AUTHOR(S): MANTE, J. and NDEKUGRI, I.

TITLE: Arbitrability in the context of Ghana's new arbitration law.

YEAR: 2012

Arbitrability in the Context of Ghana's New Arbitration Law

Joseph Mante and Issaka Ndekugri

Introduction

The last two decades have witnessed a tremendous increase in international trade and investment activities across the world. These developments have seen many countries open their doors to globalisation, economic liberalisation and privatisation.[1] International companies seeking to benefit from the advantages offered by these developments have sought to establish their presence in business friendly developing countries.

Ghana, a lower-middle-income country of about 24 million people and a stable democratic State situated on the West Coast of Africa has, over the years, endeavoured to attract international trade and investment. Its economy, which has been largely dependent on agriculture and mining with the former contributing over 50% of GDP over the years, has witnessed a remarkable change over the past few years. In 2010, the service industry grew by 6.1% and constituted 32.8% of GDP thereby displacing the agricultural sector (which constituted 32.4% of GDP) as the largest contributor to GDP. The industry sector including construction grew by 7% contributing about 25.7% to GDP for the year.[2] Overall, the economy witnessed a total GDP growth of 5.9% in 2010. With the commencement of oil production, real GDP is forecast to grow at 13.4% in 2011 and 10% in 2012 making Ghana the fastest growing economy in Sub-Saharan Africa.[3] The World Bank's Global Economic Prospects report for June, 2011 projected that the mining, agricultural, oil and service sectors will continue to

---

1 M. Sornarajah, *The international law on foreign investment.*(3rd edn, Cambridge Univ Pr. 2010) 48

2 Government of Ghana, *Budget Statement and Economic Policy of the Government of Ghana for 2011* (Government Publishers/Assembly Press 2010) 20

3 World Bank, *Global Economic Prospects -Maintaining Progress amid Turmoil*' (The International Bank for Reconstruction and Development / the World Bank, 2011) 137

witness healthy growth in the medium term. The Bank further projects increased inflow of investments into the service sector, with telecommunications and the construction industry remaining the major recipients, due to increased confidence in the economy.

As a developing country with physical infrastructure challenges in the road, transport, housing and energy sectors of the economy, the country's drive is to accelerate the procurement and delivery of infrastructure projects. The prospects of increased infrastructure development are boosted by the oil revenues and the general health of the economy which has engendered investor confidence. As international contractors and consultants engage with the State, State entities and domestic contracting firms (as sub-contractors) in the ever increasing market for major infrastructure projects in developing countries, the need for an efficient framework for effective resolution of disputes from transnational commercial transactions has become even more acute.[4] In his foreword to a ground breaking work on arbitration in Africa, Mustill remarked that whilst lack of information on dispute governance systems in developing countries promotes over-caution among traders and investors, apprehension about the enforceability of judgments in a foreign domain may discourage trading all together.[5] International arbitration has become the preferred method for the resolution of disputes arising not only from infrastructure projects but also international commercial and investment transactions.[6] With an ambition to make Ghana a business friendly place, litigation was not an option as the courts are still struggling to deal with a backlog of domestic cases. The need for the existing Arbitration Act, 1961 (Act 38) to be updated became obvious as its provisions had been overtaken by subsequent developments in international arbitration. The Alternative

---

4 S. Perloff, 'Ties that Bind: The Limits of Automony and Uniformity in International Commercial Arbitration' (1992) 13 *U. Pa. J. Int'l Bus. L.* 323.

5 E. Cotran and A. Amissah (eds), *Arbitration in Africa* (Kluwer Law Intl, 1996).

6 N. Blackaby and others, *Redfern and Hunter on international arbitration* (Oxford Univ Pr., 2009); R.D. Bishop and others, *Foreign Investment Disputes: Cases, Materials, and Commentary* (Kluwer Law Intl, 2005); R. Gaitskell, *Engineer's Dispute Resolution Handbook* (Thomas Telford, 2006) 120; J. Glover and S. Hughes, *Understanding the New FIDIC Red Book - A Clause-by-Clause Commentary* (Sweet & Maxwell, 2006).

Dispute Resolution Act, 2010 (Act 798) was thus enacted to ensure, *inter alia*, that the domestic law on international commercial arbitration is brought in line with international arbitration law and practice.[7]

Act 798 deals with arbitration and all other major dispute resolution mechanisms other than litigation in Ghana. The Act has five parts dealing with various dispute resolution mechanisms such as arbitration, mediation, conciliation and customary arbitration. Arbitration, defined in the act as the voluntary submission of a dispute to one or more impartial persons for a final and binding determination, is covered by Part One of the Act. The sections under this part apply to both domestic and international arbitration. The second and third parts of the Act are novelties under Ghanaian law as they represent the first attempt to provide a comprehensive statutory framework for both mediation and customary arbitration. Under the Act, mediation is described as a non-binding process in which the parties discuss their disputes with the assistance of an impartial person who assists them to reach a resolution.[8]

Customary arbitration under Act 798 shares a lot of the characteristics of mainstream arbitration except in two respects; firstly, the arbitration agreement need not be in writing and secondly, the conduct of the arbitration must be in line with customary law, practices and procedures on arbitration. Customary law, in the Ghanaian context, refers to the rules of law which by custom are applicable to particular communities in Ghana.[9] The jurisprudence on the age old practice of customary arbitration is well developed and had seen continuous improvement through judicial decisions. In the Ghanaian case of *Budu II v. Caesar and Ors,*[10] the essential elements of customary arbitration as against negotiations were outlined as follows:

(a) a voluntary submission of the dispute by the parties to arbitrators for the purpose of having the dispute decided informally, but on its merits;

---

7 See the Memorandum to the Alternative Dispute Resolution Bill 2009 (Ghana) i.
8 Alternative Dispute Resolution Act, 2010 (Act 798), s135.
9 See the Constitution of Ghana, 1992, Article 11(3).
10 [1959] GLR 410.

(b) a prior agreement by both parties to accept the award of the arbitrators;

(c) the award must not be arbitrary, but must be arrived at after the hearing of both sides in a judicial manner;

(d) the practice and procedure for the time being followed in the Native Court or Tribunal of the area must be followed as nearly as possible; and

(e) publication of the award.

