

# INTERNATIONAL ARBITRABILITY AND DOMESTIC ARBITRABILITY IN INTERNATIONAL ARBITRATION: A GHANAIAN VIEW FROM COMPARATIVE PERSPECTIVES

**Baffour Yiadom-Boakyet<sup>†</sup>**

## ABSTRACT

*This article examines the Ghanaian approach to international arbitrability and domestic arbitrability in international arbitration from comparative perspectives. Ghana enacted the Alternative Dispute Resolution Act 2010 (Act 798) to attract international arbitration amongst other reasons. Arbitrability in Act 798 is a fundamental factor that potentially affects the recognition of arbitration agreements and the recognition and enforcement of arbitral awards in international arbitration. Therefore, arbitrability is important to making Ghana an attractive seat and a conducive enforcement forum. This is based on a premise that the effectiveness of any approach to arbitrability in international arbitration is measured by whether it enhances or restricts the recognition of arbitration agreements and the recognition and enforcement of arbitral awards. The Ghanaian approach to arbitrability is comparatively examined by considering a prevalent theme on arbitrability in international arbitration, the criteria for international arbitrability and domestic arbitrability in international arbitration. The analysis of the criteria for international arbitrability and domestic arbitrability in international arbitration starts with a focus on the Ghanaian approach. This is followed by an examination of approaches in Singapore and the USA which have separate criteria for international arbitrability and domestic arbitrability and Tunisia and England and Wales, which have the same criteria for international arbitrability and domestic arbitrability. The article concludes by recommending that Ghana should have separate legislation for international arbitration and domestic arbitration with separate criteria for international arbitrability and domestic arbitrability. Alternatively, Ghana may amend Act 798 and have the courts distinguish between international and domestic arbitrability.*

**Key words:** Arbitrability, Arbitration, International, Domestic, Recognition and Enforcement

---

<sup>†</sup> PhD in Law (University of Aberdeen), LLM (Distinction) (University of Aberdeen), Qualifying Certificate in Law (Ghana School of Law), LLB (University of Ghana); BA (University of Ghana) Lecturer, University of Professional Studies, Accra, [b.yiadom-boakye@upsamail.edu.gh](mailto:b.yiadom-boakye@upsamail.edu.gh); [baffouryb@gmail.com](mailto:baffouryb@gmail.com). ORCID ID: <https://orcid.org/0009-0009-0769-7174>

## INTRODUCTION

Arbitrability concerns whether a subject-matter is capable of settlement by arbitration.<sup>1</sup> Arbitrability is a fundamental concept in international arbitration that affects the recognition of international arbitration agreements and the recognition and enforcement of arbitral awards.<sup>2</sup> This is at the root of international arbitration since an arbitral tribunal can only assume jurisdiction over a dispute, and parties can only use arbitration (party autonomy), if the dispute concerns an arbitrable subject-matter.<sup>3</sup> Therefore, arbitrability is an important tool that a state can use to protect certain interests in international arbitration as it concerns the 'justiciability of a subject-matter'.<sup>4</sup>

In 2010 Ghana enacted the Alternative Dispute Resolution Act, 2010 (Act 798)<sup>5</sup> to regulate arbitration, mediation, and customary arbitration. Part one of Act 798 regulates domestic and international arbitration in Ghana. Part one of Act 798 seeks to make Ghana an attractive seat for international arbitration in Africa by recognising party autonomy, limited court interference and support for the arbitral process.<sup>6</sup> Arbitrability in international arbitration in Ghana has been recognised as a potential weakness of Act 798.<sup>7</sup>

---

<sup>1</sup> Gary Born, *International Commercial Arbitration* (3<sup>rd</sup> edn, Kluwer Law International 2021) 1028-1029.

<sup>2</sup> *ibid.*

<sup>3</sup> Karim Youssef, 'Part I Fundamental Observations and Applicable Law, Chapter 3 - The Death of Inarbitrability' in Loukas A Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives*, (International Arbitration Law Library 19, Kluwer Law International 2009) para 3-5.

<sup>4</sup> Alex Mills, 'Chapter 3: Arbitral Jurisdiction' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (1<sup>st</sup> edn, OUP 2020) 86.

<sup>5</sup> Hereinafter referred to as the Act 798.

<sup>6</sup> Emelia Onyema, 'The New Ghana ADR Act 2010: A Critical Overview' (2012) 28(1) *Arbitration International* 101, 102; see also Edward Torgbor, 'Ghana Outdoors: The New Alternative Dispute Resolution Act 2010 (Act 798): A Brief Appraisal' (2011) 77(2) *Arbitration* 211, 219.

<sup>7</sup> Joe Mante and Issaka Ndekugri, 'Arbitrability in the context of Ghana's new arbitration law' (2012) 15(2) *Int. A.L.R.* 31, 32; Doe Tsikata and Matilda Idun-Donkor, 'National Report for Ghana (2020 through 2022)' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Supplement No. 120, ICCA & Kluwer Law International 2020, 14; Albert Fiadjoe and Nana Tawiah Okyir 'The Alternative Dispute Resolution Act of Ghana Deconstructed: Providing a More Positive Sum Approach to Conflict Resolution' (2016) 4 *Transnational Dispute Management* 1, 6; Edward Torgbor (n 6).

Section 1 of Act 798 makes non-arbitrable<sup>8</sup> matters relating to the national or public interest;<sup>9</sup> the environment;<sup>10</sup> the enforcement and interpretation of the Constitution;<sup>11</sup> and any other matter that by law cannot be settled by an alternative dispute resolution method.<sup>12</sup> The non-arbitrable matters in Act 798 have been criticised for being too broad, limitless and all-inclusive.<sup>13</sup> The non-arbitrable matters have also been criticised for having an implied public policy basis which contribute to their broad nature,<sup>14</sup> and a lack of territoriality as to whether they are applicable in both international and domestic arbitration.<sup>15</sup> Ghana has the same criteria for international arbitrability and domestic arbitrability.<sup>16</sup> Arbitrability in Act 798 applies to international and domestic arbitration.<sup>17</sup> The courts in Ghana have not pronounced on any distinction between international arbitrability and domestic arbitrability.

This article examines the Ghanaian approach to international arbitrability and domestic arbitrability in international arbitration in comparison with other approaches. The effectiveness of the Ghanaian approach to international arbitrability and domestic arbitrability is examined in the light of comparative approaches to determine whether the approaches of other states may be beneficial to Ghana. This is because one of the aims of Act 798 is to bring the law governing arbitration in Ghana into harmony with international conventions, rules, and practices in arbitration.<sup>18</sup> The effectiveness of the Ghanaian approach to arbitrability in international arbitration is measured by whether it enhances or restricts the recognition of arbitration agreements and the recognition and enforcement of

---

<sup>8</sup> Joe Mante (n 7) 32; Doe Tsikata (n 7) 14; Albert Fiadjoe (n 7) 6; Edward Torgbor (n 6).

<sup>9</sup> Act 798, s 1(a).

<sup>10</sup> *ibid*, s 1(b).

<sup>11</sup> *ibid*, s 1(c).

<sup>12</sup> *ibid*, s 1(d).

<sup>13</sup> Joe Mante (n 7) 38, 39.

<sup>14</sup> Joseph Mante, 'Arbitrability and Public Policy: An African Perspective' (2017) 33 *Arbitration International* 275, 290, 294.

<sup>15</sup> Edward Torgbor (n 6) 212.

<sup>16</sup> Act 798, s 1.

<sup>17</sup> Edward Torgbor (n 6) 212.

<sup>18</sup> Memorandum to the Alternative Dispute Resolution Bill 2009, i.

arbitral awards.<sup>19</sup> The analysis in this article helps determine if Ghana should maintain the same criteria for international arbitrability and domestic arbitrability, or have separate criteria for international arbitrability and domestic arbitrability.

A prevalent theme in international arbitration is the approach adopted by a state concerning international arbitrability and domestic arbitrability.<sup>20</sup> As a dispute resolution mechanism, arbitration may be international or domestic. International arbitration often involves 'parties of different nationalities, takes place in a country foreign to parties or involves an international dispute'.<sup>21</sup> In domestic arbitration usually, the nationalities of the parties, the seat of arbitration, and the place of performance of the contract may be the same.<sup>22</sup> The categorisation of arbitration as international or domestic affects arbitrability due to the different factors and interests underpinning international arbitration and domestic arbitration. States adopt two main approaches concerning international arbitrability and domestic arbitrability. The first approach is to have *separate criteria for international arbitrability and domestic arbitrability* that distinguishes international arbitrability from domestic arbitrability. This may be provided through separate legislation as is the case in Singapore,<sup>23</sup> or through the courts as is the case in the USA.<sup>24</sup> The second approach is to have *the same criteria for international arbitrability and domestic arbitrability*. This may be provided through legislation as is the case in Tunisia,<sup>25</sup> or through the courts as is the case in England and Wales.<sup>26</sup> The analysis in this paper is done by

---

<sup>19</sup> Amazu Asuozi, 'African States and the Enforcement of Arbitral Awards: Some Key Issues Arbitration' (1999) 15(1) *Arbitration International* 1, 1; White & Case, Queen Mary University of London School of International Arbitration, 2018 *International Arbitration Survey: The Evolution of International Arbitration*, 7.

