

# COMPLEX COMMERCIAL LITIGATION

## Ghana



# Complex Commercial Litigation

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights into the litigation market and legal framework; pre-action considerations (including alternative dispute resolution); bringing and defending a claim; procedural steps; funding; costs; appeals; cross-border enforcement; the advantages and disadvantages of litigating in this jurisdiction; and recent trends.

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**BACKGROUND****Frequency of use**

How common is commercial litigation as a method of resolving high-value, complex disputes?

Commercial litigation is one of the common methods for resolving high-value complex disputes in Ghana. There is an established Commercial Division of the High Court that is specifically dedicated to resolving commercial disputes. This Commercial Division of the High Court has become the court of first instance for resolving complex commercial disputes. The distinctive feature of the specialised procedure for commercial disputes in the High Court is the fact that the rules promote the amicable resolution of commercial disputes by setting up a mandatory pretrial settlement conference where parties are encouraged to settle their disputes and only proceed to trial where settlement fails. However, the establishment of the Commercial Division of the High Court has not completely solved the caseload problem of the judicial system. As a result, arbitration is increasingly becoming a viable alternative for the resolution of high-value commercial disputes in Ghana.

*Law stated - 19 July 2022*

**Litigation market**

Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

The litigation market in Ghana is vibrant and remains the main dispute resolution mechanism in Ghana. While some of the high-value commercial disputes in Ghana often involve an international party and a Ghanaian party, most of the disputes before the courts in Ghana do not involve international parties.

Accra is undoubtedly the main hub of commercial litigation and the centre of most of the high-value commercial disputes in Ghana. However, regional courts, especially in Kumasi (Ashanti Region) and Sekondi (Western Region) are also centres for significant commercial litigation although disputes in the regional courts are often low value and typically involve only domestic parties.

*Law stated - 19 July 2022*

**Legal framework**

What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

Ghana is a common law jurisdiction. Under the 1992 Constitution of Ghana, the common law comprises the rules of law generally known as 'common law' and 'equity'. As such, common law principles and case law play an important role in commercial litigation. However, if there is a statute on a particular issue, the courts are bound to apply the statute.

Practically, this has the following implications. First, the Ghanaian courts rely on the principle of stare decisis in decision making. Thus, the decisions of the apex court, the Supreme Court of Ghana, is binding on all courts on questions of law. Most of the issues that arise in commercial disputes are often resolved by reference to the ratio (main principle) in an existing precedent. Second, in circumstances where there are non-applicable Ghanaian laws, section 54 of the Courts Act allows the Ghanaian courts to apply the principles of the common law that will do substantial justice. In the determination of an issue arising from the common law, 'the Court may adopt, develop, and apply remedies from a system of law, whether Ghanaian or non-Ghanaian, that appears to meet the requirements of

justice, equity, and good conscience.’

The main rules of procedure for commercial litigation are contained in the High Court (Civil Procedure) Rules 2004 (CI 47), as amended.

*Law stated - 19 July 2022*

## BRINGING A CLAIM - INITIAL CONSIDERATIONS

### Key issues to consider

What key issues should a party consider before bringing a claim?

First, before instituting a claim, a party should consider whether the Defendant has assets in Ghana that may be attached in execution of a final judgment or which may be protected by means of interim orders. In the absence of assets held by the defendant in Ghana, any judgments or orders that one obtains could be futile. However, if there are assets that need to be preserved, initiating a claim in the courts may be advantageous.

Second, once the plaintiff determines that it may not end up with an empty judgment in Ghana, the plaintiff must determine whether the claim is not out of time. For disputes arising from a contract, the plaintiff has six years from the date of the breach to commence proceedings. If Ghana law is not the applicable substantive law, then the limitation period of the foreign law that applies to the dispute will determine whether the claim is time-barred.

Third, the plaintiff should consider the merits of the claim. This will depend on the facts of the case, the nature of reliefs the plaintiff seeks from the court, and tactical formulation of the claim.

Fourth, the plaintiff must also consider other options that may provide a more efficient resolution under the circumstances. The publicity of court proceedings means that some confidential information or business secrets may be disclosed during the litigation. Also, the appellate process linked to the judicial system means that it could take years for a final resolution of the dispute to materialise. Thus, if the circumstances of the case make it more efficient to adopt an alternative strategy like arbitration, one should consider such options seriously.

*Law stated - 19 July 2022*

## Establishing jurisdiction

How is jurisdiction established?

The High Court (Commercial Division) is usually the court of first instance for high value complex commercial disputes. The jurisdiction of the High Court is broad. It generally has original jurisdiction over all civil and criminal matters.

Regarding foreign parties, the courts will exercise jurisdiction over natural persons under the following circumstances:

- where they are present in Ghana and can be served with a writ;
- where the foreign party is resident in Ghana;
- where the foreign party submits to the jurisdiction of the court (eg, by choosing the High Court of Ghana as the forum for disputes under a contract); or
- where the courts grant a plaintiff leave to serve notice of a writ of summons on a party outside the jurisdiction of Ghana.