These principles have now been codified under the new legislation. Act798 also deals with the institutional, financial and administrative support systems for the resolution processes.[11]

Section 1 of the Act dealing with the scope of the legislation is the focus of this work. It states:

> This Act applies to 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 resolution method.

As this Act is the main source of arbitration law, the section raises the question concerning, *inter alia*, matters that are arbitrable. This article critically examines this provision in the light of international trends on arbitrability, how it is likely to be enforced and implications for arbitration in international business connected with Ghana. It is structured as follows. The very next section outlines the arbitrability concept as a necessary introduction. This is followed by an overview of modern trends on arbitrability. The third section analyses a ruling in the

---

11 Act 798, part 4.

Attorney- General v. Balkan Energy LLC & Ors [12](the Balkan Energy Case)**,** a case which raised the issue of arbitrability under the new arbitration law. There is then some discussion on the scope of the categories of subject-matters exempted from the purview of the Act, the implications of the extent of the exemptions on international arbitration connected with Ghana, the likely jurisdictional challenges that may ensue in practice and the impact on foreign business entities. This is followed by a brief comparison of the Ghanaian position with modern trends on arbitrability , recommendations for amendment of section 1 to bring it in line with the vision of the country as an international arbitration- friendly State, and the conclusion.

The Arbitrability Concept

The word 'arbitrability' is used in a number of senses. Traditionally, arbitrability concerns the question of which type of disputes can or cannot be resolved by arbitration.[13] This concept is inherent in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (NYC) and the UNCITRAL Model law on international commercial arbitration, 1985 (as amended in 2006) (the Model Law). Articles II (1) and V (2) (a) of the NYC and Articles 34(2) (b) and 36(1) (b) (i) of the Model Law refer to arbitrability in terms of disputes 'capable of settlement by arbitration'. This concept therefore raises the question of the validity of the arbitration agreement, which could strip an arbitrator of jurisdiction to determine a matter in spite of party agreement or derail enforcement of an award.[14] Access to the national court to determine a dispute is considered the quintessential form of justice. An arbitration agreement is therefore considered a compromise to accept less than this ideal form of justice.[15] It is,

---

12 Suit No. BDC/32/10 dated 6th September, 2010 (Unreported).

13 N. Blackaby and others (n.6) para 2.111.See also L.A. Mistelis, and S.L. Brekoulakis(eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law Intl, 2009) 3-4.

14 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), Article V (2) (a); the UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006) (the Model Law), Article 34 (2) (b) (i).

15 A. Redfern, *Law and practice of international commercial arbitration* (Sweet & Maxwell, 2004).

therefore, for each State to decide which matters should not be compromised by leaving them to be decided outside the State courts.

However, in some jurisdictions, particularly the United States of America, the concept of arbitrability is not just about what subject-matter is capable of resolution by arbitration but also has to do with matters of capacity[16] and the scope of the arbitration agreement.[17] Beyond the issue of capacity and scope, there is also the issue of the existence or otherwise of the arbitration agreement. In the American case of *MCI Telecommunications Corp. v. Exalon Indus., Inc.* the learned judge argued, '…a claim that nothing is subject to arbitration because there is no agreement to arbitrate must be the mother of arbitrability questions'.[18] This statement suggests that the question whether or not there is an arbitration agreement itself remains an issue of arbitrability as the arbitrator's jurisdiction to arbitrate such a matter in that context is dependent on the existence of an agreement. Thus, according to this view, beyond a statutory statement of what is and what is not arbitrable, there is also the issue of arbitrability on the basis of the agreement between the parties. Where the parties have not agreed or consented to refer an issue to the arbitrator, such a matter will remain 'unarbitrable' by the arbitrator or tribunal in question. Bockstiegel argues that where a party (a minor or a State entity) lacks the requisite capacity, this will invariably result in a situation where arbitration will simply remain impossible.[19] His argument is succinctly captured in this extract,

> In regulating arbitrability on the one hand and capacity on the other hand, different means are employed to regulate the same question, namely whether arbitration is to be

---

16 K-H. Böckstiegel, ' Public Policy as a Limit to Arbitration and its Enforcement' (11th IBA International Arbitration Day and United Nations New York Convention Day: The New York Convention: 50 Year, New York, 1 February 2008) 1-10.

17 A.S. Rau, 'The Arbitrability Question Itself' (1999) 10 *Am. Rev. Int'l Arb.*, 287-559; A.S. Rau, 'Arbitral Jurisdiction and the Dimensions of 'Consent'. *U of Texas Law, Law and Econ Research Paper No. 103*,1; See also N. Blackaby and others (n.6) para 2.111.

18 138 F.3d 426 at 429 (1st Cir. 1998) cited in A.S. Rau, 'The Arbitrability Question Itself' (n17) 355.

19 K-H. Böckstiegel (n.16) 5.

> an accepted method of dispute settlement or not. If the term 'arbitrability' is seen as answering that question, also regulating what is commonly understood as 'capacity' is in fact a regulation of arbitrability by subjective criteria, namely by criteria connected with the parties in arbitration. And even if one wishes to stick to the traditional restricted concept of 'arbitrability' as excluding such subjective criteria, one will have to admit that such objective arbitrability and capacity supplement each other, and that a realistic answer to the basic questions at stake, whether the arbitral agreement is valid and whether arbitration is admissible, can only be given if both aspects are examined.[20]

In effect, the question of who can submit to arbitration (capacity) is as important as what is arbitrable (subject -matter arbitrability).[21] So also is the question of what was eventually submitted to arbitration (the scope of the arbitration clause or the submission agreement).[22] Whilst appreciating that the consequences of all these scenarios will invariably impact the conduct of arbitration, it is also true that the question what can be arbitrated is different from who can arbitrate. This article focuses on the question which type of dispute can or cannot be resolved by arbitration under Ghana law.

It is trite, however, that under the widely accepted *Competence-Competence* and separability principles, an arbitral tribunal has jurisdiction to determine the issue of arbitrability.[23] That said, the question which follows immediately is whether that precludes

---

20 ibid.

21 ibid.