<sup>20</sup> Gary Born (n 1) 1042.

<sup>21</sup> Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6<sup>th</sup> edn, OUP 2015) para 1.19.

<sup>22</sup> *ibid.*

<sup>23</sup> International arbitration in Singapore is regulated by the International Arbitration Act (Chapter 143A) [Revised Edition 2002] whilst the Arbitration Act (Cap 10) (2002 Revised Edition) regulates domestic arbitration; see also Switzerland where international arbitration is governed by the Federal Private International Law Act, 1987 whilst the Federal Code of Civil Procedure, Part 3: Arbitration of 19 December 2008 (Articles 353 to 399) governs domestic arbitration.

<sup>24</sup> *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc.* 473 50 US 614 (1985); see also France, Judgment of 20 June 1969, *Impex v. Malteria Adriatica*, 1969 Rev. arb. 95 (Paris Cour d'appel), CA Paris 29 March 1991, *Ganz v. SNCFT*, 3 Rev. Arb. 478 (1991).

<sup>25</sup> Arbitration Code, art. 7; See also, Sweden Arbitration Act of 1999, s 1.

<sup>26</sup> *Fulham Football Club (1987) Ltd v Sir David Richards, The Football Association Premier League Ltd.* [2011] EWCA Civ 855; see also Hong Kong, Arbitration Ordinance Cap 609, Part 11A; *Paquito Lima Buton v Rainbow Joy Shipping Limited* (2008) 11 HKCFAR 464; CLOUT Case 1073: MAL 8

examining the Ghanaian approach in comparison with the approaches of Singapore and USA on the one hand and the approaches of Tunisia and England and Wales on the other hand.

After this introductory section, the article analyses the Ghanaian approach to international arbitrability and domestic arbitrability in international arbitration. This is followed by an examination of states with separate criteria for international arbitrability and domestic arbitrability. States that have the same criteria for international arbitrability and domestic arbitrability are then examined. A comparative analysis is then provided on the two approaches to highlight discernible trends in international arbitrability and domestic arbitrability. The article concludes by making recommendations for Ghana concerning how to distinguish international arbitrability from domestic arbitrability.

## **GHANAIAN APPROACH**

Section 1 of Act 798 applies to matters other than those that relate to the national or public interest;<sup>27</sup> the environment;<sup>28</sup> the enforcement and interpretation of the Constitution;<sup>29</sup> any other matter that by law cannot be settled by an alternative dispute resolution method.<sup>30</sup> The subject matters in Section 1 are non-arbitrable hence providing the scope of arbitrability in Ghana.<sup>31</sup>

Section 1 of Act 798 does not indicate its scope of application concerning territoriality.<sup>32</sup> Since no distinction is made between international arbitrability and domestic arbitrability in the Act 798, it may be assumed that the scope of arbitrability applies to both international arbitration and domestic arbitration.<sup>33</sup> This highlights a lack of certainty in territoriality.<sup>34</sup> The provisions on foreign

---

<sup>27</sup> Act 798, s 1 (a).

<sup>28</sup> *ibid.*, s 1 (b).

<sup>29</sup> *ibid.*, s 1 (c).

<sup>30</sup> *ibid.*, s 1 (d).

<sup>31</sup> Joe Mante (n 7) 32; Nene Amegatcher, 'A Daniel Come to Judgment: Ghana's ADR Act, a Progressive or Retrogressive piece of Legislation?' Ghana Bar Association Annual Conference Continuous Legal Education Workshop Elmina- Tuesday 20th September 2011, 22-23; Doe Tsikata (n 7) 14; Albert Fiadjoe (n 7) 6; Edward Torgbor (n 6) 212.

<sup>32</sup> Edward Torgbor (n 6) 212.

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.*

awards in Act 798 are the only provisions in Act 798 that are limited exclusively to international arbitration.<sup>35</sup> Act 798 does not define international arbitration. It has been observed that the lack of clarity on the scope of arbitrability and territoriality may lead to avoidable litigation.<sup>36</sup> The case of *Attorney-General v. Balkan Energy Ghana Limited & 2 Others*<sup>37</sup> highlights this assertion.

In the *Balkan Energy* case, a dispute arose between the Government of Ghana (GoG)<sup>38</sup> and Balkan Energy and its partners in respect of a Power Purchase Agreement.<sup>39</sup> Balkan Energy initiated arbitration proceedings against the GoG at the Permanent Court of Arbitration in the Hague. The GoG sued Balkan in the High Court in Ghana for a declaration that the PPA and the arbitration clause in the PPA were international business transactions requiring prior parliamentary approval as required by Article 181(5) of the 1992 Constitution. The failure to obtain prior parliamentary approval had rendered both the PPA and the arbitration agreement unenforceable. Before the arbitral tribunal, the GoG challenged the jurisdiction of the arbitral panel to hear the dispute.<sup>40</sup> The challenge by GoG was premised on the argument that the matters in contention required constitutional interpretation and enforcement which was the exclusive preserve of the Supreme Court of Ghana. The arbitral tribunal rejected the GoG's challenge to its jurisdiction.<sup>41</sup> The tribunal proceeded with the hearing of the arbitration. The High Court in Ghana based on Article 130(1)(a)<sup>42</sup> of the 1992 Constitution and Section 1 of Act 798 ruled that the underlying dispute involved the interpretation and enforcement of Ghana's Constitution.<sup>43</sup> The 1992 Constitution exclusively reserved its interpretation and

---

<sup>35</sup> Act 798, s 59.

<sup>36</sup> Edward Torgbor (n 6) 212.

<sup>37</sup> High Court, unreported, Suit No. BDC 32/10, 6/9/2010 (*Balkan Energy Case*).

<sup>38</sup> Hereinafter referred to as GoG.

<sup>39</sup> Hereinafter referred to as PPA.

<sup>40</sup> See *Balkan Energy Case* (n 37); *Balkan Energy Ghana Limited and others v. Republic of Ghana* (Interim Award) PCA Case No. 2010-7; see also *Bankswitch Ghana Ltd (Ghana) v Ghana* PCA Case No 118294 where the issue of the meaning of Article 181(5) of the 1992 Constitution arose in arbitral proceedings however arbitrability was not a specific issue in dispute.

<sup>41</sup> *ibid.*

<sup>42</sup> 1992 Constitution art 130(1) The Supreme Court shall have exclusive original jurisdiction in all matters relating to the enforcement or interpretation of this Constitution.

<sup>43</sup> *Balkan Energy Case* (n 37) 9-13; see also *Balkan Energy Ghana Limited* (n 40), para 51; Ace Anan Ankomah, 'The Interplay between the Courts and Arbitral Proceedings: Ghana's Old Order Changeth' (2016) 29 UGLJ 183, 188.

enforcement for the Supreme Court of Ghana.<sup>44</sup> The High Court refused to stay proceedings pending arbitration. The High Court granted an anti-arbitration injunction against Balkan Energy from participating in arbitral proceedings pending before the Permanent Court of Arbitration at the Hague. The arbitral tribunal, however, went ahead with arbitration proceedings and found the GoG liable for breach of contract.<sup>45</sup>

The arbitration between the GOG and Balkan Energy was seated in the Netherlands, hence an international arbitration.<sup>46</sup> However, the involvement of the GOG, which meant that there was a Ghanaian connection, played a role in the High Court of Ghana applying Article 130(1) of the 1992 Constitution and Section 1 of the Act 798 in granting the anti-arbitration injunction.<sup>47</sup> This is evidence of the fact that the lack of specific territoriality in the Act 798 means that Section 1 of the Act 798 applies to both international arbitration and domestic arbitration. Despite the ruling of the High Court in Ghana, the arbitral tribunal determined its own jurisdiction and proceeded with the matter because the arbitration was seated in the Netherlands.<sup>48</sup>

Therefore, the lack of distinction between arbitrability in international arbitration and domestic arbitration in Ghana potentially has a significant effect on international arbitration with a Ghanaian connection. This is irrespective of whether an international arbitration is seated in Ghana or not. The lack of clarity on the scope of arbitrability and territoriality in Ghana is further compounded by the broad and open-ended nature of the non-arbitrable matters in Section 1 of Act 798.<sup>49</sup> This adds further uncertainty to the scope of arbitrability in Ghana, particularly in international arbitration. The recognition of arbitration agreements and the recognition and enforcement of arbitral awards will be affected by this uncertainty. To ensure that Ghana adopts the best international practice concerning international

---

<sup>44</sup> *ibid.*

<sup>45</sup> See *Balkan Energy Limited and others v. Republic of Ghana* (Award), PCA Case No. 2010-7.