For foreign companies, the courts will exercise jurisdiction if the foreign company is resident in Ghana or doing business in Ghana. Like natural persons, the proof of service of the writ of summons on the company is sufficient to

allow the court to exercise jurisdiction over the party. However, foreign parties with exclusive jurisdiction clauses that exclude the Ghanaian courts may raise an objection to the jurisdiction of the Ghanaian courts over their dispute. Typically, the courts uphold such jurisdiction agreements but, in some instances, the courts may dismiss such an objection on the basis that the dispute is most closely connected to Ghana than the foreign court.

Where a defendant starts overlapping proceedings in another jurisdiction, the court may put the parties to election on which proceedings to move forward with. Alternatively, the courts may stay its proceedings in favour of the foreign proceedings. However, where there is an exclusive jurisdiction agreement submitting the dispute to the Ghanaian court, then the courts will exercise jurisdiction.

*Law stated - 19 July 2022*

## Preclusion

Res judicata: is preclusion applicable, and if so how?

The principle of Res judicata is applicable to commercial litigation cases in Ghana. The courts will generally refuse to adjudicate a matter or issue if one party establishes the following:

- the same matter or a particular issue has previously been decided by a court;
- the court in the previous matter was competent to determine the matter or issue;
- the previous judgment was final and conclusive; and
- the previous matter was between the same parties, their privies, agents, assignees, descendants and any other person claiming through them.

However, the principle of res judicata will, not apply where the previous action was discontinued with liberty to bring a fresh action; and where the previous action was dismissed for want of prosecution.

Res judicata applies to Ghanaian judgments as well as foreign judgments. Where the principle applies, a party can apply to the Ghanaian court to strike out the new action.

*Law stated - 19 July 2022*

## Applicability of foreign laws

In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

Ghanaian courts often deal with complex commercial disputes that are governed by foreign law. Generally, the courts respect the intentions of the parties on the choice of law as expressed in the contract. The courts may, however, refuse to apply the foreign law expressly chosen by the parties if it is contrary to public policy or statute. Where the parties fail to expressly provide for their choice of law, the courts will apply the law of the country with which the contract is most closely associated or connected. However, in applying foreign law, Ghanaian courts operate with the legal presumption that foreign law is the same as the law of Ghana. This means, a party invoking foreign law in the Ghanaian courts must prove it. The party relying on foreign law must call a legal expert of the foreign jurisdiction as a witness to testify as to the state of the foreign law on the specific issue. Thus, it is tactically useful to adduce evidence on foreign law if the applicable provisions of the foreign law provide some advantage that Ghanaian law does not provide. Where the court is confronted with conflicting expert opinions on the foreign law in question, the court will examine the opinions and determine which expert's interpretation of the foreign law is preferable.



**Initial steps**

What initial steps should a claimant consider to ensure that any eventual judgment is satisfied?  
Can a defendant take steps to make themselves 'judgment proof'?

Before instituting the claim, the plaintiff must consider whether the obligation owed is secured. In that case, a successful suit may result in the realisation of the security. However, if the obligation is unsecured, the plaintiff must investigate the defendant first to ensure that there are available assets that can be attached in execution of the eventual judgment. The available information will inform the strategy of the plaintiff to seek injunctive orders for the preservation of assets and freezing orders to prevent the defendant from dissipating assets that may be levied in satisfaction of the eventual judgment. It is also important to consider whether the defendant is in administration or liquidation. In both instances, the law restricts the ability of a party to enforce a judgment against the defendant.

Law stated - 19 July 2022

**Freezing assets**

When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

A plaintiff may freeze the defendant's assets before obtaining judgment. Before judgment, the plaintiff may apply for a freezing injunction against the defendant as an interim measure. The freezing injunction prevents a defendant from moving or unjustifiably dissipating its assets to make itself judgment proof.

The plaintiff must prove the following: (1) that the plaintiff has a good arguable case; (2) that the defendant has assets either within or outside the jurisdiction; and (3) that there is a real risk that the defendant is about to remove or dissipate her assets with the purpose of defeating or rendering nugatory any judgment that the plaintiff may obtain against the defendant.

The freezing order can be made against various types of assets (tangible and intangible) identified in the injunction application, as long as the order can be enforced against the assets. Under the High Court (Civil Procedure) Rules, the court may order the applicant to provide security, in the form of an undertaking to pay damages, as a condition for the grant of the freezing injunction.

The power of the court to grant freezing injunctions is not limited to only litigation. Under the Alternative Dispute Resolution Act 2010 (Act 798), the High Court can grant a freezing injunction in aid of arbitration.

Law stated - 19 July 2022

**Pre-action conduct requirements**

Are there requirements for pre-action conduct and what are the consequences of non-compliance?

Generally, there are no requirements for pre-action. Instead, pre-action protocols are determined by statute for certain matters and by the underlying contract between the parties. These pre-action requirements take several forms. For instance, certain statute-based claims like initiating an action against the state may require a plaintiff to serve a statutory notice for a specified period before initiating the action. In some instances, the parties themselves may contract pre-action conduct that must be exhausted before resorting to litigation.

Where the parties fail to comply with applicable pre-action requirements, the suit itself may be struck out or in some cases, proceedings may be stayed to allow the parties to comply with the pre-action requirements.

*Law stated - 19 July 2022*

## **Other interim relief**

### **What other forms of interim relief can be sought?**

The High Court can grant various types of interim reliefs in the interest of justice. Generally, the interim reliefs that may be sought include: (1) interim or interlocutory injunction; (2) order for preservation of assets and evidence; (3) an order for security for costs; and (4) specific disclosure.

