, the procedure to be followed for the appointment where the agreement does not so provide and related matters.

### **Clause 15**

Clause 15 relates to impartiality and grounds for the challenge of an arbitrator and enjoins a person requested to be an arbitrator to disclose in writing any circumstance likely to give justifiable doubt as to that person's independence or impartiality. It also estoppes a party from challenging an arbitrator in whose appointment that party participated.

### **Clause 16**

Clause 16 offers parties the freedom to agree on the procedure for challenging

the appointment of an arbitrator and further provides the procedure for the challenge where the appointment is by person(s) other than the parties.

### **Clauses 17 & 18**

Clauses 17 and 18 empower parties and the High Court respectively for the revocation of an arbitrator's authority and specify the grounds for the revocation

### **Clause 19**

In clause 19 provision is made for the resignation of an arbitrator based on agreement with the parties. In the absence of such an agreement there is a further provision for the arbitrator who resigns to apply to the appointing authority or the Court for necessary expenses and relief for any liability incurred, as well as for appropriate orders in respect of entitlement to fees or expenses, on notice to the parties.

### **Clauses 20 & 21**

Clause 20 provides for cessation of the arbitrator's authority on the death of the arbitrator and guarantees the appointment of an arbitrator even upon the death of the person(s) who made the appointment. Clause 21 states the procedure for filling the position of an arbitrator and for the adoption or otherwise of previous proceedings.

### **Clause 22**

This clause requires the parties and the arbitrators to agree on the arbitration fees payable subject to specified conditions and holds the parties jointly and severally responsible for the payment of the agreed fees. It further enables a

party to apply to the appointing authority or the High Court for the resolution of any dispute relating to fees.

### **Clauses 23, 24 & 25**

Clause 23 confers immunity on an arbitrator for all acts and omission done in good faith. Clause 24 clothes the arbitral tribunal with jurisdiction to rule on the existence, scope and validity of an arbitration agreement and to determine whether the matter submitted for arbitration is in accordance with the arbitration agreement. Clause 25 provides for the timing of an objection to jurisdiction by a party.

### **Clause 26**

The procedure, duration and processes for appealing to the appointing authority or the Court against a ruling of an arbitrator are dealt with in clause 26.

### **Clauses 27 & 28**

Clause 27 specifies the circumstances under which a party's right to raise an objection against an arbitration proceeding shall be waived. Clause 28 on the other hand indicates the remedies available to a party to an agreement who has not been notified of arbitration proceedings arising out of the agreement.

### **Clauses 29 & 30**

Clause 29 relates to arbitration management conferences and specifies the requirements and processes involved in such conferences while clause 30 empowers the appointing authority or any institution, subject to the consent of



the parties to arrange a conciliation conference at any time during the arbitration process for the resolution of the dispute.

### **Clause 31**

Clause 31 provides for the duties and powers of the arbitrator in proceedings and specifies the matters of procedure and evidence upon which the arbitrator shall decide.

### **Clauses 32 & 33**

In clauses 32 and 33 the parties are free to agree on the language of the arbitration proceedings and the time for the submission of statements of claims, defences and counterclaims respectively.

### **Clause 34**

Clause 34 enjoins the arbitrator to give the parties notice specifying the dates of the hearing, gives an indication about the timing and procedure for the conduct of the hearing and further provides for the confidentiality of proceedings.

### **Clauses 35 & 36**

Clause 35 provides for the taking of evidence and indicates the procedure for admitting evidence presented by affidavit. The filing of documents and other evidential materials after the hearing and the requirements and role of the parties as well as the arbitrator in such processes are dealt with in clause 36.

### **Clauses 37 & 38**

Clause 37 states the requirements for the arbitrator in relation to the conduct of investigation or inspection as well as the attendance or otherwise by a party to

such inspection or investigation. Clause 38 empowers the arbitrator to grant at the request of a party any interim relief(s) considered necessary for the protection and preservation of property including costs related to applications for such interim relief(s).

**Clause 39**

Clause 39 vests the Court with the power to make appropriate orders in relation to the conduct of arbitration proceedings.

**Clause 40**

Clause 40 empowers the Court, subject to agreement by the parties to the contrary and on an application by a party with notice to the other party to make a determination of any questions of law that may arise in the course of the arbitral proceedings.

**Clause 41**

Clause 41 empowers the arbitrator to determine the manner in which witnesses are examined and the relevance and materiality of such evidence in conformity with the rules of natural justice.

**Clause 42 & 43**

Clause 42 allows a party to be represented by counsel subject to agreement by the parties. Clause 43 relates to the appointment of an independent witness to report on issues specified by the arbitrator. It permits the parties to cross examine such witnesses and vests authority in the arbitrator in the settlement of any disputes which may arise between the expert witness and the parties.