<sup>46</sup> *Balkan Energy Ghana Limited and others* (n 40).

<sup>47</sup> *Balkan Energy Case* (n 37) 9-13.

<sup>48</sup> *Balkan Energy Ghana Limited and others* (n 40)

<sup>49</sup> Joe Mante (n 7) 38.

arbitrability and domestic arbitrability, it is imperative to analyse the comparative approaches of other states.

## COMPARATIVE APPROACHES

### **Separate Criteria for International Arbitrability and Domestic Arbitrability**

As noted earlier, international arbitration often involves 'parties of different nationalities, takes place in a country foreign to parties or involves an international dispute'.<sup>50</sup> In domestic arbitration, the nationalities of the parties, the seat of arbitration, and the place of performance of the contract may be the same.<sup>51</sup> Domestic arbitration often concerns commercial and non-commercial matters. For international arbitration, arbitrability often relates to commercial matters because of the aim of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) to encourage international commerce<sup>52</sup> and the commercial reservation in the New York Convention.<sup>53</sup> Parties to international arbitration are often businesses or commercial corporations, states, or state entities.<sup>54</sup> Sometimes international arbitration may concern an individual against a commercial entity or an organization.<sup>55</sup> The amounts in dispute in international arbitration are disproportionately higher as compared to sums involved in domestic arbitration.<sup>56</sup> This is because of the presence of commercial and state entities who are often involved in cross-border transactions and other transactions entailing huge sums. The relationship between arbitrability and international commerce is also because of the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (Model Law) by many countries.<sup>57</sup> Some states

---

<sup>50</sup> Nigel Blackaby (n 21) para 1.19.

<sup>51</sup> *ibid.*

<sup>52</sup> Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 1.

<sup>53</sup> New York Convention art I (3); see also <<http://www.newyorkconvention.org/countries>> accessed on 29 April 2025 for a list of contracting states applying this reservation.

<sup>54</sup> Nigel Blackaby (n 21) para 1.22.

<sup>55</sup> See <<https://www.tas-cas.org/en/general-information/frequently-asked-questions.html>> accessed 29 April 2025; an example of such a dispute is arbitration before the Court of Arbitration for Sports which provides services in order to facilitate the settlement of sports-related disputes through arbitration or mediation.

<sup>56</sup> See Nigel Blackaby (n 21) para 1.23.

<sup>57</sup> See [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status) accessed on 29 April 2025 for states that have adopted the Model Law; Model Law, art 1(1).

which have not adopted the Model Law also take cognisance of it when drafting their national arbitration legislation to ensure that it is effective for international arbitration.<sup>58</sup>

There is a narrow scope of matters which are not arbitrable in international arbitration especially concerning commercial matters.<sup>59</sup> This is because of two reasons. Firstly, the pro-enforcement stance of the New York Convention.<sup>60</sup> Secondly, the 'shared international policy of encouraging the resolution of international commercial disputes through arbitration'.<sup>61</sup> Arbitrable subject matter in international arbitration may differ from arbitrable subject matter in domestic arbitration.<sup>62</sup> Arbitrability in domestic arbitration is determined by domestic considerations mainly influenced by public policy, mandatory law, and public interest.<sup>63</sup> Domestic notions of non-arbitrability are sometimes different and broader than international notions of non-arbitrability.<sup>64</sup>

An analysis of the approaches of two states that have separate criteria for international arbitrability and domestic arbitrability reveals the different considerations undergirding international arbitrability and domestic arbitrability. Singapore has separate criteria for international arbitrability and domestic arbitrability in separate legislation. In the USA the distinction between international arbitrability and domestic arbitrability has been drawn by the courts. Therefore, these selected states have the requisite attributes necessary for analysis.

## **Singapore**

International arbitration in Singapore is regulated by the International Arbitration Act 1994 [Revised Edition 2020].<sup>65</sup> The preamble in the IAA states that the IAA is

---

<sup>58</sup> Nigel Blackaby (n 21) para 1.219; George Zekos, 'The Role of Courts in Commercial and Maritime Arbitration Under English Law' (1998) 15(1) *Journal of International Arbitration* 51, 63-64.

<sup>59</sup> *ibid.*, para 2.116

<sup>60</sup> Marike Paulsson (n 52) 1.

<sup>61</sup> Gary Born (n 1) 957.

<sup>62</sup> Loukas Mistelis, 'Part I Fundamental Observations and Applicable Law, Chapter 1 - Arbitrability – International and Comparative Perspectives' in Loukas A Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (International Arbitration Law Library 19, Kluwer Law International 2009) para 1-24.

<sup>63</sup> Gary Born (n 1) 1042-1043.

<sup>64</sup> *ibid.*

<sup>65</sup> Hereinafter referred to as the IAA.

based on the Model Law and relates to the conduct of international commercial arbitration. The IAA provides a definition for international arbitration.<sup>66</sup> The definition of commercial in the Model Law permits a wide interpretation of contractual and non-contractual matters under relationships that may be regarded as commercial.<sup>67</sup> The IAA also permits parties in domestic arbitration to adopt the IAA as the applicable legislation.<sup>68</sup>

The IAA provides that intellectual property rights disputes are arbitrable.<sup>69</sup> For matters that do not concern intellectual property disputes, the IAA provides that any dispute which the parties have agreed to submit to arbitration may be determined by arbitration unless it is contrary to public policy to do so.<sup>70</sup> The courts in Singapore interpreted this provision narrowly concerning non-arbitrable subject matter in international arbitration in the case of *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals*.<sup>71</sup> The court stated that there was a presumption of arbitrability as long as a dispute fell within the scope of an arbitration clause.<sup>72</sup> However, the presumption may be rebutted in two instances. First, a subject matter is non-arbitrable if Parliament intended to preclude a particular type of dispute from being arbitrated as evidenced by either the text or the legislative history of the statute.<sup>73</sup> Second, a subject matter is non-arbitrable where it would be contrary to public policy considerations for the subject matter to be arbitrable.<sup>74</sup>

---

<sup>66</sup> IAA s 5(2) Notwithstanding Article 1(3) of the Model Law, an arbitration is international if —(a) at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

<sup>67</sup> See Model Law art 1; see Michael Hwang, Lawrence Boo and Yewon Han, ‘National Report for Singapore (2018 through 2022)’ in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Supplement No. 120, ICCA & Kluwer Law International 2020) 11.

<sup>68</sup> IAA s 5 (1).

<sup>69</sup> *ibid*, ss 26A (1), 26B (1), 26C, 26D, 26E, 26F, 26G.

<sup>70</sup> *ibid*, s 11(1).

<sup>71</sup> [2015] SCGA 57.

<sup>72</sup> *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SCGA 57 para 76.

<sup>73</sup> *ibid*.

<sup>74</sup> *ibid*; see also Michael Hwang and Yin Wai Chan, ‘Case Law of the Supreme Court of Singapore in the Field of Arbitration’ (2019) 2019(2) *bArbitra* | *Belgian Review of Arbitration* 629, para 25.

Also the fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration does not indicate that a dispute about that matter is non-arbitrable.<sup>75</sup> The criteria for arbitrability in the IAA and decisions of the Singaporean courts indicates a wide interpretation of the scope of arbitrability in international arbitration with narrow exceptions. The presumption of arbitrability and the exceptions enables a pro-arbitration approach with a narrow scope for non-arbitrability in international arbitration. Intellectual property rights disputes are arbitrable and for other subject matters, the presumption in favour of arbitrability is evidence in favour of making all disputes potentially arbitrable.

The law regulating domestic arbitration in Singapore is the Arbitration Act (Cap 10) (2002 Revised Edition).<sup>76</sup> Cap 10 is quite similar to the Model Law though it is not limited to only commercial arbitration. Arbitration is considered domestic if it is seated in Singapore and the international arbitration legislation does not apply to it.<sup>77</sup> Cap 10 does not provide a specific category of non-arbitrable subject matter or criteria by which arbitrability should be determined. However, Cap 10 provides for the arbitrability of intellectual property rights disputes.<sup>78</sup> Intellectual property rights cover a broad range of matters.<sup>79</sup> Cap 10 further provides extensive provisions concerning intellectual property rights awards and their effects.<sup>80</sup>

Despite the absence of criteria for arbitrability or specific non-arbitrable subject matter concerning other subject matters in Cap 10, arbitrability is one of the grounds on which a domestic arbitral award may be set aside.<sup>81</sup> The Review of Arbitration Laws, LRRD No 3/2001,<sup>82</sup> which was prepared before the enactment of the CAP 10 and the IAA, provides insight on arbitrability. The Arbitration Report does not

---

<sup>75</sup> IAA, s 11 (2).

<sup>76</sup> Hereinafter referred to as Cap 10.

<sup>77</sup> Cap 10, s 3.

<sup>78</sup> *ibid*, s 52 B (1).