In cases of urgency, a party can apply ex parte to the High Court for an interim injunction that lasts 10 days. The injunction will lapse after the 10 days unless the party files for an extension of the order on notice to the other party. The ex parte application will not be granted unless the applicant gives sufficient reason for bringing the application without notice to the other party and demonstrates some irreparable damage that they will suffer if the application is not granted.

Generally, interim reliefs are granted at the discretion of the court. This means the party applying for an interim order must establish on the facts that it is just and equitable for the court to make the orders.

*Law stated - 19 July 2022*

## **Alternative dispute resolution**

### **Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?**

The courts support and encourage parties to engage in ADR mechanisms before and at all stages of the proceedings. The rules for the Commercial Division of the High Court mandates all parties to attempt amicably resolving their disputes at the pre-trial conference stage of the case. However, the pretrial Judge does not compel the parties to adopt ADR. Rather, the judge assesses the case and recommends a set of options for ADR. If the parties are unwilling to adopt ADR, the case is set down for trial.

The situation is different when there is a contractual provision submitting the dispute to some form of ADR, such as arbitration or mediation. In those circumstances, the courts stay the proceedings and refer the parties to their contractually chosen form of ADR. This applies to both local and foreign ADR proceedings.

*Law stated - 19 July 2022*

## **Claims against natural persons versus corporations**

### **Are there different considerations for claims against natural persons as opposed to corporations?**

When bringing a claim against a natural person as opposed to a company, it is more challenging to conduct investigations to ascertain the available assets of the natural person especially in circumstances where the underlying transaction is unsecured. In secured transactions, the assets are identified beforehand and verifiable at various public registries. However, in unsecured transactions, it is much more challenging to track the assets of a natural person. Thus, when suing a defendant, the strategy should consider the implications of claims against natural persons as opposed to companies.

Another consideration is that it is generally difficult to impose liability on the directors and shareholders of companies. Although directors run companies and conduct litigation on behalf of companies, a company has a separate legal personality and is liable for judgment obtained against it. Unless there is obvious fraud, it is very difficult to pierce the corporate veil to affix the company's directors with personal liability for a judgment debt.

*Law stated - 19 July 2022*

### **Class actions**

Are any of the considerations different for class actions, multiparty or group litigations?

For class actions, multi-party, or group litigations, it is important to ensure that the claims of all the several parties are aligned on the essential facts. If there are any differences in the claims of certain parties, those differences must be adequately addressed especially before trial. It is also important to consider the legal capacity issues that arise in group litigations. For instance, one ought to consider whether the suit is a representative action or whether it involves multiple plaintiffs. Also, if it is a statute-based group litigation, one must ensure that the statutory pre-action requirements are satisfied.

*Law stated - 19 July 2022*

### **Third-party funding**

What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

The practice of third-party funding is not directly permitted by statute or case law. Although the Supreme Court of Ghana in the case of *Jonah v Kulendi and Kulendi* [2013–2014] 1 SCGLR 272, recognised the practice of third-party funding as a growing trend, the court did not make a pronouncement on the legality of the practice. The general view, therefore, is that the common law principles of maintenance and champerty remain a restraint on third-party funding in Ghana. In *Jonah v Kulendi and Kulendi*, a third-party funder had sued to challenge the authority of the party's lawyer to settle the dispute without his consent. The apex court stated that while third-party funding is becoming a norm, a third-party funder does not enjoy the benefits of a lawyer-client relationship.

*Law stated - 19 July 2022*

### **Contingency fee arrangements**

Can lawyers act on a contingency fee basis? What options are available? What issues should be considered before entering into an arrangement of this nature?

Lawyers can act on a contingency fee basis. The Ghana Bar Association Scale of Fees identifies the two widely used forms of success fee arrangements: fixed fee plus success fee, and a combination of hourly rates or fixed fees with a success fee on a percentage basis ranging from 5 to 25 per cent. The amount of the success fee depends on various factors, including the complexity of the case, the chances of success, and the vulnerability of the client. The parties agree on what constitutes 'success' ahead of time.

*Law stated - 19 July 2022*

## THE CLAIM

### Launching claims

How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

Claims are launched by filing a writ of summons or, in statutory applications, by filing an originating motion or a petition. A writ will be supported by a statement of claim that is typically a few pages containing the material facts that relate to the claim. The length of pleadings depends on the complexity of the case. The rules on pleadings do not permit the addition of evidence. However, in actions launched by an originating motion, the motion is supported by an affidavit that must be deposed to by a person with personal knowledge of the facts. The affidavits may run from a few pages into several pages depending on the complexity of the dispute and the evidential documents that may be attached.

*Law stated - 19 July 2022*

### Serving claims on foreign parties

How are claims served on foreign parties?

Ghana is not a party to any civil procedure treaty for the service of court documents outside Ghana. Thus, a plaintiff must first seek leave of the court to issue the writ and then serve a notice of the writ on the foreign party outside the country with the permission of the court. After leave is granted to serve the writ, the plaintiff submits a request to the Registrar of the Court indicating whether the service will be effected through the government of the foreign country or the Ghanaian consul in that country.