### **Clauses 44, 45 & 46**

Clause 44 empowers the arbitrator to postpone a hearing at his own request, at the request of a party upon sufficient reason or upon agreement by the parties. Clause 45 empowers an arbitrator to declare a hearing closed and the grounds for such declaration while clause 46 provides for the re-opening of hearings and the grounds for doing so.

### **Clauses 47, 48, 49, & 50**

In Clause 47 the arbitrator is empowered to encourage settlement of the dispute prior to arbitration and to thereafter terminate the arbitration proceedings and record the settlement in the form of an arbitral award subject to agreement between the parties. Furthermore, clauses 48, 49 and 50 indicate the rules for arbitral awards, the form and content of the awards and the scope of the awards respectively.

### **Clauses 51, 52 & 53**

Clause 51 enjoins the arbitrator to assess the arbitration fees, expenses and compensation in the award while clause 52 states the binding nature of an arbitral award as between the parties and any person(s) claiming under them. Clause 53 empowers an arbitrator to correct any errors or make any additional awards after delivering an award within a specific time, either at the request of a party or on his own volition.

### **Clause 54**

Clause 54 absolves an appointing authority or arbitrator from liability for any act or omission in connection with an arbitration, except for deliberate wrong doing.

### **Clauses 55 & 56**

Clause 55 enjoins parties to bear the expense of any witness called by them and indicates the manner in which parties should share the expenses of the arbitration. Clause 56 empowers the arbitrator to withhold arbitral awards for the non payment of fees and expenses of that arbitrator and indicates the procedures and processes associated therewith.

### **Clauses 57, 58 & 59**

The manner in which an arbitral award should be enforced is provided for in clause 57 while clause 58 indicates the procedure for challenging arbitral awards in the High Court including the appellate process. Clause 59 relates to the enforcement of foreign awards by the Court.

### **Clauses 60, 61 & 62**

Clauses 60, 61 and 62 provide for expedited arbitration proceedings, agreement by parties for the modification of the rules of the Centre in respect of their dispute and the effect of an award made in expedited proceedings respectively.

## **6.1.2 Part Two - Mediation of Disputes**

This part comprises clauses 63-88.

### **Clauses 63, 64 & 65**

Clause 63 empowers parties to an agreement to submit a dispute arising from that agreement to mediation and provides the requirements and conditions under which the mediation may commence. Clause 64 empowers the Court to refer an action before it for mediation subject to specified conditions. Clause 65

indicates the number of mediators in an agreement, subject to agreement by the parties to the contrary.

### **Clauses 66, 67, & 68**

Clause 66 vests in parties the right to appoint their own mediator and permits parties to request assistance in the appointment of a mediator. Clause 67 specifies the qualifications of a mediator having regards to any personal or financial interest in the matter. Furthermore, clause 68 enjoins the appointed mediator to disclose any circumstances likely to cause a presumption of bias or affect the mediation prior to accepting the appointment or throughout the proceedings.

### **Clauses 69 & 70**

Clause 69 relates to the prerogative of the parties to terminate a mediator's appointment on grounds of delay and clause 70 empowers the parties to replace a mediator.

### **Clauses 71, 72 & 73**

Clause 71 allows a party to be represented by a lawyer, expert witness or any other person of their choice provided that the extent of the mediator's authority and other information is disclosed to the other parties. Clause 72 vests the mediator with the authority to determine in consultation with the parties the date, time and venue for the mediation. Clause 73 provides for identification of issues in disputes and provides the time frame within which parties are to present memoranda setting out the issues for resolution.

### **Clauses 74, 75, 76 & 77**

The powers of a mediator and a mediator's right to administrative assistance to facilitate the mediation proceedings are provided for in clauses 74 and 75 respectively. The right of the mediator to invite parties to meet and the mode of communication of such invitation to the parties are dealt with in clause 76, while clause 77 determines the persons qualified to attend mediation sessions.

### **Clauses 78 & 79**

The rules on disclosure of information to a party subject to confidentiality including the rules governing confidentiality of the entire mediation process are provided for in clauses 78 and 79.

### **Clauses 80, 81 & 82**

The determination of the end of a mediation process and the conditions governing such determination are set out in clause 80. Clause 81 relates to the conditions and processes associated with arriving at a settlement in mediation and clause 82 indicates the status and effect of a settlement agreement.

### **Clause 83**

Clause 83 prohibits parties to the mediation process from initiating arbitral or judicial proceedings in respect of the dispute which is the subject or part of the mediation, except where necessary for preserving the right of a party.