<sup>79</sup> *ibid*, s 52 A (1).

<sup>80</sup> See *ibid*, s 52 C on the effect of awards involving intellectual property rights; *ibid*, s 52D on setting aside awards involving intellectual property rights; Cap 10, s 52E on judgments entered in terms of awards involving intellectual property rights and Cap 10, s 52F on the validity of patents in arbitral proceedings.

<sup>81</sup> *ibid*, s 48 (1)(b)(i); see also *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21, para 24.

<sup>82</sup> Arbitration Report para 2.37.17.

provide criteria for arbitrability or specific arbitrable or non-arbitrable subject matter. This means that all matters are potentially arbitrable in domestic arbitration. The Arbitration Report, however, provides a list of matters which may be non-arbitrable as a result of public interest elements. The matters include citizenship or legitimacy of marriage, grants of statutory licenses, the winding-up of companies, bankruptcies of debtors, administration of estates.<sup>83</sup> Therefore, public interest elements determine arbitrability in domestic arbitration.<sup>84</sup> A dispute which has no public interest element is, in principle, arbitrable. In addition to the non-arbitrable matters stated in the Arbitration Report, the courts in Singapore have pronounced on public interest elements which may lead to a dispute being declared non-arbitrable.

The case of *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)*<sup>85</sup> considered the scope of arbitrability in Cap 10 in the light of the insolvency regime. The court held that disputes arising from the operation of the statutory provisions of the insolvency regime were *per se* non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement.<sup>86</sup> However, claims against an insolvent company concerning its pre-insolvency rights are arbitrable if they involve private *inter se* disputes between the insolvent company and another party.<sup>87</sup> The court noted that claims brought against a company concerning such pre-insolvency rights did not have any public interest elements.<sup>88</sup> The courts in Singapore have also held that whether a director is an alter ego of a company is arbitrable in domestic arbitration.<sup>89</sup> A review of the decisions by Singaporean courts reveals public interest elements as the key consideration for the courts in deciding that a dispute is non-arbitrable in domestic arbitration. The approach of the courts aligns with the Arbitration Report which emphasises public interest as the sole ground for non-

---

<sup>83</sup> *ibid.*

<sup>84</sup> Michael Hwang (n 67) 11.

<sup>85</sup> [2011] SGCA 21.

<sup>86</sup> *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21, para 46.

<sup>87</sup> *ibid* para 47.

<sup>88</sup> *ibid.*

<sup>89</sup> *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] SGHC 78.

arbitrability in domestic arbitration. The potential non-arbitrable matters stated in the Arbitration Report concern issues of status and mandatory law. The issues of status and mandatory law form the basis for public interest considerations in domestic arbitration. Intellectual property rights disputes are arbitrable, and in the absence of public interest elements, all other disputes are arbitrable in domestic arbitration.

The criteria for arbitrability in Singapore in international arbitration and domestic arbitration reveals certain similarities and differences. International arbitration is limited to international commercial arbitration, however domestic arbitration may involve commercial and non-commercial disputes. Intellectual property rights disputes are arbitrable in international arbitration and domestic arbitration. All other disputes are also potentially arbitrable in international arbitration and domestic arbitration. In international arbitration, disputes are non-arbitrable based on the text or legislative history of the statute or public policy.<sup>90</sup> Disputes that may be non-arbitrable in domestic arbitration involve public interest elements.<sup>91</sup> The public interest elements are usually based on matters of status and mandatory law.<sup>92</sup> It can be deduced that the scope of non-arbitrability in domestic arbitration based on public interest elements is broader than the scope of non-arbitrability in international arbitration based on the presumption of arbitrability, statutory and public policy exceptions. The express stipulation of the IAA that exclusive jurisdiction does not necessarily mean non-arbitrability further shows the narrow scope of non-arbitrability in international arbitration in Singapore.<sup>93</sup> The difference in the scope of international arbitrability and domestic arbitrability is evidence of the varying considerations in international arbitration and domestic arbitration

## USA

The federal law applicable to international and domestic arbitration in the USA is the Federal Arbitration Act.<sup>94</sup> Chapter 1 of the FAA has general provisions

---

<sup>90</sup> *Tomolugen Holdings Ltd and another* (n 72)

<sup>91</sup> Arbitration Report para 2.37.17.

<sup>92</sup> *ibid.*

<sup>93</sup> IAA, s 11(2).

<sup>94</sup> Hereinafter referred to as FAA.

applicable to international and domestic arbitration. Chapter 2 incorporates the New York Convention into domestic law and Chapter 3 has provisions for enforcement of the Inter-American Convention on International Commercial Arbitration. The FAA is not based on the Model Law. States within the USA have state arbitration statutes which govern domestic and international arbitration in individual states.<sup>95</sup> Where the provisions of a state's arbitration statute conflict with the FAA, the FAA supersedes the state arbitration statute.<sup>96</sup> In international arbitration an agreement or award which is entirely between citizens of the US shall be deemed not to fall under the New York Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.<sup>97</sup>

The FAA does not provide criteria for arbitrability. The FAA stipulates that agreements to arbitrate shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>98</sup> However, the FAA does not apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.<sup>99</sup> The absence of criteria of arbitrability in the FAA has resulted in the scope of arbitrability in international arbitration being determined by the courts. The case of *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc.*<sup>100</sup> is a significant case on the distinction between arbitrability in international arbitration and domestic arbitration in the USA. The US Supreme Court noted that where a party asserts that an arbitration agreement cannot be enforced as to a particular claim, the party must show reference to the text of a statute, or its legislative history.<sup>101</sup> Alternatively, a party contending non-arbitrability must show an inherent conflict between arbitration and the underlying purposes of the statute that Congress specifically

---

<sup>95</sup> Catherine Amirfar, Natalie Reid and Ina Popova, 'National Report for the United States of America (2018 through 2022)' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Supplement No. 120, ICCA & Kluwer Law International 2020) 2-7.

<sup>96</sup> *ibid.*

<sup>97</sup> FAA, s 202.

<sup>98</sup> FAA, s 2.

<sup>99</sup> FAA, s 1; see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) where the court stated that this exception applies to contracts of employment of transportation workers; Catherine Amirfar (n 95) 26.

<sup>100</sup> 473 50 US 614 (1985).

<sup>101</sup> *ibid.*, 627-628.

intended that the claim should not be arbitrable.<sup>102</sup> The court's reasoning was based on international comity, respect for the capacities of foreign tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes.<sup>103</sup> This was the case assuming that a contrary result would be forthcoming in a domestic context.<sup>104</sup> The Supreme Court noted that in international arbitration, domestic courts must subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration.<sup>105</sup>

The effect of the decision in *Mitsubishi* is the emphasis on the use of the presumption of arbitrability in deciding whether a dispute is arbitrable where claims arise from a statute. This presumption of arbitrability is applicable in international and domestic arbitration. There is a presumption of arbitrability in statutory claims unless non-arbitrability can be gleaned from the text or legislative history of the statute. The presumption of arbitrability is also rebutted where non-arbitrability can be determined based on a conflict between arbitration and the underlying purposes of the statute. The influence of the decision in *Mitsubishi*<sup>106</sup> complements the policy to favour international commercial arbitration thereby broadening the scope of arbitrability in international arbitration. The US courts have held in several cases that parties can agree to arbitrate most commercial claims<sup>107</sup> and public law claims.<sup>108</sup> This is because of adherence to the pro-arbitration attitude of the New York Convention by the US courts.<sup>109</sup> However, arbitrability may be rendered conditional upon the satisfaction of certain prerequisites such as post-dispute consent being given to ensure arbitration is voluntary.<sup>110</sup> Also the courts in the US recognising the nature of international commerce have accordingly expanded the

---

<sup>102</sup> *ibid.*

<sup>103</sup> *ibid* 629.

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.*

<sup>107</sup> Catherine Amirfar (n 95) 26-27.

<sup>108</sup> Paula . Henin and Rocio Ines Digón, 'Chapter 24: Enforcing New York Convention Awards in the United States: Chapter 2 of the FAA', in Laurence Shore, Tai-Heng Cheng, et al. (eds), *International Arbitration in the United States* (Kluwer Law International 2017) 594.