In some instances, the court may permit a foreign party to be served in its country through a courier service at a verifiable address for the foreign party.

*Law stated - 19 July 2022*

### Key causes of action

What are the key causes of action that typically arise in commercial litigation?

The key causes of action include:

- breach of contract;
- wrongful or unfair termination of employment or wrongful dismissal of senior management staff;
- insurance claims;
- the exploration of oil and gas reserves;
- intellectual property rights, including patent, copyright and trademarks;
- applications under the Companies Act 2019; and
- tax disputes.

*Law stated - 19 July 2022*

## Claim amendments

### Under what circumstances can amendments to claims be made?

Claims can be amended at any stage of the proceedings if it can be made without causing injustice to the other party. Amendments may be made either with or without the permission of the court, depending on the stage of the proceedings. A claim can be amended once without the permission of the court before pleadings close. After the close of pleadings, a claim can only be amended with the permission of the court. When an applicant needs leave of court to amend a claim, they must demonstrate that the amendment will not cause injustice or unfairly prejudice the case of the other party. In such applications, the courts generally consider whether the amendment is necessary to finally determine the material issues in dispute between the parties.

*Law stated - 19 July 2022*

## Remedies

### What remedies are available to a claimant in your jurisdiction?

The court may award remedies including damages, specific performance, injunctions, rescission, rectification, declaratory reliefs and litigation costs. The object of damages is to compensate the plaintiff. In shareholder disputes, there are a range of remedies that the court can grant under the Companies Act 2019.

*Law stated - 19 July 2022*

## Recoverable damages

### What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

Generally, a plaintiff can recover general damages, aggravated damages, special damages, exemplary damages, and incidental or consequential damages. The courts typically aim to award damages that make the plaintiff whole, depending on whether the harm was foreseeable. In cases where there are consequential damages arising from the conduct of a party, the courts will grant a plaintiff an award of special damages to recover those direct and consequential losses, unless the parties specifically excluded recovery of consequential losses in their contract.

*Law stated - 19 July 2022*

## RESPONDING TO THE CLAIM

### Early steps available

#### What steps are open to a defendant in the early part of a case?

At the early stage of a case, a defendant has the option to challenge the jurisdiction or procedural propriety of the case against him or her after entering conditional appearance to a writ of summons. This may include challenges to the issue of the writ or service of the writ or notice of the writ (in the case of foreign defendants). In some instances, a defendant may also file an application to the court to dismiss the action on legal grounds such as a lack of capacity, the pleadings do not disclose a reasonable cause of action, the pleadings are scandalous, frivolous and vexatious, abuse of court process or that the pleadings may prejudice, embarrass or delay the fair trial of the case. In instances where the defendant believes that a third party is wholly or partly liable for the claim, the defendant may seek the

permission of the court to join the third party. If the defendant has a counterclaim against the plaintiff or any other person, the defendant may file a counterclaim and join any other necessary defendants to the counterclaim.

*Law stated - 19 July 2022*

### **Defence structure**

How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

A defendant who opposes a claim against him or her must file a statement of defence (if the action is commenced by a writ of summons) or an affidavit in opposition (if the claim is a statute-based application). Where a statement of defence must be filed, the defendant must file the defence within 14 days after the time limited for entering appearance. A statement of defence is usually structured in numbered paragraphs with each allegation of fact contained in a separate paragraph. The defendant must expressly deny any allegation he or she does not intend to admit. Similarly, in an affidavit in opposition, the defendant is required to deny any allegations that he or she does not intend to admit. However, in applications, the defendant is only entitled to three clear days after the service of the application and the date for the hearing of the application (unless a statute prescribes a longer period). For a statement of defence, the defendant is prohibited from attaching any documents or evidence. The defence must only contain material facts or allegations. However, in an affidavit in opposition, the defendant must attach all documents that he or she intends to rely on in support of his or her defence.

*Law stated - 19 July 2022*

### **Changing defence**

Under what circumstances may a defendant change a defence at a later stage in the proceedings?

To change a defence at a later stage in the proceedings, a defendant will need to seek the permission of the court to amend the statement of defence. However, the court will only permit a defendant to make an amendment that changes the defence if it does not occasion a surprise (for instance, in cases, where the defendant has led evidence on the issue) and if it does not amount to injustice against the plaintiff. Thus, if a defendant intends to change his or her defence at any stage in the proceedings, he or she must do so as early as possible to afford the plaintiff the chance to respond. Before pleadings close, a defendant can amend the defence once without the permission of the court. The courts generally look favourably on amendments that allow for all the material issues in controversy to be settled. But the courts are unlikely to permit a defendant to change his or her defence after he has closed his or her case.

*Law stated - 19 July 2022*

### **Sharing liability**

How can a defendant establish the passing on or sharing of liability?

The defendant may apply to the court for leave to issue a third-party notice against a third party on the ground that he or she (the defendant) is entitled to contribution or indemnity from the third party or to any relief relating to the original subject matter of the action. A defendant may also file an application seeking to join another party as a co-defendant to the case. To establish this, the defendant will have to prove that the other person ought to have been joined to the case because his or her presence in the case is necessary to ensure that all matters in dispute between the parties are completely determined.