22 A.S. Rau (n.16) 309. Rau argues, "I suppose it could be said that the scope of a valid arbitration clause is in just this sense "jurisdictional", and thus a **question** of "arbitrability." A party may well have "consented" to the arbitration of disputes relating to a contractual shipment of pork bellies--but he has not necessarily "consented" thereby to arbitrate disputes arising out of an arguably distinct contract for the shipment of pig iron: Why, then, should any "arbitrator's assumption of jurisdiction over the latter be entitled to the slightest deference?

23 See the Model Law, Article 16 which states that the arbitral tribunal may rule on its own jurisdiction particularly in respect of the existence or validity of the arbitration agreement.

the court of the seat of the arbitration from making such a determination either concurrently or prior to the exercise of such powers by the tribunal. It has been argued that failure to follow the Competence-Competence rule is likely to paralyse the arbitral process since the parties may find themselves in the national court every now and then thereby disrupting the process.[24] The court of the seat of arbitration have power to determine the issue of arbitrability if raised as a jurisdictional issue before it by a party dissatisfied by an earlier ruling on the matter by a tribunal. Article 16(3) of the Model Law provides:

> … [I]f the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

English law takes a slightly different approach on this issue. Pursuant to the doctrine of party autonomy, the English Arbitration Act 1996 provides that subject to the agreement of the parties, an objection to the substantive jurisdiction of an arbitral tribunal may be determined in an award as to jurisdiction or as part of the award on the merits of the case by the arbitral tribunal.[25] A party may also elect to apply to the High Court for the determination of any question as to the substantive jurisdiction of the tribunal, upon notice to the other parties, and subject to the fulfillment of either of two conditions; firstly, that all parties agree in writing to such a step being taken and secondly, that the arbitral tribunal has permitted such a step on the grounds of substantial savings in cost, promptness in the making of the application and the

---

24 J. Paulsson, 'Accepting International Arbitration in Fact- and not Only in Words' in E. Cotran and A. Amissah (n 5) 36. See also the Model Law, Article 16(3).

25 The English Arbitration Act 1996, s 31(4).

existence of good reasons warranting the determination of the matter by the court.[26] The import of these provisions is that, parties to arbitration under English law can decide that the court, instead of the arbitral tribunal, should determine the issue of arbitrability. Appeal against the decision of the court on such a preliminary jurisdictional issue shall only be entertained with the leave of the court.[27]

Modern Trends on Arbitrability

What is arbitrable and what is not varies globally. Generally, issues about public policy are not arbitrable. Domestic legislation on arbitrability in terms of subject-matter coverage differs from State to State.[28] Each state decides which dispute, in furtherance of its political, social and economic interests, may or may not be resolved by arbitration, which is a private process but could produce outcomes with public consequences.[29] There is therefore the issue of arbitrability by the law of the arbitration agreement, the law of the seat of the arbitration and the law of the entity. Arbitrability under a given law is therefore a matter of its underlying public policy.[30] Some State laws expressly make public policy the determining factor for arbitrability.[31]

The challenge with the use of public policy as a rationale for arbitrability is that it is a nebulous concept determinable according to the subjective judgment of the legal fraternity of a State as to what matters are so sacrosanct only national courts should have jurisdiction to deal

---

26 ibid. s 32(1)& (2)

27 ibid. s 32(5)

28 N. Blackaby and others (n.6). Each state determines which matters may or may not be resolved by arbitration in accordance with its own political, social and economic policy. The authors, who have, in previous editions, used "public policy", avoid the concept somewhat as a basis for determination of what is arbitrable. See also K-H. Böckstiegel (n16); P.M. Baron and S. Liniger,'A Second Look at Arbitrability: Approaches to arbitration in the United States, Switzerland and Germany (2003) 19 *Arbitration International* 27-54 at 27.

29 L.A. Mistelis and S.L. Brekoulakis (n13).

30 S.L. Brekoulakis, 'On Arbitrability: Persisting Misconceptions and New Areas of Concern' *in* L.A. Mistelis and S.L. Brekoulakis (n13) 19- 44

31 For example, the Malaysian Arbitration Act, 2005, Section 4 (1) provides as follows: "Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy". See also the French Civil Code 2060 and the Singapore International Arbitration Act, 1996, Article 11.

with. Aside being a difficult concept to define, it also changes with time and needs of States.[32] What was viewed as sacrosanct and thus determinable only by national courts by the legal fraternity of a particular country two decades ago may not be the same today.[33] The changing political, economic, social and religious views and needs of a State may shape its public policy. It is axiomatic that over the years, many States have embraced the notion of international trade and its importance and have become much more liberal with the idea of arbitrating subject-matters which are trade or economic related.[34]

In most developed countries in Europe and America however, changes have been made through judicial pronouncements regarding arbitrability of public policy issues.[35] Instead of the traditional position of precluding arbitrators from deciding disputes affected by public policy all together because such disputes are not arbitrable, there are some judicial decisions which indicate that arbitrators should not be excluded from applying public policy rules.[36] In effect, instead of being a bar to arbitration, it is rather seen as a matter the arbitrator must consider at the award stage.

It is worth noting, however, that this position is not global. For many developing countries the traditional view that public policy issues are not arbitrable still hold sway. Developing countries may have special reasons to control certain types of disputes that are otherwise arbitrable. It has been argued that in the context of less developed countries, States

---

32 K-H. Böckstiegel (n.16) 3

33 ibid.

34 N. Blackaby and others (n6) para 2.114.

35 See S.L Brekoulakis (n 30) 20 where decisions from the United States (*Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc* 473 U.S. 614 S Ct 3346 (1985) (U.S. Supreme Court, 2 July 1985), France, England and Switzerland are referred to in support of this position.

36 See e.g. *Fiona Trust & Holding Corporation and Others v. Privalov and Others*(the Fiona Trust Case) [2007] 2 Lloyd's Rep. 267 as confirmed by the H L in *Premium Nafta Products Limited (20th Defendant) and others v. Fili Shipping Company Limited (14th Claimant) and others* (the Premium Nafta Case) [2007] UKHL 40. In the latter case, the then House of Lords regarded the public policy issue as to whether an agreement had been procured by fraud/bribery as a matter capable of being determined by arbitration.

may need to impose very strict limits on arbitrability, especially in respect of disputes involving State entities as this is the only way for these States to retain control over foreign trade and investment, where more economically powerful traders may have an unfair advantage.[37] Apart from the political reasons, the private nature of arbitration and its legitimacy as a resolution method for public disputes and the qualifications of arbitrators (who may not be legally qualified to determine certain legal matters) are some of the other reasons why limits may be set on arbitrability.