<sup>109</sup> *ibid.*

<sup>110</sup> *ibid.*

scope of arbitrability in international arbitration.<sup>111</sup> Arbitration is permitted for all subject matters unless there is an express legal reason for non-arbitrability.<sup>112</sup>

The absence of criteria for arbitrability in the FAA has resulted in the scope of arbitrability in domestic arbitration being determined by the courts. The attitude of the courts in the USA based on the presumption of arbitrability has led to a broad scope of arbitrability in most statutory claims.<sup>113</sup> Firstly, in *Shearson/ American Express v. McMahon*,<sup>114</sup> the court held that claims under the Racketeer Influenced and Corrupt Organizations (RICO) Act and Exchange Act are arbitrable.<sup>115</sup> This was because the party opposing arbitration could not demonstrate from the text, history, or purposes of the statutes that Congress intended to make an exception to arbitration for such claims.<sup>116</sup> Secondly, in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>117</sup> the court held that claims under the Age Discrimination in Employment Act (ADEA) are arbitrable.<sup>118</sup> This was because neither the text nor the legislative history of the ADEA explicitly precludes arbitration.<sup>119</sup> Also in *CompuCredit Corp. v. Greenwood*,<sup>120</sup> the court held that claims under the Credit Repair Organizations Act (CROA) were arbitrable.<sup>121</sup> The court noted that despite the CROA being silent on the arbitrability of claims had Congress meant to prohibit arbitrability in the CROA, it would have done so in a clearer manner than what the respondents were suggesting.<sup>122</sup> The presumption of arbitrability also applies even in cases where state law may provide contrary legislation concerning the arbitrability of a dispute.<sup>123</sup>

---

<sup>111</sup> *ibid.*

<sup>112</sup> Karim Youssef (n 3) para 3-31.

<sup>113</sup> Erica Stein and David Attanasio, 'The US Supreme Court and Arbitration' (2019) 2019(2) *b-Arbitral Belgian Review of Arbitration* 521, paras 19-22.

<sup>114</sup> 482 U.S. 220, 226-227 (1987).

<sup>115</sup> *ibid.*

<sup>116</sup> *Shearson/ American Express v. McMahon* 482 U.S. 220, 226-227 (1987).

<sup>117</sup> 500 U.S. 20, 27-28.

<sup>118</sup> *ibid.*

<sup>119</sup> *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20, 27-28.

<sup>120</sup> 565 U.S. 95, 104 (2012).

<sup>121</sup> *ibid.*

<sup>122</sup> *CompuCredit Corp. v. Greenwood* 565 U.S. 95, 103 (2012).

<sup>123</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55-60 (1995).

Flowing from the decision in *Mitsubishi* and subsequent decisions the scope of arbitrability in domestic arbitration in the USA is broad. Non-arbitrability is deduced by reference to the history or text of a statute or an inherent conflict between the purpose of the statute and arbitration. This has considerably narrowed the scope of non-arbitrability. Some matters which may have public interest elements such as consumer<sup>124</sup> and employee protection<sup>125</sup> are arbitrable. This emphasises the pro-arbitration stance of the US courts regarding agreements to arbitrate.<sup>126</sup> However, other matters which affect public interest may be non-arbitrable. Non-arbitrable claims may arise in criminal matters<sup>127</sup> pure bankruptcy matters,<sup>128</sup> 'disputes under some motor vehicle franchise contracts, limited types of claims by employees of specified public companies, and disputes concerning certain consumer lending agreements'.<sup>129</sup> These matters have public interest and often conflict with the autonomy of parties to settle their disputes by arbitration. Aside from these matters, most commercial and non-commercial matters are arbitrable in domestic arbitration.

The scope of arbitrability in international arbitration and domestic arbitration in the USA is broad due to the policy of the FAA and the pro-arbitration decisions of the US courts. The presumption of arbitrability in international arbitration focuses on promoting the goals of the New York Convention and the respect for the freedom of parties to settle disputes by arbitration. In international arbitration, arbitrability has been influenced by the New York Convention and international commerce.<sup>130</sup> The FAA and the disposition of the courts towards international arbitration has resulted in an expansive scope of arbitrability in international arbitration. The US

---

<sup>124</sup> *CompuCredit Corp. v. Greenwood* (n 122)

<sup>125</sup> *Gilmer v. Interstate/Johnson Lane Corp* (n 119)

<sup>126</sup> Alexandra Dosman and Clara Flebus, 'Chapter 2: The Federal Arbitration Act and State Arbitration Acts: Impact of Federalism on International Arbitration in the U.S.', in Laurence Shore, Tai-Heng Cheng and others. (eds), *International Arbitration in the United States* (Kluwer Law International 2017) 51.

<sup>127</sup> Thomas . Carbonneau, 'Part II Substantive Rules on Arbitrability, Chapter 8 - Liberal Rules of Arbitrability and the Autonomy of Labor Arbitration in the United States', in Loukas A. Mistelis and Stavros Brekoulakis(eds), *Arbitrability: International and Comparative Perspectives* (International Arbitration Law Library 19 Kluwer Law International 2009) para 8-6.

<sup>128</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) para 9-55.

<sup>129</sup> Gary Born (n 1) 1054.

<sup>130</sup> Paula Henin (n 108) 594.

courts respect party autonomy and sanctity of agreements between parties to refer their disputes to arbitration unless there is a compelling legislative reason for non-arbitrability.<sup>131</sup>

The presumption of arbitrability in domestic arbitration focuses on promoting domestic considerations not international commerce and the goals of the New York Convention. Therefore, though the scope of domestic arbitrability has broadened substantially, it is different from international arbitrability. Most decisions of the courts in the USA have focused on arbitrability arising from statutory claims. The presumption of arbitrability in these statutory claims has made most domestic matters arbitrable.<sup>132</sup> The courts in the USA have recognised that in domestic arbitration non-arbitrable matters may be arbitrable in international arbitration.<sup>133</sup> Although there is a generally broad scope of arbitrability in international arbitration and domestic arbitration in the USA, the scope of non-arbitrability is narrower in international arbitration. This is because of the basis of international arbitration and domestic arbitration and the different considerations used by the US courts to determine international arbitrability and domestic arbitrability.

### **Same Criteria for International Arbitrability and Domestic Arbitrability**

The second approach adopted by states concerning international arbitrability and domestic arbitrability is to have the same criteria for both. An analysis of this approach highlights the difference in practices of some states. Tunisia has the same criteria for international arbitrability and domestic arbitrability in one national arbitration legislation which applies to both international and domestic arbitration. However, Tunisia recognises that some difference may exist concerning international arbitrability and domestic arbitrability. England and Wales have criteria for arbitrability that does not distinguish between international arbitrability and domestic arbitrability. The criteria for arbitrability in England and Wales have been delimited by the courts. The national arbitration legislation in England and

---

<sup>131</sup> *ibid.*

<sup>132</sup> Gary Born (n 1) 1054.

<sup>133</sup> *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc*(n 24)

Wales applies to both international and domestic arbitration. Therefore, these selected states have the requisite attributes necessary for analysis.

## **Tunisia**

International and domestic arbitration in Tunisia is regulated by the Arbitration Code (Promulgated by Law No. 93-42)<sup>134</sup> which is based on the Model Law.<sup>135</sup> The definition of international arbitration in the Arbitration Code is similar to the definition of international arbitration in the Model Law.<sup>136</sup> However, the Arbitration Code does not regulate only international commercial arbitration.<sup>137</sup> Disputes involving state administrative agencies and local authorities are also deemed international if they relate to international relations of an economic, commercial, or financial nature.<sup>138</sup> The Tunisian courts have held that meeting one of the conditions of the definition of international arbitration suffices to clothe arbitration with an international character.<sup>139</sup> Furthermore, 'arbitration is domestic until it is established that some criteria of international arbitration are available.'<sup>140</sup> The Arbitration Code also provides that in matters which are the object of an international arbitration agreement, no court shall intervene except where so provided in the Arbitration Code.<sup>141</sup>

---

<sup>134</sup> Hereinafter referred to as the Arbitration Code; Chapter I has provisions applicable to domestic and international arbitration, Chapter II has provisions applicable to domestic arbitration and Chapter III has provisions applicable to international arbitration.

<sup>135</sup> Ahmed Ouerfelli, 'National Report for Tunisia (2009 through 2022)' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration*, (Supplement No. 120, ICCA & Kluwer Law International 2020) 4.

<sup>136</sup> Arbitration Code art 48 (1) An arbitration is international in one of the following cases: a) If the parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business in different States. b) If one of the following places is situated outside the State in which the parties have their places of business: 1. The place of arbitration if determined in, or pursuant to, the arbitration agreement. 2. Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected. c) If the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. d) Generally, if the arbitration concerns international trade.

<sup>137</sup> Abdul Hamid El Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 731, 735.

<sup>138</sup> Arbitration Code, art. 7(5).

<sup>139</sup> El Ahdab (n 137) 734-735.

<sup>140</sup> *ibid.*

<sup>141</sup> Arbitration Code, art 51.