**Avoiding trial****How can a defendant avoid trial?**

There are several methods a defendant may adopt to avoid trial. A defendant may file an application to have the pleadings or anything in the pleadings struck out, and a consequential order for the action to be dismissed, if the defendant can demonstrate that the pleadings disclose no reasonable cause of action, or that the pleadings are scandalous, frivolous or vexatious, or that the pleadings are an abuse of the court process. There are also several jurisdictional objections a defendant may raise with the aim of getting the case dismissed before trial commences. For instance, a defendant may raise issue with the plaintiff's legal capacity or subject matter jurisdiction depending on the circumstances of the case. Another means of avoiding trial is settlement. When settling cases, the parties have the advantage of fashioning a resolution of the dispute that best suits both sides rather than a zero-sum decision of a judge.

Law stated - 19 July 2022

**Case of no defence****What happens in the case of a no-show or if no defence is offered?**

Where the defendant fails to file a statement of defence within the prescribed time limit, the plaintiff may either apply for judgment in default of defence or apply for summary judgment. The court may award the plaintiff final judgment in default of defence if the plaintiff has made a liquidated claim or for possession of immovable property. In circumstances, where the plaintiff is claiming unliquidated demand, the court will enter interlocutory judgment and order for damages to be assessed. For certain specific claims such as detinue, maritime actions, moneylenders and mortgage actions, the designated procedures need to be complied with. The second option of a plaintiff when no defence is offered, is to apply for summary judgment against the defendant. It is important to note that the plaintiff may apply for summary judgment even when a defence has been filed but the statement of defence does not raise a substantive defence to the claim. However, a plaintiff cannot seek summary judgment in the following actions: probate, matrimonial actions, maritime proceedings, defamation, malicious prosecution, seduction, breach of promise to marry or fraud.

Law stated - 19 July 2022

**Claiming security****Can a defendant claim security for costs? If so, what form of security can be provided?**

A defendant can generally apply for security for costs where:

- the plaintiff is ordinarily resident outside Ghana;
- a nominal plaintiff is suing for the benefit of some other person and there is no reason to believe that he or she will be able to pay the defendant's costs if ordered to do so;
- the plaintiff's address is not stated in the originating process or is incorrectly stated; or
- the plaintiff's address has changed during the proceedings with a view to evading the consequences of the litigation.

If the court grants an application for security for costs, the award is usually in monetary terms where the plaintiff is directed to pay the specified amount into court pending the determination of the action. If the plaintiff fails to pay the money, the court may dismiss the case against the defendant. The court may, however, refuse to award security for costs in some cases, including where: (1) the plaintiff has his or her money in the hands of the defendant; or (2) the defendant admits his or her indebtedness to the plaintiff; or (3) the plaintiff satisfies the court that the failure to state his or her address or the misstatement of the address was made inadvertently and without an intention to deceive.

*Law stated - 19 July 2022*

## PROGRESSING THE CASE

### Typical procedural steps

What is the typical sequence of procedural steps in commercial litigation in this country?

Commercial litigation generally follows the following procedural steps:

- issuing of a writ of summons and statement of claim petition, or an originating motion by the plaintiff;
- entering of appearance by the defendant (in the case of a writ);
- service of statement of defence by the defendant;
- service of a reply to the statement of defence (optional for the plaintiff);
- pretrial settlement conference with a pretrial judge;
- settling issues for trial;
- exchange of witness statements and documents;
- case management conference;
- trial; and
- enforcement of judgment (by successful party) or appeal to the Court of Appeal.

Any of the parties may file interlocutory applications at any of these stages.

*Law stated - 19 July 2022*

### Bringing in additional parties

Can additional parties be brought into a case after commencement?

Yes. The parties to the case can apply to bring additional parties into the case after the case commences. The new party must be a necessary party to the action. A necessary party means a party whose presence is needed for a complete and effectual determination of the dispute. If the third party sought to be joined is a plaintiff, then he or she must consent in writing before he or she can be added as a plaintiff.

*Law stated - 19 July 2022*

### Consolidating proceedings

Can proceedings be consolidated or split?

Yes. The courts may consolidate proceedings where two or more matters are pending in the same court, and it appears that: (1) some common question of law or fact arises in both or all of them; or (2) the reliefs claimed are in respect of or arise out of the same transaction or series of transactions. Alternatively, the court may order one case to be tried



immediately after another or may order any of them to be suspended until the determination of any other of them. The court may order separate trials if a plaintiff includes two or more causes of action in the same action, or two or more plaintiffs or defendants are parties to the same action, and the court holds the view that the joinder of causes of action or of parties may embarrass or delay the trial or is inconvenient.

*Law stated - 19 July 2022*

### **Court decision making**

How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

Commercial court actions are classified as civil matters (as opposed to criminal matters) and thus are subject to the evidential standard of proof on the balance of probabilities. This means that, the courts weigh the evidence adduced by the parties against each other to determine which version of events is more likely than the other to have occurred. The party that alleges a fact bears the burden of proof to produce evidence in support of that allegation. Where a crime is alleged in a civil matter, the person alleging the crime must prove that allegation beyond reasonable doubt. For instance, if a person made an allegation of fraud in a commercial claim, they would have to prove the issue of fraud beyond a reasonable doubt (as opposed to 'on the balance of probabilities').

*Law stated - 19 July 2022*

How does a court decide what judgments, remedies and orders it will issue?