Matters generally accepted as not arbitrable include criminal matters and status of an individual or a corporate entity. Depending on the applicable law and the disputed matter, disputes about fraud allegations[38], patents, copyright, anti-trust and competition matters may or may not be arbitrable.[39] Under article 2060 of the French Civil Code all matters of public interest are not arbitrable. The French courts have however interpreted this provision very restrictively.[40]

For some States, concerns of public interest notwithstanding, transactions involving the State and its agencies are expressly made arbitrable. Section 5 of the Malaysian Arbitration Act, 2005 provides that the Act 'shall apply to any arbitration to which the Federal Government or the Government of any component state of Malaysia is a party'. Article 1 of the Legislative Decree No. 93-09 of 1993 of Algeria takes a slightly different but interesting position on the involvement of the State or its entities in arbitration. After exempting obligations relating to

---

37 N. Blackaby and others (n6) para 2.114. See M. Sornarajah, 'The UNCITRAL Model Law: A Third World Viewpoint' (1989) 6 J Intl Arb 7 at 16.

38 See the decision in the *Fiona Trust and Premium Nafta Cases* (n36).

39 P.M. Baron and S. Liniger (n28); M. Skinner and J. Simpkins, 'Enforcement of foreign awards in Australia' (2011) 77 (1) *Arbitration* 54-58 . See also Council Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Consolidated version of January-04-2005 (which gives the courts of member States exclusive jurisdiction to determine certain disputes including those involving the validity of patents, trademarks and designs).

40 N. Blackaby (n6) para 2.112

food, rights of succession, accommodation and clothing, public order and the status or capacity of persons, it provides, 'Entities of public law may not compromise except in international trade relations'. In effect, whilst the Algerian law states clearly that public entities may not compromise on domestic disputes, it allows such entities the right to do so in international trade relations.

Section 4 of the Zambian Arbitration Act, No. 19 of 2000 provides that, subject to the State Proceedings Act, the legislation is applicable to any arbitration agreement to which the Republic is a party but shall not apply to inter-State arbitration or arbitration between the Zambian State and an undertaking wholly controlled by another State (unless there is a contrary agreement). Section 41 of the Arbitration Act, 1995 of Kenya states quite simply that the provisions of the Act shall bind the State. The position of the laws of the States cited above are pragmatic in that, they admit the reality of the status of the modern State not only as a Sovereign but also a merchant with international commercial ties which more often than not, result in conflicts which require resolution by arbitration.

The Balkan Energy case

The facts[41] were that the Government of Ghana entered into a Memorandum of Understanding with the 1st Defendant to revamp a power barge. Subsequently, a Power Purchase Agreement (PPA) was entered into between the Government and the 2nd Defendant[42] on 27th July, 2007 under which it was agreed that the 3rd Defendant was to make the barge operational within ninety days. As a result of differences between the Government and the Defendants, the barge was not made operational within the stipulated ninety days. Failing subsequent attempts to

41 The facts of this case are distilled from the ruling of the High Court (Commercial Division) in the case dated 6th September, 2010. The authors are mindful that this is an ongoing matter. Thus the discussion of this case is restricted to the applications which were determined by the court.

42 A wholly foreign-owned company incorporated in Ghana in compliance with the requirements of the Energy Commission Act, 1997 (Act 541)

resolve the differences amicably, with both parties alleging breach of the PPA, the Defendants served notice of commencement of arbitration as per clause 22 of the PPA (the Arbitration agreement) on 23rd December, 2009. Subsequently, an attachment order was made against the assets of the State of Ghana by a Court in the Netherlands on 26th February, 2010. It was this step which led to the instant application before the High Court (Commercial Division) in Ghana.

The State sought an interim injunction against the 2nd Defendant to restrain it from carrying on with the arbitration instituted against it before the Permanent Court of Arbitration or commencing any further arbitration proceedings in any jurisdiction outside Ghana. The 2nd Defendant, in response, applied for a stay of proceedings (before the Ghanaian court) pending the completion of the said arbitration. In support of the Attorney-General's application for an injunction, the State contested the validity of the PPA which constituted the basis of the on-going arbitration. The Attorney-General argued, inter alia, that the Power Purchase Agreement, as an international transaction, required parliamentary approval for it to be legally binding according to Article 181(5) of the 1992 Constitution of Ghana. In the absence of such an approval, the whole transaction was a nullity including the arbitration agreement. It was further argued that the nature of the said transaction was a matter of interpretation and enforcement of the Constitution of Ghana and thus excluded from the arbitrable subject-matters under Act 798.

In opposing the application for injunction and in support of the application for an order staying proceedings, Counsel for the 2nd Defendant argued, *inter alia*, that matters relating to the jurisdiction of the arbitral tribunal in respect of the existence, scope or validity of the arbitration agreement and the existence or validity of the substantive agreement to which the arbitration agreement relates were within the competence of the Tribunal and ought to be raised

before it and not the Ghanaian court.[43] Counsel argued further that, assuming the Attorney-General's position was to be accepted, the arbitration agreement was separable from the main agreement.

The Court granted the injunction and dismissed the application for stay of proceedings purely on the basis of domestic civil procedure rules on injunction, largely ignoring the principles of international commercial arbitration[44]. Though the ruling impliedly suggested that issues of constitutional interpretation may be at stake, the learned trial judge neither made this express determination nor was the matter referred to the Supreme Court as per the requirements of the Constitution in such cases. The court's ruling was based on the existence of a *prima facie* case and on the balance of probabilities. In deciding in favour of the Attorney-General, the Court argued, 'in my opinion, there is the real danger to the Plaintiff [the State] outside its territorial borders and over which the court's power do not extend'.[45]

It is fair to say from the totality of the reasoning provided that the court did not expressly rule on the issue of arbitrability. By implication however, the court held that the issue as to whether the agreement is void or not is a matter to be determined by the pending suit in the courts. This inference is supported by the court's failure to uphold the argument that the matters raised before the Ghanaian courts were matters which ought to be determined by the arbitral tribunal. The determination of the question whether or not the subject-matter of the arbitration (with the constitutional implications) was arbitrable is a matter for the arbitral tribunal per section 24 of Act 798, unless the parties had agreed otherwise.