The Arbitration Code sets out issues that are generally considered non-arbitrable<sup>142</sup> in chapter one of the Arbitration Code. The Arbitration Code permits no arbitration in:

- matters affecting public policy;<sup>143</sup>
- disputes relating to nationality;<sup>144</sup>
- disputes relating to personal status, with the exception of questions arising therefrom concerning pecuniary obligations;<sup>145</sup>
- matters where no arbitration is permitted;<sup>146</sup> and
- disputes concerning the State, State administrative agencies and local authorities, with the exception of disputes arising in international relations of an economic, commercial or financial nature which are governed by Chapter Three of this Code.<sup>147</sup>

The non-arbitrable matters in the Arbitration Code apply to international arbitration and domestic arbitration.<sup>148</sup> It can be observed that non-arbitrability in the Arbitration Code relates to matters and disputes that parties cannot freely dispose of.<sup>149</sup> It has been noted that the non-arbitrable matters in the Arbitration Code relate to disputes that violate public order or public policy.<sup>150</sup> Arbitrability must affect the central issue in the dispute to make the dispute non-arbitrable.<sup>151</sup>

For international arbitration in Tunisia, the Arbitration Code makes disputes concerning the state, state administrative agencies, and local authorities arbitrable if such disputes arise in international relations of an economic, commercial, or

---

<sup>142</sup> Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (4<sup>th</sup> edn, Kluwer Law International 2019) 44-45.

<sup>143</sup> Arbitration Code art. 7 (1).

<sup>144</sup> *ibid.*, art. 7(2).

<sup>145</sup> *ibid.*, art. 7(3).

<sup>146</sup> *ibid.*, art. 7(4).

<sup>147</sup> *ibid.* art. 7(5).

<sup>148</sup> Arbitration Code, Chapter One.

<sup>149</sup> *ibid.*

<sup>150</sup> Ahmed Ouerfelli, 'Tunisian Case Law' (2012) 1(1) *International Journal of Arab Arbitration* 455, 472.

<sup>151</sup> El Ahdab (n 137) 739.

financial nature.<sup>152</sup> However, the interpretation of this provision in the *Ferocom* case by the courts means that such disputes may be non-arbitrable in some instances.<sup>153</sup> The court noted that a public procurement dam construction dispute between Tunisia and a foreign/local company was an administrative contract that could either be linked to 'international economic, commercial, and financial relationships or be purely administrative.'<sup>154</sup> The public procurement dam construction contract was closely linked to the public interest and was not concerned with international trade making disputes regarding such contracts non-arbitrable.<sup>155</sup> This decision has been criticised on the basis that the commercial nature of a contract is not determined by the 'use by a state entity of a contract in sovereign activities.'<sup>156</sup> The decision of the court can potentially result in a negative effect on international transactions between state entities and international firms because of the risk of nullification of arbitral agreements by state courts.<sup>157</sup> A dispute arising under such a contract should fall under the exception in Article 7(5) and be arbitrable.<sup>158</sup> Also in international arbitration even though Article 162 of the Tunisian Code of Maritime Commerce does not permit arbitration in disputes relating to maritime transport, the courts sometimes apply the Hamburg Convention of 1978 which authorises arbitration of such disputes.<sup>159</sup>

In international arbitration, matters affecting public policy, disputes relating to nationality, disputes relating to personal status, apart from questions arising therefrom concerning pecuniary obligations and matters where no arbitration is permitted are non-arbitrable. The arbitrability of matters concerning state entities in international disputes with commercial, economic, or financial transactions<sup>160</sup> is commendable. This takes cognizance of the fact that the state, public and state agencies may engage in international commercial, economic or financial

---

<sup>152</sup> Arbitration Code art. 7(5).

<sup>153</sup> Ahmed Ouerfelli, 'Recent Developments of Arbitration Law and Practice in Tunisia' (2011) 29(2) Association Suisse de l'Arbitrage Bulletin 296, 299.

<sup>154</sup> *ibid.*

<sup>155</sup> *ibid* 300.

<sup>156</sup> *ibid.*

<sup>157</sup> *ibid.*

<sup>158</sup> *ibid.*

<sup>159</sup> El Ahdab (n 137) 739.

<sup>160</sup> Arbitration Code art 7(5).

transactions with arbitration as the chosen dispute resolution mechanism. In these matters, the public interest is weighed against international relations with the economic, commercial, or financial nature of the subject matter. Priority is given to the commercial, economic or financial nature of the subject matter. The non-arbitrability concerning non-commercial disputes of public entities with an administrative character and local administrations highlights the protection of the public interest in such cases.<sup>161</sup>

Despite this fact, the ruling in the *Ferrocom* case<sup>162</sup> highlights the fact that the courts may sometimes find a way around this exception. Despite the drawback in the *Ferrocom* case, in international arbitration, the courts in Tunisia have generally adopted a pro-arbitration stance. The liberal interpretation of Article 7 of the Arbitration Code by the courts enhances the practice and development of international arbitration in Tunisia. The Arbitration Code seeks to make the domain of international arbitration in Tunisia clear and unambiguous.

### **England and Wales**

The Arbitration Act 1996 applies to international arbitration and domestic arbitration seated in England and Wales or Northern Ireland.<sup>163</sup> The law commission of England and Wales, in its proposed reforms of the Arbitration Act 1996 recommended that there should be no distinction between international arbitration and domestic arbitration in England and Wales.<sup>164</sup> This is because the Arbitration Act 1996 has operated since its inception without any such distinctions.<sup>165</sup> England is frequently selected as the seat in international arbitration.<sup>166</sup> This is symptomatic of the high regard in which English arbitration is

---

<sup>161</sup> *ibid.*

<sup>162</sup> Ouerfelli (n 153) 299.

<sup>163</sup> Arbitration Act, 1996 s2(1); ss 85-87 deals specifically with domestic arbitration agreements but has not been brought into force; see Law Commission, *Review of the Arbitration Act 1996 A Consultation Paper* (Consultation Paper 257, 2022) para 10.65.

<sup>164</sup> See Law Commission (n 163); see also Karyl Nairn, Maximilian Szymanski, Sophia Lekakis, 'National Report for England and Wales (2021 through 2022)' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Supplement No. 120, ICCA & Kluwer Law International 2020) 5-7; *Phillip Alexander Securities and Futures Limited v Bamberger and others*, 12 July 1996, Court of Appeal (Civil Division), [1996] C.L.C. 1757.

<sup>165</sup> *ibid.*

<sup>166</sup> White & Case, Queen Mary University of London School of International Arbitration, 2021 International Arbitration Survey: Adapting arbitration to a changing world, 6.

held.<sup>167</sup> The Arbitration Act 1996 aimed to modernise English arbitration law to reinforce and maintain this justified reputation and has succeeded in this regard.<sup>168</sup> However, it was recognised that after being in operation for twenty six years the Arbitration Act 1996 was in need of reforms to make it even more effective.<sup>169</sup> The Arbitration Act 1996 is not based on the Model Law, but it follows its format and has close regard to its provisions.<sup>170</sup>

The Arbitration Act 1996 does not provide criteria for arbitrability in international arbitration and domestic arbitration. Arbitrability in England and Wales is a common-law issue with no codification of matters that are arbitrable or non-arbitrable.<sup>171</sup> The Arbitration Act 1996 allows parties to agree on how their disputes are resolved, subject only to such safeguards as are necessary for the public interest.<sup>172</sup> The determination of which subject matter is arbitrable has been left to the courts to decide on a case-by-case basis.<sup>173</sup> In the *Fulham* case,<sup>174</sup> the court stated that in deciding arbitrability the courts consider whether the dispute engages third party rights.<sup>175</sup> The courts also consider where there is the delegation of matters of public interest to arbitrators which cannot be determined within the limitations of the arbitral process.<sup>176</sup> This approach by the English courts results in a broad scope of arbitrability.

Generally, matters which affect the civil interests of parties are arbitrable.<sup>177</sup> Non-arbitrable subject matter that is not based on statute may be found under the common law in England with examples such as criminal matters,<sup>178</sup> and family

---

<sup>167</sup> Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act, 1996, A Commentary* (5<sup>th</sup> edn Wiley Blackwell) 5.

<sup>168</sup> *ibid.*

<sup>169</sup> See Law Commission, *Review of the Arbitration Act 1996 A Consultation Paper* (Consultation Paper 257, 2022).

<sup>170</sup> See Departmental Advisory Committee on Arbitration Law (DAC Report) para 4.

<sup>171</sup> *ibid.*; see also Leonardo V P de Oliveira, 'The English law approach to arbitrability of disputes' (2016) 19(6) *Int. A.L.R.* 155, 156.

<sup>172</sup> Arbitration Act, 1996, s 1 (b).

<sup>173</sup> Julian Lew and Oliver Marsden, 'Chapter 19: Arbitrability', in Mathew Lew, Harris Bor, Gregory Fullelove and Joanne Greenaway (eds), *Arbitration in England with chapters on Scotland and Ireland* (Kluwer Law International 2013) para 19-6.

<sup>174</sup> *Fulham Football Club (1987) Ltd (n 26), The Football Association Premier League Ltd (n 26)*

<sup>175</sup> *ibid* para 40.

<sup>176</sup> *ibid.*

<sup>177</sup> Karyl Nairn (n 164) 27.

<sup>178</sup> Lew and Marsden (n 173) 408-410.

matters regarding the legal status of relationships and parenting of children.<sup>179</sup> Also non-arbitrable are core insolvency matters which may affect several parties who are not parties to the arbitration agreement.<sup>180</sup> Public interest and the limitations of arbitration are reasons that make the courts declare a dispute as non-arbitrable.