### **Clauses 84, 85 & 86**

Clause 84 bars a mediator from acting as either an arbitrator or a representative or counsel of a party in any arbitral or judicial process unless otherwise agreed by the parties. Clause 85 also prohibits the parties from

introducing or relying on evidence from mediation proceedings in any arbitral or judicial proceedings, irrespective of whether such proceedings relate to the dispute. Clause 86 exempts a mediator from liability in any court proceedings relating to mediation under this Act.

### **Clauses 87 & 88**

Clause 87 enjoins the payment of all mediation expenses equally by the parties subject to the express agreement by the parties to the contrary. Clause 88 empowers a mediator to direct parties to pay deposits of equal amounts for the expenses of the mediation and further enjoins the mediator to render accounts to the parties at the end of proceedings.

### **6.1.3 Part Three – Customary Arbitration**

Part 3 of the Bill provides for customary arbitrations and covers clauses 89 to 113.

#### **Clause 89**

Clause 89 requires a party to a dispute to submit the dispute to customary arbitration and precludes any person from submitting a criminal matter for customary arbitration or serving as an arbitrator in a criminal matter except otherwise directed by a court.

#### **Clauses 90 & 91**

Clause 90 states the process which constitutes a submission to customary arbitration, provides for the payment of fees by the parties and the conditions under which customary arbitration can commence. Clause 91 enables a court

to order a dispute pending before it is submitted by the parties for customary arbitration, with the consent of parties.

### **Clauses 92, 93 & 94**

The qualification of a customary arbitrator and the rules of customary arbitration are provided for in clauses 92 and 93; clause 94 enables parties to conduct a customary arbitration with the Centre and states the registration requirements of the Centre.

### **Clauses 95, 96 & 97**

Clauses 95, 96 and 97 relate respectively to the number of customary arbitrators permitted in a customary arbitration, the requirements for the appointment of a customary arbitrator and the notice for the appointment of a customary arbitrator.

### **Clauses 98 & 99**

Clause 98 enjoins a customary arbitrator to disclose any circumstance likely to affect the arbitrator's independence or impartiality. Clause 99 provides for the challenging of the customary arbitrator and the grounds for that challenge.

### **Clauses 100, 101 & 102**

Clause 100 provides for the revocation of the customary arbitrator's appointment. Clauses 101 and 102 provide for the resignation and death of the customary arbitrator respectively.

### **Clauses 103, 104 & 105**

The filling of a vacancy in customary arbitration, the place, date and time for the



first customary arbitration session and withdrawals from the arbitration process are covered in clauses 103, 104 and 105 respectively.

#### **Clause 106**

Clause 106 enables the parties to agree to choose any language for the conduct of the proceedings

#### **Clauses 107 - 111**

The time, form, effect, registration and enforcement of a customary arbitration award are all provided for in clauses 107, 108, 109, 110 and 111 respectively.

#### **Clauses 112 & 113**

Clause 112 provides the grounds for setting aside a customary award while clause 113 provides for the application of customary arbitration to a negotiated settlement and the conditions applicable to such a settlement.

### **6.1.4 Part Four**

This part covers provisions on the Alternative Dispute Resolution Centre and is provided for in clauses 114 to 124.

#### **Clauses 114 - 120**

Clauses 114, 115, 116, 117, 118, 119 and 120 provide for the establishment of the Centre, the object and functions of the Centre, the independence of the Centre, the governing board, tenure of office of Members of the Board, allowances for members of the Board and the meetings of the Board respectively.

### **Clauses 121, 122, 123 & 124**

Clause 121 provides for disclosure of interest by members of the Board or of a committee of the Board in any matter under consideration by the Board. Clause 122 provides for the establishment of committees of the Board. Clauses 123 and 124 make provisions for the registration of arbitrators and mediators on application to the Centre and the creation of regional and district offices for the Centre respectively.

### **6.1.5 Part Five**

Part five covers financial, administrative and miscellaneous provisions from clauses 125 to 138.

### **Clauses 125-130**

Clause 125 provides for the establishment of an Alternative Dispute Resolution Fund and clauses 126 and 127 outline the objects and management of the Fund. The functions of the Board in relation to the Fund, the appointment of an Executive Secretary and other staff of the Centre are dealt with in clauses 128, 129 and 130 respectively.

### **Clause 131**

Clause 131 provides for the delegation of the power of appointment under the Constitution.

### **Clauses 132 & 133**

Audit, financial year and annual reports are provided for in clauses 132 and 133 respectively.

### **Clauses 134 & 135**

Clause 134 gives power to the Minister to issue Regulations for the effective and efficient implementation of the Act. Clause 135 provides for Interpretation.