---

43 See Act 798,s 24 and the Model Law, Article 16.

44 The decision of the court to issue an anti-arbitration injunction is not a unique case as this practice is widely accepted in English jurisprudence in exceptional circumstances. See *Nomihold Securities Inc* v *Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm.), *Excalibur Ventures LLC* v *Texas Keystone Inc* [2011] EWHC1624 (Comm.); [2011] 2 Lloyd's Rep. 289

45 See the ruling in *the Balkan Energy Case,* 12

Discussion

The categories of exclusions from the ambit of Act 798, which covers not only ADR as understood by the international business community and local methods of alternative dispute resolution but also international commercial arbitration, are matters relating to 'national or public interest', 'the environment', 'constitutional interpretation and enforcement', and "any other matter that by law cannot be settled by an alternative dispute resolution method". These terms warrant comment in the light of, first, the debate on the Bill which resulted in the Act during its passage through the Ghana Parliament and, second, related aspects of the general legal framework in Ghana.

National or Public Interest

Unfortunately, the Act provides no definition for the terms 'public interest' and 'national interest'. In the debate in Parliament, a fleeting reference was made to these phrases.[46] For example, on the issue of "national interest", the Chairman of the Parliamentary Committee on the Bill made this contribution to the debate:

> We are saying that in matters of national interest, we must not give power to persons to settle disputes that touch and concern national interest by themselves… in matters of constitutional interpretation and application, persons or individuals must not have the power to settle any dispute arising from the constitution by arbitration. So we are excepting these acts from matters that can be resolved by alternative dispute resolution.[47]

---

46 The Parliamentary Debates of Ghana, Official Report, Tuesday, 16th March, 2010, Fourth Series, Volume 67,No. 30, Column 2252 .

47 See also the contribution of Honourable Inusah Fuseini, Member of Parliament in the Parliamentary Debates of Ghana, Official Report, Tuesday, 16th March, 2010, Fourth Series, Volume 67,No. 30, Column 2252 and 2254

Matters relating to constitutional interpretation and application/enforcement are therefore perceived as matters of national interest, thus calling into question the decision to include "constructional interpretation and enforcement" as a separate excluded category. In the absence of definitions for these terms one has to look elsewhere in Ghanaian law for the meanings attributable to them. Article 295(1) of the Constitution, 1992 defines "public interest" to include 'any right or advantage which enures or is intended to enure to the benefit generally of the whole of the people of Ghana'.[48] The use of the word 'include' by the Constitution demonstrates the open-ended nature of the definition. Under section 98 of the Public Procurement Act, 2003 (Act 663), "national interest" is defined as 'a condition where the nation attaches high value, returns, benefit and consideration to the matter in question'. These definitions are so broad that most contracts entered into by the State, government departments and other State entities are likely to be caught by the exemptions. In a sense, section 1 of Act 798 is to the effect that disputes arising from public transactions including those listed above, particularly contracts for the procurement of major infrastructure projects, are not arbitrable under Act 798!

It is, however, commonplace that government bilateral investment treaties and agreements with foreign investors and other entities contain clauses on international arbitration sanctioned by legislation such as the Ghana Investment Promotion Council Act,1994 (Act 478) and the Free Zones Act,1995 (as amended) (Act 504). Such contracts often relate to transactions that the public attach high value and importance to or consider beneficial to the people of Ghana generally. For example, a public transaction relating to the generation of electricity must certainly be a matter of public interest or 'relate' to a matter of public interest

[48] See the Electronic Transactions Act, 2008 (Act 772), s 144 for a similar definition for the term.

or national interest (electricity generation), particularly so when at the time of the said contract the country was experiencing energy crises.

Under section 29 of the Ghana Investment Promotion Council Act, 1994 (Act 478),[49] investors who are unable to settle their disputes amicably with the State are permitted to proceed, at their own election, to international arbitration under: (a) the rules of UNCITRAL; (b) any multilateral or bilateral treaty on investment to which Ghana is a party; or (c) any other '**national** or international **machinery for settlement of investment dispute agreed to by the parties**' (emphasis added). Why will the State be willing to submit such matters which may involve or relate to matters of national interest or public interest to international arbitration? It is therefore submitted that the existence of section 29 of Act 478 and section 32 of the Free Zones Act, 1995 indicate that the focus of the exemptions under section 1 of Act 798 is more on alternative dispute resolution mechanisms other than international commercial arbitration. Unfortunately, the language of Act 798 does not reflect this position.

The Environment

In its literal sense, the term "environment" may refer to the area in which something exists or a person's surroundings. It may also refer to the conditions under which a person or a thing exists.[50] The suspicion here is that the exemption refers to matters which directly affect the environment such as an oil spillage, water pollution or generally matters negatively affecting the quality of the physical environment supporting human life. This interpretation is, however, only a conjecture as neither the Act nor the memorandum accompanying the Bill provides any insight. That said, there still remain other unanswered questions. What is the scope of this exemption? What is the rationale for this exemption? The preparatory documents on the

---

49 See the Free Zone Act, 1995 (Act 504), s 32.

50 See for example, Article 1 of the Stockholm Declaration on the Human Environment, 1972, where policies and political situations were considered as part of the environment.

passage of the Act provide very little clue on these questions, except a very illuminating statement that appears in the Parliamentary records.[51] A Member of Parliament in his contribution to the debate on the provisions under what is now Section 1 of Act 798 commented as follows:

> Mr. Speaker, on clause 1 at the winnowing, we dropped an amendment in respect of deletion of "environment" and we were assured that we should retain "environment" and they will provide a definition in the interpretation column. So I just want to bring this to the notice of the House so that at the Second Consideration stage, they should try and submit to this House, a definition of what is "environment".[52]

An examination of section 135 of the Act on interpretation reveals that this important and insightful advice went unheeded.

Constitutional Interpretation and Enforcement

Under the 1992 Constitution of Ghana,[53] the Supreme Court has exclusive original jurisdiction in 'all matters relating to the enforcement or interpretation' of the Constitution[54] and 'all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution'.[55] This power is subject only to the powers granted under article 33 of the Constitution, 1992 to the High Court to enforce human rights provisions under the Constitution. All other courts are required to refer

---

51 Parliamentary Debates of Ghana, Official Report, Tuesday, 16th March, 2010, Fourth Series, Volume 67, No. 30, Column 2252.