Commercial claims (like all civil matters) are determined solely by a judge without a jury. Thus, judges consider the pleadings, witness statements, and other evidence adduced in the proceedings. The judge then decides the merits of the case based on the existing precedent and binding statutory provisions. The reliefs granted by the courts are generally dependent on the reliefs the parties expressly seek in their pleadings. If, however, a party does not expressly demand for a particular remedy, but his evidence shows that he or she is entitled to that remedy, the court has the discretion to grant that order or remedy.

*Law stated - 19 July 2022*

### **Evidence**

How is witness, documentary and expert evidence dealt with?

The parties in a case submit witness statements that serve as the evidence-in-chief for each of the witnesses. Thus, the witness statements are adopted as the evidence of the parties. The opposing party is then afforded the opportunity to cross-examine the witness. The same process is adopted for expert witnesses. However, the court will only admit expert evidence if the subject of his testimony is sufficiently beyond common experience that the opinion or inference of an expert will assist the court in understanding evidence in the action or in determining an issue. The parties may also agree to conduct discoveries or seek the orders of the court to compel the other party to produce vital evidence in their possession. To achieve tactical advantage, some parties may serve interrogatories or request to admit facts on the opposing side as a step to procure a judgment on admission. When weighing evidence, the courts generally prefer documentary evidence to oral evidence.

*Law stated - 19 July 2022*

## How does the court deal with large volumes of commercial or technical evidence?

The parties have the obligation to submit the most relevant evidence in support of their case. Thus, if there is a need for large volumes of commercial or technical evidence, it is generally advisable for the parties to call witnesses (including expert witnesses) who can adequately explain and answer questions on the evidence. The court also has the power to appoint court experts, on its own. The courts therefore have the power to appoint independent experts to examine the large volumes of technical evidence and submit reports to the court.

*Law stated - 19 July 2022*

## Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

Ghana is not a party to the Hague Convention on Taking Evidence Abroad. This means before the Ghanaian courts will compel a witness in Ghana to give evidence in a foreign court, the foreign court or tribunal must first apply to the High Court requesting for a witness to be examined in Ghana. The application may be made ex parte by a person duly authorised to make the application on behalf of the foreign court or tribunal. The High Court may then order the attendance of the witness named in the foreign court's request to be examined on oath, on interrogatories, and produce specific documents. Conversely, the Ghanaian court may apply for the judicial authorities of the foreign country in which the witness resides to take the evidence. Where there is a Civil Procedure Convention between Ghana and the foreign country, the Ghanaian consul may be appointed as special examiner. If there is no such convention, the consent of the Minister of Foreign Affairs is needed to appoint the Ghanaian consul.

*Law stated - 19 July 2022*

## How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

Witness and documentary evidence are generally tested through cross-examination of the witness. Witness evidence is presented as a witness statement of the witness at the case management stage. At trial, the witness statement is initially offered as evidence under oath. Where a witness who has testified is not available to be examined by counsel for the opposing parties to the action and his unavailability was not caused by the party who seeks to cross-examine, the court may exclude the entire testimony or a part of the testimony as fairness requires. There are also evidential rules on admissibility of evidence that determine what evidence a court is permitted to consider, and a witness is permitted to adduce. For instance, a witness is only permitted to testify to facts that they have personal knowledge of. The hearsay rule also operates to regulate what testimony witnesses can rely on.

*Law stated - 19 July 2022*

## Time frame

### How long do the proceedings typically last, and in what circumstances can they be expedited?

The entire lifespan of a case in the High Court can generally last for about one to three years. The judge may fix a date for early hearing if the circumstances require it. In some instances, the parties may ask the court to set down for trial, a preliminary issue that has the potential to dispose of the entire matter. If it is a legal issue, it could be set down for legal arguments instead of the conduct of a full trial. The appropriate strategy will depend on the demands of each case, and

the lawyers handling the litigation.

*Law stated - 19 July 2022*

### **Gaining an advantage**

**What other steps can a party take during proceedings to achieve tactical advantage in a case?**

The circumstances of each case will dictate what strategies to apply to achieve a tactical advantage in the case. The parties must consider the substantial issues that are pivotal to a decision, and the procedural rules that may be employed to help achieve that goal. For instance, a defendant might apply to strike out pleadings or have the case dismissed, and a plaintiff may apply for default judgment or summary judgment or consider serving interrogatories, or notices to admit facts. The appropriate strategy will be determined on a case-by-case basis.

*Law stated - 19 July 2022*

### **Impact of third-party funding**

**If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?**

Third-party funding is not often used in litigation in Ghana. The courts hold the view that the third-party funder does not enjoy the benefits of the attorney-client relationship. This means the third-party funder cannot control the litigation. The primary party responsible for instructing a lawyer remains the party to the suit, and the common law principles of maintenance and champerty remain a fetter on the development of third-party funding of litigation in Ghana.

*Law stated - 19 July 2022*

### **Impact of technology**

**What impact is technology having on complex commercial litigation in your jurisdiction?**

Technology plays a key role in recording proceedings, filing court processes, storing files, among others. Currently, paperless trials are not very common. However, the Rules of Court permit the courts to receive evidence through video links or other means. The government of Ghana has piloted an 'E-justice' project, an electronic case management system aimed at enabling parties to gain access to the justice system through electronic means, from filing of cases to the execution of judgments.