The notion of safeguards in the public interest stated in the Arbitration Act 1996<sup>181</sup> applies to the whole arbitration process including arbitrability. The Arbitration Act 1996 and the approach of the English courts concerning arbitrability has made the England and Wales a favourable destination in international arbitration<sup>182</sup> and domestic arbitration. This is the case despite the lack of criteria of arbitrability in the Arbitration Act 1996.<sup>183</sup> As noted earlier, how arbitrability is determined in England and Wales was deemed by the Law Commission as a subject that does not require reform.<sup>184</sup>

### **Comparative Analysis**

A comparative analysis of the approaches used by the states discussed in this article reveals discernible trends concerning international arbitrability and domestic arbitrability. These discernible trends reveal the similarities and differences between having separate criteria or same criteria for international arbitrability and domestic arbitrability. The discernible trends elucidate the purpose and function of arbitrability in international arbitration and domestic arbitration.

The first discernible trend is the influence of the definition of international arbitration on international arbitrability and the influence of the definition of domestic arbitration on domestic arbitrability. In defining international arbitration Tunisia<sup>185</sup> and Singapore<sup>186</sup> adopt a definition similar to that of the Model Law. For the USA, international arbitration usually involves property located abroad,

---

<sup>179</sup> *ibid* 410.

<sup>180</sup> Leonardo de Oliveira (n 171) 160; Lew and Marsden (n 173); *Syska v Vivendi Universal SA* [2009] EWCA Civ 677; para 19-58, 19-59.

<sup>181</sup> Arbitration Act, 1996, s 1(b).

<sup>182</sup> Leonardo de Oliveira (n 175) 167.

<sup>183</sup> *ibid*.

<sup>184</sup> See Law Commission, *Review of the Arbitration Act 1996 A Consultation Paper* (Consultation Paper 257, 2022) paras 11.57-11.59.

<sup>185</sup> Arbitration Code art 48 (1).

<sup>186</sup> IAA s 5(2).

envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.<sup>187</sup> The definitions of international arbitration by the states reveal the nexus between international considerations and international arbitrability. International arbitration involves cross-boundary transactions which may involve citizens of different states. Citizens living in the same state may be involved in international arbitration where the place of performance of the contract is in a foreign state. The place of performance of the contract may not necessarily be the same as the seat of the arbitration. The domicile, habitual residence and nationalities of parties are also important in defining international arbitration. This is despite the fact that Singapore<sup>188</sup> allows parties in international arbitration the option of using its domestic arbitration legislation, instead of its international arbitration legislation and vice versa. In effect, arbitrability in international arbitration concerns international affairs which occur within a state or outside a state. International considerations, are therefore, the prime factor in deciding arbitrability in international arbitration. England and Wales<sup>189</sup> does not expressly define international arbitration.

In defining domestic arbitration, in Singapore,<sup>190</sup> arbitration is domestic if arbitration is seated in Singapore and the IAA is inapplicable. In the USA, domestic arbitration involves citizens of the USA, the place of performance of the contract is in the USA and the contract does not establish a relationship with a foreign state or entity in the contract.<sup>191</sup> Tunisia<sup>192</sup> and England and Wales<sup>193</sup> do not define domestic arbitration however, there are specific parts of their national arbitration legislation applicable to domestic arbitration. The common trend in the definitions of domestic arbitration reveals that domestic arbitration concerns citizens or residents of a state and has no international elements. Furthermore, where domestic arbitration concerns a contract, the place of performance of the contract is often the same as the

---

<sup>187</sup> FAA S 202, This applies to enforcement of international awards based on the New York Convention.

<sup>188</sup> IAA s 5(1).

<sup>189</sup> Arbitration Act, 1996 s 2(1).

<sup>190</sup> Cap 10, s 3.

<sup>191</sup> See FAA s 202 for definition of international arbitration which falls under the New York Convention.

<sup>192</sup> Arbitration Code, Chapter II.

<sup>193</sup> Arbitration Act, 1996, ss 85-87 deals specifically with domestic arbitration agreements.

seat of the arbitration. There is often no cross-boundary transaction involved in domestic arbitration. This means that subject matter in domestic arbitration concerns purely domestic affairs that occur within a state except in the case of Singapore<sup>194</sup> where domestic parties are allowed the use of the international arbitration legislation. Domestic considerations characterise the nature of domestic arbitration which serves as the basis for domestic arbitrability.

The second discernible trend is the influence of international legal instruments and international considerations on arbitrability in international arbitration and the influence of domestic considerations on arbitrability in domestic arbitration. In international arbitration, arbitrability in Singapore is influenced by the Model Law and relates to international commercial matters.<sup>195</sup> Though Tunisia is a Model Law state, arbitrability is not solely influenced by the Model Law as the national legislation applies to non-commercial matters, commercial matters and international commercial matters.<sup>196</sup> Arbitrability in the USA is influenced by international considerations including the commercial reservation in the New York Convention.<sup>197</sup> Arbitrability in the aforementioned states reveals the correlation between the New York Convention and Model Law on arbitrability in international arbitration. Arbitrability in international arbitration largely concerns matters affecting international commerce, trade and finance. These states have adopted a broad notion of arbitrability to ensure that these matters are arbitrable. The New York Convention and the Model Law have a direct bearing on how the states delimit the scope of arbitrability. However, the approach of England and Wales is different. Arbitrability in England and Wales affects commercial and commercial matters in international and domestic arbitration.

For domestic arbitration, arbitrability is influenced by domestic considerations. In Singapore arbitrability concerns subject matter with public interest elements.<sup>198</sup>

---

<sup>194</sup> IAA s 5(1).

<sup>195</sup> IAA, preamble.

<sup>196</sup> Arbitration Code, art. 7, The special nature of disputes arising in international relations of an economic, commercial or financial nature concerning the state, state administrative agencies and local authorities is recognised and made arbitrable.

<sup>197</sup> *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc* (n 24)

<sup>198</sup> Arbitration Report para 2.37.17.

Arbitrability in the USA is based on the presumption of arbitrability and clear legislative direction.<sup>199</sup> It is evident that in domestic arbitration matters that do not have public interest elements are arbitrable whilst matters which concern public interest elements are non-arbitrable. Matters which have public interest elements often affect third party interests and potentially the general public. For England and Wales, and Tunisia arbitrability in domestic arbitration is affected by mandatory law, exclusive jurisdiction and public policy. Mandatory law requirements grant exclusive jurisdiction to the courts over certain matters. This may have an impact on arbitrability in domestic arbitration as it excludes some disputes from arbitration.

The third discernible trend is the manner of delimiting international arbitrability and non-arbitrability and the manner of delimiting domestic arbitrability and non-arbitrability. In delimiting international arbitrability, states adopt varying approaches. These include providing specific non-arbitrable subject matter,<sup>200</sup> and tests developed by the courts.<sup>201</sup> The approach of these states has a broad scope of arbitrability as the end goal. The approaches of the USA,<sup>202</sup> Singapore,<sup>203</sup> and England and Wales<sup>204</sup> seem less restrictive as compared to Tunisia.<sup>205</sup> The presumption of arbitrability and tests for arbitrability makes all subject matter potentially arbitrable. The Tunisian approach which has broad specific non-arbitrable matters may make the scope of arbitrability uncertain. This is despite the exception made in international arbitration for disputes concerning the state, state administrative agencies, and local authorities if such disputes arise in international relations of an economic, commercial, or financial nature,<sup>206</sup> as happened in the *Ferocom* case. What can be deduced from the various approaches of the states is that all the approaches aim to ensure a broad scope of arbitrability that makes most subject matter arbitrable in international arbitration. This effectively narrows the

---

<sup>199</sup> See Gary Born (n 1) 1054

<sup>200</sup> IAA, s 11 (1); Arbitration Code s 7.

<sup>201</sup> *Mitsubishi Motors Corporation* (n 24); *Tomolugen Holdings Ltd and another* (n 72); *Fulham Football Club (1987) Ltd* (n 26), *The Football Association Premier League Ltd* [2011] EWCA Civ 855.

<sup>202</sup> *ibid*

<sup>203</sup> IAA ss 11(1), 26; *Tomolugen Holdings Ltd and another* (n 72)

<sup>204</sup> *Fulham Football Club (1987) Ltd* (n 26), *The Football Association Premier League Ltd* (n 26)

<sup>205</sup> Arbitration Code s 7.

<sup>206</sup> *ibid*, art. 7 (5).

scope of non-arbitrability. Whether by legislation or through the courts, states seek to ensure that only clear legislative intent or public policy considerations may lead to non-arbitrability in international arbitration. Public policy considerations are examined through the lens of international arbitration with a focus on subject matter capable of settlement by arbitration rather than domestic public policy.