52 ibid. at 2257; see the contribution of Honourable William Boafo.

53 Article 1(2) of the Constitution of Ghana, 1992 provides that the Constitution is the supreme law of country and any law that is inconsistent with its provisions is void to the extent of the inconsistency.

54 The Constitution of Ghana, 1992, Articles 2 and 130.

55 ibid. Article 130 (1) (a) and (b)

matters of interpretation and enforcement of the Constitution to the Supreme Court for determination.[56] Exempting matters of constitutional interpretation and enforcement from the scope of Act 798 is thus in accord with the provisions of the supreme law of Ghana.

What constitutes a matter of interpretation and enforcement of the provisions of the Constitution has been the subject matter of judicial decisions[57] and has been thought to be well-settled. However, this provision surprisingly generated the first controversy under Act 798 in the *Balkan Energy* case**.** One question likely to attract jurisdictional challenges is whether or not a transaction constitutes an international business or economic transaction to which the government is a party under Article 181 (5) of the 1992 Constitution of Ghana. The answer to this question will determine whether a transaction requires parliamentary approval or not. In the light of the *Balkan Energy* case, foreign parties will be well advised to verify whether the transactions they are entering into requires parliamentary approval and if so, whether the approval has been sought. They may also seek warranties that the relevant approval has been, or will be, obtained.

Other matters not capable of settlement by ADR methods

Where an Act of Parliament has spelt out clearly how a matter should be settled or dealt with, the provisions of Act 798 cannot supersede such edict. Accordingly, serious criminal offences such as murder and robbery which are first degree felonies under the Criminal Offences Act, 1960, for example, cannot be settled under the provisions of the Act. However, under section 73 of the Criminal Offences Act, 1960 (as amended), misdemeanors, offences which are not felonies and those not aggravated in degree are capable of amicable settlement by negotiation. However, the relevant law prohibiting settlement by ADR is not limited to statute or even the

---

56 ibid. Article 130(2)

57 *Tuffour v. Attorney-General* [1980] GLR 637 ; *Aduamoa II v. Twum II* [1999-2000] 2GLR 409,S.C; *Republic v. Maikankan* [1971] 2 GLR 473 at 478,SC;

law of Ghana. A further source of uncertainty concerns absence of any universal agreement on which resolution methods may be classified as ADR. For example, whilst arbitration is considered an ADR technique in the US, this is not the practice in the UK.[58]

Likely Effects of the Excluded Categories on International Arbitration

It is a common theme cutting across most of the reviews of developments in international arbitration worldwide that countries reforming their arbitration laws are motivated to capture for the benefit of their economies some of the business of providing dispute resolution and related services to international business. For example, Keir concluded from his review that such countries 'seek to attract international arbitrations to the home territory, as an adjunct of international commerce for the benefit of [their] status and economy, and of …[their] legal and other related professions'.[59] The benefits of national arbitration law being considered attractive by the international business community include less objection to choice of local law as the applicable law in dispute resolution clauses and greater acceptability of the territory as the seat of international arbitrations. To be found attractive to the international business community, the national arbitration law must be easily accessible and conform to international norms,[60] particularly keeping to the minimum necessary to support arbitrations the likelihood of local court intervention into disputes covered by arbitration agreements.

---

58 H.J. Brown. and A.L. Marriott, ADR principles and practice (2nd Ed. Sweet & Maxwell,1999) 12

59 M. Kerr, 'International Commercial Arbitration- Worldwide' *in E.*Cotran and A.Amissah (n5) 16-17. See also G. Herrman, (1998) 'UNCITRAL Arbitration Law: A Good Model of a Model Law', (1998) *Unif. L. Rev.* **3**, .483.Herrmann posits that adopting the UNCITRAL Model law has a public relations effect. He asserts that, 'it announces to the international business world that a country is not only welcome but it is also ready to ensure that those who opt for international arbitration are supported by the domestic legal system.

60 Adoption of the UNCITRAL Model Law or basing the national law on it has been the main route to making the law accessible. The extent to which the current Ghana arbitration law conforms to the Model Law is outside the scope of the article.

Unfortunately, although making Ghana an attractive venue for international arbitrations and its arbitration law acceptable in choice of law clauses appeared to be part of the case for the enactment of Act 798,[61] this consideration did not receive any attention during the Parliamentary debate on the Bill in relation to the delineation of the broad categories of exemptions. Reading the Memorandum to the Bill reveals that domestic concerns, such as clearing the backlog of cases in the courts and providing institutional structures and rules for domestic ADR practice, were the main focus of the legislators. For example, the political sensitivity of the prospect of certain matters being settled by customary arbitration, the applicable law of which varies from ethnic group to ethnic group, was bound to be a major concern. Then there were concerns which transcended the confines of customary arbitration to all the other forms of ADR such as the resolution of public disputes by private mechanisms.[62] The legislature, judiciary and the legal profession would be far better informed about these issues than international commercial arbitration as the use of the latter has been modest and without much participation by local lawyers.[63]

On the important question of arbitrability by Ghana law, three directions of elasticity in the meaning of the excluded matters are discernible. First, as already discussed, the ambit of the labels used for the excluded categories is extremely broad. Second, "matters relating" to any of the categories are almost limitless. Thirdly, the "any other matter that by law cannot be settled by an alternative dispute resolution method" catch-all exclusion could prove to be a formidable tool in the arsenal of any recalcitrant party to an arbitration agreement.

---

61 The arbitrability issue aside, most of the arbitration provisions in Act 798 are based on the UNCITRAL Model Law

62 See the contribution of Honourable Inusah Fuseini, Member of Parliament in the Parliamentary Debates of Ghana, Official Report, Tuesday, 16th March, 2010, Fourth Series, Volume 67, No. 30, Column 2252-4.

63 Most of the international arbitration cases involving the Ghana Government or state entities have been held in the major arbitration centres in the developed economies, with the legal advisors being international law firms based within such jurisdictions.