*Law stated - 19 July 2022*

### **Parallel proceedings**

**How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?**

The courts will refrain from exercising jurisdiction over a civil case that is already pending before or has been decided by another court or tribunal. However, the pendency of a criminal case before a court does not prevent the parties from instituting a civil action on the same set of facts. In Ghana, parties are not typically allowed to bring private criminal prosecutions.

*Law stated - 19 July 2022*

## TRIAL

### Trial conduct

How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

For cases typically commenced by writ of summons and petitions, the parties to a case are required to submit their witness statements at the case management stage. Thus, when trial commences, the plaintiff's witness is called to swear an oath and adopt his witness statement as the examination-in-chief. After the court adopts the witness statement as the examination-in-chief, the lawyer for the defendant then cross-examines the witness. The lawyer for the plaintiff may then choose to re-examine the witness. This process may range from one month to a year depending on the number of adjournments and other factors such as the caseload of the court. In cases that are commenced by originating motions, the parties file their documentary evidence as part of their affidavits. Thus, if a party desires to cross-examine a deponent to an affidavit, he or she needs to seek the permission of the court. In the absence of any cross-examination, the trial of the case is conducted by the filing of written submissions or hearing of oral submissions.

*Law stated - 19 July 2022*

### Use of juries

Are jury trials the norm, and can they be denied?

In Ghana, jury trials are not used in civil matters. The norm is for a single Justice to hear the case and determine both questions of law and fact.

*Law stated - 19 July 2022*

### Confidentiality

How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

Court proceedings are generally held in public, except as otherwise ordered by the courts in the interest of justice, public safety, the protection of the private lives of persons concerned in the proceedings, among others. The matters that may be heard in chambers include:

- applications to pay or transfer funds in court or for the transfer of the funds to a separate account or for the payment of any dividends of or interest on any securities or money comprised in such funds;
- applications for the investment or change of investment of any funds in court;
- applications for payment of dividends or interest on any funds in court representing or comprising money or securities lodged in court under any enactment;
- applications for the payment or transfer out of court of any funds mentioned immediately above;
- applications connected with the management of property;
- applications for the sale by auction or private contract of property, and also to the manner in which the sale is to be conducted, and for payment into court and investment of the purchase money; and
- the determination of any question of construction arising under a deed, will or other written instrument, and declarations of the rights of the persons interested. The owners of trade secrets or their authorised representatives may claim privilege to refuse to disclose, and to prevent any other person from disclosing, the

trade secrets unless the value of the disclosure of the trade secret substantially outweighs the disadvantages caused by its disclosure.

*Law stated - 19 July 2022*

## Media interest

How is media interest dealt with? Is the media ever ordered not to report on certain information?

The media may cover court proceedings, but the permission of the court is needed for live coverage of court proceedings. It is common for the media to report on high-profile cases of national interest. However, lawyers who are directly involved in a pending matter are not permitted to grant interviews to the media on the merits of the case.

*Law stated - 19 July 2022*

## Proving claims

How are monetary claims valued and proved?

The factors the court considers in assessing the damages depend on the nature of the claims. In assessing damages, the courts typically consider the issue of whether the losses being claimed are a consequence of the breach complained of. The parties may prove their monetary claims by producing receipts, written contracts (if applicable), among others. Generally, assessment of damages take place together with the trial of the merits. The courts, however, have the power to order split trials. A defendant will typically object to assessment of damages on the grounds that the loss is too remote, or that the plaintiff failed to mitigate its loss.

*Law stated - 19 July 2022*

## POST-TRIAL

### Costs

How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

Costs are discretionary, but usually awarded to the successful party. A party may apply for the court to award costs but the party must establish the demand for costs by relying on any of the following factors:

- the amount of expenses, including travel expenses reasonably incurred by that party or that party's lawyer or both in relation to the proceeding;
- the amount of court fees paid by that party or that party's lawyer in relation to the proceedings;
- the length and complexity of the proceedings;
- the conduct of the parties and their lawyers during the proceedings; and
- any previous order as to costs made in the proceedings.

The length of the judgments generally depends on the nature of the case and the number of issues that arose from the case. The judgments are accessible to the public in both electronic and paper law reports. A certified copy of a judgment may also be obtained, at a fee, from the Court Registry.

*Law stated - 19 July 2022*

## Appeals

When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

Typically, for complex commercial litigation, the High Court is the court of first instance. And, for judgments of the High Court, the losing party has a right of appeal to the Court of Appeal, and finally to the Supreme Court. The time limit for appealing against judgments depends on whether the judgment is interlocutory or final. For interlocutory appeals, the appellant must file his or her appeal within 21 days from the date of the judgment. There is no room for extension of time. For final judgments, the appellant must file his or her appeal within three months from the date of the judgment. Where the time for appealing a final judgment elapses, the appellant may apply for extension of time. However, the application must not be brought later than three months after the expiration of the original time limit. Depending on the circumstances of each case, interlocutory appeals generally last for about six months to two years, while final appeals last for about one to two years.

*Law stated - 19 July 2022*

## Enforceability

How enforceable internationally are judgments from the courts in your jurisdiction?