### **Clauses 136, 137 & 138**

Clause 136 makes provision for the modification of court rules. Clauses 137 and 138 outline the repeals and savings of this Act and establish transitional provisions respectively.

## **7.0 OBSERVATIONS**

7.1 The Committee noted that the Alternative Dispute Resolution Bill is one of the bold initiatives by Government under the legal sector reform project to broaden the scope of administration of justice, ensure fair access to justice delivery and the speedy resolution of disputes at less cost. The Committee particularly noted that the Bill provides for the establishment of an institutional framework which will facilitate the settlement of disputes through arbitration. It also provides for other forms of voluntary dispute settlement procedures including customary arbitration. The Bill, when passed would eliminate the tedious formalities, frustrations and delays that characterise the long and protracted nature of litigation in the traditional courts. It would result in cost effectiveness in terms of man hours and legal fees.

The Committee also observed with satisfaction that the alternative dispute resolution procedures would be conducive to more healthy relationships as opposed to the adversarial system in the traditional courts which often leaves disputants worse off.

The Committee noted a number of positive developments to the Bill in its current form including the role of the Centre and customary arbitration.

## **7.2 The Role of the Centre**

The Committee together with the stakeholders endorsed the limited role assigned to the Centre in the Bill. In the previous edition of the Bill, the Centre was to provide facilities and manage the entire alternative dispute settlement process. The current Bill confines the role of the Centre to educating the public on the benefits of the ADR process, the undertaking of research aimed at improving settlement, updating the public with a list of practitioners and the provision of conference facilities in order to facilitate the arbitration process.

## **7.3 Customary Arbitration**

The Committee noted with satisfaction that customary arbitration which had been practiced for years is now being mainstreamed under this Bill. This initiative the Committee noted will go a long way to strengthen the processes associated with such methods of dispute resolution. Against this background, the Committee supports the new mandate of the Centre to increase awareness and deepen public confidence in the system of alternative dispute resolution.

## **7.4 Amendments proposed**

The Committee proposes the following amendments for consideration by the House:

- I. Clause 16 - amendment proposed – sub-clause 4, delete
- II. Clause 35 – amendment proposed – after sub-clause “2” add the following sub-clauses:

"(3) Where evidence by affidavit is admitted the arbitrator may permit a party to cross examine the witness who presented that evidence

(4) An arbitrator may in admitting an affidavit allow a party, a request calling for the re-examination of the deponent of the affidavit".

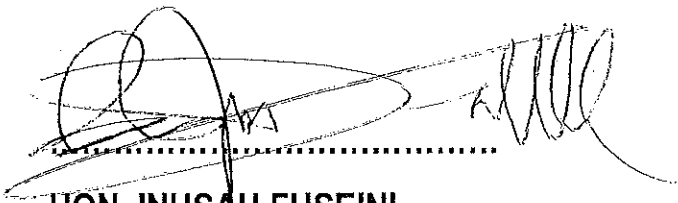
- III. Clause 58 – amendment proposed – sub-clause (2), line 1, delete "High".
- IV. Clause 58 – amendment proposed – sub-clause (2), paragraph (f), lines 1 & 2 delete "umpire".
- V. Clause 63 – amendment proposed – sub-clause (3), line 4, after telephone insert "and fax".
- VI. Clause 68 – amendment proposed – sub-clause (2), line "2", delete "arises" and insert "arise".
- VII. Clause 112– amendment proposed – sub-clause (1), line 1, before "High Court" insert "nearest District Court, Circuit Court or".
- VIII. Clause 115 – amendment proposed – sub-clause (2), paragraph (j), delete all the words before "register"
- IX. Clause 115 – amendment proposed – sub-clause (2), paragraph (k), delete all the words before "request".

## **8.0 RECOMMENDATIONS AND CONCLUSION**

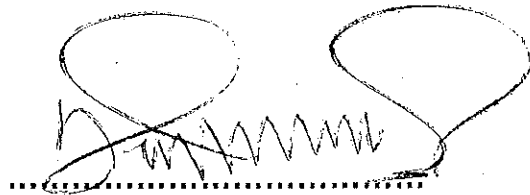
The Committee has carefully examined the provisions of the Bill in the light of its object and purpose and notes that the inclusion of alternative dispute resolution methods in the justice delivery system is necessary and appropriate for the

creation of a wider legal frame work for the speedy administration of justice. The Committee accordingly recommends its passage by the House subject to the above proposed amendments.

Respectfully submitted



**HON. INUSAH FUSEINI**  
**CHAIRMAN, COMMITTEE ON**  
**CONSTITUTIONAL, LEGAL &**  
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**MR. EBENEZER DJIETROR**  
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