As further noted by Torgbor,[64] there is no territorial limitation to the matters exclude under section 1 of Act 798. All that may be required for it to spring into operation will be a connection between the transaction in issue and Ghana law by virtue of the latter being the *lex contractus,* the *lex fori*, *the lex loci arbitri* or the law of the place of enforcement. For example, if Ghana law happens to be the *lex loci arbitri*, section 1 can become a convenient basis for the challenge of the jurisdiction of the arbitrators as the Ghanaian court is obliged to recognize arbitration agreements in writing only if they concern "subject-matter capable of settlement by arbitration".[65] These areas of uncertainty on what is or is not arbitrable by Ghana law is likely to provide huge scope for jurisdictional battles before local and foreign courts in relation to international arbitrations associated with Ghana and ample opportunity to resist enforcement of arbitration awards, thus undermining the realisation of any motivation to make the country an arbitration-friendly jurisdiction.

Jurisdictional Challenges

Under the new arbitration law, the issue of arbitrability may be raised at three different stages: firstly, as part of an objection to the jurisdiction of the tribunal and prior to the first step towards a contest on the merits;[66] secondly, at any time during the subsequent arbitration proceedings;[67] and finally, after delivery of an arbitration award as a challenge to its enforcement or recognition.[68] The complexity associated with jurisdictional challenges stems from the fact that the arbitral tribunal and the court often have consecutive sequential and concurrent jurisdiction.

---

64 E.Torgbor, 'Ghana Outdoors: the New Alternative Dispute Resolution Act 2010 (Act 798): A Brief Appraisal (2011) **77**(2) Arbitration 211-219 at 212

65 See the New York Convention, Article II (1) to which Ghana is a signatory.

66 See Act 798, s25 (1).

67 ibid. s 25(4)

68 ibid. s 58(3)

The effect of s. 24 of Act 798 is that the parties to an arbitration agreement are at liberty to decide, by agreement, who determines the question of arbitrability. It states:

> 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.

It is to be observed that s. 24 essentially adopts Article 16 of the UNCITRAL Model Law on the doctrine of Competence/Competence but with two additional features. Firstly, some of the commonly invoked matters of jurisdiction are stated expressly. Secondly, the power of the tribunal to rule on its own jurisdiction is a default power, i.e., it acquires the power only if the parties have not agreed otherwise. The practicalities of international arbitration, e.g., the incorporation of international arbitration rules supportive of the *Competence/Competence* doctrine[69] and the disabling impact of a dispute on party cooperation, are often such that party agreement is more likely to be the exception rather than the norm.

The power of the tribunal is to "rule" on the matter of jurisdiction; it does not make a final decision on the matter. A party dissatisfied with the tribunal's ruling may repeat the

---

69 The Model Law, Article 16, the ICC Rules (2012), Article 6

application before the appointing institution[70] or the High Court.[71] The Act does not provide expressly for the situation where one party applies to the appointing institution and the other responds by making the same application to the High Court. However, as the determination of the application by the appointing institution is subject to judicial review by the High Court,[72] there would little point in following up the application before the appointing institution once the same matter comes before the High Court. All the same, there is arguably some value in providing expressly for this eventuality in the interest of avoiding unnecessary costs from gamesmanship, particularly with novice users of arbitration. In any case, handling of the appeal in multiple fora is likely to involve considerable cost and delays, particularly where the facts are disputed. Also, considering the difficulties with the scope of the excluded categories, party agreement to bypass the tribunal and the appointing institution to the High Court directly may be the most cost effective and speedier option depending on the confidence of the parties in the efficiency of the courts.[73] Such a step may even be taken prior to the constitution of the arbitral tribunal where there is joint agreement. Leave of the High Court is required for any appeal against its decision or judicial review of the decision of the appointing authority, which is to be granted only when the matter involves a fundamental point of law or a special reason exists for the appeal or review to go ahead.[74] Some English cases suggest that the refusal of leave to appeal could be the subject of an appeal to the higher court if the decision to refuse leave was reached unfairly.[75]

---

[70] The appointing authority under Act 798 has power to determine jurisdictional issues. Cf the role of the international Court of arbitration under Article 6 of the ICC rules, 2012 where issues relating to the jurisdiction of the arbitral tribunal are determined by the tribunal notwithstanding any preliminary intervention by the Court

[71] See Act 798, s. 26

[72] ibid s. 26(5)

[73] From our experience, although the courts in general could be faster, the Commercial Court in which arbitration matters are brought is comparatively very responsive to the interest of the business community in speedy and cost effective determination of disputes.

[74] Act 798, s 26(6)

[75] See: *North Range Shipping Ltd. v. Seatrans Shipping Corporation (The Western Triumph)* [2002] EWCA Civ. 405; [2002] 1 WLR 2307; *CGU International Insurance plc v. AstraZeneca Insurance Co. plc*

Where the issue at stake involves the determination of an issue related to constitutional interpretation and enforcement, further complications are introduced. If the arbitral tribunal decides that an issue of constitutional interpretation or enforcement is at stake, a further application must be brought before the High Court for the said issue to be referred to the Supreme Court. The same procedure needs to be followed where an appointing authority decides that a constitutional issue is at stake. The circuitous procedure is attributable to the fact that the arbitral tribunal and the appointing authority (if not the High Court) lack power to refer such matters directly to the Supreme Court.[76]

Allowing jurisdictional challenges to the court is not unique to the Act under consideration. Indeed, the system of jurisdictional challenge is broadly the same as under the English Arbitration Act 1996.[77]The concern is that, given the potentially wide scope of the exclusions highlighted by our analysis, the risk of satellite litigation on jurisdictional issues would be a much larger scale. Such development would accentuate the very shortcomings of the local courts that it is sought to remedy by the legislation: delays, lack of familiarity of foreign parties to local procedures, lack of confidentiality, lack of trust in the national judicial system and lengthy appeal periods[78]. It must be acknowledged that, although jurisdictional challenges will not act as a stay of any arbitral proceeding unless the parties agree otherwise,[79]they will be an unwelcome distraction which may result in further cost and waste of time.

Enforcement/Recognition of Awards

[2006] EWCA Civ. 1340; [2007] 1 All ER (Comm) 501. It is to be borne in mind that Art 6 of the European Convention on Human Rights provided justification for such appeal.

76 See the Constitution of Ghana, 1992, Article 130(2)

77 The EnglishArbitration Act 1996, ss 31(4). 32(1)& (2) and 32(5) make similar provisions in relation to the determination of jurisdictional issues.