Enforcement of judgments from Ghanaian courts is generally dependent on local law and whether Ghana has a reciprocal arrangement with the foreign country. The judgment from Ghana may generally be enforced where there is such reciprocal arrangement with the foreign country.

*Law stated - 19 July 2022*

How do the courts in your jurisdiction support the process of enforcing foreign judgments?

It depends on whether Ghana and the courts of the foreign jurisdiction have a reciprocal arrangement for the enforcement of judgments. Under the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement Instrument) 1993 LI 1575), certain judgments of certain courts in some jurisdictions are subject to enforcement under the reciprocal arrangement. Thus, the procedure requires the party enforcing the foreign judgment to register the foreign judgment and then proceed to enforce it as a judgment of the Ghanaian court. However, if the judgment is not a registrable judgment, the party relying on the foreign judgment may have to issue a fresh action in Ghana relying on the foreign judgment as fact (*res judicata*) on the issue in dispute. The defences available to a defendant are limited. However, a foreign judgment will not be recognised and enforced by the court if, among others, it offends the rules of natural justice or the public policy of Ghana.

*Law stated - 19 July 2022*

## OTHER CONSIDERATIONS

### Interesting features

Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

The Ghanaian courts are open to examining foreign decisions and legal decisions (especially from common law

jurisdictions) that can offer guidance on cases involving emerging technologies and novel legal issues. This offers parties the opportunity to fashion out new legal principles that pick the best lessons from several jurisdictions across the world.

*Law stated - 19 July 2022*

### **Jurisdictional disadvantages**

Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

The caseload of the courts in Ghana may cause delays in the completion of trials and the resolution of cases. Thus, arbitration has begun to grow as an alternative for resolving complex commercial disputes in Ghana. Also, the courts have been slow in adopting virtual hearings as an alternative to in-person court appearance.

*Law stated - 19 July 2022*

### **Special considerations**

Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

Typically for novel issues or areas of law (for example, disputes involving new technologies), the courts are generally hesitant to dismiss a case summarily on preliminary legal issues or issues of mixed law and fact. Thus, as a defendant, a party must consider going through a full trial to set up his or her defence and establish why the case against him or her ought to be dismissed under such circumstances.

*Law stated - 19 July 2022*

## **UPDATE AND TRENDS**

### **Key developments of the past year**

What were the key cases, decisions, judgments and policy and legislative developments of the past year?

First, the High Court (Civil Procedure) (Amendment) Rules 2020 (CI 133) and the Court of Appeal (Amendment) Rules 2020 (CI 132) have revoked the review jurisdictions of the High Court and the Court of Appeal respectively.

Second, CI 132 eliminated the previous practice of first applying to the High Court for stay of execution of judgments pending appeal. However, the Supreme Court has reversed the effect of CI 132 and confirmed that the High Court still has jurisdiction to hear applications for stay of execution of judgments pending appeal as a court of first instance (The Republic v High Court (Criminal Division 9) Accra; ex parte Ecobank Ghana Ltd (Origin 8 Limited and Another – interested parties) (unreported civil motion No. J5/10/2022 delivered on 18 January 2022)).

Third, the Supreme Court has issued a new practice direction on drawing up a notice of entry of judgment. This is the first step in executing a judgment of the court. The terms of the practice direction are summed up as follows.

- Trial judges must summarise and specifically state all enforceable orders made in their decision at the end of their judgments. This judicial summary must also be recorded in the Record Book of the Court.
- Court registrars must carefully review the notices of entry of judgment filed and ensure that the contents reflect



the orders made by the court. When in doubt, the registrars should seek clarification from the judge who pronounced the judgment before commencing execution.

- Counsel representing judgment debtors must carefully scrutinise notices of entry of judgment filed by their colleagues and confirm that the contents are in line with the agreement of the parties or the final orders made by the court (or both). If the notice has been misrepresented, counsel for the judgment debtor must object promptly to the terms filed and apply to the court immediately to set aside or rectify the notices.
- Where a lawyer misstates the orders made by a court in a notice of entry of judgment, he or she ought to be referred to the Disciplinary Committee of the General Legal Council for the appropriate sanctions (see the case of *Ken Kwame Asamoah v State Insurance Company* (Civil Appeal No. J4/55/2021) delivered on 18 January 2022).

*Law stated - 19 July 2022*



## Jurisdictions

	<b>Australia</b>	Holding Redlich
	<b>Bermuda</b>	MJM Barristers & Attorneys
	<b>Brazil</b>	Arruda Alvim, Aragão, Lins & Sato Advogados
	<b>Cyprus</b>	Karamanolis & Karamanolis LLC
	<b>Ghana</b>	Ferociter
	<b>Gibraltar</b>	Signature Litigation
	<b>India</b>	Chadha & Co
	<b>Japan</b>	TMI Associates
	<b>Lithuania</b>	Triniti Jurex
	<b>Luxembourg</b>	Brucher Thieltgen & Partners
	<b>Mexico</b>	OLIVARES
	<b>Netherlands</b>	Evers Soerjatin NV
	<b>Switzerland</b>	Kellerhals Carrard
	<b>Thailand</b>	Duensing Kippen
	<b>United Arab Emirates</b>	Horizons & Co Law Firm
	<b>United Kingdom - England &amp; Wales</b>	Seladore Legal
	<b>USA</b>	Vinson & Elkins LLP