In delimiting domestic arbitrability the states adopt varying approaches. These include subject matter with public interest elements<sup>207</sup> and the presumption of arbitrability predicated on domestic considerations.<sup>208</sup> For Tunisia, disputes concerning the state, state administrative agencies and local authorities, except for disputes arising in international relations of an economic, commercial and financial nature are non-arbitrable.<sup>209</sup> The clear distinction in delimiting domestic arbitrability is absent in England and Wales, however domestic arbitration may be affected by mandatory law and exclusive jurisdiction and public policy. Non-arbitrability in domestic arbitration concerns similar subject matters in the states discussed. This applies whether non-arbitrable subject matters or tests developed by the courts are used. These include matters of status, in rem claims and public policy. This makes matrimonial disputes, criminal law disputes, consumer law and sometimes labour law disputes often non-arbitrable in domestic arbitration. The purpose and function of domestic arbitrability is predicated on domestic considerations to protect mandatory law, exclusive jurisdiction and public interest. The resolution of such disputes is usually reserved for the courts. There are also borderline disputes which may have public interest elements, such as company law, intellectual property law, bankruptcy and insolvency disputes. These disputes may be non-arbitrable depending on the facts. It is noticeable however that Singapore has made intellectual property rights disputes specifically arbitrable in domestic arbitration.<sup>210</sup> Arbitrability in domestic arbitration concerns both commercial and non-commercial matters. The provision made by some states for parties in domestic arbitration to benefit from international arbitration provisions including

---

<sup>207</sup> Arbitration Report para 2.37.17.

<sup>208</sup> *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc* (n 24); Gary Born (n 1) 1054).

<sup>209</sup> Arbitration Code, s 7(5).

<sup>210</sup> IAA, s 26.

arbitrability is commendable.<sup>211</sup> This emphasises the fact that efforts are being made to expand the scope of arbitrability in domestic arbitration. England and Wales maintain the same criteria based on judicial tests for arbitrability irrespective of whether arbitration is international or domestic. However, non-arbitrability in domestic arbitration remains quite broad, because the main determinants of non-arbitrability are local factors with no international perspective. Non-arbitrability in domestic arbitration is broader than non-arbitrability in international arbitration even though arbitrability in domestic arbitration is expanding.

In international arbitration, whether a state adopts separate criteria for international arbitrability and domestic arbitrability or uses the same criteria, it is evident that differences exist concerning arbitrability in international arbitration and domestic arbitration. Where states have separate criteria for international arbitrability and domestic arbitrability either through legislation or the courts, the distinction between international arbitrability and domestic arbitrability is clearer. Where states have the same criteria for arbitrability in legislation or through the courts, the distinction between international arbitrability and domestic arbitrability may not be so clear. In such instances the onus lies on the courts to delimit international arbitrability through the prism of international considerations rather than purely domestic considerations.

## CONCLUSION AND RECOMMENDATIONS FOR GHANA

Section 1 of the Act 798 does not indicate its scope of application concerning territoriality.<sup>212</sup> This makes the non-arbitrable matters in Section 1 of the Act 798 applicable in international arbitration and domestic arbitration.<sup>213</sup> The broad nature of the non-arbitrable matters in Section 1 of Act 798,<sup>214</sup> may have a negative effect on international arbitration as happened in the *Balkan Energy* case.<sup>215</sup> Therefore, the same criteria for international and domestic arbitrability adopted by Ghana is not

---

<sup>211</sup> *ibid*, s 5(1).

<sup>212</sup> Edward Torgbor (n 6) 212.

<sup>213</sup> *ibid*.

<sup>214</sup> Joe Mante (n 7) 38.

<sup>215</sup> *Attorney-General* (n 37)

effective for international arbitration as there is a high risk that it restricts the recognition of arbitration agreements and the recognition and enforcement of arbitral awards.<sup>216</sup> It is noticeable that the same criteria for international and domestic arbitrability in Ghana is different from what pertains in England and Wales which does not provide broad non-arbitrable subject matter in its national arbitration legislation. The Ghanaian approach is also different from that of Tunisia which provides broad non-arbitrable matters but makes an exception in international arbitration for disputes concerning the state, state administrative agencies, and local authorities if such disputes arise in international relations of an economic, commercial, or financial nature.<sup>217</sup> Based on discernible trends concerning international arbitrability in international arbitration, Ghana may distinguish international arbitrability from domestic arbitrability in two alternative ways.

First, by having separate legislation for international and domestic arbitration with separate criteria for international arbitrability and domestic arbitrability. This article favours this approach since it leaves no ambiguity and clearly establishes the distinction between international arbitrability and domestic arbitrability. Ghana may enact separate legislation to govern international arbitration with international arbitrability based on the nature of international arbitration.<sup>218</sup> The scope of arbitrability in Section 1 of Act 798 will govern only domestic arbitrability. This is important as Section 1 of the Act 798 applies to arbitration, mediation and customary arbitration. Domestic arbitration, mediation and customary arbitration are influenced by domestic considerations, therefore ideally, they should not have the same scope of arbitrability as international arbitration. The peculiar nature of international arbitration requires separate legislation.<sup>219</sup> The legislation to govern international arbitration may be the Model Law or legislation that is substantially based on the Model Law. Ghana may adopt the definition of international

---

<sup>216</sup> *ibid.*

<sup>217</sup> Arbitration Code art. 7(5).

<sup>218</sup> See Joe Mante (n 7) 40 the authors make a similar suggestion but do not go into details as to the nature of the suggested legislation as done in this article.

<sup>219</sup> *ibid* 41.

arbitration in the Model Law<sup>220</sup> with slight modifications if necessary. Since the Model Law has been specifically crafted for international commercial arbitration, this may be the best route for Ghana to define international arbitration. Instead of adopting the Model Law, Ghana may also choose to enact special legislation for international arbitration other than the Model Law. International arbitration in the special legislation may relate to international arbitration seated in Ghana and the enforcement of foreign awards in Ghana. This may involve cross border commercial transactions concerning foreign citizens, nationals and residents or Ghanaian citizens, nationals or residents. In defining international arbitration in the special legislation, the definition of the Supreme Court of Ghana of an international business transaction within the context of article 181(5) of the 1992 Constitution may be instructive.<sup>221</sup> Once Ghana defines international arbitration, it provides the basis to properly delineate international arbitrability in international arbitration. In the new legislation for international arbitration, criteria for arbitrability or specific arbitrable subject matter may be provided. Whichever approach is adopted, matters concerning international trade, international commerce, and financial interests, should be arbitrable even if they involve the state, state administrative agencies, and local authorities. The definition of the term commercial in the Model Law is instructive in this regard.<sup>222</sup> Irrespective of the international arbitration legislation adopted by Ghana, international arbitrability should only be rebutted where non-arbitrability can be gleaned from the text or legislative history of a statute or a conflict between arbitration and the underlying purposes of a statute.<sup>223</sup> The presumption of arbitrability should be applicable in Ghana unless the contrary can be proved.

Second, Ghana may amend Act 798 and have the courts distinguish between international arbitrability and domestic arbitrability. This amendment should

---

<sup>220</sup> See Model Law, art 1(3).

<sup>221</sup> *Attorney General v (n 37)*, 1034 “We think that a business transaction is “international” within the context of Article 181 (5) where the nature of the business which is the subject-matter of the transaction is international in the sense of having a significant foreign element or the parties to the transaction (other than the Government) have a foreign nationality reside in different countries or, in the case of companies, the place of their central management and control is outside Ghana.”

<sup>222</sup> Model Law art 1(1).

<sup>223</sup> See *Mitsubishi Motors Corporation (n 24)*

provide for a definition of international arbitration which may be adopted from the Model Law or based on other international considerations as noted earlier.<sup>224</sup> Once international arbitration is defined, the courts when faced with any arbitrability dispute will determine arbitrability based on the international nature of the dispute. Where the dispute is determined to be international, the purpose of the New York Convention to facilitate the recognition of arbitration agreements and the recognition and enforcement of arbitral awards should be given prominence.<sup>225</sup> This will be in accord with Ghanaian law.<sup>226</sup> This approach ensures that the potential for Section 1 of Act 798 to negatively affect international arbitration in Ghana is minimised.

The recommended alternative approaches to distinguishing international arbitrability from domestic arbitrability in Ghana will ensure that international considerations influence international arbitrability whilst domestic considerations influence domestic arbitrability. International obligations and considerations should override purely domestic obligations and considerations in determining international arbitrability. These recommended alternative approaches will also ensure that the Ghanaian approach to distinguishing international arbitrability from domestic arbitrability is more effective for international arbitration by enhancing the recognition of arbitration agreements and the recognition and enforcement of arbitral awards.

---

<sup>224</sup> See Model Law, art 1(3); *Attorney General* (n 37)

<sup>225</sup> Marike Paulsson (n 52) 1.

<sup>226</sup> See 1992 Constitution, art 40(c), in its dealings with other nations, the Government shall promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means.