78 R. Gaitskell (n6) 120; J.T. McLaughlin,'Arbitration and Developing Countries' (1979) 13 *Int'l Law* 211.

79 Act 798, s 26(4)

In respect of the impact of section 1 on challenge of awards, section 58(3) of Act 798 provides that, 'the court shall set aside an arbitral award where it finds that **the subject-matter of the dispute is incapable of being settled by arbitration** or the arbitral award was induced by fraud or corruption' (emphasis added). Thus, an award can be set aside because the subject-matter is not capable of settlement by arbitration under Ghana law. A party may challenge the validity of a domestic award either by an application to the High Court or at the point of enforcement. In both cases, the application may succeed on the basis of a successful challenge of the arbitrability of the subject-matter. The lack of clarity of the confines of the excluded categories is likely to provide an opportunity to desperate parties looking for some basis/ground to challenge, set aside or prevent the enforcement of an award.

The unease here is not about the right of the State to set arbitrability criteria. In creating these exemptions, Ghana has followed an age old practice accepted by many countries in Africa[80] and elsewhere in the world. In Germany, for example, non- economic disputes are not arbitrable, except those which the parties are entitled to freely dispose.[81] Article 3 of the Arbitration Law of China, 1994, states that family and marital disputes may not be subject to arbitration. Under section 4 of the Arbitration Act, 2005 of Malaysia (Act 646), the only limitation placed on arbitration is when the arbitration agreement is contrary to public policy. Under Article 1 (5) of the Model Law, States are not precluded from determining which matters are arbitrable and those which are not. The contention here is that the exemptions under Act 798 are so broad as to defeat the very essence of incorporating the Model Law provisions into

---

80 The trend in Africa has been that some States omit reference to what subject-matters are covered under [80] See the New York Convention, Article II (1).

80 See the Memorandum to the Alternative Dispute Resolution Bill, 2009, 1 and the Model law, Article 5.

80 The trend in Africa has been that some States omit reference to what subject-matters are covered under the law but rather stipulate issues that are not arbitrable (see Section 2 of the South African Arbitration Act, 1965 and Article 7 of the 1993 Tunisian Arbitration Code) and others outline in detail what subject-matters come under the purview of the law (e.g. the Arbitration and Conciliation Act ,1988 of Nigeria, section 57 and the Egyptian Arbitration law, Article 2). For a detailed discussion of these issues, see A.A Asouzu (n47) 146-161.

81 N. Blackaby and others (n6) para 2.112; S 1030(1) and (2) of the German Code of Civil Procedure.

Act 798. Adopting the Model law must result in the alignment of domestic law with internationally acceptable principles of arbitration.

Three options may be considered to deal with the challenges posed by section 1 of Act 798. Firstly, terms such as ‘public interest’, ‘the environment’ and ‘national interest’ need to be expressly defined restrictively to exclude international commercial transactions involving the State and State entities and to bring the provisions of Act 798 in line with those of Act 478 and Act 504. Alternatively, with the exception of that in Section 1 (d), the excluded matters could dropped from the legislation as “matter that by law cannot be settled by an alternative dispute resolution method” is broad enough to cover most matters not normally considered arbitrable under the laws of many countries. The third option is in recognition of the reality that the public policy issues concerning commercial arbitration are bound to differ in many respects from those applicable to customary arbitration and ADR in its general sense. For example, as already explained, customary arbitration is based on an array of different systems of ethnic customary laws and may be employed in non-commercial matters such as family matters, interests in land, chieftaincy and other forms of traditional administration. There is therefore a very strong case for providing for commercial arbitration in a separate piece of legislation with specific arbitrability criteria.

Conclusion

Many countries have modernized their national arbitration laws to align them with norms of international business transactions as reflected in the UNCITRAL Model law and the New York Convention. A common motivation to attract the business of international dispute resolution and related legal services for the benefit of their economies is discernible in these developments. Ghana has just followed suit but taken the unusual step of enacting one piece of

legislation covering not only arbitration but also alternative dispute resolution methods and customary resolution dispute methods unique to Ghana. Excluded from the ambit of the Act are matters relating to 'national or public interest', 'the environment', 'constitutional interpretation and enforcement', and "any other matter that by law cannot be settled by an alternative dispute resolution method". The nebulous nature of these exclusions poses serious risk of not only jurisdictional challenges before arbitral tribunals but also challenges to the enforcement and recognition of arbitration awards. This risk applies to arbitrations connected with Ghana by virtue of: Ghana being the seat of the arbitration or the place of enforcement of the award; or the applicable law of the arbitration agreement or the mother contract being the law of Ghana.

The *Balkan Energy* case highlights the fact that, for two reasons, contracts for the procurement of major infrastructure projects entered into between the Government or State entities and foreign contractors and consultants are particularly susceptible to arbitrability disputes. First, it would only be in exceptional circumstances that it would be possible to deny that disputes from such projects are matters relating to the "national or public interest". Secondly, such contracts require Parliamentary approval, a requirement that the foreign contracting parties might not be sufficiently aware of. The importance of verifying that the requisite approval has been obtained by the Government or the relevant State entity before entering to contractual relationship cannot therefore be overemphasized. Where the contract must be entered into in advance of the approval, appropriate warranties that such approval will be obtained may be prudent although the validity of such warranties is not without some doubt.

Modern trends on arbitrability are moving towards the widening of the scope of matters that can be arbitrated. Applying the exclusions in Act 798 to arbitration would make Ghana arbitration law one of the most restrictive legal systems on arbitrability in the world. The discourse on the passage of the Act through the Ghana Parliament was focused almost

exclusively on the application of the law on domestic disputes, thus suggesting that perhaps insufficient attention was paid to the impact of the exclusions on the perceptions of the international business community as to the extent to which the Ghanaian arbitration law is supportive of commercial international arbitration. Attempting to cover a wide range of dispute resolution methods ranging from ADR technique unique to Ghana, through ADR in its wider context, to international commercial arbitration was perhaps an over-ambitious undertaking, considering the inevitable differences in the underlying policy considerations. Rethinking the specific issue of arbitrability criteria under Ghana law is therefore called for. This may be done together with examination of the case for hiving off the arbitration provisions in Act 789 as a separate piece of legislation dedicated to arbitration.